R. *v.* Côté, [1996] 3 S.C.R. 139

Franck Côté, Peter Decontie, Frida Morin-Côté, Russell Tenasco and Ben Decontie — *Appellants/Respondents on Cross-Appeal*

v.

Her Majesty The Queen — *Respondent/Appellant on Cross-Appeal*

and

The Attorney General of Canada, Atikamekw-Sipi/Council of the Atikamekw Nation and Chief Robert Whiteduck, on behalf of the Algonquins of Golden Lake First Nation and on behalf of others — *Interveners*

Indexed as: R. *v.* Côté

File No.: 23707.

1996: June 17; 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 -- Natives teaching traditional fishing techniques -- Charge of fishing without licence laid -- Incident occurring in traditional

fishing area -- Whether an aboriginal fishing or other right must be necessarily incident to a claim of aboriginal title in land -- Whether an aboriginal right may exist independently of a claim of aboriginal title -- Constitution Act, 1982, s. 35(1).

Constitutional law -- Aboriginal rights -- Quebec -- Aboriginal law not recognized by French colonial regime prior to transition to British sovereignty -- Whether constitutional protection extends to aboriginal practices, customs and traditions of Quebec natives -- Constitution Act, 1982, s. 35(1) -- Quebec Act, 1774, R.S.C., 1985, App. II, No. 2 -- Royal Proclamation, 1763, R.S.C., 1985, App. II, No. 1.

Constitutional law -- Aboriginal rights -- Treaty right to fish -- Division of powers -- Natives entering a provincial controlled harvest zone by motorized vehicle -- Provincial regulation requiring payment of fee for such entry -- Fee directly tied to cost of roads and infrastructure -- Entry by other modes of transportation free -- Whether a provincial regulation infringing a treaty right to fish was of no force or effect given the overlapping statutory and constitutional protection extended to treaty rights from provincial legislation under both s. 35(1) of the Constitution Act, 1982, and s. 88 of the Indian Act -- Constitution Act, 1982, s. 35(1) -- Indian Act, R.S.C., 1985, c. I-5, s. 88 -- Regulation respecting controlled zones, R.R.Q. 1981, 370 (supp.), ss. 5, 5.1.

Practice -- Defective information -- Amendment -- Information indicating wrong section -- Parties aware of infraction notwithstanding defect -- Whether the information should be amended by this Court -- Criminal Code, R.S.C., 1985, c. C-46, s. 601 -- Summary Convictions Act, R.S.Q., c. P-15, ss. 66(1), 82, 90, 101 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 48.

The appellants, all Algonquins, were members of an expedition to teach traditional fishing methods. All were convicted under Quebec's *Regulation respecting controlled zones* with entering a controlled harvest zone (Z.E.C.) without paying the required fee for motor vehicle access. This zone was located within the appellants' traditional hunting and fishing grounds. The appellant Côté was also convicted under s. 4(1) of the *Quebec Fishery Regulations* of fishing within the zone without a valid licence. The Superior Court and the Court of Appeal upheld the convictions. The appellants jointly challenged their convictions on the basis that they were exercising an aboriginal right and a concurrent treaty right to fish on their ancestral lands as recognized and protected by s. 35(1) of the *Constitution Act, 1982*. The Attorney General cross-appealed the Court of Appeal's holding that the appellants enjoyed a treaty right to fish under a treaty concluded at Swegatchy in 1769.

In resolving this appeal, the Court had to address three questions: (1) whether an aboriginal fishing or other right must be necessarily incident to a claim of aboriginal title in land, or whether an aboriginal right may exist independently of a claim of aboriginal title; (2) 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 commencement of British sovereignty in 1763; and, (3) whether a provincial regulation allegedly infringing a treaty right to fish was of no force or effect given the overlapping statutory and constitutional protection extended to treaty rights from provincial legislation under both s. 35(1) of the *Constitution Act, 1982*, and s. 88 of the *Indian Act*.

The information laid was defective in that it referred to s. 5 rather than s. 5.1 of the *Regulation respecting controlled zones*. A further issue existed as to whether the information, absent any confusion because of the error, should be amended by this Court.

Held: The appeal against the conviction of Franck Côté under s. 4(1) of the *Quebec Fishery Regulations* should be allowed. The appeals against conviction under the *Regulation respecting controlled zones* should be dismissed.

Per Lamer C.J. and Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The appellants were not obliged to prove aboriginal title over the Z.E.C., whether at common law or under the *Royal Proclamation, 1763*, as a precondition to demonstrating the existence of an ancestral right to fish. For the reasons given in *R. v. Adams*, aboriginal rights may indeed exist independently of aboriginal title. Aboriginal title is simply one manifestation of the doctrine of aboriginal rights. The purpose of s. 35(1) of the *Constitution Act, 1982* was to constitutionally entrench and recognize those practices, customs and traditions central to the distinctive culture of pre-existing aboriginal societies. These defining practices, customs and traditions are not limited to those representing incidents of a continuous and historical occupation of a specific tract of land. A protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory of location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.

French law, while never explicitly recognizing the existence of a *sui generis* aboriginal interest in land, did not explicitly deny its existence. Indeed, the French Crown

may never have assumed full title and ownership to the lands occupied by aboriginal peoples in light of the nature and pattern of French settlement in New France and given its diplomatic relations which maintained that aboriginal peoples were sovereign nations rather than mere subjects of the monarch.

It is not clear that French colonial law governing relations with aboriginal peoples was mechanically received by the common law upon the commencement of British sovereignty. The common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France. Indeed, the law of aboriginal title has been found to be a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province.

Even if it is assumed that the French Crown did not legally recognize the right of the Algonquins to fish within the Z.E.C. prior to the commencement of British sovereignty, the appellants can still seek to establish their aboriginal right to fish within the Z.E.C. under the principles of the *Van der Peet* trilogy. The intervention of French sovereignty did not negate the potential existence of aboriginal rights within the former boundaries of New France under s. 35(1) of the *Constitution Act, 1982*. The fact that a particular practice, custom or tradition continued, in an unextinguished manner, following the arrival of Europeans but in the absence of the formal gloss of legal recognition from French colonial law should not undermine the constitutional 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 receiving the legal recognition and approval of European colonizers. Such a static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal

and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies. In addition, the French Regime's failure to recognize legally a specific aboriginal practice, custom or tradition (and indeed the French Regime's tacit toleration of a specific practice, custom or tradition) clearly cannot be equated with a "clear and plain" intention to extinguish such practices under the extinguishment test of s. 35(1).

A substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation to ensure the continuity of aboriginal practices, customs and traditions. The actual substantive claim in this instance was therefore a site-specific right to fish for food. The *Quebec Fishery Regulations* prohibit all fishing within the area in the absence of a licence and on its face directly regulates the appellant's fishing practices. The *Regulation respecting controlled zones*, however, only prohibits access to the Z.E.C. by motor vehicle in the absence of payment of a fee. At face value, the provincial regulation would appear to regulate a right of access to land, rather than a right to fish. But a right to fish for food upon a certain tract of territory would be meaningless without a right of physical access to that territory. If the provincial regulation effectively precluded the Algonquins from gaining access to the Z.E.C., such a regulation would have a direct impact upon the claimed right to fish. Under the totality of the circumstances, the asserted right is therefore properly framed as a right to fish for food within the territory of the Z.E.C.

The second stage of the *Van der Peet* analysis requires the court to inquire whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition which was, prior to the contact with Europeans, an integral part of the distinctive

aboriginal society of the aboriginal people in question. Evidence that a custom was a significant part of their distinctive culture at contact will generally be sufficient to demonstrate that that custom was also significant to that particular culture prior to contact. Here, the relevant time period for contact is best identified as the arrival of Samuel de Champlain in 1603.

In light of the Crown's failure to elicit any contrary historical evidence at trial, the evidence produced at trial coupled with the findings of fact of the Superior Court was sufficient to support the inference that fishing for food within the lakes and rivers of the territory of the Z.E.C. was a significant part of the life of the Algonquins from at least 1603 and the arrival of French explorers and missionaries into the area. Fishing was significant to the Algonquins, as it represented the predominant source of subsistence during the season leading up to winter.

The second stage of the *Van der Peet* analysis requires a "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. Because the courts below collectively operated on the assumption that the claim of an aboriginal right to fish must rest in an underlying claim to aboriginal title, they did not direct themselves to answering this question. Nevertheless, a survey of the record revealed that this part of the *Van der Peet* test was met. In conclusion, the appellants have demonstrated the existence of an aboriginal right to fish within the lakes and rivers of the territory of the Z.E.C. under the *Van der Peet* test.

The Algonquins' aboriginal right to fish within the Z.E.C. was not extinguished prior to 1982, because the respondent declined to offer any proof relating to the question of extinguishment.

Certain factors might indicate that there had been a *prima facie* infringement of an aboriginal right: (1) whether the limitation is unreasonable; (2) imposes undue hardship; (3) or denies the holder of the right the preferred means of exercising that right. As noted in *R. v. Gladstone,* however, these questions do not define the concept of *prima facie* infringement; they only point to factors which will indicate if such an infringement has taken place. The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

The *Quebec Fishery Regulations* infringed the appellant Côté's right to fish for food within the Z.E.C. They stipulated that a person fishing within designated territories must hold a valid licence. The regulations, while authorizing the Minister at his or her discretion to issue a special permit to an aboriginal person authorizing that person to fish for food, did not prescribe any criteria to guide or structure the exercise of this discretion. Such a regulatory scheme must, in the very least, structure the exercise of a discretionary power to ensure that the power is exercised in a manner consistent with the Crown's special fiduciary duties towards aboriginal peoples, as is held in *Adams*. Section 4(1) and the surrounding provisions of the *Quebec Fishery Regulations* therefore impose undue hardship on the appellant and interfere with his preferred mode of exercising his rights.

The *Regulation respecting controlled zones* does not infringe the appellants' right to fish for food within the Z.E.C. Under the terms of the provincial regulation, an Algonquin person is at liberty to enter the Z.E.C. by a variety of means other than motor

vehicle without fee. Although the regulation may infringe an aboriginal or treaty right under the *Sparrow* test by conditioning the exercise of such a right upon the payment of a user fee, the financial burden in this instance does not amount to an infringement of the appellants' ancestral right to fish for food. The fee, rather than constituting a revenue-generating tax for the provincial government or the Z.E.C. administration, represented a form of user fee dedicated to the upkeep of the facilities and roads of the Z.E.C. The access fee, by improving the means of transportation within the Z.E.C., effectively facilitates rather than restricts the constitutional rights of the appellants.

