R. *v.* Nikal, [1996] 1 S.C.R. 1013

Jerry Benjamin Nikal *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of British Columbia, the Attorney General for Alberta, the Alliance of Tribal Councils, Delgamuukw et al., the Fisheries Council of British Columbia, the Canadian National Railway Company, the BC Fisheries Survival Coalition and the BC Wildlife Federation *Interveners*

Indexed as: R. *v.* Nikal

File No.: 23804.

1995: November 30; 1996: April 25.

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 british columbia

Indians -- Aboriginal rights -- Fishing rights -- Appellant charged with fishing without a licence -- Whether licensing scheme infringing appellant's

aboriginal rights and therefore not applying to him -- Constitution Act, 1982, ss. 35(1), 52 -- British Columbia Fishery (General) Regulations, SOR/84-248, s. 4(1).

Appellant is a native charged with fishing without a licence contrary to s. 4(1) of the *British Columbia Fishery (General) Regulations*. Native persons, although required to have a licence, were entitled to a free permit to fish for salmon in the manner they preferred. Appellant had been gaffing salmon in the Bulkley River where it flows through his reserve. He took the position that the licensing scheme infringed his aboriginal rights as provided in s. 35(1) of the *Constitution Act, 1982* and was therefore inapplicable. He further contended that the river is, at this point, part of his reserve so that only the band by-law, which allowed band members unrestricted fishing in the river, applied.

Appellant was acquitted at trial and the acquittals were upheld by the Summary Conviction Appeal Judge. The acquittals were set aside by the Court of Appeal. The constitutional question before this Court queried whether s. 4(1) of the Regulations and licences issued under it were of no force or effect with respect to the appellant in the circumstances by reason of the aboriginal rights protected by s. 35 of the *Constitution Act, 1982*. In essence, two issues are raised: (1) whether the band's fishing by-law applies to the Bulkley River where it flows through the band's reserve, and (2) whether the licence requirement under s. 4(1) of the Regulations infringes the appellant’s aboriginal rights contrary to s. 35.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: Historical documents available to the public were relied on. All parties had an opportunity to review and make submissions pertaining to them.

The Crown did not intend to grant an exclusive fishery to the band when it created the reserve. Reserve commissioners were not given authority to bind the Crown and were instructed not to assign fishing rights irrevocably and absolutely. The Crown's policy against the granting of exclusive fisheries to the Indians was often and forcefully stated. No evidence supported the position that the Department of Indian Affairs had intended to grant the bands exclusive fisheries but the Department of Marine and Fisheries overrode this intention in an inter-departmental jurisdiction dispute. Notwithstanding the band's claim that it was misled as to the grant of an exclusive fishery, the facts surrounding this particular grant considered in light of the expressed general policy indicate an intention to allot only the land of the reserve and not the river.

The portion of the river flowing through the reserve (with the reserve on both sides) does not form part of the reserve through operation of the doctrine of *ad medium filum aquae* to non-navigable water. This doctrine, assuming without deciding that it should apply in Canada, does not apply for three reasons. First, it only applies to non-navigable rivers and the Bulkley River, taking into account its entire length, should be considered to be navigable. Secondly, when the reserve was created at common law the fishery was a right severable from the title to the river bed. Ownership of the river bed had no effect on the fishery as

the Crown specifically refused to grant an exclusive fishery to the band. Thirdly, even if the presumption could be said to apply, it was rebutted in light of the evidence that the Crown never allotted nor intended to allot the river bed to the band.

The onus of establishing a *prima facie* infringement of an aboriginal right rests on the person claiming that right. The existence and the extent of the aboriginal right must first be established. The right established was to fish for food and ceremonial purposes and to provide members of the band with fish necessary for personal food and ceremonial needs but no position was taken as to whether the right extends beyond that. The appellant had no right not to comply with the directions of the Department of Fisheries and Oceans.

A *prima facie* infringement of an aboriginal right does not necessarily occur if something should affect that right. Rights do not exist in a vacuum and the ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom without any restriction is not an acceptable concept in our society.

The aboriginal right to fish must be balanced against the need to conserve the fishery stock. This right cannot automatically deny the ability of the government to set up a licensing scheme or program as part of a conservation program since the right's exercise depends on the continued existence of the resource.

Only aboriginal peoples can exercise aboriginal rights. The nature and scope of these rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities. In this context, a licence may be the least intrusive way of establishing the existence of an individual's aboriginal right as well as preventing non-aboriginals from exercising aboriginal rights.

Conditions of the licence can infringe the rights guaranteed by s. 35 of the *Constitution Act, 1982*. The test established in *Sparrow* requires: (1) an assessment of whether the legislation in question has the effect of interfering with an existing aboriginal right, and if so, whether that effect represents a *prima facie* infringement of s. 35(1); and, (2) a determination of whether the limitation is unreasonable, imposes an undue hardship or denies holders of the right the preferred means of exercising the right. The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

The licence, as distinct from its conditions, does not constitute an infringement of s. 35(1). The simple requirement of a licence is not in itself unreasonable; rather, it is necessary for the exercise of the right itself. A licence which is freely and readily available cannot be considered an undue hardship for that term implies more than mere inconvenience. The licence by itself, without its conditions, cannot affect the preferred means of exercising the right since it is nothing more than a form of identification.

The government must justify those conditions of a licence which on their face infringe the s. 35 right to fish. The infringing conditions of the 1986

licence are: (i) the restriction to fishing for food only; (ii) the notations providing that fishing time was subject to change by public notice and that Indian food fishing outside set dates must be licensed by the Provincial Fish and Wildlife Conservation Officer; (iii) the restriction to fishing for the fisher and his or her family only; and (iv) the restriction to fishing for salmon only. These conditions are *prima facie* infringements of the appellant's aboriginal rights: (i) to determine band members who will receive the fish for ultimate consumption; (ii) to select the use (food, ceremonial or religious) of the fish; (iii) to fish for steelhead; and, (iv) to choose the period of time to fish in the river. Other terms of the licence could be infringements if they contradicted the appellant's aboriginal rights. These terms provide for: (i) the prescribed waters in which fishing can take place; (ii) the type of gear which can be used; and, (iii) the fishing times and days. Non-enforcement does not result in these conditions being valid. The holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right.

Sparrow set out questions to be addressed in determining if an infringement of aboriginal or treaty rights could be justified: (1) whether there was a valid legislative objective; and if so (2) whether the honour of the Crown and the special trust relationship and the responsibility of the government vis-à-vis aboriginals was at stake. Further questions might arise depending on the circumstances of the inquiry: whether there had been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation was available, and whether the aboriginal group in question had been consulted with respect to the conservation measures being

implemented. The concept of reasonableness forms an integral part of the *Sparrow* test for justification.

Reasonableness must come into play in aspects of information and consultation. Regulations pertaining to conservation may have to be enacted expeditiously, however, if a crisis is to be avoided. The nature of the situation will have to be taken into account.

The government adduced no evidence to justify the conditions of the licence and accordingly did not meet its onus to do so. The licence and its integral conditions are an indivisible whole. The conditions, even if they could be considered separately, were not severable.

Per L'Heureux-Dubé and McLachlin JJ. (dissenting): The requirement of a licence did not constitute a *prima facie* infringement of the appellant's constitutionally protected right to fish for food.

The issue before the Court was whether the act of licensing *per se* was unconstitutional and not whether the conditions attached to the licence were unconstitutional. The charge of failing to obtain a validly required licence must be distinguished from breach of one of the conditions of the licence. The invalidity of licence conditions does not excuse a person from obtaining the licence required by law even if the conditions are "integral" to the licence.

Cases Cited

By Cory J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Keewatin Power Co. v. Kenora (Town)* (1906), 13 O.L.R. 237; **considered**: *Flewelling v. Johnston* (1921), 59 D.L.R. 419; **referred to**: *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97, rev'g [1991] 3 W.W.R. 97; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Re Coleman and Attorney-General for Ontario* (1983), 143 D.L.R. (3d) 608; *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, 122 E.R. 274; *Holford v. Bailey* (1846), 8 Q.B. 1000, 115 E.R. 1150, rev'd on other grounds (1850), 13 Q.B. 426, 116 E.R. 1325; *R. v. Agawa* (1988), 65 O.R. (2d) 505; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Sharma*, [1993] 1 S.C.R. 650; *R. v. Bob* (1991), 88 Sask. R. 302; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Norton v. Shelby County*, 118 U.S. 425 (1886); *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161.

By McLachlin J. (dissenting)

Schachter v. Canada, [1992] 2 S.C.R. 679.

Statutes and Regulations Cited

Act respecting the extension and application of "The Fisheries Act," to and in the Provinces of British Columbia, Prince Edward Island and Manitoba, S.C. 1874, c. 28.

British Columbia Fishery (General) Regulations, SOR/84-248, s. 4(1).

Canadian Charter of Rights and Freedoms, ss. 1, 6(1).

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

English Law Ordinance, 1867, S.B.C. 1867, No. 70, s. 2 [now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2].

Fisheries Act, R.S.C., 1985, c. F-14 (formerly R.S.C. 1970, c. F-14).

Fisheries Act, S.C. 1868, c. 60.

Gitksan-Wet'suwet'en Indian Fishing By-Law, SOR/86-612, ss. 2, 3, 4.

Indian Act, R.S.C., 1985, c. I-5, s. 81(1)(*o*) [am. c. 32 (1st Supp.), s. 15(3)] (formerly R.S.C. 1970, c. I-6 [am. S.C. 1985, c. 27, s. 15.1(2)]).

North-West Territories Act, R.S.C. 1886, c. 50, s. 11.

Authors Cited

Coulson, H. J. W., and Urquhart A. Forbes. *The Law relating to Waters*, 2nd ed. London: Sweet and Maxwell, 1902.

La Forest, Gérard V. *Water Law in Canada -- The Atlantic Provinces*. Ottawa: Information Canada, 1973.

