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## **The Public Right to Fish and the Triumph of Colonial Dispossession in Ireland and Canada**

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### **Abstract**

In both late-nineteenth-century Ireland and late-twentieth-century Canada there were a cluster of cases which discussed the public right to fish. A comparison of the jurisprudence in these two examples highlights the tacit clash between two competing legal systems seen in fishing rights cases; namely the common law versus pre-existing legal systems. By comparing the two examples, I examine the ways in which the law can be used to challenge and withstand colonial assertions of power but also the ways in which courts silence or ignore these claims, even if they are phrased in terms the common law ought to understand. As adaptable as the common law may be to local conditions, in the case of the public right to fish it was altered to suit colonial ends and to further the dispossession of the rightful owners of the fisheries.

### **I - Introduction**

The public right to fish has had a strange jurisprudential history. Decades can pass without the right being mentioned, only for a cluster of cases with similar facts to appear in a particular jurisdiction. Such patterns of case law might not be surprising given that the public right to fish is somewhat obscure and is hardly as important a right as, for example, the free use and enjoyment of property. Perhaps we should be more surprised that there has been any litigation at all about

public fishing rights. Then again, such clusters of cases might themselves be indicative of something else, of a broader claim centred on fishing rights.

In this paper I focus on the jurisprudence on the public right to fish in two different jurisdictions at two different points in time: in turn-of-the-twentieth-century Ireland and turn-of-the-twenty-first-century Canada.<sup>1</sup> In both these jurisdictions at those particular times, there have been a spate of cases which discuss the limits and application of the public's fishing right. Although, superficially, my two examples have little in common, their jurisprudence on fishing rights offers a window into colonial dispossession. In fact, my reasons for focusing on these two jurisdictions are to do with their complimentary, yet contrasting colonial experiences. Both countries, with the exception of Quebec, received the English common law in its entirety, including the common law's public right to fish. Both, at the time the English or British claimed sovereignty over them, had a pre-existing population which had its own laws – albeit not always identical across the territory as a whole<sup>2</sup> – about land ownership and access to the fisheries which differed from that of England.<sup>3</sup> Nonetheless, the native Irish were not overrun by settlers in the same way that the Indigenous population of Canada was. In other words, the public of the public right to fish was very different in the two countries.

My reason for focusing on the particular point in time in each country is due to the context in which the cases about fishing rights occurred. As the nineteenth century gave way to the twentieth, nationalist sentiment was on the rise in Ireland along with increasing frustration at

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<sup>1</sup> For a chronological table of these cases see Appendix.

<sup>2</sup> The Brehon laws never formed a unified code throughout Ireland, Hans S Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985) at 57. Nor can Indigenous legal systems be said to be identical across Canada.

<sup>3</sup> I say 'England' here as the law the British exported was the *English* common law – the legal system not being uniform throughout the United Kingdom.

British rule. Questions of property, particularly land-holding were a key flashpoint at this moment of Irish history. According to the common law fishing rights are a species of property and one which flows with the soil of the river or other body of water. Even the public right to fish is said to flow from the fact of Crown ownership of particular waters.<sup>4</sup> In fact, several fishing rights cases from Ireland at this time hint at the broader Irish dissatisfaction with the British administration.

The activism that formed the backdrop to the late-twentieth-century Canadian jurisprudence on the public right to fish was that of Indigenous Peoples in Canada. These Peoples were and still are fighting back against several centuries of colonial oppression and dispossession and, by the late twentieth century, were beginning to see increased judicial and political recognition of their rights. In parts of Canada, but particularly along the Pacific Coast of British Columbia and along the many salmon-rich rivers of that province, access to the fisheries was and remains a key source of settler-Indigenous conflict.<sup>5</sup> Not surprisingly,

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<sup>4</sup> Richard Barnes, “Revisiting the Public Right to Fish in British Waters” (2011) 26:3 Int’l J Marine & Coastal L 433 at 450, 453.

<sup>5</sup> See e.g., Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada’s Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993); Victor P Lytwyn, “Waterworld: The Aquatic Territory of the Great Lakes First Nations” in Dale Standen & David McNab, eds, *Gin Das Winan: Documenting Aboriginal History in Ontario* (Toronto: Champlain Society, 1996) 14; James Kenny & Bill Parenteau, ““Each Year the Indians Flexed Their Muscles a Little More”: The Maliseet Defence of Aboriginal Fishing Rights on the St John River, 1945-1990” (2014) 95:2 Canadian Historical Review 187; Peggy J Blair, “Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court’s Decisions in R v Nikal and Lewis” (2001) 31 RGD 87 [Blair, “Settling the Fisheries”]; “No Middle Ground: Ad Medium Filum Aquae, Aboriginal Fishing Rights and the Supreme Court of Canada’s Decisions in Nikal and Lewis” (2001) 31 RGD 515 [Blair, “No Middle Ground”]; Douglas C Harris, “Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery” (2000-01) 34 UBC Law Rev 195 [Harris, “Territoriality”]; “Indian Reserves, Aboriginal Fisheries, and the Public Right to Fish in British Columbia, 1876-82” in John McLaren et al, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 266 [Harris, “Indian Reserves”]; Douglas C Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) [Harris, *Fish, Law and Colonialism*]; *Landing Native Fisheries: Indian Reserves and Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) [Harris, *Landing Native Fisheries*]. This list is not exhaustive.

questions of property and rights to land and resources were and still are a key Indigenous legal issue.

One striking feature of the cases examined in this paper is the tension between the facts as presented and the courts' struggle or refusal to fit the law to the facts. I argue that this difficulty is a result of the inherently colonial nature of the litigation and of the need to ensure the integrity of the colonial legal system writ large. In Ireland the challenge posed by claims of a public right to fish was squarely towards that sacred cow of the common law world: private property. In Canada, the challenge was (and still is) broader and often implicitly indicted the Crown's claim to sovereignty and title over unceded territory. Yet in both countries there was law in the form of a statute in Ireland and a constitutional guarantee in Canada which should have allowed the courts to better fit the law to the facts presented to them. That they did not, or would not, speaks to the colonial contexts in which the cases were decided. But it also shows how the law can be a sword and a shield to defend, maintain, and justify colonial dispossession while also having the potential to be used to withstand and attack colonial assertions of power. In turn, a tacit argument in both my examples was which law should govern access to the fisheries and whether the common law could or would recognize pre-colonial laws, however indirectly. While there is an argument that some of the Crown's treaties with Indigenous People did recognize pre-existing legal orders, I will not be dealing with the broader issue of treaties in this paper.<sup>6</sup> Ireland did not have comparable treaties but nor did vast swathes of what is now British Columbia. What is more important to note is that treaties indicate the *potential* for the common law to recognize pre-existing legal orders, even if the practice was much different.

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<sup>6</sup> For more on the argument that treaties recognised Indigenous legal orders see, e.g. John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 UBC L Rev 1.

I begin with a brief discussion of the public right to fish. Due to constraints of space, I cannot fully trace its origins and history. Instead, I raise certain questions about its accepted history; questions which become more important for when the right is exported to Canada. In particular, I focus on the claim that the right emerged with the Magna Carta. The third part examines the late-nineteenth and early-twentieth-century Irish cases to show how the common law courts refused to recognize a legislated deviation from the common law. The fourth part examines the interaction between Indigenous fishing rights and the public right to fish in Canada. The fifth part unpacks what the jurisprudential history of the public right to fish means in the context of dispossession and claimed rights.

## **II – The Public Right to Fish**

Under the English common law, the public has a right to fish in all tidal waters. This right is said to emerge out of the Crown's ownership of the beds of tidal waters and the fact that these beds are held by the Crown for the benefit of the public. Ever since the time of the Magna Carta, or so the standard history goes, the Crown has been prohibited from granting out either the beds or their related tidal fisheries to a private person.<sup>7</sup> In short, the public right to fish is an ancient and longstanding common law right. Or at least it is provided the history is not examined too closely.

Due to the limits of space I cannot set out the complete origins of the public right to fish. I can, however, prove that the right did not emerge with the Magna Carta. The Magna Carta is a

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<sup>7</sup> Gerard V La Forest et al, *Water Law in Canada – The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 196.

deeply symbolic document which can be and has been twisted to suit a range of purposes, often with little basis on the text or the context in which the document was written.<sup>8</sup> Any claim that the document recognises a public right to fish in tidal waters reveals an ignorance of the socio-political context in which the Magna Carta was signed. It was the barons who forced the document upon John I, not the public. It is doubtful that there was any real ‘public’ to speak of at the time, given that the main differentiation in personal status was whether one was an unfree villein bound to the land, or a freeman.<sup>9</sup>

Even if the Magna Carta did seek to win protections for the broader English population, the text of the document does not support a public right to fish. Although a handful of scholars have already pointed out that the Magna Carta does not protect public fishing rights,<sup>10</sup> many courts still cite to it in discussions of the public right to fish.<sup>11</sup> When courts and scholars mention the Magna Carta and public fishing the two chapters usually cited are chapter sixteen: “No river banks shall be guarded (placed in defence) from henceforth, but such as were in defence in the time of King Henry;”<sup>12</sup> and chapter twenty-three: “All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.”<sup>13</sup>

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<sup>8</sup> Nicholas Vincent, “Introduction” in Nicholas Vincent, ed, *The Magna Carta: The Foundation of Freedom, 1215-2015* (London: Third Millennium Publishing, 2015) 12 at 13.

<sup>9</sup> Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2000) at 1-4.

<sup>10</sup> Barnes, *supra* note 4 at 442-43; Glenn J MacGrady, “Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don’t Hold Water” (1975) 3:4 Florida State UL Rev 511 at 554; James L Huffman, “Speaking of Inconvenient Truths – A History of the Public Trust Doctrine: (200&) 18:1 Duke Evntl L & Pol’y Forum 1 at 9-12.

<sup>11</sup> See e.g. *R v Gladstone*, [1996] 2 SCR 723 at 770-771, [1996] WWR 149; *Anderson v Alnwick District Council*, [1993] 3 All ER 613 at 621.

<sup>12</sup> *McKie v KVP Co Ltd*, [1947] OR 398, [1948] 3 DLR 201, 1948 CarswellOnt 47 at para 52 [*McKie*]; Barnes, *supra* note 4 at 443; Mark D Walters, “Aboriginal Rights, *Magna Carta*, and Exclusive Rights to Fisheries in the Waters of Upper Canada” (1998) 23 Queen’s LJ 301 at 303. This chapter was numbered 47 in the 1215 text, see <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation#sthash.sQ2n4drD.dpuf>

<sup>13</sup> This chapter was numbered 33 in the 1215 text see text cited in *supra* note 12.

