R. *v.* Van der Peet, [1996] 2 S.C.R. 507

Dorothy Marie Van der Peet *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Quebec,
the Fisheries Council of British Columbia,
the British Columbia Fisheries Survival Coalition and
the British Columbia Wildlife Federation,
the First Nations Summit,
Delgamuukw et al., Howard Pamajewon,
Roger Jones, Arnold Gardner, Jack Pitchenese
and Allan Gardner *Interveners*

Indexed as: R. *v.* Van der Peet

File No.: 23803.

1995: November 27, 28, 29; 1996: August 21.

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

Constitutional law -- Aboriginal rights -- Right to sell fish on non-commercial basis -- Fish caught under native food fish licence --

Regulations prohibiting sale or barter of fish caught under that licence -- Fish sold to non-aboriginal and charges laid -- Definition of "existing aboriginal rights" as used in s. 35 of Constitution Act, 1982 -- Whether an aboriginal right being exercised in the circumstances -- Constitution Act, 1982, s. 35(1) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) -- British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).

The appellant, a native, was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, which prohibited the sale or barter of fish caught under such a licence. The restrictions imposed by s. 27(5) were alleged to infringe the appellant's aboriginal right to sell fish and accordingly were invalid because they violated s. 35(1) of the *Constitution Act, 1982*. The trial judge held that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found the appellant guilty. The summary appeal judge found an aboriginal right to sell fish and remanded for a new trial. The Court of Appeal allowed the Crown's appeal and restored the guilty verdict. The constitutional question before this Court queried whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*.

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

The Aboriginal Right

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: A purposive analysis of s. 35(1) must take place in light of the general principles applicable to the legal relationship between the Crown and aboriginal peoples. This relationship is a fiduciary one and a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples. Any ambiguity as to the scope and definition of s. 35(1) must be resolved in favour of aboriginal peoples. This purposive analysis is not to be limited to an analysis of why a pre-existing doctrine was elevated to constitutional status.

Aboriginal rights existed and were recognized under the common law. They were not created by s. 35(1) but subsequent to s. 35(1) they cannot be extinguished. They can, however, be regulated or infringed consistent with the justificatory test laid out in *R. v. Sparrow*.

Section 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose. The French version of the text, prior jurisprudence of this Court and the courts of Australia and the

United States, academic commentators and legal literature support this approach.

To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. A number of factors must be considered in applying the “integral to a distinctive culture” test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.

In assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. The activities must be considered at a general rather than specific level. They may be an exercise in modern form of a pre-contact practice, custom or tradition and the claim should be characterized accordingly.

To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to

survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided. It does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after an interruption.

Basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the inclusion of the Métis in the definition of “aboriginal peoples of Canada” in s. 35(2) of the *Constitution Act, 1982*. The history of the Métis and the reasons underlying their inclusion in the protection given by s. 35 are quite distinct from those relating to other aboriginal peoples in Canada. The manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.

A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts.

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. Claims to aboriginal rights are not to be determined on a general basis.

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning "unique", to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture.

The fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. A practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences.

The relationship between aboriginal rights and aboriginal title (a sub-category of aboriginal rights dealing solely with land claims) must not confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look both at the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The first step in the application of the integral to a distinctive culture test requires the Court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. Here, the appellant claimed that the practices, customs and traditions of the Sto:lo include as an integral element the exchange of fish for money or other goods. The significance of the practice, tradition or custom is relevant to the determination of whether that practice,

custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. The claim must be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

The trial judge made no clear and palpable error which would justify an appellate court's substituting its findings of fact. These findings included: (1) prior to contact exchanges of fish were only "incidental" to fishing for food purposes; (2) there was no regularized trading system amongst the appellant's people prior to contact; (3) the trade that developed with the Hudson's Bay Company, while of significance to the Sto:lo of the time, was qualitatively different from what was typical of Sto:lo culture prior to contact; and, (4) the Sto:lo's exploitation of the fishery was not specialized and that suggested that the exchange of fish was not a central part of Sto:lo culture. The appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed prior to contact and was therefore protected by s. 35(1) of the *Constitution Act, 1982*.

Per L'Heureux-Dubé J. (dissenting): Aboriginal rights find their origin in the historic occupation and use of native ancestral lands. These rights relate not only to aboriginal title but also to the component elements of this larger right, such as aboriginal rights to hunt, fish or trap, and their accompanying practices, customs and traditions. They also include other matters, not related to land, that form part of a distinctive aboriginal culture.

Aboriginal rights can exist on reserve lands, aboriginal title lands, and aboriginal right lands. Reserve lands are reserved by the federal government for the exclusive use of Indian people. Title to aboriginal title lands -- lands which the natives possess for occupation and use at their own discretion -- is founded on common law and is subject to the Crown's ultimate title. It exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. Aboriginal title can also be founded on treaties. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. These types of lands are not static or mutually exclusive.

Prior to 1982, aboriginal rights were founded only on the common law and they could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign". Now, s. 35(1) of the *Constitution Act, 1982* protects aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

The *Sparrow* test deals with constitutional claims of infringement of aboriginal rights. This test involves three steps: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the

establishment of a *prima facie* infringement of such right; and, (3) the justification of the infringement.

Section 35(1) must be given a generous, large and liberal interpretation and ambiguities or doubts should be resolved in favour of the natives. Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Most importantly, aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives.

The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Two approaches have emerged.

The first approach focuses on the particular aboriginal practice, custom or tradition. It considers that what is common to both aboriginal and non-aboriginal cultures is non-aboriginal and hence not protected by s. 35(1). This approach should not be adopted. This approach misconstrues the words "distinctive culture", used in *Sparrow*, by interpreting it as if it meant "distinct culture". It is also overly majoritarian. Finally, this approach is unduly restrictive as it defines aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.

The second approach describes aboriginal rights in a fairly high level of abstraction and is more generic. Its underlying premise is that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Section 35(1) should be viewed as protecting, not a catalogue of individualized practices, customs or traditions but the "distinctive culture" of which aboriginal activities are manifestations. The emphasis is on the significance of these activities to natives rather than on the activities themselves. These aboriginal activities should be distinguished from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1).

The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, customs and traditions which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). A generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. What constitutes a practice, custom or tradition distinctive to native culture and society must be examined through the eyes of aboriginal people.

The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, custom or tradition has to exist prior to a specific date, and also to the length of time necessary for an

aboriginal activity to be recognized as a right under s. 35(1). Two basic approaches exist: the "frozen right" approach and the "dynamic right" approach. The latter should be preferred.

The "frozen right" approach would recognize practices, customs and traditions that existed from time immemorial and that continued to exist at the time of British sovereignty. This approach overstates the impact of European influence on aboriginal communities, crystallizes aboriginal practice as of an arbitrary date, and imposes a heavy burden on the persons claiming an aboriginal right even if evidentiary standards are relaxed. In addition, it embodies inappropriate and unprovable assumptions about aboriginal culture and society and is inconsistent with *Sparrow* which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982.

Underlying the "dynamic right" approach is the premise that "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality. Practices, customs and traditions need not have existed prior to British sovereignty or European contact. British sovereignty, instead of being considered the turning point in aboriginal culture, would be regarded as having recognized and affirmed practices, customs and traditions which are sufficiently significant and

fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity".

The aboriginal activity must have formed an integral part of a distinctive aboriginal culture for a substantial continuous period of time. This period should be assessed based on: (1) the type of aboriginal practices, customs and traditions; (2) the particular aboriginal culture and society; and, (3) the reference period of 20 to 50 years. This approach gives proper consideration to the perspective of aboriginal people on the meaning of their existing rights.

As regards the delineation of the aboriginal right claimed, the purposes of aboriginal practices, customs and traditions are highly relevant in assessing if they are sufficiently significant to the culture for a substantial continuing period of time. The purposes should not be strictly compartmentalized but rather should be viewed on a spectrum, with aboriginal activities undertaken solely for food at one extreme, those directed to obtaining purely commercial profit at the other extreme, and activities relating to livelihood, support and sustenance at the centre.

An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. Whether an activity is sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time will have to be determined on the specific facts giving rise to each case, as proven by the

Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right.

Nevertheless, the facts did not support framing the issue in this case in terms of commercial fishing. Appellant did not argue that her people possessed an aboriginal right to fish for commercial purposes but only the right to sell, trade and barter fish for their livelihood, support and sustenance. Finally, the legislative provision under constitutional challenge was not only aimed at commercial fishing but also at the non-commercial sale, trade and barter of fish.

The trial judge and the Court of Appeal erred in framing the issue and in using a "frozen right" approach. The trial judge, since he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1), made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. An appellate court, given these palpable and overriding errors affecting the trial judge's assessment of the facts, is accordingly justified in intervening in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial.

The fishery always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. These activities formed part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time -- for

centuries before the arrival of Europeans -- and continued in modernized forms until the present day. The criteria regarding the characterization and the time requirement of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* were met.

