R. *v.* Adams, [1996] 3 S.C.R. 101

**George Weldon Adams** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

and

**The Attorney General of Canada** *Intervener*

**Indexed as: R. *v.* Adams**

File No.: 23615.

1995: December 5; 1996: October 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for quebec

*Constitutional law -- Aboriginal rights -- Native fishing on traditional fishing area without a licence -- Licence only available on application for exercise of ministerial discretion -- Title alleged to be extinguished either by flooding or by treaty -- Whether aboriginal rights are inherently based in claims to land -- Whether claims to land are simply one manifestation of a broader-based concept of aboriginal rights --*

*Constitution Act, 1982, ss. 35(1), 52 -- Quebec Fishery Regulations, C.R.C., c. 852, ss. 4(1), 5(9) -- Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.*

Appellant, a Mohawk, was charged with fishing without a licence on Lake St. Francis, Quebec, contrary to s. 4(1) of the *Quebec Fishery Regulations*. A licence was unavailable under those regulations. A special licence issued under ministerial permit authorizing native persons to fish for food may have been available under s. 5(9) but appellant did not apply for such permission. The appellant was convicted at trial and this conviction was upheld on appeal to the Quebec Superior Court and on further appeal to the Quebec Court of Appeal. The constitutional question before this Court queried whether s. 4(1) of the *Quebec Fishery Regulations* was of no force or effect with respect to the appellant in virtue of s. 52 of the *Constitution Act, 1982* by reason of his aboriginal rights under s. 35 of the *Constitution Act, 1982*. The fundamental issue was whether aboriginal rights are inherently based in claims to land, or whether claims to land are simply one manifestation of a broader-based conception of aboriginal rights.

*Held*: The appeal should be allowed.

*Per* Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: Claims to land are simply one manifestation of a broader-based conception of aboriginal rights. While claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van*

*der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *R. v. Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.

Aboriginal rights cannot be inexorably linked to aboriginal title given that some aboriginal peoples were nomadic. Nomadic peoples survived through reliance on the land prior to contact with Europeans and many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those that the provision was intended to protect. Moreover, some aboriginal peoples varied the location of their settlements both before and after contact, but this in no way subtracts from the fact that, wherever they were settled, prior to contact some aboriginal peoples engaged in practices, customs or traditions on the land which were integral to their distinctive culture.

The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site-specific, with the result that it can be exercised only upon that specific tract of land. A site-specific hunting or fishing right does not, simply

because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

For the reasons developed in *R. v. Côté*, notwithstanding the fact that the French Crown may never have formally recognized any legal right of the Mohawks to fish in Lake St. Francis, the status of aboriginal rights under French colonial law does not defeat a claim under s. 35(1). The purpose of the entrenchment of s. 35(1) was to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans. If the exercise of such practices, customs and traditions effectively continued following contact in the absence of specific extinguishment, such practices, customs and traditions are entitled to constitutional recognition subject to the infringement and justification test outlined in *R. v. Sparrow* and *R. v. Gladstone*. The fact that a particular practice, custom or tradition continued following the arrival of Europeans, but in the absence of the formal gloss of legal recognition from the European colonizers, should not undermine the protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which received the legal approval of British and French colonizers.

The appellant demonstrated that fishing in Lake St. Francis was an element of a practice, custom or tradition integral to his people's distinctive culture and so met the *Van der Peet* test. First, the claim, which was supported by the evidence, was best characterized as one for the right to fish for food in Lake St. Francis. The appellant's essential challenge was to the prohibition of food fishing. Second, fishing for food in Lake St. Francis was a central, significant or defining feature of the Mohawk's distinctive

culture. This Court normally relies on the trial judge's findings in making this determination. Here, however, the trial judge, while coming to a clear legal determination, did not articulate a clear finding of fact. The evidence, therefore, was considered to arrive at the finding of fact that the Mohawks had exercised a right to fish for food in Lake St. Francis and the St. Lawrence River from before contact, which was established to be in 1603. The continuity required under the *Van der Peet* test between aboriginal practices, customs and traditions that existed prior to contact and a particular practice, custom or tradition that is integral to aboriginal communities today was demonstrated.

A "clear and plain intention" must be proved by the Crown to establish that an aboriginal right has been extinguished. Although flooding the fishing area in 1845 and the signing of a surrender agreement concerning land in 1888 may have demonstrated a clear and plain intention in the Crown to extinguish any aboriginal title to the lands of the fishing area, neither event demonstrated a clear and plain intention to extinguish the appellant's aboriginal right to fish for food in the fishing area.

The nature of the impact on the appellant's rights from the operation of the provision must be determined, taking into account the broader regulatory scheme of which the provision is a part. Here, the appellant's exercise of his aboriginal right to fish for food was only exercisable at the discretion of the Minister. This scheme did not meet the test for infringement laid down in *Sparrow*. The scheme imposed undue hardship on the appellant and interfered with his preferred means of exercising his rights. The appellant's aboriginal rights were also infringed in that the regulations did not provide sufficient direction to those exercising the discretion to fulfil the Crown's fiduciary duties to the aboriginal peoples.

This infringement was not justified. It did not (1) take place pursuant to a compelling and substantial objective and (2) was not consistent with the Crown's fiduciary obligation to aboriginal peoples. To be justifiable, limits on the aboriginal rights protected by s. 35(1) must be informed by the same purposes underlying their constitutional entrenchment: (1) recognition of the prior occupation of North America by aboriginal peoples, and (2) reconciliation of this prior occupation with the assertion of Crown sovereignty. Measures aimed at conservation can limit aboriginal rights because they clearly accord with both purposes. Those aimed at enhancing sports fishing *per se*, however, accord with neither purpose and therefore cannot be a compelling and substantial objective for the purposes of s. 35(1). Furthermore, the scheme failed to provide the requisite priority to the aboriginal right to fish for food and so did not meet the second part of the test for justification. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met.

*Per* L'Heureux-Dubé J.: The reasons of Lamer C.J. were generally agreed with subject to comments about the relationship between aboriginal rights and aboriginal title, and about the proper approach to the definition of the nature and extent of aboriginal rights.