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 245, [1993] 5 W.W.R. 629, [1993] 4 C.N.L.R. 117, 33 B.C.A.C. 18, 54 W.A.C. 18, allowing the Crown's appeal from a decision of the British Columbia Supreme Court (1990), 51 B.C.L.R. (2d) 247, [1991] 2 W.W.R. 359, [1991] 1 C.N.L.R. 162, 5 C.R.R. (2d) 118, upholding the acquittal of the accused by Smyth Prov. Ct. J., [1989] 4 C.N.L.R. 143, on a charge of

fishing without a licence. Appeal allowed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Peter R. Grant, *David Paterson* and *Peter W. Hutchins*, for the appellant.

S. David Frankel, Q.C., and *Cheryl J. Tobias*, for the respondent.

Paul J. Pearlman, for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

Arthur C. Pape, for the intervener the Alliance of Tribal Councils.

Michael Jackson, for the interveners Delgamuukw et al.

J. Keith Lowes, for the intervener the Fisheries Council of British Columbia.

Patrick G. Foy, for the intervener the Canadian National Railway Company.

Christopher Harvey, Q.C., for the interveners the BC Fisheries Survival Coalition and the BC Wildlife Federation.

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

I. CORY J. -- The appellant is a Wet'suwet'en Indian of the Moricetown Band. He lives in the village of Moricetown which is within the boundaries of Moricetown Reserve No. 1. The reserve comprises lands on both sides of the Bulkley River. On July 20 and 23, 1986, officers of the Department of Fisheries and Oceans watched the appellant gaff salmon in the Bulkley River at Moricetown. When he was asked for his licence he stated that he did not have one. He was then charged with fishing without a licence contrary to s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. The Regulations provided that Indian people were entitled to a free permit to fish for salmon in the manner they preferred.

II. The appellant took the position that the *Fisheries Act*, R.S.C., 1985, c. F-14 (formerly R.S.C. 1970, c. F-14), and Regulations did not apply to him as the licensing scheme infringed his aboriginal rights as provided in s. 35(1) of the *Constitution Act, 1982*. The section is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and reads:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The appellant further contended that the Bulkley River is, at this point, part of the Moricetown Reserve and that as a result he was bound solely by the band by-law as it pertains to fishing in the river.

III. At trial on May 29, 1989, Smyth Prov. Ct. J. acquitted the appellant of the charges. On appeal, the Summary Conviction Appeal Justice Millward J. upheld the acquittals, but on different grounds. On further appeal to the British Columbia Court of Appeal, a majority of the court (Lambert and Hutcheon JJ.A. dissenting) set aside the acquittals and entered convictions on the charges.

Issues

IV. By order of the Chief Justice the following constitutional question was stated:

> Is s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force or effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

V. The appellant and respondent have agreed that two issues are raised in this appeal. The first is whether the fishing by-law of the Moricetown Band applies to the Bulkley River at Moricetown. The second is whether the licence requirement under s. 4(1) of the *British Columbia Fishery (General) Regulations* infringes the appellant's aboriginal rights, contrary to s. 35.

The Band By-Law

VI. Section 81(1)(*o*) of the *Indian Act*, R.S.C., 1985, c. I-5 (formerly R.S.C. 1970, c. I-6), provides:

> **81.**(1) The council of a band may make by-laws . . . for any or all of the following purposes, namely,
>
> . . .
>
> (*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

VII. Pursuant to that provision, the Moricetown Band Council passed a by-law which provided in part as follows:

Gitksan-Wet'suwet'en Indian Fishing By-Law, SOR/86-612

> 2. The following definitions apply in this By-Law:
>
> . . .
>
> r) "Waters of the Bands" means all water, waterways, rivers or streams which are located upon, or within boundaries of the reserves set aside for the use and benefit of the Moricetown Band.
>
> 3. This By-Law applies in respect and over all waters of the Band.
>
> 4. a) Gitksan-Wet'suwet'en persons are permitted to engage in fishing in waters of the Bands at any time and by any means. . . .

Whether or not the by-law could be applied to the Bulkley River will depend on whether that river forms part of the reserve.

Reasons of the Courts Below

Trial, [1989] 4 C.N.L.R. 143

VIII. Smyth Prov. Ct. J. began by considering the band's by-law. He noted that the Crown had conceded that if the by-law applied to the Bulkley River, it

would take priority over the *Fisheries Act* and the Regulations. Section 81(1)(*o*) of the *Indian Act* authorized the band to make by-laws for the "preservation, protection and management of . . . fish . . . on the reserve". The key issue was therefore the interpretation of the expression "on the reserve". He held, at p. 146, that this expression authorized the band to make by-laws not only in relation to fisheries which were a geographical part of the reserve, but also in relation to "waters that are merely touching, against or at the reserve". Since the Bulkley River touched the Moricetown Reserve, the band's by-law would apply to the river and the appellant could rely on the by-law as a defence to the charges against him. On this ground, Smyth Prov. Ct. J. acquitted the appellant.

Supreme Court of British Columbia (1990), 51 B.C.L.R. (2d) 247

IX. Millward J. found that Smyth Prov. Ct. J. erred in his interpretation of the expression "on the reserve". He held that the expression could not be read so as to include land outside the boundaries of the reserve. Since the bed of the Bulkley River is not a geographic part of the Moricetown Reserve he found that the by-law did not apply to it, and thus the appellant could not rely upon it.

X. Millward J. then examined the food fishing licensing regime as a whole and concluded that it constituted a *prima facie* infringement of the appellant's aboriginal right. He then turned to the question of whether this infringement could be justified. He noted that the licensing regime was enacted pursuant to the valid legislative objectives of conservation and management. He observed that because salmon are particularly vulnerable to overfishing, the management of the salmon fishery must be directed by an objective, central organization. He found that the

conservation and management concerns justified the imposition of a licensing scheme on all fishers including aboriginals.

XI. Turning to the specific licensing scheme in question, Millward J. considered whether it was rationally connected to the goals of conservation and management. He noted that licences are free, do not restrict the amount of fish which may be caught and impose only minimal conditions on the manner of catching the fish. However, he found that in 1986 the salmon stocks near Moricetown were healthy and there was no need for any conservation steps to be taken in that year.

XII. The Department of Fisheries and Oceans argued that the licensing system was important because it allowed it to exert some control over the fishery if conservation measures were required in the future. Millward J. found the licensing scheme to be lacking in several aspects. First he pointed out that since aboriginal peoples must be given priority in the allocation of salmon, conservation measures should be directed first at other users, such as sport fishers. Second, using licences only to keep track of those who can fish achieves little, and simply provides the Department with the number of people that are fishing with a licence. Third, the licensing scheme does not aid in determining the harvest rates of the fishery since it does not specify how many fish may be caught. Moreover, several alternatives to licensing are available to ensure that fishers receive information about the fishery (i.e., newspaper announcements). In short, the licensing scheme could not be justified either on the basis that it was necessary for information gathering or on the basis that it was necessary for information dissemination.

British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 245

Macfarlane J.A. (Taggart J.A. concurring)

XIII. Macfarlane J.A. began by observing that the appellant was not simply asserting an aboriginal right to fish for food. Rather, he was asserting an aboriginal right of self-regulation in relation to the salmon fishery. In his view, the existence of the right of self-regulation would be inconsistent with the judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where it was recognized that the Crown could regulate aboriginal rights. Moreover, in *Sparrow* it was decided that not all regulations of an aboriginal right constituted *prima facie* infringement of that right. A regulation must constitute an unreasonable limitation or impose undue hardship in order for it to infringe an aboriginal right. Macfarlane J.A. concluded at p. 257:

> . . . the requirement that an Indian hold a licence does not constitute a prima facie infringement of an aboriginal right. Licensing is a natural part of a centralized scheme to manage fisheries in order to ensure conservation and to achieve a proper allocation of the resource. It is a simple means of determining where and by whom fishing is done and it may provide data necessary to properly manage the resource. Licensing is reasonable and does not cause undue hardship. The licence is free, and available to all band members. It does not deny a right to fish; it is a small part of the regulation of fishing.

XIV. Macfarlane J.A. then considered whether the actual terms of the licence constituted a *prima facie* infringement of the aboriginal right. Although the licence limited fishing activities, Macfarlane J.A. could not characterize these limitations as unreasonable or unduly harsh. Had the appellant obtained a licence,

he could have done exactly what he was doing when charged. In the circumstances, there was no *prima facie* infringement.

XV. Macfarlane J.A. then rejected the appellant's argument that the band's by-law afforded him a defence. He found that the by-law had no application outside of the reserve and that the river was outside of the reserve. The appellant could not rely on the principle of *ad medium filum aquae* since in Macfarlane J.A.'s view, the Crown never intended to include the bed of the Bulkley River in the reserve allotted to the Moricetown Band. He found this was demonstrated by the acreage of the allotment and by the firm and consistent rejection by the province and Canada of native claims to foreshore rights.

XVI. Finally, the creation of the Moricetown Reserve did not involve a conveyance of land, nor did it result in title's being vested in the band. Therefore, a common law property concept which depends on ownership, such as *ad medium filum aquae,* has no relevance with respect to reserves.

Wallace J.A. (concurring in the result)

XVII. In Wallace J.A.'s view, the imposition of a licensing requirement is not, *per se*, an infringement of aboriginal fishing rights. The federal government has the constitutional power to regulate fisheries, and the elders of the Moricetown Band do not have an aboriginal right to excuse band members from complying with federal laws and regulations respecting fisheries. Wallace J.A. stated that he found himself in agreement with Macfarlane J.A.'s conclusion that licensing *per se* did

not constitute a *prima facie* infringement of the right to fish for food, nor did the conditions of this particular licence.

XVIII. Wallace J.A. then went on to reject the application of the *ad medium filum aquae* principle on the basis that the Bulkley River is navigable and that the principle has no application to navigable rivers. He found that the proper test for the navigability of a river requires a consideration of the river in its entirety.

Lambert J.A. (dissenting)

XIX. Lambert J.A. began his reasons by dealing with the band's by-law. He found that the Bulkley River was not within the geographic boundaries of the Moricetown Reserve, was therefore not "on the reserve", and *ad medium filum aquae* could not be used to extend the reserve boundaries to include the river. As a result, a defence based on the application of the band's by-law could not succeed.