In determining whether an infringement is justified, the court must first be satisfied that the asserted legislative objective is "compelling and substantial" and then examine whether the infringement unduly restricts the aboriginal right in question and whether the restriction can be accommodated with the Crown's special fiduciary relationship with First Nations. The infringement of the appellant Côté's right to fish resulting from s. 4(1) of the *Quebec Fishery Regulations* was not justified. The Crown failed to meet both legs of the test of justification, since the scheme appeared driven by the objective of facilitating sport fishing, and since the scheme provided no priority to aboriginal rights to fish for food. Absent infringement, it was not necessary to consider whether this provincial regulatory scheme met the test of justification.

Section 88 of the *Indian Act* serves two distinct purposes. The first is jurisdictional. Through its operation, provincial laws otherwise not applicable to native persons under the division of powers are made applicable as incorporated federal law. The second is to accord federal statutory protection to aboriginal treaty rights through the operation of the doctrine of federal paramountcy.

Section 88 was not engaged here. Assuming without deciding the existence of the alleged treaty right, the impugned provincial regulation did not restrict or infringe this treaty right to fish. Rather, it only imposed a modest financial burden on the exercise of this alleged treaty right where access is sought by motor vehicle, and under the circumstances, the access fee actually facilitated rather than restricted the exercise of this right. Thus, even if the relevant right is characterized as a treaty right, the provincial regulation remains operative in relation to the activities of the appellants.

In considering whether to amend a defective information or indictment, a court must concern itself with the impact of the proposed amendment upon the accused. The applicable standard under s. 601 of the *Criminal Code* is whether the accused would suffer "irreparable prejudice" as a result of the amended charge. The applicable standard for amendment is the same under the *Summary Convictions Act*. To the extent that the evidence conforms with the correct charge and the appellants have not been misled or irreparably prejudiced by the variance between the evidence and the information, the defect can and should be remedied. There is no evidence here that the appellants have been prejudiced or misled by the reference to s. 5 in the information.

Per La Forest J.: The traditional use by natives that has continued from pre-contact times of a particular area for a particular purpose can be recognized as an aboriginal right, even though the natives have no general right of occupation ("Indian title") of the affected land. This type of servitude should be recognized and was sufficiently established here. The fact that Quebec once fell under the French regime does not affect the matter. It was not established -- and certainly not in clear and plain terms -- that this aboriginal right was extinguished either during the French regime or later. The right claimed is, therefore, an "existing right" under s. 35(1) of the *Constitution Act, 1982*. Agreement was expressed with the reasons of Lamer C.J. with respect to the

claimed right's being infringed by the *Quebec Fishery Regulations* but not by the *Regulation respecting controlled zones* and with respect to his discussion under the headings "Treaty Rights" and "Amendment of Information and Constitutional Questions".

Per L'Heureux-Dubé J.: The reasons of Lamer C.J. were agreed with subject to the comments made in *R. v. Adams*.

Cases Cited

By Lamer C.J.

Applied: *R. v. Adams*, [1996] 3 S.C.R. 101, rev'g *sub nom. Adams v. La Reine*, [1993] R.J.Q. 1011; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025, aff'g [1987] R.J.Q. 1722; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Badger*, [1996] 1 S.C.R. 771; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045; *Sammut v. Strickland*, [1938] A.C. 678; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Dick*, [1985] 2 S.C.R. 309; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555; *R. v. Tremblay*, [1993] 2 S.C.R. 932; *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2; *Morozuk v. The Queen*, [1986] 1 S.C.R. 31.

By La Forest J.

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

By L'Heureux-Dubé J.

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

Statutes and Regulations Cited

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Constitution Act, 1982, s. 35(1).

Criminal Code, R.S.C., 1985, c. C-46, s. 601.

Fisheries Act, R.S.C., 1985, c. F-14.

Indian Act, R.S.C., 1985, c. I-5 [formerly R.S.C. 1970, c. I-6], s. 88.

Quebec Act, 1774, R.S.C., 1985, App. II, No. 2.

Quebec Fishery Regulations, C.R.C., c. 852, ss. 4(1) [rep. & sub. SOR/84-56, s. 3(1)], 5(3) [rep. & sub. SOR/81-660, s. 2(1)], (9) [ad. *idem*, s. 2(2)].

Regulation respecting controlled zones, R.R.Q. 1981, 370 (supp.), ss. 5 [rep. & sub. (1984) 116 G.O. II, 2114, s. 4], 5.1 [ad. *idem*].

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

Summary Convictions Act, R.S.Q., c. P-15, ss. 66(1), 82, 90, 101.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 48.

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APPEAL from a judgment of the Quebec Court of Appeal, [1993] R.J.Q. 1350, [1994] 3 C.N.L.R. 98, (1993) 107 D.L.R. (4th) 28, dismissing an appeal from a judgment of Frenette J., [1989] R.J.Q. 1893, [1991] 1 C.N.L.R. 107, dismissing an appeal from conviction by Barrière Prov. Ct. J., [1988] R.J.Q. 1969, [1989] 3 C.N.L.R. 141, under the *Quebec Fishery Regulations* and the *Regulation respecting controlled zones*.

Appeal allowed with respect to the conviction under the *Quebec Fishery Regulations* but dismissed with respect to the convictions under the *Regulation respecting controlled zones*.

Agnès Laporte, Richard Gaudreau and *Michel Ste-Marie,* for the appellants, respondents on the cross-appeal.

René Morin and *Pierre Lachance,* for the respondent, appellant on the cross-appeal.

Jean-Marc Aubry, Q.C., and *Richard Boivin,* for the intervener the Attorney General of Canada.

Paul Dionne and *Anjali Choksi,* for the intervener Atikamekw-Sipi/Council of the Atikamekw Nation.

Alan Pratt and *Paul Williams,* for the intervener Chief Robert Whiteduck, on behalf of the Algonquins of Golden Lake First Nation and on behalf of others.

The judgment of Lamer C.J. and 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. Adams*, [1996] 3 S.C.R. 101, have been released simultaneously and should be read together in light of the closely related issues raised by both cases.

2 The appellants, members of the Algonquin people, were convicted of the offence of entering a controlled harvest zone in the Outaouais region of Quebec without paying the required fee for motor vehicle access. The appellant Côté was additionally convicted of the offence of fishing within the zone in the absence of a valid licence. The appellants jointly challenge their convictions on the basis that they were exercising an aboriginal right and a concurrent treaty right to fish on their ancestral lands as recognized and protected by s. 35(1) of the *Constitution Act, 1982*.

3 The appellant Côté was convicted under the same federal fishing regulation as the accused in *Adams*. In resolving both this appeal and *Adams*, this Court must answer the question of whether an aboriginal fishing or other right must be necessarily incident to a claim of aboriginal title in land, or whether an aboriginal right may exist independently of a claim of aboriginal title. In the trilogy of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, this Court elaborated the appropriate principles for identifying aboriginal rights recognized and affirmed by s. 35(1). This case and *Adams* will require an application of the principles articulated in this trilogy to the question of the relationship between aboriginal title and other aboriginal rights, particularly fishing rights, recognized and affirmed by s. 35(1).

4 Additionally, these two related appeals involve the claim of an aboriginal right within the historic 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 did not achieve legal recognition under the colonial regime of New France prior to the transition to British sovereignty in 1763.

5 However, unlike the appeals in *Van Der Peet*, *Gladstone*, *N.T.C. Smokehouse Ltd.* and *Adams*, this appeal also implicates the constitutionality of a provincial regulation which allegedly infringes a treaty right to fish. Therefore, in the context of this appeal, this Court is additionally asked to consider the overlapping statutory and constitutional protection extended to treaty rights from inconsistent provincial legislation under both s. 35(1) of the *Constitution Act, 1982*, and s. 88 of the *Indian Act*, R.S.C., 1985, c. I-5.

II. Facts

6 The five appellants are Algonquin Indians, members of the Desert River Band and residents of the Maniwaki reserve. The relevant facts are not in dispute. In July 1984, the appellants, accompanied by a number of young aboriginal students, entered the Controlled Harvest Zone of Bras-Coupé-Desert (the "zone d'exploitation contrôlée", or "Z.E.C."), a 1 100 km^2 wilderness zone located in the Outaouais region of Quebec, by motor vehicle. The Z.E.C. falls outside the Maniwaki reserve. The appellants entered the Z.E.C. for the purpose of teaching the students traditional hunting and fishing practices. The appellants refused to pay the required fee for motor vehicle access to the Z.E.C. Upon entry within the zone, the appellant Côté fished the waters of Desert Lake to demonstrate traditional Algonquin fishing practices. Côté did not possess a fishing licence.

7 The appellants were collectively charged with the provincial offence of failing to pay the access fee required under the *Regulation respecting controlled zones*, R.R.Q.

1981, 370 (supp.), promulgated under *An Act respecting the conservation and development of wildlife*, S.Q. 1983, c. 39. Under the Regulation as it existed at the time, an individual on foot could enter the Z.E.C. free of charge, but an individual within a vehicle could only enter the Z.E.C. for an access fee ranging from $3 to $7. The penalty for failing to pay the access fee was a fine ranging from $75 to $200 per infraction. While the sworn informations charged the appellants with infractions under s. 5 of the Regulation, the prosecution was conducted under the assumption that the appellants had committed infractions under s. 5.1 of the Regulation. As the two regulatory provisions read:

> **5.** In order to hunt, fish or trap in a controlled zone, the following dues are payable:
>
> (1) not more than 10 $ per day for fishing, hunting or trapping activities, except for hunting deer, moose and black bear;
>
> (2) not more than 25 $ per day for hunting deer, moose and black bear.
>
> **5.1** In order to enter a controlled zone, the following dues are payable:
>
> (1) not more than 3 $ when a person enters alone in a vehicle;
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> (2) not more than 5 $ when 2 persons enter in a vehicle;
>
> (3) not more than 7 $ when 3 persons or more enter in a vehicle;

(4) not more than an additional 3 $ per vehicle entering or leaving the controlled zone between 10 p.m. and 7 a.m.

8 The single appellant Côté was additionally charged with the federal offence of fishing without a licence contrary to s. 4(1) of the *Quebec Fishery Regulations*, C.R.C., c. 852, promulgated under the *Fisheries Act*, R.S.C., 1985, c. F-14. Under ss. 5(3) and 5(9) of the Regulations, the appellant could have applied for a special licence exempting him from the requirements of the Regulations. As the provisions read:

> 4. (1) Subject to subsections (2), (6), (18), (19) and 18(1.2), no person shall fish for any fresh-water, anadromous or catadromous fish unless he is the holder of the appropriate licence described in Schedule III.
>
> 5. ...
>
> (3) The Minister may issue to any person engaged in activities of an educational nature or in biological management or research a special licence exempting, subject to the conditions set out therein, the licensee from the requirements of these Regulations.
>
> (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.