The evil that chapter sixteen aimed at was the king's sport, his right to hunt. The English king has long had special rights *qua* king and his right of sport was one of them.<sup>14</sup> The king's barons had a duty to support the king's sport and in the original version of the Magna Carta, chapter sixteen appears alongside related concerns such as building bridges to allow the king to pass.<sup>15</sup> What chapter sixteen does is it limits the king's sport to those rivers which had been used during the reign of Henry II. Such limits would protect the private fishing rights in these rivers, not the public's. The confusion over Chapter Sixteen appears to stem from Sir Edward Coke who thought it meant no grant of inland fisheries.<sup>16</sup> It is clear that such a reading is contrary to the text of the chapter.

Meanwhile, chapter twenty-three is properly about navigation. Prior to 1215 there had been a number of statutes which sought to remove fish weirs from key rivers.<sup>17</sup> Such removals were not aimed at preserving or protecting the fish but protecting ships and boats' ability to pass up and down the rivers. That being said, the protection of navigation had the incidental effect of also protecting fish which soon led to legal confusion. In 1472, *An Act for Wears and Fishgarthes* observed that the Magna Carta protected the passage of ships and the "Safeguard of all the Fry of Fish spawned within the same."<sup>18</sup> Such comments show the idea that the Magna Carta protected fish is longstanding but such protections were not the driving force behind chapter twenty-three, particularly not when the chapter left all coastal weirs in place. It should also be noted that the *Wears and Fishgarthes Act* does not mention the public right to fish.

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<sup>14</sup> Stuart A Moore & Hubert Stuart Moore, *The History and Law of Fisheries* (London: Stevens & Haynes, 1903) at 7.

<sup>15</sup> Moore & Moore, *supra* note 14 at 10. See e.g. chapter twenty-three of the original text, cited in *supra* note 12.

<sup>16</sup> George C Oke, *A Handy Book of the Fishery Laws* (London: Butterworth, 1903) at 269; Coke 2 Inst C 16. Though here Coke is citing to an older authority which is likely doubtful, Moore & Moore *supra* note 14 at 12-13.

<sup>17</sup> Stuart Moore, *A History of the Foreshore* (London: Stevens & Haynes, 1888) at 741-743.

<sup>18</sup> *An Act for Wears and Fishgarthes* 12 Ed IV, c 7 (1472).

In sum, then, the origins of the public right to fish emerge elsewhere. It would appear that the public right to fish is bound up with the idea that the Crown owns the foreshore. This too is a relatively modern doctrine and its first appearance seems to be in Thomas Digges' *Proofs of the Queen's Interest in Lands Left by the Sea and Salt Shores thereof*.<sup>19</sup> The problem with that doctrine is: if the Crown did own the foreshore, then all of the weirs which the Magna Carta left in place would have been an invasion of the Crown's right. Richard Barnes argues that the public right to fish's history is bound up with the colonial goals of the nascent British state.<sup>20</sup>

Assertions of Crown authority over the coast and coastal fisheries did much to encourage the development of a navy with fishermen providing a source of ready-made sailors.<sup>21</sup> In turn, a strong navy led to a strong empire. Of course, it should also be noted that marine fish, particularly preserved marine fish such as cod and herring were an important trade good from the turn of the second millennium AD.<sup>22</sup>

The claim of Crown ownership of the foreshore does not start to appear with any regularity until the reign of Charles II and, when it does, the doctrine is unsettled. The 1664 case of *Bulstrode v Hall* held that where a river is tidal, it belongs to the king.<sup>23</sup> *Bulstrode* cited to *Sir Henry Constable's Case* from 1607,<sup>24</sup> and to Rolle's Abridgement in support of the king's right.

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<sup>19</sup> Thomas Digges, *Proofs of the Queen's Interest in Lands Left by the Sea and Salt Shores thereof* reprinted in Moore, *supra* note 14 at 185-211.

<sup>20</sup> Barnes, *supra* note 4 at 439-440.

<sup>21</sup> *Ibid* at 440; J McDonnell, "Inland Fisheries in Medieval Yorkshire" (1981) Borthwick Papers No 60 at 28; Gordon Jackson, "State Concern for the Fisheries, 1485-1815" in David J Starkey, Chris Reid & Neil Ashcroft, eds, *England's Sea Fisheries: The Commercial Sea Fishers of England and Wales Since 1300* (London: Chatham Publishing, 2000) 46 at 47.

<sup>22</sup> For an overview of this process, including some discussion as to why this should happen see, James H Barrett, David Orton, Cluny Johnstone et al, "Interpreting the expansion of sea fishing in medieval Europe using stable isotope analysis of archaeological cod bones" (2011) 38:7 *Journal of Archaeological Science* 1516; D Serjeantson & CM Woolgar, "Fish Consumption in Medieval England" in CM Woolgar, D Serjeantson & T Waldron, eds, *Food in Medieval England: Diet and Nutrition* (Oxford: Oxford University Press, 2006) 102

<sup>23</sup> *Bulstrode v Hall* (1664), (1685) 1 Keb 532, 83 ER 1096 (KB). See also, *Bulstrode v Hall* (1664), (1714) 1 Sid 148, 82 ER 1024. The latter citation is the same case but the report is in law French and has more detail.

<sup>24</sup> *Sir Henry Constable's Case* (1601), 77 ER 218, 5 Co Rep 106.

The relevant page of Rolle's Abridgement also cites to *Constable's Case* and reads "Le soile sur que le mere flowe & reflowe, scilicet inter high-water marke & le low-water marke *poet etre* parcel d'manor d'un subject."<sup>25</sup> *Constable's Case* suggests that the foreshore *may* be privately owned, and that prescription could be evidence of such ownership – a direct contraction of Digges' claim. The relevant part of *Constable's Case* is itself a referral to an earlier case: the *Anonymous* case from 1382 which states that the sea is part of the king's ligeance.<sup>26</sup> Here the king's ligeance did not mean property but jurisdiction.<sup>27</sup> It seems that following the inter-regnum, the common law courts were confused by the dual meaning of ligeance and took it to mean ownership. Despite such doubtful authority, in 1668, *Kirby v Gibs* echoed the rule about Crown ownership with respect to the banks of a royal river.<sup>28</sup> Almost a decade later, *Attorney General v Edwards* held that "the soil of the sea is in the King as part of his inheritance, and not as a thing of prerogative."<sup>29</sup> In other words, it could be granted to private persons. Yet just two years prior to *Edwards*, Sir Matthew Hale, then Chief Justice of the King's Bench, held that fishing in tidal waters belonged to everyone, but that this was a rebuttable presumption rather than an unshakeable rule.<sup>30</sup> The idea that a private fishery could not bar the public does not appear until 1704.<sup>31</sup> Yet, later cases continued to allow for an individual to gain private rights via prescription to tidal waters, apparently to the exclusion of the public.<sup>32</sup>

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<sup>25</sup> 2 Roll Abr 170 (translation by author: the soil where the sea flows and reflows, that is to say between the high water mark and the low water mark *may be* part of the manor of a subject) [emphasis added].

<sup>26</sup> *Anonymous* (1382), 6 R II 35 (Protect 46) (CP).

<sup>27</sup> For the shifting meaning of ligenace see Kim, *supra* note 9 at 137-142; Ann Lyon, "From Dafydd ap Gruffydd to Lord Haw-Haw: The Concept of Allegiance in the Law of Treason" (2002) 33 *Cambrian L Rev* 35 at 40-41.

<sup>28</sup> *Kirby v Gibs* (1668), 2 Keb 294, 84 ER 183 (KB).

<sup>29</sup> *Attorney General v Edwards* (1676), 83 ER 125, (1803) T Raym 241.

<sup>30</sup> *Lord Fitzwalter's Case* (1674), 1 Mod 105, 86 ER 766 at 766-767.

<sup>31</sup> At least this is the first reference I found to it. See, *Warren v Matthews* (1704), 87 ER 831 at 831, 6 Mod 73 (KB)

<sup>32</sup> *Carter v Murcot* (1768) 98 ER 127 at 128, 4 Burr 2162; *Orford (Mayor of) v Richardson* (1791) 100 ER 1106 at 1107, 4 TR 438. But see Lord Chief Justice Willes' decision in *Ward v Creswell* (1741) 125 ER 1165 at 1166, (1741) Willes 265.

In short, the public right to fish was far from settled. There was a popular belief that the right existed and that it was longstanding,<sup>33</sup> but the evidence suggests otherwise. That being said, the veracity of the public right to fish does not particularly matter for its exportation to new lands, the common law can be and has been adapted to meet local conditions. What is more interesting is how courts reacted to attempts to challenge or extend the right in question.

### **III - Irish Land and Irish Rights versus English Property and English Common Law.**

Although the English common law had applied in Ireland since at least the start of the seventeenth century, the laws of Ireland were never completely identical to that of England, even after the Union of the Parliaments in 1801. From time to time, the Parliament in Westminster would pass legislation specific to Ireland and in 1842 a new *Fisheries Act* came into force for Ireland.<sup>34</sup> The Irish opposed the draft version of the Act, and the Parliamentary Debates report numerous petitions against it. The Act was duly amended and those amendments included changes to the public right to fish.<sup>35</sup> The *Fisheries Act (Ireland)* recognised a public right of fishing in inland waters, provided that right had existed for upwards of twenty years. The public's right was to be paramount as section 114 read, in part, "Provided always, that nothing herein contained shall be construed to lessen or abridge any public Right of Fishing by lawful Means and in lawful Seasons heretofore enjoyed and exercised within the Limits of any such

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<sup>33</sup> Moore & Moore, *supra* note 14 at vi, 6, 13-14.

<sup>34</sup> *Fisheries Act (Ireland)* 5 & 6 Vict, c 106 (1842).

<sup>35</sup> TM Healy, *Stolen Waters: A Page in the Conquest of Ulster* (London: Longmans, Green & Co, 1913) at 462.

several Fisheries.”<sup>36</sup> Yet, as I show in this section, such legislative protection was rarely referred to by the courts, nor upheld when it was.