XX. He did, however, state that while the river was not within the reserve, the Moricetown Band nevertheless has an aboriginal title to the exclusive possession, use and enjoyment of the reserve land and to the Bulkley River fishery. Lambert J.A., relying on his reasons in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), found that the band had the right of self-government and self-regulation in relation to this fishery, but that this was an internal right and did not extend beyond the bounds of the reserve.

XXI. Lambert J.A. then considered whether the food fishing licensing requirement infringed the appellant's aboriginal right, and if so, whether it could

be justified pursuant to the *Sparrow* test. He observed that the appellant was asserting an aboriginal right to fish which was not dependent on holding a licence. He found that licensing was an external imposition on the right. In his view, it was a *prima facie* interference with the appellant's fishing rights to require as a precondition to the exercise of these rights that he fill out forms, answer questions, and wait until a licence was granted.

XXII. On the question of justification, Lambert J.A. recognized the importance of having a single, central organization to coordinate the conservation and management of fish resources. The scheme administered by such an organization might well require licensing to ensure reporting and to enforce catch limitations. However, in 1986 the federal government did not recognize aboriginal fishing rights other than that related to food. There was no recognition of the right to sell salmon nor of the rights of self-regulation and self-government. In that context, the licensing system as it operated in 1986 was not consistent with the true rights of the Moricetown Band. Regardless of the objectives of the scheme, the manner of putting it into effect and carrying it out without the cooperation of the Moricetown Band was contrary to the principles set out in *Sparrow*, *supra*. Lambert J.A. added that the requirement of holding a licence is not justified by conservation goals.

Hutcheon J.A. (dissenting)

XXIII. Hutcheon J.A. observed that the conditions of the food fishing licences are not at issue in this case. The real issue is whether the requirement of a licence infringed the appellant's aboriginal right to fish. In Hutcheon J.A.'s view, it was

implicit in *Sparrow* that a licensing requirement is not, *per se*, a violation of aboriginal fishing rights. *Sparrow* is, therefore, authority for the proposition that a licensing regime is within the legislative power of the federal government and is not itself an infringement of the aboriginal right to fish.

XXIV. On the issue of the band's fishing by-law, Hutcheon J.A. agreed with Millward J. that the *Indian Act* only authorizes fishing by-laws related to waterways within the geographic boundaries of a reserve. Thus, the question is whether the Bulkley River is within the Moricetown reserve. He held that in this case, the principle of *ad medium filum aquae* created a presumption that the Bulkley River was within the reserve because it is non-tidal and non-navigable. This presumption was not rebutted, and the appellant could rely on the by-law as a defence.

Analysis

XXV. In order to determine whether the band by-law applies to the Bulkley River, it will be necessary to consider and resolve a number of questions. At the outset it must be emphasized that a consideration of the by-law raises the question of whether an exclusive right to fish in the Bulkley River at Moricetown was granted to the band. This is very different and distinct from the aboriginal right to fish for food and ceremonial purposes which is given constitutional recognition and protection by s. 35 of the *Constitution Act, 1982*. Obviously if an exclusive right to fish was granted to the band, the by-law would be valid and applicable to the Bulkley River in its passage through the reserve.

XXVI. At the outset I would confirm that I have read and relied upon some of the historical documents filed by the intervener Canadian National Railway Company. The appellant objected to any use being made of these documents. I cannot accept that position. First, all parties have had an opportunity to review the documents and make submissions pertaining to them. Further these are all documents of a historical nature that can be found in the public archives. They are available for use by all members of the public. Lamer J. (as he than was) spoke of such documents in clear and convincing tones in *R. v. Sioui*, [1990] 1 S.C.R. 1025. He wrote at p. 1050:

> I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge.

Did the Crown Intend to Include the Fishery in the Allotment of Moricetown Indian Reserve No.1 to the Wet'suwet'en Band?

The General Policy of the Crown

XXVII. In this case much has been said as to the general practice of the Crown in allocating reserves to native peoples. Evidence as to a general practice may be particularly helpful in determining the scope or extent of native rights. The relevant evidence is sometimes lost and that which remains must be carefully placed in context so that its true significance is neither distorted nor lost.

XXVIII. The historical evidence as to the standard practice of the Crown can be conveniently divided into pre- and post-Confederation periods. This evidence,

taken from documents in the public archives, demonstrates that in both periods there was a clear and specific Crown policy of refusing to grant, in perpetuity, exclusive rights to fishing grounds. The Crown would, however, grant exclusive licences or leases over particular areas for a fixed period of time. Obviously this practice was far from an absolute assignment of a fishery right.

Pre-Confederation

XXIX. There are numerous examples of statements by the Crown, both in British Columbia and in the Province of Canada, that the firm policy of the Crown was to treat Indians in the same manner as non-Indians with respect to the allocation of fishing grounds for commercial use. There are also clear statements that this policy involved a rejection of claims to exclusive use or control of any public waters for the purposes of fishing. An example is the statement of Governor Douglas, made in 1860 during a major address concerning the Indians on the mainland of British Columbia. He stated:

> *I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony*; and that on their becoming registered free miners they might dig and search for gold, and hold mining claims on the same terms precisely as other miners: in short, I strove to make them conscious that they were recognized members of the commonwealth. . . . [Emphasis by underlining added.]

(Dispatch of Governor Douglas to the Secretary of State for the Colonies, cited in *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, at p. 255. (Italics added by McEachern C.J.))

XXX. An even earlier example of the same concept is expressed in a letter dated April 16, 1845 from W. H. Draper, Attorney General, Province of Canada to J. M. Higginson, Superintendent General of Indian Affairs, Province of Canada. The Attorney General wrote:

> Sir
>
> In reply to your reference of the 10th February last calling for my opinion whether a fishery in the waters of Lake Huron around and adjacent to certain islands which are within the British territory, but have not been formally ceded to the Crown by the Indians, is to be considered the property of the Crown or of these Indians, I have the honor to report my opinion, that the right to fish in public navigable waters in Her Majesty's dominions is a common public right - not a regal franchise - and I do not understand any claim the Indians can have to its exclusive enjoyment. [Emphasis added.]

(National Archives of Canada, Record Group 10, Volume 612, p. 215.)

XXXI. These two passages indicate that the intention and policy of the Crown was to guarantee full public access to the fisheries, and to reject any exclusive claims to fishing grounds. The policy permitted the Indians to exercise their right to fish but did not accord them any special status.

XXXII. In England, it has been accepted that since the *Magna Carta*, the Crown has no power apart from statute to grant a several or exclusive fishery to anyone. See Gérard V. La Forest, *Water Law in Canada -- The Atlantic Provinces* (1973),

at p. 196. Thus in refusing to grant an exclusive fishery to the Indians, the federal government was following historical precedent.

XXXIII. An examination of the early Fisheries Acts of the Province of Canada and the first *Fisheries Act* of the new Dominion, the *Fisheries Act*, S.C. 1868, c. 60, confirms this same policy of exercising only limited powers. The Act gave the government the right to grant exclusive leases and licences to fishing grounds, but there was no provision in the Act for the permanent alienation of fishing rights to private parties.

XXXIV. This pre-Confederation policy is also set out in the 1866 opinion of James Cockburn, Solicitor General of the Province of Canada. He stated:

> With reference . . . to the claim of the Indians to exclusive fishing rights, my opinion is that they have no other or larger rights over the public waters of this Province than those which belong at Common Law to Her Majesty's subjects in general.
>
> . . . I should say that without an Act of Parliament ratifying such reservation, no exclusive right could thereby be gained by the Indians, as the Crown could not by any Treaty or act of its own (previous to the recent Statute) grant an exclusive privilege in favour of Individuals over public rights, such as this, in respect of which the Crown only holds as trustee for the general public.

(Memorandum *in re* 23 January, 1866 memorandum of W. F. Whitcher (Head of Fisheries Branch, Department of Crown Lands, Province of Canada), 8 March, 1866 in File No. 4/1866, Department of Justice, Ottawa, Ontario.)

Post-Confederation

XXXV. The policy of refusing to grant exclusive fisheries was maintained in the post-Confederation period. It is clear that the same understanding of the policy which existed in the Provinces of Canada and British Columbia before Confederation continued subsequently. For example, on December 17, 1875, W. F. Whitcher, Dominion Commissioner of Fisheries, sent a Department of Marine and Fisheries Circular to Fishery Overseers which stated, in part that:

> Certain circumstances . . . render it desirable to direct your attention to the exact legal status of Indians in respect of the Fishery Laws.
>
> Fisheries in all the public navigable waters of Canada belong *prima facie* to the public, and are administered by the Crown under Act of Parliament. . . . Indians enjoy no special liberty as regards either the places, times, or methods of fishing. They are entitled only to the same freedom as whitemen, and are subject to precisely the same laws and regulations.
>
> . . .
>
> There seems to be an impression in some quarters, that exclusive control of fishings in connection with Indian properties belongs to the resident Indians, and that they are at liberty to remove the fishing gear of Whitemen who resort to these fisheries under leases or licences granted by the Crown.
>
> This impression is alike erroneous, mischievous and unfortunate. No such exceptional power exists. . . .

(National Archives of Canada, Record Group 10, Volume 1972, File No. 5530.)

It should be noted that this circular properly refers to the “administration”, that is to say, the regulation by the Government of Canada of fisheries in navigable waters. The Bulkley River is a navigable waterway both above and below the

Moricetown Reserve and, for the reasons which appear later, is therefore to be considered navigable at the Reserve.

