Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada

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In 1996, the Supreme Court of Canada handed down seven judgments relating to aboriginal fishing rights. These cases developed the doctrine of aboriginal priority, according to which the government is obligated to give precedence to aboriginal communities when allocating rights of access to fisheries. The court has so far rejected the notion of exclusive aboriginal fishing rights, reasoning that a public right to fish in tidal waters has existed since the time of *Magna Carta*, and was not abolished even by the entrenched of aboriginal rights in section 35(1) of the Constitution Act, 1982.

Mark D. Walters explores whether it is possible to argue for an exclusive aboriginal right to certain fisheries outside the unique context of British Columbia and suggests that the Chippewas of Nawash may have an exclusive right to fish the waters in Lake Huron and Georgian Bay in Ontario. Walters examines the treaties signed in August 1836 over the Manitoulin Islands and the Saugeen Peninsula and argues that comments made by Bond Head and several Saugeen chiefs shortly before and after the treaty was signed demonstrate that the intent was to grant exclusive fishing rights to the Saugeen Ojibway.

The English law relating to fisheries and title to lands beneath navigable waters is also explored. Walters proposes that public fishing rights were established by deviating from English common law rules, and from the original intention of the 16th chapter of *Magna Carta*, in order to be consistent with the demands of the political morality of settlers in colonial Canada. The author analyzes how aboriginal fishing rights have been manifested in the non-aboriginal legal system, with particular reference to New Zealand cases that confirm that aboriginal (Maori) rights have a non-statutory foundation at common law and/or under treaty. Finally, Walters distinguishes the claims made to lands in British Columbia, a jurisdiction in which aboriginal rights are determined under a municipal model (particular customs remain in place for practical reasons), from those in Upper

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Canada, where aboriginal rights existed under the imperial model (native law was valid unless explicitly abrogated by legislation). He concludes by suggesting that, in light of the unique legal-historical context of mid-nineteenth century Upper Canada, claims to exclusive jurisdiction over the Saugeen Ojibway fisheries - and the Lake Huron and Georgian Bay waters in particular - may have a firm legal foundation under either common law or by prerogative instrument.

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Introduction

In 1996 the Supreme Court of Canada issued seven judgments in the area of aboriginal fishing rights. These judgments develop the law relating to aboriginal rights in very significant ways, both in relation to the general interpretation of "existing aboriginal and treaty rights" in section 35(1) of the Constitution Act, 1982 and in relation to the particular issue of aboriginal fishing rights. In the

words of Lamer C.J., the identification of constitutionally protected aboriginal rights demands reconciling “the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory”; further, this reconciliation must “take into account the aboriginal perspective, yet do so in terms that are cognizable to the non-aboriginal legal system.”

With respect to fishing rights, the Supreme Court of Canada has (thus far) concluded that this process of reconciliation results in a right of aboriginal priority: if an aboriginal community can establish that it has an existing aboriginal right to fish in certain waters, then the government is under a constitutional obligation when allocating rights of access to that fishery to give precedence to the aboriginal community over non-aboriginal users. An exclusive aboriginal fishing right is precluded, at least in tidal waters, because non-aboriginal users have their own legal entitlement to fisheries with which the aboriginal right must be reconciled. As stated by Lamer C.J., “since the time of Magna Carta” there has been a public right to fish in tidal waters, and this right could not have been abolished when aboriginal rights were entrenched by section 35(1) in 1982. The public right of fishing to which Lamer C.J. refers is often said to be protected by the 16th chapter of Magna Carta, which states: “nullae ripariae defendentur decaetero, nisi illae quae fuerunt in defenso tempore Henrici regis avi nostri” — “no banks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather . . .”

The purpose of this article is to consider whether, notwithstanding these recent Supreme Court decisions, it may still be argued that certain First Nations have exclusive rights to their traditional fisheries. The cases in which the doctrine of aboriginal priority was developed involved claims to aboriginal rights existing independ-

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3. Van der Peet, supra note 1 at 551.
4. Gladstone, supra note 1 at 770-771.
ently of aboriginal title to land beneath water and unrecognized by treaty or other Crown instrument. Although the Court has denied the possibility of exclusive native fisheries pursuant to Crown instrument in non-tidal waters, the cases in which it did so involved the unique legal-historical context existing in British Columbia. It is therefore important to determine whether the nature of a First Nation's fishing right might be different if one or more of these contextual factors is altered. In particular, the recent Supreme Court fishing cases must be considered in light of the Supreme Court's latest decision on aboriginal title in Delgamuukw v. British Columbia. If, as Delgamuukw confirms, aboriginal title is the "exclusive" right to use and occupy land, then it may be argued that fishing rights incidental to aboriginal title must also be exclusive.

Aboriginal and treaty rights cannot be determined in the abstract and must be established in relation to specific First Nations. This article therefore examines the question of whether an exclusive aboriginal and/or treaty right to fish can exist by reference to a particular claim — that of the Chippewas of Nawash to their traditional fisheries in Lake Huron and Georgian Bay off the Bruce peninsula in Ontario. This claim is based, in part, upon certain mid-nineteenth century treaties and letters patent; therefore, the following inquiry will focus upon defining the fishing rights of the Chippewa/Ojibway of the Bruce — or Saugeen — peninsula as they existed in the legal and constitutional context of colonial Upper Canada when these instruments were made. The interpretative perspective of the analysis will, however, be legal as opposed to...
historical, with the objective of contributing to the resolution of the modern problem surrounding attempts by successors of the Saugeen Ojibway, like the Chippewas of Nawash, to assert jurisdiction over their traditional fisheries. The importance of examining this question is increased by *obiter dicta* in two recent cases: in *Jones and Nadjiwon* it was suggested that exclusive Saugeen fisheries might exist; whereas in *Nikal*, certain mid-nineteenth century legal opinions denying exclusive Saugeen Ojibway fisheries were cited with approval.

Part I of this article reviews the Crown instruments which support the claim for exclusive Saugeen Ojibway fishing rights. Part II examines the English law relating to fisheries and title to lands beneath navigable waters, and how this law was applied in colonial and post-colonial territories in cases unrelated to aboriginal peoples. Part III analyzes how the common law relating to rights to fisheries applies in relation to aboriginal peoples generally, with specific reference to Maori rights in New Zealand. Finally, Part IV returns to the question of aboriginal fishing rights in Upper Canada, and reconsidered the rights of the Saugeen Ojibway in light of the preceding analysis.


I. Saugeen Ojibway Fishing Rights

Ojibway (Chippewa) — or Anishnabe — peoples were fishing in the upper Great Lakes before the arrival of Europeans in the early seventeenth century.\textsuperscript{14} Even after contact with the French and British, the Ojibway continued to follow the same seasonal pattern of resource use: after dispersing in small groups for the winter hunt, members of particular bands, or extended family groupings, congregated at traditional village sites near productive fisheries to engage in fishing during the spring and summer months.\textsuperscript{15} Each band controlled its own fishery, although the fishery’s use by others was sometimes permitted.\textsuperscript{16} The Ojibway bands of the Saugeen peninsula controlled and used fisheries in waters adjacent to the peninsula and around so-called “fishing islands” in Lake Huron and Georgian Bay for food and trade purposes.\textsuperscript{17}

Due to settler demand for farming land in the province of Upper Canada, the Crown sought the surrender of the Saugeen territory in the mid-1830s. In 1836, Lieutenant Governor Sir Francis Bond Head treated with various Ottawa and Ojibway bands, including those from Saugeen, on Manitoulin Island.\textsuperscript{18} Bond Head, in explaining the resulting treaties to the Secretary of State for the Colonies, observed that the Indians had long lived “in their Canoes” among the islands of Lake Huron, in part because “the surrounding

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\textsuperscript{16} Borrows, \textit{ibid.} at 31.

\textsuperscript{17} \textit{Royal Commission Report, supra} note 11 at 462; and Jones and Nadjiwon, \textit{supra} note 11 at 435.

\textsuperscript{18} On the Bond Head treaties, see Borrows, \textit{supra} note 14 at 94-110.
Water abounds with Fish."\textsuperscript{19} Because of the abundance of fish and other natural resources around the isolated Manitoulin islands, Bond Head concluded that they were "adapted to them" and "in no Way" adapted to non-natives, and that therefore the islands represented a suitable place on which to relocate Indians whose presence on fertile lands elsewhere in the colony was blocking the "Progress of Civilization."\textsuperscript{20} He recognized that the islands "belong (under the Crown) to the Chippewa and Ottawa Indians" and it was "necessary to obtain their Permission" before proceeding with this removal plan; but, he reported, he had succeeded in obtaining this permission, as well as the surrender of much of the Saugeen territory, and the treaties were found in the enclosed "short plain Memorandum" which was, he admitted, "not in legal Form."\textsuperscript{21} According to the Lieutenant Governor, the new regime would leave the Indians "better off" because their reserves "will bona fide be fortified against the Encroachments of the Whites ..."\textsuperscript{22}

Although the two treaties contained in the memorandum relate to different bands and territories, they must be read together because they were made in the same council and the second treaty refers expressly to the first.\textsuperscript{23} The Manitoulin treaty begins by stating that "new Arrangements" were necessary to protect Indian lands from "Encroachments" of non-natives.\textsuperscript{24} The arrangement proposed

\textsuperscript{19.} Sir F. Bond Head, Lt. Gov. Upp. Can., to Lord Glenelg, Sec. of State (20 August 1836) \textit{Imperial Blue Books, 1839}, No. 93 at 122-123 [hereinafter \textit{Imperial Blue Books}].
\textsuperscript{20.} Ibid.
\textsuperscript{21.} Ibid.
\textsuperscript{22.} Ibid.
\textsuperscript{23.} The treaties, dated 9 August 1836, were in the form of addresses given by Sir F. Bond Head, written and signed by Bond Head and the chiefs. They were enclosed in Sir F. Bond Head to Glenelg, \textit{Imperial Blue Books, supra} note 19 at 123-124, and are printed as Treaty No. 45 (Ottawas and Chippewas of Manitoulin) and Treaty No. 45 1/2 "To the Saukings" (Saugeen Ojibway) in Canada, \textit{Indian Treaties and Surrenders}, vol. 1 (Ottawa: Queen's Printer, 1891) at 112-113 [hereinafter \textit{Indian Treaties and Surrenders}].
\textsuperscript{24.} Treaty No. 45 in \textit{Indian Treaties and Surrenders, ibid.}
involved relocating Indians to one common reserve, Manitoulin Island. This island, states the treaty, is “surrounded by ennumerable Fishing Islands” and would therefore be a suitable residence “for many Indians who wish to be civilized as well as totally separated from the Whites.”25 Sixteen Ottawa and Chippewa chiefs from Manitoulin agreed to allow their island to be used for this purpose and signed the treaty.

In the treaty with the Saugeen Ojibway, Bond Head began by stating: “You have heard the Proposal I have just made to the [Manitoulin] Chippewas and Ottawas . . . .”26 He then stated:

I now propose to you that you should surrender to your Great Father the Sauking Territory you at present occupy, and that you should repair either to this [Manitoulin] Island or to that Part of your Territory which lies in the North of Owen’s Sound, upon which proper Houses shall be built for you, and proper Assistance given to enable you to become civilized and to cultivate Land which your Great Father engages for ever to protect for you from the Encroachments of the Whites.27

Four Saugeen chiefs signed the treaty.

Although the two treaties are short, they are not plain: clarity was sacrificed in favour of brevity. Did either of these treaties recognize exclusive fishing rights? According to the Manitoulin treaty, the “new Arrangements” would make natives “totally separate” from non-natives whose “Encroachments” would be prohibited. An exclusive right to the fisheries surrounding the “Fishing Islands” is, it may be argued, a necessary incident to this new arrangement. If the purpose of the treaty was to create a reserve in which Indians could fish and hunt free from non-native encroachment, that purpose could not have been accomplished if there existed a right of non-native access to relevant fisheries.

25. Ibid.
26. Treaty No. 45 1/2 in Indian Treaties and Surrenders, ibid.
27. Ibid.
The Saugeen treaty is, on its face, less clear. It recognizes that the Saugeen Ojibway retained the Saugeen peninsula north of Owen's Sound as their reserve. If this territory included their fishing islands in the adjacent waters of Lake Huron and Georgian Bay, then perhaps the treaty implicitly recognized the same sort of exclusive fishing rights as the Manitoulin treaty recognized. The question, then, is whether the second treaty secured the same degree of protection for the Saugeen reserve as the first treaty established for the Manitoulin reserve or whether it contemplated some lesser status. Although a literal reading of the texts reveals differences between the two treaties, such an interpretative approach may be inappropriate given that these "short plain" treaties were not intended to be in legal form. Having regard to the surrounding circumstances, it may be argued that it is simply unlikely that the Saugeen Ojibway chiefs, having just heard that the fishing resources in the Manitoulin islands would be protected from non-native encroachment, would have thought that the treaty they were signing secured to them any less protection for their fisheries.

