The One that Got Away: Fishery Reserves in Prince Edward Island

Rusty Bittermann
St. Thomas University

Margaret E. McCallum
University of New Brunswick

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Legal History Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
In 1767, the British government divided Prince Edward Island into sixty-seven townships of about 20,000 acres each, and allocated all but one of these to about one hundred people who had some claim on the Crown's munificence. Subsequently, Island governments complained of their disadvantaged state in comparison with other British North American colonies, which could raise revenue by selling rights to Crown land and resources. Their complaints, although not totally unjustified, did not acknowledge the extensive and valuable lands which the Crown retained as fishery reserves. Most of the township grants reserved rights to the first 500 feet of land above the high water mark, to facilitate pursuit of the fishery. Debates about the nature and extent of the reserves were part of the long struggle to end the concentration of land ownership in the hands of owners of large estates, and to convert leaseholds to freeholds. After the Island government finally acquired the power to purchase the large proprietary estates, for resale as small freeholds to tenants and settlers, it began to acquiesce in the occupiers' possession of the fishery reserves. Ultimately, it did not attempt to maintain its rights in these for the public.

En 1767, le gouvernement britannique a divisé l'Île-du-Prince-Édouard en 67 townships d'environ 20 000 acres chacun, et les a tous alloués, sauf un, à la centaine de personnes qui pouvaient avoir des prétentions à la générosité de l'État. Par la suite, les gouvernements de l'Île se sont plaints d'être désavantages par rapport à d'autres colonies britanniques en Amérique du Nord qui pouvaient tirer des revenus de la vente de terres et de ressources de la Couronne. Leurs plaintes, même si elles étaient en partie justifiées, ne prenaient pas en compte les terres vastes et de grande valeur que la Couronne avait conservées comme réserves de pêche. Pour la plupart des octrois de townships, les premiers 500 pieds (env. 150 mètres) au-dessus de la ligne des hautes eaux, pour favoriser l'exploitation des pêcheries. Les débats sur la nature et sur l'étendue des réserves ont fait partie de la longue lutte pour mettre fin à la concentration des titres de propriétés foncières entre les mains des grands propriétaires terriens et pour convertir les territoires cédés à bail en propriétés franches. Après que le gouvernement provincial eut enfin acquis le pouvoir d'acheter les grandes propriétés foncières pour les céder à bail en propriétés franches à des locataires et à des colons, il a commencé à accepter que les occupants étaient possesseurs des réserves de pêche. En bout de ligne, il n'a pas tenté de préserver ses droits dans ces terres au bénéfice du public.

* Department of History, St. Thomas University, Fredericton
** Faculty of Law, University of New Brunswick, Fredericton
The pre-Confederation history of Prince Edward Island is dominated by the land question—the struggle of tenants and proprietors over land distribution and land tenure. Central to the story is the assertion that the imperial government, in an "ill-advised exercise of the Royal prerogative," alienated all of the Island land in a single day. As the history came to be summarized, the British Crown acquired the Island from the French by the Treaty of Paris of 1763, divided it into sixty-seven large lots, called townships, of about 20,000 acres each, and allocated these to people with various claims on the Crown, leaving Prince Edward Island alone among the British North American colonies in having no Crown lands. As the summary continued, governments in other colonies could raise revenues by selling land and wood from Crown land, but Prince Edward Island could not; while other colonies had Crown lands that might be reserved for aboriginal peoples, Prince Edward Island did not. The lack of Crown lands was a grievance that could be aired in many contexts. For example, in 1865, when the imperial government reminded the colonial government that it would soon have to accept responsibility for paying the salary of the Island's lieutenant governor, the legislative council and assembly joined in a protest to the Queen, saying that it was "reasonable" to expect the imperial government to cover this expense, as "small compensation for the great wrong" done to the colony when, on the "26th August, 1767, the fee simple of the whole of the lands of [Prince Edward] Island, (except for about six thousand acres subsequently granted) was vested in one hundred and three persons." The alleged lack of Crown lands became a negotiating point in the Confederation discussions, and the new federal government created in 1867 legitimated the Island's assertion of its disadvantaged position in the terms finally accepted for the Island's joining Canada. The federal negotiators agreed to "endeavor to secure . . . fair compensation for

1. We use the modern name of the Island throughout this paper, even though the Island was given that name only in 1799. We gratefully acknowledge the assistance generously given by Donald Parker, and his staff at the Nova Scotia Crown Lands Record Centre, who helped us locate copies of most of the original Crown grants of Island townships.

2. Report of the Commissioners Appointed by the Queen to Inquire into the Differences Prevailing in Prince Edward Island relative to the Rights of Landowners and Tenants, with a View to a Settlement of the Same on Fair and Equitable Principles, 18 July 1861, Prince Edward Island Journals of the House of Assembly (PEI JHA), 1875, Appendix E, [53].

3. Thus, L.F.S. Upton notes that although Lieutenant Governor Fanning "received numerous appeals from Indians for lands of their own with access to water" during his administration (1786-1805) he lacked the resources to respond: "But where could the land be found? The government had none." L.F.S. Upton, "Indians and Islanders: The Micmacs in Colonial Prince Edward Island" (1976) 6:1 Acadiensis 21.

the loss of Crown lands” from the imperial government, as its eighteenth-century policies had left “the Government of the Island no lands.” Failing that, the Dominion government would assume the cost of compensating Prince Edward Island. Prince Edward Island thus carried its claim of having no Crown lands forward into the new constitutional context.

Contextualized on a grand scale and in terms of the Island’s situation in the late eighteenth century, the claim concerning the absence of Crown lands on the Island seems unassailable. The imperial government did indeed sanction the alienation of much of the Crown land on the Island in advance of settlement. There were, however, exceptions. The Crown retained one of the sixty-seven townships, the land-locked Township 66, about half the size of the others, as “Demesne Lands of the Crown.” As well, the Crown retained 15,300 acres, more or less, for county seats in each of the three counties planned for the Island. The Privy Council instructions for the township grants also provided for various reservations from the total acreage to be granted. All of the original township grants contained a reservation of land, already set apart or to be set apart, for building wharves, erecting fortifications, enclosing naval yards or laying out highways. This reservation did not specify either the total amount of land so reserved, or its location. The grants also reserved one hundred acres for a church and for glebe lands for a minister, and thirty acres for a school master, without specifying where. The Privy Council’s instructions further required that grants on the seashore contain a reservation of land to support the fishery; about two-thirds of the original township grants and all but one of the Crown grants of islands contained a fishery reserves clause. The Crown land situation on Prince Edward Island was thus not quite as simple as the “no Crown land” claim suggests.

In addition to the lands reserved from the original grants, the Crown acquired more land in the colonial period. In 1818, the Island government enlarged Crown land holdings by escheating two of the original township grants, Lots 15 and 55. Beginning in the 1850s, the Island government began to buy back some of the large proprietary estates; by the time of Confederation, the government had purchased 457,260 acres, for resale

5. Royal Gazette, Extraordinary (Charlottetown), 8 January 1870.
7. For an attempt at a complete list of the Island grants, see PEI JHA, 1839, Appendix B. Copies of all but six of the original township grants are available for public searching on microfilm at the Nova Scotia Crown Lands Record Centre, Halifax, and at the Prince Edward Island Public Archives and Record Office (PARO), RG 16, Land Registry Records, 1769-1872. The grants of islands are in the latter repository.
as small freeholds. The escheated lots were handled in the same way. With the establishment of Prince Edward Island as a colony separate from Nova Scotia, the Island administrators granted Crown lands that had not been allocated to grantees under the 1767 order in council—lots within the town reserves, islands not conveyed with the original township grants, and Township 66. In 1837, under the authority of legislation passed by the Island government in 1835, the glebe and school lands, totalling about 7,600 acres, were offered for sale by public auction. Thus, despite the claim of having no Crown lands, government officials were actively engaged in acquiring and distributing public lands.