There is no evidence in the record which indicates that Côté had attempted to obtain a special licence.

9 The appellants admit the constituent elements of both offences. However, they claim that the federal and provincial regulations were inoperative in relation to their activities as they were exercising an aboriginal right and a concurrent treaty right to fish on their ancestral lands as recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*. More specifically, they claim an aboriginal right to fish incident to a right of aboriginal title over the Z.E.C. derived from historical occupation at common law or, alternatively, under the terms of the *Royal Proclamation, 1763*, R.S.C., 1985, App. II,

No. 1 (hereinafter the "Proclamation"). For the purposes of the application of s. 35(1) and the Proclamation, it is accepted that the Z.E.C. falls within the boundaries of New France prior to 1763, and within the interior of the Colony of Quebec under the Proclamation at 1763.

10 On April 21, 1988, Barrière Prov. Ct. J. rejected the appellants' constitutional arguments and convicted the appellants of the stipulated offences. The appellants appealed their convictions to the Superior Court under s. 90 of the former *Summary Convictions Act*, R.S.Q., c. P-15, and on May 19, 1989, Frenette J. upheld their convictions. On further appeal to the Quebec Court of Appeal, a majority of the Court (Baudouin and Tyndale JJ.A.) again affirmed the convictions. The majority found that the appellants enjoyed a treaty right to fish within the Z.E.C., but concluded that the access fee regulation and the licensing regulation could ultimately be justified under the test set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Delisle J.A., dissenting in part, would have allowed the appellant Côté's appeal of his conviction under the *Quebec Fishery Regulations*, as the licensing requirement could not be justified under the *Sparrow* test.

III. Judgments Below

11 As a preliminary remark, I wish to note two important features of the judgments below. First, the judgments in the Provincial Court and the Superior Court were rendered prior to this Court's decisions in *Sparrow* and *R. v. Sioui*, [1990] 1 S.C.R. 1025. Accordingly, both courts lacked the elaboration by this Court of the appropriate methodology and framework for approaching both aboriginal rights under s. 35(1) of the *Constitution Act, 1982*, and treaty rights under s. 88 of the *Indian Act*. Second, in all three of the courts below, the parties characterized their asserted aboriginal right to fish

as a right incident to aboriginal title. As such, the judgments of the Provincial Court, Superior Court, and the Quebec Court of Appeal uniformly focused their factual inquiries and their legal analysis on whether the appellants had established the existence of aboriginal title over the Z.E.C. territory. In short, the courts below did not consider the possibility that the appellants may have enjoyed a free-standing aboriginal right to fish independent of title.

Provincial Court, [1988] R.J.Q. 1969, [1989] 3 C.N.L.R. 141

12 At trial, the appellants adduced testimonial evidence from a number of lay and expert witnesses, including Dr. Raynald Parent (historian), Mr. Jean-Guy Deschênes (anthropologist), Mr. Jacques Frenette (anthropologist and ethnohistorian), and Messrs. Albert Brascoupé and William Commanda (elders of the Desert River Band). In argument, the appellants submitted that they had demonstrated the existence of aboriginal title over the territory of the Z.E.C. under the terms of the Proclamation and at common law. Alternatively, the appellants submitted that they had established the existence of a valid treaty, concluded in 1760 at Swegatchy and subsequently confirmed at Caughnawaga, which guaranteed a right to fish within the territory of the Z.E.C.

13 In reply, the respondent Attorney General called only three witnesses: Ms. Jacqueline Beaulieu (a geographer), Mr. Gilbert Ryan (an employee of the Department of Indian Affairs and Northern Development) and Mr. Claude Morin (Director of the Z.E.C.). The respondent rejected the existence of both an aboriginal right and a concurrent treaty right. The respondent further took the position that aboriginal title does not exist within the former territories of New France, as French colonial law received through the *Quebec Act, 1774*, R.S.C., 1985, App. II, No. 2, recognized no aboriginal right arising from prior occupation.

14 At the outset of his analysis, Barrière Prov. Ct. J. engaged in a close examination of the legal effect of the Proclamation. After surveying the relevant history, and relying upon the decisions of the Quebec Superior Court and the Quebec Court of Appeal in *Adams v. La Reine*, [1993] R.J.Q. 1011 (C.A.), Barrière Prov. Ct. J. concluded that the Proclamation did not create or recognize any new aboriginal rights to land within the interior of the Colony of Quebec. However, it remained to be determined whether the appellants could establish a right to title outside the Proclamation.

15 Proceeding to the circumstances of this case, Barrière Prov. Ct. J. held that the appellants did not enjoy any right to hunt or fish within the Z.E.C. on the basis of an ancestral right connected to aboriginal title. On the basis of the historical evidence presented before him (particularly by the historian Parent, and the anthropologists Deschênes and Frenette), the trial judge arrived at a number of conclusions. He found that the Z.E.C. was indeed located within the ancestral lands of the Desert River Band of the Algonquin Indians. He also concluded that the legal requirements for the existence of aboriginal title over this specific territory were satisfied. However, based on his interpretation of the jurisprudence, Barrière Prov. Ct. J. held that the Proclamation was not the source of any new aboriginal rights to land within the interior of the Colony of Quebec; this territorial restriction also prevented the application, within Quebec, of the common law of aboriginal title. Since the Z.E.C. fell within the boundaries of the Colony, he concluded that the appellant did not enjoy any aboriginal title over the relevant lands. In the absence of title and given the manner in which the case had been argued before him, Barrière Prov. Ct. J. thus reasoned that the appellants did not enjoy any accessory aboriginal rights to fish and hunt.

16 Barrière Prov. Ct. J. also concluded that the appellants did not enjoy a treaty right to hunt and fish within the entire territory of the Z.E.C. He did find that an enforceable and valid treaty was concluded in 1760 at Swegatchy. He further found that this treaty included the right to possess the settled lands the Algonquins occupied at the time of discovery. But in light of the nomadic quality of the Algonquins, he was sceptical whether the Algonquins enjoyed a roaming right to hunt or fish over all their traditional hunting grounds. Rather, he was of the view that the Algonquins only enjoyed a right to hunt and fish in proximity to the lands they actually settled -- lands which did not include the entire expanse of the Z.E.C.

17 However, unguided by this Court's future jurisprudence, Barrière Prov. Ct. J. concluded that "our laws" recognize a general aboriginal right to hunt and fish. It was during this discussion that the trial judge made his important findings of fact. More specifically, he found that the Algonquins represented an organized society which exercised exclusive occupation over this specific territory in the past. However, it is important to stress that his finding was dated at the time of the British Conquest rather than at the time of first contact. As he stated at p. 156 (C.N.L.R.):

> [TRANSLATION] Based on the foregoing, although the Algonquins were not the "owners" of the place where the offences were committed, the evidence showed that they had the right to hunt and fish for their subsistence. This was an organized society that occupied the said territory. The testimony of the historian Dr. Parent, the anthropologists Mr. Deschênes and Mr. Frenette and the two elders William Commando [*sic*] and Albert Brascoupé is also sufficient for the Court to conclude that this occupation was exclusive to the Algonquins at the time Great Britain took possession. There was no evidence that the whites or anyone else occupied the said territory. [Emphasis added.]

Accordingly, he concluded that the appellants enjoyed an aboriginal right to hunt and fish for subsistence within the Z.E.C. which was entitled to constitutional protection under s. 35(1) of the *Constitution Act, 1982*.

18 Lastly, the trial judge found that the regulations did not unreasonably infringe the rights of the appellants, and he accordingly entered convictions. Barrière Prov. Ct. J. did not neatly divide the questions of infringement and justification. However, he appeared to conclude that there was no infringement in this instance, as he reasoned that the appellants were not exercising their right to fish for subsistence but rather had engaged in fishing for the purpose of teaching.

Superior Court, [1989] R.J.Q. 1893, [1991] 1 C.N.L.R. 107

19 On appeal, Frenette J. affirmed the convictions. Frenette J. arrived at the same result as the trial judge, but he did so by means of a different route, premised in large part on his interpretation of the evidence. Frenette J. thoroughly reviewed the expert testimony presented in the court below. On the basis of this evidence, in contrast to Barrière Prov. Ct. J., Frenette J. found that: (1) the Algonquins never exercised sufficient historical occupation of the Z.E.C. lands to engender aboriginal title, and (2) the Algonquins did not enter into a valid treaty with English authorities at Swegatchy in 1760.

20 To begin, similar to the trial judge, Frenette J. held that the appellants did <u>not</u> enjoy any right to fish within the Z.E.C. on the basis of any ancestral right connected to aboriginal title. He explicitly assumed at p. 122 (C.N.L.R.) that any ancestral right would have to be tied to a right over the land: [TRANSLATION] "ancestral rights or Indian title (these expressions are often used as <u>synonyms</u>) ..." (emphasis added). But unlike Barrière Prov. Ct. J., Frenette J. found that owing to their thin numbers and nomadic character, the Algonquins never enjoyed real and exclusive possession over the Z.E.C. territory at the time of contact. His interpretation of the evidence on the issue of occupation was as follows, at p. 125 (C.N.L.R.):

> [TRANSLATION] If account is taken of all these factors and of the fact that the evidence shows that, given the number of Indians frequenting the territory in question, it was sparsely inhabited, while most of the Algonquins lived at the Sulpician mission at Lac des Deux-Montagnes (as noted by these anthropologists and by William Johnson), it must be concluded that the thesis put forward by the appellants is, at the very least, highly questionable and that it has instead been proved on a balance of probabilities that the Algonquins did not have real and exclusive possession of the territory in question. [Emphasis added.]

21 Like Barrière Prov. Ct. J., Frenette J. concluded that the Proclamation did not create any new aboriginal right to lands within the interior of the Colony of Quebec. Accordingly, in the absence of any aboriginal title over the disputed land in 1763, he concluded that the appellants did not enjoy an incidental aboriginal right to fish within the Z.E.C.

22 Frenette J. then held that the appellant did not enjoy any treaty right to fish within the Z.E.C. On the basis of the slim indirect historical evidence presented before the trial judge, Frenette J. concluded that no treaty was solemnized between the Algonquins and the British Crown in 1760 at Swegatchy and Caughnawaga. As such, he found no treaty right deserving of protection under s. 35(1) of the *Constitution Act, 1982* or under s. 88 of the *Indian Act*.

23 Even if the appellants enjoyed an aboriginal or treaty right to fish for subsistence, Frenette J. was of the view that the regulations were justifiable restrictions of this right. He stressed that the requirement of a permit or an access fee did not represent a negation of such an aboriginal right. Furthermore, similar to Barrière Prov. Ct. J., he concluded that there was no evidence that the appellants were exercising a right to subsistence in this instance.