Aboriginal rights can exist independently of aboriginal title. The doctrine of aboriginal rights is not solely concerned with land but covers all aboriginal interests arising out of the native peoples' historic occupation and use of ancestral lands. Aboriginal rights can be incidental to aboriginal title but need not be: they are severable from and can exist independently of aboriginal title. The strict conditions for recognition of aboriginal title at common law are not applicable when a claimant does not seek the broadest right to occupy and use a tract of land but rather only the limited right to fish

upon it. In such cases, the only requirements are those set out in *Van der Peet* regarding the recognition of an aboriginal right under s. 35(1) of the *Constitution Act, 1982*.

The nature and extent of aboriginal rights constitutionally protected under s. 35(1) should be determined by reference to the historic occupation and use of ancestral lands by the natives which is the rationale of the doctrine of aboriginal rights. Constitutionally recognized aboriginal practices, customs and traditions must be sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people and must have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time. A "frozen rights" approach focusing on aboriginal practices should not be adopted.

The Mohawks' aboriginal right to fish for food in Lake St. Francis is protected under s. 35(1) because they have fished for food on the tract of land in question in a manner sufficiently significant and fundamental to their culture and social organization for a substantial and continuous period of time. This right, which was not extinguished by a "clear and plain intention" of the Government, was infringed by the *Quebec Fishery Regulations*. The restriction was not justified under the *Sparrow* test.

**Cases Cited**

By Lamer C.J.

**Applied:** *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Slaight Communications Inc. v.*

*Davidson*, [1989] 1 S.C.R. 1038; *R. v. Swain*, [1991] 1 S.C.R. 933; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

By L'Heureux-Dubé J.

**Applied:** *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518.

**Statutes and Regulations Cited**

*Constitution Act, 1982*, ss. 35(1), 52.

*Quebec Fishery Regulations*, C.R.C., c. 852, ss. 4(1) [rep. & sub. SOR/82-320, s. 3], 5(9) [ad. SOR/81-660, s. 2(2)].

*Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1.

APPEAL from a judgment of the Quebec Court of Appeal, [1993] R.J.Q. 1011, [1993] 3 C.N.L.R. 98, 55 Q.A.C. 19, dismissing an appeal from a judgment of Paul J., [1985] 4 C.N.L.R. 39, dismissing an appeal from conviction by Barrette Ct. S.P.J., [1985] 4 C.N.L.R. 123. Appeal allowed.

*James O'Reilly*, *Peter W. Hutchins*, *Chantal Chatelain*, *Diane H. Soroka* and *Martha Montour*, for the appellant.

*René Morin* and *Pierre Lachance*, for the respondent.

*Jean-Marc Aubry*, Q.C., and *Richard Boivin*, for the intervener

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

THE CHIEF JUSTICE --

I. Introduction

1 This appeal and the appeal of *R. v. Côté*, [1996] 3 S.C.R. 139, have been released simultaneously and should be read together in light of the closely related issues raised by both cases.

2 The appellant, a Mohawk, was charged with the regulatory offence of fishing without a licence in Lake St. Francis in the St. Régis region of Quebec. He challenges his conviction on the basis that he was exercising an aboriginal right to fish as recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

3 In resolving this appeal and the appeal in *Côté*, this Court must answer the question of whether aboriginal rights are necessarily based in aboriginal title to land, so that the fundamental claim that must be made in any aboriginal rights case is to aboriginal title, or whether aboriginal title is instead one subset of the larger category of aboriginal rights, so that fishing and other aboriginal rights can exist independently of a claim to aboriginal title.

4 In the trilogy of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, this

Court had opportunity to consider the question of the scope of the aboriginal rights recognized and affirmed by s. 35(1). This case and *Côté* will require the application of the principles articulated in those cases to the question of the relationship between aboriginal title and the other aboriginal rights, particularly fishing rights, recognized and affirmed by s. 35(1). Furthermore, these two related appeals involve the claim of an aboriginal right to fish within the historical boundaries of New France. As such, this Court must answer the question of whether, under the principles of the *Van der Peet* trilogy, the constitutional protection of s. 35(1) extends to aboriginal practices, customs, and traditions which may not have achieved legal recognition under the colonial regime of New France prior to the transition to British sovereignty in 1763.

## II. Facts

5 The appellant, George Weldon Adams, is a Mohawk who lives on the St. Regis (Akwesasne) Reserve. He was charged with fishing for perch without a licence contrary to s. 4(1) of the *Quebec Fishery Regulations*, C.R.C., c. 852.

6 The facts giving rise to this charge are not in dispute. On May 7, 1982 the appellant was fishing for perch in the marshes of the southwest portion of Lake St. Francis, a part of the St. Lawrence River approximately 95 km west of Montreal and some 15 km from a current Akwesasne village (the "fishing area"). He was fishing during the spawning season and caught 300 pounds of perch with a seine net made of very fine mesh several hundred feet in length. The appellant was fishing without a licence; under the *Quebec Fishery Regulations* a licence was in fact unavailable, although under s. 5(9) of the Regulations he could have applied for an exercise of Ministerial discretion permitting him to fish for food. The appellant did not apply for such permission.

7 At the time at which the appellant was charged ss. 4(1) and 5(9) of the *Quebec Fishery Regulations* provided:

> 4. (1) Subject to subsections (2), (3), (7.1), (18), and (20), no person shall fish unless he is the holder of a licence described in Schedule III.
>
> 5....
>
> (9) The Minister may issue to an Indian or an Inuk, to a band of Indians or to an Inuit group, a special licence permitting, subject to the conditions set out therein, the catching of fish for food.

8 The appellant was convicted at trial. This conviction was upheld on appeal to the Quebec Superior Court and on further appeal to the Quebec Court of Appeal, Rothman J.A. dissenting.

III. Judgments Below

*Court of Sessions of the Peace*, [1985] 4 C.N.L.R. 123

9 At trial the appellant argued that in fishing for perch in Lake St. Francis he was acting pursuant to an aboriginal right existing either because of the aboriginal title of the Mohawks to the fishing area or because the Mohawks have a free-standing aboriginal right to fish in the fishing area. The appellant argued, further, that the *Quebec Fishery Regulations* constituted an unjustified infringement of this right and that, as such, they were in violation of s. 35(1) of the *Constitution Act, 1982* and must be held to be of no force or effect by virtue of the operation of s. 52 of the *Constitution Act, 1982*.