This paper explores unresolved questions about one aspect of the complex story of the Island’s Crown lands in the colonial era—the reservation of land to be used for the pursuit of the fishery. European settlement in Prince Edward Island, as in the adjacent Maritime colonies, tended to begin along coasts and riverbanks and to move inland from there. The result in Nova Scotia and New Brunswick was that over time the Crown’s domain was increasingly limited to interior lands with little or no agricultural value. The Prince Edward Island situation was different, as most of the interior lands were allocated in the original township grants. The Crown retained rights, though, in the front lands along seacoasts, bays and rivers, including some of the most accessible and desirable lands on the Island. Imperial and local officials did not, however, actively assert these rights in the early colonial period and their existence slipped from public view.

The fishery reserves attracted public attention in the nineteenth century as growing tensions between settlers and landlords occasioned a close reading of all the terms of the original grants and, in time, the recognition that the Crown retained property rights in some of the Island’s most valuable agricultural lands. Demands that the Crown assert its rights provoked conflicting interpretations of the nature and extent of

9. PEI JHA, 1875, Appendix E, [6].
10. On early land-granting policies, see J. M. Bumsted, Land, Settlement, and Politics on Eighteenth-Century Prince Edward Island (Kingston and Montreal: McGill-Queen’s University Press, 1987). An Act to Authorize the Sale of Glebe and School Lands, S.P.E.I. 1835, c. 13, was passed with a suspending clause and so was not effective until confirmed by the imperial government; see PEI JHA, 1834, 29-30, 89-90, 93-94; 1835, 32, 129; 1837, 36; PARO, Acc. 1005, Report of Joint Committee of Assembly and Legislative Council, 6 April 1838.
11. We use the term Crown land to include all land owned by the Crown, whether it was retained by the Crown at the time of the original township grants or subsequently acquired by the Crown through escheat or purchase. Island officials tended to refer to re-acquired lands as public lands rather than Crown lands; the official with responsibility for managing these lands had the title of Commissioner of Public Lands.
the fishery reserve lands. Some of the disagreement centred on technical arguments about the legal meaning and consequences of the different language that various colonial administrators used to translate the Privy Council instructions into clauses in a Crown grant, and, as well, on the unexplained omission of a fishery reserve clause in some grants. These legal arguments mattered because the fishery reserves became a weapon in the struggle against the proprietorial system. The interests of landlords, small freeholders, tenants, officials and politicians, on the Island and at the imperial centre, were different, leading each, in varying degrees, to seek an interpretation of the Crown’s rights that would support the claims they were making in the political realm. Resolution of the land question on the Island through voluntary and compulsory purchase of landlords’ estates by the Island government in the Confederation era diminished public interest in attempts to clarify and assert the Crown’s property rights in coastal lands. Nonetheless, British law officers, leading members of the Island government, and the Island’s Supreme Court accepted that the Crown retained extensive rights in coastal property into the second half of the nineteenth century. The transfer of the Crown’s property rights in the fishery reserves to private individuals by grant was a nineteenth- and twentieth-century story, not an eighteenth-century one.

Two central concerns shaped imperial thinking on how best to manage the territory that Britain had acquired on the Nova Scotia frontier as a result of the Seven Years War and the Treaty of Paris of 1763. Imperial planners wished to reward military men who had served in the North American campaign, and to secure conquered lands by peopling them, and so the newly-acquired Island lands were allocated by lottery to people chosen on the basis of their service to the Crown and their willingness and ability to establish settlers on the Island. Indeed, the grants were conditional on meeting settlement terms. Imperial planners also sought to protect and promote the fishery in the Gulf of St. Lawrence and elsewhere. Thus, when the Lords of Trade authorized Samuel Holland to survey what would become Prince Edward Island and Cape Breton, they emphasized that “no measure should be left untried that may tend to promote and encourage the carrying on of this Fishery to the utmost extent it is capable of.” The Lords of Trade also wanted to prevent monopoly or individual advantage in the fishery. Even in their instructions for interim arrangements for Prince Edward Island and Cape Breton Island, the Lords of Trade highlighted the

13. Lords of Trade to Egremont, enclosure, 8 June 1763, and Dunk Halifax to Lords of Trade, 19 September 1763, reprinted in Adam Shortt and Arthur G. Doughty, eds., Documents Relating to the Constitutional History of Canada, Part 1 (Ottawa, 1918) at 142, 155; Acts of the Privy Council V, 26 August 1767 (and 13 April) at 60.
importance of guarding against any one establishment occupying too great an extent of coast, or securing "any undue preference."

Subsequently, the Privy Council recommended issuing grants that would reserve "a sufficient breadth on the Sea Coast from the High Water mark for the free Accommodation of all your Majesty's Subjects in carrying on the Fisheries...together with proper Accommodations for the Fishery of Sea Cows, which, we understand abound on some parts of the Coast of the said Island."\(^\text{14}\)

These ideas concerning how best to foster the fishery, and protect it from any who might wish to monopolize it, were reflected in the Privy Council's instructions in 1767 to the governor of Nova Scotia, of which Prince Edward Island was then a part, to issue grants for townships on Prince Edward Island, in accordance with the lot descriptions included in Samuel Holland's survey. The Privy Council provided the governor with a list of the grantee or grantees of each township, and stipulated the terms of the grants, but not the legal language for expressing them. In the case of the fishery reserves, the governor was instructed to include a "Clause in the Grant of each Township that abuts upon the Sea Shore, containing a reservation of Liberty to all His Majesty's Subjects in general of carrying on a free Fishery on the Coast of the said Township, and of erecting Stages and other necessary Buildings for the said Fishery within the Distance of five hundred Feet from high water mark." The governor was instructed to include these and other terms, including payment of quitrents, in grants to be issued on application from the proprietors who had been named as grantees by the Privy Council.\(^\text{15}\)

Even though the Privy Council set a deadline for grantees to apply for their grants, the process of issuing grants dragged on, under the supervision of different governors, and, indeed, within different jurisdictions. Michael Francklin, lieutenant governor of Nova Scotia, issued the first two grants from Halifax, in September 1768.\(^\text{16}\) Subsequently William Campbell,

\(^\text{14}\) Nova Scotia Archives and Record Management (NSARM) RG 1, vol. 31, doc. 24, microfilm 15229, Lords of Trade to Wilmot, 22 November 1763; James Munro, ed., *Acts of the Privy Council of England, Colonial Series, Vol. IV A.D. 1745-1766*, (London, 1911), 9 May 1764 at 658. John Stewart, in his *Account of Prince Edward Island in the Gulph of St. Lawrence* (London: Winchester & Son, 1806), 90-93, described the sea-cow as "found in great numbers on the north coast of this Island thirty years ago, but they have now become very scarce, and are seldom seen on shore." Stewart used the Latin name *trichecus manatus* for these creatures, but from the description of their tusks, size, habits, and geographic range, as well as the uses made of them when killed, he must have been referring to the Atlantic walrus (*odobenus rosmarus*).