Per McLachlin J. (dissenting): A court considering the question of whether a particular practice is the exercise of a s. 35(1) constitutional aboriginal right must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the Crown's position as fiduciary for the first peoples. The legal perspectives of both the European and the aboriginal societies must be incorporated and the common law being applied must give full recognition to the pre-existing aboriginal tradition.

The sale at issue should not be labelled as something other than commerce. One person selling something to another is commerce. The critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

An aboriginal right must be distinguished from the exercise of an aboriginal right. Rights are generally cast in broad, general terms and remain constant over the centuries. The exercise of rights may take many forms and vary from place to place and from time to time. The principle that aboriginal

rights must be ancestral rights is reconciled with this Court's insistence that aboriginal rights not be frozen by the determination of whether the modern practice at issue may be characterized as an exercise of the right. The rights are ancestral: their exercise takes modern forms.

History is important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial.

Continuity -- a link -- must be established between the historic practice and the right asserted. The exercise of a right can lapse, however, for a period of time. Aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982.

Neither the "integral part" nor the "dynamic rights" approach provides a satisfactory test for determining whether an aboriginal right exists, even though each captures important facets of aboriginal rights. The "integral-incidental" test is too broad, too indeterminative and too categorical.

Aboriginal rights should be defined through an empirical approach. Inferences as to the sort of things which may qualify as aboriginal rights under

s. 35(1) should be drawn from history rather than attempting to describe *a priori* what an aboriginal right is.

The common law predicated dealings with aboriginals on two fundamental principles: (1) that the Crown asserted title subject to existing aboriginal interests in their traditional lands and adjacent waters, and (2) that those interests were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for their sustenance is a fundamental aboriginal right which is supported by the common law and by the history of this country and which is enshrined in s. 35(1) of the *Constitution Act, 1982*.

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained therefrom. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. The right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for traditional needs, albeit in their modern form. If the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource -- basic housing, transportation, clothing and amenities -- over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers.

All aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. Any right, aboriginal or other, also carries with it the obligation to use it responsibly. The Crown must establish a regulatory regime which respects these objectives.

The evidence conclusively established that over many centuries the fishery was used not only for food and ceremonial purposes but also for a variety of other needs. The scale of fishing here fell well within the limit of the traditional fishery.

Extinguishment

Per L'Heureux-Dubé J. (dissenting): The question of the extinguishment of the right found to exist must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain." No government of the day considered either the aboriginal right or the effect of its proposed action on that right, as required by the "clear and plain" test, in effecting any regulations which allegedly had the effect of extinguishing the aboriginal right to fish commercially.

Prima Facie Infringement

Per L'Heureux-Dubé J. (dissenting): The question of *prima facie* infringement must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): The inquiry into infringement involves two stages: (1) the person charged must show that he or she had a *prima facie* right to his or her actions, and (2) the Crown must then show that the regulatory scheme satisfied the particular aboriginal entitlement to fish for sustenance. The second requirement was not met.

Justification

Per L'Heureux-Dubé J. (dissenting): The question of justification must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): A large view of justification which cuts back the aboriginal right on the ground that this is required for reconciliation and social harmony should not be adopted. It runs counter to the authorities, is indeterminate and ultimately more political than legal. A more limited view of justification, that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use, should be adopted.

A government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified.

Subject to the limitations relating to conservation and prevention of harm to others, the aboriginal people have a priority to fish for food, ceremony and supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times. Non-aboriginal peoples may use the resource subject to these conditions.

The regulation at issue was not justified.

Cases Cited

By Lamer C.J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **considered:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *R. v. Oakes*, [1986] 1 S.C.R. 103; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. George*, [1966] S.C.R. 267; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.

By L'Heureux-Dubé J. (dissenting)

R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46; *R. v. Lewis*, [1996] 1 S.C.R. 921; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R. v. George*, [1966] S.C.R. 267; *Sikyea v. The Queen*, [1964] S.C.R. 642; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v.*

Alberta (Attorney General), [1989] 2 S.C.R. 1326; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *R. v. Jones* (1993), 14 O.R. (3d) 421; *R. v. King*, [1993] O.J. No. 1794; *R. v. Fraser*, [1994] 3 C.N.L.R. 139; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *R. v. Burns*, [1994] 1 S.C.R. 656; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

By McLachlin J. (dissenting)

R. v. Sparrow, [1990] 1 S.C.R. 1075; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516; *In re Southern Rhodesia*, [1919] A.C. 211; *Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399; *Oyekan v. Adele*, [1957] 2 All E.R. 785; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *United States v. Dion*, 476 U.S. 734 (1986); *Jack v. The Queen*, [1980] 1 S.C.R. 294.

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APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 75, 29 B.C.A.C. 209, 48 W.A.C. 209, 83 C.C.C. (3d) 289, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221, allowing an appeal from a judgment of Selbie J. (1991), 58 B.C.L.R. (2d) 392, [1991] 3 C.N.L.R.

161, allowing an appeal from conviction by Scarlett Prov. Ct. J., [1991] 3 C.N.L.R. 155. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Louise Mandell and *Leslie J. Pinder*, for the appellant.

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

René Morin, for the intervener the Attorney General of Quebec.

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

Christopher Harvey, Q.C., and *Robert Lonergan*, for the interveners the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation.

Harry A. Slade, *Arthur C. Pape* and *Robert C. Freedman*, for the intervener the First Nations Summit.

Stuart Rush, Q.C., and *Michael Jackson*, for the interveners Delgamuukw et al.

Arthur C. Pape and *Clayton C. Ruby*, for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.

//*The Chief Justice*//

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

THE CHIEF JUSTICE --

I. Introduction

1. This appeal, along with the companion appeals in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, raises the issue left unresolved by this Court in its judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075: How are the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* to be defined?

2. In *Sparrow*, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analyzing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified. In *Sparrow*, however, it was not seriously

disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined. It is this question and, in particular, the question of whether s. 35(1) recognizes and affirms the right of the Sto:lo to sell fish, which must now be answered by this Court.

3. In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, a constitutional provision must be understood "in the light of the interests it was meant to protect". This principle, articulated in relation to the rights protected by the *Canadian Charter of Rights and Freedoms*, applies equally to the interpretation of s. 35(1).

4. This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect.

II. Statement of Facts

5. The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. At the time at which the appellant was charged s. 27(5) read:

> 27. . . .
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

6. The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982*.

III. Judgments Below

Provincial Court, [1991] 3 C.N.L.R. 155

7. Scarlett Prov. Ct. J. rejected the appellant's argument that she sold fish pursuant to an aboriginal right. On the basis of the evidence from members of the appellant's band, and anthropological experts, he found that, historically, the Sto:lo people clearly fished for food and ceremonial purposes, but that any trade in salmon that occurred was incidental and occasional only. He found, at p. 160, that there was no trade of salmon "in any regularized or market sense" but only "opportunistic exchanges taking place on a casual basis". He found that the Sto:lo could not preserve or store fish for extended periods of time and that the Sto:lo were a band rather than a tribal culture; he held both of these facts to be significant in suggesting that the Sto:lo did not engage in a market system of exchange. On the basis of these findings regarding the nature of the Sto:lo trade in salmon, Scarlett Prov. Ct. J. held that the Sto:lo's aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. He therefore found the accused guilty of violating s. 61(1) of the *Fisheries Act*.

Supreme Court of British Columbia (1991), 58 B.C.L.R. (2d) 392

8. Selbie J. of the Supreme Court of British Columbia held that Scarlett Prov. Ct. J. erred when he looked at the evidence in terms of whether or not it demonstrated that the Sto:lo participated in a market system of exchange. The evidence should not have been considered in light of "contemporary tests for 'marketing'" (at para. 15) but should rather have been viewed so as to determine whether it

"is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise" (at para. 16). He held, at para. 16, that the evidence in this case was consistent with an aboriginal right to sell fish because it suggested that aboriginal societies had no stricture or prohibition against the sale of fish, with the result that "when the first Indian caught the first salmon he had the ‘right’ to do anything he wanted with it -- eat it, trade it for deer meat, throw it back or keep it against a hungrier time". Selbie J. therefore held that the Sto:lo had an aboriginal right to sell fish and that the trial judge's verdict against the appellant was inconsistent with the evidence. He remanded for a new trial on the questions of whether this right had been extinguished, whether the regulations infringed the right and whether any infringement of the right had been justified.