XXXVI. The letter of W. F. Whitcher, Dominion Commissioner of Fisheries to E. A. Meredith, Deputy Minister of the Interior, of January 20, 1876, indicates that the situation in British Columbia was very much a concern of Federal officials. He wrote:

> Having submitted to the Minister the text of the correspondence which has taken place on the subject of fishing rights claimed by Indians. . . I am desired by him to acknowledge the prompt attention bestowed on this matter by the Department of the Interior, and the satisfactory settlement effected. This difficulty, thus fortunately concluded, was such as might at any moment have become extremely troublesome. It was more necessary therefore to deal with it decisively at its present stage, rather than to delay until its existence should produce further misapprehensions affecting these public properties, <u>particularly in the younger provinces of the Dominion</u>, inhabited largely by Indians and half-breeds, where the Government may be soon called upon to apply the fishery laws.
>
> . . . it is believed that the cordial co-operation of the Departments in respect of the fishing <u>privileges</u> which exist in the vicinity of Indian Reserves, and the occupation of fishing stations connected therewith, under a uniform system of licence, will ensure to the Indians free and exclusive use of fishery grounds ample for their necessities. . . . [Emphasis added.]

(National Archives of Canada, Record Group 10, Volume 1972, File No. 5530.)

XXXVII. The younger provinces of the Dominion referred to were obviously the provinces of British Columbia, Manitoba, and Prince Edward Island, to which the *Fisheries Act* would be extended only a few months later: *An Act respecting the extension and application of "The Fisheries Act," to and in the Provinces of British Columbia, Prince Edward Island and Manitoba,* S.C. 1874, c. 28. Accordingly,

when Reserve Commissioners were appointed a few months later with the mandate to allocate reserves in British Columbia, they were certainly not either specifically authorized or by inference empowered to grant exclusive rights in the fishery.

The Mandate of the Reserve Commissioners

XXXVIII. The appellant contended that the Reserve Commissioners, as representatives of the Crown, were given the authority to bind the Crown, and to assign fishing rights irrevocably and absolutely. This position is contrary to both the general policy statements made by the Crown and the specific instructions provided to Commissioners. In a letter from D. C. Scott, Deputy Superintendent General of Indian Affairs, to D. H. MacDowall, Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia, dated May 2, 1916, it was stated:

> . . . I do not think that former Commissioners could grant special fishing privileges as distinct from fishing stations and reserves. The Department has no record of confirmation of such by the Department of Marine and Fisheries.
>
> . . .
>
> . . . I cannot find that Mr. O'Reilly had power to grant any fishing privileges whatever.

(National Archives of Canada, Record Group 10, Volume 3822, File No. 59335-1.)

XXXIX. Earlier statements confirm this view. For example, in 1890, Robert Sedgewick, Deputy Minister of Justice stated:

> I have examined all the papers in connection with the matter. The Indian Reserve Commissioner appears to have power to mark out reserves, but it does not appear that the Governor in Council, or any other authority ever gave or purported to give him authority to deal with the right of fishery.
>
> . . .
>
> I have therefore to state that the Indian Reserve Commissioner has not the power to set apart for the exclusive use of the Indians any of the waters of British Columbia.

(R. Sedgewick, Deputy Minister of Justice, to John Tilton, Deputy Minister of Fisheries, August 15, 1890 in National Archives of Canada, Record Group 10, Volume 3828, File No. 60926.)

And in 1897, J. D. McLean, Secretary, Department of Indian Affairs, stated:

> As to fishing rights in British Columbia it should be stated that under the arrangement come to with the Government of that Province in 1876, by which reserves were to be set aside for the Indians, no special mention was made of fishing privileges; but the Reserve Commissioner has from time to time allotted Indians certain fisheries, and the Department of Marine & Fisheries has been advised of these, and asked to confirm them; but, so far as the correspondence shows, that Department has not confirmed them, and has objected to exclusive fishing privileges being granted to Indians as against white people.

(Memorandum, November 26, 1897, in National Archives of Canada, Record Group 10, Volume 3909, File No. 107297-3.)

XL. It was argued by the appellant that these statements only represent the view of the Department of Marine and Fisheries. It was the appellant's position that the Department of Indian Affairs intended to grant exclusive fisheries to the Indians, but that this was overridden by the Department of Marine and Fisheries

in what amounted to an inter-departmental dispute as to jurisdiction. This position, however, is not supported by the evidence.

XLI. The evidence does indicate that efforts were made by the Department of Indian Affairs to protect traditional Indian fishing grounds from being leased exclusively to non-native fishers. This is far different from assigning exclusive title to those fishing grounds to the Indians. The difference between these positions was consistently acknowledged by the Department of Indian Affairs.

XLII. This policy is reflected in a letter from Frank Pedley, Deputy Superintendent General of Indian Affairs, to the Indian Commissioner for Manitoba and the North West Territories, dated February 8, 1906:

> The Department has come to the conclusion that generally speaking, and unless under very exceptional circumstances the proper policy to pursue will be to let the Indians stand on the same footing as the settlers in so far as concerns the use of the waters, and to confine its efforts to endeavouring, where considered necessary, to secure stations on land to afford access to the waters, a system which it may be remarked appears to work well in the Province of British Columbia, and to resist efforts should any be made to compel the Indians to pay fees for licences to fish for domestic as distinguished from commercial purposes. [Emphasis added.]
>
> (National Archives of Canada, Record Group 10, Volume 6972, File No. 774/20-2 Part 1.)

XLIII. The claim of the Indians to exclusive fishing grounds had been made on numerous occasions but had been consistently rejected. This was expressed in the letter of opinion of the Solicitor General of the Province of Canada in 1866, referred to earlier. In a letter dated April 5, 1898 from E. E. Prince, Dominion Commissioner of Fisheries, to the Minister of Marine and Fisheries, the

Commissioner referred to this opinion as settling the issue of native legal claims to exclusive fisheries throughout the country. He specifically stated:

> With respect to the alleged differences between this Department and the Department of Indian Affairs respecting the claims urged by the Indians to fishery privileges it is necessary to recall the circumstances that 15 or 16 years ago a number of communications passed between the two Departments, resulting in certain definite conclusions which appeared to finally decide and render unnecessary in the future any new inquiry. This Department has consistently adhered to the conclusions referred to, in its policy regarding Indian fishing.
>
> In order to make the matter clear, I quote from a report dated July 11th 1876 by the late Mr. Whitcher, Commissioner of Fisheries: -
>
> After much inconvenience and many conflicting actions the disputed points were referred to the notice of the Law Officers of the Crown. Their decision, dated 8th March 1866 was adverse to the pretentions made on behalf of the Indians. A certified copy of said opinion was lodged with the Indian Bureau.
>
> . . .
>
> The position laid down by the Law Officers of the Crown has been consistently adhered to by this Department, and in a communication addressed to the Minister of the Interior on January 30th 1882, the Minister of Marine and Fisheries (Hon. A. W. McLelan) once more set forth clearly and definitely the matter, stating that this Department acts on the legal advice of the Law Officers of the Crown as recorded in the Department "which is in effect that fishing rights in public waters cannot be made exclusive except under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as whitemen, subject to the Fisheries Act and Fishery Regulations. . . ." [Emphasis added.]

(National Archives of Canada, Record Group 10, Volume 3909, File No. 107297-3.)

The Specific Allotment of the Moricetown Reserve

XLIV. The Crown policy against the granting of exclusive fisheries to the Indians had been forcefully stated and often repeated. The band argued alternatively that it was misled into believing that it was, in fact, being given an exclusive fishery. However, when the facts surrounding this particular grant are considered in light of the expressed general policy, they clearly indicate an intention to allot only the land of the reserve and not the river.

The Directions to Commissioner O'Reilly

XLV. In terms of the instructions Commissioner O'Reilly received, his duties were expressed as:

> . . . ascertaining accurately the requirements of the Indian Bands in that Province [British Columbia], to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes. [Emphasis added.]

(Federal Order in Council of July 19, 1880. Canada. Privy Council. Order in Council No. 1334/1880 in National Archives of Canada, Record Group 2, Series 1.)

XLVI. These instructions were later modified, but the principle that the ultimate decision as to the allocation of fishing grounds remained with the Department of Marine and Fisheries never changed. Thus, on December 20, 1881 the Superintendent General of Indian Affairs wrote to A. W. McLelan, Acting Minister of Marine and Fisheries and stated:

> I have the honor to inform you that Judge O'Reilly having been last year appointed Commr. for allotting lands as Reserves in British Columbia for occupation by the Indian Bands and Tribes of that Province I considered it expedient and proper to instruct him, while engaged in assigning these lands, to mark off the fishing grounds which should be kept for the exclusive use of the Indians and he is following those instructions.
>
> . . .
>
> It is desirable that the fisheries recommended for allotment to the Indians be not otherwise disposed of without the consent of this Department being first obtained.

(National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

XLVII. The instructions referred to were also given to Indian Commissioners in Manitoba, Keewatin and the Northwest Territories, and they state that the Commissioners are to ascertain what fishing grounds should be reserved in order that application might be made to the Department of Marine and Fisheries to have those areas secured for the use of the Indians. These instructions reveal that Commissioner O'Reilly was not given the authority to allot an exclusive fishery, and that the most he could do was make recommendations.

XLVIII. In response to being informed that Indian Commissioners were receiving such instructions, and making such recommendations, the Acting Minister of Marine and Fisheries made it clear that his department would not act on any such recommendation. He reiterated the position of his department and informed the Department of Indian Affairs that:

> . . . fishing rights in public waters cannot be made exclusive excepting under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as white men, subject to the *Fisheries Act* and Fishery Regulations. The mere

> assignment of these fishery privileges by Indian Agents, or the abstention of this Department from otherwise disposing of them -- which there was no intention to do pending careful consideration of all the circumstances of each case -- could not legally exclude the public from fishing therein.