This interpretation of the treaty is supported by statements made by Chief Metigwob, one of the Saugeen Ojibway signatories. At a council held shortly afterwards, Metigwob explained that during the treaty negotiations the Saugeen chiefs had informed Bond Head that, rather than accept the offer to relocate to Manitoulin, they preferred to remain on the Saugeen peninsula "as there were many fish in that place."28 Bond Head's response, said Metigwob, was this:

[T]he Sahgeeng Indians owned all the islands in the vicinity of that neck or point of land, he was about to reserve for them, and that he would remove all the white people who were in the habit of fishing on their grounds.29

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29. Ibid.
Thus, Bond Head’s oral statements about the Saugeen reserve were consistent with what he had written in relation to the Manitoulin reserve: native fishing rights were exclusive and non-native encroachment would be prevented. The significance of this promise arises from the larger context within which it was made. In the years preceding the treaty, non-native use of the Saugeen fisheries had increased and some confusion had arisen about the terms under which a non-native commercial fishing company operated from the fishing islands: the company had obtained both a licence of occupation from the Lieutenant Governor in council and a lease from the Saugeen chiefs in 1834 for use of islands. In light of this, treaty recognition of their exclusive rights to the islands and fisheries was important to the Saugeen chiefs. Furthermore, in the 1836 treaty no provision was made for payment for the surrender of the Saugeen territory. It may therefore be argued that the Crown’s consideration was, in part, its promise — conveyed orally by Bond Head — to protect exclusive Saugeen possession of unsurrendered Ojibway fisheries. In short, very strong reasons exist to

30. Upper Canada, Office of the Lieutenant Governor, “Licence of Occupation to the Huron Fishery Company” (3 July 1834) (Lt. Govr. Sir. J. Colborne) NA RG10 vol. 55 at 58368. In 1834, the Huron Fishery Company obtained this licence of occupation for the islands from the Lieutenant Governor of Upper Canada Sir J. Colborne on the condition that the “Indian Tribes are not excluded from the right of fishing which they have always enjoyed” (Wm. Rowan, Sec. to the Lt. Govr., to Dr. Dunlop (22 May 1834) NA RG10, vol. 55 at 58367. Before commencing its operations on the islands the company therefore obtained the “sole use” of the islands from the Saugeen Chippewa, entering into a lease with the “Chiefs of the Chippewa Fisheries,” Report of the Huron Fishery Company, E. C. Taylor, Secretary, Goderich (18 April 1835) NA RG 5 M vol. 152 at 83421-83426; Lease to the Huron Fishery Company from the Chiefs of the Chippewa Fisheries (2 September 1834) NA RG10, vol. 56 at 58707. However, it was later suggested that this lease was not necessary: see “Opinion of Attorney General in reference to Licence of Occupation &c of the fishing islands, 1834” (NA RG10, vol. 55 at 58370-58371). See also Blair, supra note 11 at 129-130; and Jones and Nadjiwon, supra note 11 at 437.

conclude that the 1836 treaty recognized exclusive rights of fishing.\textsuperscript{32}

Notwithstanding the 1836 treaty, non-native use of Saugeen fisheries increased. A commission of inquiry on Indian affairs in 1844 observed in relation to the Saugeen fisheries that the “fishing is very productive, and has attracted the notice of the white people, who annoy the Indians by encroaching on what they consider their exclusive right . . . “.\textsuperscript{33} In an effort to protect their territories, the Saugeen Ojibway sought further written confirmation of their rights,\textsuperscript{34} and in 1847 the imperial Crown issued a proclamation in the form of letters patent under the great seal of the province of Canada defining the Saugeen territory and confirming Ojibway title to it. This 1847 deed defined the boundaries of the Saugeen territory as:

all that tract of land lying on the shore of Lake Huron, and which is butted and bounded or otherwise known as follows: commencing at the mouth of the River Saugeen, thence . . . [a southern boundary line along the base of the Saugeen peninsula is described], bounded on the east, north, and west by Lake Huron, including any islands in Lake Huron within seven miles of that part of the main land comprised within the hereinbefore described tract of land.\textsuperscript{35}

The deed went on to declare that the Saugeen Ojibway “for ever shall possess and enjoy” the tract and its “rents, issues, and profits

\textsuperscript{32} Jones and Nadijwon, supra note 11 at 438. Fairgrieve J. noted at 438: “[T]he historical evidence supports the conclusion that from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area.”

\textsuperscript{33} Canada, Legislative Assembly of Canada, Report on the Affairs of the Indians in Canada (22 January 1844) in Journals of the Legislative Assembly of Canada (1845), Appendix EEE, s. 2, II.15 at 43.

\textsuperscript{34} Letter of Chief Wahbahdick to the Colonial Secretary, (10 June 1843) NA RG1 L3 vol. 538 “W” Bundle 1843-44, 29m-29o.

\textsuperscript{35} Declaration by Her Majesty in favor of the Ojibway Indians respecting certain lands on Lake Huron (29 June 1847) NAC RG68, vol. LIBER AG. SPECIAL GRANTS 1841-1854, C-4158.
... without any hinderance whatever on our part, or on the part of our heirs and successors, or of our or their servants or officers.”36 It was stated in *Jones and Nadjiwon* that this instrument “extended treaty protection to the Saugeen Ojibway’s use of their traditional fishing grounds surrounding the Peninsula.”37

Although further ethnohistorical and historical evidence would be necessary to establish the full nature of Saugeen Ojibway fishing rights under aboriginal custom, the brief review given here suggests that the traditional fisheries of the Saugeen Ojibway fell within territory that they controlled, used and occupied, and exclusive Ojibway possession of this territory and its fisheries was guaranteed, implicitly at least, by treaty and letters patent. Although in subsequent years most of the Saugeen reserve was surrendered, smaller reserves on the shores of Lake Huron, as well as the fishing islands, remained unceded.38 No effort was made by the Crown to obtain the cession of the lake bed under the waters that comprised the Saugeen territory — yet as Bond Head observed in 1836, the aboriginal nations of Lake Huron lived on the waters of the lake as much as they lived on the lands adjacent to it.39 Despite the treaty and letters patent, exclusive Saugeen fishing rights were later disregarded: in 1857 the provincial legislature enacted the first statute regulating fishing in the colony, and thereafter officials leased the fishing islands without Ojibway consent.40 Doubts were expressed about whether the Saugeen had ever had exclusive fishing rights.41

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36. *Ibid*.
37. *Jones and Nadjiwon*, supra note 11 at 438.
38. Treaty No. 72 (13 October 1854) in *Indian Treaties and Surrenders*, supra note 23 at 195-196.
40. *Fisheries Act, 1857*, 20 Vict. c. 21 (Can.). This empowered the Commissioner of Crown lands to lease fishing stations on public lands. See generally Blair, supra note 11 at 134-136; both articles by Lytwyn, supra note 11; and *Royal Commission Report*, supra note 11 at 498-499.
Having briefly reviewed the grounds for exclusive Saugeen Ojibway fishing rights, it is now necessary to consider how these rights could have been manifested in the non-aboriginal legal system. Could Magna Carta, or the common law from the time of Magna Carta, really provide a legal basis for public fishing rights in the Great Lakes of Upper Canada that rendered such exclusive aboriginal and/or treaty fishing rights impossible? To answer this question an understanding of the English law governing title to land covered by water and to fisheries is required.

II. English Law on Fisheries in Navigable Waters and Its Application to Colonial and Post-Colonial Territories

The basic English common law rules regarding waters and fisheries were summarized by Matthew Hale, Lord Chief Justice of England, in his seventeenth century treatise, “De Jure Maris”. According to those rules, land covered by water is the same as land not so covered: it is susceptible to private ownership but until granted by the Crown to a subject it constitutes part of the royal demesne. Fisheries are regarded as profits of the soil, and therefore the owner of lands covered by water has, as an incident of that ownership, a separalis piscaria or a “several” fishery — an exclusive


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right to fish in those waters. Indeed, the common law presumes that riparian land owners own the land under and the fisheries within adjacent waters usque ad medium filum aquae. Instruments by which land is conveyed (either by the Crown or the subject) that define the granted lands as bordered by a body of water are interpreted consistently with this ad medium filum aquae presumption, and the grantee is therefore presumed to receive title to the solum and an exclusive fishery to the middle of the adjacent waterway. The landowner’s right to fish may be severed from the right to land and alienated as a profit à prendre. The recognition of exclusive fishing rights is not legally inconsistent with any public rights of navigation that may exist at common law by user; however, the public navigation right is “paramount” and, as long as it is exercised reasonably, it prevails over private fishing rights when the two come into practical conflict.

These rules apply to non-tidal waters. In relation to tidal waters — also known as ‘navigable’ waters (when used in this de jure sense, ‘navigable’ excludes non-tidal waters which are de facto navigable) — the rules are modified in certain respects. First, title in the soil under tidal waters, while capable of being granted to the subject, is presumed to be in the Crown — the ad medium filum presumption

43. Alderman of London v. Hastings (1657), 2 Sid. 8; Lord Fitzwalter’s Case (1674), 1 Mod. 105 [hereinafter Fitzwalter’s]; Seymour v. Courtenay (1771), 5 Burr. 2814; and Moore & Moore, supra note 5 at 43-45.

44. Le Case del Royall Piscarie de le Banne (1610), Davis. 55 at 56 [hereinafter Royall Piscarie]; and “De Jure Maris”, supra note 42, c. 1. The phrase ‘usque ad medium filum aquae’ means, in essence, ‘just to the centre thread of the water’.

45. Mayor of Lynn v. Turner (1774), 1 Cowp. 86; Anon. (1808), 1 Camp. 517n; Williams v. Wilcox (1838), 8 Ad. & E. 314 at 333-334; Colchester Co. v. Brooke (1845), 7 Q.B. 339 at 374 [hereinafter Colchester]; and Murphy v. Ryan (1868), I.R. 2 C.L. 143 at 152-153 [hereinafter Murphy].

46. On the legal definition of “navigable” waters see: Royall Piscarie, supra note 44; “De Jure Maris”, supra note 42, c. 4; Carter v. Murcot (1768), 4 Burr. 2163 at 2164 [hereinafter Carter]; and Murphy, ibid.
does not apply to land grants bordered by tidal waters. 47 Second, the common law recognizes a prima facie public right to fish in tidal waters. With respect to non-tidal waters, a public right of fishing is impossible at common law. The owner of the soil (whether Crown or subject) has an exclusive right of fishing that may be granted to another and that cannot be abridged in favour of the public; evidence of long public user may create an easement over a non-tidal waterway making it a public highway, but user cannot give rise to a public right of fishing. 48 In relation to tidal waters, however, a different conclusion is reached. According to Hale’s “De Jure Maris”, “the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof . . . and may not without injury to their right be restrained of it.” 49 This “prima facie” public right is only denied where a several fishery has been granted by the Crown or has arisen “by prescription or usage.” 50

As Lamer C.J. suggests, the public right of fishing in tidal waters is linked to the terms of Magna Carta. 51 The relationship is not, however, clear. Blackstone stated that exclusive rights of fishing in “public” rivers could not “at present be granted, by the express provision of magna carta, c. 16.” 52 As seen above, chapter 16 was anything but express in this respect. 53 The leading judges of the seventeenth and eighteenth centuries acknowledged the power of the Crown to

47. “De Jure Maris”, ibid., c. 4; R. v. Smith (1780), 2 Doug. 441; and Colchester, supra note 45 at 374.
49. “De Jure Maris”, supra note 42, c. 4. See also Fitzwalter’s, supra note 43, Hale C.J.; and Warren v. Matthews (1703), 1 Salk. 357 [hereinafter Warren].
50. “De Jure Maris”, supra note 42, chap. 5. See also Carter, supra note 46.
51. Gladstone, supra note 1.
53. See supra note 5 and accompanying text.

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grant several fisheries in tidal waters without mentioning this *Magna Carta* restriction, and, in “De Jure Maris”, Hale observed that the admonition in chapter 16 that “No Banks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather” merely prohibited writs of *de defensione ripariae* that allowed the King to put rivers *in defenso* until he had enjoyed his prerogative of hunting and fishing for his own pleasure. It is unlikely, then, that *Magna Carta* was intended to restrict the Crown’s ability to grant (or the subject’s ability to prescribe for) exclusive fishing rights. Nevertheless, by the mid-nineteenth century Blackstone’s view of chapter 16 had prevailed: the House of Lords held that *Magna Carta* did indeed prevent Crown grants of several fisheries in tidal waters, and that to establish a lawful exclusive fishery in such waters one had to produce either a Crown grant “not later than the reign of Henry II” or evidence of “long enjoyment” of the fishery from which it might be inferred that such a grant had been made. In short, the common law came to conclude that after the reign of Henry II, the public right of fishing in tidal waters could not be limited or abrogated except by Act of Parliament.

In articulating the law relating to waters and fisheries, the early common law focused upon the sea and its arms on the one hand and non-tidal rivers on the other; no express mention was made of large fresh water lakes.

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non-tidal rivers that might be seen as inappropriate for such lakes. First, the presumption that riparian land owners own the land under the lake *usque ad medium filum aquae* would, in many cases, mean that many small landowners actually own great tracts of submerged land. Second, it might seem unfair that the public, who usually has rights of navigation in such lakes, does not have a common law right of fishing and any public use of the fisheries in these lakes exists only by the owner’s grace. Nevertheless, English courts have applied the common law strictly: if lakes are non-tidal then the rules governing non-tidal waters govern. Thus, in a case involving fishing rights on Lough Neagh, which is twenty by fifteen miles, non-tidal and a public highway, Lord Macnaghton stated that it was “incontrovertible” that “[n]o right can exist in the public to fish in the waters of an inland non-tidal lake,” and “there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea.”

Although judges did not seem opposed to the idea that the soil and fisheries in such lakes could be privately owned, concerns were expressed about the idea that the law would *presume* that the riparian owners had these rights *usque ad medium filum aquae*, and therefore the normal presumptions regarding the rights of riparian owners came to be regarded in relation to such lakes as easily rebutted by reference to the surrounding circumstances. Thus, the Crown could grant title to the solum and/or fisheries of large non-tidal lakes by an instrument expressly conveying these rights, or by the grant of riparian lands if the surrounding circumstances supported the inference that the

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Crown also intended to convey the solum under and/or fisheries within adjacent lake waters.

English law was introduced into British colonies either by legislation or by the silent operation of common law principle (as the so-called “birthright” of settlers). In either case, English common and statute law applied in the colonies (or, after the American revolution, in the United States) only insofar as it was applicable to “local conditions,” a qualification that operated even if it was not expressly included in the reception statute. It was left to judges to determine if and how English law applied. Judges were not restricted to taking or leaving English rules; rather, judges could modify the law so that it suited local conditions. In general, English rules that were designed to address particular social or political problems peculiar to England were not applied. Thus, English statutes that were “wholly political” and relevant only to “local [English] circumstances,” or that “record[ed] a compromise between the King of England and his people” relating to some peculiar “insular medieval” legal principle (descriptions that, it may be noted, apply to many of Magna Carta’s provisions) were disregarded.