Before moving on to examine the cases it is helpful to set out some background. Nineteenth-century Ireland was a largely agricultural society. Prior to the final conquest of Ireland in 1603 it was “a pastoral and semi-nomadic society” which centred more on the raising of livestock than growing crops.<sup>37</sup> Post-conquest the landscape shifted, both out of the hands of the native Irish and towards a more settled, crop-based agriculture, or at least for the native Irish towards an agriculture and diet which was heavily dependent on potatoes.<sup>38</sup> Fish was never the sole or main source of food but it was a useful supplement, particularly so during the Irish potato famine of 1845-1852.<sup>39</sup>

Historic records show that fish, including salmon, were plentiful in Ireland’s rivers and the stocks appeared in good health in the early nineteenth century.<sup>40</sup> By the time of the 1842 Act, however, the fish stocks were in decline and this was the source of ample concern.<sup>41</sup> According to Marilyn Silverman, the 1842 Act “had three ambitious but contradictory aims: to increase productivity, to allow everyone to fish, and to preserve the stocks.”<sup>42</sup> Her study of three rivers in the south-east of Ireland details the lengthy struggle between public fishing rights and private claims to these rivers during the nineteenth century. She notes that the private owners moved their claims from the local magistrates to the higher courts as it was there that they stood

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<sup>36</sup> *Fisheries Act (Ireland)*, *supra* note 34, s114. See also, *ibid* s 65.

<sup>37</sup> Leslie Clarkson & Margaret Crawford, *Feast and Famine: Food and Nutrition in Ireland, 1500-1920* (Oxford: Oxford University Press, 2001) at 25.

<sup>38</sup> *Ibid* at 86.

<sup>39</sup> *Ibid* at 75, 80-81, 106; Marilyn Silverman, *An Irish Working Class: Explorations in Political Economy and Hegemony, 1800-1950* (Toronto: University of Toronto Press, 2001) at 150 [Silverman, *An Irish Working Class*].

<sup>40</sup> Silverman, *An Irish Working Class*, *supra* note 40 at 142.

<sup>41</sup> *Ibid* at 144-45. For contemporary concerns see e.g. Herbert Francis Hore, *An Inquiry into the Legislation, Control, and Improvement of the Salmon and Sea Fisheries of Ireland* (Dublin: Hodges & Smith, 1850) esp at 1-2.

<sup>42</sup> Silverman, *An Irish Working Class*, *supra* note 40 at 147

a better chance of winning.<sup>43</sup> While Silverman's study was geographically limited, the cases discussed in this section are from across Ireland and show that in the fight over access to the fisheries private rights proved more persuasive to the courts.

Starting in the 1850s there were a number of Irish fishing rights cases in the higher courts, including three which were heard by the House of Lords,<sup>44</sup> which sought to use the protection offered by the public right to fish. The Irish cases advance two arguments both of which challenged the accepted version of the public fishing right: first, that there were or could be several fisheries in tidal waters; and, second, that there was a public right to fish in inland waters. The former ought to have failed, given that proving a pre-Magna Carta grant was impossible for much of Ireland. While the latter ought to have won, given that proving the existence of a right for twenty years is relatively easy to do and certainly easier than proving a pre-1215 grant. Yet, that is not what happened and, in the vast majority of cases, private rights won the day with a little help from the common law courts.

The majority of these cases follow a similar pattern: they are primarily cases about trespass where the public right of fishing is used as a defence.<sup>45</sup> Those who claim a private or several fishery try to prove their title via a range of documents and other evidence of possession. The evidence often had gaps or documents which contradicted each other but seeing as most cases were also heard by juries, it fell to the juries to declare themselves convinced or not. These

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<sup>43</sup> *Ibid* at 180-82. Many of the lower court cases are unreported but for some discussion of them see, Marilyn Silverman, "How Custom Became a Crime on the River Nore: Fishing at Bennettsbridge, 1837-95" in William Murphy, ed, *In the Shadow of the Steeple IX* (Duchas-Tullaheerin Parish Heritage Society) 66; Marilyn Silverman, "From Fisher to Poacher: Public Right and Private Property in the Salmon Fisheries of the River Nore in the Nineteenth Century" in Marilyn Silverman & PH Gulliver, eds, *Approaching the Past: Historical Anthropology Through Irish Case Studies* (New York: Columbia University Press, 1992) 99

<sup>44</sup> *Malcomson v O'Dea* (1863) 11 ER 1155, 10 HL Cas 593 [*Malcomson* cited to ER]; *Bristow v Cormican* (1878), 3 App Cas 641 (HL) [*Bristow*]; *Johnston v O'Neill* [1911] AC 552 (HL) [*Johnston*].

<sup>45</sup> *Wyse v Leahy* (1875), 9 IRCL 384 at 388.

cases only appear in the written record as the result of challenges, usually by the defendants at trial, to judicial decisions about the admissibility of evidence or improper jury instructions. In the 1845 case of *Gabbett v Clancy*,<sup>46</sup> for example, a majority of the Queen's Bench did not think the trial judge's failure to tell the jury that "unless the Crown was seized of a several fishery prior to Magna Carta, they should find for the defendants" amounted to misdirection.<sup>47</sup> The fishery in question was in the tidal part of the River Shannon and thus in theory subject to the public right to fish. The plaintiffs managed to prove possession and so the public right did not apply.

What is more important is what the decisions have to say about the litigation in question. In the 1856 Chancery decision of *Allen v Donnelly*, the court observed that the litigation over the public's right to fish arose after local newspapers asserted that such rights existed in Lough Foyle. Apparently these newspapers encouraged fund-raising to support the fishermen's rights.<sup>48</sup> Four years later, the Master of the Rolls delivered a stinging rebuke to the respondents in *Ashworth v Browne*, a case about the fishery between Lough Corrib and the sea including in some non-tidal waters.<sup>49</sup> The petitioners in *Ashworth* alleged that "some persons of the humbler classes in Galway were in the habit of trespassing upon said fishery, by angling and taking salmon and other fish in said river" and asked the court to quiet their title.<sup>50</sup> Some of the respondents failed to defend their suit, instead they put forward "two paupers" and "supported their defence by subscriptions." This was "a bad example to the lower orders" and evidence of a lack of "manliness."<sup>51</sup> The Master of the Rolls also accused the defendants of thinking that

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<sup>46</sup> *Gabbett v Clancy* (1845), [1844] 8 Ir L Rep 299 (QB) [*Gabbett*].

<sup>47</sup> *Ibid* at 311.

<sup>48</sup> *Allen v Donnelly*, [1856] 5 Ir Ch R 229 at 229-231 [*Allen*].

<sup>49</sup> *Ashworth v Browne* (1860), 10 Ir Ch R 421 [*Ashworth*].

<sup>50</sup> *Ibid* at 427

<sup>51</sup> *Ibid* at 439-440.

“because the petitioners are Englishmen they are not to get justice in Ireland. This line of defence will not succeed in this Court.”<sup>52</sup> In short, the public right to fish was set up as an *Irish* right, claimed against *English* landowners. The concern over fish stocks may have been prompted (at least in part) by the commercial value of salmon and other fish, but as the fisheries became privatized the fisheries question took on a markedly nationalistic air.<sup>53</sup> Despite the nationalistic undertones of the fisheries question, the Irish cases do not seem to be part of any unified strategy and the fight over fishing rights was not central to Irish nationalism at this time.

As it happens, in all of the cases where there was a clash between a claimed public right and a claimed private right, the private right won.<sup>54</sup> The only case I found where the public right succeeded was where a private owner attempted to restrict public fishing as a way of ensuring enough salmon reached their fishery.<sup>55</sup> That case did not represent two competing claims in one location as the other cases did.

In addition, the vast majority of cases also fail to mention the *Fisheries Act (Ireland)* and its guarantee of public fishing in inland waters. Two exceptions are *Morrissey v Kilkenny*,<sup>56</sup> and the Irish Court of Appeal’s decision in *Johnston v O’Neill*.<sup>57</sup> In *Morrissey* the defendants stood accused of illegally fishing in the River Nore. Writing for the Court, Justice Lawson relied on the common law to ignore the fisheries legislation. He observed that the “highest authorities”

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<sup>52</sup> *Ibid* at 440.

<sup>53</sup> Silverman, *An Irish Working Class*, *supra* note 40 at 165. In the 1960s, the IRA briefly tried to turn fishing rights into an issue again, an attempt which was largely unsuccessful, Tim P O’Neill, “Fish, Historians, and the Law: The Foyle Fishery Case” (2009) 17:6 *History Ireland* 62 at 65.

<sup>54</sup> Most of the cases involved a claimed fishing right but one was about the right to take seaweed. Besides from those discussed in the text, other Irish fishing rights cases are, *Murphy v Ryan*, [1867] 2 IRCL 143 (CP); *Johnston v Bloomfield*, [1867] IRCL 68; *Crichton v Collery* (1870) 4 IRCL 508; *Wyse v Leahy* (1875), 9 IRCL 384 (about the right to take seaweed).

<sup>55</sup> *Ireland (AG) v Fleming*, [1911] 1 IR 323 (Chanc Div) at 370, 387.

<sup>56</sup> *Morrissey v Kilkenny* (1884), 14 IR 349 [*Morrissey*].

<sup>57</sup> *O’Neill v Johnston* (1908), [1909] 1 IR 237 (CA) [*Johnston CA*].

had “settled that use[] by the public, no matter how long, will not confer a right to take fish in inland waters...we must construe this section [of the *Fisheries Act (Ireland)*], having regard to the state of the law - the section says that the right must be in the nature of a common of piscary, which can only be acquired by grant or prescription; and such a public right as is here claimed, based on mere user, cannot, in point of law, exist.”<sup>58</sup> Here it is not so much that Parliament had gotten the law wrong but that the statute ought to be interpreted in accordance with the common law. Justice Lawson did not explain how such an interpretation worked with the doctrine of Parliamentary sovereignty, nor did he explain the difference between “mere user” and prescription. Meanwhile in *Johnston (CA)* the Lord Chancellor of Ireland said, with respect to the relevant sections of the *Fisheries (Ireland) Act*, that “[t]hese sections do not create a right. There was a misapprehension as to the law, and a saving was based on that.”<sup>59</sup> In short, Parliament had gotten the law wrong.

Leaving aside for a moment the question of why the courts were so hostile to the public right to fish, why were the Irish even making the argument? One potential answer to that question lies not with the fisheries legislation but with the pre-conquest legal system of Ireland. Under the Brehon laws land was owned by the clan and not by any one individual,<sup>60</sup> and the same rules applied to govern access to Ireland’s fisheries.<sup>61</sup> Ireland’s fisheries pre-conquest were not an open commons in the sense that *anyone* could access the fisheries. The evidence suggests that each clan had a set of rules which governed access to the fisheries.<sup>62</sup> Communal access is, of

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<sup>58</sup> *Morrissey*, *supra* note 56 at 352.

<sup>59</sup> *Johnston (CA)*, *supra* note 57 at 253.

<sup>60</sup> *Moore v Attorney General*, [1934] IR 44 (Ir Sup Ct) at 68, 85 [*Moore*]; Herbert Francis Hore, *An Inquiry into the Legislation, Control, and Improvement of the Salmon and Sea Fisheries of Ireland* (Dublin: Hodges & Smith, 1850) at 3.