24 Baudouin J.A. (with Tyndale J.A. concurring) upheld the convictions. At the outset of his judgment, Baudouin J.A. considered the appellant's argument under the Proclamation. Like the courts below, Baudouin J.A. concluded that the prerogative instrument did not grant or create any new and independent aboriginal right to lands within the interior of the Colony of Quebec. Rather, he held, the effect of the Proclamation was limited to the protection of lands lying to the exterior of the Colony, and lands falling within the Colony which had been specifically ceded by the British Crown. As he stated at p. 108 (C.N.L.R.), the Proclamation merely [TRANSLATION] "acknowledged, recognized, and stabilized the situation that had existed in the past".

25 Baudouin J.A. then turned to examine whether, independent of the Proclamation, the appellants had demonstrated the existence of aboriginal title over the disputed lands at common law according to the requirements of *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. In his study of the nature of French colonisation, Baudouin J.A. was sceptical as to whether aboriginal title existed at the commencement of British sovereignty over New France. More specifically, it was his view that, unlike the British regime of colonisation whereby the Crown assumed ownership subject to aboriginal title, the French Crown was automatically vested with full and complete ownership of discovered territories. And following conquest, the French colonial regime of property was explicitly given legal continuity with the adoption of *The Quebec Act, 1774*. As Baudouin J.A. explained at pp. 109-10 (C.N.L.R.):

> [TRANSLATION]
>
> In other words, considering the specific nature of the conquest and of French settlement prior to New France's being ceded to the British, it does not seem to me to have been established that a general Indian title to the hunting and fishing grounds, as recognized in common law and for another Canadian province by *Calder* v. *A.G. B.C.*, may have survived legally under a public law system in which all titles and rights were held by the French

> Crown from the time of the taking of possession, if only symbolic, of the territory.
>
> . . .
>
> Furthermore, passage of the *Quebec Act*, in 1774, established juridical continuity of the ownership and civil law systems between the French colonizer and his British counterpart: it did not break with the former system.

Thus, Baudouin J.A. expressed grave doubts as to whether aboriginal title survived the intervention of French sovereignty. However, in light of his finding of a treaty right to fish within the Z.E.C., he concluded that it was not necessary to resolve this difficult question of law.

26 On the basis of the evidence presented in the courts below, Baudouin J.A. accepted that the Algonquins did enter into a valid treaty with the British Crown in 1760 which recognized a right to possession and enjoyment of their traditional lands including the territory of the Z.E.C. He concluded that this treaty right included the right of access to these territories to fish for sustenance.

27 Invoking the test set out in *Sparrow*, Baudouin J.A. found that both the access fee and the licensing requirement represented infringements of the treaty right of the appellants under s. 35(1) of the *Constitution Act, 1982*. He had no difficulty in concluding that the aboriginal right to fish for subsistence included a right to teach traditional fishing techniques to a younger generation.

28 However, Baudouin J.A. found that the infringements were justified in the circumstances of this case. The *Regulation respecting controlled zones* advanced a legitimate governmental objective, and the infringement was modest. Further, the regulation did not restrict access *per se*, as the regulation merely imposed a user fee for access by motor vehicles which reflected the cost of upkeep of interior roads. Baudouin

J.A. also found that the licensing regulation promoted a legitimate governmental objective in resource management, and the infringement was again modest. Further, he noted that the *Quebec Fishery Regulations* permit an aboriginal person to apply to the Minister for a special licence which provides an exemption from the more stringent requirements of the Regulations. Considering all these factors, Baudouin J.A. did not find that the treaty right restrictions were unduly harsh under the circumstances.

29 Delisle J.A., dissenting in part, was in general agreement with the reasons of Baudouin J.A. However, he parted company with his colleague on the question of whether the fishing regulation could be justified under the *Sparrow* test. He agreed that the licensing requirement *prima facie* infringed the treaty rights of the appellants protected under s. 35(1). However, Delisle J.A. found that such a restriction could not be justified under the circumstances. In his view, the blanket licensing requirement failed to accommodate the constitutional rights of the appellants adequately. While the Regulations did provide for a special licence for aboriginal persons, Delisle J.A. concluded that it was not sufficient to subject the availability of such licences to the full and unguided discretion of the Minister.

IV. Grounds of Appeal

30 The appellants sought leave to appeal their convictions, and the respondent Attorney General sought leave to cross-appeal the Court of Appeal's holding that the appellants enjoyed a treaty right to fish. This Court granted leave to appeal and cross-appeal on March 3, 1994: [1994] 1 S.C.R. vi. The following constitutional questions were originally stated on October 17, 1994:

1. Is s. 5 of the *Regulation respecting controlled zones*, as it read at the time of the offences charged, unenforceable against the appellants, in the

circumstances of the present case, on their ancestral hunting and fishing lands, pursuant to s. 88 of the *Indian Act* and/or s. 52 of the *Constitution Act, 1982*, by reason of the rights under a treaty allegedly concluded at Swegatchy, in August 1760, or by reason of the aboriginal rights of the aboriginal peoples invoked by the appellants?

2. Is s. 4(1) of the *Quebec Fishery Regulations*, as it read at the time of the offences charged, unenforceable against the appellant Franck Côté, in the circumstances of the present case, on his ancestral hunting and fishing lands, pursuant to s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights of the aboriginal peoples or the rights under a treaty allegedly concluded at Swegatchy, in August 1760, within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

It should be noted that the first stated constitutional question, drawing on the sworn information, replicates the erroneous reference in the charge to s. 5 as opposed to s. 5.1 of the *Regulation respecting controlled zones.*

V. Analysis

31 The core issue raised by this appeal concerns whether the appellants enjoyed an unextinguished aboriginal right or treaty right to fish within the Z.E.C. deserving of constitutional protection under s. 35(1) of the *Constitution Act, 1982*, and whether the federal and provincial regulations in this instance infringe these rights and can be justified under the framework set out in *Sparrow*, *supra*. For reasons which I will elaborate, I find that the appellants have indeed established the existence of an aboriginal right to fish for food within the Bras-Coupé-Desert Z.E.C. in accordance with the principles recently articulated by this Court in the *Van der Peet* trilogy. I also find that the appellants were exercising this right in accessing the Z.E.C. for the purpose of teaching younger band members traditional Algonquin fishing practices. I further conclude that the licensing requirement of the *Quebec Fishery Regulation* represents an unjustified infringement of this ancestral right, but that the access fee requirement of *Regulation respecting controlled zones* does not represent an infringement of this right.

32 However, these conclusions do not dispose of the entirety of this appeal. More specifically, in light of my holding that the appellants cannot successfully challenge their convictions under the provincial *Regulation respecting controlled zones* through the claim of an aboriginal right, it must still be considered whether the appellants could succeed in vacating these convictions through the claim of a treaty right to fish.

33 As a general rule, where a claimant challenges the application of a federal regulation under s. 35(1), the characterization of the right alternatively as an aboriginal right or as a treaty right will not be of any consequence once the existence of the right is established, as the *Sparrow* test for infringement and justification applies with the same force and the same considerations to both species of constitutional rights: *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 37, 77, 78 and 79. However, in this instance, the appellants challenge a provincial regulation which allegedly restricts their aboriginal or treaty right to fish within the Z.E.C. by imposing a financial burden on their access to the land in question. As such, even if the *Regulation respecting controlled zones* is not found to infringe their constitutional rights unjustifiably under the *Sparrow* test for s. 35(1), if the right to fish is characterized as a treaty right, it may still be open to the appellants to challenge the provincial regulation under the federal statutory protection extended to aboriginal treaties under s. 88 of the *Indian Act*.

34 Accordingly, I will proceed as follows. I will begin by considering whether the appellants can succeed in challenging their convictions through the establishment of an aboriginal right to fish for food within the waters and rivers of the Z.E.C. Following my resolution of that issue, I will turn to examine whether the appellant may alternatively succeed through the establishment of a concurrent treaty right to fish, particularly in light of the statutory protection of s. 88 of the *Indian Act*.

A. *Aboriginal Right*

Aboriginal Rights and Aboriginal Title

35 Throughout the proceedings below, the appellants framed their ancestral right to fish on the Z.E.C. territory as an aboriginal right incidental to a claim of aboriginal title. The first step in their argument was therefore to contend that they enjoyed aboriginal title over the Z.E.C. through a right of historical occupation at common law as recognized in *Calder*, *supra*, and *Guerin v. The Queen*, [1984] 2 S.C.R. 335. As the appellants identified the foundation of their ancestral right in their factum:

> [TRANSLATION] The Appellants submit that their right to have access to and fish in the Z.E.C., although recognized by the Treaty of Swegatchy, also exists independently of that treaty or of any instrument or grant by the Crown, the whole as recognized in *Calder* and reaffirmed in *Guerin* and *Simon*, and that their historical occupation of this territory, as the first occupiers, entitles them to exercise the rights arising from their Indian title. . . . [Emphasis added.]

36 In response to this approach, the courts below uniformly considered the claim of the appellants in terms of whether they had established the existence of title. The Provincial Court, the Superior Court and the Court of Appeal all declined to infer the existence of title for divergent reasons. Barrière Prov. Ct. J. found that the Algonquins had established sufficient continuous historical occupation over the disputed lands, but he considered that the common law of aboriginal title had no application within the Colony of Quebec, given his interpretation of the Proclamation. Frenette J., by contrast, failed to find sufficient occupation in light of the nomadic character of the Algonquins, and he further concluded that the Proclamation did not recognize any new title in lands within the interior of the former Colony. Baudouin J.A., for the Court of Appeal,

declined to resolve the issue, but he strongly hinted that aboriginal title did not survive within New France following the transition to British sovereignty.

37 In short, the parties and the courts below collectively operated on the assumption that the claim of an aboriginal right to fish must rest in an underlying claim to aboriginal title over the territory in which the fishing took place. These actors, of course, did not have the benefit of this Court's recent holdings in *Van der Peet*, *Gladstone*, and *N.T.C. Smokehouse Ltd.* which articulated the organizing principles governing claims under s. 35(1) of the *Constitution Act, 1982*. Thus, this Court must now answer the fundamental question of whether this operating assumption was correct under the principles of the *Van der Peet* trilogy. In other words, this Court must answer whether aboriginal rights are necessarily based in aboriginal title to land, or whether claims to the land are simply one manifestation of a broader-based conception of aboriginal rights.

38 For the reasons I have given in the related appeal in *Adams*, *supra*, I find that aboriginal rights may indeed exist independently of aboriginal title. As I explained in *Adams*, at para. 26, aboriginal title is simply one manifestation of the doctrine 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.