\(^\text{15}\) *Acts of the Privy Council V*, 26 August 1767 at 59-60.

\(^\text{16}\) *Acts of the Privy Council V*, 29 June 1768 at 80-1; *London Gazette*, 2-5 July 1768; NSARM, RG 1, vol. 31, doc. 69, microfilm 15229, Hillsborough to Francklin, 26 February 1768; Grant of Lot 13 to John Pownall, 3 September 1768, Nova Scotia Crown Lands Record Centre, Book 6/766; Grant of Lot 63 to Hugh Palliser, 2 September 1768; *ibid.*, Book 6/768.
governor of Nova Scotia, issued grants in Halifax. When Prince Edward Island became a separate colony in 1769, its governor, Walter Patterson, was instructed to complete the granting process under the great seal of Prince Edward Island. As well, Patterson was to re-issue the Halifax grants, to reflect changes in the quitrent terms authorized by the imperial government as part of the agreement with proprietors who had requested a separate colony. Some proprietors applied to Patterson for new grants, but most did not. Patterson’s first grants are dated 5 October 1769 and indicate that they were issued in Charlottetown, although Patterson does not appear to have arrived on the Island until the summer of 1770, and the great seal of Prince Edward Island was not approved and sent to the Island until late October 1769.\footnote{Acts of the Privy Council V, 28 June 1769 at 81-85; see, for example, PARO, RG 16, Land Registry Records 1769-1872, Liber 1, Folio 1, copy of Grant of Township 2 to James Hunter and William Hunter.} Despite the instructions to Patterson, William Campbell continued to issue township grants from Halifax, using the same terms as before, until 1771. Nor was Patterson the only Island administrator to issue grants; the last township grants on record were made by the lieutenant governor, Edmund Fanning, in 1795.\footnote{PEI JHA, 1839, Appendix B. The last grant issued in Nova Scotia was for Lot 51, issued by Governor Campbell to John Pringle, on 19 August 1771, recorded in Nova Scotia Crown Lands Record Centre, Book 8/196. For the Fanning grants, see PARO, RG 16, Land Registry Records, 1769-1872, Liber 8, Folio 55-9.}

The granting process almost inevitably raised questions concerning the fishery reserves. Some township grants created the reserve in these words: “saving and reserving for the Disposal of His Majesty, His Heirs & Successors Five Hundred feet from High Water mark on the Coast of the Tract hereby granted, to erect Stages and other necessary Buildings for carrying on the Fishery,” while in others, the fishery reservation clause read: “Saving and Reserving a Liberty to all His Majesty’s subjects of carrying on a free fishery or fisheries on any Part or Parts of the Coast of said Township and of Erecting Stages and other necessary Buildings for the said Fishery or Fisheries within the distance of five hundred feet from High Water Mark.” Some of these latter grants replaced grants made in Nova Scotia that created a fishery reserve “for the disposal” of His Majesty. Grants of offshore islands not included in the original townships used the “liberty” language. At least fifteen of the township grants issued in Nova Scotia contained no fishery reserve clause, judging from the Crown’s official copies of the deeds. Only one of these was an inland lot. Colonial officials could not say definitely how many grants were in which category, as the combined Nova Scotia and Island records did not yield a complete
and consistent set of copies of original Crown grants of Island townships.\textsuperscript{19} Nor was there agreement on why the clause was missing in some grants, which language best expressed the intentions of the imperial planners, how the choice of language changed the rights of the parties, or where exactly the Crown might claim whatever rights it possessed. What were the limits of “Coast” in the context of Prince Edward Island’s complex shoreline, with its many inlets, bays and tidally-influenced rivers? And did the Crown retain the fee simple in those cases where a reservation of 500 feet above the high water mark “for the Disposal of His Majesty, His Heirs & Successors” had been stipulated, while transferring it to the proprietor in grants that reserved “a Liberty to all His Majesty’s subjects” of carrying on a free fishery and erecting necessary structures for that purpose on land within 500 feet of the high water mark? And did the Crown hold whatever interest it retained as a trustee for the public, to use only for the fishery, or could the Crown convert the lands to other, privatized, uses?

Initially, other questions about the terms of the original township grants captured the attention of Island administrators and settlers. In agreeing to the proprietors’ request to establish Prince Edward Island as a separate colony, with its own officials, courts and legislature, the imperial government warned that there would be no imperial grant to cover the salaries of government officers; these would have to come from the quitrents payable by the grantees of the township lots. Quitrents thus mattered to Island administrators, and they paid attention to any default in meeting these terms of the grants. Settlement terms mattered as well, as the proprietors’ failure to settle their grants with the required settlers

\textsuperscript{19} The original grants, written on large sheets of vellum and sealed with a large wax seal, were the property of the proprietors. A few of these have made their way into the collection of PARO. Despite repeated attempts, the Island legislature in the colonial period was unable to obtain imperial approval for legislation compelling the proprietors to register their title deeds on the Island. Thus in compiling information on the original grants, officials had to rely on copies held by the Crown. Some are missing and some may not be accurate. Some of the deeds in the Nova Scotia Crown Lands Record Centre were entered in duplicate, in different Record Books, but with differences between the two. See, for example, Grant of Lot 33 to Robert Worge, 31 December 1768, N.S. Crown Lands Records Centre, at Book 8/20 with a fishery reserve clause and at Book 9/131 without the clause. The original vellum deed is at PARO, Acc. 2517/17, and contains the fishery reserve clause.
within the required time might provide the basis for an escheat. In Nova Scotia and New Brunswick, similar large grants were revested in the Crown to provide lands to accommodate Loyalist refugees. In Prince Edward Island, the Loyalists were provided for in other ways, and in the eighteenth century, nothing came of the demands for an escheat of proprietorial lands. Nonetheless, non-fulfilment of the settlement conditions remained a significant issue, and Charles Douglass Smith, appointed as the Island’s lieutenant governor in 1812, used it to increase the resources available to the Crown, by escheating Lots 15 and 55. The fishery reserves, however, were of limited significance to state revenues or to the possibility of an escheat, and so these terms in the grants attracted little attention. The emergence of a significant fishery might have made them a public issue, but there was limited Island involvement in a commercial fishery in the colonial period. In consequence, settlement in the colony proceeded with little regard to the fishery reserves clauses. Although some proprietors included a term in their conveyances of leases or freeholds making them subject to the terms and conditions of the original Crown grants, generally proprietors collected rents and settlers cut timber, planted crops, and erected fences and buildings as if the fishery reserves did not exist.

This situation changed in the 1830s, when the rise of a protest movement seeking to end landlordism in the colony made the fishery reserves a contentious issue between landlords and tenants, and a focus of political activity in the legislature and the countryside. Initially the leaders of this movement hoped to change property relations through an escheat of township lands for breach of the settlement conditions of the grants, and so the movement came to be known as the Escheat movement. When escheat legislation was stymied by effective landlord lobbying, tenants

---

20. In the original township grants, the clause read: “And the said Grantee further binds and obliges himself, his Heirs and Assigns to Settle the said Lot or Township hereby granted within Ten Years from the Date hereof with Protestant Settlers, in the proportion of One Person to every Two Hundred Acres, said Protestant Settlers to be Introduced from such Parts of Europe as are not within His Majesty’s Dominions, or to be such Persons as have resided within His Majesty’s Dominions of America Two Years Antecedent to the Date hereof. And if the Said Grantee shall not Settle One Third of the said Lot and Township in the proportion aforesaid within four years from the Date hereof, then the whole of the said Lot or Township shall become forfeited to His Majesty His Heirs & Successors, and this Grant shall be void and of none Effect.” In the grant of Township 66, the reserved lot, the required population density was one person to every 400 acres. The grants of islands also contained a similar settlement clause, with the requirement either unspecified or varying from one person for every 200 acres, as in the township grants, to two persons for every fifty acres.