The Court of Appeal (1993), 80 B.C.L.R. (2d) 75

9. The British Columbia Court of Appeal allowed the Crown’s appeal and restored the guilty verdict of Scarlett Prov. Ct. J. Macfarlane J.A. (Taggart J.A. concurring) held, at para. 20, that a practice will be protected as an aboriginal right under s. 35(1) of the *Constitution Act, 1982* where the evidence establishes that it had "been exercised, at the time sovereignty was asserted, for a sufficient length of time to become integral to the aboriginal society". To be protected as an aboriginal right, however, the practice cannot have become "prevalent merely as a result of

European influences" (para. 21) but must rather arise from the aboriginal society itself. On the basis of this test Macfarlane J.A. held that the Sto:lo did not have an aboriginal right to sell fish. The question was not, he held at para. 30, whether the Sto:lo could support a right to dispose of surplus food fish on a casual basis but was rather whether they had a right to "sell fish allocated for food purposes on a commercial basis" which should be given constitutional priority in the allocation of the fishery resource. Given that this was the question, Macfarlane J.A. held that the assessment of the evidence by the trial judge was correct. The evidence, while indicating that surplus fish would have been disposed of or traded, did not establish that the "purpose of fishing was to engage in commerce" (para. 41). While the Sto:lo did trade salmon with the Hudson's Bay Company prior to the British assertion of sovereignty in a manner that could be characterized as commercial, this trade was "not of the same nature and quality as the aboriginal traditions disclosed by the evidence" (para. 41) and did not, therefore, qualify for protection as an aboriginal right under s. 35(1).

10. In his concurring judgment Wallace J.A. articulated a test for aboriginal rights similar to that of Macfarlane J.A. in so far as he too held, at para. 78, that the practices protected as aboriginal rights by s. 35(1) are those "traditional and integral to the native society pre-sovereignty". Wallace J.A. emphasized that s. 35(1) should not be interpreted as having the purpose of enlarging the pre-1982

concept of aboriginal rights; instead it should be seen as having the purpose of protecting from legislative encroachment those aboriginal rights that existed in 1982. Section 35(1) was not enacted so as to facilitate the current objectives of the aboriginal community but was rather enacted so as to protect "traditional aboriginal practices integral to the culture and traditional way of life of the native community" (para. 78). Wallace J.A. held, at para. 104, that rights should not be "determined by reference to the economic objectives of the rights-holders". He concluded from this analytical framework that the trial judge was correct in determining that the commercial sale of fish is different in nature and kind from the aboriginal right of the Sto:lo to fish for sustenance and ceremonial purposes, with the result that the appellant could not be said to have been exercising an aboriginal right when she sold the fish.

11. Lambert J.A. dissented. While he agreed that aboriginal rights are those aboriginal customs, traditions and practices which are an integral part of a distinctive aboriginal culture, he added to that proposition the proviso that to determine whether a practice is in fact integral it is necessary first to describe it correctly. In his view, the appropriate description of a right or practice is one based on the significance of the practice to the particular aboriginal culture. As such, in determining the extent to which aboriginal fishing is a protected right under s. 35(1) a court should look not to the purpose for which aboriginal people fished, but should rather look at the significance of fishing to the aboriginal society; it is the

> social significance of fishing which is integral to the distinctive aboriginal society and which is, therefore, protected by s. 35(1) of the *Constitution Act, 1982*. Lambert J.A. found support for this proposition in this Court's judgment in *Sparrow, supra*, in the American case law arising out of disputes over the terms of treaties signed with aboriginal people in the Pacific northwest (see, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)), and in the general principle that the definition of aboriginal rights must take into account the perspective of aboriginal people. Lambert J.A. held that the social significance of fishing for the Sto:lo was that fishing was the means by which they provided themselves with a moderate livelihood; he therefore held at para. 150 that the Sto:lo had an aboriginal right protected by s. 35(1)
>
> *to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood*. . . . [Emphasis in original.]

Lambert J.A. rejected the position of the majority that the commercial dimension of the fishery was introduced by Europeans and therefore outside of the protection of s. 35(1). The key point, he suggested, is not that the Europeans introduced commerce, but is rather that as soon as the Europeans arrived the Sto:lo began trading with them. In doing so the Sto:lo were not breaking with their past; the trade with the Hudson's Bay Company "represented only a response to a new circumstance in the carrying out of the

existing practice" (para. 180). Lambert J.A. went on to hold that the Sto:lo right to fish for a moderate livelihood had not been extinguished and that it had been infringed by s. 27(5) of the Regulations in a manner not justified by the Crown. He would thus have dismissed the appeal of the Crown and entered a verdict of acquittal.

12. Hutcheon J.A. also dissented. He did so on the basis that there is no authority for the proposition that the relevant point for identifying aboriginal rights is prior to contact with Europeans and European culture. Hutcheon J.A. held that the relevant historical time is instead 1846, the time of the assertion of British sovereignty in British Columbia. Since it is undisputed that by 1846 the Sto:lo were trading commercially in salmon, the Sto:lo can claim an aboriginal right to sell fish protected by s. 35(1) of the *Constitution Act, 1982*. Hutcheon J.A. held further that this right had not been extinguished prior to 1982. In the result, he would have remanded for a new trial on the issues of infringement and justification.

IV. Grounds of Appeal

13. Leave to appeal to this Court was granted on March 10, 1994. The following constitutional question was stated:

> Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

The appellant appealed on the basis that the Court of Appeal erred in defining the aboriginal rights protected by s. 35(1) as those practices integral to the distinctive cultures of aboriginal peoples. The appellant argued that the Court of Appeal erred in holding that aboriginal rights are recognized for the purpose of protecting the traditional way of life of aboriginal people. The appellant also argued that the Court of Appeal erred in requiring that the Sto:lo satisfy a long-time use test, in requiring that they demonstrate an absence of European influence and in failing to adopt the perspective of aboriginal peoples themselves.

14. The First Nations Summit intervened in support of the appellant as did Delgamuukw et al. and Pamajewon et al. The Fisheries Council of British Columbia, the Attorney General of Quebec, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation intervened in support of the respondent Crown.

V. Analysis

Introduction

15. I now turn to the question which, as I have already suggested, lies at the heart of this appeal: How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?

16. In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are rights and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

17. While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.

18. In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: *R.*

v. Oakes, [1986] 1 S.C.R. 103, at p. 136; *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 336.

19. Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality", Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991), 29 *Alta. L. Rev.* 498, at p. 502; they are the rights held by "Indians *qua* Indians", Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 776.

20. The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a

way which captures both the aboriginal and the rights in aboriginal rights.

21. The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of aboriginal rights will be comprehended. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Hunter*, *supra*, at p. 155. A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect"(*Big M Drug Mart Ltd.*, *supra*, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.

22. In *Sparrow, supra,* Dickson C.J. and La Forest J. held at p. 1106 that it was through a purposive analysis that s. 35(1) must be understood:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. [Emphasis added.]

In that case, however, the Court did not have the opportunity to articulate the purposes behind s. 35(1) as they relate to the scope of the rights the provision is intended to protect. Such analysis is now required to be undertaken.

General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown

23. Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow, supra,* this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples:

> When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added].

24. This interpretive principle, articulated first in the context of treaty rights -- *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 402; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1066 -- arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

25. The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. In *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the *Constitution*

Act, 1982 and should, again, inform the Court's purposive analysis of that provision.

Purposive Analysis of Section 35(1)

26. I now turn to a purposive analysis of s. 35(1).

27. When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

28. In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 112; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v;

it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.

29. The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status.

30. In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples

from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

31. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

32. That the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples is suggested by the French version of the text. For the English "existing aboriginal and treaty rights" the French text reads "*[l]es droits existants -- ancestraux ou issus de traités*". The term "*ancestral*", which *Le Petit Robert 1* (1990) dictionary defines as "*[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres*", suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence -- the ancestry -- of aboriginal peoples in North America.

33. This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. In *Calder, supra*, the Court refused an

application by the Nishga for a declaration that their aboriginal title had not been extinguished. There was no majority in the Court as to the basis for this decision; however, in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized. Hall J. based the Nishga's aboriginal title in the fact that the land to which they were claiming title had "been in their possession from time immemorial" (*Calder, supra,* at p. 375). Judson J. explained the origins of the Nishga's aboriginal title as follows, at p. 328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder, supra,* can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328).

34. The basis of aboriginal title articulated in *Calder*, *supra*, was affirmed in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. The decision in *Guerin* turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title", he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied, at p. 376, on *Calder*, *supra*, for the proposition that "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". [Emphasis added.]

35. The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States" -- "Understanding Aboriginal Rights", *supra*, at p. 739. I would add to Professor Slattery's comments only the observation that the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the

relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings.

36. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the first of the Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. government, not by the Indians themselves. In the course of his decision (written for the court), Marshall C.J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection (at pp 572-74):

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. [Emphasis added.]

It is, similarly, the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

37. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) the U.S. Supreme Court invalidated the conviction under a Georgia statute of a non-Cherokee man for the offence of living on the territory of the Cherokee Nation. The court held that the law under which he was convicted was *ultra vires* the State of Georgia. In so

doing the court considered the nature and basis of the Cherokee claims to the land and to governance over that land. Again, it based its judgment on its analysis of the origins of those claims which, it held, lay in the relationship between the pre-existing rights of the "ancient possessors" of North America and the assertion of sovereignty by European nations (at pp. 542-43 and 559):

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.
>
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.
>
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?
>
> But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.
>
> . . .
>
> <u>The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other</u>

> European potentate than the first discoverer of the coast of the particular region claimed. [Emphasis added.]