We wish to reiterate the fact that there is no *a priori* reason why the defining practices, customs and traditions of such societies and communities should be limited to those practices, customs and traditions which represent incidents of a continuous and historical occupation of a specific tract of land.

39 However, as I stressed in *Adams*, at para. 30, a protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land.

Aboriginal Title and the *Royal Proclamation, 1763*

40 As noted previously, the appellants argued that they possessed aboriginal title over the disputed territories derived from historical occupation at common law. Additionally, they argued that they independently enjoyed a right to title over the territories of the Z.E.C. under the terms of the Proclamation. The respondent Attorney General, by contrast, submits that not only did the Proclamation not create an independent aboriginal interest in lands within the interior of the Colony, but it effectively precluded the recognition of any aboriginal interest or right upon such lands at common law in the absence of a specific concession.

41 For the purposes of this appeal, it is unnecessary to wade deeper into the murky historical waters surrounding the legal effect of the Proclamation because the case

can be disposed of on other grounds. In light of the principles articulated in *Adams*, it is clear that the appellants were not obliged to prove aboriginal title over the Z.E.C., whether at common law or under the Proclamation, as a precondition to demonstrating the existence of an ancestral right to fish. Rather, the appellants may succeed in their claim of an aboriginal right under s. 35(1) if they are able to establish that fishing within the territory of the Z.E.C. was "an element of a practice, custom or tradition integral to the distinctive culture" of the Algonquin people. For the reasons which I will elaborate below, I am satisfied that the appellants have indeed met the requirements of the *Van der Peet* test in this instance.

Aboriginal Rights within New France

42 In the proceedings below, the respondent adopted the position that the Algonquins could not assert the existence of aboriginal title within the former boundaries of New France in light of the process of French colonization and the legal transition to British sovereignty following capitulation. In short, given the intervention of French sovereignty following first contact with aboriginal peoples within New France, it is argued that the common law does not recognize the existence of an aboriginal *sui generis* interest in land within France's former colonial possessions in Canada. The Attorney General of Quebec took the position that the intervention of French sovereignty necessarily prohibits the recognition of aboriginal title and other ancestral rights under s. 35(1) within the prior geographic expanse of New France. As the respondent argued in categorical terms:

> [TRANSLATION] The effects of French sovereignty and of the legal system specific thereto are therefore clear: no aboriginal right could have survived the assertion of French sovereignty over the territory of New France. [Emphasis added.]

43 The argument of the respondent is fairly straightforward. Under the British law of discovery, the British Crown assumed ownership of newly discovered territories subject to an underlying interest of indigenous peoples in the occupation and use of such territories. Accordingly, the Crown was only able to acquire full ownership of the lands in the New World through the slow process of negotiations with aboriginal groups leading to purchase or surrender.

44 Unlike the British process of colonization, however, it is suggested that the French Crown did not legally recognize any subsisting aboriginal interest in land upon discovery. Rather, the French Crown assumed full ownership of all discovered lands upon symbolic possession and conquest. Accordingly, French colonizers never engaged in the consistent practice of negotiating formal territorial surrenders with the aboriginal peoples. G. F. G. Stanley, summarized this process in "The First Indian ‘Reserves’ in Canada", *Revue d'histoire de l'Amérique française*, 4, 2 (1950): 178-210, at p. 209, as follows:

> One point of interest emerges with respect to the Indian reserves of the Ancien Régime. At no time was there any recognition on the part of the French crown of any aboriginal proprietary rights in the soil. The French settler occupied his lands in Canada without any thought of compensating the native. There were no formal surrenders from the Indians, no negotiations, and no treaties such as marked the Indian policy of the British period. The lands which were set aside for the Indians were granted not of right but of grace, not to the Indians themselves but to the religious orders who cared for them. The nearest approach to any grant to the Indians themselves was the Sillery grant of 1651. Whatever rights the Indians acquired flowed not from a theoretical aboriginal title but from the clemency of the crown or the charity of individuals.

See, similarly, Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada* (2nd ed. 1972), at pp. 80-81; Henri Brun, “Les droits des Indiens sur le territoire du Québec” (1969), 10 *C. de D.* 415, at pp. 428-30; Henri Brun, *Le territoire du Québec: six études juridiques* (1974), at p. 64; L. C. Green and O. P. Dickason, *The Law of*

Nations and the New World (1989), at p. 223. The French monarch did cede important specific lands to missions for the purpose of organizing and evangelizing the indigenous residents of New France. As well, colonial authorities did indeed tolerate the fact that aboriginal peoples occupied and engaged in traditional practices and activities (such as fishing and hunting) on Crown lands. However, it is contended that the toleration of such activities represented a general liberty accorded to all of the King's subjects, rather than the recognition of a special right enjoyed by aboriginal peoples.

45 The respondent further argues that following capitulation, pre-existing French colonial law was fully received under the terms of *The Quebec Act, 1774* and under the general principles of the British law of conquest. See *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.), at pp. 1047-48 (E.R.), respectively; *Sammut v. Strickland*, [1938] A.C. 678 (P.C.), at p. 701. In the absence of a formal renunciation of the French colonial system, it is submitted that the common law thus incorporated the non-existence of aboriginal rights within New France in its doctrine of aboriginal title.

46 To begin, I am not persuaded that the status of French colonial law was as clear as the respondent suggests. As H. Brun admitted in “Les droits des Indiens”, *supra*, at p. 442, while French law never explicitly recognized the existence of a *sui generis* aboriginal interest in land, [TRANSLATION] "nor did it [explicitly] state that such an interest did not exist”. Indeed, some legal historians have suggested that the French Crown never assumed full title and ownership to the lands occupied by aboriginal peoples in light of the nature and pattern of French settlement in New France.

47 According to this historical interpretation, from the time of Champlain to 1763, French settlements within New France fell almost exclusively within the St. Lawrence Valley. At the date of Champlain’s arrival in the Montreal area in 1603, the

surrounding region was largely devoid of indigenous inhabitants. In one of the mysteries of the history of New France, the Iroquois people who occupied the region at the date of Jacques Cartier's visit in 1534 had simply disappeared by 1603. The French colonists thus claimed and occupied this particular area as *terra nullius*. But these historians argue that the French chose not to further encroach on the traditional lands of the aboriginal peoples surrounding the valley. In the west of New France, for instance, French seigneuries did not extend further than the Long-Sault, stopping well before the vague eastern boundary of the ancestral lands of the Algonquins. The French, of course, had good reason for not encroaching upon these lands, as they were both outnumbered and surrounded by potentially hostile forces in the Valley. Content with occupation of the *terra nullius* of the Valley, the French thus never engaged in a pattern of surrender and purchase similar to British colonial policy. In this interpretation, it is argued that the French Crown only assumed ownership of the lands lining the St. Lawrence River which it actually occupied and organized under the Seigneurial system. See, *e.g.*, Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at pp. 768-69; Brian Slattery, "Did France Claim Canada Upon 'Discovery'?", in J. M. Bumsted, ed., *Interpreting Canada's Past* (1986), vol. I, at pp. 2-26; W. J. Eccles, "Sovereignty-Association, 1500-1783", *Canadian Historical Review*, 65, 4 (1984): 475-510, at pp. 480-87; Report of the Legal Committee of the Indian-Eskimo Association of Canada, *Native Rights in Canada* (1970), at pp. 62-66; Cumming and Mickenberg, *Native Rights in Canada*, *supra*, at pp. 83-84; Cornelius J. Jaenen, "French Sovereignty and Native Nationhood during the French Régime", in J. R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (1991), 19, at p. 20; Richard Boivin, "Le droit des autochtones sur le territoire québécois et les effets du régime français" (1995), 55 *R. du B.* 135, at pp. 156-60.

48 This argument is supported by the fact that, in its diplomatic relations, the French Crown maintained that aboriginal peoples were sovereign nations rather than mere subjects of the monarch. As Cumming and Mickenberg chronicle in *Native Rights in Canada*, *supra*, at pp. 81-83, 96-98, in the diplomatic period following the Treaty of Utrecht, 1713, the French officially maintained that they could not cede title to lands occupied by aboriginal peoples in the Maritimes and Upper New York State as such peoples were independent nations allied with the French Crown, rather than mere royal subjects. The French similarly disavowed responsibility for Indian attacks on the British, on the grounds that aboriginal nations were independent allies of the French monarch rather than his royal subjects. See R. O. MacFarlane, "British Indian Policy in Nova Scotia to 1760", *Canadian Historical Review* 19, 2 (1938): 154-167, at pp. 160-61; W. S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society 1712-1857* (1965), at pp. 29-30; G. F. G. Stanley, *New France: The Last Phase 1744-1760* (1968), at pp. 80-85. While such assertions were raised in the context of subtle diplomatic manoeuvring between the two European powers, they do not appear to have been received as entirely hollow.

49 Furthermore, even under the assumption that the respondent's characterization of French colonial system is accurate, it is not at all clear that French colonial law governing relations with aboriginal peoples was mechanically received by the common law upon the commencement of British sovereignty. It is true that under *The Quebec Act, 1774*, and under the legal principles of British conquest, the pre-existing laws governing the acquired territory of New France were received and continued in the absence of subsequent legislative modification. It is by these legal means that the distinct civilian system of private law continues to operate and thrive within the modern boundaries of the province of Quebec. But while the new British regime received and continued the former system of colonial law governing the proprietary relations between

private individuals, it is less clear that the advent of British sovereignty continued the French system of law governing the relations between the British Crown and indigenous societies. In short, the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France. As Professor Slattery argues in "Understanding Aboriginal Rights", *supra*, at pp. 737-38:

> The doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to be "settled" or "conquered", and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.

Indeed, this Court has held that the law of aboriginal title represents a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province: *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340. See the views of the Royal Commission on Aboriginal Peoples on the status of aboriginal rights as federal common law in *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (1993), at p. 20.

50 However, I do not rely on such reasoning to reject the position of the respondent on the reception of French colonial law. Rather, I believe that the respondent's submission is best addressed under the terms and purpose of the constitutional enactment of s. 35(1) of the *Constitution Act, 1982*.

51 I do not believe that the intervention of French sovereignty negated the potential existence of aboriginal rights within the former boundaries of New France under s. 35(1). The entrenchment of aboriginal ancestral and treaty rights in s. 35(1) has changed the landscape of aboriginal rights in Canada. As explained in the *Van der Peet* trilogy, the purpose 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 such practices, customs and traditions 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 tests outlined in *Sparrow*, *supra*, and *Gladstone*, *supra*.