23. CO 226/82/82-3, Bannerman to Newcastle, 6 December 1853; PEI JHA, 1859, Appendix D, Proprietors' Petition, paragraphs 11-12.
increasingly turned their attention to the fishery reserves. After more than half a century as a British colony, much of the coast of the Island was under lease, and some portions had been sold to settlers as part of small freeholds. Close reading of the fishery reserves clauses suggested that landlords were collecting rents from lands that might not be theirs to lease and had sold lands they might not own. Thus, the fishery reserve clauses might provide a basis for resisting at least some landlords’ demands for rents or payments on freehold purchases, and holding proprietors accountable for money already collected that was not rightly theirs. As well, the clauses might provide the government with a basis for recovering the land from the proprietors. Whether these strategies would work depended in part on unresolved questions concerning the nature of the property rights in the fishery reserves and the meaning of the word “Coast” in the clauses creating them.

As the fishery reserves drew increasing attention over the course of the 1830s, the Island’s lieutenant governor, Charles FitzRoy, began to investigate these questions and alerted imperial authorities to their growing significance in the Island’s land conflict. FitzRoy sent the Colonial Office his research on the fishery reserve terms included in each of the township grants, along with a plan of the Island to show that some of the townships with fishery reserves had frontage only on estuaries and arms of the sea, but not on the exterior coast. The most striking example, Lot 51, contained a fishery reserve “for the disposal” of his Majesty, even though its only “coast” was along the Montague River. FitzRoy also asked for advice on how to respond to requests from tenants for leases of fishery reserve lands. He reported that as of January 1838, he had not granted leases of fishery reserves, as he believed the tenants’ applications were intended to undercut the proprietors’ property claims, and not motivated by an interest in the fishery. FitzRoy also noted that one of his predecessors as governor, Aretas Young, had raised questions about whether he had the power to grant leases of fishery reserves if the lands were reserved for all of his Majesty’s subjects. In the face of growing popular interest, the government needed a policy concerning these reserves, and FitzRoy advised the colonial secretary against “relinquishing those Reserves which

are in the Crown to the Proprietors,” because of the political consequences of what tenants would view as a provocative move.25

Shortly after FitzRoy began his research into the nature and extent of the fishery reserves, the Island assembly, guided by an Escheat party majority, began its own research. During the 1839 session, an assembly committee questioned the Island’s attorney general and solicitor general on the legal implications of the fishery reserves policy. The attorney general, Robert Hodgson, was an experienced land agent who had served many of the Island’s leading proprietors.26 The solicitor general, James Horsfield Peters, was the son-in-law and land agent of Samuel Cunard, whose land purchases were making him the largest proprietor on the Island.27 Both Hodgson and Peters interpreted wording that reserved 500 feet above the high water mark “for the disposal” of the Crown as reserving the land in the fishery reserves from the conveyance, so that the Crown retained ownership of the fee simple. With this wording, users would require a license from the Crown to enter the reserves. In contrast, wording that described the reserve as “a liberty” for British subjects to use the land extending 500 feet above the high water mark conveyed the legal estate to the grantee, subject to the “unfettered” privilege of British subjects to use the land to pursue the fishery. In these townships, proprietors were free to sell or lease lands included in the fishery reserve, subject to the public’s rights. In townships that had been granted without a fishery reserves clause, the Crown had no claim to a reservation.28

The combined research of the lieutenant governor and the assembly provided some tentative answers to key questions concerning the fishery reserves. With the exception of six townships for which no record of a grant could be found, FitzRoy’s research, which the assembly published, clarified the exact language of the fishery reserve clauses, and provided some figures on which townships had which clauses. Though he did not comment on this point, FitzRoy’s tabular accounting of fishery reserve clauses, and their absence in some cases, revealed that with the exception of the two landlocked townships (66 & 67), the grants without fishery reserves clauses were all issued by William Campbell in Halifax. FitzRoy counted twelve grants that described the reserve in terms of “a liberty,” all but one issued by Prince Edward Island’s first governor, Walter Patterson. The exception, the grant of Patterson’s own Lot 19, was issued in 1777

25. FitzRoy to Glenelg, 8 January 1838, reprinted in Royal Gazette, 5 February 1839; PEI JHA, 1839, Appendix B; CO 226/50/100-01, Young to Stanley, 25 May 1833.
28. PEI JHA, 1841, Appendix S.
by the Island's attorney general, Philip Callbeck, to replace the original grant issued to Patterson in Halifax in 1769. By FitzRoy's count, thirty-two township grants described the reserve as being "for the disposal" of the Crown — all issued in Nova Scotia or by Patterson's successor as governor, Edmund Fanning, previously the lieutenant governor of Nova Scotia.\(^{29}\)

The colonial secretary, Lord Glenelg, responded to FitzRoy's information concerning the fishery reserves and his request for guidance by noting important differences in the rights created by the two different fishery reserve clauses. In the townships where the reserves were described as "a liberty," Glenelg observed that "so far as the right has been reserved to the Queen's subjects collectively, [they] constitute a property over which the power of the Crown is exceedingly questionable." As well, Glenelg noted: "These lands would appear to have been dedicated to the use of the public for a special purpose, and that dedication of them seems to be irrevocable." As for the townships grants that reserved a 500-foot band "for the disposal" of His Majesty, Glenelg said these lands should "be considered as forming part of the Territorial Revenue"; he envisioned the state profiting from them by granting short term leases by auction. The "liberty" reserves he saw as open to all British subjects, with only those limits that might be necessary to prevent "improvident and injurious practices" that would interfere with the public's pursuit of the fishery.\(^{30}\)

Glenelg's despatch gave FitzRoy some freedom to shape policy, and FitzRoy advised the assembly that the most prudent approach would make the fishery reserves that were "for the disposal" of the Crown available generally for those engaged in the fishery, thus placing them on the same footing as the "liberty" reserves. The assembly bill, introduced by the Escheat majority, did more. It clarified the extent of the Crown's property right by defining the word "Coast" in the grants as extending along "all of

\(^{29}\) See PEI JHA, 1839, Appendix B. FitzRoy counted the following township grants as reserving 500 feet "for the disposal" of the Crown (1, 3, 4, 5, 7, 9, 13, 14, 18, 19, 22, 24, 30, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 50, 51, 54, 55, 56, 61, 62, 63, 64). There were fourteen townships granted subject to the "liberty" clause (2, 10, 15, 16, 19, 21, 23, 26, 34, 43, 45, 47, 53, 59). This includes the re-issued grants for 19 and 34, which, as FitzRoy noted, had been granted originally with the "disposal" clause, and then re-issued with the "liberty" clause. FitzRoy's count of twelve "liberty" reserves must have included Lot 26, which, as FitzRoy noted in a table but not in the text of his despatch, had been granted originally with no fishery reserve clause. It seems that FitzRoy counted Lot 26 both in the "liberty" list and in the list of township grants with no fishery reserve. FitzRoy identified fifteen other townships with coastline that had been granted with no fishery reserve clause (6, 11, 17, 27, 28, 29, 31, 32, 48, 49, 52, 57, 58, 60, 65). There was no fishery reserve clause in the grants of the two inland townships (66 and 67). FitzRoy's table listed six townships (8, 12, 20, 25, 44, 46) for which there was no grant on record, but he gave this figure as five in his text, an error that gave him a total of sixty-seven grants even though he counted Lot 26 twice. On Fanning, see J. M. Bumsted, "Edmund Fanning," DCB vol. V, 308-12.