63. Blackstone, supra note 52 at 106-107; Kielley v. Carson (1841), 4 Moo. P.C. 63 (P.C.) at 84-85; Cooper, ibid.; The Lauderdale Peerage (1885), 10 App. Cas. 692 at 744-745 (H.L.); Uniacke v. Dickson (1848), 2 N.S.R. 287 (Ch.); Mercer v. Hewston (1859), 9 U.C.C.P. 349 at 354-355; Boehm v. Engle, 1 Dall. 15 (Penn. S.C., 1767); U.S. v. Worral, 2 Dall. 384 at 394 (Penn. S.C., 1798); and Pawlett (Town of) v. Clark, 9 Cranch 292 at 333 (U.S.S.C., 1815).

64. Doe d. Anderson v. Todd (1845), 2 U.C.Q.B. 82.

65. Morris’s Lessee v. Vanderen, 1 Dall. 64 (Penn. S.C., 1782); and Farrell, supra note 62.

66. A.G. v. Stewart (1817), 2 Merr. 144 (Statute of Mortmain (1736), 9 Geo. II, c. 1 did not apply in Grenada).

The difficulties inherent in deciding how English law should apply in colonies are clearly reflected by cases on riparian rights and fisheries. In most American states, the English common law rules were followed closely. However, judges in the United States were reluctant to accept that the English rules governing navigable waters should be restricted to tidal waters only; the reasonableness of recognizing private rights to the solum and fisheries in non-tidal waters was questioned, and exceptions were invariably made in relation to large fresh water lakes and rivers that were *de facto* navigable.68 For example, in the Pennsylvania case of *Carson v. Blazer,*69 in which a "several fishery" was claimed by the owner of lands bounded by the Susquehanna River, the trial judge refused to apply the common law's *ad medium filum aquae* presumption because, although the river was non-tidal, it was a "mile wide" and was navigable by "large boats" for "several hundred miles through a rich country" and it would be "highly unreasonable" to apply the English rules on non-tidal waters to "our large rivers."70 Instead, it was held that fisheries in non-tidal but navigable waters in America were "vested in the state, and open to all . . . ."71 The appellate court agreed, describing the assertion by riparian owners of private fisheries to the middle of such rivers as a "wild claim" that "the warmest advocates for the right of exclusive fisheries would scarcely contend for."72

Judges in other states expressed similar views. The idea that riparian owners on large lakes and rivers in America might own the solum and fisheries *usque ad medium filum acquae* was variously

69. 2 Binn. 475 (Penn. S.C., 1810).

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described as "preposterous,"73 "opposed to our sense of all that is reasonable, right or true,"74 and "an absurdity too monstrous to be thought of."75 It was not just the physical differences in the respective geographies of England and America that led these judges to regard the strict application of English rules to American waterways as unreasonable. The English law in this respect represented a balance of public and private interests that, while perhaps appropriate to a country possessed by the English for centuries, was considered inappropriate to the needs of English settlers carving a new life out of a hostile wilderness. Some judges thought pioneer morality demanded that public interests prevail over private ones. Thus, Taney C.J. observed in 1842 that the first settlers could not have met the "many hardships" of the "new world" if fisheries under navigable waters were "liable to immediate appropriation by another as private property . . . ."76

The approach in Carson v. Blazer was not followed in all states. Indeed, many judges were anxious to ensure that the evolving American common law accorded as central a place to private property interests as did the English common law. For example, in Adams v. Pease77 it was held that the owners of land adjoining the non-tidal, though navigable, reaches of the Connecticut river did have an exclusive right of fishing opposite their land to the middle of the river while the public had an easement in the river as a highway. With respect to the English common law rules that dictated

73. *Canal Appraisers v. The People, ex rel. Tibbits (No. 1)*, 5 Wend. 423 at 462 (N.Y.C.A., 1830) [hereinafter *ex rel. Tibbits (No. 1)*].
74. *Canal Appraisers v. The People, ex rel. Tibbits (No. 2)*, 17 Wend. 571 at 621 (N.Y.C.A., 1836) [hereinafter *ex rel. Tibbits (No. 2)*].
77. 2 Conn. 481 (Conn. Sup. Ct of Errors, 1818) [hereinafter *Pease*].
this result, Swift C.J. observed: "A more perfect system of regulations on this subject could not be devised. It secures common rights, as far as the public interest requires; and furnishes a proper line of demarcation between them and private rights."78 This approach to public and private interests was adopted in the New York case of Hooker v. Cummings79 in which a several fishery in the Salmon River, a navigable non-tidal river flowing into Lake Ontario, was recognized. Spence J. said: a river may be "subject to the public servitude, for the passage of boats" but this public right of navigation over waters could not "divest the owners of the adjacent banks of their exclusive rights to the fisheries therein."80 Indeed, certain judges regarded the common law's compromise between public and private interests as not only suitable but necessary for the orderly settlement of the American frontier. Unless property in fisheries was vested in particular people there might be an "individual scramble" for the resource resulting in "violence and outrage" and other "incalculable mischiefs."81 As one judge stated, the common law's recognition of private fisheries in navigable waters "promotes the grand ends of civil society" by "assigning to every thing capable of ownership a legal and determinate owner."82 Thus, many judges applied the English common law without modification.83

Although American courts were divided upon whether to apply the English common law on non-tidal waters to de facto navigable

78. Ibid. at 483.
79. 20 Johns. 90 (N.Y.S.C., 1822).
80. Ibid. at 99-100. See also Palmer v. Mullaney, 3 Caines 308 at 318 (N.Y.S.C., 1805); Shaw v. Crawford, 10 Johns. 236 (N.Y.S.C., 1813); Canal Fund (Commissioners of) v. Kempshall, 26 Wend. 404 (N.Y.S.C., 1841) [hereinafter Kempshall]; McCullough v. Wall, 4 Rich. 68 (S.C.S.C., 1850).
82. Pease, supra note 77 at 484-485.
rivers and lakes, there seemed to be unanimity in relation to particularly large lakes. The approach taken is reflected in the statements of Walworth C. in the 1830s: the beds and islands of “our large fresh water lakes, or inland seas, which are wholly unprovided for by the common law of England,” as well as “those lakes and streams which form the national boundaries between us and a foreign nation,” are by “our own local law” assigned not to the riparian owners but “to the public.” Courts in states bordering the Great Lakes or other large lakes invariably adopted a similar attitude.

In concluding that the lake bed and fisheries in large lakes vested in the “public,” or in the state on the public’s behalf, American judges were not purporting to determine what powers the Crown would have had in relation to these waters; they were applying English law only insofar as it was relevant to the American condition, and after the American Revolution the question of whether Magna Carta prevented Crown grants of exclusive fisheries in such waters was of little practical importance. Occasionally, however, a claim to an exclusive fishery in tidal waters was traced to a pre-Revolution Crown grant and courts were then forced to consider the legality of that grant. For example, in Roger v. Jones the inhabitants of the Town of Oyster Bay, New York, claimed an exclusive fishery in tidal waters based upon a 1677 grant issued by the colonial governor in the name of Charles II. In response, the defen-

84. ex rel. Tibbits (No. 1), supra note 73 at 447 and ex rel. Tibbits (No. 2), supra note 74 at 597.
85. The State v. Gilmanton, 9 N.H. 461 (N.H.S.C., 1838); Kempshall, supra note 80; Kingman v. Sparrow, 12 Barb. 201 (N.Y.S.C., 1851); Morgan v. King, 30 Barb 9 (NYSC, 1858); Champlain & St. Lawrence RR v. Valentine, 19 Barb 484 (NYSC, 1853); La Plaisance Bay Harbour Co. v. Munroe (City of), Walk’s Ch. 155 at 168 (Mich. 1843); Fletcher v. Phelps, 28 Vt. Rep. 257 at 262 (Vt.S.C., 1856); People v. Silberwood, 67 N.W. 1087 (Mich., 1896); State v. Cleveland, 113 N.E. 677 (Ohio S.C., 1916); Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (U.S.S.C., 1892).
86. Gould, supra note 68 at 71-75; Martin, supra note 76 at 410; Brookhaven v. Strong, 60 N.Y. 56 at 66 (N.Y.C.A., 1875) [hereinafter Brookhaven].
87. 1 Wend. 237 (N.Y.S.C., 1828) [hereinafter Rogers].
dant argued that *Magna Carta* made this grant unlawful. Woodworth J., after reviewing Hale’s “De Jure Maris” and the English case law of the seventeenth and eighteenth centuries, concluded that the Crown was under no such restriction. Adopting Hale’s analysis of *Magna Carta*’s chapter 16, he concluded that the only object of that provision was “to prevent the King from putting any rivers in defenso for his recreation,” and therefore the Crown remained “at liberty” to grant an “exclusive right of fishing” in tidal waters. Of course, at the time *Roger* was decided there was, aside from Blackstone’s statements, little academic or judicial support for the *Magna Carta* restriction in England. But even after the restriction gained favour in English courts later in the nineteenth century, American courts continued to apply the law as stated in *Roger*. In short, American judges did not conclude that English law prevented Crown grants of exclusive fisheries in such lakes.

In Australia and New Zealand, the English common law relating to rights to the solum and fisheries of navigable waters was applied without modification. Non-tidal waters were, even if *de facto* navigable, subject to the non-tidal rules. However, the *ad medium filum* presumption was only applied to grants of lands bordering non-tidal waters where “surrounding circumstances” suggested that the Crown intended it to apply. The surrounding circumstances that informed the courts’ construction of land grants were the “facts known to both parties at the time of the grant,” and included, for example, the Crown “policy” of encouraging settlement in an “infant colony,” the need for public navigation during times of war,

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89. *People v. Schermerhorn*, 19 Barb. 540 (N.Y.S.C., 1855); *Brookhaven*, *supra* note 86 at 65-66. See also *Martin*, *supra* note 76 at 410.
92. *Commissioners for Sydney*, *supra* note 90 at 497-498.
“physical circumstances” such as the size of the body of water adjacent to the granted land,\textsuperscript{94} and any “other special facts” that indicated that the grantor intended to retain the river bed.\textsuperscript{95}

In colonial Canada, the English common law rules were faithfully applied, at least in relation to tidal waters and small non-tidal rivers and ponds.\textsuperscript{96} When it came to the question of large non-tidal rivers and lakes that were \textit{de facto} navigable, however, Canadian judges — like their American counterparts — deviated from a strict application of English rules. Early judgments were informed by a colonizing spirit according to which the public interest of the settler community prevailed. In \textit{The Queen v. Meyers} it was stated that, with the introduction of law and the “first occupancy” of land by settlers, the “great lakes and some rivers” of Upper Canada became “common to the whole province” — like “air and light,” waters that were \textit{de facto} navigable, were by “nature” subject to public rights with which the Crown by its prerogative could not interfere.\textsuperscript{97} Although \textit{Meyers} only addressed rights of navigation, and public rights of navigation can coexist with private rights of fishing at common law, the judgments in the case reflect a judicial preoccupation with the public rights of settlers that underlies the cases on waters and fisheries generally.

This attitude is clearly manifested in the Upper Canadian response to the question of rights to the solum under and fisheries within the waters of the Great Lakes. Many Crown land grants to settlers defined one of the Great Lakes as a boundary, and according to a strict application of English law these grants should have conveyed the solum and fisheries \textit{usque ad medium filum aquae}. However, colo-

\textsuperscript{94} Joyce, supra note 91 at 114.

\textsuperscript{95} Ibid. at 96, 99-100.

\textsuperscript{96} Caldwell v. McLaren (1884), 9 App. Cas. 392 (P.C.) at 404-405; North Shore Ry. Co. v. Pion (1889), 14 App. Cas. 612 (P.C.) at 621; Maclaren v. Quebec (A.G.), [1914] A.C. 258 at 273-274; British Columbia (A.G.), supra note 57 at 166-173; Canada (A.G.) v. Quebec (A.G.), [1921] 1 A.C. 413 at 421-422 (P.C.) [hereinafter Canada (A.G.)].

\textsuperscript{97} (1853), 3 U.C.C.P. 305 at 350-352, Macaulay C.J. and at 357-358, McLean J. [hereinafter Meyers].

324 (1998) 23 Queen’s L.J.
nial judges asserted that this rule was “unsuitable” to “our great lakes,” and that grants to settlers of land bordering these lakes were not subjected to the ad medium filum presumption. In *Parker v. Elliot* Sullivan J. observed that this conclusion could be reached either by construing Crown land grants as stopping at the water’s edge — that is, by applying the usual English non-tidal rules but holding the ad medium filum presumption to be rebutted — or by not applying the English non-tidal rules to the Great Lakes at all — that is, by holding that the Great Lakes were subject instead to the English rules on tidal waters. Opinions of Crown law officers and obiter dicta of judges confirm that the latter justification was accepted. Thus, it was suggested that, as in tidal waters in England, there was a “public right” of fishing in the Great Lakes of Upper Canada and that Crown grants of exclusive fishing rights in these waters to individual settlers would be “void.”99 As Wilkes Co. J. stated in *Daragh v. Dunn*, the effect of “King John’s Great Charter” was to render it “questionable” whether at common law “by any lease or licence . . . a right of fishing in any of the public waters of Upper Canada, can be conveyed to any one or more of Her Majesty’s subjects to the exclusion of others.”101 Unlike American


judges, Canadian colonial judges did not attempt to consider the original meaning of the 16th chapter of *Magna Carta*; nor did they consider why this ancient provision barring writs of *de defensione ripariae* applied in the colony of Upper Canada to restrict the Crown's ability to create exclusive fishing rights in the Great Lakes. Although chapter 16 may originally have been the result of a political compromise between King and barons addressing a peculiar medieval grievance unrelated to the local conditions of colonial Canada, its reinterpretation as the foundation of public fishing rights made it consistent with the demands of the settler political morality that informed the emerging common law of colonial Canada. In its new form, then, *Magna Carta* was applicable to local conditions as perceived by colonial judges.