Marshall C.J.'s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land -- their "undisputed" possession of the soil "from time immemorial" -- is as relevant for the identification of the interests s. 35(1) was intended to protect as it was for the adjudication of Worcester's claim.

38. The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute: *Halsbury's Laws of Australia* (1991), vol. 1, paras. 5-2250, 5-2255, 5-2260 and 5-2265. Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, is persuasive in the Canadian context.

39. The *Mabo* judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown,

it was insufficient to eliminate a claim for native title; the court held at pp. 50-51 that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty".

40. From this premise, Brennan J., writing for a majority of the Court, went on at p. 58 to consider the nature and basis of aboriginal title:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society", *In re Southern Rhodesia*, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added.]

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" -- that which is "handed down [from ancestors] to posterity",

The Concise Oxford Dictionary (9th ed. 1995), -- implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

41. Academic commentators have also been consistent in identifying the basis and foundation of the s. 35(1) claims of aboriginal peoples in aboriginal occupation of North America prior to the arrival of Europeans. As Professor David Elliott, at p. 25, puts it in his compilation *Law and Aboriginal Peoples of Canada* (2nd ed. 1994), the "prior aboriginal presence is at the heart of the concept of aboriginal rights". Professor Macklem has, while also considering other possible justifications for the recognition of aboriginal rights, described prior occupancy as the "familiar" justification for aboriginal rights, arising from the "straightforward conception of fairness which suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals": Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173, at p. 180. Finally, I would note the position of Professor Pentney who has described aboriginal rights as collective rights deriving "their existence from the common law's recognition of [the] prior social organization" of aboriginal peoples: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the

Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207, at p. 258.

42. I would note that the legal literature also supports the position that s. 35(1) provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty. In his comment on *Delgamuukw v. British Columbia* ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350), Mark Walters suggests at pp. 412-13 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

> The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added.]

Similarly, Professor Slattery has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities" (Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992), at pp. 120-21) and that such rights concern "the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions" ("Understanding Aboriginal Rights", *supra*, at p. 737).

43. The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.

The Test for Identifying Aboriginal Rights in Section 35(1)

44. In order to fulfil the purpose underlying s. 35(1) -- i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions -- the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

45. In *Sparrow, supra*, this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J. and La Forest J. identified the Musqueam right to fish for food in the fact that:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [Emphasis added.]

The suggestion of this passage is that participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.

46. In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

47. I would note that this test is, in large part, consistent with that adopted by the judges of the British Columbia Court of Appeal. Although the various judges disagreed on such crucial questions as how the right should be framed, the relevant time at which the aboriginal culture should be examined and the role of European influences in limiting the scope of the right, all of the judges agreed that aboriginal rights must be identified through the practices, customs and traditions of aboriginal cultures. Macfarlane J.A. held at para. 20 that aboriginal rights exist where "the right had been exercised . . . for a sufficient length of time to become integral to the aboriginal society" (emphasis added); Wallace J.A. held at para. 78 that aboriginal rights are those practices "traditional and integral to the native society" (emphasis added); Lambert J.A. held at para. 131 that aboriginal rights are those "custom[s], tradition[s], or practice[s] . . . which formed an integral part of the distinctive culture of the aboriginal people in question" (emphasis added). While, as will become apparent, I do not adopt entirely the position of any of the judges at the Court of Appeal, their shared position that aboriginal rights lie in those practices, customs and traditions that are integral is consistent with the test I have articulated here.

Factors to be Considered in Application of the Integral to a Distinctive Culture Test

48. The test just laid out -- that aboriginal rights lie in the practices, customs and traditions integral to the distinctive cultures

of aboriginal peoples -- requires further elaboration with regards to the nature of the inquiry a court faced with an aboriginal rights claim must undertake. I will now undertake such an elaboration, concentrating on such questions as the time period relevant to the court's inquiry, the correct approach to the evidence presented, the specificity necessary to the court's inquiry, the relationship between aboriginal rights and the rights of aboriginal people as Canadian citizens, and the standard that must be met in order for a practice, custom or tradition to be said to be "integral".

Courts must take into account the perspective of aboriginal peoples themselves

49. In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow*, *supra*, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and

non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

50. It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right

51. Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's

claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.

52. I would note here by way of illustration that, in my view, both the majority and the dissenting judges in the Court of Appeal erred with respect to this aspect of the inquiry. The majority held that the appellant's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right and, in part, rejected her claim on the basis that the evidence did not support the existence of such a right. With respect, this characterization of the appellant's claim is in error; the appellant's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was. It was however, equally incorrect to adopt, as Lambert J.A. did, a "social" test for the identification of the practice, tradition or custom constituting the aboriginal right. The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus -- the nature of the aboriginal community's practices, customs or traditions themselves. The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a

practice, custom or tradition cannot, itself, constitute an aboriginal right.

53. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.

54. It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

<u>In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question</u>

55. To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice,

custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.

56. This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

57. Moreover, the aboriginal rights protected by s. 35(1) have been said to have the purpose of reconciling pre-existing aboriginal

societies with the assertion of Crown sovereignty over Canada. To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.

58. As was noted earlier, Lambert J.A. erred when he used the significance of a practice, custom or tradition as a means of identifying what the practice, custom or tradition is; however, he was correct to recognize that the significance of the practice, custom or tradition is important. The significance of the practice, custom or tradition does not serve to identify the nature of a claim of acting pursuant to an aboriginal right; however, it is a key aspect of the court's inquiry into whether a practice, custom or tradition has been shown to be an integral part of the distinctive culture of an aboriginal community. The significance of the practice, custom or tradition will inform a court as to whether or not that practice, custom or tradition can be said to be truly integral to the distinctive culture in question.

59. A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact

60. The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

61. The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

62. That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next

to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

63. I would note in relation to this point the position adopted by Brennan J. in *Mabo*, *supra*, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

> . . . when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather in its

suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

64. The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow*, *supra*, at p. 1093, that "the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and

traditions is demonstrated, prevent their protection as aboriginal rights.

65. I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

66. Further, I would note that basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the fact that s. 35(2) of the *Constitution Act, 1982* includes within the definition of "aboriginal peoples of Canada" the Métis people of Canada.

67. Although s. 35 includes the Métis within its definition of “aboriginal peoples of Canada”, and thus seems to link their claims to those of other aboriginal peoples under the general heading of

"aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims

68. In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret

the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to aboriginal rights must be adjudicated on a specific rather than general basis

69. Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more,

sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists

70. In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct

71. The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is not that it be

distinct to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is distinctive. A tradition or custom that is distinct is one that is unique -- "different in kind or quality; unlike" (*Concise Oxford Dictionary*, *supra*). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is distinctive -- "distinguishing, characteristic" -- makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture what it is, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

72. That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow*, *supra*, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the

Musqueam claimed in *Sparrow*, *supra*, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a distinctive part of that culture. Since it was so it constituted an aboriginal right under s. 35(1).

The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

73. The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

74. As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

75. With these factors in mind I will now turn to the particular claim made by the appellant in this case to have been acting pursuant to an aboriginal right.

Application of the Integral to a Distinctive Culture Test to the Appellant's Claim

76. The first step in the application of the integral to a distinctive culture test requires the court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. In this case the most accurate characterization of the appellant's position is that she is claiming an aboriginal right to exchange fish for money or for other goods. She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods.

77. That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold 10 salmon for $50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, cannot be said to constitute a sale on a "commercial" or market basis. These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.

78. Moreover, the regulations under which the appellant was charged prohibit all sale or trade of fish caught pursuant to an Indian food fish licence. As such, to argue that those regulations implicate the appellant's aboriginal right requires no more of her than that she

demonstrate an aboriginal right to the exchange of fish for money (sale) or other goods (trade). She does not need to demonstrate an aboriginal right to sell fish commercially.

79. The appellant herself characterizes her claim as based on a right "to sufficient fish to provide for a moderate livelihood". In so doing the appellant relies on the "social" test adopted by Lambert J.A. at the British Columbia Court of Appeal. As has already been noted, however, a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

80. Having thus identified the nature of the appellant's claim, I turn to the fundamental question of the integral to a distinctive

culture test: Was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans? In answering this question it is necessary to consider the evidence presented at trial, and the findings of fact made by the trial judge, to determine whether the evidence and findings support the appellant's claim that the sale or trade of fish is an integral part of the distinctive culture of the Sto:lo.

81. It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

This principle has also been followed in more recent decisions of this Court: *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, at pp. 8-9; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 794; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426. In the recently released decision of *Schwartz v. Canada*, [1996] 1 S.C.R. 254, La Forest J. made the following observation at para. 32, with which I agree, regarding appellate court deference to findings of fact:

> Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact . . . This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. . . .

I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses, *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247, at pp. 1249-50.

82. In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis -- his determination of the scope of the appellant's aboriginal rights

on the basis of the facts as he found them -- is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however -- the findings of fact from which that legal inference was drawn -- do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.