\(^{30}\) Glenelg to FitzRoy, 10 May 1838, reprinted in Royal Gazette, 5 February 1839.
the Bays or narrow Arms of the Sea, or Inlets from the Sea, as far as sea or saltwater runs at highwater” and including the shores of “all and every Island or Islands belonging to this Island.” The bill also extinguished the proprietors’ claims for rent or payment for freehold property for land within the fishery reserves.\textsuperscript{31} This provision was necessary because, as Hodgson and Peters had explained to the assembly committee, those who had agreed to purchase land from a proprietor were bound by the contractual terms of payment, on the principle of “Caveat Emptor,” even if some of the land was part of Crown fishery reserves, unless the contract contained provisions allowing them to sue the vendor for breach of a warranty of good title. Leaseholders, too, would have to pay the full amount stipulated in the lease unless actually evicted from some portion of the leased land.\textsuperscript{32} The bill passed the assembly but the legislative council so altered it that the assembly was unwilling to proceed with the amended version.\textsuperscript{33} Nonetheless, the legislative debate flagged outstanding property questions concerning the reserves, and newspaper coverage of the assembly proceedings ensured discussion of them across the Island.

In the course of revising the fishery reserves bill passed by the assembly, the legislative council did its own research, asking questions of Hodgson and Peters that the assembly had not. Given this opportunity, both men offered a more limited definition of coast than that adopted in the assembly bill. Arguing that the word “coast” had to be given its “plain, ordinary and popular sense,” they invoked dictionaries, both general and technical, “common parlance” and the “best English lexicographers” to define coast as synonymous with seashore, thus excluding the shores of rivers, inlets, or brackish landlocked ponds with a small outlet to the sea, even if these were known locally as bays. Hodgson argued further, relying on the legal distinction between the high seas and waters governed by domestic law, that there would be a fishery reserve on bays that were mere indentations of the coast, open to the sea, but not on enclosed bays. Peters offered a different analysis, arguing that the imperial planners must have intended the word coast to include the shore of enclosed bays, as that is where fishermen were most likely to land their catch and secure their boats. Peters admitted that he had come to this conclusion reluctantly, as he was “well aware of the great mischief this reserve will occasion by

\textsuperscript{31} Royal Gazette, 5 March 1839, text of Assembly bill.  
\textsuperscript{32} PEI JHA, 1841, Appendix S; on the position of the leaseholder, see also the report of Justice Jarvis’s instructions to the jury in Selkirk v. Macneil, Royal Gazette, 14 January 1840.  
\textsuperscript{33} CO 226/58, Address of House of Assembly to FitzRoy, 25 April 1839; Royal Gazette, 30 April 1839.
subjecting the best cultivated parts of the most fertile farms to useless interruption.”

Without legislation on the fishery reserves, the evolving understanding of the nature and extent of the Crown’s rights in the fishery reserves emerged in large part from discussion of legal opinions such as these. In 1839, the Colonial Office also sought a legal opinion on the questions being aired in the Island assembly and legislative council. Crown law officers Sir Frederick Pollock and William Wightman differed from Hodgson and Peters in their interpretation of the clause that reserved 500 feet “for the disposal of His Majesty.” In their view, this wording transferred the Crown’s interest in “the soil” of the reserve to the grantee, subject to the Crown’s right to use the land for the purpose of the fishery, without any obligation to compensate the grantees for loss of any improvements. On another crucial issue, Pollock and Wightman read “Coast” as including not just the open sea coast but the shores of enclosed bays and of creeks and inlets of the sea.

In the fall of 1842, faced with continuing pressure from the Island assembly for fishery reserves legislation, and with differing legal opinions from colonial and imperial officials, the Colonial Office again asked for a legal opinion on the meaning and application of the fishery reserves clause. Frederick Pollock and William Follett submitted a report in December 1842 in which they asserted, with appropriate lawyerly qualifications, a different conclusion than that in the previous report. In their view, the grants containing a reservation of a “liberty” to British subjects transferred ownership of the fee simple to the grantee, but the grants that reserved a 500-foot band “for the disposal of His Majesty” would except the soil itself, leaving title in the Crown. They acknowledged, however, that looking at the grant as a whole, it was possible to find an intention that such wording transferred the fee simple subject to an easement to permit entry for the purposes of the fishery. Pollock and Follett thus agreed with the Island Attorney and Solicitor General that the Crown retained the fee simple in most of the fishery reserves; they reiterated this conclusion with fewer qualifications three months later, after reviewing copies of both a Patterson and a Campbell grant. The former, they said, did not reserve the soil; the latter did. Despite the existence of contradictory opinions on this question, twenty years later proprietors petitioning against a fishery reserves bill described the minority opinion repudiated by Pollock and

Follett as the “well understood interpretation” of the fishery reserves provisions. On the issue of the physical extent of the reserves, Pollock and Follett concurred with the earlier opinion prepared for the Colonial Office. Noting that the word “Coasts” had “no clearly defined legal meaning,” and that its meaning in any particular grant depended on the rest of the grant, as well as “the description and local situation of the premises,” they concluded that “generally it would be taken to apply to those places in which the sea ebbs and flows, and that it would extend therefore to those portions of the Bays, Harbours and Rivers in which there was an ebb and flow of the sea.”

Henry Vere Huntley, who succeeded FitzRoy as lieutenant governor in 1841, was troubled by the implications of such an expansive interpretation of the word “coast.” Huntley recognized that proprietors who collected rents from lands that the Crown had retained as a fishery reserve “can hardly have with justice exercised this right; if rent should be paid at all, the Crown certainly should receive it.” But in Huntley’s view, a definition of coast that included the banks of all tidally-influenced waters would extend the fishery reserves over a great deal of land that tenants used for agriculture, and for which the proprietors could justifiably charge rent. Drawing on the knowledge acquired as a career naval officer, Huntley offered arguments to support a more limited definition of coast, and suggested that the definition be made authoritative either through legislation or by appointing a commission from England to “define and declare the limits of the fishery reserves.” Without some remedial action, Huntley feared, proprietors would “imagine the reserves are only to be found upon the coasts of the Island washed by the sea” but tenants and Island politicians would claim reserve rights wherever “a tide ebbs and flows... where no boat could float, and where no fish, larger than a smelt, could swim.” With the limits of the reserves clearly defined, Huntley believed the government would be in a position to give notice that “in the future the Crown would exercise all the rights of Landlord over these at its pleasure.”