<sup>61</sup> *Moore*, *supra* note 60 at 68.

<sup>62</sup> Healy, *supra* note 35 at 370 (though at 109 he notes that the Lough Neagh fisheries were never in the possession of any single clan); *Moore*, *supra* note 17 at 68.

course, much different than public access but given nineteenth-century Irish demographics the difference was more semantic than real. Whether deliberate or not, the fisheries legislation tacitly recognised the Brehon laws' old rule and attempts to assert what were understood by the common law as public rights over 'private' fisheries harked back to the pre-conquest legal system. Such claims of public right were attempts to repackaging an old right for the common law. Not surprisingly, the common law proved resistant even in the face of explicit legislation.

There was, however, a procedural weakness with the way in which the Irish fishing rights cases proceeded: that of the jury. It was for the juries to decide – albeit with judicial direction – whether or not there had been a grant of a several fishery or if the 'acts of ownership' were sufficient. In a country where the majority of the population was becoming, or seemed to be becoming increasingly hostile to British rule, there was a possibility that jury decisions might not always be so favourable to private property in the fisheries. Bad feeling against the British and their property law was no secret or rare thing in late-nineteenth-century Ireland and in 1878 the danger of juries was brought home to Irish fishing litigation by the House of Lords.

*Bristow* emerged out of an action for trespass to a claimed private fishery in Lough Neagh. Lough Neagh is the largest lake by surface area anywhere in the British-Irish Isles and is a *de facto* inland sea. England's largest natural lake, Lake Windermere, is a mere sixteen square kilometres while Lough Neagh is three-hundred and ninety-two square kilometres.<sup>63</sup> To put it more simply, the question of whether there should be a public right to fish in inland waters had never faced such a large lake as Lough Neagh. Even if the public right to fish would not be

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<sup>63</sup> "Lough Neagh" in *Encyclopedia Britannica* online: <http://www.britannica.com/place/Lough-Neagh> ; "Windermere" in *Encyclopedia Britannica* online: <http://www.britannica.com/place/Windermere>

extended to Ireland's other inland waters, Lough Neagh's sheer size might give rise to different considerations.

The trespass in *Bristow* was limited to a place called Fenmore and the plaintiff brought the action "for the purpose of establishing a right to a several fishery in the whole of the Lough."<sup>64</sup> At trial the judge removed the question of title from the jury by directing that a verdict be entered for the plaintiffs. When the case reached the House of Lords the only question for the Court was whether the trial judge had made the right decision: was the question of title one of law and thus for the judge, or was it one of fact and so for the jury?<sup>65</sup> The Lord Chancellor noted that much of the argument had been devoted to the question of whether Lough Neagh was subject to the public right to fish but he did not think that question was properly before the Court.<sup>66</sup> Several of the decisions commented on the interest in the case among the local community in Ireland and Lord Blackburn observed that "it appears from the report of the learned Judge that the jurymen intimated that, if the question was left for them, they were prepared to find a verdict for the Defendants."<sup>67</sup> Such comments echo Silverman's observation from south-eastern Ireland, namely that the private claims over inland fisheries were unpopular with the local population.<sup>68</sup>

The House of Lords ordered a new trial in *Bristow* but given Lord Blackburn's observation it should be no surprise that the new trial never happened. Hence the question of public fishing in Lough Neagh remained unanswered. What those who claimed several fisheries in Irish waters needed was some way to remove the decision about title from a jury, a ruling that

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<sup>64</sup> *Bristow*, *supra* note 44 at 650.

<sup>65</sup> *Ibid* at 650-51.

<sup>66</sup> *Ibid* at 651

<sup>67</sup> *Ibid* at 660.

<sup>68</sup> Silverman, *An Irish Working Class*, *supra* note 40 at 160, 165.

would turn the question of title from one of fact to one of law. Such a ruling would eventually emerge when the question of title to Lough Neagh returned to the House of Lords in 1911 in *Johnston v O'Neill*.<sup>69</sup>

*Johnston* represents the culmination of the turn-of-the-century Irish fishing rights cases not just because it was one of the last from pre-partition Ireland but because it was the case where the public right to fish came closest to succeeding. The case centred on the open and notorious eel fishing of the appellants who argued that the public had fished in Lough Neagh since time immemorial. The reason the case focused on eels and not salmon was the fact that by the time the case came to court, Lough Neagh's salmon fishery had all but collapsed. A pattern which had been repeated, to a greater or lesser extent, across Ireland.<sup>70</sup> At the time of the decision, there were about eight hundred fishermen supporting roughly three thousand individuals by fishing 'illegally' in Lough Neagh.<sup>71</sup> At trial and on appeal the Irish courts were unanimous: there was no such thing as a public right to fish in non-tidal inland waters. In so holding the Irish courts followed the existing Irish jurisprudence which had refused to recognise a public right to fish different from that which existed in England. Given the extent of the lower courts' agreement, the House of Lords' split decision in *Johnston* surprised the three Law Lords who sided with the lower courts.<sup>72</sup> It is not clear what prompted such a split but given that the case occurred against the backdrop of increasing Irish nationalism, the split in the case went along party lines: the majority were all Conservatives, while the minority were all Liberals. Not

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<sup>69</sup> It is not yet clear what specific range of circumstances prompted the question of Lough Neagh's fisheries to come back to court or why it happened in the early 1900s. For the purposes of this paper the judgements in the case are more important than the microhistory of the case itself. Suffice to say that by 1911, people had been fighting over the ownership of Lough Neagh and its related rivers for three centuries.

<sup>70</sup> See e.g. Silverman, *An Irish Working Class*, *supra* note 40 at 144-45; Silverman, "From Fisher to Poacher", *supra* note 43 at 100 (noting it was a UK-wide problem).

<sup>71</sup> *Johnston supra* note 44 at 566, 599, 613.

<sup>72</sup> *Johnston, supra* note 44 at 567-68, 577-579, 591.

surprisingly the Conservatives and Liberals differed in their approach to the Irish question. At the risk of oversimplifying, the Conservatives were opposed to Irish Home Rule while the Liberals were in favour.<sup>73</sup> Equally striking was the extent of the disagreement with the seven judgments disagreeing on just about everything it was possible to disagree on with one exception: the fact that the public had fished for eels and other fish in Lough Neagh for centuries prior to 1911.<sup>74</sup>

Even those Law Lords who felt these fishermen were trespassers agreed that the alleged trespass had been going on for a significant time. The sheer extent and length of the fishery cast doubt on the respondents' claims to have had exclusive possession of the Lough Neagh fishery since 1605.<sup>75</sup> Much as with the earlier fishing rights litigation, the respondents in *Johnston* used a range of evidence in support of their claimed possession. The various grants, leases and similar presented to the Court did not agree, at least one was alleged to be a forgery,<sup>76</sup> and they all rested on the assumption that the Crown had title to Lough Neagh and was thus able to grant it.<sup>77</sup> The documents were much the same as was presented in *Bristow* and while in that case the House of Lords hinted that they were not much convinced by the evidence they left the final decision to a jury. Not so in *Johnston*.

The majority focused their attention on the sufficiency of possession and the impossibility of the claimed public right. Lord Macnaghten thought the real issue was not

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<sup>73</sup> The exact meaning of Home Rule differed among the various Irish nationalist groups but the general idea was Irish responsibility for Irish affairs. The year after *Johnston* was heard, the Liberal government introduced the third and final Home Rule bill which eventually became the *Government of Ireland Act 1914*, 4 7 5 Geo V, c 90.

<sup>74</sup> *Johnston*, *supra* note 44 at 553, 573-74, 581-583, 588, 599, 613.

<sup>75</sup> *Ibid* at 555-56, 565-566, 576-577, 606, 613

<sup>76</sup> *Ibid* at 609. Macnaghten LJ said that such allegations of any document being a forgery were unfounded, *ibid* at 590.

<sup>77</sup> *Ibid* at 553, 576, 593-95. See the House of Lord's earlier comments in *Bristow*, *supra* note 44 at 658-59 (noting the discrepancy between the two stories of title presented).

whether the paper title to Lough Neagh was flawless – it clearly was flawed – but whether “possession has been held...in accordance with the express terms of the grant”<sup>78</sup> and in his view the evidence supported the claimed possession.<sup>79</sup> Lord Dunedin observed that it although it was questionable that the Crown had the fishing rights in Lough Neagh, the fishery had to belong to someone as it was “contrary to law” for the fishery to be without an owner.<sup>80</sup>

Defective title aside, Lord Dunedin, Lord Macnaghten and Earl Halsbury, agreed that it was also impossible in law for the public to acquire any rights to an inland lake.<sup>81</sup> Here the majority undermined their argument by not including *all* of Lough Neagh’s fisheries in the private fishery claimed by the respondents. The respondents were only interested in the eel fishery and not the ‘pollen’ fishery even though it was “valuable and much sought after in the neighbourhood.”<sup>82</sup> Lord Macnaghten expressly excluded the pollen fishery from being affected by the decision because “there is not...the remotest probability of persons interested in salmon fishing or in eel fishing interfering with ...fishing for coarse fish in the lough. For one thing, it could not pay to interfere.”<sup>83</sup> Calling pollen a ‘coarse fish’ referenced the distinction between ‘game fish,’ like salmon and trout, which were usually reserved for the gentry, and all other fish

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<sup>78</sup> *Johnston*, *supra* note 44 at 581.

<sup>79</sup> *Ibid* at 584-591.

<sup>80</sup> *Ibid* at 594.

<sup>81</sup> *Ibid* at 568 (per Halsbury E), 577-78 (per Macnaghten LJ), 594 (per Dunedin LJ). Though Lord Ashbourne concurred in part here, he was not convinced that the respondents had shown possession of the entirety of Lough Neagh, *ibid* at 577.

<sup>82</sup> *Ibid* at 571, 574. For reference to the collapse of the salmon fishery see *ibid* at 583.