### III. English Law on Fisheries and Aboriginal Rights

Having summarized the English common law on waters and fisheries and its application to large lakes in colonial territories, it is now possible to return to the question of aboriginal fishing rights and to determine how these rights were manifested in the non-aboriginal legal system. Assuming that the Saugeen Ojibway did assert and exercise against other aboriginal nations in the Great Lakes region an exclusive right over their fisheries in Georgian Bay and Lake Huron, what was the fate of this right upon the arrival of British settlers and the introduction of English law? Was the Saugeen fishing right recognized by and incorporated within the common law, either as an incident to title to the solum or as an independent right? If so, did this right remain an *exclusive* right or was it somehow, in the course of being translated into terms acceptable to the common law, reduced to a mere right of *priority*? If it is determined either that the Saugeen Ojibway fishing right was not originally exclusive or that it was originally exclusive but was reduced by the common law to a right of priority, did the Crown in
colonial Canada have the authority to grant the Saugeen Ojibway an exclusive right either by the 1836 treaty or by the 1847 letters patent?

For the Saugeen Ojibway and any other aboriginal nation in the Great Lakes region wishing to claim an exclusive aboriginal and/or treaty right of fishing in the Great Lakes, the analysis in Part II presents some obvious problems. On the one hand, basic English legal principles are helpful: if Ojibway title to the bed of Lake Huron can be established, a several fishery in these non-tidal waters is (arguably) established as an incident to that title. This title might be common law aboriginal title, as confirmed by the Royal Proclamation of 1763$^{102}$ and the 1836 treaty, or it might derive from Crown grant under the 1847 letters patent. If either the treaty or patent definition of Saugeen territory is used, the _ad medium filum aquae_ presumption might be said to ensure that the boundary was not the lake edge but included the adjacent lake bed; “surrounding circumstances” might be argued to demonstrate that, unlike the typical settler grant, the Crown intended to convey the solum under the adjacent Great Lake waters in order to protect native fisheries from non-native “encroachment” of reserve territories. Alternatively, it may be argued that if title to the lake bed did not exist, an exclusive fishing right was severed from the Crown’s title and granted as a _profit à prendre_ by the treaty.

These arguments are, of course, premised upon a strict application of the English common law on non-tidal waters. However, if the Great Lakes are governed by the common law rules on tidal waters, then the following three arguments can be made: (a) the common law recognized a public right of fishing in the Great Lakes and, therefore, could not have recognized exclusive aboriginal rights of fishing; (b) the common law included the so-called _Magna Carta_ restriction and therefore denied the Crown’s authority to recognize exclusive aboriginal fisheries by prerogative instrument, whether treaty or letters patent; and (c) in addition to these limits on the

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102. See Part IV below.
Crown’s powers, any instrument defining Indian reserves as bounded by a lake cannot be interpreted according to the *ad medium filum* rule of construction. If these arguments have merit then it may be said, as one recent commentator has done, that aboriginal fishing rights in Upper Canada were really determined by the signing of *Magna Carta* on Runnymede meadow in 1215.103

Is this latter approach sound? One method that advocates of exclusive aboriginal fisheries could use to challenge it is simply to assert that colonial judges were wrong. Thus, it might be argued that according to English common law as properly applied in colonial Canada, the Great Lakes were not in all respects like tidal waters but rather were (like Lough Neagh104) subject to non-tidal rules with the minor caveat that the *ad medium filum* presumption was easily rebutted. This interpretation of the local common law is preferable, it may be argued, because it is closer to the “true” common law rule on large inland lakes as it developed in the United Kingdom in the late nineteenth and early twentieth centuries. Furthermore, it may be argued that this English interpretation is not inconsistent with local conditions; although the Crown would be free to grant the lake bed and fisheries to private individuals, most Crown grants of riparian lots on the Great Lakes would be interpreted as excluding the lake bed and fisheries. Though there would be no public right of fishing protected from the royal prerogative, there would be a public right of navigation (established by user) and settlers would have been at complete liberty to fish unless and until the Crown considered it to be in the public interest to limit public access to fisheries by some prerogative instrument (or, as was done, by statute).

Alternatively, one could concede that colonial judges were correct in applying the tidal rules to the Great Lakes, but argue that the English/Canadian interpretation of the *Magna Carta* restriction was

104. See supra note 59 and accompanying text.
wrong, and that the *American* interpretation was right — that chapter 16, properly interpreted, did *not* prevent Crown grants of exclusive fisheries in tidal waters (or, therefore, in the Great Lakes). Under this approach then, the public would have a common law right to fish in the Great Lakes but it would have been susceptible to abrogation or limitation not only by statute but also by instruments made under the royal prerogative granting exclusive fishing rights to some person or persons.

These two alternative options for reinterpreting local common law, if accepted, would effectively counter arguments that appear to preclude recognition of exclusive aboriginal common law and/or treaty rights of fishing in the Great Lakes. In terms of abstract legal principle the two options are sound — indeed, the first even has some support in later case law. However, it must be conceded that both options run counter to a large body of cases on waters and fisheries that developed without reference to aboriginal rights, and that they are inconsistent with a judicial attitude favouring public rights in all navigable waters in Canada that, in light of the Supreme Court of Canada's decisions in *Nikal* and *Lewis*, must be considered as strong today as it was in the mid-nineteenth century. Although there are grounds to argue that the Great Lakes are not subject to the rules that developed in English common law in relation to tidal waters, and are not subject to a public right of fishing, for the purposes of the following analysis it will be assumed that they are.

To accept that local conditions necessitated this colonial interpretation of the common law is not, however, to accept that there

105. In *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184 at 198-200 (Ont. C.A.), it was suggested that judicial statements classifying the Great Lakes as subject to tidal rules were in *obiter* and that there was no reason to modify the common law in relation to them. The Privy Council in *British Columbia (A.G.)*, supra note 57 and *Canada (A.G.)*, supra note 96 at 421, assumed that the basic English common law rules applied in Canada to tidal and non-tidal waters without modification. See also Blair, supra note 11 at 140.

106. *Nikal*, supra note 1 at 1046-1047; and *Lewis*, supra note 1 at 950-951.
could be no exclusive aboriginal fisheries in the Great Lakes at common law or under treaty. The analysis in Part II demonstrates that it was with settler interests that the courts were concerned when adjusting the common law to fit North American conditions. It is simply unreasonable to assume that the common law rules that were carefully refashioned to define the property rights of newly-arrived individual settlers consistent with their interests and objectives could be blindly extended and applied to the determination of the territorial rights of indigenous nations without any regard for the obvious differences between the two sets of peoples. Underlying the concept of aboriginal rights is the notion that settlers and aboriginal peoples were not always subject to the same rules. The common law accommodated political and cultural pluralism by recognizing varying degrees of legal pluralism: aboriginal title, for example, has consistently been held to be a sui generis legal interest in lands and resources that cannot be defined by the same common law rules that define non-native property interests.  

So even if the case law summarized in Part II is accepted as defining settler rights, it is far from clear that it also served to define aboriginal rights. The difficulty is, of course, that while two sets of rules may have existed for the two sets of people, a particular fishery could not be subject to both an exclusive aboriginal right and a public settler right at the same time. It is important to consider in more precise terms how exclusive aboriginal fishing rights might have been accommodated within a common law context that (arguably) included a public right of fishing.

Consideration of this question is all the more important in light of two implications of the recent Supreme Court of Canada judgments on aboriginal fishing rights. First, in Gladstone it was held that, because the common law context within which the aboriginal right of

fishing exists includes a public right of fishing protected since *Magna Carta* from the royal prerogative, once aboriginal custom is reconciled with the common law the resulting aboriginal right must be one of priority not exclusivity. The *Gladstone* process of reconciliation was undertaken in the course of defining the fishing right as an independent aboriginal right not as a right incidental to aboriginal title. Elsewhere the Court draws a distinction between the “free-standing aboriginal right to fish” and “aboriginal title to the

108. *Gladstone*, supra note 1 at 770-771. In *Gladstone*, the Court defined the aboriginal fishing right as a constitutional ‘aboriginal right’ under s. 35(1) of the *Constitution*, supra note 2, and therefore applied the four-stage analysis that it has developed for s. 35(1), namely: (1) it defined the nature of the right claimed; (2) it determined whether the right was extinguished by some clear and plain legislative instrument prior to 1982; (3) as the right was unextinguished, it then determined whether the impugned government action infringed the right; and (4) having found infringement, the Court then considered whether the impugned government action was justified: *Gladstone*, supra note 1 at 742. Lamer C.J. defined the right in stage (1) in broad terms, concluding that the commercial fishing right in issue had no ‘internal’ limit and would therefore, given market demand, embrace the entire fishery unless limited in some way. Then, at stage (4)—the justification stage—he concluded that some government restriction of this right is lawful because, *inter alia*, the public has had a competing right of fishing since *Magna Carta* with which the aboriginal right must be reconciled: *Gladstone*, supra note 1 at 764-772. One can therefore interpret *Gladstone* as providing that the right itself is exclusive and is only reduced to one of priority at the justification stage. However, it is important to emphasize that the Court’s four stage analysis was undertaken to define the constitutional aboriginal right under s. 35(1), and the relationship between these stages and aboriginal rights at common law is rather ambiguous. It would appear that Lamer C.J. did not consider the stage (1) right as representing the status of the aboriginal right at common law. Thus, although in *Gladstone* he waited until the justification stage to invoke *Magna Carta* and the public fishing right, it is clear from his comments that he considered the ‘common law’ aboriginal right to have been limited by *Magna Carta* and the public fishing right prior to the entrenchment of s. 35(1) in 1982: *Gladstone*, supra note 1 at 770. In other words, he concluded that, at common law, the aboriginal right in that case was not exclusive, and he used this conclusion as additional support for his view that some governmental limitation of the constitutional right if justified after 1982.
lands in the fishing area that gives rise to an incidental right to fish there,” suggesting that aboriginal title may secure to First Nations a more complete bundle of rights relating to land than mere aboriginal rights. Indeed, in Delgamuukw in which fishing and water rights were not addressed, the Court confirmed that aboriginal title is the “right to exclusive use and occupation of the land held pursuant to that title.” Thus, the constitutional expression ‘aboriginal rights’ — or what may be called ‘aboriginal rights broadly defined’ — includes an exclusive right to land known as aboriginal title, as well as other ‘free-standing’ aboriginal rights — or what may be called ‘aboriginal rights narrowly defined’ — that exist independently of aboriginal title and that, if related to access to natural resources, are likely non-exclusive. The question yet to be determined by the Court is whether there may be fishing rights incidental to aboriginal title that are exclusive, even though the ‘free-standing’ aboriginal fishing right is not.

Second, in Nikal, the Court held that a Crown grant of reserve land to an aboriginal nation in British Columbia did not include the land beneath the adjacent navigable, non-tidal river because the common law, as adjusted to local conditions, treated such waters like tidal waters. Consequently, the ad medium filum presumption did not apply and the Crown was restrained by Magna Carta from granting exclusive fisheries. Although citing legal opinions from Upper Canada in support of this conclusion, the Court did not attempt to address the considerable differences existing between the legal-constitutional contexts of British Columbia and Upper Canada, differences that may affect the scope of the Crown prerogative powers in Upper Canada and the validity of the opinions cited.

109. Adams, supra note 1 at 122, Lamer C.J.
110. Ibid. at 117, Lamer C.J. and at 136, L’Heureux-Dubé J.; Côté, supra note 1 at 197, LaForest J.; and Van der Peet, supra note 1, L’Heureux-Dubé J. at 579-581.
111. Delgamuukw, supra note 8, para. 117.
112. Nikal, supra note 1.
In other words, although *Gladstone* appears to preclude exclusive native fisheries at common law and *Nikal* appears to prevent their creation by Crown grant, it is submitted that neither case closes the door on Saugeen Ojibway claims to exclusive aboriginal and/or treaty fishing rights. To explain why, however, an analytical framework within which to analyze the effect of the introduction of English law on aboriginal customs is necessary.

**A. An analytical framework**

The principle according to which the common law acknowledged aboriginal rights and thereby distinguished aboriginal peoples from settlers is often identified as the *principle of continuity*. In its simplest form, the principle of continuity provides that aboriginal rights, possessions, customary laws, practices and usages continued after the assertion of British sovereignty and were recognized by and incorporated within British law as common law rights. In other words, there was — from the British common law perspective — continuity of at least certain elements of local substantive law upon


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the transition from one legal regime to the next. Until recently, Canadian courts were not very explicit about the extent to which the continuity of aboriginal customary law provided a foundation for the recognition of common law aboriginal rights to lands and natural resources. In Van der Peet, however, the Supreme Court of Canada expressly recognized that common law aboriginal title is based, in part, upon the "traditional laws and customs" of aboriginal nations as recognized by the common law. However, the definition of ‘aboriginal rights narrowly defined’ articulated in Van der Peet is based upon a "concept of continuity" that is doctrinally distinct from the principle of continuity found in earlier cases on British imperial constitutional law. According to the Van der Peet concept of continuity, aboriginal rights are those customs, practices and traditions integral to the distinctive culture of the claimant nation that were followed prior to contact with Europeans and that, not having been expressly extinguished by government prior to 1982, continue to be followed today. The Van der Peet concept of continuity is ultimately about the continuity of (elements of) the aboriginal cultures that pre-dated the time of European contact, a time that, in many parts of Canada, preceded the assertion of British sovereignty by over a century. In contrast the traditional imperial principle of continuity ensured the continuity of aboriginal laws, customs and/or possessions existing at the time British sovereignty was asserted, whether or not they were integral to aboriginal culture as it existed then or at some earlier date of European contact.