In the 1840s, as in the 1830s, legislation to clarify rights in the fishery reserves did not become law, and in the next decade, in the changed

36. PEI JHA, 1859, Appendix D, Proprietors' Petition.
political context of responsible government, the lieutenant governor, Alexander Bannerman, found himself searching in vain for a resolution of “this long unsettled and vexed question.”\textsuperscript{40} Appointed in 1850, Bannerman had the unenviable task of carrying out imperial instructions to govern in accordance with the wishes of the party with majority support in the assembly while protecting the proprietors from legislation infringing on their rights as owners of property.\textsuperscript{41} Specifically, legislation that might prejudice the property rights of subjects had to include a suspending clause, in accordance with instructions given to pre-responsible-government administrations,\textsuperscript{42} although imperial officials were privately warning proprietors that “sooner or later, the principle of free government in local affairs will have its way.”\textsuperscript{43} Nonetheless, as fishery reserves were part of the territorial revenue, the first administration after the grant of responsible government, led by Reformer George Coles, considered how to ensure that rents from the reserves went to the government, not to proprietors.\textsuperscript{44}

The proprietors regarded any government plans for the fishery reserves as an invasion of their property rights, and the imperial authorities seemed to agree. In 1857, when the Island government asked for advance approval of draft legislation that would enable tenants to refuse to pay rent for whatever proportion of their leasehold was included in a fishery reserve, the Colonial Office informed the lieutenant governor that the Island could not expect to obtain imperial sanction for any fishery reserves legislation until the proprietors had been given an opportunity to state their objections.\textsuperscript{45} A fishery reserves bill that the Island legislature passed in 1858, with a suspending clause, was rejected by the Colonial Office the following year.\textsuperscript{46} Indeed, so vigilant was the Colonial Office to protect the proprietors’ interests that in 1860, when the legislature enacted a bill “to authorize grants of the shores of this Island” with the usual suspending clause, the

\begin{itemize}
\item \textsuperscript{40} CO 226/82/82-3, Bannerman to Newcastle, 6 December 1853.
\item \textsuperscript{42} JHA PEI, 1851, Appendix F. Imperial officials reiterated this policy as late as 1870. See CO 226/106/120, Minute, Sir Frederick Rogers, on Hodgson to Granville, 3 May 1870.
\item \textsuperscript{43} CO 226/105/58, Minute on Hodgson to Granville, 15 February 1869.
\item \textsuperscript{44} Ian Ross Robertson, “George Coles,” \textit{DCB} Vol. X, 182-8; \textit{Royal Gazette}, 13 May 1851, “Draft address of house of assembly on Crown Lands and Fishery Reserves.”
\item \textsuperscript{45} See, for example, CO 226/89/175-84, The Humble Petition and Memorial of the Undersigned Proprietors of Land in Prince Edward Island [1858]; CO 226/82/86-90, Hensley to Bannerman, 29 November 1853; CO 226/88/400-07, Murdoch & Rogers to Merivale, 10 March 1857, and Minute.
\item \textsuperscript{46} \textit{Royal Gazette}, 23 April 1858, “An Act relating to the Fishery Reserves in this Island”; 19 April 1859, “Opening of the Legislature.”
\end{itemize}
imperial officials read the bill as an attempt to re-enact the rejected fishery reserves bill of 1858. George Dundas, the lieutenant governor, on being chastised for having sent the bill on without alerting the Colonial Office to the danger, explained that the bill dealt only with the foreshore, that is, land below the high water mark, and allowed the government to authorize construction of wharves, piers, and breakwaters.\footnote{47. CO 226/92/501-516, Murdoch to Rogers, 17 November 1860; 516-524, Minute. Two years later, after considerable correspondence on the subject, the imperial government approved a bill revised in accordance with colonial office instructions to ensure that owners of shore frontage would not be cut off from access to the water. See CO 226/93/15-19, Dundas to Newcastle, 1 February 1861, enclosing Brecken to Dundas, 31 January 1861; /20, draft response; CO 226/94/301-06, Murdoch to Elliot, 19 March 1861; /305-06, draft, Newcastle to Dundas, 10 April 1861; CO 226/97/269-73, Walcott to Elliot, 10 September 1862; /275-7, Newcastle to Dundas, 26 September 1862; Royal Gazette, 3 December 1862; S.P.E.I. 1862, c. 19, \textit{An Act to Authorize Grants of the Shores of this Island.}}

The Island government thus pursued two strategies simultaneously—legislation to declare its rights in the fishery reserves, while limiting those of the proprietors, and judicial support for actions to establish its control over reserves land. With the grant of responsible government, the Island government had obtained imperial approval for legislation authorizing it to purchase landlords' estates, for resale in small tracts to tenants or squatters occupying the land, or to settlers seeking small freeholds. The first acquisition, in 1854, was the 81,000-acre Worrell estate in northeastern Prince Edward Island.\footnote{48. \textit{Land Purchase Act}, S.P.E.I. 1853, c. 18; Ian Ross Robertson, "William Henry Pope," \textit{DCB} vol. X, 593-4; M. Brook Taylor, "Charles Worrell," \textit{DCB} vol. VIII, 954.} Excluded from the purchase were those properties that had already been conveyed as freeholds. Among these was a 900-acre property fronting on St. Peters Bay and the Morell River, owned by John Benjamin Cox. With title to the surrounding land, the government brought an action against Cox to recover possession of the fishery reserves on his property, claiming sixty-nine acres fronting on St. Peters Bay and another sixty-nine acres on the Morell River, in Townships 39 and 40. The original Crown grants for these townships were issued by Campbell as governor of Nova Scotia, and described the fishery reserves as "for the disposal of His Majesty."\footnote{49. Grant of Lots 38, 39, 41, 42 to Simon Fraser, James Abercrombie, John Campbell and John Mackdonnell, for themselves and the rest of the officers of the 78th Regiment, Nova Scotia Crown Lands Record Centre, Book 8/135; Grant of Lot 40 to George Spence, John Mill and George Burns, \textit{ibid.}, Book 8/106.}

Cox complained that he had been chosen as the defendant in the fishery reserves litigation because the Attorney General was "afraid that if he attacks the noble, rich and great proprietors, they may prove too strong for him," while the \textit{Islander} suggested that the government had chosen to proceed against someone who had made himself obnoxious by
his opposition to the party in power. Nevertheless, he did not win the sympathy of the jury, who found for the Crown on its claim both for river frontage and shore frontage, despite the judge’s instruction that the fishery reserves did not extend along the banks of rivers. Cox then applied for an order for a new trial. In his affidavit in support of the application, he asserted that the jury’s verdict “was given almost wholly from political prejudice and self-interested motives, and with no proper regard to the principles of law governing the case.” According to Cox, four or five of the six jurors were leaseholders whose farms included shore or river frontage. Such men were bound to be influenced by the long-standing popular view, encouraged “by various persons for political purposes” that, following confirmation of its title, the Crown would then grant the fishery reserves to the tenantry who occupied them, “in opposition to any claim or rights” of the proprietors. Indeed, Cox stated that one of the jurors asked him after the trial, “Well, Mr. Cox, have we done not a fine thing for the country today?” From the juror’s perspective, the decision was a victory over the proprietors, who would no longer be able to collect rent on fishery reserves land. The juror did not regard Cox as a proprietor, and so did not recognize that Cox might view things differently. From Cox’s perspective, the decision denied his title to about fifteen per cent of his 900 acres, and meant the loss of “the whole front of [his] farm.”