83. In adjudicating this case Scarlett Prov. Ct. J. obviously did not have the benefit of direction from this Court as to how the rights recognized and affirmed by s. 35(1) are to be defined, with the result that his legal analysis of the evidence was not entirely correct; however, that Scarlett Prov. Ct. J. was not entirely correct in his legal analysis of the facts as he found them does not mean that he made a clear and palpable error in reviewing the evidence and making those findings of fact. Indeed, a review of the transcript and exhibits submitted to this Court demonstrate that Scarlett Prov. Ct. J. conducted a thorough and compelling review of the evidence before him and committed no clear and palpable error which would justify this Court, or any other appellate court, in substituting its findings of fact for his. Moreover, I would note that the appellant, while disagreeing with Scarlett Prov. Ct. J.'s legal analysis of the facts, made no arguments suggesting that in making findings of fact

from the evidence before him Scarlett Prov. Ct. J. committed a palpable and overriding error.

84. Scarlett Prov. Ct. J. carefully considered all of the testimony presented by the various witnesses with regards to the nature of Sto:lo society and came to the following conclusions at p. 160:

> Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.
>
> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [*sic*] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.
>
> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic.

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly described trade as occurring through the "idiom" of maintaining family relationships:

> The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. . . .

Similarly, Mr. Dewhirst testified that the exchange of goods was related to the maintenance of family and kinship relations.

85. The facts as found by Scarlett Prov. Ct. J. do not support the appellant's claim that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo. As has already been noted, in order to be recognized as an aboriginal right, an activity must be of central significance to the culture in question -- it must be something which makes that culture what it is. The findings of fact made by Scarlett Prov. Ct. J. suggest that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.

86. First, Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only "incidental" to fishing for food

purposes. As was noted above, to constitute an aboriginal right, a custom must itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom. Thus, while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, this is not sufficient, absent a demonstration that the exchange of salmon was itself a significant and defining feature of Sto:lo society, to demonstrate that the exchange of salmon is an integral part of Sto:lo culture.

87. For similar reasons, the evidence linking the exchange of salmon to the maintenance of kinship and family relations does not support the appellant's claim to the existence of an aboriginal right. Exchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods.

88. Second, Scarlett Prov. Ct. J. found that there was no "regularized trading system" amongst the Sto:lo prior to contact. The inference drawn from this fact by Scarlett Prov. Ct. J., and by Macfarlane J.A. at the British Columbia Court of Appeal, was that the absence of a market means that the appellant could not be said to have been acting pursuant to an aboriginal right because it suggests that there is no aboriginal right to fish commercially. This inference is incorrect because, as has already been suggested, the appellant in this case has only claimed a right to exchange fish for money or

other goods, not a right to sell fish in the commercial marketplace; the significance of the absence of regularized trading systems amongst the Sto:lo arises instead from the fact that it indicates that the exchange of salmon was not widespread in Sto:lo society. Given that the exchange of salmon was not widespread it cannot be said that, prior to contact, Sto:lo culture was defined by trade in salmon; trade or exchange of salmon took place, but the absence of a market demonstrates that this exchange did not take place on a basis widespread enough to suggest that the exchange was a defining feature of Sto:lo society.

89. Third, the trade engaged in between the Sto:lo and the Hudson's Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the exchange of salmon was an integral part of Sto:lo culture. As was emphasized in listing the criteria to be considered in applying the “integral to” test, the time relevant for the identification of aboriginal rights is prior to contact with European societies. Unless a post-contact practice, custom or tradition can be shown to have continuity with pre-contact practices, customs or traditions, it will not be held to be an aboriginal right. The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the

exchange of salmon between the Sto:lo and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.

90. Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour -- for example, specialization in the gathering and trade of fish -- whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.

91. For these reasons, then, I would conclude that the appellant has failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but

was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*.

The Sparrow Test

92. Since the appellant has failed to demonstrate that the exchange of fish was an aboriginal right of the Sto:lo, it is unnecessary to consider the tests for extinguishment, infringement and justification laid out by this Court in *Sparrow*, *supra*.

VI. Disposition

93. Having concluded that the aboriginal rights of the Sto:lo do not include the right to exchange fish for money or other goods, I would dismiss the appeal and affirm the decision of the Court of Appeal restoring the trial judge's conviction of the appellant for violating s. 61(1) of the *Fisheries Act*. There will be no order as to costs.

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

Question Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect

with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Answer No.

L'Heureux-Dubé J.\\

The following are the reasons delivered by

95. L'HEUREUX-DUBÉ J. (dissenting) -- This appeal, as well as the appeals in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, in which judgment is handed down concurrently, and the appeal in *R. v. Nikal*, [1996] 1 S.C.R. 1013, concern the definition of aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

96. While the narrow issue in this particular case deals with whether the Sto:lo, of which the appellant is a member, possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, the broader issue is the interpretation of the nature and extent of constitutionally protected aboriginal rights.

97. The Chief Justice concludes that the Sto:lo do not possess an aboriginal right to exchange fish for money or other goods and that, as a result, the appellant's conviction under the *Fisheries Act*,

R.S.C. 1970, c. F-14, should be upheld. Not only do I disagree with the result he reaches, but I also diverge from his analysis of the issue at bar, specifically as to his approach to defining aboriginal rights and as to his delineation of the aboriginal right claimed by the appellant.

98. The Chief Justice has set out the facts and judgments and I will only briefly refer to them for a better understanding of what follows.

99. Dorothy Van der Peet, the appellant, was charged with violating s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, and, thereby, committing an offence contrary to s. 61(1) of the *Fisheries Act*. These charges arose out of the appellant's sale of 10 salmon caught by her common law spouse and his brother under the authority of an Indian food fish licence, issued pursuant to s. 27(1) of the Regulations. Section 27(5) of the *British Columbia Fishery (General) Regulations*, is the provision here under constitutional challenge; it provides:

> 27. . . .
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

100. The appellant, her common law husband and his brother are all members of the Sto:lo Band, part of the Coast Salish Nation. Both parties to this dispute accept that the appellant sold the fish, that the

sale of the fish was contrary to the Regulations and that the fish were caught pursuant to a recognized aboriginal right to fish. The parties disagree, however, as to the nature of the Sto:lo's relationship with the fishery, particularly whether their right to fish encompasses the right to sell, trade and barter fish.

101. Scarlett Prov. Ct. J., the trial judge found on the evidence, [1991] 3 C.N.L.R. 155, that trade by the Sto:lo was incidental to fishing for food and was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. He held, therefore, that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell and found the appellant guilty as charged.

102. On appeal to the British Columbia Supreme Court, (1991), 58 B.C.L.R. (2d) 392, Selbie J., the summary appeal judge, gave a different interpretation to the oral testimony, expert evidence and archaeological records. In his view, the evidence demonstrated that the Sto:lo's relationship with the fishery was broad enough to include the trade of fish since the Sto:lo who caught fish in their original aboriginal society could do whatever they wanted with that fish. He overturned the appellant's conviction and entered an acquittal.

103. At the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 75, the findings and verdict of the trial judge were restored.

The majority of the Court of Appeal, *per* Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., found that the Sto:lo engaged only in casual exchanges of fish and that this was entirely different from fishing for commercial and market purposes. Lambert J.A., dissenting, held that the best description of the aboriginal practices, traditions and customs of the Sto:lo was one which included the sale, trade and barter of fish. Also dissenting, Hutcheon J.A. focused on the evidence demonstrating that by 1846, the date of British sovereignty, trade in salmon was taking place in the Sto:lo community.

104. Leave to appeal was granted by this Court and the Chief Justice stated the following constitutional question:

> Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

105. In my view, the definition of aboriginal rights as to their nature and extent must be addressed in the broader context of the historical aboriginal reality in Canada. Therefore, before going into the specific analysis of aboriginal rights protected under s. 35(1), a review of the legal evolution of aboriginal history is in order.

I. Historical and General Background

106. It is commonly accepted that the first aboriginal people of North America came from Siberia, over the Bering terrestrial bridge, some 12,000 years ago. They found a *terra nullius* and gradually began to explore and populate the territory. These people have always enjoyed, whether as nomadic or sedentary communities, some kind of social and political structure. Accordingly, it is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.

107. In that regard, it is useful to acknowledge the findings of Marshall C.J. of the United States Supreme Court in the so-called trilogy, comprised of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Particularly in *Worcester*, Marshall C.J.'s general description of aboriginal societies in North America is apropos (at pp. 542-43):

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

This passage was quoted, with approval, by Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 383. Also in *Calder*,

Judson J., for the majority in the result, made the following observations at p. 328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. [Emphasis added.]

See also, regarding the independent character of aboriginal nations, the remarks of Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1053.

108. At the time of the first formal arrival of the Europeans, in the sixteenth century, most of the territory of what is now Canada was occupied and used by aboriginal people. From the earliest point, however, the settlers claimed sovereignty in the name of their home country. Traditionally, there are four principles upon which states have relied to justify the assertion of sovereignty over new territories: see Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (1979). These are: (1) conquest, (2) cession, (3) annexation, and (4) settlement, i.e., acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.