(A. W. McLelan, Acting Minister of Marine and Fisheries, to Sir John A. Macdonald, Superintendent General of Indian Affairs, January 30, 1882, in National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

XLIX. Accordingly, when assessing what Commissioner O'Reilly did, it is important to understand the existing limitations on what he could do. The powers of Commissioner O'Reilly and his instructions are perhaps best summarized in the following extract from a letter written by Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Sir John A. Macdonald, who was then Superintendent General of Indian Affairs as well as Prime Minister. In the letter, dated February 27, 1882, the Deputy Superintendent states:

> With regard to the authority under which Mr. O'Reilly acted in designating fishing stations which it might be advisable to have reserved for Indian Bands in British Columbia . . . the Reserve Commissioner had been instructed while engaged in assigning lands to Indian Bands in that Province, to mark off the fishing grounds which should be kept for their exclusive use, and the Acting Minister was informed that it would be desirable that the fisheries "recommended" for allotment to the Indians should not be otherwise disposed of without the consent of this Department having been first obtained. . . . The designation of these fishing limits as being desirable for the exclusive use of Indian Bands, no more assigns the fishing grounds thus designated to them permanently, without the consent of the Government having been obtained, than does Mr. O'Reilly's allotment of Indian Reserve lands assign the latter to the same Indians without similar approval.
>
> . . .
>
> Mr. O'Reilly's allotments are only recommendatory; and may be curtailed or increased; as, after consultation and mature deliberation by

> the Officers of the Department of Marine and Fisheries and the Department of Indian Affairs, may be considered advisable. [Emphasis in original.]

(National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

The Statements of Commissioner O'Reilly

L. Commissioner O'Reilly was clearly instructed that his role was limited to making recommendations. In light of these instructions it is apparent that his statements and actions do not disclose an attempt to grant control of the fishery. Rather, at most, they represent a recommendation that a fishery be allotted.

LI. On the day before Commissioner O'Reilly recommended the allotment of Moricetown Indian Reserve No. 1 (Lach-kal-tsap), he made the following statements to the band in a discussion concerning the allotment of the reserve:

> The Gov. is anxious land shd be set apart for you as it has been in the rest of B.C. A reserve when made protects the land from trespass by others, but the Indian still has the right to hunt, fish or gather berries <u>outside. The Gov. does not wish to confine you on the reserve</u>. . . .

Later in the same discussion he stated that:

> I never make a promise without seeing the land I am reserving. The reserve will be for the tribe, not for individuals. Allotments may be made by the Agent. <u>Surveyors will be sent to define the exact boundaries, and plans will be sent to the Chiefs</u>. [Emphasis added.]

(Transcript of meeting with Chief Le goul, two other Chiefs, Fr. Morris & Commissioner, September 18, 1891.)

LII. These comments reveal that Commissioner O'Reilly made it apparent that he was not making the final decision with respect to the reserve boundaries, and that in any event he was concerned with reserving the land, not the fishery.

LIII. His position was made still clearer in his conversations with the neighbouring Indians of New Kitseguela, about 30 miles downstream from Moricetown, less than two weeks after the allotment of the Moricetown Reserve. Commissioner O'Reilly stated:

> I hope you will not ask an unreasonable extent of country, but only for that which would be useful to you. It is not necessary that the berrying or hunting grounds shd be reserved. It would be an impossibility to define them as you go over hundreds of miles. You will not be confined to the reserves, but can hunt, fish or gather berries where you will as heretofore. [Emphasis added.]

He continued:

> You not only have good land, you have a good salmon river at your door, and good hunting and berrying mountains close at hand. When the reserves are defined the land belongs exclusively to the Indians. [Emphasis added.]

LIV. Commissioner O'Reilly certainly believed the reserve consisted of the land but not the river. His concern was to reserve a fishing station on the bank of the river and not with reserving control of the fishery itself. This is made clear

later in the conversation, when in response to a request for the reservation of a portion of the stream, Commissioner O'Reilly stated:

> I cannot see the necessity of making such a large reserve. You cannot use it. It is necessary you shd have timber, and that I will give you, and your village and agricultural land, <u>but it is not necessary to give you seven miles of fishing ground</u>, that cannot be used by anyone else. [Emphasis added.]

(Transcript of O'Reilly Commission Meeting at New Kitseguela, September 30, 1891. National Archives of Canada, Record Group 10, Volume 3571, File 126, pt. A; Provincial Archives of British Columbia microfilm reel B-274.)

Was an Exclusive Fishery Included in the Grant?

LV. The Minutes of Decision of Commissioner O'Reilly, dated September 19, 1891 referred to the allotment of the Moricetown Reserve in the following terms:

> Lach kal tsap, a reserve of twelve hundred and ninety (1290) acres, situated on the Hagwilget river about 35 [miles] southeast of Hazelton.
>
> Commencing on the right bank of the Hagwilget river at a Poplar tree marked Indian reserve and running East ninety (90) chains; thence North one hundred and twenty (120) chains; thence West one hundred and twenty (120) chains; thence South one hundred and twenty (120) chains; and thence East thirty (30) chains to the place of commencement.

(Indian Lands Registry (Registry No. B-64652), Department of Indian and Northern Affairs, Hull, P.Q.)

LVI. The appellant urged that this metes and bounds description was clear and cogent evidence that Commissioner O'Reilly intended that the Reserve include the Hagwilget River and with it an exclusive fishery.

LVII. It is true that the metes and bounds description does not exclude the river. Yet, it must be remembered that the Commissioner had explained to the Indians, that this was only a rough allocation of land which would later be more accurately surveyed. More importantly, with regard to the alleged allotment of an exclusive fishery, it is certainly significant that the letter from Commissioner O'Reilly of January 21, 1892 forwarding the Minutes of Decision makes no mention of any fisheries being reserved for the Indians.

LVIII. Commissioner O'Reilly did refer to a fishery adjacent to the proposed reserve in his report to the Superintendent General of Indian Affairs on March 26, 1892. When, on May 13, 1892, the Deputy Superintendent General of Indian Affairs sent a copy of the recommended allotment of the Moricetown Reserve and others to the Department of Marine and Fisheries, he asked that the fishing grounds adjacent to the reserves be reserved for the Indians who had been allocated the lands adjacent to those fishing grounds. This request confirms that Indian Affairs understood its powers and that of its Commissioners to be limited to the allocation of land to the Indians, and that any allocation of fishing grounds would have to be approved by the Department of Marine and Fisheries.

LIX. When the Department of Marine and Fisheries forwarded the request for fishing grounds to the Dominion Inspector of Fisheries in British Columbia for comment, that official stated:

> I beg to respectfully, but in the strongest way possible to recommend that no salmon fishing grounds be reserved for the use of Indians.
>
> . . .
>
> In my opinion the Dept. of Fisheries should not grant, or acknowledge any exclusive rights of Indians to any waters in British Columbia.

(John McNab, Dominion Inspector of Fisheries, British Columbia, to William Smith, Deputy Minister of Marine and Fisheries, May 26, 1892 in Indian Lands Registry (Registry No. B-64648), Department of Indian and Northern Affairs, Hull, P.Q.)

LX. This letter was in turn forwarded to Indian Affairs by the Department of Marine and Fisheries on June 4, 1892. In reply, R. Sinclair of the Department of Indian Affairs wrote the Minister of Marine and Fisheries to ask whether he concurred with the recommendation of the Inspector of Fisheries not to allocate salmon fishing grounds to the Indians. In this letter of June 9, 1892 he reiterated that the Department of Indian Affairs claimed no right to allot fishery reserves to the Indians, and that it was for the Department of Marine and Fisheries to decide whether any or all of the recommended allotments of fishing grounds was to be approved.

LXI. The clear reply of the Deputy Minister of Marine and Fisheries on July 14, 1892 was that his Department would not sanction any reservation of fishing grounds. He repeated the long-standing position of the Department that exclusive fisheries would not be granted, and suggested instead that:

> . . . it would be far better to have such waters as you may deem to be necessary for the support and maintenance of these Indians, licensed to them under similar conditions as licenses are issued to other Bands of Indians in Ontario. This would place them on a footing of equality with White fishermen, and enable them to dispose of their fish in the same manner as the latter do.

(William Smith, Deputy Minister of Marine and Fisheries, to Deputy Superintendent General of Indian Affairs, July 14, 1892 in Indian Lands Registry (Registry No. B-64648), Department of Indian and Northern Affairs, Hull, P.Q.)

LXII. The only conclusion which can be reached on this evidence is that there was never any intention on the part of the Crown to allot an exclusive fishery for the Moricetown Band.

The Application of the Ad Medium Filum Aquae Presumption

LXIII. The appellant argued that the intention of the Crown to allot fishery rights to the band as part of the reserve was to a large extent irrelevant in this case. The basis for the argument is that the Crown only intended to reserve the fishery in navigable waters, and that in non-navigable waters, which the appellant contends includes the Bulkley River at the reserve, the presumption *ad medium filum aquae* applies, and accordingly the river surrounded, as it is on both sides by the reserve, would be presumptively part of the reserve.

LXIV. Assuming without deciding that the doctrine of *ad medium filum aquae* should apply to Indian Reserves, it is not applicable in this case for three reasons. First, it must be remembered that the doctrine is only applicable in cases where the river forming the boundary is not navigable. The Bulkley River is navigable above

and below the Moricetown gorge and should be considered a navigable river. This in itself is a sufficient basis for determining that the river did not form part of the reserve and that the presumption of ownership to the middle of the river cannot arise. Secondly, at the time the reserve was created the English common law provided that the fishery was a right which was severable from the title to the river bed itself. Thus, even if the presumption *ad medium filum aquae* were to apply to pass title to the bed of the river to the band, the presumption has no effect on the fishery as the Crown specifically refused to allot an exclusive fishery to the band. It was the clear intention of the Crown to reserve all of the fishery to itself. It follows that any by-law with respect to fishing would therefore be beyond the band's authority as control of this riparian right remained with the Crown. Thirdly, if the presumption could possibly be said to apply it was rebutted in light of the evidence that the Crown never intended to grant nor did it grant the bed of the river to the band. It will be necessary to say a little more with regard to each of these aspects.

When Does the *Ad Medium Filum Aquae* Presumption Apply?

LXV. In British Columbia, the civil and criminal laws of England were adopted as at November 19, 1858 "so far as the same [were] not by local circumstances inapplicable": *The English Law Ordinance, 1867*, S.B.C. 1867, No. 70, s. 2 (now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2). Similar language also introduced the common law of England into Manitoba and Alberta, although in other provinces, such as Ontario, no allowance was made for "local circumstances".