<sup>83</sup> *Ibid* at 590-591.

of lesser value.<sup>84</sup> Moreover, the pollen fishery could not be carried out on the same mass scale as eel fishing; it was only useful for subsistence fishing.<sup>85</sup>

Yet three of the other Law Lords were not convinced that the respondent had proven possession and Lord Ashbourne was only willing to recognise the respondents' possession over part of the Lough.<sup>86</sup> In dissent Lord Shaw noted that one of the deeds relied upon by the respondents "quite openly and bluntly defies all the formalities relating to the grant of Crown properties, and it is frankly founded upon nothing but the will of the Protector [Oliver Cromwell]. But I think that the maxim "Stat pro ratione voluntas" [trans: the triumph of will over reason] can also be discerned equally as alone lying at the foundations of title in all of the Royal grants."<sup>87</sup> So common was this practice that the common law had to devise a way to regularize such grants "either constitutionally or legally" through the passage of a statute.<sup>88</sup> In short, these grants could not and did not grant good title, a further confirmation was needed and it was not clear that title to Lough Neagh had ever been adequately confirmed.<sup>89</sup>

While the other dissenting judges focused more on the question of possession, Lord Shaw was careful to leave room to recognise the unique nature of Lough Neagh and the pre-conquest use of the Lough. Lord Shaw was willing to concede that, due to its size, the lough might be subject to the public right to fish.<sup>90</sup> In addition, he thought that "there may be much in the history

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<sup>84</sup> John Lowerson, *Sport and the English Middle Classes, 1870-1914* (Manchester, UK: Manchester University Press, 1993) at 42-43. Of course this distinction was never absolute and the real issue was who controlled access to the fisheries. Lowerson notes that in nineteenth-century England, the middle-classes sought to control the best angling grounds as angling became a popular sport, *ibid*.

<sup>85</sup> *Johnston, supra* note 44 at 590-591.

<sup>86</sup> *Ibid* at 576-577.

<sup>87</sup> *Ibid* at 604. Compare Lord MacNaughten's comments, *ibid* at 580.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid*. See also the comments of Robson LJ in *ibid* at 615 ("no one would contend that the letters patent issued at this period of English history are always to be taken without question at their face value.")

<sup>90</sup> *Ibid* at 605.

of Ireland....to confirm the view that the transition...from what was practically a tribal society to what was practically a feudal system should be accompanied by the conservation of those public rights in those waters which...form both a highway and a source of sustenance for the people of the country.”<sup>91</sup> Although made in a paternalistic fashion, Lord Shaw’s point was correct.

Lord Robson agreed that *Johnston* spoke to the Irish situation but he had a different explanation for the public’s rights. For him “The facts .... are consistent with...a license tacitly given by...persons whose ancient title has never yet been extinguished by the Crown.”<sup>92</sup> The point being that the Crown had not succeeded in completely asserting its authority and the pre-common law legal system was still in effect. Admittedly, this is a misunderstanding of the Brehon Law but it highlights the challenge *Johnston* posed to the common law and the Crown’s authority.

*Johnston* and the other Irish cases also threatened the common law’s regime of property rights. In *Johnston*, Lord Dunedin stated that Lough Neagh simply had to be private property,<sup>93</sup> meaning the public could only fish as the result of trespass or the tacit permission of the true owner.<sup>94</sup> The majority in *Johnston* recognized the injustice their decision would cause but the law was the law and could not be altered just “because one sympathizes very much with a large class of poor people who are supposed to obtain their living by the exercise of the practice of fishing in an area over which they have no legal right to claim the rightfulness of their practice.”<sup>95</sup> The legitimacy of the fishermen’s claims could not be recognised without tacitly suggesting that the common law was potentially illegitimate with respect to Lough Neagh. The

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<sup>91</sup> *Ibid* at 605. See also Robson LJ in *ibid* at 622.

<sup>92</sup> *Ibid* at 622.

<sup>93</sup> *IBid* at 594.

<sup>94</sup> *Ibid* at 592-93.

<sup>95</sup> *Ibid* 568-569.

majority held that any rights to or in Lough Neagh must have originated from the Crown for them to be recognized by the common law.<sup>96</sup> The public could not prove that their rights had been granted by the Crown. As far as the common law was concerned they were trespassers.

#### **IV – Indigenous Rights versus Public Rights**

The story of how the public right to fish came to be exported to Canada, and other former British Colonies, is important in and of itself. Again, due to constraints of space there is not room to offer a full history but a few key points are necessary. The first is that the public right to fish had not yet settled into its final form by the time the British conquest of North America began.<sup>97</sup> The second is that British colonisers, like other European colonisers, did not always respect Indigenous claims to North America, a tendency which increased as white settlement increased. Indigenous claims are absent from the Canadian case law on the public right to fish until the latter half of the twentieth century. In fact, between 1947 and 1982, no Canadian decision appears to have even mentioned the public right to fish.<sup>98</sup> The third key point is that the common law as received in Canada is not the same as that which existed in England; Canadian courts were allowed to and did adapt the law to meet the new circumstances of Canada.<sup>99</sup> One of those

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<sup>96</sup> Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 79; Nicole Graham, *Landscape: Property, Environment, Law* (New York: Routledge, 2011) at 95.

<sup>97</sup> Barnes, *supra* note 4 at 443-444.

<sup>98</sup> The last case to mention the right appears to have been *McKie*, *supra* note 12 decided in 1947. Though this case was appealed, the public right to fish was not mentioned by the higher courts. The next case to mention it is from 1982 and it appears as obiter, *Chessie v JD Irving* (1982), 140 DLR (3d) 501, 1982 CarswellNB 42 [*Chessie* cited to Carswell]

<sup>99</sup> *Flewelling v Johnston*, 16 Alta LR 409, [1921] 2 WWR 374, 1921 CarswellAlta 28 (SCAD) [*Flewelling* cited to Carswell]; *In re Iverson and Greater Winnipeg Water District*, 31 Man R 98, [1921] 1 WWR 621, 1921 CarswellMan 15 [*Iverson* cited to Carswell].

changes to the common law was the reservation of the beds of navigable waters to the Crown.<sup>100</sup> This reservation was done to uphold the public's right of navigation and to protect their right of fishing in such waters.<sup>101</sup> The belief that the public right to fish extended to Canada's inland waters can be seen as far back as 1818 when William Claus, superintendent general of Indian affairs, told the Mississauga "that the rivers and forests were open to all and that the Mississaugas had an equal right to them."<sup>102</sup>

The initial sharing of the fisheries and other resources ignored Indigenous perspectives on whether they had retained any exclusive rights and it broke down when white settlement increased.<sup>103</sup> It also ignores that Indigenous Peoples may not have understood the fisheries as being open commons. The evidence suggests that Indigenous legal systems had (and still have) rules and limits about who could access what fisheries.<sup>104</sup> The story of how Indigenous Peoples were pushed out of the fishing industry, particularly in British Columbia, is well worn. Colonial officials and white settlers pushed for the fisheries to be opened and the public right to fish offered a powerful argument in support of such demands.<sup>105</sup> Such displacement was motivated, by and large, by the commercial value of the fisheries. In 1982, Aboriginal rights finally received explicit constitutional recognition under section 35 of the *Constitution Act 1982*.<sup>106</sup> Such

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<sup>100</sup> Sometimes this was done or confirmed by courts, other times by statute. For the latter see, e.g. *Bed of Navigable Waters Act* (1911) 1 Geo V, c 6. For the former see *Iverson*, *supra* note 82; *Flewelling*, *supra* note 99.

<sup>101</sup> *Iverson*, *supra* note 82 at para 81; *Keewatin Power Company v Kenora (Town)*, 123 OLR 237, 8 OWR 369, 1906 CarswellOnt 484 at paras 42, 56.

<sup>102</sup> Robert J Surtees, "Indian Land Cessions in Upper Canada, 1815-1830" in Ian AL Getty & Antoine S Lussier, eds, *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) 65 at 75.

<sup>103</sup> See, e.g. Kenny & Parenteau, *supra* note 5 at 191-194; Blair, "Settling the Fisheries", *supra* note 5 at 149.

<sup>104</sup> John Borrowes, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 *Am Indian L Rev* 37 at 59.

<sup>105</sup> Newell, *supra* note 5; for discussion of Ontario see, e.g., Blair, "Settling the Fisheries", *supra* note 5 at 103.

<sup>106</sup> I say 'Aboriginal' here as that is the term used by the *Constitution Act 1982*.

recognition allowed Indigenous Peoples to fight for increased access to Canadian fisheries. It was against this background that a cluster of cases referencing the public right to fish emerged.

After its thirty-five-year absence from the case law, the public right to fish returned in *obiter dicta* of Justice La Forest of the New Brunswick Court of Appeal (as he then was). He merely mentioned that the right had existed since “time immemorial” but that did not give it special importance.<sup>107</sup> Five years later, the Pacific Fishermen’s Defence Alliance (PFDA) attempted to rely on the public right to stop the Nisga’a’s land claims agreement. Justice Dubé of the Federal Court rejected the PFDA’s claim, noting that the government had “to determine, define, recognize and affirm whatever aboriginal rights existed. It may not ignore them under the guise of protecting so-called public fishing rights.”<sup>108</sup>

In 1990, the Supreme Court of Canada explicitly recognised an Aboriginal right to fish for food and recognised an Indigenous priority over the fisheries.<sup>109</sup> The Court’s decision in *Sparrow* affirmed that of the British Columbia Court of Appeal which had noted that the federal fisheries officials already had a practice of preferring the Indigenous food fishery.<sup>110</sup> The day after the Supreme Court decided *Sparrow*, the British Columbia Supreme Court issued its decision in *Mann v Canada* which arose out of an attempt by commercial fishermen to challenge the government’s practice of giving Indigenous fishers priority.<sup>111</sup> Again the commercial fishermen sought to rely on the public right to fish. The decision in *Mann* did not directly answer the question of public fishing given that the decision centred on a lack of jurisdiction but the

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<sup>107</sup> *Chessie*, *supra* note 98 at para 19.

<sup>108</sup> *Pacific Fishermen’s Defence Alliance v Canada (Minister of Indian Affairs)*, [1987] 3 FC 272, 9 FTR 86, 1987 CarswellNat 180 at para 22.

<sup>109</sup> *R v Sparrow*, [1990] 1 SCR 1075, [1990] 4 WWR 410 [*Sparrow*].

<sup>110</sup> For the lower court’s decision see, *R v Sparrow* (1986), 36 DLR (4th) 246, [1987] 2 WWR 577, 1986 CarswellBC412 at para 23.

<sup>111</sup> *Mann v Canada*, 1990 CarswellBC 1834 at para 2 (SC).

claimed common law right was found to raise “fundamental constitutional questions.”<sup>112</sup> A year later, Justice MacKinnon rejected the Crown’s attempt to strike out an amended statement of claim in this litigation.<sup>113</sup> *Mann* does not appear to have ever resulted in a decision on the points raised by the commercial fishermen. Nonetheless, it highlights how non-Indigenous fishers were attempting to use the public right to fish to protect and justify their access to Canada’s fisheries.