10 Barrette Ct. S.P.J. at p. 128 made the following findings of fact with regards to the presence of the Mohawks, whom he found to be one of the Five Nations of the Iroquois, in the region of the fishing area:

> [TRANSLATION] History teaches that the Iroquois as such occupied the two banks of the St. Lawrence between Montreal and Québec at the time of the arrival of Jacques Cartier. They were no longer there when Champlain arrived.
>
> The Mohawks, one of the five (5) Iroquois nations, frequented the territory situated on the banks of the St. Lawrence upstream of Montreal and they controlled the river towards the west around 1615, and this area comprised at least part of their hunting and fishing territory. They went to war in order to ensure the control of this area.
>
> ...
>
> One fact is certain. In 1754, a group of Mohawks from the Caughnawaga Reserve established a permanent settlement on the two banks of the St. Lawrence River and the islands situated on the extreme western end of Lake St. Francis. This occupation took place with the knowledge of the French authorities of the time, even if no title was granted to them. . . .

11 Barrette Ct. S.P.J. held that these facts regarding the Mohawks' historical presence in the area supported the appellant's position that his ancestors had aboriginal title to the lands in question. He held further, however, that this title was extinguished prior to 1982 and that, as such, it could not support an incidental aboriginal right to fish in the waters in the area.

12 Barrette Ct. S.P.J. noted that in 1845 the water level in the St. Lawrence River was raised owing to the construction of the Beauharnois canal. The result of this rise in the water level was that the lands of the fishing area were submerged. Barrette Ct. S.P.J. also noted that in 1888 an agreement for the cession of land, including the fishing area, was entered into by the Mohawks, although the Mohawks contested this cession immediately upon its taking effect and continue to dispute its validity. Barrette Ct. S.P.J. held that it was unnecessary to consider whether the 1888 cession was valid. He held at

p. 135 that the submersion of the land was sufficient to extinguish any aboriginal title to the disputed lands; upon submersion aboriginal title passed to the Crown because the beds of all navigable rivers are Crown lands:

> [TRANSLATION] This marsh is no longer part of Dundee Lands. And if the riparian landholders at one time could have asserted some right of ownership on some part, the Crown has long ago prescribed this right since the bed of a navigable river is part of the public domain.

13 Barrette Ct. S.P.J. went on, at pp. 139-40, to hold that while the Mohawks' aboriginal title to the lands had been extinguished, the facts were sufficient to demonstrate that the Mohawks had a free-standing aboriginal right to fish in Lake St. Francis:

> [TRANSLATION] In addition to their rights over their lands, the Mohawks have always had and have always exercised a right of hunting and fishing on the St. Lawrence River and in particular on Lake St. Francis in this part situated in the southwest area of this lake and where there are numerous islands and very vast marshes.
>
> ...
>
> This was a hunting and fishing territory situated in the immediate neighbourhood of their village and which is part of an easily identifiable whole.

Barrette Ct. S.P.J. held that this right had not been extinguished.

14 Barrette Ct. S.P.J. nonetheless convicted the appellant. He did so on the basis that aboriginal fishing rights are not absolute; Parliament retains the power to regulate aboriginal fishing rights (at p. 140):

> [TRANSLATION] This having been established, the exercise of this hunting and fishing right is not absolute. This right cannot be exercised without taking into account the laws which Parliament has legally adopted and applied in accordance with the Constitution.
>
> ...

> The court considers that it is reasonable, in a free and democratic society, that the aboriginal right of the Mohawks to fish on the St. Lawrence River and Lake St. Francis is subject to the regulation provided for in the *Quebec Fishery Regulations*.

He noted in support of this conclusion that the licence only affects the manner of the exercise of the appellant's aboriginal right.

*Superior Court*, [1985] 4 C.N.L.R. 39

15 The appellant was unsuccessful in his appeal to the Superior Court. Paul J. held that the appellant's ancestors had enjoyed aboriginal title to the fishing area under the terms of the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1, but that title was extinguished when, in 1888, the Mohawks ceded their title to the Crown. Further, Paul J. agreed at p. 49 with the trial judge that upon submersion of the lands in 1845 the aboriginal title held by the appellant's ancestors ceased to exist:

> [TRANSLATION] Consequently, since these lands were surrendered in 1888 and since the court must consider this surrender as legal and valid, the Indians of St. Regis cannot claim an aboriginal right to fish based on the "Indian title" which they had on Dundee Lands in front of Lake St. Francis (the place where the offence was committed by appellant). Such a usufruct, although it once existed, no longer exists since 1888 because of the surrender.
>
> Moreover, the weedbeds or marshes in front of these lands form part of Lake St. Francis, and are consequently part of the public domain from the shore and Indians cannot claim exclusive ownership or even any particular right whatsoever.

16 Paul J. agreed with Barrette Ct. S.P.J., however, that the Mohawks have an aboriginal right to fish in Lake St. Francis, although his reasons for holding that they do so differed from those of Barrette Ct. S.P.J. Paul J. did not rely specifically on the Mohawks' traditional exploitation of the St. Lawrence fishery, but rather on the general importance of fishing to the life and survival of the Mohawks (at p. 50):

> [TRANSLATION] I think that it cannot be doubted that Indians have an aboriginal right to hunt, fish and even to trap for their livelihood. Fishing, hunting and trapping constitute traditionally and historically their means of subsistence and livelihood in the country which they have inhabited since well before 1763. And since 1763, they have continued up to a certain point and depending upon the usages and customs to live "by hunting, trapping and fishing".

17 In the result, Paul J. affirmed the appellant's conviction on the basis that the existence of this aboriginal right did not abrogate Parliament's powers to regulate fishing, with the result that the *Quebec Fishery Regulations* could not be said to have infringed the appellant's aboriginal rights.

*Court of Appeal*, [1993] 3 C.N.L.R. 98

18 Beauregard J.A. accepted Barrette Ct. S.P.J.'s findings of fact but held, at p. 110, that those facts were insufficient to support the appellant's claim that the Mohawks had "original" aboriginal title to the fishing area. The facts demonstrated only that the Mohawks occasionally exploited the lands in question; they did not indicate a sufficient presence in the region to support a claim to original aboriginal title:

> [TRANSLATION] Even though, according to witness Bruce Trigger, the Mohawks fished and hunted in Lake Saint-François during the 17th and 18th centuries, I feel that those activities, which were carried out in an area two hundred miles away from their settlements south of Lake George, do not provide a sufficient basis to claim original Indian title, according to the criteria set forth in *Calder*.