In Delgamuukw, however, the Court has reverted (implicitly at least) to the more traditional conception of ‘continuity’ for the pur-

115. Van der Peet, supra note 1 at 546.
116. Ibid. at 554-558.
117. Ibid. at 556; Gladstone, supra note 1 at 747; Adams, supra note 1 at 129; and Côté, supra note 1 at 183.
poses of defining aboriginal title to land. Aboriginal title, says Lamer C.J., derives from two sources: (a) possession of the relevant land by the claimant nation at the time British sovereignty was asserted; and (b) the relationship between the common law and any “laws in relation to land” that the nation may have had “at the time of sovereignty” regardless (apparently) of whether these laws derived from, or were integral to, pre-contact aboriginal cultures. In short, Canadian law on aboriginal rights broadly defined now contains two distinct conceptions of ‘continuity’ relating to the two general categories of ‘aboriginal rights broadly defined’ so far recognized: cultural continuity for aboriginal activities not incidental to aboriginal title, or ‘aboriginal rights narrowly defined’, and legal continuity for aboriginal title. As the purpose of this analysis is to consider the nature of aboriginal fishing rights that are incidental to aboriginal title, the latter conception of continuity is applicable. Assuming that the Saugeen Ojibway did have exclusive possession of their fisheries at the time British sovereignty was asserted, the focus of attention shifts to the second branch of the Delgamuukw test for aboriginal title — what Lamer C.J. describes as “the relationship between the common law and pre-existing systems of aboriginal law.” What follows then, is a legal interpretation of the legal-historical point of contact between the common law and aboriginal customary law as it relates to fishing rights, beginning in abstract terms and then shifting in Part IV to the specific question of Ojibway rights in colonial Canada. The discussion of the specific question will be assisted if, at the abstract level the relevant principle of continuity is considered in two distinct legal, dimensions, labelled for the purposes of this discussion the imperial and the municipal dimensions.

119. Ibid., para. 114.
The recognition and incorporation by one legal system of the rights, possessions, laws and customs of another system was hardly unique to the British North American colonial experience. On the contrary, it was a policy employed by most imperialist powers and, as a result, was a recognized principle of the *jus gentium*. Citing Roman practice, Grotius stated that, although a conquering power was free to impose new laws upon a subjected people, the decision to leave in place their own laws and government was “not only an act of humanity, but often an act of prudence also.”

In English common law, the principle was expressed as a presumption: the Crown could, without Parliament, legislate for any territories newly added to the empire, but until it took some positive step to abrogate local rights and laws, judges presumed that such rights and laws continued in force as part of British law.

Although the common law principle was often traced to the *jus gentium*, a more


indigenous source for the principle, the supposed continuity of Saxon law after the Norman Conquest, was also occasionally cited.\(^{23}\)

While Roman and Norman practice may have provided some historical inspiration for the principle of continuity, in fact the common law foundation for the principle derives from a rather more practical concern — that of ensuring basic social order — coupled with a constitutional concern — that of respecting the separation of judicial and legislative powers. When confronted with legal disputes involving newly-acquired territories that the Crown had not expressly abrogated or altered local rights and laws, courts were driven by "necessity" to recognize the continuity of those rights and laws: the maintenance of civil peace and stability precluded recognition by the common law of either a legal vacuum or the *ipso facto* abolition of local rights and laws by the sudden introduction of English law. Indeed, unless judges were to assume the role of legislators and pre-empt the decisions of the Crown, they could not declare the introduction of English or any other law. In short, the only reasonable judicial option was to presume the continuity of the legal *status quo* existing upon the assertion of British sovereignty.\(^{24}\)


\(^{124}\) Blankard *v.* Galdy (1693), 4 Mod. 215 at 225-226: "though a conqueror may make new laws, yet there is a necessity that the former should be in force till new are obtained" [emphasis added]; F. Maseres, Att. Gen. Quebec, "Considerations on the Expediency of Procuring an Act of Parliament for the Settlement of the Province of Quebec (1766)" in Shortt & Doughty, *supra* note 122 at 261: continuity derived from "the necessity of the case, since otherwise the conquered provinces would be governed by no laws at all" [emphasis added]; and *R. v. Picton* (1804-1812), 30 St. Tr. 225 at 946, Lord Ellenborough: "the old laws continue till the new are introduced, or they must be positively in a lawless state."

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Although the early cases justified the principle by reference to these practical concerns, the principle was far from being morally neutral; on the contrary, the principle can be seen to have been informed by judicial ideas of what fairness or (as Grotius said) “humanity” required under conditions of imperialist aggression that may have been, objectively speaking, inherently unfair. Nevertheless, the British imperial law’s principle of continuity is very different from the Van der Peet “concept of continuity” designed to protect “distinctive cultures.” Although the imperial principle of continuity may have had the effect of protecting local cultures, that protection was not its primary purpose but was only a possible incident to the protection of existing local law. Thus, the imperial principle of continuity was applied in relation to other European peoples (like New France) whose cultures were not, in relation to Britain’s, very distinctive, and any local customs that were regarded as too “distinctive” in light of British values were regarded as mala in se and deemed to be ipso facto abrogated. The relevant time that local law and custom was considered was the point at which British sovereignty was asserted: the objective was to ensure civil order and a smooth and (to the extent possible) fair transition from one legal regime to the next without intruding upon the Crown’s legislative powers. This objective could not have been achieved had courts upset expectations of local inhabitants by ignoring rights secured by existing laws and customs and by instead limiting legal protection to rights defined by externally-imposed and (from the local perspective) arbitrary criteria designed to preserve fragments of unique cultures that had pre-existed contact with other cultures. In short, the Delgamuukw approach to the continuity of aboriginal land law is much more in keeping with British imperial constitutional law.

Insofar as the principle of continuity was articulated and applied by judges, it may be said to be a common law principle; however, it was not a principle of English municipal common law. It served to

125. See e.g.: Maseres, Marriott and Thurlow, supra notes 122 and 124.
126. Anon. (1722), supra note 121 at 76.
identify the municipal laws and institutions of British territories into which English municipal law had not yet been introduced. It was, in short, a principle of imperial common law. In this respect, it parallels another imperial common law presumption: the "birthright" principle identified in Part II according to which judges presumed that the municipal law of a previously-uninhabited territory discovered and settled by British subjects was English municipal law, as adjusted to local conditions. Indeed, these two imperial legal principles were sometimes applied in relation to the same territory. Although the presumption in relation to previously-inhabited territory was that existing local law continued as the municipal law governing both local and English inhabitants, where for religious or cultural reasons local law was "little suited" to British settlers and English law was unsuitable for local inhabitants, the common law recognized both the introduction of English municipal law into British enclaves as the birthright of settlers as if their settlement were in an uninhabited place, and also recognized the continuity of local law for local communities under the principle of continuity. By this means, two parallel municipal systems were possible. Of course, the imperial continuity principle was, at common law, only a presumption: legislation introducing English municipal law might, if it extended to the native inhabitants, abrogate the existing local system.

127. "Legal Status of Aboriginal Customary Laws", supra note 113 at 789-790. See also B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 737-738, quoted with approval in Côté, supra note 1 at 173. Slattery observes that the "unwritten British law" on aboriginal rights was not "part of English common law in the narrow sense . . . ."
129. Campbell v. Hall (1774), Lofft 655 at 741.
The imperial model of aboriginal rights is reflected by British-Indian relations in eastern North America in the seventeenth and eighteenth centuries. Colonial statutes, as well as English and imperial judicial authorities and later American authorities, recognized that: (a) although English settlers brought English municipal law to the newly-discovered continent as their birthright, sovereignty over Indian nations was not asserted by discovery, or settlement, but rather by conquest or treaty (or, at least initially, not at all); and (b) once under British imperial sovereignty, Indian nations retained a distinct status independent to some degree at least from the municipal legal systems of the colonies in which they happened to be located. This constitutional condition is best reflected by *Mohegan Indians v. Connecticut* (1704-1773) in which the Mohegan Indians, although located within the colony of Connecticut, were held to be a distinct nation under imperial sovereignty exempt from the municipal legal system established for settlers. Their claims to aboriginal and treaty rights were therefore determined not by Connecticut municipal law in local courts but by imperial law, which had incorporated their customary laws, in imperial tribunals.

(ii) Common Law Aboriginal Rights in the Municipal Dimension

As mentioned, certain commentators emphasized the Norman sources of the principle of continuity: the continuity of Saxon law after the Norman Conquest provided an early precedent from England for the principle. Thus, the principle may be argued to explain the survival in common law of certain "remnants and patches" of pre-Norman law, like the customs of gavelkind and

However, gavelkind and borough-english are more often cited as examples of particular customs that derived legitimacy at common law, not as remnants of another legal regime but because they were reasonable, certain and consistent customs to which the inhabitants of particular localities had acquiesced as if compulsory since time immemorial.135

Although the continuity and particular custom principles were clearly distinct principles by the seventeenth century — the former being part of the imperial common law, the latter being part of the municipal common law — they did operate in tandem under certain constitutional conditions. Under the principle of continuity, local rights and laws continued in force as elements of British imperial law in part because English municipal law had not been introduced into the territory. Once English municipal law was introduced, then (if the legislation were interpreted to extend to native inhabitants) local law as a distinct system was abrogated. However, if local law continued to be followed in particular places, it was held that it might be recognized by the newly-introduced English municipal common law as a particular custom.136 Both the particular custom and the continuity principles are needed to explain the common law’s recognition of local customs under these conditions. The particular-custom principle cannot, on its own, explain the common law recognition of customs in territories newly acquired by Britain because its purpose is to explain the legal status of customs that

134. Calvin’s Case, supra note 121 at 670. See also: Tanistry, ibid. at 40; Clements v. Scudamore (1701), 2 Ld. Raym. 1024 at 1024-1025; Blackborough v. Davis (1701), 1 P. Wms. 41, 47-53; Fisher v. Nicholls (1701), 3 Salk. 127; Blackstone, supra note 52, vol. 1 at 74-75.

135. Blackstone, ibid. at 76-78.

136. Anon. (1579), 3 Dyer 363b (continuity of local Welsh custom not abrogated by 27 H. VIII, c. 26 (1536), which introduced English law into Wales, because it was “agreeable to some customs in England” and because English law was “to be ministered in like form as in this realm”), discussed at Tanistry, supra note 121 at 40; Blankard, supra note 121 at 225 (local laws continued until English law was introduced, but “even then some of their old customs may remain”).

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have been exercised, notwithstanding the general applicability of the English common law, since time immemorial. However, the principle of continuity only served to create a presumption of continuity of existing law until its abrogation by the introduction of an alternative legal system, and it would have ceased to be relevant after the introduction of English municipal law as the common law of the territory and its extension to native inhabitants. However, by weaving the two rules together, the continuity of local customs after the introduction of English municipal law can be explained: to the criteria of the municipal particular-custom rule other than the immemoriality criterion can be added the criteria of the imperial-continuity principle to make a hybrid rule. In essence, the continuity of law from a preceding legal system displaced the need for immemorial usage.

This second model of aboriginal rights can be applied to territories into which English municipal law ran automatically under the birthright principle, as well as territories where it was introduced by legislation, as illustrated by the Australian High Court's decision in Mabo v. Queensland. According to Mabo, British sovereignty

137. Chamberlain v. Harvey (1696), 1 Ly. Raym. 146, 5 Mod. 182 at 182, illustrates problems inherent to applying principle of immemorial rights to newly-acquired territories: defendant argued that a slave could not have been a villein attached to a plantation in Barbados "for then the plaintiff and his ancestors must be seised of this negro and his ancestors time out of memory of man, which could not be, because Barbardoes was acquired to the English within the memory of man . . . ." Cf. Sir E. Northey, Att. Gen., 1713 in W. Forsyth, Cases and Opinions on Constitutional Law and Various Points of English Jurisprudence (London: Stevens and Haynes, 1869) at 161-162: New York acquired "within time of memory" therefore "no prescription can be there against the Crown."

138. Cf. Tanistry, supra note 121 at 30: the plaintiff argued that the principle of continuity in Calvin’s Case, supra note 121 at 17b, supported the proposition that the custom of tanistry survived the English conquest of Ireland (i.e., there was continuity in the imperial dimension), and then cited the English common law’s recognition of the Kentish custom of gavelkind to support the proposition that tanistry survived the subsequent legislative introduction of English municipal law (i.e., there was subsequently continuity in the municipal dimension).

was established over lands and peoples lacking European forms of law and government by discovery and occupation, or settlement, and English municipal law applied automatically as the municipal law of the colony. However, because it was adjusted to local conditions, the local municipal common law recognized the continuity of aboriginal title to lands and resources as defined by native custom.

(iii) The Imperial and Municipal Models as Applied to Fishing Rights

In light of the above discussion, it can be stated that British law provided two distinct foundations for the recognition of aboriginal rights: an imperial legal foundation according to which aboriginal customs and possessions continued in force as systems distinct from the English municipal systems introduced for settlers, and a municipal legal foundation according to which aboriginal customs remained in force as elements of the English municipal law introduced for settlers. For the determination of aboriginal fishing rights, the choice of analytical foundation has obvious significance.

If aboriginal fishing rights are defined under the imperial model, then the locally-adjusted English municipal law introduced for settlers would have no direct application; aboriginal fishing rights would be defined by the imperial common law. The locally-adjusted English municipal law might recognize a public right of fishing in large lakes protected from the royal prerogative by *Magna Carta*, but this right would exist as amongst settlers only and would not necessarily affect whatever exclusive aboriginal fisheries had been recognized under the imperial common law principle of continuity. Obviously the two rights could not exist over the same fisheries at the same time. Therefore, the survival of an imperial common law exclusive aboriginal fishery would depend upon there being a geographical limit placed upon the applicability of the English municipal system.

If aboriginal fishing rights were defined under the municipal model, then locally-adjusted English municipal law would be di-
rectly relevant: the status of aboriginal fishing rights at common law would be defined by the local municipal common law of the colony. Thus, the continuity of any exclusive aboriginal fisheries would have to be reconciled in some way with the existence of any public right of fishing that the municipal system might recognize. It might be argued that all exclusive aboriginal fishing rights would, under this model, be reduced to rights of priority to account for the public right of fishing. However, it could also be argued that the principle of continuity — even though operating on the municipal legal dimension — somehow precluded the public right from fully vesting, in relation to fisheries, in the exclusive possession of aboriginal nations, at least until the aboriginal right were ceded or extinguished.