109. In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it (see Patrick

Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173) although there is still debate as to whether the land was indeed free for occupation. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 *Osgoode Hall L.J.* 681, and Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

110. In spite of the sovereignty proclamation, however, the early practices of the British recognized aboriginal title or rights and required their extinguishment by cession, conquest or legislation: see André Émond, "Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?" (1995), 41 *McGill L.J.* 59, at p. 62. This tradition of the British imperial power (either applied directly or after French capitulation) was crystallized in the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1.

111. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Dickson C.J. and La Forest J. wrote the following regarding Crown sovereignty and British practices *vis-à-vis* aboriginal people at p. 1103:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. . . .

See also André Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996), 30 *R.J.T.* 1, at p. 1.

112. As a result, it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment: see *Calder v. Attorney-General of British Columbia*, *supra*, at p. 390, *per* Hall J., confirmed in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 379, *per* Dickson J. (as he then was), and *Sparrow*, *supra*; see also the decision of the High Court of Australia in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1. See also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 *Queen's L.J.* 232, at p. 242, and Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992) at p. 679. This position is known as the "inherent theory" of aboriginal rights, as contrasted with the "contingent theory" of aboriginal rights: see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991), 29 *Alta. L. Rev.* 498, Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382, and Kent McNeil, *Common Law Aboriginal Title* (1989).

113. Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to

events such as war, epidemic, famine, dwindling game reserves, etc. Aboriginal practices, traditions and customs also changed and evolved, including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and development, bringing novel opportunities, technologies and means to exploit natural resources: see Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at pp. 741-42. Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.

114. Aboriginal interests arising out of natives' original occupation and use of ancestral lands have been recognized in a body of common law rules referred to as the doctrine of aboriginal rights: see Brian Slattery, "Understanding Aboriginal Rights", *supra*, at p. 732. These principles define the terms upon which the Crown acquired sovereignty over native people and their territories.

115. The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title, i.e., the *sui generis* proprietary interest which gives native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land: see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.), at p. 54, *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328,

per Judson J., and at p. 383, *per* Hall J., and *Guerin*, *supra*, at pp. 378 and 382, *per* Dickson J. (as he then was).

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

117. This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands: see Brian Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 743-44. The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. There are, however, important

distinctions to draw between these types of lands with regard to the legislation applicable and claims of aboriginal rights.

118. Reserve lands are those lands reserved by the Federal Government for the exclusive use of Indian people; such lands are regulated under the *Indian Act*, R.S.C., 1985, c. I-5. On reserve lands, federal legislation, pursuant to s. 91(24) of the *Constitution Act, 1867*, as well as provincial laws of general application, pursuant to s. 88 of the *Indian Act*, are applicable. However, under s. 81 of the *Indian Act*, band councils can enact by-laws, for particular purposes specified therein, which supplant incompatible provincial legislation — even that enacted under s. 88 of the Act — as well as incompatible federal legislation — in so far as the Minister of Indian Affairs has not disallowed the by-laws pursuant to s. 82 of the Act. The latter scenario was the foundation of the claims in *R. v. Lewis*, [1996] 1 S.C.R. 921, and partly in *R. v. Nikal*, *supra*.

119. Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title (see *Guerin v. The Queen*, *supra*, at p. 382); federal and provincial legislation applies to aboriginal title lands, pursuant to the governments' respective general legislative authority. Aboriginal title of this kind is founded on the common law and strict conditions must be fulfilled for such title to be recognized: see *Calder v. Attorney-General of British Columbia*, *supra*, and *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980]

1 F.C. 518. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. It follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title. As I have already noted elsewhere, the source of these rights is the historic occupation and use of ancestral lands by the natives.

120. Aboriginal title can also be founded on treaties concluded between the natives and the competent government: see *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Horseman*, [1990] 1 S.C.R. 901. Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement. The rights arising out of a treaty are immune from provincial legislation — even that enacted under s. 88 of the *Indian Act* — unless the treaty incorporates such legislation, as in *R. v. Badger*, [1996] 1 S.C.R. 771. A treaty, however, does not exhaust aboriginal rights; such rights continue to exist apart from the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.

121. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a

result, does not meet the criteria for the recognition, at common law, of aboriginal title. In these cases, the aboriginal rights on the land are restricted to residual portions of the aboriginal title — such as the rights to hunt, fish or trap — or to other matters not connected to land; they do not, therefore, entail the full *sui generis* proprietary right to occupy and use the land.

122. Both the Canadian Parliament and provincial legislatures can enact legislation, pursuant to their respective general legislative competence, that affect native activities on aboriginal right lands. As Cory J. puts it in *Nikal, supra* (at para. 92): "[t]he government must ultimately be able to determine and direct the way in which these rights [of the natives and of the rest of Canadian society] should interact". See also, *Calder v. Attorney-General of British Columbia, supra,* at pp. 328-29, *per* Judson J., and at p. 401, *per* Hall J; *Guerin, supra,* at pp. 377-78, *Sparrow, supra,* at p. 1103, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 109.

123. These types of lands are not static or mutually exclusive. A piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land. Further, aboriginal title land can become aboriginal right land because the occupation and use by the particular group of aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land

described above, to a larger or smaller degree, aboriginal rights can arise and be recognized.

124. This being said, the instant case is confined to the recognition of an aboriginal right and does not involve by-laws on a reserve or claims of aboriginal title, nor does it relate to any treaty rights. The contention of the appellant is simply that the Sto:lo, of which she is one, possess an aboriginal right to fish — arising out of the historic occupation and use of their lands — which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

125. Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, at p. 54, also *R. v. George*, [1966] S.C.R. 267, *Sikyea v. The Queen*, [1964] S.C.R. 642, and *Calder v. Attorney-General of British Columbia*, *supra*; see also, regarding the mode of extinguishing aboriginal rights, Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 *Can. Bar Rev.* 450.

126. Since then, however, s. 35(1) of the *Constitution Act, 1982* provides constitutional protection to aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty

rights of the aboriginal peoples of Canada": see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 *Can. Bar Rev.* 261, at p. 263. Consequently, as I shall examine in some detail, the general legislative authority over native activities is now limited and legislation which infringes upon existing aboriginal or treaty rights must be justified.

127. The general analytical framework developed under s. 35(1) will now be outlined before proceeding with the interpretation of the nature and extent of constitutionally protected aboriginal rights.

II. Section 35(1) of the *Constitution Act, 1982* and the *Sparrow* Test

128. The analysis of the issue before us must start with s. 35(1) of the *Constitution Act, 1982*, found in Part II of that Act entitled "Rights of the Aboriginal Peoples of Canada", which provides:

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

129. The scope of s. 35(1) was discussed in *Sparrow*, *supra*. In that case, a member of the Musqueam Band, Ronald Edward Sparrow, was charged under s. 61(1) of the *Fisheries Act* with the offence of fishing with a drift-net in excess of the 25-fathom depth permitted by the terms of the band's Indian food fishing licence. The fishing occurred in a narrow channel of the Fraser River, a few miles

upstream from Vancouver International Airport. Sparrow readily admitted having fished as alleged, but he contended that, because the Musqueam had an aboriginal right to fish, the attempt to regulate net length was inconsistent with s. 35(1) and was thus rendered of no force or effect by s. 52 of the *Constitution Act, 1982*.

130. I pause here to note that in *Sparrow*, Dickson C.J. and La Forest J. stressed the importance of taking a case-by-case approach to the interpretation of the rights involved in s. 35(1). They stated at p. 1111:

> We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

See also *Kruger v. The Queen*, [1978] 1 S.C.R. 104, and *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.).

131. The Court, nevertheless, developed a basic analytical framework for constitutional claims of aboriginal right protection under s. 35(1). The test set out in *Sparrow* includes three steps, namely: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and (3) the justification of the infringement. I shall briefly discuss each of them in turn.

132. The rights of aboriginal people constitutionally protected in s. 35(1) are those in existence at the time of the enactment of the *Constitution Act, 1982*. However, the manner in which they were regulated in 1982 is irrelevant to the definition of aboriginal rights because they must be assessed in their contemporary form; aboriginal rights are not frozen in time: see *Sparrow*, at p. 1093; see also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *supra*, Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255, and William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II — Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207. The onus is on the claimant to prove that he or she benefits from an existing aboriginal right. I will return later to this first step to elaborate on the interpretation of the nature and extent of aboriginal rights.

133. Also, the Crown could extinguish aboriginal rights by legislation prior to 1982, but its intention to do so had to be clear and plain. Therefore, the regulation of an aboriginal activity does not amount to its extinguishment (*Sparrow*, at p. 1097) and legislation necessarily inconsistent with the continued enjoyment of aboriginal rights is not sufficient to meet the test. The "clear and plain" hurdle for extinguishment is, as a result, quite high: see *Simon*, *supra*. The onus of proving extinguishment is on the party alleging it, that is, the Crown.