Beauregard J.A. held, however, that s. 35(1) not only protects "original" aboriginal title to lands, of the sort contemplated by *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, but that s. 35(1) also protects both aboriginal title obtained as a concession for the ceding of original Indian title ("conceded" title) and title granted

informally by the French prior to the *Royal Proclamation of 1763*. On the facts of this case he was willing to assume that the lands of the fishing area were occupied by the Mohawks in 1763 so as to fall within the Proclamation and, if unextinguished, within s. 35(1). He did not definitively resolve this question, however, because he held that even if aboriginal title did flow from the Proclamation, it was extinguished prior to 1982 either by the act of flooding the lands in 1845 or by the 1888 cession agreement.

19 Beauregard J.A. held that aboriginal fishing rights could not, absent a treaty, exist where there was no aboriginal title to land. Given his position that the appellant had not demonstrated existing aboriginal title of the Mohawks to the lands where he was fishing, Beauregard J.A. held that no aboriginal right to fish in the fishing area could exist.

20 Beauregard J.A. did state that if an aboriginal right to fish in Lake St. Francis had been demonstrated then s. 4(1) would not be enforceable against the appellant. Because the section amounts to a complete denial of aboriginal rights to fish in the area, it contravenes s. 35(1). The possibility of the exercise of ministerial discretion does not compensate for this complete denial.

21 Proulx J.A. concurred with Beauregard J.A. but wrote reasons explaining why aboriginal rights cannot exist where there has been no demonstration of the existence of aboriginal title. In Proulx J.A.'s view at p. 121 [TRANSLATION] "Indian title engenders rights, which vary according to the customs, culture, way of life and particular characteristics of each group as the years go by"; absent the existence of treaty rights, or aboriginal title, to an area, an aboriginal group cannot claim aboriginal rights to fish or hunt in that area. Proulx J.A. went on to hold, however, that if the appellant had been successful in demonstrating the existence of an aboriginal right to fish in Lake St. Francis, s. 4(1) would have infringed that right because the evidence demonstrated that the policy

of the government (at p. 127) [TRANSLATION] "essentially favours sport fishing, to the detriment of those wanting to fish for food" and that (at p. 128) [TRANSLATION] "sport fishing is the major concern, after conservation".

22 Rothman J.A. dissented, holding that an aboriginal right to fish can exist independently of aboriginal title and that, in this case, the appellant had demonstrated that the Mohawks have an aboriginal right to fish in the fishing area. Rothman J.A. emphasized at p. 135 that in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court held that aboriginal rights are not traditional property rights but are rather "rights held by a collective and ... *in keeping with the culture and existence of that group*" (emphasis added by Rothman J.A.). He held, at pp. 135-36, that in order to demonstrate a right to fish in this case the appellant simply had to show that "their possession [of the fishing area] existed before the arrival of Europeans and their role and fishing activities in the area were substantial and of long duration. . . . We are not concerned here with a right of way but rather with a way of life". In this case, Rothman J.A. held at p. 136 that the facts as found by the trial judge were sufficient to demonstrate the existence of the Mohawks' aboriginal right to fish for food in Lake St. Francis:

> The evidence, as found by the trial judge and the Superior Court, establishes that, although the ancestors of the St. Regis Mohawks came originally from the region of Lake George in northern New York State, they hunted and fished in the upper St. Lawrence, including Lake St. Francis, from at least 1603 and probably before then. According to Professor Trigger, the Mohawks effectively occupied and controlled this territory -- they were unchallenged by other Indian tribes and the exercise of their ancestral rights was unopposed by the French. According to Professor Parent, they were here when the French arrived and had probably arrived between 1470 and 1490 A.D.

Rothman J.A. also held that there was nothing to suggest that, in 1888, when the Mohawks voluntarily ceded the lands of the fishing area, they also intended to give up their aboriginal rights to fish in the area.

23 Rothman J.A. held that the Mohawks' right to fish was violated by s. 4(1). There was no evidence that the government's regulatory scheme was aimed at conservation (the issuance of a permit did not depend on any concerns of conservation) and the scheme did not include any allocation system to ensure that Indians were given priority in the fishery.

## IV. Grounds of Appeal

24 Leave to appeal to this Court was granted on December 9, 1993 ([1993] 4 S.C.R. v). On June 22, 1994 the following constitutional question was stated:

> Is s. 4(1) of the *Quebec Fishery Regulations*, as they read on May 7, 1982, of no force or effect with respect to appellant in the circumstances of these proceedings in virtue of s. 52 of the *Constitution Act, 1982* by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by appellant?

The appellant appealed on the basis that the Court of Appeal erred in holding that aboriginal fishing rights could not exist where there was no aboriginal title; moreover, the appellant argued that on the facts of this case such a fishing right had been shown to exist. The appellant appealed on the further basis that the Court of Appeal erred in holding that the Mohawks did not have aboriginal title to the fishing area; the appellant argued that such title did exist and that an aboriginal right to fish arose as an incident to that title.

## V. Analysis

### *Aboriginal Title and Aboriginal Rights*

25 As was noted at the outset, the fundamental question to be answered in this case is as to whether a claim to an aboriginal right to fish must rest in a claim to aboriginal title to the area in which the fishing took place. In other words, this Court must determine whether aboriginal rights are inherently based in aboriginal title to the land, or whether claims to title to the land are simply one manifestation of a broader-based conception of aboriginal rights. The reasons of this Court in *Van der Peet* demonstrate that it is the latter characterization of the relationship between aboriginal rights and aboriginal title that is correct.

26 In *Van der Peet*, at para. 43, aboriginal rights were said to be best understood as:

> ... first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

From this basis the Court went on to hold, at para. 46, that aboriginal rights are identified through the following test:

> ... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

What this test, along with the conceptual basis which underlies it, indicates, is that while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities

which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.

27 To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.

28 Moreover, some aboriginal peoples varied the location of their settlements both before and after contact. The Mohawks are one such people; the facts accepted by the trial judge in this case demonstrate that the Mohawks did not settle exclusively in one location either before or after contact with Europeans. That this is the case may (although I take no position on this point) preclude the establishment of aboriginal title to the lands on which they settled; however, it in no way subtracts from the fact that, wherever they were settled before or after contact, prior to contact the Mohawks engaged

in practices, customs or traditions on the land which were integral to their distinctive culture.

