

ETHNOHISTORICAL AND LEGAL-ANTHROPOLOGICAL
RESEARCH REPORT:
ABORIGINAL AND TREATY RIGHTS TO FISHERIES

BY THE SAUGEEN OJIBWA

FOR

THE MINISTRY OF NATURAL RESOURCES
OF THE GOVERNMENT OF ONTARIO

NATIVE AFFAIRS UNIT
300 Water Street, P.O. Box 7000
Peterborough, Ontario K9J 8M5

LEGAL SERVICES BRANCH
99 Wellesley, 3rd Floor
Toronto, Ontario M7A 1W3

by

PRAXIS Research Associates
Orleans, Ontario

July 24, 1997

EXECUTIVE SUMMARY

This research report presents additional evidence relevant to R. v. Jones & Nadjiwon (1993). Primary and secondary data and analysis reveal that there were significant omissions from the Defence documentation that formed the exhibits in that case. These omissions mean that the complete context within which to evaluate the documentary evidence was not present. This is evident both in terms of the full context of the British perspective on fishing and fishing rights, and in terms of ethnohistorical and ethnographic material related to traditional Ojibwa culture and the pre-history of the Bruce Peninsula region. A careful examination of these additional sources demonstrates that interpretations alternative to those concluded by the Defence, may be reached regarding issues of commercial fishing rights by the Saugeen First Nation.

The report begins with detailed discussions of several methodological considerations involved in conducting this type of research. These issues include:

Limitations in primary and secondary data collection and analysis related to ethnohistorical research generally;

Problems of research bias when conducting ethnohistorical research for advocacy purposes;

Limitations of documentation pertaining specifically to the Saugeen Ojibwa, and;

Issues in the conduct of legal-anthropological research on the intent of treaties;

Analytical issues specific to Cape Croker and Saugeen fisheries.

The remainder of this report presents the detailed analysis of a large body of primary and secondary data, which in its entirety, is relevant to the following two broad, but crucial issues:

- **Aboriginal Rights:** The archaeological and early historical records indicate that Ojibwa did not make use of the fishing grounds of the Georgian Bay/Lake Huron region until late in the 17th century, well after European contact. Hence, the evidence may not adequately support an aboriginal right by the Saugeen Ojibwa First Nation to exclusive and/or commercial fisheries.
- **Treaty Rights:** Analysis of British and Colonial treaties with Aboriginal groups within the same time period as, and including the Bond Head Agreement of 1836. demonstrates that exclusive title to fisheries was not intended. This conclusion is supported by contemporaneous and subsequent fisheries policy in both pre-and post-Confederation Canada.

The analyses contained in this report follow social scientific standards, using criteria set out in the anthropological, economic-anthropological, ethnohistorical, and legal-anthropological literatures. Where legal criteria - as used by the Supreme Court of Canada, for example - differ significantly from academic criteria, these differences are highlighted, and an attempt is made to discuss the relevant evidence from both perspectives.

Following is an outline of the major points of argument and evidence for these related conclusions.

Aboriginal Rights to Exclusive and/or Commercial Fishing: The evidence does not demonstrate use by Saugeen Ojibwa of their claimed fishing grounds in the Georgian Bay / Bruce Peninsula area, either at or around the time of European contact (ca. 1615). Hence, an Aboriginal right to these fisheries is questionable.

This argument is based on the following points of evidence:

- Archaeological evidence indicates a continuity in Aboriginal 'occupation' of the Bruce Peninsula region, but this does not imply continuity in terms of a single Aboriginal group inhabiting the region. Specific to the present context, it does not imply continuous Ojibwa occupation. To the contrary, the available evidence strongly suggests that throughout the thousands of years prior to the arrival of Europeans, the Bruce Peninsula and Georgian Bay area was subject to habitation and occupation - in the sense of resource use - by different Aboriginal groups, organized in different types of societies, and having distinct cultures with different economic systems. The group most likely to have occupied the area at the time of contact, was the Ottawa.
- There exists a basic problem in determining the social identity of the various Aboriginal groups encountered by early Europeans, in that the historical record does not allow a definitive specification of the nature of group 'names' reported.