52 As such, the fact that a particular practice, custom or tradition continued, in an unextinguished manner, following the arrival of Europeans but in the absence of the formal gloss of legal recognition from French colonial law should not undermine the constitutional 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 recognition and approval of European colonizers. I should stress that the French Regime's failure to recognize legally a specific aboriginal practice, custom or tradition (and indeed the French Regime's tacit toleration of a specific practice, custom or tradition) clearly cannot be equated with a "clear and plain" intention to extinguish such practices under the extinguishment test of s. 35(1). See *Sparrow, supra,* at p. 1099; *Gladstone, supra,* at para. 34.

53 The respondent's view, if adopted, would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country. In my

respectful view, such a static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies. To quote the words of Brennan J. in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.), at p. 42:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

54 Therefore, even on the assumption that the French Crown did not legally recognize the right of the Algonquins to fish within the Z.E.C. prior to the commencement of British sovereignty, it remains open to the appellants to establish that they enjoyed an aboriginal right to fish within the Z.E.C. under the principles of *Van der Peet*, *Gladstone*, and *N.T.C. Smokehouse Ltd*.

Application of the *Van der Peet* Test

55 The first stage 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 taken pursuant to an aboriginal right, the government regulation said to infringe the right, and the practice, custom or tradition relied upon to establish the right.

56 In this case, the claim of the appellants is best characterized as a claim for an aboriginal right to fish for food within the lakes and rivers of the territory of the Z.E.C. At trial, the Algonquin elders Albert Brascoupé and William Commanda testified at length in relation to the practice, custom and tradition of their ancestors of fishing for sustenance within the waters of the Z.E.C., particularly but not exclusively within Desert Lake. The actions of the appellant Côté in this instance, of course, did not represent an act of fishing for food *per se*; rather, he was fishing to illustrate and teach younger aboriginal students the traditional Algonquin practices of fishing for food. But this fact should not change the nature of the appellant's claim. In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation. Thus, looking behind the immediate context of the appellant Côté's actions, the actual substantive claim in this instance should still be viewed as a right to fish for food.

57 The characterization of the appellants' claim as a site-specific right to fish for food is confirmed by the nature of the regulations alleged to infringe the right. The *Quebec Fishery Regulations* prohibit all fishing within the area in the absence of a licence. On its face, the regulation directly regulates the fishing practices of the appellant, thus supporting the foregoing characterization. The *Regulation respecting controlled zones*, however, only prohibits access to the Z.E.C. by motor vehicle in the absence of payment of a fee. At face value, the provincial regulation would appear to regulate a right of access to land, rather than a right to fish. But a right to fish for food upon a certain tract of territory would be meaningless without a right of physical access to that territory. If the provincial regulation effectively precluded the Algonquins from gaining access to the Z.E.C., such a regulation would have a direct impact upon the claimed right to fish.

Under the totality of the circumstances, the asserted right is therefore properly framed as a right to fish for food within the territory of the Z.E.C.

58 The second stage of the *Van der Peet* analysis requires the court to inquire whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition which was, prior to the contact with Europeans, an integral part of the distinctive aboriginal society of the aboriginal people in question. In this case, it must be determined whether fishing for food in the Z.E.C. was a central or significant feature of the distinctive culture of the Algonquin people prior to the time of contact. But as noted in *Adams*, at para. 46, evidence that at contact a custom was a significant part of their distinctive culture will generally be sufficient to demonstrate that prior to contact that custom was also significant to that particular culture. In this instance, similar to the situation of the geographically proximate Mohawks in *Adams*, I believe that the relevant time period for contact is best identified as the arrival of Samuel de Champlain in 1603, when the French began to assume effective control over the territories of New France.

59 Following the example of *Van der Peet, Gladstone,* and *N.T.C. Smokehouse Ltd.*, and most recently, *Adams*, the role of this Court is to rely on the findings of fact made by the trial judge and to assess whether those findings of fact were both reasonable and support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal community or group in question. In this instance, both Barrière Prov. Ct. J. and Frenette J. made divergent findings of fact in relation to whether the Algonquins exercised sufficient continuous occupation over the disputed territory to give them aboriginal title to it. However, these particular findings do not relate specifically to the proper question at issue today: namely, whether the reliance on the rivers and lakes within the Z.E.C., particularly Desert Lake, as a source of food was a significant part of the life of the Algonquins prior to contact. Furthermore,

as noted previously, the findings of Barrière Prov. Ct. J. were focused on the incorrect date; the trial judge scrutinized the occupation of the Algonquins at the time of British conquest, rather than the correct and much earlier date of the dawn of the 17th century.

60 However, Frenette J. did indeed make a finding of fact which was directed at the proper question before the Court in this case. On the question of title, Frenette J. undertook a comprehensive review of the historical and anthropological evidence in the record to determine whether the appellants had exercised sufficient occupancy over the Z.E.C. lands to satisfy the criteria set out in *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.). He concluded that in light of the itinerant hunting patterns and the thin population of the Algonquins, the appellants had failed to demonstrate that the Algonquins exercised real and exclusive possession over the disputed territories. But in framing his findings of fact in relation to title, he found that the evidence did demonstrate that the Algonquins exerted a presence in the disputed territory at the time of contact. He stated at p. 125 (C.N.L.R.):

> [TRANSLATION] If account is taken of all these factors and of the fact that the evidence shows that, given the number of Indians frequenting the territory in question, it was sparsely inhabited, while most of the Algonquins lived at the Sulpician mission at Lac des Deux-Montagnes (as noted by these anthropologists and by William Johnson), it must be concluded that the thesis put forward by the appellants is, at the very least, highly questionable and that it has instead been proved on a balance of probabilities that the Algonquins did not have real and exclusive possession of the territory in question. [Emphasis added.]

In short, while Frenette J. disputed the exclusive quality of the Algonquins' occupation of the Z.E.C., he accepted that the Algonquins did indeed frequent the territory in question at the relevant time. This finding is not contradicted by any other finding by Barrière Prov. Ct. J.

61 This finding is supported by the expert testimony presented at first instance. The appellants' key expert witness was Dr. Parent, a historian of aboriginal peoples in New France during the 17th century. Notwithstanding some of the Attorney General's doubts concerning Dr. Parent's expertise in this domain, the trial judge certified Parent as an expert witness on the history of the Algonquin people. In his testimony, Parent stated that in analysing the primary materials prepared by explorers and missionaries in the beginning of the 17th century, he could accurately identify the ancestral territories of the Algonquin people. As he described his methodology and conclusions:

> [TRANSLATION] To determine who controlled what and where, I relied primarily on what was written by Champlain at the time, and the first books by the Jesuits, essentially all the documents of those who wrote between 1603 and 1653. On that basis, I was able to delimit the territories of each nation, because Champlain described them. . . .
>
> [Turning to a map] The Algonquin territory covered first the entire Ottawa River geographic basin and then all the river basins, including, as I told you earlier, the Jacques Cartier River. That means the St. Maurice as well. [Emphasis added.]

Parent concluded that the Z.E.C. Bras-Coupé-Desert fell well within these traditional grounds of the Algonquins. As he stated:

> [TRANSLATION] The origin of the Algonquins is the Ottawa River, including, of course, the [Bras-Coupé-Desert] Z.E.C., which is an integral part of the Ottawa River geographic basin. [Emphasis added.]

62 Parent further testified as to the nature of Algonquin society at the time of contact. He explained that the Algonquins were, both socially and politically, a highly organized society. The foundation of their social organization consisted of multi-familial units of 15 people or more. These multi-familial units were organized into larger groups ("winter bands" and "summer bands") for purposes of coordinating domestic activities, such as acquiring food and building shelter. According to Parent, these larger bands shared a sufficient sense of community to be characterized as a "nation". As he noted,

they were governed by [TRANSLATION] "types of laws, ways and customs accepted and followed by everyone".

63 Parent described the Algonquins as a moderately nomadic people, who settled only temporarily and moved frequently within the area of the Ottawa River basin by means of foot, snowshoe, and canoe. Their itinerant habits were dictated by the presence and movements of their sources of sustenance, which in turn were governed by the changes of the seasons. Depending on the season, Parent testified that the Algonquin diet consisted of migratory birds, beavers, deer and moose. He was specific, however, that the Algonquins did indeed rely on fishing as an important source of sustenance. As he described the traditional diet of the Algonquins with the arrival of the fall:

> [TRANSLATION] August, generally late August, and early September were the fish spawning season; the fish spawned, if you will, in relatively sandy places and it was at this time that the multi-familial units and the winter bands and summer band came together, it was at this time that the summer band came together. They fished intensively in the spawning grounds of different species of fish.
>
> Why? Strictly because the fish served to build up the provisions they would use until the major winter snowfalls in late January. So the fish were caught, dried, smoked and stored, as it were, for the fall period.

In brief, in Parent's expert opinion, fishing within these traditional lands represented an important mode of survival for the Algonquins during the fall and early winter prior to the migration of potential prey such as deer, moose, and caribou.

64 The content of Parent's testimony was not significantly impugned upon cross-examination. Parent did acknowledge that following war in 1632, the Algonquins left the Ottawa River basin in large numbers and sought refuge next to French settlements. The Algonquins resumed occupation of their traditional lands following a peace treaty in 1666.

However, the substance of Parent's testimony relating to the society and practices of the Algonquins at the time of contact remained unchallenged.

65 The respondent Attorney General, for its part, did not call any comparable historian or anthropologist to rebut Parent's conclusions. The respondent called upon Ms. Jacqueline Beaulieu, a geographer and cartographer employed by the Quebec government, who testified in relation to official government mapping of aboriginal groups following 1760 until today. The respondent also elicited the testimony of Mr. Gilbert Ryan, an employee of the Department of Indian Affairs and Northern Development, whose experience related to title registries of Indian lands. Neither of these experts testified in relation to the practices, customs and traditions of the Algonquin people at the time of contact, nor, it would appear, would they have been qualified to do so. In short, the respondent led no expert evidence which would call into doubt Mr. Parent's historical conclusions.

66 Before this Court, the respondent continued to challenge Parent's expertise. The Attorney General asserted that Parent's expertise was limited to the history of the Montagnais and the Attikamekws, and that Parent lacked objectivity in relation to the claims of the Algonquins. On the evidence, I see no reason to overrule the trial judge's certification of Parent as an expert. Indeed, I note that the Crown relied on the expertise of Parent in *Adams* in relation to the historical customs and practices of the Mohawks, notwithstanding the alleged limits on the scope of his expertise.

67 In summary, following my survey of the record, I conclude that Frenette J. made a finding of fact that the Algonquins did frequent the Z.E.C. as part of their traditional lands at the time of contact. This finding was not contradicted by any of the findings of the Provincial Court, or for that matter, the Court of Appeal. Frenette J.'s

finding is supported and elaborated by the expert evidence of Dr. Parent presented at trial. According to Dr. Parent, at the time of contact, the ancestral lands of the Algonquins lay at the heart of the Ottawa River basin. These ancestral lands included the territory demarked by the Z.E.C. Bras-Coupé-Desert. The Algonquins, as a socially organized but nomadic people, moved frequently within these lands. The traditional diet of the Algonquins depended on the season, but Parent concluded on the basis of the available anthropological evidence that the Algonquins predominantly relied on fish to survive during the fall season prior to winter.