29 Finally, I would note that the Court in *Van der Peet* did address itself to this question, holding at para. 74 that:

> Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights. [Emphasis in original.]

This analysis supports the position adopted here.

30 The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.

*Aboriginal Rights and The Colony of New France*

31 The respondent raises another important question concerning the doctrine of aboriginal rights under s. 35(1). The aboriginal right to fish claimed in this instance relates to a tract of territory, specifically Lake St. Francis, which falls within the boundaries of New France prior to 1763. The respondent argues that this claimed right should be rejected as the French colonial regime never legally recognized the existence of aboriginal title or any incident aboriginal right to fish prior to the commencement of British sovereignty.

32 Under the British law governing colonization, the Crown assumed ownership of newly discovered territories subject to an underlying interest of indigenous peoples in the occupation and use of such territories. By contrast, it is argued that under the French regime of colonization, the French monarch assumed full and complete ownership of all newly discovered territories upon discovery and symbolic possession. In the absence of a specific concession, colonists and aboriginal peoples were only entitled to enjoy the use of the land through the grace and charity of the French monarch, but not by any recognized legal right. As the respondent explained its position:

> [TRANSLATION] In establishing its sovereignty, France established a legal regime in which the ownership of land and fishing rights belonged to the Crown from the point of departure. This translated into a general presumption of non-concession from the public domain, a presumption which went against the recognition of any right outside the terms of the specific concession.
>
> . . .
>
> [In this instance, it] was only through the tolerance of the French Crown and the absence of a specific concession that the Mohawks were able to establish themselves in St. Regis in 1754. One therefore cannot contend that the Mohawks were conceded a right to fish in Lake St. Francis.

. . .

> The hypothesis of an informal concession must be equally rejected. The fishing activities which the Mohawks might have exercised on the relevant territory effectively represented a general public freedom to fish and not a more particular right recognized or conferred by the French authorities to the Mohawks of St. Regis.

In brief, the respondent submits that regardless of the actual fishing practices of the Mohawks both prior to and during the French regime, the French Crown never formally recognized any legal right of the Mohawks to fish in Lake St. Francis, and thus no such right was received into the common law with the transition to British sovereignty in 1763.

33 For the reasons developed in *Côté*, *supra*, this argument must be rejected. The respondent's characterization of the status of aboriginal rights under French colonial law is open to question, although, as in *Côté*, I need not decide the point here. What is important is that, as explained in *Van Der Peet*, *supra*, the purpose of the entrenchment of s. 35(1) was to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans. If the exercise of such practices, customs and traditions effectively continued following contact in the absence of specific extinguishment, such practices, customs and traditions are entitled to constitutional recognition subject to the infringement and justification test outlined in *Sparrow*, *supra*, and more recently, in *Gladstone*, *supra*. The fact that a particular practice, custom or tradition continued following the arrival of Europeans, but in the absence of the formal gloss of legal recognition from the European colonizers, should not undermine the protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal approval of British and French colonizers.

*The Van der Peet Test*

34 I now turn to the claim made by the appellant in this case. The appellant argues that the Mohawks have an aboriginal right to fish in Lake St. Francis. In order to succeed in this argument the appellant must demonstrate that, pursuant to the test laid out by this Court in *Van der Peet*, fishing in Lake St. Francis was "an element of a practice, custom or tradition integral to the distinctive culture" of the Mohawks. For the reasons given below, I am of the view that the appellant has satisfied this test. Given that this is so, it will be unnecessary to address the appellant's argument that the Mohawks have aboriginal title to the lands in the fishing area that gives rise to an incidental right to fish there. The appellant himself rests his claim primarily on the existence of a free-standing aboriginal right to fish in Lake St. Francis; since I accept this argument it is unnecessary to consider any subsidiary arguments the appellant makes.

35 The first stage in the application of the *Van der Peet* test requires the Court to determine the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been done pursuant to an aboriginal right, the government regulation argued to infringe the right, and the practice, custom or tradition relied upon to establish the right.

36 In this case, the appellant's claim is best characterized as a claim for the right to fish for food in Lake St. Francis. First, Francis Lickers, a biologist working for the St. Regis band, testified at trial that the [TRANSLATION] "Indians used perch <u>for food</u> in the winter and caught the fish during summer in order to store it for the winter" (emphasis added). There was no suggestion that the perch caught by the appellant was to be used for any purpose other than to meet the food requirements of the appellant and his band.

Second, the regulation under which the appellant was charged prohibits all fishing without a licence, whether for food or any other purpose; the only manner in which an Indian food fishing licence can be issued is by an act of ministerial discretion under s. 5(9) of the Regulations, a provision which the appellant challenges the constitutional validity of. The breadth of this scheme, and the limits it places on the aboriginal food fishery, support the characterization of the appellant's essential challenge as to the prohibition of food fishing. Finally, all the evidence presented at trial to support the appellant's claim was directed at demonstrating that it was a custom of the Mohawks to rely on the perch in Lake St. Francis for food. The evidence was not directed towards demonstrating any other use of the fish, for example use for ceremonial or commercial purposes.

37 The second stage of the *Van der Peet* analysis requires the Court to determine whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition which was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the aboriginal people in question. The Court must determine in this case, therefore, whether fishing for food in Lake St. Francis was a central, significant or defining feature of the distinctive culture of the Mohawks.

38 In making this determination the normal approach of this Court -- and that followed in *Van der Peet*, *N.T.C. Smokehouse Ltd.* and *Gladstone* -- is to rely on the findings of fact made by the trial judge and to assess whether those findings of fact (if not made as a result of a clear and palpable error) support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal people in question. In this case, however, in deciding that the appellant had an aboriginal right to fish in Lake St. Francis, the trial judge did not explicitly articulate the findings of fact on which this decision was based. With regards to this question the trial judge said at pp. 139-40:

> [TRANSLATION] In addition to their rights over their lands, the Mohawks have always had and have always exercised a right of hunting and fishing on the St. Lawrence River and in particular on Lake St. Francis in this part situated in the southwest area of this lake and where there are numerous islands and very vast marshes.
>
> This right of hunting and fishing is distinct from the right of use of their lands. This right can be exercised over vast territories and even over lands belonging to the Crown.
>
> ...
>
> This was a hunting and fishing territory situated in the immediate neighbourhood of their village and which is part of an easily identifiable whole.