The indisputable evidence of occupation in the Bruce Peninsula by Ojibwa perhaps by the late-17th century but certainly by the 18th century, also indicates that this emergence was the result of a complex interrelation of social, cultural, political, and economic changes experienced by diverse Algonquian groups during the fur trade wars.

Goods regularly obtained by what were small, mobile, and autonomous Aboriginal societies were obtained by trade with their closest neighbours. The pre-contact trade between Aboriginal groups in what is now Ontario, can in pan be seen as a symbiosis between ecological zones.

- Pre-contact trade was a secondary economic activity in which Aboriginal groups had the opportunity to supplement their primary resources.

Pre-contact trade certainly included fish as one exchange item. However, evidence indicates that this did not occur at what could be considered/in academic terms, a commercial level. For example, resource harvesting throughout the pre-contact period will have been primarily motivated by and directed at domestic consumption, and only secondarily toward trade.

Post-contact trade continued to be subsistence-motivated. As well there is no historical record of trading posts established on or near the Bruce Peninsula until the 19th century.

The historical record and secondary sources clearly indicate that commercial fisheries in the Great Lakes did not begin until the early 19th century.

Historical and ethnographic evidence indicates that Ojibwa maintained a spiritual relationship with land and animals. The deification of objects implies that Ojibwa related to animals and the land not as 'owners', but rather as 'co-residents' of an environment in which access to its resources was negotiated at a spiritual level.

In the management of available resources, it is apparent that Ojibwa practised either band-based or family-based systems of territoriality, particularly with regard to winter hunting grounds. However, summer fishing grounds were excluded from this land tenure system.

The economic transactions between Aboriginal trappers and European fur traders reflect aspects of Aboriginal concepts of property which are contrary to European, or commercial concepts of ownership.

Overall, the evidence available on traditional Ojibwa concepts of property and territory demonstrates a progressive, and sometimes contradictory pattern of 'ownership', one which changed over time. It appears that as the fur-trade intensified territoriality rigidified.

- Pre- and Post-Contact Trade according to criteria used by the Supreme Court- With regard to recent decisions on the importance of establishing a continuity of practice historical evidence suggests that Ojibwa were involved in some degree of trade in foodstuffs - including fish products - from pre- to post-contact periods. While there is evidence, for example, that this trade was one of several economic activities that was incorporated into the Ojibwa seasonal cycle, pre-contact trade is best characterized as secondary to the overall traditional Ojibwa economy. The degree to which trade practices were nevertheless integral to the distinctive Ojibwa culture - as is important to legal criteria of Aboriginal rights to commercial activity - is unclear as far as the historical record is concerned, and may remain a matter for the courts to decide.

- Treaty Rights to Exclusive and/or Commercial Fishing: A close analysis of historical and legal documentation related to British and Colonial Canadian treaties with Aboriginal groups demonstrates that exclusive title to fisheries was not intended. The historical documentary evidence demonstrates that in both pre- and post-Confederation periods, the Crown had a clear and specific policy - rooted in its understanding of British common-law - refusing to grant in perpetuity, exclusive rights to fishing grounds. The Fishery Act passed in 1857, and subsequent amendments to the Act confirmed this view. Consistent with this policy, branches and departments responsible for Fisheries and for Indian Affairs maintained that exclusive fishing rights for Aboriginal people was outside the legal purview of their administrative powers. Because the available historical evidence does not support the view that the Crown intended to grant exclusive fisheries to Aboriginal groups as part of treaty agreements, it is questionable whether the Saugeen Ojibwa can claim treaty rights or title to fishing grounds.