Whichever model is employed, the general character of aboriginal title to land at common law will be significant. At common law, the Crown acquired ultimate or radical title to Indian territories upon the assertion of British sovereignty over North America, but this title remained burdened by the aboriginal title: settlers could not acquire any property interest in such lands until the aboriginal title was surrendered to the Crown by the relevant aboriginal nation. There was no general right of public access to unsurrendered aboriginal title territories: in law (though not always in fact) the pace of settlement was controlled by the Crown’s monopoly over Indian land surrenders. In short, it may be argued that as long as aboriginal title remained unceded and unextinguished — and upon the assumption that aboriginal title extended to lands covered by waters — any public rights of access to waters in which exclusive aboriginal fisheries were located and, a fortiori, any public right of fishing, were at best inchoate. The limited nature of public rights in unsurrendered Indian lands has implications under both the impe-

140. Gladstone, supra note 1.
141. See e.g. Guerin v. R., [1984] 2 S.C.R. 335; and Delgamuukw, supra note 8, para. 129.
142. Slattery, supra note 127 at 743.
rial and municipal models. Under the imperial model, the geographical limits of the municipal system may be defined as the limits of Indian territories surrendered to the Crown. Only within ceded territories, then, did municipal law apply in full and did public rights of fishing, if any, vest. Under the municipal model, however, the fact that aboriginal title remained unceded might support an argument that fisheries incidental to that title never entered fully into the public realm, and, although municipal law applied to determine the extent to which aboriginal fishing rights continued in force, that law simply did not acknowledge a public right in unceded territories. To illustrate these arguments in more detail, and to establish that they have some judicial support, reference to cases on Maori fishing rights in New Zealand is helpful.

The Crown purported to acquire sovereignty over New Zealand by the Treaty of Waitangi (1840), and this treaty guaranteed certain aboriginal rights, including “the full exclusive and undisturbed possession of their Lands and Estates, Forests, [and] Fisheries.” However, the colony was judicially regarded as a “settled” colony into which English municipal law ran automatically, and the treaty was held to have no municipal legal status in the absence of implementing legislation. Successive Native Lands Acts that allowed Maori land claims before special native land courts made no express mention of lands covered by waters or of fisheries or fishing rights (although fisheries legislation after 1884 expressly stated that they did not “affect any Maori fishing rights”).

144. Maori Magna Carta, supra note 113 at 43.
146. The first of these Acts were passed in the 1860s: Native Lands Act 1862, 27 Vict., c. 42 (N.Z.); Native Lands Act 1865, 29 Vict., c. 71 (N.Z.).

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New Zealand cases defining native title under the native lands legislation confirm the following propositions: native title existed in relation to a tribe’s “territory” that is regarded “in its entirety,” there being no distinction “between dry land and land covered by water”;¹⁴⁸ public rights to navigable non-tidal rivers could not vest “so long as the soil in the river remained Native land and in the possession of the Native owners”;¹⁴⁹ and native title to a river bed could be established if, at the time British sovereignty was asserted, it was held pursuant to a native custom by which possession was exclusive — the facts of colonization and public use being “completely extraneous” to the native custom by which title was defined.¹⁵⁰ Although “the common law of England” entered New Zealand with British sovereignty, “it came as part of our European law, and not as a body of principles to be applied in ascertaining and interpreting the Maori customs and usages . . . .”¹⁵¹ These propositions support the idea that, under either the imperial or municipal models of aboriginal rights, public rights in navigable waters did not fully vest until native rights were extinguished, and that the scope of native rights was determined by looking at native custom in isolation from English common law concepts.

Insofar as these cases were based upon the unique statutory context existing in New Zealand, they may be said to be inapplicable to defining aboriginal rights in Canada at common law. However, certain cases confirm that Maori rights have a non-statutory foundation at common law and/or under treaty. Indeed, in a recent case addressing Maori rights to river beds, the New Zealand Court of Appeal (relying upon, inter alia, Canadian judicial authority)

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¹⁴⁹ Mueller, supra note 93 at 123. See also Re Wanganui, ibid. at 434, Cooke J.
described aboriginal title at common law as "a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonization."\textsuperscript{152} It is worth noting that a similar conclusion has been accepted in \textit{obiter} in Australia — namely, that the "exclusive use, possession and occupation of land" secured by common law native title extends to "similar or analogous" rights of fishing, there being "no relevant distinction ... between dry land and land covered by water."\textsuperscript{153} The leading New Zealand decision on the common law status of Maori title to land, \textit{R. v. Symonds},\textsuperscript{154} relied upon the same American decision, \textit{Johnson v. M'Intosh},\textsuperscript{155} which Canadian courts have relied upon when addressing aboriginal title. The general approach to aboriginal title to land taken in \textit{Symonds} was extended to aboriginal fishing rights in 1870 by the decision of the Native Land Court in the \textit{Kauwaeranga} case that recognized the possibility of "exclusive" Maori fishing rights in tidal waters.\textsuperscript{156} In \textit{Kauwaeranga}, a claim of native title was made to certain mudflats between the high and low water marks of the sea in which the Maori claimants had exercised fishery rights. After reviewing general principles — derived from, \textit{inter alia}, \textit{Johnson v. M'Intosh} — Fenton C.J. held that the evidence had established that the claimants had "consistent and exclusive use"

\begin{itemize}
\item \textsuperscript{152} \textit{Te Runanganui o Te Ika Whenua Inc. v. A.G.}, [1994] 2 N.Z.L.R. 20 at 23-24 (C.A.) [emphasis added].
\item \textsuperscript{153} \textit{Mason v. Tritton} (1994), 34 N.S.W.L.R. 572 at 580 (C.A.), Kirby P. The other two judges were prepared to assume without deciding that s. 223(2) of the \textit{Native Title Act 1993} (Cth.), which defines native title as including rights of fishing, accurately reflects the position of Australian common law.
\item \textsuperscript{154} (1847), [1840-1932] N.Z.P.C.C. 387 (S.C.) [hereinafter \textit{Symonds}].
\item \textsuperscript{155} 8 Wheat. 543 (U.S.S.C., 1823).
\end{itemize}
of the fisheries from time immemorial, that this fishery was of the "highest value" to them, and that there was no reason why Maori could not have ownership of land covered by the sea at high-water.\textsuperscript{157} "The real question," he stated, "is a question of fact — Was the land now claimed, at the date of the Treaty of Waitangi, land or a fishery collectively or individually possessed by aboriginal natives?"\textsuperscript{158} If it was, then the Treaty of Waitangi was intended to guarantee such exclusive possession.\textsuperscript{159} What about the "common law of England" that entered the colony "with the sovereignty of the Crown"?\textsuperscript{160} Was an exclusive aboriginal fishery in tidal waters (whether recognized at common law under \textit{Johnson} v. \textit{M'Intosh} or conferred by treaty) inconsistent with the public fishing right recognized by the English common law in tidal waters? In Fenton C.J.'s view, it was not. He observed that exclusive fisheries in tidal waters were possible under English law and that according to Hale's "De Jure Maris" such rights could arise by "custom and usage or prescription."\textsuperscript{161} Then, addressing implicitly the \textit{Magna Carta} restriction, Fenton C.J. stated:

And accepting the principle that all properties, rights, privileges, or easements of this character [i.e., several fisheries] are held to be derived from the King, for \textit{prima facie} they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And, \textit{in our case the title is older, for the ownership was before the King, and the King confirmed and promised to maintain it}.\textsuperscript{162}

An exclusive right to the fishery was therefore made out.

The \textit{Kauwaeranga} case is critically important to answering the question of how the English municipal common law relating to fisheries affected aboriginal rights to fisheries — in other words, it

\begin{itemize}
  \item \textsuperscript{157} \textit{Kauwaeranga}, \textit{ibid.} at 239-240, including note 3.
  \item \textsuperscript{158} \textit{Ibid.} at 243.
  \item \textsuperscript{159} \textit{Ibid.} at 240.
  \item \textsuperscript{160} \textit{Ibid.} at 243.
  \item \textsuperscript{161} \textit{Ibid.}
  \item \textsuperscript{162} \textit{Ibid.} at 244 [emphasis added].
\end{itemize}
suggests how aboriginal fishing rights should be defined under the above-summarized municipal model. The case supports the following line of reasoning: the common law recognizes a public fishing right in tidal waters and it denies the validity of Crown grants of exclusive fisheries after the reign of Henry II, but it also recognizes the continuity of aboriginal rights, and if, as a matter of fact, an exclusive aboriginal fishery already existed at the time British sovereignty was asserted and English law was introduced, then, as a matter of common law, that fishery was not extinguished or modified by the public right, but continued in force and was capable of confirmation by the Crown by prerogative instrument. This approach is sound because, as seen, the public fishing right was, at common law, only a \textit{prima facie} right rebuttable by proof of a lawful several fishery. In England, a several fishery supported by usage or Crown grant dating from the reign of Henry II rebutted the public right. In colonial territories, however, this sort of requirement is meaningless. In a legal sense, any exclusive fishing right exercised just prior to the Crown's assertion of sovereignty is, as \textit{Kauwaeranga} states, "older" than that (or any other) date of legal memory because it pre-dates the arrival of the Crown and of English law. Thus, the principle of continuity gives exclusive native fisheries a lawful foundation — a common law foothold — sufficient to rebut the \textit{prima facie} public right.\textsuperscript{163}

It may be argued that the fact that the Treaty of Waitangi expressly recognized the continuity of exclusive Maori fisheries distinguishes this case from Canadian law. However, this argument lacks merit. Either the Treaty had no municipal legal force, in which case it could not, on its own, limit the public right of fishing in tidal waters, or it did have municipal legal force and it did limit the public right of fishing in tidal waters. If the former interpretation is accepted, then the \textit{Kauwaeranga} case can only be explained if Maori \textit{common law} rights precluded the vesting of public fishing

rights; if the latter interpretation is accepted, then the case supports the view that the Crown, by prerogative instrument (i.e., treaty), could limit public fishing rights in tidal waters. Either way, the result is relevant to the Canadian context and, in particular, the status of Saugeen Ojibway fishing rights. Of course, it might be said that fishing rights were only justiciable in New Zealand by virtue of local Native Lands Acts. However, Fenton C.J. did not purport to rely upon this argument. Although he cited legislation by which native land rights were recognized, in his view exclusive Maori fisheries had some foundation in law in 1840 after British sovereignty was asserted under the Treaty of Waitangi, but before the first Native Lands Act was made.\textsuperscript{164}

The \textit{Kauwaeranga} approach stands in stark contrast to the \textit{Gladstone} reconciliation process summarized above. If the principles underlying \textit{Kauwaeranga} are valid, \textit{Gladstone} is either wrong or should be restricted to defining the so-called "free-standing" aboriginal fishing right. In other words, it should be regarded as inapplicable to defining exclusive native fisheries incidental to aboriginal title. Significantly, the validity of the \textit{Kauwaeranga} approach has been confirmed by modern New Zealand cases that, relying upon Canadian cases, emphasize the common law foundation of aboriginal title.

In \textit{Te Runanga},\textsuperscript{165} a Maori group sought to restrain the government from setting fishing quotas under fisheries legislation, arguing that the quotas violated their exclusive rights to commercial and non-commercial fisheries in coastal sea waters. The statute recognized a form of aboriginal priority: commercial quotas were to be set by the Minister "after allowing for the Maori, traditional, recreational and other non-commercial interests."\textsuperscript{166} Although relief

\begin{itemize}
\item \textsuperscript{164} See comments by Frame, \textit{supra} note 156 at 228 and McHugh, \textit{ibid.} at 257.
\item \textsuperscript{165} \textit{Supra} note 147.
\end{itemize}
was denied on the ground that the statute prevailed over Maori common law and treaty rights, the court made some important observations about Maori common law rights. In arguing against exclusive Maori fishing rights, the Crown cited *Waipapakura v. Hempton* in which it was stated:

Now, in English law — and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us ... — there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast. ... In the tidal waters ... all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right. ... An Act alone can confer such a right, just as an Act is required in England to confer such a right unless some charter from the Crown prior to *Magna Carta* can be proved ... 167

This statement — which echoes the legal opinions from Upper Canada cited recently in *Nikal* — clearly contradicts the *Kauwaeranga* approach. Although not purporting to make a definitive statement of the law, Cooke P. (now Lord Cooke of Thorndon, a law lord in the House of Lords) suggested that *Waipapakura v. Hampton* is “a dubious authority” in light of the many cases that recognize the continuity of “native title” at common law after the assertion of British sovereignty over colonial territories.168 In support of this proposition, he cited not only the *Kauwaeranga* case but, *inter alia*, the Supreme Court of Canada’s decision in *Guerin v. R.*,169 and emphasized that Maori rights at “common law” should be no less respected than aboriginal rights in North America.170

To summarize, the argument that denies exclusive aboriginal fisheries on the grounds that they conflict with the public right of

170. *Te Runanga*, supra note 147 at 655.

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fisheries in navigable waters and the effect of Magna Carta is regarded by the New Zealand courts as highly questionable in light of the theory of the common law continuity of aboriginal title as developed by the pre-1996 Canadian cases on aboriginal rights. Although Gladstone now applies in Canada to limit the scope of "free-standing" native fisheries, the New Zealand cases may provide indirect support for the proposition that the Gladstone process of reconciliation is inapplicable to native fisheries in waters over which, according to their "traditional laws and customs," native use and occupation was exclusive, that is, in aboriginal title territories. In other words, even under the above-defined municipal model of aboriginal rights, exclusive aboriginal fisheries may exist in waters that would otherwise be subject to a public right of fishing under municipal law.