In 1993, the public right to fish appeared in the British Columbia Court of Appeal’s decision in *R v NTC Smokehouse*.<sup>114</sup> In *NTC Smokehouse BCCA*, the public right is mentioned once with the comment that it cannot be extinguished in tidal waters without federal legislation and no such legislation existed.<sup>115</sup> In *NTC Smokehouse BCCA*, the issue was whether or not the Sheshaht and Opetchesaht First Nations had exclusive rights over the Somass River as it flowed into the Port Alberni inlet. As the river was tidal, the claim of exclusivity failed.

Although the public right to fish did not appear in the Supreme Court’s 1996 decision in *NTC Smokehouse* at the Supreme Court, three other cases decided by the Court that same year explicitly or tacitly referenced the public right to fish. These cases were *R v Gladstone*, *R v Nikal*, and *R v Lewis*.<sup>116</sup> *Gladstone* was about a fishery in tidal waters to which the Heiltsuk claimed an exclusive right, or, more precisely, a right which would have amounted to exclusivity. In *Gladstone*, Chief Justice Lamer’s majority decision incorrectly claimed that the public right to fish had existed in the common law since the time of the Magna Carta. Chief Justice Lamer also thought that the constitutional entrenchment of Aboriginal rights could not,

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<sup>112</sup> *Ibid* at para 28.

<sup>113</sup> *Mann v Canada* 1991 CanLII 1962 (BCSC).

<sup>114</sup> *R v NTC Smokehouse* (1993), 80 BCLR (2d), [1995] 5 WWR 542, 1993 CarswellBC 149 (CA) [*NTC Smokehouse BCCA* cited to Carswell]

<sup>115</sup> *Ibid* at paras 116-117

<sup>116</sup> *Gladstone*, *supra* note 11; *R v Nikal*, [1996] 1 SCR 1013, [1996] 5 WWR 305 [*Nikal* cited to SCR]; *R v Lewis*, [1996] 1 SCR 921, [1996] 5 WWR 348 [*Lewis* cited to SCR]

did not, and was not meant to extinguish the public's common law rights.<sup>117</sup> The difficulty is not so much that the majority erred in their reference to the Magna Carta – this error is rife among common law judges – but that they struggled to conceptualize what an exclusive Indigenous fishery would look like and how it would interact with the potential rights which might yet be recognized of other Indigenous Peoples. In addition, an exclusive fishery would suggest an Indigenous right to fish for commerce, not just for food. Chief Justice Lamer seemed to think that the right to “participate in the commercial fishery” was a right held by Canadians and it was only by virtue of being *Canadians* that the Heiltsuk could participate in the commercial fishery.<sup>118</sup>

Although he makes the point somewhat awkwardly, what Chief Justice Lamer was trying to do was strike a balance between Indigenous rights and the desire of non-Indigenous people to access the fishery. Access to British Columbia's fisheries is politically sensitive,<sup>119</sup> and Chief Justice Lamer clearly felt the need to recognize that there had been extensive non-Indigenous reliance on BC's fisheries. The fact that the Heiltsuk may have exercised exclusive control over the fishery prior to British colonization of BC was not entirely irrelevant but it did not mean that the Heiltsuk could have an exclusive fishery under the common law, particularly not in tidal waters.

What *Nikal* and *Lewis* made clear is that an exclusive Indigenous fishery could not exist even where the English common law might have recognised one. The facts of *Nikal* and *Lewis* are similar in that both involved fisheries in rivers which were either contained within the

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<sup>117</sup> *Gladstone*, *supra* note 11 at 770-771.

<sup>118</sup> *Ibid*; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 61.

<sup>119</sup> See e.g. Harris, *Fish, Law, and Colonialism*, *supra* note 5 at 57, 214; *Landing Native Fisheries*, *supra* note 5 at 106.

boundaries of a reserve or formed the boundary of the reserve, respectively. Both First Nations involved attempted to rely on the common law rules about riparian ownership to assert their proprietary right over the fishery. Under the English common law, as both rivers in question were non-tidal, the First Nations could have owned at least part of the river bed and the fisheries as riparian owners, unless of course the fisheries or river bed had been expressly excluded in the grant of the reserve lands. In both cases the Indigenous fishers attempted to argue that their actions were legal because they were in accordance with band bylaws, even though their actions violated fisheries legislation. In both cases, however, the Supreme Court found that the common law's rules about river ownership had never applied in BC.

In *Nikal*, the majority claimed that Western Canadian courts had never followed the common law rule about ownership of riverbeds with respect to navigable rivers.<sup>120</sup> Citing to 1921 Appeal Court decisions from Manitoba and Alberta, the majority found that the local conditions of Western Canada had resulted in a modification of the common law rule so that the public had a right to fish in non-tidal navigable waters.<sup>121</sup> In addition, the majority also found that the Crown had not intended to grant an exclusive fishery to the Wet'suwet'en with respect to the Bulkley River.<sup>122</sup> The majority said that the Crown's policy "was to guarantee full public access to the fisheries, and to reject any exclusive claims to fishing grounds" including those of Indigenous Peoples.<sup>123</sup> Not surprisingly the majority referenced the Magna Carta to further support the claim that there could be no exclusive fishery;<sup>124</sup> the Crown may have attempted to

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<sup>120</sup> *Nikal*, *supra* note 116 at 1046-1048.

<sup>121</sup> *Ibid* at 1047-1050.

<sup>122</sup> *Ibid* at 1053-1054

<sup>123</sup> *Ibid* at 1031. Though see Harris, *Fish, Law, and Colonialism*, *supra* note 5 at 9; Harris, *Landing Native Fisheries*, *supra* note 5 at 104.

<sup>124</sup> *Nikal*, *supra* note 116 at 1031.

protect some of the fishing grounds for Indigenous Peoples but this was “far different from assigning exclusive title to those fishing grounds.”<sup>125</sup>

In contrast to *Nikal*, the river at issue in *Lewis* formed the boundary to the reserve and thus the question was whether or not the *ad medium filum aquae* rule applied. Here, Justice Iacobucci writing for the Court, distinguished the Privy Council’s decision *BC Fisheries* because it did not deal with a river being used as a boundary.<sup>126</sup> Justice Iacobucci also found that the *ad medium* presumption did not apply to navigable rivers in BC.<sup>127</sup> Yet it is clear from *BC Fisheries* that fisheries in British Columbia’s rivers, when in non-tidal rivers, had to be the subject of property. In *BC Fisheries* the Privy Council applied the same common law rules to navigable rivers as applied in England: they had to be owned by someone, even if that someone was the Crown.<sup>128</sup> The decision in *BC Fisheries* strongly suggests that the Crown’s ownership of such rivers would be the same as a private owner and there would be no automatic public right.

In *Lewis*, as the majority did in *Nikal*, Justice Iacobucci emphasized the historical evidence which showed that the Crown did not intend to include the fishery as part of the reserve. Nor did the Crown intend to “grant exclusive use of any public waters for the purpose of fishing.”<sup>129</sup> Here the phrasing “public waters” makes clear that BC’s rivers were always-already public, even before Indigenous land claims had been settled. The public right to fish was not

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<sup>125</sup> *Ibid* at 1036.

<sup>126</sup> *Lewis*, *supra* note 116 at 951-953. See also *ibid* at 935 (summarizing holdings of the lower courts on this question). For the Privy Council decision see, *Reference re British Columbia Fisheries*, [1913] UKPC 63, 5 WWR 878, 15 DLR 308, 1913 CarswellBC 125 [*BC Fisheries*].

<sup>127</sup> *Lewis*, *supra* note 116 at 951-953.

<sup>128</sup> *BC Fisheries*, *supra* note 126 at 16.

<sup>129</sup> *Lewis*, *supra* note 116 at 939. Curiously, in their discussion of Crown policy neither *Nikal* nor *Lewis* explores whether that policy was legal. A full exploration of the legal basis for Crown policy in BC is beyond the scope of this paper.

explicitly mentioned in *Lewis* but it is implicit in the court's refusal to find an exclusive Indigenous right to fish.

The Supreme Court's misinterpretation of *BC Fisheries* and its insistence that the common law of Canada was and is different than that of England point to the importance of BC's fisheries. When BC joined Confederation in 1871 one of the promises the federal government made was the "Protection and Encouragement of Fisheries."<sup>130</sup> This promise came roughly around the same time that officials in Ontario were turning away from their previous policy of granting or recognizing exclusive Indigenous fishing rights in order to grant settlers access to the fisheries.<sup>131</sup> Not surprisingly, the concern over access to the fisheries was primarily economic.<sup>132</sup>

The fact that nineteenth-century Canada, at least initially, lacked the infrastructure such as roads and railways linking the nation, made its rivers the *de facto* highways of the country. Understandably the need to keep such rivers open to navigation was essential for the development of the Canadian economy. Canada's *de facto* highway system of inland waters did not necessarily require as large a deviation from the common law as some Canadian courts ultimately made. Historically the public right of navigation was a question of regulation and did not require Crown ownership,<sup>133</sup> in fact many English rivers were subject to this right while the bed remained in private hands. Canada was perfectly capable of recognizing such a regulatory-proprietary divide in its inland waters; the Privy Council relied on this divide in the *Provincial*

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<sup>130</sup> *British Columbia Terms of Union*, (16 May 1871), schedule term 5 (d).

<sup>131</sup> Blair, "No Middle Ground", *supra* note 5 at 572.

<sup>132</sup> For Ontario see, *ibid.* For BC see Dorothee Schrieber, "'A Liberal and Paternal Spirit': Indian Agents and Native Fisheries in Canada" (2008) 55:1 *Ethnohistory* 87 at 101; Harris, *Fish, Law, and Colonialism*, *supra* note 5 at 14. This appears to have been the case across Canada and was also seen in New Brunswick, see, Kenny & Parenteau, *supra* note 5 at 191-194

<sup>133</sup> Daniel J Hulsebosch, "Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century" (2002) 23:3 *Cardozo L Rev* 1049 at 1072.

*Fisheries Reference* with respect to who controlled Canada's inland fisheries: the provinces owned them, the federal government regulated them.<sup>134</sup> Of course the question of whether or not Canada's inland fisheries were inherently public or inherently private was not settled by that case but nor was private ownership of the fisheries completely precluded as later courts seemed to think.