This argument is based on the following major points of evidence:

A brief overview of the early British and colonial Canadian legal historical context relating to water and fisheries reveals that the value and principle of a 'public right to fish' was deeply held, and was reinforced by succeeding generations of law makers.

There are few explicit references to fishing and hunting rights in treaties signed before 1850. While definitive conclusions about the intentions of Crown as evidenced by the statements and actions of colonial negotiators are difficult to make, some important facts can be learned from the available evidence. In particular, the Crown demonstrated an unwillingness to grant exclusive fishing rights in navigable waters.

The Fishery Act of 1857 legislatively affirmed the public right of fishing, and contained no mention of Aboriginal fishing privileges. However, amendments to the Act in 1858, and an Order-in-Council in 1859 regarding licenses and leases, allowed for special leasing arrangements of traditional Aboriginal fishing grounds, whether adjacent to reserves or not.

Aboriginal groups continued to lobby for title to fishing grounds despite government intransigence on this issue. Despite lobbying efforts by both Aboriginal leaders and by non-Aboriginal supporters in favour of exclusive rights, one Aboriginal band at Manitoulin Island appears to have acknowledged that such rights would not be recognized, and agreed to a treaty in 1862 specifying that fishing rights were held in common with all Her Majesty's subjects.

Evidence indicates that at their highest bureaucratic level, both Marine & Fisheries and Indian Affairs were fairly consistent in adhering to a policy of non-exclusivity of fishing grounds under treaties. In practice, however, disputes arising out of the implementation of the Aboriginal fisheries leasing arrangement, created and maintained a long-standing tension between the two departments throughout the latter

half of the 19th century, and into the 20th century. By the end of the 19th century, it is apparent that the two Departments held different views regarding the finality of these arrangements: Indian Affairs claimed the arrangements were temporary and in need of legislative settlement, and; Marine & Fisheries claimed the matter had been legally settled before Confederation.

- Local-level problems between Aboriginal and non-Aboriginal fishermen were blamed on a series of factors related to: the treaty process; Fishery Overseers; Indian Agents; non-Aboriginal commercial fishermen, and; missionaries.
- While recent Supreme Court decisions dealing with fishing rights pertain to British Columbia, the general tenor of the Court's analysis and conclusions is not supportive of the position taken by the Defence in *R. v. Jones and Nadjiwon*. The Court has demonstrated a willingness to examine a broad range of historical material in order to discern what it considers to be the appropriate context for developing its analysis. This context reveals that the Crown had distinctly different views of fishing rights than did Aboriginal peoples and was not prepared to modify its policy on a public right to fisheries, a position with deep roots in English common-law and culture.

In addition to the major conclusions listed above, this report also reviews data pertaining to the socio-economic conditions of the Cape Croker reserve, from the 1850s to the present time. The following conclusion is drawn:

- Historically, Cape Croker is characterized as a community with a limited economic base. Commercial fishing played an intermittent role in the local economy, beginning in the mid-19th century, declining in the 1940s due to decimation of lake trout in Lake Huron, and being revived again in the late 1970s. While all income sources, including commercial fishing, are important to local economies with a limited resource base, it is quantitatively estimated here that the community-wide impact on Cape Croker's economy, as a result of Quotas introduced in 1984, was not as "devastating" as suggested by witnesses for the Defence in *R. v. Jones & Nadjiwon*.

Finally, a brief and purely descriptive review is conducted of research related to lake trout mortality rates and quotas as these relate to the commercial fishing industry at Cape Croker. The main conclusion in this regard is as follows:

- A purely descriptive review of research on marine mortality in Lake Huron indicates two general causal factors responsible for the near extinction of lake trout: over-fishing by commercial operations, and; the proliferation of the sea lamprey. Recent research articles indicate that the successful rehabilitation of lake trout will only be achieved by a combination of predator control, stocking, and fishing restrictions. It is concluded here that recent social science publications authored by expert witnesses for the Defence have omitted discussions of the role played by sea lamprey in the decimation of lake trout.