134. As regards the second step of the *Sparrow* test, when an existing aboriginal right has been established, the claimant must demonstrate that the impugned legislation constitutes a *prima facie* infringement of the right. Put another way, the question becomes whether the legislative provision under scrutiny is in conflict with the recognized aboriginal right, either because of its object or its effects. In *Sparrow*, Dickson C.J. and La Forest J. provided the following guidelines, at p. 1112, regarding infringement:

> 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. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

135. Thirdly, after the claimant has demonstrated that the legislation in question constitutes a *prima facie* infringement of his or her aboriginal right, the onus then shifts again to the Crown to prove that the infringement is justified. Courts will be asked, at this stage, to balance and reconcile the conflicting interests of native people, on the one hand, and of the rest of Canadian society, on the other. Specifically, this last step of the *Sparrow* test requires the assessment

of both the validity of the objective of the legislation and the reasonableness of the limitation.

136. As to the objective, there is no doubt that a legislative scheme aimed at conservation and management of natural resources will suffice (*Sparrow*, at p. 1113). Other legislative objectives found to be substantial and compelling, such as the security of the public, can also be valid, depending on the circumstances of each case. The notion of public interest, however, is too vague and broad to constitute a valid objective to justify the infringement of an aboriginal right (*Sparrow*, at p. 1113).

137. With respect to the reasonableness of the limits upon the existing aboriginal right, the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people have to be contemplated. At a minimum, this fiduciary duty commands that <u>some priority</u> be afforded to the natives in the regulatory scheme governing the activity recognized as aboriginal right: see *Sparrow*, at pp. 1115-17, also *Jack v. The Queen*, [1980] 1 S.C.R. 294, and *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S.C.A.).

138. A number of other elements may have to be weighed in the assessment of justification. In *Sparrow*, Dickson C.J. and La Forest J. drew up the following non-exhaustive list of factors relating to justification at p. 1119:

> Within the analysis of justification, there are further questions to be addressed, 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.

139. In the case at bar, the issue relates only to the interpretation of the nature and extent of the Sto:lo's aboriginal right to fish and whether it includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes; i.e., the very first step of the *Sparrow* test, dealing with the assessment and definition of aboriginal rights. If it becomes necessary to proceed to extinguishment or to the questions of *prima facie* infringement and justification, the parties agreed that the case should be remitted to trial, as the summary appeal judge did, given that there is insufficient evidence to enable this Court to decide those issues.

140. In order to determine whether the Sto:lo benefit from an existing aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, it is necessary to elaborate on the appropriate approach to interpreting the nature and extent of aboriginal rights in general. That I now propose to do.

III. Interpretation of Aboriginal Rights

141. While I am in general agreement with the Chief Justice on the fundamental interpretative canons relating to aboriginal law which he discussed, the application of those rules to his definition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982* does not, in my view, sufficiently reflect them. For the sake of convenience, I will summarize them here.

142. First, as with all constitutional provisions, s. 35(1) must be given a generous, large and liberal interpretation in order to give full effect to its purposes: see, regarding the *Constitution Act, 1867*, *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016, *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; in the context of the *Charter*, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, *R. v. Keegstra*, [1990] 3 S.C.R. 697; and, particular to aboriginal rights in s. 35(1), *Sparrow, supra*, at p. 1108, where Dickson C.J. and La Forest J. wrote that "s. 35(1) is a solemn commitment that must be given meaningful content".

143. Further, the very nature of ancient aboriginal records, such as treaties, agreements with the Crown and other documentary evidence, commands a generous interpretation, and uncertainties, ambiguities or doubts should be resolved in favour of the natives: see *R. v. Sutherland*, [1980] 2 S.C.R. 451, *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, *Nowegijick v. The Queen*, [1983] 1

S.C.R. 29, *Simon*, *supra*, *Horseman*, *supra*, *Sioui*, *supra*, *Sparrow*, *supra*, and *Mitchell*, *supra*; see also William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee", *supra*, at p. 255.

144. Second, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people: see *Taylor*, *supra*, and *Guerin*, *supra*. This fiduciary obligation attaches because of the historic power and responsibility assumed by the Crown over aboriginal people. In *Sparrow*, *supra*, the Court succinctly captured this obligation at p. 1108:

> That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]

See also Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 *C. de D.* 669.

145. Finally, but most importantly, aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. In that respect, the following

remarks of Dickson C.J. and La Forest J. in *Sparrow*, at p. 1112, are particularly apposite:

> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. [Emphasis added.]

Unlike the Chief Justice, I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the natives when defining aboriginal rights.

146. These principles of interpretation are important to keep in mind when determining the proper approach to the question of the nature and extent of aboriginal rights protected in s. 35(1) of the *Constitution Act, 1982*, to which I now turn.

147. The starting point in contemplating whether an aboriginal practice, tradition or custom warrants constitutional protection under s. 35(1) was hinted at by this Court in *Sparrow, supra*. Dickson C.J. and La Forest J. made this observation, at p. 1099, regarding the role of the fishery in Musqueam life:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. [Emphasis added.]

148. The crux of the debate at the British Columbia Court of Appeal in the present appeal, and in most of the appeals heard contemporaneously, lies in the application of this standard of "integral part of their distinctive culture" to defining the nature and extent of the particular aboriginal right claimed to be protected in s. 35(1) of the *Constitution Act, 1982*. This broad statement of what characterizes aboriginal rights must be elaborated and made more specific so that it becomes a defining criterion. In particular, two aspects must be examined in detail, namely (1) what are the necessary characteristics of aboriginal rights, and (2) what is the period of time relevant to the assessment of such characteristics.

Characteristics of aboriginal rights

149. The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Which aboriginal practices, traditions and customs warrant constitutional protection? It appears from the jurisprudence developed in the courts below (see the reasons of the British Columbia Court of Appeal and the decision in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470) that two approaches to this difficult question have emerged. The first one, which the Chief Justice endorses, focuses on the particular aboriginal practice, tradition or custom. The second approach, more generic, describes aboriginal rights in a fairly high level of abstraction. For the reasons that follow, I favour the latter approach.

150. The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted. The analysis turns on the manifestations of the "integral part of [aboriginals'] distinctive culture" introduced in *Sparrow*, *supra*, at p. 1099. Further, on this view, what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture. The majority of the Court of Appeal adopted this position, as the following passage from Macfarlane J.A.'s reasons reveals (at para. 37):

> What was happening in the aboriginal society before contact with the Europeans is relevant in identifying the unique traditions of the aborigines which deserved protection by the common law. It is also necessary to separate those traditions from practices which are not a unique part of Indian culture, but which are common to Indian and non-Indian alike. [Emphasis added.]

Accordingly, if an activity is integral to a culture other than that of aboriginal people, it cannot be part of aboriginal people's distinctive culture. This approach should not be adopted for the following reasons.

151. First, on the pure terminology angle of the question, this position misconstrues the words "distinctive culture", used in the above excerpt of *Sparrow*, by interpreting it as if it meant "distinct culture". These two expressions connote quite different meanings and must not be confused. The word “distinctive” is defined in *The Concise Oxford Dictionary* (9th ed. 1995) as "distinguishing,

characteristic" where the word “distinct” is described as "**1** (often foll. by *from*) **a** not identical; separate; individual. **b** different in kind or quality; unlike". While "distinct" mandates comparison and evaluation from a separate vantage point, "distinctive" requires the object to be observed on its own. While describing an object's "distinctive" qualities may entail describing how the object is different from others (i.e., "distinguishing"), there is nothing in the term that requires it to be plainly different. In fact, all that "distinctive culture" requires is the characterization of aboriginal culture, not its differentiation from non-aboriginal cultures.

152. While the Chief Justice recognizes the difference between "distinctive" and "distinct", he applies it only as regards the manifestations of the distinctive aboriginal culture, i.e., the individualized practices, traditions and customs of a particular group of aboriginal people. As I will examine in more detail in a moment, the "distinctive" aboriginal culture has, in my view, a generic and much broader application.

153. Second, holding that what is common to both aboriginal and non-aboriginal cultures must necessarily be non-aboriginal and thus not aboriginal for the purpose of s. 35(1) is, to say the least, an overly majoritarian approach. This is diametrically opposed to the view propounded in *Sparrow*, *supra*, that the interpretation of aboriginal rights be informed by the fiduciary responsibility of the Crown *vis-à-vis* aboriginal people as well as by the aboriginal

perspective on the meaning of the rights. Such considerations command that practices, traditions and customs which characterize aboriginal societies as the original occupiers and users of Canadian lands be protected, despite their common features with non-aboriginal societies.

154. Finally, an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of the *Constitution Act, 1982* advocated in *Sparrow*.

155. A better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality.

156. A generic approach to defining the nature and extent of aboriginal rights starts from the proposition that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Instead of focusing on a particular practice, tradition or custom, this conception refers to a more abstract and profound concept. In fact, similar to the values enshrined in the *Canadian Charter of Rights*

and Freedoms, aboriginal rights protected under s. 35(1) should be contemplated on a multi-layered or multi-faceted basis: see Andrea Bowker, "*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 *Toronto Fac. L. Rev.* 1, at pp. 28-29.