The real issue in *Nikal* and *Lewis* is not so much whether tidal, non-navigable waters were subject to the public right to fish, but which body had legislative authority over the fishery.<sup>135</sup> In both cases, the First Nations next to the rivers had issued their own bylaws about fishing which conflicted with the fishing regulations issued under the authority of the federal *Fisheries Act*.<sup>136</sup> The need for a uniform and centralized system of fisheries regulation is important in order to protect against overfishing.<sup>137</sup> Yet when the reserves in question were created at the end of the nineteenth century, overfishing was not the primary concern, rather it was the need to develop these fisheries and protect access for non-Indigenous people.<sup>138</sup>

The decisions in *Nikal* and *Lewis* relied on the rules about inland waters in order to nullify the possibility of First Nations having the all same rights as riparian owners under the English common law. The idea that Canada's non-tidal, navigable waters were inherently public was never explicitly adopted by the Privy Council; it was an idea promoted by various Canadian officials because it served to guarantee and justify non-Aboriginal access to valuable fisheries.<sup>139</sup>

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<sup>134</sup> *Reference re Provincial Fisheries*, [1898] AC 700, 78 LT 697, 1898 CarswellNat 41 at paras 10, 15.

<sup>135</sup> Justice Cory noted that this point was explicitly recognized by the British Columbia Court of Appeal in *Lewis*. See *Lewis*, *supra* note 116 at 934.

<sup>136</sup> *Fisheries Act*, RSC 1985, c F-14; *Nikal*, *supra* note 116 at 1020; *Lewis*, *supra* note 116 at 927 and 934 (noting the British Columbia Court of Appeal had stated that the real issue was legislative control).

<sup>137</sup> *Nikal*, *supra* note 116 at 1023.

<sup>138</sup> *Ibid* at 1032-1034. See also, Harris, *Landing Native Fisheries*, *supra* note 4.

<sup>139</sup> *Nikal*, *supra* note 116 at 1029-1037 (giving a summary of Crown policy which shows a desire to protect non-Aboriginal access).

If Indigenous Peoples were to continue have access to these fisheries, it would only be at the same level as non-Indigenous people, they were to have no special rights.<sup>140</sup> Although cloaked in the language of equality, this nineteenth-century policy aimed at assimilating Indigenous Peoples.

The *Constitution Act, 1982* may have explicitly recognized Indigenous rights but the cases of *Gladstone*, *Nikal* and *Lewis* made it clear that these rights do not and cannot include exclusive fisheries. These cases relied on the doubtful doctrine of the public right to fish and its questionable application to all navigable waters in Canada. Though it is clear that the Supreme Court was attempting to balance access to the fisheries and protect the overall integrity of Canada's fishing regulations, it was equally clear that Indigenous rights had to flow from the common law.<sup>141</sup> The existence of an exclusive Indigenous fishery, in contrast to the accepted theory of public access to all navigable waters, pointed to a pre-existing legal system.<sup>142</sup> Much as with *Johnston* the issue for these Indigenous fishing rights cases was that the claim made by Indigenous Peoples did not and *could not* originate from the Canadian common law. The claim was understood as contrary to the common law as adopted and adapted in British Columbia and much of the rest of Canada.

Canada's deviation from the common law of England did two things: first it differentiated Canada from England;<sup>143</sup> second, it served to preclude exclusive Indigenous fisheries. Both of these are tied with the assertion of a particular national identity and speak to

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<sup>140</sup> *Ibid.*

<sup>141</sup> Compare, Graham, *supra* note 96 at 95, 106.

<sup>142</sup> Indeed as Harris notes many BC First Nations initially grounded their claims to the fisheries in their own laws and legal traditions, Harris, *Fish, Law, and Colonialism*, *supra* note 5 at 7, 61-65; *Landing Native Fisheries*, *supra* note 5 at 195.

<sup>143</sup> See e.g. *Iverson*, *supra* note 99 at paras 71 , 85

the kind of nation that Canada wished to be. The Supreme Court's recognition of Indigenous priority of access to certain fisheries sought to reconcile the common law with section 35 of the Constitution or perhaps vice versa. Yet it ultimately fails to grapple with the colonial legacy of fisheries' access. There is no doubt that the common law could be, should be, and was altered as local conditions necessitated and one of the key differentiating features of Canada at the time of the common law's reception was the existence of Indigenous Peoples and their legal traditions. That the common law should have been adapted in western Canada in such a way which justified and continues to justify the dispossession of Indigenous Peoples is more than a little problematic, particularly when the original common law rule would have better protected their rights. The laws, policies, and jurisprudence about access to BC's fisheries were not based in sound legal doctrine; they were and to some extent remain, based on the will of the Canadian government.

## **V – Fishing Rights and Colonial Dispossession**

The challenge faced by the House of Lords in *Johnston* and the Supreme Court of Canada in the 1996 fishing rights cases invoked a *de jure* dispossession with *de facto* continued use. The use in both of these situations did not seem to be supported by the common law as received in Ireland or Canada. In Ireland the rule was that all non-tidal waters had to be privately owned and no public right could exist therein; at least, that was the rule according to the jurisprudence, legislation which suggested otherwise was ignored by the courts. In Canada, the rule was that all navigable waters were subject to the public rights of fishing and navigation, so that the *ad medium* rule did not apply to riparian owners. Both of these rules, however, emerged not out of longstanding legal doctrine consistently applied but out of political attempts to shape the law.

The very idea of the public right to fish arose in the seventeenth century as part of a nationalizing process, designed to justify a state's control over its territorial waters. As shown in section two the origins of the public right to fish are much more recent than many judges have since claimed. With these questionable origins in mind, this section examines what the courts in Ireland and Canada attempted to do in order to reconcile the extra-legal uses of the fisheries with the existing law and why they ultimately failed to address longstanding injustices.

In *Johnston* several Law Lords attempted to find a way to legally justify and protect the Lough Neagh fishermen. These ways included the pre-existence of their right to fish in the lough, the idea that the common law can recognize local customs even if they differ from the law, and the argument that the English Crown had never secured title to the Lough and so could not grant the fishing there to anyone. Yet such attempts ultimately failed and the majority of the Law Lords held that there could be no public right to fish in Lough Neagh. *Johnston* took place against the background of increasing pressure on the Lough Neagh eel fishery and the preservation of that valuable fishery played an important role in the litigation. So too did the protection of common law property rights play an important role in the decisions of the majority. Lord Macnaghten's observation that every title in Ulster was stolen coupled with his refusal to address such historic wrongs points to the old common law preference for longstanding possession.<sup>144</sup> In fact the ultimate ratio of *Johnston*, and one of the reasons for which it is cited by subsequent cases is its holding about what kind of possession is sufficient to cure defects in title.<sup>145</sup>

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<sup>144</sup> *Johnston*, *supra* note 44 at 580.

<sup>145</sup> *Ibid* at 583-590. For subsequent citations see e.g. *Halifax (City) v Dominion Atlantic Railway Co*, [1947] SCR 107 at 109-110, [1947] 1 DLR 431. *Johnston* was also recently referenced by the British Columbia Court of Appeal, *Mowatt v British Columbia*, 2016 BCCA 113 at paras 61 (quoting *Dominion Atlantic*'s reference to the same case), 77.

Although Earl Halsbury stated that sympathy for poor people was not a good reason to alter the law,<sup>146</sup> the others in the majority attempted to leave some room for the public fishery, albeit at a smaller scale. Lord Macnaghten said that the fishers should have stuck to line fishing and not used nets, a claim that Lord Robson then debunked by arguing that the use of nets was longstanding.<sup>147</sup> Lord Macnaghten also held that it was fine for the fishers to continue to fish for pollan.<sup>148</sup> Lord Dunedin seemed to agree that public fishing for pollan was acceptable, in part because it could never be profitable for a private owner.<sup>149</sup> The problem is that leaving the pollan fishery alone made it clear that the real issue was not that the public fishing was illegal but that it was bad for the respondents' commercial eel fishery. The room that the majority left for the fishers was that which was not valuable; the fishers could survive but they could not profit.

The Supreme Court of Canada did not work quite so hard to find a way to protect the Indigenous fishers in *Gladstone*, *Nikal* and *Lewis*. No justice advanced the argument that there was an exclusive Indigenous right to fish in these cases. The Supreme Court did recognize an Indigenous priority over access to the fisheries at issue, but this priority stemmed from their right to fish for *food* and did not extend to cover *profit*.<sup>150</sup> Such a divide between fishing for food and fishing for commercial value overlooks the fact that Indigenous Peoples might well need to trade some fish in order to afford the tools and materials necessary to preserve the rest of their catch.<sup>151</sup> This puts Indigenous fishers, particularly subsistence fishers in a bit of a bind though,

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<sup>146</sup> *Johnston*, *supra* note 44 at 569.

<sup>147</sup> *Ibid* at 581-582. For Robson LJ's comments see *ibid* at 613-614.

<sup>148</sup> *Ibid* at 590-91.

<sup>149</sup> *Ibid* at 597-98.

<sup>150</sup> For the origins of this divide see Harris, *Fish, Law, and Colonialism*, *supra* note 5 at 16.

<sup>151</sup> See e.g. *NTC Smokehouse BCCA*, *supra* note 114 at para 191 (noting that one Indigenous fisher, Agnes Sam, sold salmon to pay for "jars to can salmon and to buy little things for her grandchildren.") In *Gladstone* McLachlin J (as she then was) addressed the question of sustenance and thought that "the Aboriginal right to trade in herring spawn on kelp from the Bella Bella region is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities," *Gladstone*, *supra* note 11 at 816-817.

presumably, so long as they merely traded fish for the items they needed and did not receive cash, this would not count as ‘commerce’ as per *Gladstone*.<sup>152</sup> Granted, subsequent jurisprudence has left more room for the Indigenous right to fish to include *some* rights to sell, but this will not extend to an unlimited commercial fishery.<sup>153</sup> As in *Johnston*, the fishers claiming the right contrary to the common law might be allowed to fish but their profit will be limited, and their fishing must be in accordance with the national fisheries regime. Unlike *Johnston*, which examined the origins of private title to Lough Neagh, the Supreme Court of Canada never examined *where* the Crown got its title to the various fisheries from; a question all the more pressing for large parts of BC which remain formally unceded territory.<sup>154</sup>

Ultimately it would seem that the key to *Johnston* and the 1996 Indigenous fishing rights cases is not so much the question of what the law actually is but who gets access to what resources and under what law. Attempts to legally justify the decisions in the nineteenth-century Irish fishing rights cases and the late 1990s Canadian Indigenous fishing rights cases fail. There are compelling legal arguments as to why the outcome for both should have been different: either the existence of a statute protecting public fishing in inland waters; or jurisprudence supporting the idea that inland fisheries could be privately owned, to say nothing of constitutional protections for Indigenous rights. These alternative arguments would have also been the situation, by and large, prior to the reception of the English common law in both Ireland and Canada. The arrival of the English common law and settlers altered the legal landscape and, for

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<sup>152</sup> *Gladstone*, *supra* note 11 at 747.