The trial judge thus came to a clear legal conclusion on the issue of whether the Mohawks have an aboriginal right to fish in the area but did not articulate the facts on which this legal conclusion is based. In his consideration of the aboriginal title issue Barrette Ct. S.P.J. did articulate his findings of fact regarding the Mohawks' historical presence on the lands of the fishing area; however, these findings do not relate specifically to, and nor are they determinative of, the question of whether the reliance on fish in the St. Lawrence River and Lake St. Francis as a source of food was a significant part of the life of the Mohawks prior to contact.

39 That the trial judge did not make explicit findings of fact on this question is not surprising given that he was writing entirely without any guidance from this Court on the factual basis necessary for determining whether an aboriginal right under s. 35(1) has been demonstrated; however, that he did not do so means that in this appeal the Court cannot rely entirely on his reasons to determine whether the Mohawks have demonstrated the existence of an aboriginal right to fish for food in Lake St. Francis. That the Court cannot do so is not, however, fatal to the appeal. At trial testimony was received from two expert witnesses: Dr. Bruce Trigger for the appellant and Dr. Rénald Parent for the

respondent. The testimony of these two witnesses, despite being contradictory in some respects, provides a sufficient basis for this Court to review, and to uphold, the trial judge's conclusion that the Mohawks have a right to fish for food in Lake St. Francis.

40 Dr. Trigger, an anthropologist and a recognized expert on the history of the Huron people during the period prior to 1660, was the key expert witness for the appellant. In light of the shared linguistic heritage of the Hurons and the Mohawks, the similar economies of the two peoples, and the complex relationship between the Huron and the Mohawk (the precise nature of which we need not closely examine in this appeal), Trigger's studies closely followed the history of the Mohawks in the upper St. Lawrence Valley prior to 1660. In his examination in chief, Trigger testified that between 1000 and 1500 AD the upper St. Lawrence Valley encompassing Lake St. Francis was occupied by an Iroquois speaking people of a lineage distinct from that of the Mohawks and the other members of the Five Nations. In 1535, when Cartier travelled to Montreal, he encountered this people and documented their distinct language. At the time, the Mohawks generally occupied a region south of Montreal and extending into New York state, while the Hurons generally occupied a region west of Montreal extending into Ontario. However, Trigger testified that by 1600, this distinct Iroquois people had effectively become extinct, presumably as a result of war. Thus, at that time, there was no longer any significant Iroquois group which occupied the Lake St. Francis region.

41 Trigger continued, stating that by the time of Champlain's visit in 1603, the Mohawks had begun to assert a presence in upper St. Lawrence Valley, along with the Hurons and the Algonquins. Territorial frictions eventually resulted in war between the Mohawks and a coalition of the Hurons, Algonquins and Etchemins (the "Laurentian Coalition"), and the region effectively became a battleground. But during this conflict, the Mohawks were able to exert dominance over the territory between Lake Ontario and

Montreal. As Trigger testified, the records of French explorers indicate that the Hurons eventually refused to escort the explorers into the region as a result of the hostile Mohawk presence. Trigger stated his conclusions:

> [TRANSLATION] On the basis of the evidence which is available, I have little difficulty in concluding that the St. Lawrence River between Montreal and Lake Ontario was controlled by the Iroquois and mostly by the Mohawks from the year 1603 and possibly a number of years or possibly numerous decades during the course of the first half of the 17th century.

42 The respondent's key expert witness was Dr. Parent, a historian whose research activities covered aspects of the history of First Nations within New France during the 17th century. Parent generally accepted Trigger's characterization of the area as the subject of conflict between the Mohawks (whom he preferred to characterize as the "Agniers") and the Laurentian Coalition during the first part of the century. But he testified that in his interpretation of the documentary evidence, the Laurentian Coalition was generally successful between 1603 and 1628 in keeping the Five Nations of the Iroquois out of the upper St. Lawrence Valley. In his view, it was only during the period between 1632 and 1653, that the Mohawks were able to gain the military initiative and to assert control over the area. However, he reiterated that during this period the region was best characterized as a war zone.

43 With regards to the specific activities of the Mohawks within the upper St. Lawrence Valley during the first half of the 17th century, Trigger testified that the Mohawks and the Unidas (of the Five Nations) had used the region as a hunting and fishing ground, and that this usage was recognized by other aboriginal peoples, including members of the Laurentian Coalition. Parent, on the other hand, concluded that the Mohawks used the territory in question solely for war purposes, passing through the land on their way to raiding villages north and east of the river. The Mohawks hunted and

fished during these campaigns, but the lands did not constitute hunting and fishing grounds for them.

44 The general picture presented by the testimony of Parent and Trigger, when considered together, is that prior to 1603 it is unclear which aboriginal peoples made use of the St. Lawrence Valley, although there is evidence to suggest that at that time the lands were occupied in part by a group of Iroquois unrelated to the Mohawks. From 1603 to the 1650s the area was the subject of conflict between various aboriginal peoples, including the Mohawks. During this period the Mohawks clearly fished for food in the St. Lawrence River, either because the Mohawks exercised military control over the region and adopted the territory as fishing and hunting grounds, or because the Mohawks conducted military campaigns in the region during which they were required to rely on the fish in the St. Lawrence River and Lake St. Francis for sustenance.

45 This general picture, regardless of the uncertainty which arises because of the witnesses' conflicting characterizations of the Mohawks' control and use over this area from 1603 to 1632, supports the trial judge's conclusion that the Mohawks have an aboriginal right to fish for food in Lake St. Francis. Either because reliance on the fish in the St. Lawrence River for food was a necessary part of their campaigns of war, or because the lands of this area constituted Mohawk hunting and fishing grounds, the evidence presented at trial demonstrates that fishing for food in the St. Lawrence River and, in particular, in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain into the area. The fish were not significant to the Mohawks for social or ceremonial reasons; however, they were an important and significant source of subsistence for the Mohawks.