68 In light of the Crown's failure to elicit any contrary historical evidence at trial, the evidence produced at trial coupled with the findings of fact of the Superior Court is sufficient to support the inference that fishing for food within the lakes and rivers of the territory of the Z.E.C., and in particular, Desert Lake, was a significant part of the life of the Algonquins from a time dating from at least 1603 and the arrival of French explorers and missionaries into the area. Fishing was significant to the Algonquins, as it represented the predominant source of subsistence during the season leading up to winter.

69 As part of the second stage of the *Van der Peet* analysis, there must also 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. Because the courts below collectively operated on the assumption that the claim of an aboriginal right to fish must rest in an underlying claim to aboriginal title, they did not direct themselves to answering this question. Nevertheless, a survey of the record reveals that this part of the *Van der Peet* test has been met as well.

70 The relevant testimony was provided by two witnesses for the defence, Mr. Jacques Frenette and Mr. Jean-Guy Deschênes. Mr. Frenette was an anthropologist and ethnohistorian who studied the Desert River Band of the Algonquin people. Part of his testimony involved a description of the progressive abandonment of agriculture by this band after 1945. Despite the shift away from agriculture, traditional activities, such as fishing, continued:

> [TRANSLATION] [A]griculture was abandoned, but the traditional activities continued. And here, well, I spoke of the example of fishing, and I come back to it, because the example of fishing is important.

Later on in his testimony, Mr. Frenette concluded that [TRANSLATION] "fishing is a traditional activity that is continuing, is a traditional activity that has remained important". Finally, in relation to his work on the Z.E.C. Bras-Coupé-Desert, Mr. Frenette again stated that [TRANSLATION] "traditional activities, that is, fishing ... activities ... continued". Mr. Deschênes, also an anthropologist, stressed that aboriginal customs relating to fishing which exist today have their roots in a long tradition which started prior to European contact:

> [TRANSLATION] All the basic characteristics of the Algonquin culture ... concerning dealings with animals, these are factors which I regard as coming from a very lengthy tradition.
>
> The reason I say that is that it is shared by such a large number of groups that it must be part of an ancient development. The manner, for example, of respecting animals, of carrying out rituals, is shared by all the Algonquins and for it to be so widespread, it must thus go back a long way because these are basic concepts, that is how people see the world, and these are things that change fairly slowly.
>
> Therefore, in evolution, these phenomena can be regarded as coming from the pre-Columbian period.

71 In conclusion, I am satisfied that the appellants have demonstrated the existence of an aboriginal right to fish within the lakes and rivers of the territory of the Z.E.C. under the *Van der Peet* test.

Extinguishment

72 The Court must now consider whether, prior to 1982, the Algonquins' aboriginal right to fish within the Z.E.C. was extinguished. The respondent Attorney General, however, has declined to offer any proof relating to the question of extinguishment. Accordingly, I take it that the ancestral right of the Algonquins in this instance represents an "existing" aboriginal right within the meaning of s. 35(1) of the *Constitution Act, 1982*.

Infringement

73 Having found an "existing" aboriginal right to fish within the lakes and rivers of the Z.E.C., I now turn to the question of whether the impugned federal and provincial regulations infringe this right in this instance. The Court must examine the effect of these distinct regulatory regimes separately. First, it must be answered whether s. 4(1) of the *Quebec Fishery Regulations* constituted an infringement of the appellant Côté's aboriginal right to fish for food within the Z.E.C. Second, it must be considered whether s. 5.1 of the *Regulation respecting controlled zones* restricted the appellants' aboriginal right to fish for food within the Z.E.C.

74 In *Sparrow*, the Court set out the applicable framework for identifying the infringement of an aboriginal right or treaty right under s. 35(1) of the *Constitution Act, 1982*. It should be noted that the test in *Sparrow* was originally elucidated in the context

of a federal regulation which allegedly infringed an aboriginal right. The majority of recent cases which have subsequently invoked the *Sparrow* framework have similarly done so against the backdrop of a federal statute or regulation. See, *e.g.*, *Gladstone*. But it is quite clear that the *Sparrow* test applies where a provincial law is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified: *Badger*, *supra*, at para. 85 (application of *Sparrow* test to provincial statute which violated a treaty right). The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.

75 Speaking for the Court in *Sparrow*, Dickson C.J. and La Forest J. described the applicable test for infringement in these terms, at p. 1112:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right the preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

As recently noted in *Gladstone*, *supra*, at para. 43, this original formulation of the infringement test suggests an internal inconsistency, as it equated an analysis of *prima facie* infringement with an analysis of whether the infringement is unreasonable or "undue". But as I clarified in *Gladstone*:

> This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place.

The guiding inquiry at the infringement stage remains whether the regulations at issue represent a *prima facie* interference with the appellants' aboriginal or treaty rights.

76 Applying the infringement test set out in *Sparrow* and *Gladstone* in this instance, I find that the *Quebec Fishery Regulations* infringe the appellant Côté's right to fish for food within the Z.E.C. The federal regulation stipulates that a person who seeks to fish within designated territories must hold a valid licence. In *R. v. Nikal*, [1996] 1 S.C.R. 1013, Cory J. noted for a majority of this Court, at para. 102, that the existence of a licensing requirement will not necessarily constitute a *prima facie* infringement of an aboriginal right to fish in all cases. But for the reasons expressed in *Adams*, *supra*, I find that this particular licensing scheme infringes the rights of the appellants. In *Adams*, this Court finds that precisely the same provision, namely s. 4(1) of the *Quebec Fishery Regulations*, infringes the ancestral fishing right of a Mohawk fishing in Lake St. Francis. The provision enacts a blanket prohibition on fishing in the absence of licence. Under ss. 5(3) and 5(9) of the Regulations, the Minister, at his or her discretion, may issue a special permit to an aboriginal person authorizing them to fish for their own subsistence. But the regulations do not prescribe any criteria to guide or structure the exercise of this discretion. Such a regulatory scheme must, in the very least, structure the exercise of a discretionary power to ensure that the power is exercised in a manner consistent with the Crown's special fiduciary duties towards aboriginal peoples. Therefore, consistent with my conclusion in *Adams*, I find that s. 4(1) and the surrounding provisions of the *Quebec Fishery Regulations* impose undue hardship on the appellant Côté and interfere with his preferred mode of exercising his rights.

77 However, under the same test for infringement, I do <u>not</u> find that the *Regulation respecting controlled zones* infringes the right of the appellants to fish for food within the Z.E.C. Under the terms of the provincial regulation, an Algonquin person

is at liberty to enter the Z.E.C. by foot without restriction and without fee. Similarly, an Algonquin is free to penetrate the Z.E.C. by a variety of other means of transportation, including such traditional aboriginal means as canoe and snowshoe, and such modern means as bicycle or snowmobile. Again, these forms of access do not entail any financial cost. The impugned application of s. 5.1 of the *Regulation respecting controlled zones* only arises when an Algonquin person seeks access to the Z.E.C. by means of motor vehicle. The Regulation does not create a blanket prohibition against access by motor vehicle, nor does it subject such access to an unstructured administrative discretion. But it does condition the exercise of an aboriginal right to fish on the payment of a fee. In short, the tenor of the appellants' argument is that the provincial zoning regulation infringes their ancestral rights as it imposes a financial burden on the exercise of their constitutional right under s. 35(1).

78 I accept the general proposition that a regulation may infringe an aboriginal or treaty right under the *Sparrow* test by conditioning the exercise of such a right upon the payment of a user fee to the state. But in light of the surrounding circumstances of this case, I am persuaded that the financial burden in this instance does not amount to an infringement of the appellants' ancestral right to fish for food.

79 The fee in this instance, rather than constituting a revenue-generating tax for the provincial government or the Z.E.C. administration, represents a form of user fee dedicated to the upkeep of the facilities and roads of the Z.E.C. Claude Morin, director of the Z.E.C. at the relevant time, testified that all revenues collected from the motor vehicle access fees are directed towards the development and maintenance of the Z.E.C. For example, in 1984, revenues from vehicle entrance fees amounted to $18 287, while road maintenance expenditures amounted to $15 234 and buildings and road capital expenditures totalled $11 855. Comparing the Z.E.C.'s combined sources of revenue

with the Z.E.C.'s diverse expenses related to upkeep, the Z.E.C. was operating at a loss during the 1984 fiscal year. This particular Z.E.C. had been previously exploited by a forestry company, and its logging roads were left in a state of disrepair. According to Mr. Morin, the access fees actually facilitated access to the Z.E.C., as the collected funds were spent towards repairing and modernizing the transportation infrastructure of the Z.E.C.

80 As such, given the particular facts of this case, I find that s. 5.1 of the *Regulation respecting controlled zones* does not constitute a *prima facie* infringement of the appellants' ancestral right to fish for food. Rather than representing a revenue-generating fee which arbitrarily burdens the exercise of an aboriginal right connected to land, the challenged fee represents a tailored user fee directed at the repair and improvement of the modern transportation network upon that tract of land. In my view, the access fee, by improving the means of transportation within the Z.E.C., effectively facilitates rather than restricts the constitutional rights of the appellants.

Justification

81 Following the demonstration of an infringement of an aboriginal or treaty right under s. 35(1), the framework of analysis under *Sparrow* turns to the question of justification. As noted by the Court in that decision at pp. 1113-14, the justification inquiry consists of two distinct stages:

> If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective?
>
> ...

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue.

At the first stage of justification, the court must be satisfied that the asserted legislative objective is "compelling and substantial". At the next stage, the court must examine whether the infringement unduly restricts the aboriginal right in question, and whether the restriction can be accommodated with the Crown's special fiduciary relationship with First Nations.

82 I conclude that the infringement of the appellant Côté's right to fish resulting from s. 4(1) of the *Quebec Fishery Regulations* was not justified. In considering the identical regulatory scheme in *Adams*, I found that the Crown had failed to meet both legs of the test of justification. Since the scheme appeared to be driven by the desire to facilitate sport fishing, without any evidence of a meaningful economic dimension to that sport fishing, it could not be said to have been based on a compelling and substantial objective. Moreover, since the scheme provided no priority to aboriginal rights to fish, it failed to satisfy the Crown's fiduciary duty toward the Algonquin people. The Crown has not adduced any new evidence in this appeal which persuades me to alter these conclusions.