<sup>153</sup> See e.g. *Ahousht Indian Band v Canada (AG)*, 2011 BCCA 237 at para 18, leave to appeal to SCC refused, 34387 (January 30, 2014). Compare Chiasson JA’s dissent in this case which argues that the Indigenous right to fish is limited to sustenance, *ibid* at para 75.

<sup>154</sup> At least for the common law, the issue of BC being unceded land should not upset any privately held title given the ratio of *Johnston*. This would not preclude a separate land claims process being set up which would address the loss of lands now privately owned, but such a process would require separate legislation.

whatever reason, in both Ireland and much of Canada the common law usurped any and all pre-existing legal systems and was deemed equally applicable to everyone.<sup>155</sup> It was never the case that Irish people or Indigenous Peoples were completely prohibited from the fishery in their respective countries, merely that they could only access it in the same ways as everyone else under the common law.

The problem in both of these examples is not merely a question of sharing the physical space but also a question of who gets to share in the benefits of the land: who owns which resources and why? In Ireland the answer was that fisheries were privately owned in non-tidal waters; but in Canada the answer is quite different, with public ownership (or assumed public ownership) being the norm not just with respect to fisheries but with respect to oil and gas as well.<sup>156</sup> The Canadian situation may seem to be more democratic but it cannot be more just if this public ownership fails to account for the continued existence of Indigenous rights and laws for accessing the fisheries.

The balancing done in *Johnston* and the recognition of Indigenous priority over BC's fisheries are judicial attempts to find a way for everyone to share in the fishery, insofar as the fishery allows. Yet this balancing falls short simply because it does not recognize the actual facts or the law. It is clear that the public had fished for eels since time immemorial in Lough Neagh and it is also clear that in many parts of Canada, Indigenous Peoples were granted an

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<sup>155</sup> This was not always the case with respect to settler-Aboriginal relations, at least in North America, see Katherine Hermes, "'Justice Will Be Done Us:?' Algonquin Demands for Reciprocity in the Courts of European Settlers" in Christopher L Tomlins & Bruce H Mann, eds, *The Many Legalities of Early America* (Chapel Hill: UNC Press, 2001) 123 (noting that initially Aboriginal people were able to keep their own legal traditions with minimal interference from European Colonizers). It was also not the case with Quebec which successfully fought to retain its own legal system.

<sup>156</sup> David H Breen, *Alberta's Petroleum Industry and the Conservation Board* (Edmonton: University of Alberta Press, 1993) at 4.

exclusive fishery and have continued to act as though they have an exclusive fishery.<sup>157</sup> The balancing is also problematic because it does not hear and cannot hear the echoes of pre-common law legal orders. Consequently, whether intentionally or not, the decisions examined in this paper repeat the dispossession and conquest of previous centuries.

Of course, overfishing must be guarded against and it seems likely that a centralized form of control is the best way to do this. Such centralized regulatory control does not require the fishery to be publicly owned; it does and will have an impact on the property rights of those who own fisheries but it will not necessarily abolish that property.<sup>158</sup> Nor would the recognition of an exclusive Indigenous fishery completely abolish the public right to fish – however doubtful the origins of the public right may be – public fisheries can and do coexist alongside private fisheries.<sup>159</sup> Centralized control could also potentially leave room for Indigenous law to shape access to the fisheries thought that would require the federal government to work with Indigenous people and take Indigenous laws seriously.

In Ireland, *Johnston* has proven to be the last word on whether or not public fishing rights could exist in non-tidal waters.<sup>160</sup> The 1996 cases of *Gladstone*, *Nikal* and *Lewis* do not have to be the last word with whether or not there can be an exclusive Indigenous fishery in Canada's non-tidal, navigable waters, or even in its tidal waters. The public right to fish is an accepted common law right, even if it is not as longstanding as the courts think, but the right is not

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<sup>157</sup>Perhaps the seminal discussion of the continued existence of Aboriginal peoples' jurisdiction over their traditional fisheries is, Kiera L Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Canadian Journal of Political Science 923. See also, Kenny & Parenteau, *supra* note 5; Walters, *supra* note 12; Blair, "No Middle Ground", *supra* note 5; Harris, *Fish, Law, and Colonialism*, *supra* note 5; *Landing Native Fisheries*, *supra* note 5.

<sup>158</sup> *Provincial Fisheries Reference*, *supra* note 134 at para 22 (here Lord Herschell seemed to sanction regulation which would amount to a "practical confiscation" as it would fall under Parliamentary sovereignty).

<sup>159</sup> See e.g. *McKie*, *supra* note 12.

<sup>160</sup> Although there have been several subsequent fishing rights cases, including at least one about Lough Neagh, all have followed *Johnston*. See e.g. *Toome Eel Fishery (Northern Ireland) v Cardwell*, [1963] NI 92, 1963 WL 21430 (HC).

absolute and it can be altered. There is no legal reason why exclusive Indigenous fisheries could not exist along sections of the Canadian coast or in inland waters, if anything this would be the recognition of a longstanding custom – something the common law has always been able to do.<sup>161</sup> In other words, it is open for the courts to recognize such a fishery or for such a fishery to be ‘granted.’<sup>162</sup> The recognition of Indigenous priority over the fisheries has created a new right under the common law but this is a relatively limited right and it is one which seeks to divide fishing for subsistence from fishing for commercial gain. As such Indigenous priority over the fisheries is an example of the ‘frozen rights’ problem which limits rights claims to what *was* integral to Indigenous cultures.<sup>163</sup>

## **VI – Conclusion**

The jurisprudence on the public right to fish offers a case study of the ways in which the law can be both a tool for resisting and enforcing colonialism and the role that the courts have to play in such battles. In Ireland and Canada, the courts understood the law as incapable of recognising the claims advanced. In the former, there simply could not be any public rights in inland waters; while in the latter, there simply had to be public rights in inland waters. The fact that there was a statute protecting public fishing rights in Ireland and that the law was not as consistent as the Canadian courts claimed, did not seem to matter if it even featured in the decisions. Insofar as both the Irish and Canadian cases tacitly invoked pre-common law legal systems, they did so in terms which the common law could have recognised as its own: statute, or the *ad medium*

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<sup>161</sup> Blair, “No Middle Ground”, *supra* note 5 at 590-591; *Goodman v Saltash* (1882), 7 App Cas 633.

<sup>162</sup> Granted is in inverted commas as parts of Canada, such as most of BC, are on unceded territory.

<sup>163</sup> For more on this see, John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22:1 Am Indian L Rev 37

presumption. In not recognising these claims, the courts reconfirmed the colonial dispossession which formed the backdrop to the litigation in both Ireland and Canada.

A comparison of the jurisprudence on fishing rights in both countries highlights the ways in which the common law can change to fit new conditions. Yet the changes that the common law courts have been willing to recognise are ones which fit within the broader pattern of colonial goals; of defending private property and protecting commerce. In Ireland the courts refused to extend the public right to fish to inland waters because that conflicted with the common law of England. In contrast, Canadian courts have consistently upheld the public's right to fish in inland waters and have refused to find an exclusive Indigenous right to fish, even where the common law as it applied in England would have found such an exclusive right. The courts' willingness to recognise 'deviations' from the English common law rule, have not been done to recognise the different conditions which existed in Ireland and Canada, but are often motivated by the outcome which best suited colonial interests.

**Appendix: Chronological Table of Public Fishing Rights Cases**

Case Name	Year	Country
<i>Gabbett v Clancy</i> (1845), [1844] 8 Ir L Rep 299 (QB)	1845	Ireland
<i>Allen v Donnelly</i> , [1856] 5 Ir Ch R 229	1856	Ireland
<i>Ashworth v Brown</i> (1860), 10 Ir Ch R 421	1860	Ireland
<i>Malcomson v O'Dea</i> (1863), 11 ER 1155, 10 HL Cas 593	1863	Ireland
<i>Johnston v Bloomfield</i> , [1867] IRCL 68	1867	Ireland
<i>Murphy v Ryan</i> , [1867] 2 IRCL 143 (CP)	1867	Ireland
<i>Chricton v Collery</i> (1870), 4 IRCL 508	1870	Ireland
<i>Wyse v Leahy</i> (1875), 9 IRCL 384	1875	Ireland
<i>Bristow v Cormican</i> (1878), 3 AC 641 (HL)	1878	Ireland
<i>Morrissey v Kilkenny</i> (1884), 14 IR 349	1884	Ireland
<i>Reference re Provincial Fisheries</i> , [1898] AC 700, 1898 CarswellNat 41	1898	Canada
<i>Keewatin Power Company v Kenora (Town)</i> , 123 OLR 237, 1906 CarswellOnt 484	1906	Canada
<i>O'Neill v Johnston</i> (1908), [1909] 1 IR 237 (CA)	1908	Ireland
<i>Ireland (AG) v Fleming</i> , [1911] 1 IR 323 (Chanc Div)	1911	Ireland
<i>Johnston v O'Neill</i> , [1911] AC 552	1911	Ireland
<i>Flewelling v Johnston</i> , 16 Alta LR 409, [1921] 2 WWR 374 (SC(AD))	1921	Canada
<i>In re Iverson and Greater Winnipeg Water District</i> , 31 Man R 98, [1921] 1 WWR 621	1921	Canada
<i>Reference re British Columbia Fisheries</i> , [1913] UKPC 63, 1913 CarswellBC 125	1921	Canada
<i>Toome Eel Fishery (Northern Ireland) v Cardwell</i> , [1963] NI 92, 1963 WL 21430 (HC)	1963	Ireland
<i>Chessie v JD Irving</i> (1982), 140 DLR (3d) 501, 1982 CarswellNB 42	1982	Canada
<i>Pacific Fishermen's Defence Alliance v Canada (Minister of Indian Affairs)</i> , [1987] 3 FC 272, 9 FTR 86, 1987 CarswellNat 180	1987	Canada
<i>Mann v Canada</i> , 1990 CarswellBC 1834	1990	Canada
<i>R v Sparrow</i> , [1990] 1 SCR 1075, [1990] 4 WWR 410	1990	Canada
<i>R v NTC Smokehouse</i> , (1993), 80 BCLR (2d), 1993 CarswellBC 149 (CA)	1993	Canada
<i>R v Gladstone</i> , [1996] 2 SCR 723, [1996] WWR 149	1996	Canada
<i>R v Lewis</i> , [1996] 1 SCR 921, [1996] 5 WWR 348	1996	Canada
<i>R v Nikal</i> , [1996] 1 SCR 1013, [1996] 5 WWR 305	1996	Canada
<i>Ahousaht Indian Band v Canada (AG)</i> , 2011 BCCA 237	2011	Canada