46 This conclusion is sufficient to satisfy the *Van der Peet* test. The arrival of Samuel de Champlain in 1603, and the consequent establishment of effective control by the French over what would become New France, is the time which can most accurately be identified as "contact" for the purposes of the *Van der Peet* test. The evidence presented clearly demonstrates that from that time fishing for food in the fishing area was a significant part of the Mohawks' life. Further, where there is evidence that at the point of contact a practice was a significant part of a group's culture (in this case fishing for food in the fishing area) then the aboriginal group will have demonstrated that the practice was a significant part of the aboriginal group's culture prior to contact. No aboriginal group will ever be able to provide conclusive evidence of what took place prior to contact (and here the witnesses agree that it is unclear which aboriginal peoples were fishing in the fishing area prior to 1603); evidence that at contact a custom was a significant part of their distinctive culture should be sufficient to demonstrate that prior to contact that custom was also a significant part of their distinctive culture. The appellant here has clearly demonstrated that at the time of contact fishing in the St. Lawrence River and Lake St. Francis for food was a significant part of the life of the Mohawks. This is sufficient to demonstrate that it was so prior to contact.

47 As part of the second stage of the *Van der Peet* analysis, there must be "continuity" between aboriginal practices, customs and traditions that existed prior to contact and a particular practice, custom or tradition that is integral to aboriginal communities today: *Van der Peet, supra*, at para. 63; *Gladstone, supra*, at para. 28. This part of the *Van der Peet* test has been met as well. The evidence of numerous witnesses at the trial proves the existence of continuity. Francis Henry Lickers, a biologist, testified that according to the Mohawk, the practice of fishing had been going on for years and years. Reverend Thomas Eagan, a Jesuit Pastor at St. Regis, testified that before the establishment of the village of Akwesasne and while living at Akwesasne, the Mohawks

used the area for hunting and fishing. This was the way of life of their ancestors, and these practices continued into the present. Chief Lawrence Francis testified that hunting and fishing have been practised by the Mohawks since time immemorial, and that the practice of fishing has not been interrupted. It was no doubt this testimony which led Barrette Ct. S.P.J. to make the finding of fact at trial that the Mohawks had and had always exercised a right to fish on the St. Lawrence River and in particular on Lake St. Francis.

*Extinguishment*

48 Having accepted the appellant's claim that he was exercising an aboriginal right to fish in the fishing area, the Court must now consider whether, prior to 1982, that right was extinguished. In *Sparrow*, *supra*, the Court held that in order for an aboriginal right to be extinguished the Crown must demonstrate a "clear and plain intention" for such extinguishment. In this case, the Crown rests its argument that such an intention has been demonstrated on two events: the submersion of the lands constituting the fishing area in 1845 as part of the construction of the Beauharnois canal and the 1888 surrender agreement entered into between the Mohawks and the Crown in which the lands around the fishing area were surrendered to the Crown, in exchange for $50,000 in compensation.

49 While these events may be adequate to demonstrate a clear and plain intention in the Crown to extinguish any aboriginal title to the lands of the fishing area, neither is sufficient to demonstrate that the Crown had the clear and plain intention of extinguishing the appellant's aboriginal right to fish for food in the fishing area. The enlargement of the body of water on which the appellant has the aboriginal right to fish for food does not relate to the existence of that right, let alone demonstrate a clear and plain intention to extinguish it. The surrender of lands, because of the fact that title to land is distinct from

the right to fish in the waters adjacent to those lands, equally does not demonstrate a clear and plain intention to extinguish a right. The surrender agreement dealt only with the Mohawks proprietary interest to the lands in question; it did not deal with the free-standing aboriginal right to fish for food which existed in the waters adjacent to those lands. There is no evidence to suggest what the parties to the surrender agreement, including the Crown, intended with regards to the right of the Mohawks to fish in the area; absent such evidence the *Sparrow* test for extinguishment cannot be said to have been met.

*Infringement and Justification*

50 Given that the appellant was exercising an existing aboriginal right to fish for food when he was fishing in Lake St. Francis, the next question this Court must address is whether s. 4(1) of the *Quebec Fishery Regulations* constituted an infringement of the appellant's aboriginal rights and, if it did so, whether that infringement was justified. In order to answer this question the nature of the impact on the appellant's rights from the operation of the provision must be determined, taking into account the broader regulatory scheme of which the provision is a part.

51 The basic structure of the government's regulatory scheme, in terms of its application to the appellant, is as follows: under s. 4(1) of the Regulations fishing is prohibited absent a licence of the type described in Schedule III. Under Schedule III licences are available for sport and commercial fishing only; the Schedule does not allow for the issuance of licences for aboriginal food fishing. Under s. 5(9) of the Regulations the Minister may, at his discretion, issue a special permit to an Indian or Inuk authorizing them to fish for their own subsistence. In essence, under the regulatory scheme as it

currently exists, the appellant's exercise of his aboriginal right to fish for food is exercisable only at the discretion of the Minister.

52 This scheme infringes the aboriginal rights of the appellant under the test for infringement laid out in *Sparrow*. In *Sparrow* the Court held at p. 1112 that to determine whether an aboriginal right has been infringed the Court must consider the following questions:

> First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?

In this instance, the regulatory scheme subjects the exercise of the appellant's aboriginal rights to a pure act of Ministerial discretion, and sets out no criteria regarding how that discretion is to be exercised. For this reason, I find that the scheme both imposes undue hardship on the appellant and interferes with his preferred means of exercising his rights.

53 In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1078-79; *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 1010-11; and *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.

54 I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

55 The infringement in this instance is all the more pronounced when one considers the testimony offered by the Crown's own witness to the effect that no permits allowing fishing for food with a seine net (the traditional manner of fishing of the Mohawks) were being issued for Lake St. Francis. Conservation officer Langevin testified at trial:

> [TRANSLATION] But in Lake St. Francis it is still prohibited, no permits for fishing for perch with a seine net are being issued.

In the absence of the factual possibility of the issuance of a licence for the appellant's exercise of his aboriginal right to fish for food, the appellant has clearly demonstrated that his aboriginal rights have been infringed.