IV. Saugeen Fishing Rights Reconsidered

Having considered aboriginal fishing rights in abstract, it is now possible to reconsider Saugeen Ojibway fishing rights within the specific legal context of mid-nineteenth century Upper Canada. The constitutional history of aboriginal peoples in Upper Canada is not susceptible to a neat categorization under either of the two general models defined in Part III. However, the imperial and municipal models do provide a useful initial framework for analysis, and, in particular, they assist in illustrating the ways in which the constitutional history of Upper Canada was different from that of British Columbia.

During the seventeenth and eighteenth centuries, both Britain and France claimed the Great Lakes region within which the Saugeen territory is located; even after its conquest of New France and its acquisition of Canada under the Treaty of Paris 1763, Britain re-

171. Van der Peet, supra note 1 at 546.
fused to acknowledge that its claims to this region derived from France. Instead, Britain took steps to ensure that its rights to the region had some basis in treaties made with the local Indian nations, including the Ojibway.

Once the French claim to Canada was defeated, Britain organized its North American possessions under the Royal Proclamation of 1763. By the Proclamation, the Great Lakes region, including the Saugeen territory, was constituted an Indian territory into which no form of local municipal colonial law or government was introduced. Although French-Canadian municipal law may have remained in force among the pockets of French settlers who remained in the region, in light of the fact that Britain had previously denied French sovereignty therein, it is unlikely that the common law would have regarded French law as forming the general municipal law of the entire region. Imperial legislation proposed in 1764 (though not enacted) to supplement the Proclamation confirmed that Indian nations in this territory were distinct components of the empire governed internally by their own governments and constitutions. Individual traders lawfully entering this Indian territory might have carried English municipal law with them to govern their relations with each other, and French communities remaining after the conquest may have been governed internally by French-Canadian municipal law, but neither English nor French municipal

172. Board of Trade to the King (5 August 1763), Shortt & Doughty, eds., supra note 122 at 110-112.
175. Drulard v. Welsh (1906), 11 O.L.R. 647 (Div. Ct.).
law was generally applicable so as to govern the internal affairs of Indian nations or the determination of their rights to land and resources.\textsuperscript{177} According to the \textit{imperial} common law doctrine of continuity, existing aboriginal customary laws, governments, and possessions would have remained in place as part of distinct municipal systems within the empire. If the Indian nations exercised exclusive rights to fisheries and waterways previously, these would have continued in force at imperial common law subject only to any rights of entry the Crown required to maintain its sovereignty. No “public” right of fishing under English municipal law could vest in favour of British subjects generally because English municipal law had not been introduced.

These imperial common law conclusions are consistent with the terms of the \textit{Proclamation}, which provided that Indian nations were not to be “molested and disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their \textit{Hunting Grounds}” and that the “\textit{Land and Territories}” in the Indian territory, including the Great Lakes region, were reserved to them.\textsuperscript{178} In light of the fact that at certain times of the year Indian nations in the Great Lakes region survived largely upon fishing,\textsuperscript{179} it is not unreasonable to conclude that “\textit{Hunting Grounds}” included fisheries. It may also be said that “\textit{Land and Territories}” must have included territories covered by water, a conclusion consistent with the interpretation of \textit{Native Lands Acts} in New Zealand\textsuperscript{180} and the acknowledgment that the \textit{Proclamation} recognized “territorial rights akin to those asserted by sovereign Princes.”\textsuperscript{181}

\textsuperscript{177} Conolly \textit{v.} Woolrich (1867), 17 R.J.R.Q. 75 at 84, 96; 1 C.N.L.C. 70 at 79, 91 (Que. S.C.); aff’d sub nom Johnstone \textit{v.} Conolly (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (Que. Q.B.).

\textsuperscript{178} Supra note 174 [emphasis added].

\textsuperscript{179} Supra notes 14-17.

\textsuperscript{180} Supra notes 148-151.

\textsuperscript{181} Report of the Special Commissioners Appointed on the 8th of September 1856, To Investigate Indian Affairs in Canada, 1858 in Journals of the Legislative Assembly

354 (1998) 23 Queen’s L.J.
the *Proclamation* suggests that these rights were exclusive. Not only was their “Possession” not to be “molested” or “disturbed,” but public entry generally was restricted: all settlers were ordered to leave and rights of entry were limited to licensed traders, Indian Department officials and military personnel. In short, it may be said that during the 1760s an exclusive Saugeen Ojibway fishing right, if it existed by aboriginal custom, gained imperial legal recognition at imperial common law and was confirmed by imperial prerogative legislation. The Crown’s power to enact this sort of legislation was not limited by any principles of municipal English law as this law had not been introduced. The question, then, is whether these imperial common law and/or legislative rights were abrogated or modified by the subsequent introduction of municipal law and government into the Great Lakes region.

The *Quebec Act 1774* annexed to the colony of Quebec much of the Indian territory, including the Great Lakes region, thereby introducing a colonial municipal legal system consisting of French-Canadian civil law and English criminal law. French-Canadian civil law recognized a public right of fishing in tidal and non-tidal navigable waters but did not limit the French Crown’s authority to grant exclusive fisheries. Although there is debate about whether French law recognized aboriginal rights, it has been held that aboriginal title in the territories added to Quebec continued to be governed by the *Proclamation* and/or by British common law prin-

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182. *Canada (A.G.), supra* note 96 at 423 (the *Magna Carta* restriction relating to fisheries did not apply in those parts of Canada into which English common law had not been introduced).

183. 14 Geo. III, c. 83.


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ciples confirmed and recognized by the Proclamation. It may be argued, however, that by introducing a municipal legal system into the region, the imperial legal status of aboriginal rights was abolished and those rights became a matter for Quebec municipal law (defined by a common law component of an otherwise civil law system). If so, aboriginal fishing rights existed within a municipal system that recognized a public right of fishing in navigable waters, and therefore the Gladstone reconciliation process applied to render the previously exclusive aboriginal right one of priority only.

The short answer to this argument is that section 3 of the Quebec Act expressly stated that the Act did not “vary or alter” any “right, title or possession” to land. This provision has been held to preserve aboriginal title in this region. If the aboriginal right of fishing incidental to aboriginal title was exclusive under imperial common law and/or legislation prior to the Act, then, according to the Act itself, that right was not varied or altered by the new legal regime introduced by the Act so as to become a right of priority only; it remained an exclusive right.

A more complicated response would be to argue that although a municipal legal system was introduced for settlers in the territories added to Quebec, that municipal system was not intended to extend over Indian nations. Instead, these nations occupied a Mohegan-like status as imperially-recognized units outside the scope of the settler-municipal system. This second response requires a detailed explanation of the historical context of the Quebec Act that is beyond the scope of this analysis. However, it is important to observe that after 1774 Indian affairs remained firmly within the control of the imperial Indian Department, a body that was constitutionally distinct.

187. Supra notes 131-132.
from the local municipal colonial government and subject to regulations that characterized Indians as "free and independent" nations whose "Customs" were to be respected.\(^8\) Within unceded Indian lands added to Quebec, it was later acknowledged that elements of "Indian sovereignty"\(^9\) remained and that the Crown did not claim "absolute power or Sovereignty" until these lands were "fairly sold... at Public Treaties."\(^1\) Indeed, royal instructions and local legislation confirmed the basic common law principle embraced by the Proclamation: there was no public right of entry into the unceded Indian territories added to Quebec.\(^\)\(^\)\(^\)\(^1\)\(^9\)

In short, if the settler municipal system introduced by the Quebec Act was not intended to displace the imperial regime governing Indian affairs, and if Crown sovereignty over unceded Indian territories was of a limited nature, then there may be grounds to argue that aboriginal fishing rights were defined under the imperial model — that there was a geographical limit to the applicability of municipal law and that the municipal public right of fishing did not apply within these territories. Of course, even if this interpretation of the Quebec Act is not accepted and it is held that the Act did abolish the distinct imperial legal status of Indian nations and subjected them to Quebec municipal law, if that law recognized abo-

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188. F. Haldimand, Commander in Chief, Instructions to Sir J. Johnson, Supt. Indian Dept., 6 February 1783, PRO CO 42/44: 95, reissued by Lord Dorchester, Commander in Chief, as "Instructions for the good Government of the Indian Department" (27 March 1787) NA RG 10 vol. 789 at 67759-67765.


190. Simcoe's speech to the Western Indians, 22 June 1793 in Cruikshank, ibid., vol. 1 at 363.

191. Royal Instructions to Guy Carleton, Gov. Que., 3 January 1775, art. 31 in Shortt and Doughty, supra note 122 at 594-621; An Ordinance relative to the trade and intercourse with the said Indians (1777), 17 Geo. III, c. 7 (Que.).

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iginal title to unceded Indian territories, including lands covered by navigable waters, the application of the Gladstone reconciliation process can be argued to be inappropriate for the reasons developed in Part III above.

The Constitutional Act 1791 provided for the partition of Quebec into the provinces of Upper and Lower Canada and the Union Act 1840 provided for their reunification as the province of Canada; existing laws were preserved by both Acts. The first statute of the new Upper Canada legislature provided that "from and after" its enactment "the laws of England" would constitute the rule for decisions in controversies relating to property and civil rights. Arguments analogous to those possible in relation to the Quebec Act can be made here. Thus, the following may be said: the 1792 Act had the effect of introducing the English common law on waters and fisheries; this law (once adjusted to local conditions) recognized a public right of fishing in the Great Lakes that could not be abrogated by prerogative instrument; the aboriginal fishing right, once reconciled with the public right (as per Gladstone), was reduced to one of priority only at common law and the Magna Carta restriction prevented the Crown from conferring an exclusive right by treaty or letters patent.

This argument is supported by the opinion of Solicitor General James Cockburn given in 1866 after the Saugeen Ojibway complained that leases made under the 1857 Fisheries Act violated their exclusive fishing rights. This opinion was cited with approval in obiter in Nikal. Cockburn stated:

Indians . . . have no other or larger rights over the public waters of this province than those which belong at common law to Her Majesty's subjects in general.

192. Constitutional Act 1791, 31 Geo. III, c. 31 (Imp.), s. 33; Union Act 1840, 3 & 4 Vict., c. 35 (Imp.), s. 46.
193. An Act . . . to introduce the English Law as the rule of decision in all matters of controversy, relative to property and civil rights (1792), 32 Geo. III, c. 1 (Upp. Can.), s. 3.
194. See supra notes 40 - 41 and accompanying text.
Previous to the present statute [Fisheries Act 1857], the Crown could not legally have granted an exclusive right of fishing on the lakes and Navigable waters but under the 3rd section of that Act the power is conferred on the Commissioner of Crown Lands of granting licences for fishing in favour of private persons, wheresoever such fisheries are situated, the only exception is 'where the exclusive right of fishing does not already exist by law in favour of private persons.' This exception was intended as I understand to exclude the application of the Act from certain Fishing rights which had been granted under the French law in Lower Canada before the Conquest; it certainly does not apply to the Indian tribes who have acquired no such rights by law unless it may be contended that in any of those treaties or instruments for the cession of Indian Territory there are clauses reserving the Exclusive right of fishing and even in that case, if such should be the fact, I should say that without an Act of Parliament ratifying such a reservation no exclusive right could thereby be gained by the Indians, as the Crown could not by any Treaty or act of its own (previous to the recent Statute) grant an exclusive privilege in favour of Individuals over public rights...

The emphasized passages from this statement are important for two reasons. First, they confirm that the 1857 Fisheries Act was regarded as acknowledging the possibility that exclusive fisheries in navigable waters that pre-dated the British conquest of New France existed in law. Second, these passages, which identify an important qualification to the opinion, were left out of the portion of the statement quoted in obiter by Cory J. in Nikal.

Cockburn's opinion is problematic for a number of reasons. It is premised upon the assumption that upon the assertion of British sovereignty exclusive fisheries created under French law for French settlers continued in force but that no such exclusive fisheries could exist and continue in force for aboriginal peoples under aboriginal custom. In other words, the opinion is informed by an unequal application of legal principle. Either the imperial common law principle of continuity applied upon the assertion of British sovereignty or it did not: if it applied to save exclusive fisheries recognized in areas governed by French law, then it can be argued that it also

195. J. Cockburn, Sol. Gen. (3 April 1866) NA RG 10 vol. 323 at 216131-216136 [emphasis added]; see Blair, supra note 11 at 136-137.
196. Supra note 1 at 1031-1032.
saved exclusive fisheries recognized in areas governed by aboriginal custom.

Of course, Cockburn stated that the effect of the Fisheries Act was to save exclusive French fisheries in Lower Canada, where French civil law, not English common law, continued to govern. If (a) it is accepted that exclusive aboriginal fisheries could have survived the assertion of British sovereignty as an incident of aboriginal title pursuant to the imperial principle of continuity, and (b) the arguments made above are accepted that this common law continuity was confirmed by the Proclamation and saved by section 3 of the Quebec Act, then the question becomes whether these exclusive aboriginal fisheries survived the 1792 Act introducing English law into Upper Canada. Given his assumptions, Cockburn did not turn his mind to this question.

Again, a short answer is found in the statute itself. The 1792 Act introduced English law into Upper Canada but, by section 2, stated that it did not “affect any existing right, lawful claim or incumbrance, to and upon any lands, tenements or hereditaments” in the province. If an exclusive aboriginal fishery existed before the Act was made, it existed afterwards.\(^{197}\) Aside from section 2, however, the very “local conditions” qualification upon which the public right of fishing in the Great Lakes depends may be said to apply to ensure the continuity of exclusive fisheries in these lakes. In other words, if a municipal model of aboriginal rights is used, exclusive fisheries may still exist. As seen, the municipal public fishing right is only a \textit{prima facie} right, and it is rebuttable by proof of a several fishery existing from before the reign of Henry II, or, in colonial territories, from before the introduction of English law.\(^{198}\) The \textit{Gladstone} reconciliation process might reduce the free-standing aboriginal right to fish to one of priority, but aboriginal fisheries in

\begin{footnotes}
\footnote{197. \textit{Dixon v. Snetsinger}, supra note 184 at 243-244, Gwynne J. (French law recognized public rights in non-tidal navigable rivers, and the introduction of English law by the 1792 Act could not affect those rights because they were saved by section 2 of the Act).