LXVI. As La Forest explained in his book *Water Law in Canada -- The Atlantic Provinces*, *supra*, at pp. 241-42, the English rule was that:

> . . . the owner of land through which a non-tidal stream flows owns the bed of the stream unless it has been expressly or impliedly reserved; and if the stream forms the boundary between lands owned by different persons, each proprietor owns the bed of the river *ad medium filum aquae* -- to the centre thread of the stream.

LXVII. While this rule expressed the common law as it existed in England, the courts in western Canada have not applied this rule to navigable rivers. Thus in the case of *Re Iverson and Greater Winnipeg Water District* (1921), 57 D.L.R. 184 (Man. C.A.), Dennistoun J.A. wrote, at pp. 202-3:

> These references to the common law of England indicate clearly to my mind that they are not and never were applicable to conditions in this Province. Here the public right in navigable waters whether under the Hudson's Bay tenure or since 1869 under the title vested in the Crown, was prior to, and superseded all private rights acquired by grant or settlement, upon the banks of a navigable stream. In a country occupied from the earliest days by hunters, trappers, fishers and traders whose main and almost exclusive highways were the rivers and streams, such laws were contrary to the requirements and necessities of the whole community.
>
> . . .
>
> The applicability of the common law of England to navigable rivers in respect to the *ad medium* rule may be doubted when it is remembered that the importance of public rights in non-tidal navigable waters was not recognised in England when title to land upon their banks was acquired.
>
> In this country the public right of navigation and of fishery in all navigable waters has always existed and been recognised.

LXVIII. Similarly, in the same year the Alberta Court of Appeal in the case of *Flewelling v. Johnston* (1921), 59 D.L.R. 419, held that the English common law

presumption did not apply in the very different circumstances which existed in Canada. In short, the "local circumstances" which existed in Canada rendered the common law inapplicable with respect to navigable rivers. As Beck J.A. stated in his reasons at pp. 422-23:

> In Barthel v. Scotten (1895), 24 Can. S.C.R. 367, it was held that a grant of land bounded by the bank of a navigable river or an international waterway does not extend ad medium filum aquae.
>
> In re Provincial Fisheries (1896), 26 Can. S.C.R. 444, Gwynne, J., said that the rule that riparian proprietors own ad medium filum aquae does not apply to the great lakes or navigable rivers.
>
> In Keewatin Power Co. v. Kenora (1906), 13 O.L.R. 237, Anglin, J. held, as stated in the head note, that: --
>
> > "The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the alveus of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of land bordering thereon to the bed of such waters ad medium filum aquae; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown ex jure naturae, so that the title in the bed thereof remained in the Crown after it had made grants of land bordering upon the banks of such rivers, the doctrine of ad medium filum aquae not applying thereto."
>
> This Court has declared in Rex v. Cyr (1917), 38 D.L.R. 601, 29 Can. Cr. Cas. 77, 12 Alta. L.R. 320 at p. 325, that where resort is to be had to the common law the applications of its principles are not necessarily to result in same decisions as have been or may be given by the English Courts, but that account must be taken of the different conditions prevailing in this country, not merely physical conditions but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question.
>
> The decision of Anglin, J., was reversed by the Ontario Court of Appeal (1908), 16 O.L.R. 184, but explicitly on the ground of the precise wording of the statute of the Province, R.S.O. 1897, ch. 111, sec. 1, enacting that "In all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the said 15th of October, 1792, as the rule for the decision of the same. . . . . except so far as the said laws may have

> been repealed by any Act of the late Province of Upper Canada . . . . . still having the force of law in Ontario, or by these Revised Statutes."

LXIX. Beck J.A. then went on to cite s. 11 of the *North-West Territories Act*, R.S.C. 1886, c. 50, which is to the same effect as s. 2 of the British Columbia *English Law Ordinance Act*. He observed at p. 424:

> The words which I have quoted do not appear in the Ontario Act. The quoted word "applicable" means "suitable", "properly adapted to the conditions of the country". Brand v. Griffin (1908) 1 Alta. L. R. 510, I accept then, for this Province at least the view propounded by Anglin, J. <u>In that view the doctrine that in non-tidal waters prima facie the title to the bordering lands runs ad medium filum aquae is not in force in the Province so far as to affect waters -- lakes or rivers -- which are in fact navigable</u>. [Emphasis added.]

LXX. I am in complete agreement with the reasoning and conclusions of the Manitoba and Alberta Courts of Appeal. The wording of the Manitoba, Alberta, and British Columbia statutes leads inexorably to the conclusion that the decisions of the Manitoba and Alberta Courts of Appeal are correct and applicable to British Columbia.

LXXI. This conclusion is further supported by the statements of La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 54, where he said:

> The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; for a summary

> of the cases, see my book on *Water Law in Canada* (1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling v. Johnston* (1921), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province. There is no issue between the parties that the Oldman River is in fact navigable.

What is the Correct Test for Navigability, and Is the Bulkley River a Navigable River?

LXXII. It is clear that the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia. From the earliest times the Courts and legislatures of this country have refused to accept the application of a rule developed in England which is singularly unsuited to the vast non-tidal bodies of water in this country. It is therefore necessary to determine whether the Bulkley River can properly be considered to be a navigable river.

LXXIII. To assess navigability, the entire length of the river from its mouth to the point where its navigability terminates must be considered. On this issue I am in agreement with the reasoning and conclusions of Wallace J.A. in the Court of Appeal. In particular I would adopt the statements of Anglin J. (as he then was) in the case of *Keewatin Power Co. v. Kenora (Town)* (1906), 13 O.L.R. 237 (H.C.). There the navigability of the Winnipeg River was in question. It was a river not unlike the Bulkley River in that various falls and rapids necessitated numerous portages between stretches of good water. Anglin J. wrote at p. 263:

> But it is argued that in any event the *ad medium* rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is

> not my opinion. Once the navigable character of the river is established, up to the point at which navigability entirely ceases the stream must be deemed a public highway, though above that point it is private property: *The Queen* v. *Robertson*, 6 S.C.R. 52.
>
> The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown, *juris publici*, and in the riparian owners, *juris privati*, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the east branch of the Winnipeg river is presently impossible, the engineers say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable *in posse*? I think it is.
>
> There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed *ad medium filum: Re State Reservation at Niagara Falls* (1884), 16 Abbott's N. C. (N.Y.) 159, 187; 37 Hun 507, 547-8. [Emphasis added.]

Similarly, Henry J. in *Re Coleman and Attorney-General for Ontario* (1983), 143 D.L.R. (3d) 608 (Ont. H.C.), at p. 614 (cited with approval by Wallace J.A. at the Court of Appeal) found that:

> Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points. . . .

Finally, La Forest in his book *Water Law in Canada -- The Atlantic Provinces*, *supra*, states at p. 181:

> Thus the whole of a river or lake may be regarded as navigable even though at some point navigation may be impossible or possible only for small craft by reason of rapids or shoals.

LXXIV. The Bulkley River is navigable both above and below the Moricetown Canyon and should be considered a navigable river. The fact that it is not navigable at the Moricetown gorge cannot alter that conclusion. Since the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia, it has no application to the Bulkley River in its passage through the Moricetown Reserve. On this basis alone it can be concluded that reserve does not include the river.

The Fishery is Separate from Ownership of the Bed

LXXV. The appellant contends that the *ad medium filum aquae* presumption became applicable in British Columbia on November 18, 1858, when the common law of England was explicitly adopted as the law except to the extent that it was inapplicable. Accordingly, it is argued that when the Crown granted land to the Indians it implicitly included the title to the river *ad medium filum aquae*. Where, as in this case, the river is bordered on both sides by the reserve, the principle would act to give title to the entire river bed to the reserve. Accordingly, the river would be "on the reserve", subject only to the Crown's ability to demonstrate that such a grant was not intended. I cannot accept that position.

LXXVI. To understand why the presumption does not apply requires a review of the common law rules concerning water. H. J. W. Coulson and Urquhart A. Forbes in *The Law relating to Waters* (2nd ed. 1902), at p. 100, explain the application of the *ad medium filum aquae* presumption in the following terms:

> When the lands of two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is

> *primâ facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquae*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty . . . . Where the same person is the proprietor of the ground on both sides of the stream, he is *primâ facie* the proprietor of the whole of the channel. . . .
>
> The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, *usque ad medium filum*, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question, which negative the possibility of such having been the intention.

LXXVII. One of the rights that flow from this possession of the bed is the right to the fishery. This is explained by the authors, at p. 104, in the following terms:

> The right of fishery being a right of property, the presumption is that each owner of land abutting on a non-tidal stream has the right of fishing in front of his land, *usque ad medium filum aquae*; and where a man possesses land on both sides of the water, he has the sole right of fishing.

LXXVIII. However, the authors go on to explain that this right of fishery is severable from the title, with the result that the right can be granted to another, or reserved from a grant. As Wightman J. stated in *Marshall v. Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732, 122 E.R. 274, at p. 278 E.R.:

> . . . it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishery therein, be specially appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto.

LXXIX. This point is explained very clearly by La Forest in *Water Law in Canada -- The Atlantic Provinces*, *supra*, at p. 236, where he states:

> Though the right of fishing is usually enjoyed as an incident to the bed, it may of course be transferred to others by lease or licence. Moreover it can be granted, or reserved from a grant, and exist as a separate property right severed from the ownership of the soil.

LXXX. Clearly the fishery, even where the *ad medium filum aquae* presumption otherwise applies, can be severed from the ownership of the river bed. The evidence presented clearly establishes that there was no intent on the part of the Crown to grant an exclusive fishery. As a result, any grants of title to land adjacent to rivers, navigable or otherwise, must be taken as excluding the fishery, even if it was accepted that the *ad medium filum aquae* presumption was otherwise applicable. The consequence for this appellant is obvious. Even if the *ad medium filum aquae* should make the soil of the river bed part of the reserve, the explicit reservation of the fishery from the grant makes any by-law with respect to the fishery *ultra vires* the band's authority.