56 Moreover, the Crown has failed to adduce evidence sufficient to demonstrate that this infringement was justified. Under *Sparrow*, in order to demonstrate that an

infringement of an aboriginal right is justified the Crown must demonstrate, first, that the infringement took place pursuant to a compelling and substantial objective and that, second, the infringement is consistent with the Crown's fiduciary obligation to aboriginal peoples. On the evidence presented in this case the Crown has satisfied neither of these criteria. I would note here, and adopt, the description of the Crown's evidence regarding the regulatory scheme given by Proulx J.A. at the Court of Appeal at pp. 127-28:

> [TRANSLATION] Far from proving that perch fishing for food would have harmful ecological effects (the witness did not even know the incidence of sport fishing on conservation), the evidence tends instead to prove the existence of a policy that essentially favours sport fishing, to the detriment of those wanting to fish for food.
>
> ...
>
> [I]t appears to me that what has been shown instead in the case at bar is that sport fishing is the major concern, after conservation. [Emphasis added.]

What counts as a compelling and substantial objective for the purposes of limiting s. 35(1) rights was recently discussed by this Court in *Gladstone*. The lack of evidence in that case precluded us from determining whether the government's regulatory scheme was justified. We therefore did not have to definitively determine what particular objectives, beyond conservation, do or do not meet the test of justification set out in *Sparrow*. Nevertheless, we made some general observations about the kinds of objectives which might be compelling and substantial enough to justify governmental infringements on aboriginal rights.

57 As with limitations of the rights enshrined in the *Charter*, limits on the aboriginal rights protected by s. 35(1) must be informed by the same purposes which underlie the decision to entrench those rights in the Constitution to be justifiable: *Gladstone, supra*, at para. 71. Those purposes are the recognition of the prior occupation of North America by aboriginal peoples, and the reconciliation of prior occupation by

aboriginal peoples with the assertion of Crown sovereignty: *Van der Peet*, at para. 39, *Gladstone*, at para. 72. Measures which are aimed at conservation clearly accord with both these purposes, and can therefore serve to limit aboriginal rights, as occurred in *Sparrow*.

58 I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone*, at para. 74) to warrant the limitation of aboriginal rights.

59 Furthermore, the scheme does not meet the second leg of the test for justification, because it fails to provide the requisite priority to the aboriginal right to fish for food, a requirement laid down by this Court in *Sparrow*. As we explained in *Gladstone*, the precise meaning of priority for aboriginal fishing rights is in part a function of the nature of the right claimed. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met.

## VI. Disposition

60 In the result the appeal is allowed and the appellant's conviction is set aside.

61 For the reasons given above, the constitutional question must be answered as follows:

Question : Is s. 4(1) of the *Quebec Fishery Regulations*, as they read on May 7, 1982, of no force or effect with respect to appellant in the circumstances of these proceedings in virtue of s. 52 of the *Constitution Act, 1982* by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by appellant?

Answer : Yes.

The following are the reasons delivered by

62. L'HEUREUX-DUBÉ J. -- This appeal, as well as the appeals heard contemporaneously in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, and the appeal in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, concern aboriginal rights constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

63. This broad issue was dealt with in *Van der Peet* and the present case provides an opportunity to examine, more particularly, the relationship between aboriginal rights and aboriginal title. I have had the benefit of the Chief Justice's opinion and I agree with the result he reaches. I also agree generally with his reasons, subject to the following comments about the relationship between aboriginal rights and aboriginal title, and about the proper approach to the definition of the nature and extent of aboriginal rights.

64. Like the Chief Justice, I am of the view that this case must be decided on the basis of an existing aboriginal right which is unjustifiably restricted by the *Quebec Fishery Regulations*, C.R.C., c. 852. As regards the relationship between aboriginal rights and aboriginal title, however, I wish to emphasize, as did Rothman J.A., dissenting at the Court of Appeal, that aboriginal rights can exist independently of aboriginal title. In *Van der Peet*, I pointed out that the doctrine of aboriginal rights was not solely concerned with land but covered all aboriginal interests arising out of their historic occupation and use of ancestral lands (at para. 116):

> The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as its name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component elements of this larger right — such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs — as well as to other matters, not related to land, that form part of a distinctive aboriginal culture: see W. I. C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990), 15 *Queen's L.J.* 217, and Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314.

65. Although the point is implicit in the Chief Justice's reasons, I believe it is important in this case to state clearly that aboriginal rights can be incidental to aboriginal title but need not be: they are severable from and can exist independently of aboriginal title (*Van der Peet*, at para. 119, *per* L'Heureux-Dubé J.). Put another way, the strict conditions for recognition of aboriginal title at common law (see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; and *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518) are not applicable when, as in this case, the appellant seeks, not the broadest right to occupy and use a tract of land, but only the limited right to fish upon it. In such cases, the

only requirements are those set out in *Van der Peet*, regarding the recognition of an aboriginal right under s. 35(1) of the *Constitution Act, 1982*.

66. With respect to the approach to the interpretation of the nature and extent of aboriginal rights, the test utilized by the Chief Justice centres on the individualized practices of the particular aboriginal group prior to contact with the Europeans. I must distance myself from this approach. In *Van der Peet*, I suggested the following guidelines regarding the definition of aboriginal rights guaranteed by s. 35(1) (at para. 180):

> In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the *Constitution Act, 1982* if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time. [Emphasis added.]

Accordingly, a "frozen rights" approach focusing on aboriginal practices should not, in my view, be adopted to define aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

67. This being said, in this case, I agree with the Chief Justice that, in view of the evidence presented at trial, the Mohawks of the St. Regis (Akwesasne) Reserve,

of which the appellant is a member, possess an aboriginal right to fish for food in Lake St. Francis, a right which is protected under s. 35(1) of the *Constitution Act, 1982*, since they have fished for food on the tract of land in question in a manner sufficiently significant and fundamental to their culture and social organization for a substantial and continuous period of time. Furthermore, I agree with the Chief Justice that this right was not extinguished by a "clear and plain intention" of the Government, that the *Quebec Fishery Regulations* constitute a *prima facie* infringement of that right, and that such a restriction is not justified under the *Sparrow* test (*R. v. Sparrow*, [1990] 1 S.C.R. 1075).

68. In the result, I would dispose of the appeal in the manner stated by the Chief Justice and answer the constitutional question as he suggests.

*Appeal allowed.*

*Solicitors for the appellant: O'Reilly & Associates, Montreal.*

*Solicitor for the respondent: The Attorney General of Quebec, Ste-Foy.*

*Solicitor for the intervener: The Attorney General of Canada, Ottawa.*