198. See supra notes 156-163 and accompanying text.}
\end{footnotes}
territories over which aboriginal title is claimed might, pursuant to
the Kauwaeranga approach, be exclusive.

As in the case of the Quebec Act, there is also a more complex an-
swer to the argument that the introduction of English law reduced
aboriginal fishing rights to rights of priority. It may be argued that
Indian nations continued to occupy a Mohegan-type status after the
division of Quebec and the introduction of English law; therefore,
English municipal law did not extend to Indian nations in unceded
lands. Consequently, it may be argued that there would have been
no need to attempt to balance imperial exclusive native fisheries
with municipal settler public fishing rights — in other words, that
the imperial model of aboriginal rights applied. In fact, colonial
judges and Indian Department officials of the early nineteenth
century were of the view that municipal law did not extend to the in-
ternal affairs of natives resident in unsurrendered lands. This view
was only slowly modified as the nineteenth century progressed.99

Governmental control over Indian affairs remained firmly with the
imperial Crown, through its Indian Department, until 1860.200 Un-
til then, Indian Department Superintendents were appointed by the
imperial Crown to which they were “responsible directly . . . thus
superceding the Provincial Governments.”201 In the same year that

199. Walters, supra note 176 at 273.
200. The Act respecting the management of the Indian Lands (1860), 23 Vic., c. 151
(Can.), “declares the terms upon which Her Majesty the Queen assented to the
transfer of the management of Indian affairs from under the direct supervision of the
Imperial Government” (Ontario Mining Co. v. Seybold (1901), 32 S.C.R. 1 at 7); it was reserved
by the governor for the assent of the imperial crown in
London.
201. St. Catharines Milling and Lumber Co. v. The Queen, supra note 186 at 608.
See also, Muchmore v. Davis (1868), 14 Grant 346 (Ont. Ch.) at 358; Re Indian
Claims (1895), 25 S.C.R. 434 at 497-503; Ontario Mining Co. v. Seybold, ibid. at 3.
See also, Minute of the Executive Council of Canada (25 November 1845) NA
RG1 Canada State Books, 1841-67, vol. E at 84 (the Indian Department was “not
one under the superintendence and management of the local authorities, but
rather, one especially intrusted to Your Excellency by Her Majesty, as a matter,
the direct control of which belongs to Imperial Authority”).

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Lieutenant Governor Bond Head treated with the Saugeen Ojibway, he was advised by the provincial Attorney General that colonial legislation on Indian affairs, other than that directed at fraudulent settlers, was inappropriate because:

Hitherto the Indians have been under the exclusive care of His Majesty alone: the Territories which they inhabit within the Province are tracts of Crown lands devoted to their sole use as his 'Allies', and over which His Majesty has never exercised his paramount right. . . . They have within their own communities governed themselves by their own laws and customs . . . In all respects they appear to be most constitutionally within the jurisdiction and prerogative of the Crown.\(^\text{202}\)

This view was echoed in \textit{R. v. McCormick} in which Robinson C.J. stated that “Indian land, in which the right of the natives had not been extinguished” fell within lands that had never “been reduced into actual possession of the Crown . . . .”\(^\text{203}\) In short, Indian nations resident in unceded Indian lands were regarded, to some extent at least, as self-governing nations exempt from the settler municipal system, and unsurrendered Indian lands were regarded as outside the Crown’s \textit{de facto} possession. If so, then the imperial rather than municipal model of aboriginal rights may best explain aboriginal rights to lands and resources in mid-nineteenth century Upper Canada. Under this model, the municipal legal system, including the public right of fishing, has no application in Indian territories until they are incorporated within the municipal system by their surrender to the Crown.

There are therefore a number of alternative grounds upon which to argue that exclusive aboriginal fisheries existed in Upper Canada.

\(^{202}\) R. Jamieson, Att. Gen. Upp. Can., to J. Joseph, Sec. to Lt. Gov. (18 February 1836) NA RG10 vol. 60 at 60737-60738. See also Province of Canada, \textit{Debates of the Legislative Assembly of United Canada}, E. Nish, ed., (Montreal: Centre D'Etude du Quebec), vol. 1 at 936 (in response to a motion inquiring about an Indian reserve it was argued that Indian affairs “had always been under the especial protection of the Crown and that hitherto no interference had been allowed on the part of the popular branch of the Legislature”).

\(^{203}\) (1859), 18 U.C.Q.B. 131 at 136.
However, if these arguments are rejected and it is concluded that by the mid-nineteenth century Saugeen Ojibway fishing rights were not exclusive, the question remains whether the effect of the introduction of English municipal law by the 1792 Act was to confer upon the public a right of fishing in the Great Lakes that (though subject to an aboriginal right of priority) could not have been abrogated by prerogative Crown grant of an exclusive fishery to an aboriginal nation by treaty or letters patent. If the cases examined above in relation to settler rights are applied to aboriginal rights, the answer must be that the Crown was prohibited by the *Magna Carta* restriction in colonial Canada from doing this. Indeed, this appears to have been the conclusion reached by Cockburn and applied to British Columbia in *Nikal*.

However, the approach taken to the prerogative in *Nikal* is questionable on general grounds. It may be argued that the very “local conditions” qualification to the introduction of English law that premises the argument also undermines it; for the scope of the royal prerogative, like any other principle of common law, might also have been affected by “local conditions.” Thus, it might be said that any public right of fishing that vested under the English municipal law in relation to waters subject to aboriginal rights of priority would have been more limited than that recognized in relation to tidal waters in England. The Crown had the exclusive authority to obtain the cession of aboriginal title and aboriginal rights. If the Crown had the power to accept a cession of aboriginal title and/or rights relating to certain of these lands and waters, thereby making the public right to fishing complete and no longer subject to the aboriginal right of priority, then perhaps it also had a concomitant power to create Indian reserves in which the public was wholly excluded. This approach, it may be said, is a necessary adjustment to English law in light of local conditions: where an infant colony was established in unceded aboriginal territories occupied by potentially hostile aboriginal nations, perhaps the common law would not have denied the Crown’s prerogative power to confer exclusive rights on these nations over relatively small areas in return for their surrender

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— to the great benefit of the public — of their rights of priority to resources over a significantly larger areas.

The approach taken to the Crown's powers in British Columbia in *Nikal* is also distinguishable from the unique constitutional context existing in the provinces of Upper Canada and Canada. From 1763 until 1792, the Crown had the authority to grant exclusive fisheries in the region: English municipal law and its *Magna Carta* restriction had not been introduced.204 Could a local colonial statute in 1792 abolish the *imperial* Crown's authority to grant exclusive fisheries to Indians? Although the colonial legislature had plenary legislative power within the territory of the colony,205 this legislative authority was not limitless. Colonial statutes could be declared *ultra vires* if they conflicted with imperial statutes,206 were extra-territorial in application207 or were on matters that were of "imperial concern."208 Colonial legislatures could regulate or limit the exercise of the royal prerogative in the colony,209 but it has been argued that this authority extended only to so-called "minor" prerogatives defined by English municipal common law. They could not limit or abrogate the "fundamental" or "major" prerogatives of the Crown:

204. *Supra* note 182.


those inherent powers of the Crown as sovereign of the empire.\textsuperscript{210} Included among the Crown's fundamental prerogatives were its powers over the empire's foreign affairs, military, and treaties of war and peace,\textsuperscript{211} hearing appeals from the colonies,\textsuperscript{212} and regulating relations between political components within the empire.\textsuperscript{213} In colonial Canada, Indian trade was within colonial legislative competence,\textsuperscript{214} as was the protection of Indians and Indian lands from settler fraud and encroachment,\textsuperscript{215} but, as seen, jurisdiction over managing relations with Indians and negotiating the acquisition of Indian territories was, at least as a matter of policy, retained by the Imperial Crown until 1860.\textsuperscript{216} It may be argued that these aspects of Indian affairs were matters of fundamental prerogative beyond local legislative competence because they were linked inherently to matters of "imperial concern" such as military and foreign relations\textsuperscript{217} or relations between political units within the

\textsuperscript{210} Chitty, \textit{ibid.} at 25-26; Roberts-Wray, \textit{ibid.} at 379, 557-558.

\textsuperscript{211} Chitty, \textit{ibid.}; C. Clark, \textit{A Summary of Colonial Law, The Practice of the Court of Appeals from the Plantations, and the Laws and their Administration in All the Colonies} (London: S. Sweet, 1834) at 47.

\textsuperscript{212} Roberts-Wray, \textit{supra} note 208 at 379-380; \textit{Cuvillier v. Aylwin} (1832), 2 Knapp. 72 (P.C.) at 78; \textit{R. v. Eduljee Byramjee} (1846), 5 Moo. P.C. 276 (P.C.) at 295.

\textsuperscript{213} \textit{Penn v. Baltimore} (1750), 1 Ven. Sen. 444; \textit{Aboriginal Customs and Government}, \textit{supra} note 113 at 807-811.

\textsuperscript{214} For example, see Royal Instructions to Lord Dorchester, Gov. Upp. Can., 16 September 1791, PRO CO 43/4: 217-274 (§55).

\textsuperscript{215} Jamieson to Joseph, \textit{supra} note 202.

\textsuperscript{216} See \textit{supra} notes 200 - 202 and accompanying text.

\textsuperscript{217} Royal commissions to superintendents of the Indian Department described "the Indians inhabiting our Province of Upper Canada" as "Allies": Royal Commission to Sir J. Johnson, 16 September 1791, PRO CO 42/316: 65. As the Governor of Upper Canada, Lord Dorchester, said in 1799: "[The] Indians, the Indian department, and all Indian concerns, without exception, are under the protection and control of the Commander in Chief; the Indians make part of the military strength of the Country . . . ." (Dorchester to Duke of York, 12 July 1799, PRO CO 42/330: 123-124).
empire. Indeed, it may be argued that as long as the Imperial Crown exercised the royal prerogative over Indian affairs, colonial statutes purporting to limit that prerogative were ultra vires as extra-territorial. According to the doctrine of crown divisibility, the crown’s “situs” depends upon the location of the ministers upon whose advise it acts. Until 1860, the situs of the Crown when exercising the royal prerogative over Indian affairs in the province of Canada was Britain: “the Indians were under the protection of the Imperial Government, and their affairs were administered by the Governor General, not through the responsible ministers of the province, but directly as representing the Crown . . . .” Thus, courts have consistently held that colonial legislation on public lands could not have been intended to extend to Indian lands as long as the imperial Crown managed those lands directly. Applying the same principle to the 1792 Act introducing English law, it may be argued that it could not have been the intention of this Act to abolish existing prerogative powers of the imperial Crown in relation to Indian affairs, powers that included treating with aboriginal nations in such a way as to confer upon them certain exclusive rights over small reserves of lands and waters in return for the surrender of their title to vast territories within the province.

British Columbia has been described as a “settled” colony into which English municipal law ran automatically and in which aboriginal rights could not have existed as a separate “system” under

218. See generally Walters, supra note 113.
221. *Re Indian Claims* (1895), 25 S.C.R. 434, Strong J. at 503 [emphasis added].
222. *Mutchmore v. Davis* (1868), supra note 201 at 357-358; *Church v. Fenton* (1878), 28 U.C.C.P. 384 at 391-392 (Ont. Ch); *St. Catharines Milling and Lumber Co. v. The Queen* (1887), supra note 186 at 661-665.
the principle of continuity. In other words, it is a jurisdiction in which aboriginal rights are determined under the municipal model and not the imperial model. In contrast, Upper Canada (which may not have been a settled colony) was one in which aboriginal rights existed under the imperial model, at least between 1763 and 1774 when the region was part of the Indian territory established under the Royal Proclamation of 1763. The initial (and arguably continuing) status of aboriginal rights under the imperial model differentiates Upper Canada from British Columbia, for all subsequent imperial and local statutes introducing municipal law and government expressly saved existing rights. Upper Canada is distinguished from British Columbia for another reason: in the former colony, the Imperial Crown managed Indian affairs directly until 1860, and this fact must be considered when deciding the effect of colonial legislation on the Crown's power to recognize or grant exclusive fisheries by treaty or otherwise. In short, there are grounds upon which to argue that the exclusive Saugeen Ojibway fisheries described in Part I above had some legal foundation in mid-nineteenth century Upper Canada under either common law, prerogative instrument, or both.

Conclusion

The recent Supreme Court of Canada cases on aboriginal fishing rights suggest that there is an unresolved conflict within the present law of aboriginal rights in Canada between the objective of ensuring that aboriginal rights throughout the country derive from one common doctrinal foundation and the objective of avoiding the definition of aboriginal rights in a vacuum without reference to the particular legal-historical context of specific aboriginal claims. Given the vastly different ways in which British law and institu-

tions were introduced and in which native peoples were treated in various regions of Canada, it is not surprising to find certain First Nations armed with better common law, treaty and/or legislative arguments than other First Nations when formulating their claims to lands and resources. Although the entrenchment of aboriginal rights within the Constitution provides the basis for a new foundation for aboriginal rights underlying the claims of all aboriginal peoples in Canada, it is hoped that this entrenchment will not serve as an excuse for levelling aboriginal rights to the lowest common denominator. In the case of fishing rights, the above analysis suggests that there is a legal basis for a conception of aboriginal title, applicable throughout Canada, which secures exclusive rights of fishing in waters that would otherwise be subject to public rights where such exclusive rights existed under aboriginal custom. If this conception of aboriginal title is rejected, however, the analysis also demonstrates that in certain parts of the country the imperial Crown may have had the prerogative power to confer exclusive rights of fishing by treaty or other form of prerogative instrument. In particular, the analysis suggests that — obiter dicta in Nikal notwithstanding — the modern-day successors of the Saugeen Ojibway, like the Chippewas of Nawash, have a sound legal-historical basis for their claims to exclusive rights to, and jurisdiction over, their traditional fisheries in the waters of Lake Huron and Georgian Bay.