The Presumption is Rebutted

LXXXI. Any intent to grant the bed of the river has been conclusively rebutted. It will be remembered that the acreage of the reservation indicates an intention to exclude the river. In addition, the retention of the fishery by the Crown leads to the presumption that the bed of the river was retained by the Crown. As Coulson and Forbes point out at p. 368 in *The Law relating to Waters, supra,* the cases of *Marshall v. Ulleswater Steam Navigation Co., supra,* and *Holford v. Bailey* (1846), 8 Q.B. 1000, 115 E.R. 1150 (reversed in the Exchequer Chamber on other grounds (1850), 13 Q.B. 426, 116 E.R. 1325), stand for the proposition that:

> No doubt the allegation of a several fishery, *primâ facie*, imports ownership of the soil, though they are not necessarily united.

LXXXII. As a result, it would appear that the common law as it existed at the time the reserve was allotted would lead to the conclusion that the presumption that the title to the bed of the river would pass with the allotment of the shore had been rebutted. There is no doubt that the Crown intended to keep the fishery in its own possession. Accordingly, the allotment of the shore cannot be presumed to have included the title to the bed of the river *ad medium filum aquae*. To the contrary, the presumption is that with the title to the fishery goes the title to the bed of the river. The appellant has failed to demonstrate any intention or action on the part of the Crown to rebut this presumption.

LXXXIII. It may now be helpful to summarize what I consider to be the relevant evidence and the applicable principles of law which determine the first issue.

1. The Crown in all of its manifestations was consistently clear in its statements that no exclusive fishery should be granted to Indian bands in British Columbia. This is consistent with the fact that the Crown had no power to grant an exclusive fishery, and that after Confederation this would involve the grant of provincial property.

2. The correct test for an assessment of navigability is to consider the entire length of the river. A section of the river which is non-navigable in fact does not necessarily render either the river as a whole or that section non-navigable in law if it is found to be substantially navigable throughout. The Bulkley River is navigable both above and below the Moricetown Canyon, and is therefore a navigable river.

3. The presumption *ad medium filum aquae* does not apply on the facts of this case because:

    a. Correctly considered the river is navigable, and the application of *ad medium filum aquae* to navigable rivers was not adopted into the common law of British Columbia since it was unsuited to local conditions.

b. Fishing as a right can be the subject of a separate grant or reservation. On the facts of this case it is clear that the fishery was reserved from the allotment.

LXXXIV. It follows that the band by-law does not apply to the Bulkley River.

LXXXV. It is now necessary to determine whether the appellant's s. 35 rights were infringed by the licensing requirement of the Department of Fisheries and Oceans. If they were not, it still must be considered whether the conditions of the licence infringe the s. 35 rights and if so whether they can be justified.

Was the Appellant's Section 35 Right to Fish for Food Violated by the Licensing Requirement of the Department of Fisheries and Oceans?

Does Licensing Constitute a *Prima Facie* Violation of Section 35?

LXXXVI. The appellant contends that the mere requirement of a licence constitutes a *prima facie* infringement of his s. 35 aboriginal rights. This section of the *Constitution Act, 1982* provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

LXXXVII. It was held in *Sparrow*, *supra*, at p. 1112, that the onus of establishing a *prima facie* infringement of an aboriginal right rests on the claimant of that right.

LXXXVIII. The first step in this process is to establish the existence and the extent of the aboriginal right. I am satisfied that the appellant has successfully

demonstrated an aboriginal right to fish for food and ceremonial purposes. The Summary Conviction Appeal Judge, Millward J., specifically found in oral reasons from judgment dated July 12, 1990 that:

> . . . the aboriginal right includes the right to choose the period of time, whether early in the year when the ice is still in the river, or after the end of August, up to a date in September, when steelhead are normally taken, the right to select persons intended to be the recipients of the fish for ultimate consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial or religious purposes, and the method or manner of fishing. . . .

(*R. v. Nikal*, [1991] 1 C.N.L.R. 162, at p. 167.)

LXXXIX. This, based on the evidence, is an appropriate finding as to the scope of the aboriginal rights of the Wet'suwet'en people with respect to the fishery subject to one qualification. Specifically, the selection of the ultimate recipients of the fish is not an unqualified right. Rather, the evidence adduced went no farther than establishing that the appellant as a Wet'suwet'en had the right to provide to other members of the band those fish that are necessary for their personal food and ceremonial needs. I take no position as to whether the right extends beyond that.

XC. I cannot accept Millward J.'s finding that the appellant has a right not to comply with the directions of the Department of Fisheries and Oceans. This finding is not supported by the evidence, nor is it sustainable in law. Moreover, this conclusion, if not conceded, was not seriously contested by the appellant.

XCI. With respect to licensing, the appellant takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

XCII. This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

> . . . Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

XCIII. This conclusion is consistent with the approach to interpreting s. 35 rights as set out in *Sparrow*, *supra*, at p. 1110:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. [Emphasis added.]

XCIV. This case provides an example of the wisdom of the reasoning referred to in *Sparrow* and *Agawa*. Here, the aboriginal right to fish must be balanced against the need to conserve the fishery stock. The existence of an aboriginal right to fish cannot automatically deny the ability of the government to set up a licensing scheme or program since the exercise of the right itself is dependant on the continued existence of the resource. The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program.

XCV. It must also be remembered that aboriginal rights, by definition, can only be exercised by aboriginal peoples. Moreover, the nature and scope of aboriginal rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities. In this context, a licence may be the least intrusive way of establishing the existence of the aboriginal right for the aboriginal person as well as preventing those who are not aboriginals from exercising aboriginal rights.

XCVI. The situation presented in this case pertaining to s. 35 aboriginal rights is analogous to the mobility rights guaranteed under s. 6(1) of the *Charter*. That section guarantees the right of every citizen of Canada to enter, remain in and leave Canada. This right, by definition, is limited to citizens of Canada, and its enforcement requires some means of identifying Canadian citizens. Accordingly, a requirement that citizens present a passport to enter Canada would not be an infringement of their mobility rights since the passport serves to identify those who can exercise the rights of Canadian citizens.

XCVII. This is not to say that there are not conditions of the licence which could constitute infringements of s. 35 rights. Even a simple licence could constitute an infringement if it could only be obtained with great difficulty or expense. The test for this assessment has been set out clearly in *Sparrow*, beginning at p. 1111:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1).

XCVIII. The questions which must be resolved in order to determine whether a *prima facie* infringement has occurred are set out 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 their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

XCIX. Applying these tests to the facts of this case reveals that the licence itself, as distinct from its conditions, does not constitute an infringement of s. 35(1). The simple requirement of a licence is not in itself unreasonable; rather, it is necessary for the exercise of the right itself. Accordingly the first question, is licensing unreasonable, must be answered in the negative.

C. The second question is whether the regulation imposes an undue hardship. The term "undue hardship" implies that a situation exists which imposes something more than mere inconvenience. It follows that a licence which is freely and readily available cannot be considered an undue hardship. The situation might be different if, for example, the licence could only be obtained at locations many kilometres away from the reserve and accessible only at great inconvenience or expense.

CI. The final question is whether the right holder is denied the preferred means of exercising the right. The licence by itself, without its conditions, cannot affect the preferred means of exercising the right since at its most basic it is nothing more than a form of identification. Requiring identification so as to assist fisheries officers in distinguishing rights holders from non-rights-holders cannot be an interference with the preferred means of exercising the right. It follows that the licence itself, without considering its conditions, cannot be said to constitute an infringement of the aboriginal right to fish. Thus the mere requirement of a licence in the circumstances of this case does not amount to an infringement of the appellant's s. 35 rights.

CII. Indeed as a general rule it can be said that the simple requirement of a licence will seldom constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery. It is for the federal government to ensure that all users who are entitled to partake of the salmon harvest have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in *Sparrow*. Any system of control must commence with a licensing scheme. It is through the issuing of licences to the various type of users that the department will be able to know at least the numbers of fishers and the categories of those that are fishing. This will provide the first rough basis from which the department can make the estimates necessary to manage the fishery resource. The licence is the essential first step in the preservation and management of this fragile resource. This need to manage the stock goes far further than simply preventing the elimination of the salmon. Management imports a duty to maintain and increase reasonably the resource. The licence assists this duty by providing a means of identification that helps to ensure that only those permitted to do so are fishing in the authorized areas. It serves as a means of control by eliminating those that do not have a licence from fishing.

The Specific Terms of this Licence

CIII. Although licensing by itself will not as a rule constitute a *prima facie* infringement of the aboriginal right to fish, the government will be required to justify those conditions of a licence which on their face infringe the s. 35 right to fish. The 1986 licence at issue in this case contains several conditions. Some of

these printed on the licence itself are mandatory. Others are completed by the issuing fishery officer and are discretionary. Of the mandatory conditions printed on the face of the licence, some are clearly *prima facie* infringements of the aboriginal right of the appellant as properly found by the courts below. The infringing conditions are:

(i) the restriction of fishing to fishing for food only;

(ii) notes 4 and 5 of the licence, which provide:

4. Fishing Time Subject to Change by Public Notice.

5. Indian Food Fishing before July 1st and after September 30th must be licenced by the Provincial Fish & Wildlife Conservation Officer.

(iii) the restriction to fishing for the fisher and his family only;

(iv) the restriction to fishing for salmon only.

CIV. These conditions are *prima facie* infringements of the appellant's aboriginal rights, which were specifically and correctly found to include:

(i) the right to determine who within the band will be the recipients of the fish for ultimate consumption;

(ii) the right to select the purpose for which the fish will be used, i.e. food, ceremonial, or religious purposes;

(iii) the right to fish for steelhead;

(iv) the right to choose the period of time to fish in the river.

Since those conditions of the licence set out above clearly impinge upon these aspects of the appellant's s. 35 rights, they must constitute *prima facie* infringements.

CV. In addition, there are other terms of the licence which could be infringements if they contradicted the appellant's aboriginal rights. These terms provide for:

(i) the prescribed waters in which fishing can take place;
(ii) the type of gear which can be used;
(iii) the fishing times and days.

CVI. With respect to these conditions, whether they will constitute an infringement depends on whether the particular conditions written in by the fishery officer contradict the appellant's s. 35 rights. I would note that Millward J. did find that the appellant's aboriginal rights include the right to determine when fishing will occur and the method and manner of fishing. Accordingly, these conditions may, depending on their terms, infringe the appellant's aboriginal rights.