Cox’s application for a new trial was heard by two judges of the Supreme Court, James Horsfield Peters and Robert Hodgson, the same men who, while solicitor general and attorney general, had provided the assembly and legislative council with their views on the fishery reserves. In rendering their decision, the judges assumed that the Crown retained the fee simple in the fishery reserve, and focused on its physical limits. They ruled that the jury had erred in including the river frontage in its award, as “coast,” properly defined, included the inlets of the sea and bays such as St. Peters, but excluded frontage on rivers “on a diminutive scale,” such as the Morell, even though these rivers were subject to the ebb and flow of the tide for many miles upstream, and in some cases, almost to the source. As well, the judges ruled that the fishery reserves on St. Peters Bay were no longer the full sixty-nine acres claimed, but that acreage less what had been lost by erosion since the township grants had been issued. Conflicting testimony on the rate of erosion provided estimates ranging from one foot to four feet per year, yet the jury had failed to make any deduction for

50. Examiner, 12 March 1855, Cox to the Editor; Islander, 9 April 1858, editorial, “The Late Fishery Reserve Trial”; initially, the Island government was preparing to proceed against Thomas Caie “for dispossessing Our Lady the Queen of various of her fishery reserves” on Lot 1, but we have been unable to find any record of any such prosecution. See CO 226/82/86-90 and 104-5.
51. PARO, RG 6, Supreme Court Case Papers, The Queen. v. Cox, 1857, Affidavit of John B. Cox.
erosion from the acreage claimed by the Crown. The attorney general’s concession at trial that there should be a deduction spared the judges from addressing the complex question of determining property rights defined by changing water boundaries. In the result, the court ordered a new trial to resolve the erosion issue.52

The Supreme Court’s ruling provided a working definition of the Crown’s coastal lands, consistent with the definition that Huntley had urged on the Colonial Office in 1844. Fishery reserves, where created in the township grants, were a 500-foot band following the high water mark along the coast, and extending into bays and estuaries, but not along the banks of rivers. So how much land did the Crown hold in the 1850s as fishery reserves “for the disposal of His Majesty”? Without a precise measure of the length of the coast in the thirty-two or so townships granted with the “disposal” clause, and without precise figures on erosion or accretion of the coast on all those townships, we can offer only an educated guess. If we take the contemporary measure of the whole Island coast, divide it in half, and take an erosion rate of 2.5 feet, halfway between the extremes offered in evidence at the Cox trial, then the Crown held around 18,000 acres of fishery reserve land at the beginning of the responsible government era.53

There is no record of a new trial in The Queen v. Cox. The Island government, under the leadership of Conservative Edward Palmer, a proprietor and land agent who had been Cox’s lawyer, tried a new approach to the land question—one that had the backing of some of the

52. The Queen v. Cox, (1858) 1 Haszard and Warburton Reports 170; Peters’ Prince Edward Island Reports 122 (Sup. Ct.).

53. This estimate is probably low. We began with an estimated 1,600 kilometres of coastline, the figure on the Prince Edward Island government’s InfoPEI website, and assumed that the coast is distributed uniformly across the Island, or, alternatively, that the thirty-two or so townships with a fishery reserve expressed as being “for the disposal” of the Crown had the same proportion of coast as lots on the coast with no reserve or with a “liberty” reserve. This gave a figure of 30,000 acres of fishery reserve on townships with the “disposal” clause in the original grants. We assumed a rate of erosion higher than that suggested in testimony to the 1860 Land Commission (PEI JHA, 1875, Appendix E, [65]) and we assumed a uniform rate of erosion across a widely varying coast. On these assumptions, the loss to erosion across eighty years would be 12,000 acres: \((1,600 \text{ km. of coast} \times 2) \times 500\text{-feet} - (2.5 \text{ feet} \times 80 \text{ years})\). The calculation does not address the problem of overlapping 500-foot reserves on narrow points of land. The government’s coastline inventory figure for 2000, measured at the average high tide mark, and including the coast of bays, offshore islands, sand dunes and inlets, is 2871 kilometres. Using this number, which comes close to measuring what imperial Crown law officers Frederick Pollock, William Wightman and William Follett would have considered as coast, there would have been 54,000 acres of fishery reserves in townships with the “disposal” clause in the original grants. In 1861, the Examiner (2 September 1861) estimated that fishery reserves occupied 11,250 acres along the coast, and up to 50,000 acres if measured everywhere the tide went. Our thanks to John Neilson of the Harriet Irving Library, University of New Brunswick, and Sandra Jamieson, P.E.I. Dept. of Environment, Energy, and Forestry, for their assistance in obtaining coastline estimates.
most significant proprietors. In 1860, after extensive consultation, the imperial government appointed a tripartite commission to “inquire into the differences prevailing in Prince Edward Island relative to the rights of Landowners and Tenants, with a View to Settlement of the Same on Fair and Equitable Principles.” Both the extent and the nature of the reserves were among the questions referred to the commission, a step Huntley had suggested in the 1840s. Indeed, the chair of the commission, John Hamilton Gray of New Brunswick, was chosen in part because of the knowledge of the Island’s rivers that he had acquired as umpire between the fisheries commissioners of the United Kingdom and the United States of America appointed pursuant to the Reciprocity Treaty. The commissioners held public hearings on the Island in the fall of 1860, and hired their own researcher to continue gathering information over the next few months. The final report, written in June 1861 and released to the public the following February, proved unsatisfactory to the proprietors and the imperial government. The proprietors were unwilling to accept the commissioners’ recommendation for compulsory sale of the proprietors’ estates, at a negotiated price if possible, and if not, at a price to be determined by arbitration. The final resolution of the land question would ultimately proceed in just that way, but not for another decade and a half, after Prince Edward Island joined Confederation.

Regarding the fishery reserves, J. W. Ritchie, a Halifax lawyer appointed to represent the proprietors’ interests on the commission, raised the question of limits on the Crown’s power during testimony given by former premier George Coles. Ritchie suggested that it was “questionable that the government have a right to grant the fishery reserves for agricultural purposes.” Coles never adequately responded to Ritchie’s proposition, though he noted that the government was charged with preserving the reserves for the “public interest.” In his testimony, William Swabey, who had served as the Island’s commissioner of public lands, returned to Coles’s point about the public interest, arguing that the Crown had a duty to

55. Royal Gazette, 14 April 1859, “Legislative Summary”; CO 226/67/130-5, Huntley to Stanley, 10 May 1844. For an edited version of the Land Commission’s Proceedings and Report, see Ian Ross Robertson, ed., The Prince Edward Island Land Commission of 1860 (Fredericton: Acadiensis Press, 1988); the full Report without the Appendices or Proceedings is reproduced in PEI JHA, 1875, Appendix E. The Report and the Appendices in manuscript are in CO 226/95, 1A to 505.
The One that Got Away

protect the land so that it would be available if needed for the fishery in the future. This, he suggested, could be done by letting the land for agricultural use, but on short leases; limited agricultural use was not antithetical to the purpose of the reserve.\textsuperscript{59} In their final report, the commissioners concluded otherwise, without addressing Swabey's counterargument. The Crown would, they maintained, "be stopped from granting the reserve . . . for any other purpose than that of the fishery."\textsuperscript{60}

Despite this conclusion, the commissioners recommended exactly that: the Crown should, they argued, abandon any claim to a fishery reserve above the high water mark. The commissioners agreed with the majority legal opinion that in grants reserving land "for the disposal" of the Crown, the Crown had retained the fee simple title in the fishery reserve land, while grants using the "liberty" clause transferred the fee simple to the grantees, subject to an easement over the 500 feet above the high water mark. For both types of grants, however, the commissioners recommended that those who held the fee simple title to the land adjacent to the fishery reserve should be acknowledged as holding title down to the high water mark, as if the original grants had not contained a fishery reserve clause. In explaining their recommendation, the commissioners noted that with responsible government, the reserves had become "the property of the Local Government" and that, "if juries could be found to carry out the law," the Crown could enforce its rights over these parts of the "public domain." The commissioners noted, too, that "in the Island there is no Statute of Limitations against the Crown," so the Crown had not lost its rights through adverse possession. Yet to enforce the Crown's claims after so long a lapse of time would cause confusion and be unjust. As well the commissioners noted the problem of defining the physical limits of the fishery reserves, given the loss of land due to erosion.\textsuperscript{61}