83 Since I find no infringement of the appellants' constitutional rights by s. 5.1 of the *Regulation respecting controlled zones*, it is unnecessary for me to consider whether this provincial regulatory scheme meets the test of justification for s. 35(1). I note in passing though, that the compatibility of the access fee with the fishing rights of the appellants does not preclude the Quebec government from reducing or eliminating this fee. Section 35(1) only lays down the constitutional minimums that governments must meet in their relations with aboriginal peoples with respect to aboriginal and treaty rights.

Subject to constitutional constraints, governments may choose to go beyond the standard set by s. 35(1).

B. *Treaty Rights*

84 Finally, it remains to be determined whether the appellants may alternatively succeed in challenging their convictions under the *Regulation respecting controlled zones* through their concurrent claim of a treaty right to fish for food. While the appellants have failed to demonstrate that the Regulation unjustifiably infringes their constitutional rights under s. 35(1) of the *Constitution Act, 1982*, I must still consider whether the provincial regulation has encroached on their treaty rights in contravention of the federal statutory protection accorded to treaty rights under s. 88 of the *Indian Act*.

85 Section 88 reads as follows:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. [Emphasis added.]

86 Originally adopted in 1951, s. 88 has played a pivotal role in our modern federal system by coordinating the interaction of federal and provincial laws in relation to aboriginal peoples. As I understand the intent of the provision, s. 88 presently serves two distinct purposes. First, s. 88 serves an important jurisdictional purpose. Through the operation of the provision, provincial laws which would otherwise not apply to Indians under the federal and provincial division of powers are made applicable as incorporated federal law: *R. v. Dick*, [1985] 2 S.C.R. 309. Second, s. 88 accords federal

statutory protection to aboriginal treaty rights. The application of such generally applicable provincial laws through federal incorporation is expressly made "[s]ubject to the terms of any treaty". Section 88 accords a special statutory protection to aboriginal treaty rights from contrary provincial law through the operation of the doctrine of federal paramountcy. See *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at pp. 114-15; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Sioui*, *supra*, at p. 1065; *Badger*, *supra*, at para. 69.

87 This second purpose, of course, has become of diminished importance as a result of the constitutional entrenchment of treaty rights in 1982. But I note that, on the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*. Once it has been demonstrated that a provincial law infringes "the terms of [a] treaty", the treaty would arguably prevail under s. 88 even in the presence of a well-grounded justification. The statutory provision does not expressly incorporate a justification requirement analogous to the justification stage included in the *Sparrow* framework. But the precise boundaries of the protection of s. 88 remains a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88. In the near future, Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these uncertainties and in light of the parallel constitutionalization of treaty rights under s. 35(1).

88 In this instance, however, I find that the protection of s. 88 is not engaged. In his thorough review of the historical evidence contained within the record, Baudouin J.A. of the Court of Appeal was satisfied that the appellants benefitted from a treaty right to fish for food within the Z.E.C. according to the terms of a treaty solemnized between the Algonquins and the British at Swegatchy in 1760. Assuming without deciding the existence of such a treaty right, I am satisfied that the impugned provincial regulation

does not restrict or infringe this treaty right. For the reasons which animated my previous finding that the *Regulation respecting controlled zones* does not infringe the aboriginal rights of the appellants, I find that the Regulation does not infringe or restrict the asserted right of the appellants to fish under the terms of the Swegatchy treaty. The Regulation only imposes a modest financial burden on the exercise of this alleged treaty right where access is sought by motor vehicle, and under the circumstances, the access fee actually facilitates rather than restricts the exercise of this right. Accordingly, although the Regulation is subject to the terms of the alleged treaty, the Regulation is not inconsistent with the treaty and remains operative in relation to the activities of the appellants. It is therefore unnecessary to further consider the scope of protection of s. 88, particularly in relation to whether the provision incorporates a justification defence similar to that outlined in *Sparrow*.

C. *Amendment of Informations and Constitutional Questions*

89 As indicated previously, the appellants were incorrectly charged and convicted under s. 5 of the *Regulation respecting controlled zones.* Although neither party objected to this error, nor moved to amend it in the proceedings below, both parties were in agreement before this Court that the charges should have been properly laid under s. 5.1 of the *Regulation respecting controlled zones.* Similarly, both parties agree and accept that the first stated constitutional question should address the enforceability of s. 5.1 of the Regulation as against the appellants.

90 This Court must therefore consider whether it can and should amend the convictions and constitutional questions *proprio motu* at this late stage of the proceedings. In criminal proceedings under the *Criminal Code,* R.S.C., 1985, c. C-46,

a court enjoys a broad authority to amend a defective indictment. See s. 601. The prosecution of these particular regulatory offences was undertaken under the *Summary Convictions Act* as it existed at the time. The Act contemplates a similarly broad power to amend a defective information. As the relevant parts of the Act read:

> **66.** (1) No objection shall be allowed to any information, complaint, summons or warrant for any defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant, or for any variance between such information or complaint and the summons or warrant at the hearing upon such information or complaint.
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> ...
>
> **82.** No judgment shall be given in favour of the appellant, if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant, issued upon any such information, complaint or summons, for any defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it be proved before the court hearing the appeal that such objection was made before the justice of the peace who tried the case and by whom such conviction or judgment was pronounced or decision given, nor unless it be proved that notwithstanding it was shown to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as in this act provided.
>
> ...
>
> **101.** No conviction or order which has been affirmed, with or without modification in appeal, shall be thereafter quashed for want of form, or be removed into the Superior Court according to articles 846 to 850 of the Code of Civil Procedure; and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same.

Section 48 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, further vests this Court with a broad authority to amend proceedings on its own initiative.

> **48**. (1) At any time during the pendency of an appeal before the Court, the Court may, on the application of any of the parties, or without any such application, make all such amendments as are necessary for the purpose of determining the appeal or the real question or controversy between the parties as disclosed by the pleadings, evidence or proceedings.

> (2) An amendment referred to in subsection (1) may be made, whether the necessity for it is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend.

91 In considering whether to amend a defective information or indictment, a court must concern itself with the impact of the proposed amendment upon the accused. The applicable standard under s. 601 of the *Code* is whether the accused would suffer "irreparable prejudice" as a result of the amended charge: *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555; *R. v. Tremblay*, [1993] 2 S.C.R. 932; *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2; *Morozuk v. The Queen*, [1986] 1 S.C.R. 31. In those *Criminal Code* cases where there was no evidence that the accused was misled or irreparably prejudiced by the variance between the indictment and the evidence, the Court amended the indictment and dismissed the appeal.

92 The applicable standard for amendment is the same under the *Summary Convictions Act*. Where a charge is reparable, you repair. To the extent that the evidence conforms with the correct charge and the appellants have not been misled or irreparably prejudiced by the variance between the evidence and the informations, the defect can and should be remedied. There is no evidence here, or even a mere suggestion, that the appellants have been prejudiced or misled by the reference to s. 5 in the informations. The appellants admit the constituent elements of the offences under s. 5.1. They made no motion to quash the defective informations at any stage. Both parties have acted throughout these proceedings as if the charge properly referred to s. 5.1 of the *Regulation respecting controlled zones.* Finally, and dispositively, the appellants agreed to the proposed solution, having no objection to the amendment of the appellants' charges and to the correction of the constitutional questions before this Court.

93 Accordingly, this Court amends the informations to stipulate that the appellants were charged under s. 5.1 of the *Regulation respecting controlled zones*, vacates the convictions under s. 5, and enters convictions under s. 5.1. The first stated constitutional question is similarly amended to refer to s. 5.1.

VI. Disposition

94 For these reasons, the appeal of the appellant Côté's conviction under the *Quebec Fishery Regulations* is allowed and an acquittal is entered. The appeal of the appellants' respective convictions under the *Regulation respecting controlled zones* is dismissed. Since we find that it is unnecessary to address the existence of a treaty right in this instance in view of our other holdings, we dismiss the respondent's cross-appeal against the Court of Appeal's finding of a treaty right.

95 The constitutional questions, as subsequently amended, are answered as follows:

Question 1: Is s. 5.1 of the *Regulation respecting controlled zones*, as it read at the time of the offences charged, unenforceable against the appellants, in the circumstances of the present case, on their ancestral hunting and fishing lands, pursuant to s. 88 of the *Indian Act* and/or s. 52 of the *Constitution Act, 1982*, by reason of the rights under a treaty allegedly concluded at Swegatchy, in August 1760, or by reason of the aboriginal rights of the aboriginal peoples invoked by the appellants?

Answer: No.

Question 2: Is s. 4(1) of the *Quebec Fishery Regulations*, as it read at the time of the offences charged, unenforceable against the appellant Franck Côté, in the circumstances of the present case, on his ancestral hunting and fishing lands, pursuant to s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights of the aboriginal peoples or the rights under a treaty allegedly concluded at Swegatchy, in August 1760, within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Answer: Yes.

The following are the reasons delivered by

96. LA FOREST J. -- I have had the advantage of reading the reasons of the Chief Justice, and while I agree with his conclusion and much of what he says, I am concerned about the possible reach of some parts of his reasons and I, therefore, find it advisable to succinctly set forth my own views.

97. As in the companion case of *R. v. Adams*, [1996] 3 S.C.R. 101, the issue in the present case is whether the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose can be recognized as an aboriginal right even though the Indians have no general right of occupation (often referred to as the "Indian title") of the affected land. As in *Adams*, I agree that this type of servitude (to use a generic term) should be recognized where the Indians exercise the right as an aspect of their particular way of life in pre-contact times. I think that was sufficiently established here. The fact that Quebec once fell under the French regime does not affect the matter in the present case. It was not established -- and certainly not in clear and plain terms -- that this aboriginal right was extinguished either during the French regime or later. The right claimed is, therefore, an "existing right" under s. 35(1) of the *Constitution Act, 1982*. I agree with the Chief Justice for the reasons he gives that this right was infringed by the *Quebec Fishery Regulations* but not by the *Regulation respecting controlled zones*. I also agree with what he has to say under the headings "Treaty Rights" and "Amendment of Informations and Constitutional Questions". It follows, therefore, that I would dispose of the case in the manner proposed by him.

The following are the reasons delivered by

98. L'HEUREUX-DUBÉ J. -- Subject to my remarks in *R. v. Adams*, [1996] 3 S.C.R. 101, I agree with the Chief Justice's analysis and would dispose of the appeal as he suggests.

Appeal allowed with respect to the conviction under the Quebec Fishery Regulations but dismissed with respect to the convictions under the Regulation respecting controlled zones.

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Solicitor for the intervener Chief Robert Whiteduck, on behalf of the Algonquins of Golden Lake First Nation and on behalf of others: Alan Pratt, Dunrobin.