CVII. There was little or no argument directed to the other conditions attached to the licence. Accordingly, I have not reached any conclusions nor made any comments concerning them.

CVIII. Before turning to the issue of justification, I must address the respondent's argument that these conditions are valid since they were not enforced. I cannot accept this argument. It has long been recognized that the holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right. That submission cannot therefore be accepted. See for example *R. v. Bain*, [1992] 1 S.C.R. 91, at

pp. 103-4. Indeed, counsel for the respondent conceded that there might be some problems with the conditions that were attached to the 1986 licence and reserved his strongest submissions for the position that the requirement of a licence in itself did not constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. In that submission he was correct.

Justification

CIX. In *Sparrow*, *supra*, it was held, at p. 1113, that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

> First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized.

At p. 1114, the next step was set out in this way:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

CX. It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. For example, in these last questions reasonableness will be a necessary aspect of the inquiry as to justification. For instance, when considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement. So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. This is no more than recognizing that regulations pertaining to conservation may have to be enacted expeditiously if a crisis is to be avoided. On occasion, strict and expeditious conservation measures

will have to be taken if potentially catastrophic situations are to be avoided. The nature of the situation will have to be taken into account in assessing the conservation measures taken. The greater the urgency and the graver the situation the more reasonable strict measures may appear.

CXI. In the case at bar, the government did not adduce any evidence which might justify the conditions of the licence and accordingly has not met the onus which rests upon it. It follows that the government has failed to justify those conditions that I have referred to which infringe the appellant's aboriginal rights.

CXII. What then is the appropriate disposition of this appeal? It is clear that the federal government may validly require aboriginal people to obtain a fishery licence pursuant to s. 4(1) of the *British Columbia Fishery (General) Regulations*. It is also apparent that at least four of the mandatory conditions of the licence infringe the s. 35(1) rights of the appellant. The conditions make the 1986 licence invalid. They are an integral and essential part of the licence. They stipulate the conditions or terms upon which the licence is issued and the holder may use it. A licence holder is required to abide by the conditions. The licence is issued on that basis. The conditions are unconstitutional. As a result of the conditions the licence is invalid. It follows that there cannot be an offence created of fishing without a licence in 1986. The licence as issued in 1986 pursuant to s. 4(1) of the *British Columbia Fishery (General) Regulations* is as invalid as any other act or regulation which is found to be unconstitutional or *ultra vires*. It has always been held that an invalid act or regulation cannot create an offence. See for example *R. v. Sharma*, [1993] 1 S.C.R. 650, and *R. v. Bob* (1991), 88 Sask. R. 302 (C.A.). This dictates the result that there must be an acquittal.

CXIII. The licence and its integral conditions are so inextricably bound together that they cannot be considered separately. They are part of an indivisible whole. If I am correct in this conclusion it is not necessary to consider whether the conditions are in fact severable. If I am in error, however, on this I would hold that the conditions were not severable. Section 52 of the *Constitution Act, 1982* provides that:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

CXIV. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 697. Lamer C.J. interpreted the section as meaning:

> Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:
>
> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

CXV. In my view, when the purpose of this particular licence is considered together with the number of mandatory conditions which infringe the appellant's aboriginal rights, severability can be seen to be an unacceptable option. The

invalid conditions are numerous. They are mandatory and form an integral part of the licence itself. The licence required that the conditions be met, which is to say that the holder of the licence was required to comply with its conditions. I cannot see that this licence can be severed from its invalid mandatory conditions. Further, from a practical point of view it is significant that the licences at issue were created and used before the government had the benefit of this Court's judgment in *Sparrow*. Crown counsel advised that as a result these particular licences are no longer in use. Accordingly, a declaration that the entire licence is invalid is appropriate both legally and practically.

CXVI. There can be no question that an enactment that breaches the Constitution is invalid and cannot impose any enforceable duties. See for example *Norton v. Shelby County*, 118 U.S. 425 (1886), at p. 442; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1195.

CXVII. Accordingly, the appellant must be acquitted of the charge of fishing without a licence contrary to s. 4(1) since the licence conditions infringed his aboriginal rights and the licence was therefore unconstitutional.

Disposition

CXVIII. In the result, the appeal is allowed. The question as to whether the band's fishing by-law applies to the Bulkley River at Moricetown must be answered in the negative. The question as to whether the licence requirement under s. 4(1) is an infringement of the appellant's aboriginal rights contrary to s. 35 must also be answered in the negative. As a result of my answer to these two

questions, and for the reasons given above, the constitutional question must be answered as follows:

Question: Is s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force or effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer: Section 4(1) of the *British Columbia Fishery (General) Regulations* is not invalid by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant. However, the mandatory conditions affixed to the 1986 licence infringe the appellant's aboriginal rights and are not severable and the licence is therefore invalid.

CXIX. The order of the Court of Appeal of British Columbia convicting the appellant must be set aside and his acquittal restored. There will be no costs to either party.

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by

CXX. MCLACHLIN J. (dissenting) -- The issue in this case is whether the requirement that the appellant have a licence for fishing was *per se* unconstitutional. I agree with the majority of the Court of Appeal and with Justice Cory in this Court that the requirement of a licence did not constitute a *prima facie* infringement of the appellant's constitutionally protected right to fish for food.

CXXI. This leaves the issue of whether the conditions attached to the licence are unconstitutional. In my view, this issue is not properly before us. The appellant was not charged with violation of the conditions of the licence, but with

fishing without a licence. The trial proceeded on the basis that it was the licensing scheme as a whole which was invalid. The issue, as Hutcheon J.A. stated expressly in the Court of Appeal, was whether the act of licensing *per se* was unconstitutional, not the terms of the particular licence at issue.

CXXII. This court, *per* Cory J., today endorses the view of the trial judge and the majority of the Court of Appeal below that the state is entitled to impose a licensing scheme on the aboriginal fishing and consequently require that the appellant obtain a licence as a condition of fishing. However, the majority goes on to conclude that because four of the conditions attached to the licence infringe his aboriginal rights, the requirement for the particular licence in this case is unconstitutional and that the appellant's conviction for failure to have a licence must be set aside.

CXXIII. I do not share this conclusion. The fact that four of the conditions are invalid does not excuse the appellant on a charge of <u>fishing without a licence</u>. If the charge had been violation of one of the conditions of the licence, proof that the condition was unconstitutional would have afforded a defence to that charge. But the unconstitutionality of a condition of a licence does not, in my view, absolve the appellant from the need to obtain a licence at all.

CXXIV. Cory J. asserts that the invalidity of licence conditions excuses a person from obtaining the licence required by law, provided the condition is "integral" to the licence. I cannot accept this proposition. Can a chemical plant be excused from obtaining a licence to emit a polluting chemical merely because it can show that one or more of the conditions imposed by the licence are invalid? Can a

person over a certain age be excused from obtaining a licence to drive a motor vehicle merely because he or she deems an age-related restriction to violate the provincial Human Rights Code? I think not. And if we say that the conditions are "integral" to the licence, does the situation change? Again I think not.

CXXV. It is important, in my view, to distinguish between the charge of failing to obtain a licence required by a valid licensing scheme, and breach of one of the conditions of the licence. This appeal presents us with a quasi-criminal offence. The appellant has been charged with failing to obtain a licence required by law. His defence is that the state has no right to require him to obtain a licence. The trial judge, the majority of the Court of Appeal, and this Court unanimously have ruled that the state does have the right to require him to obtain a licence. That issue having been resolved against him, the appellant stands properly convicted of fishing without the required licence.

CXXVI. The situation would have been different had the appellant been charged with violating one of the conditions of the licence. It would then have been open to him to raise the defence that the condition he is alleged to have breached is unconstitutional. The constitutionality of the condition would have become the focus of the trial and of the appeals. In the event the condition was found to have been unconstitutional, it would fall. Severance would be automatic. The issue raised in *Schachter v. Canada*, [1992] 2 S.C.R. 679, of whether to strike out a portion or the whole of the licence would not arise. The licence would stand, together with such conditions as remain valid. The right of the state to require a licence for monitoring purposes would remain constitutional.

CXXVII. The position advocated by Cory J. has important practical consequences. Having ruled that the state is entitled to require persons engaged in fishing to obtain licences for the purpose of monitoring the fishery, he would deprive the state of the right to do so where conditions attached to the licence, not put in issue on the facts, fail to pass abstract constitutional scrutiny. Persons who object to conditions of a licence will be encouraged not to apply for a licence, thus undermining the monitoring function of the licensing scheme. The validity of state requirements for licences of all sorts may be called into question. These results are avoided if one confines the decision to the allegation contained in the charge -- the failure to obtain a licence.

CXXVIII. Jurisprudential considerations also support this approach. Courts determining guilt or innocence of an accused should confine themselves to the issues raised by the charge. The validity of conditions of a licence are better considered in the context of facts which raise them than in the abstract. Similarly, appeal courts reviewing trial decisions are generally well advised to confine themselves to the defences and issues raised in the decisions under review. In the case at bar, the only issue at trial and before the Court of Appeal was the right of the state to require the appellant to obtain a licence. Accordingly, I would prefer to confine this Court's decision to that issue.

CXXIX. In conclusion, the question before us, as before the courts below, is whether the obligation on the appellant to obtain a licence to fish, whatever its terms, is constitutional. The answer to that question is yes. The appellant freely admits that he did not have the licence that the law validly required. It follows that

he was properly convicted of the charge. The issue of whether the conditions of the licence are valid should await a case where their validity arises.

CXXX. The constitutional question stated by the Chief Justice was as follows:

> Is s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force or effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

CXXXI. I would answer the question as follows:

> Section 4(1) of the *British Columbia Fishery (General) Regulations* and licences issued thereunder are not of no force and effect, with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant.

CXXXII. I would dismiss the appeal and affirm the conviction.

Appeal allowed, L'HEUREUX-DUBÉ *and* MCLACHLIN JJ. *dissenting*.

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