The commissioners cited these practical and legal impediments to the Crown asserting rights to the fishery reserves, but the primary basis for their recommendation was their perception that the fishery reserves posed an obstacle to rational land use and did nothing to promote a

\textsuperscript{60} PEI JHA, 1875, Appendix E, [65].
\textsuperscript{61} PEI JHA, 1875, Appendix E, [64-6]. It seems that Prince Edward Island neither received nor adopted the Nullum Tempus Act, 9 Geo. III, c. 16 (1769), which barred the Crown from asserting claims to land against those who could prove that they, along with their predecessors in title, had enjoyed sixty years of undisturbed possession of the land. The current Island legislation, (Statute of Limitations, S.P.E.I., c. 5-7, in a section which dates from 1939 (The Limitations of Actions Act, S.P.E.I. 1939, c. 30), seems to have made the Crown subject to the same limitation period as any other litigant, through defining "action" as "any civil proceeding, including any civil proceeding by or against the Crown."
commercial fishery. Perhaps drawing on the expertise of Joseph Howe, the commissioner chosen by the Island government, the commissioners noted that the thriving commercial fishery in Nova Scotia, and to a lesser extent in New Brunswick, had developed without any fishery reserves.62

Behind the commissioners' readiness to condemn the fishery reserves as "an impolitic reservation" was their abiding faith in a new liberal order in which the state facilitated access to resources, on a competitive basis.63 This faith informs their other recommendations, as well as the fervent concluding paragraph to their report:

Should the general principles propounded in this report be accepted in the spirit which animates the Commissioners, and followed by practical legislation, the Colony will start forward with renewed energy, dating a new era from 1861. . . . The Legislature will no longer be distracted with efforts [to injure proprietors]. The cry of "tenant right" will cease to disguise the want of practical statesmanship, or to overawe the local administration. . . . Roads will be levelled, breakwaters built, the river beds will be dredged, and new fertilizers applied to a soil now annually drained of its vitality. Emigration will cease, and population, attracted to the wild lands, will enter upon their cultivation unembarrassed by the causes which perplexed the early settlers. . . . [E]nfranchised and disenthralled from the poisoned garments that enfold her, Prince Edward Island will yet become, what she ought to be, the Barbadoes of the St. Lawrence.64

Such confidence left no room to wonder whether abolishing the fishery reserves might contribute to the kind of monopolistic practices that the imperial government had hoped the reserves would prevent, or how liberalism might work for marginalized peoples, such as the Acadians and the Mi'kmaq, whose claims had been urged before the Land Commission.65

The imperial government did not implement the commissioners' report, but the Island government took steps concerning the fishery reserves that were consistent with the commissioners' recommendations.

64. PEI JHA, 1875, Appendix E, [71-2].
65. The Commission Report rejected the Acadian claims completely, but recommended that the Mi'kmaq should have their title confirmed to Lennox Island, so that "this very small portion of the wide territory their forefathers formerly owned should be left in undisturbed possession of this last remnant of the race." See PEI JHA, 1875, Appendix E, [71].
In 1864, after lengthy negotiations conducted through the Colonial Office, twelve proprietors, who together owned about 353,000 acres, consented to legislation known as the 15 Years Purchase Act. The title summarizes a feature of the bill that was also consistent with the recommendations of the Land Commission: the act provided that tenants of the consenting proprietors who held leases with an unexpired term of forty years or more had the right, exercisable within ten years, of purchasing their farms by paying fifteen times their annual rent, plus a limited portion of whatever arrears might be owing.  

In the four years following passage of the 15 Years Purchase Act, only forty-five tenants took advantage of its provisions, purchasing less than 3,000 acres in total. The greatest beneficiaries of the Act were not tenants, many of whom considered the terms of purchase too harsh, but the consenting proprietors, for by section 2 of the Act, the Crown gave up all claims to the fishery reserves on the townships to which the Act applied. By this provision, the Crown abandoned more than one-third of the fishery reserves described as being “for the disposal” of the Crown and nearly half of the “liberty” reserves. Subsequently, the Island government continued the process by issuing freehold grants of land in the townships that the government purchased from the proprietors, as if the fishery reserves did not exist.  

The history of the fishery reserves on Prince Edward Island reveals a more complex reality than is captured in the claim that the Island had no Crown lands. According to majority legal opinion on the subject, including that of the Island Supreme Court, the Crown retained ownership rights in fee simple in valuable coastal land in about half of the townships with coast; in another dozen or so, the grants contained a reservation of rights for the public. Arguments about who could, and should, enjoy the benefits of these rights were part of the larger struggle against proprietorial

66. An Act for Settling Differences Between Landlord and Tenant, and to enable Tenants of certain Townships to purchase the fee simple of their Farms, S.P.E.I. 1864, c. 2.
67. Robertson, ed., The Prince Edward Island Land Commission of 1860, xxiv; in the same period, the Island government directly purchased some of the estates covered by the Act, including the Cunard estate, at over 200,000 acres the largest on the Island. See PEI JHA, 1875, Appendix E, [6]; Ian Ross Robertson, The Tenant League of Prince Edward Island, 1864-1867 (Toronto: University of Toronto Press, 1996) at 259-60.
68. Section 2 of the Act provided that the recommendations of the Land Commission recited in the preamble to the Act concerning the fishery reserves “be and the same are hereby declared to be, binding in law and equity in respect of the estates of the Proprietors of Township Lands” who had agreed to be bound by the Act. The Preamble stated that “the Commissioners did find and declare... that the proprietors, their tenants or occupiers, should be quieted in their possession of certain parts of [their] lands called or known as the ‘Fishery Reserves’.” The standard form printed deed used to convey government lands did not provide for any reservation for the fishery.
control of the Island’s land and against imperial control of the Island government.

Yet in the second half of the nineteenth century, the Island government relinquished its rights both to the fishery reserves in which it held the fee simple and to the public rights reserved in granted lands. In 1864, with the 15 Years Purchase Act, the Island legislature extinguished Crown rights in the fishery reserves across proprietors’ estates comprising roughly one-quarter of the Island’s land. And in managing and granting public lands acquired by voluntary or compulsory purchase, the Island government acted as if it had no claim to the fishery reserves, and no responsibility to maintain any claim for the benefit of all Her Majesty’s subjects. Having eliminated proprietorial control over Island land, the Island government was no longer interested in wresting control of the fishery reserves from the new owners. And those who acquired freeholds on the former proprietary estates had no interest in raising the fishery reserves question. While recognizing that the Crown held the foreshore as a trustee for the public, the Island government, like the 1860 Land Commission, appears to have let slip away the question raised by the colonial secretary, Lord Glenelg, a quarter century earlier—whether the public “liberty” established on the coastal lands of townships with a fishery reserve was an irrevocable right that the Crown could not extinguish. Perhaps the question will become urgent again as environmentalists and others invoke the idea of the public trust to promote land stewardship and to compel governments to apply stewardship principles in managing public land and resources.70

69. CO 226/93/18-19, Brecken to Dundas, 1 February 1861.