157. Accordingly, s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves.

158. Although I do not claim to examine the question in terms of liberal enlightenment, an analogy with freedom of expression guaranteed in s. 2(*b*) of the *Charter* will illustrate this position. Section 2(*b*) of the *Charter* does not refer to an explicit catalogue of protected expressive activities, such as political speech, commercial expression or picketing, but involves rather the protection of the ability to express: see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, *Keegstra*, *supra*; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. In other words, the constitutional guarantee of freedom of expression is conceptualized, not as protecting the possible

manifestations of expression, but as preserving the fundamental purposes for which one may express oneself, i.e., the rationales supporting freedom of expression.

159. Similarly, aboriginal practices, traditions and customs protected under s. 35(1) should be characterized by referring to the fundamental purposes for which aboriginal rights were entrenched in the *Constitution Act, 1982*. As I have already noted elsewhere, s. 35(1) constitutionalizes the common law doctrine of aboriginal rights which recognizes aboriginal interests arising out of the historic occupation and use of ancestral lands by natives. This, in my view, is how the notion of "integral part of a distinctive aboriginal culture" should be contemplated. The "distinctive aboriginal culture" must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was).

160. This rationale should inform the characterization of aboriginal activities which warrant constitutional protection as aboriginal rights. The practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. See *Delgamuukw v. British Columbia*, *supra*, at pp. 646-47, *per* Lambert J.A., dissenting; see also Asch

and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*", *supra*, at p. 505, and Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee", *supra*, at pp. 258-59.

161. Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1). This was described by Lambert J.A., dissenting at the Court of Appeal, as the "social" form of description of aboriginal rights (see para. 140), a formulation the Chief Justice rejects. Lambert J.A. distinguished these aboriginal activities from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1) of the *Constitution Act, 1982*. I agree with this description which, although flexible, provides a defining criterion for the interpretation of the nature and extent of aboriginal rights and, contrary to what my colleague McLachlin J. suggests, does not suffer from vagueness or overbreadth, as defined by this Court (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031).

162. Further comments regarding this approach are in order. The criterion of "distinctive aboriginal culture" should not be limited to

those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

163. It is necessary to discuss at this point the period of time relevant to the assessment of the practices, traditions and customs which form part of the distinctive culture of a particular group of aboriginal people.

Period of time relevant to aboriginal rights

164. The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, tradition or custom has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Here, again, two basic approaches have been advocated in the courts below (see the decisions of the British Columbia Court of

Appeal in this case, and in *Delgamuukw v. British Columbia*, *supra*), namely the "frozen right" approach and the "dynamic right" approach. An examination of each will show that the latter view is to be preferred.

165. The "frozen right" approach would recognize practices, traditions and customs — forming an integral part of a distinctive aboriginal culture — which have long been in existence at the time of British sovereignty: see Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 758-59. This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty. Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of "aboriginal time" prior to the arrival of Europeans. Contrary to the Chief Justice, I do not believe that this approach should be adopted, for the following reasons.

166. First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities: see Bowker, "*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal", *supra*, at p. 22. From the native people's perspective, the coming of the settlers constitutes one of many factors, though a very significant

one, involved in their continuing societal change and evolution. Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of aboriginal people as to the significance of European arrival on their rights.

167. Second, crystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing aboriginal rights: see Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*" (1991), 36 *McGill L.J.* 1382, at pp. 1403-4. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 — the year in which the *Oregon Boundary Treaty, 1846* was concluded — as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.

168. As a third point, in terms of proof, the "frozen right" approach imposes a heavy and unfair burden on the natives: the claimant of an

aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses, even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about aboriginal culture and society. It forces the claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in *Sparrow, supra*, which commands a purposive, liberal and favourable construction of aboriginal rights.

169. Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the *Constitution Act, 1982* provides that the "'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada" (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights of the Aboriginal

Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee", *supra*, at pp. 272-74. Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case-by-case application of s. 35(2) of the *Constitution Act, 1982* proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

170. Finally, the "frozen right" approach is inconsistent with the position taken by this Court in *Sparrow*, *supra*, which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982. The following passage from Dickson C.J. and La Forest J.'s reasons makes this point (at p. 1093):

> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," *supra*, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected. [Emphasis added.]

This broad proposition should be taken to relate, not only to the meaning of the word "existing" found in s. 35(1), but also to the more fundamental question of the time at which the content of the rights themselves is determined.

Accordingly, the interpretation of the nature and extent of aboriginal rights must "permit their evolution over time".

171. The foregoing discussion shows that the "frozen right" approach to defining aboriginal rights as to their nature and extent involves several important restrictions and disadvantages. A better position, in my view, would be evolutive in character and give weight to the perspective of aboriginal people. As the following analysis will demonstrate, a "dynamic right" approach to the question will achieve these objectives.

172. The "dynamic right" approach to interpreting the nature and extent of aboriginal rights starts from the proposition that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (*Sparrow*, at p. 1093). According to this view, aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality.

173. Distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary

world. Instead of considering it as the turning point in aboriginal culture, British sovereignty would be regarded as having recognized and affirmed practices, traditions and customs which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity", founded in British imperial constitutional law, to the effect that when new territory is acquired the *lex loci* of organized societies, here the aboriginal societies, continues at common law.

174. See, on the doctrine of continuity in general, Sir William Blackstone, *Commentaries on the Laws of England* (1769), vol. 2, at p. 51, Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), at p. 119, and Sir William Searle Holdsworth, *A History of English Law* (1938), vol. 11, at pp. 3-274. See also, in the context of Canadian aboriginal law, Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), Kent McNeil, *Common Law Aboriginal Title* (1989), Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones", *supra*, at p. 719; and Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale", *supra*, at p. 96.

175. Consequently, in order for an aboriginal right to be recognized and affirmed under s. 35(1), it is not imperative for the practices, traditions and customs to have existed prior to British sovereignty and, *a fortiori*, prior to European contact, which is the cut-off date favoured by the Chief Justice. Rather, the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture — i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group — for a substantial continuous period of time as defined above.

176. Such a temporal requirement is less stringent than the "time immemorial" criterion developed in the context of aboriginal title: see *Calder v. Attorney-General of British Columbia*, *supra*; and, *Baker Lake v. Minister of Indian Affairs and Northern Development*, *supra*; see also Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*", *supra*, at p. 1394. This qualification of the time immemorial test finds support in the *obiter dicta* of this Court in *Sparrow*, *supra*, at p. 1095, regarding the Musqueam Band's aboriginal right to fish:

> It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it. [Emphasis added.]

177. The substantial continuous period of time for which the aboriginal practice, tradition or custom must have been engaged in will depend on the circumstances and on the nature of the aboriginal right claimed. However, as proposed by Professor Slattery, in "Understanding Aboriginal Rights", *supra*, at p. 758, in the context of aboriginal title, "in most cases a period of some twenty to fifty years would seem adequate". This, in my view, should constitute a reference period to determine whether an aboriginal activity has been in existence for long enough to warrant constitutional protection under s. 35(1).

178. In short, the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years. Such a time frame does not minimize the fact that in order to benefit from s. 35(1) protection, aboriginal activities must still form the core of the lives of native people; this surely cannot be characterized as an extreme position, as my colleague Justice McLachlin affirms.

179. The most appreciable advantage of the "dynamic right" approach to defining the nature and extent of aboriginal rights is the proper consideration given to the perspective of aboriginal people on the meaning of their existing rights. It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited

in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society. This, in the aboriginal people's perspective, is no doubt the true sense of the constitutional protection provided to aboriginal rights through s. 35(1) of the *Constitution Act, 1982*.

Summary

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

181. This approach being set out, I will turn to the specific issue raised by this case, namely whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Before examining the distinctive aboriginal culture of the Sto:lo people in that respect, a brief review of the case law on aboriginal trade activities, which shows that aboriginal practices, traditions and customs can have different purposes, will be helpful to delineate the issue at bar.

IV. Case Law on Aboriginal Trade Activities

182. At the British Columbia Court of Appeal, the majority framed the issue as being whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. Macfarlane J.A. put the question that way because "[i]n essence, [this case] is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis" (see para. 30). I leave aside for the moment the delineation of the aboriginal right claimed in this case in order, first, to examine the case law on treaty and aboriginal rights regarding trade to demonstrate that there is an important distinction to be drawn between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes.

183. This Court, in *Sparrow*, *supra*, proposed to leave to another day the discussion of commercial aspects of the right to fish, since (at p. 1101) "the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes" (emphasis added). Accordingly, Dickson C.J. and La Forest J. confined their reasons to the aboriginal right to fish for food, social and ceremonial purposes. In so doing, however, it appears that they implicitly distinguished between (1) the right to fish for food, social and ceremonial purposes (which was recognized for the Musqueam Band), (2) the right to fish for livelihood, support and sustenance purposes, and (3) the right to fish for purely commercial purposes (see *Sparrow*, at pp. 1100-1101). The differentiation between the last two classes of purposes, which is of key interest here, was discussed and elaborated upon by Wilson J. in *Horseman*, *supra*.

184. In *Horseman*, this Court examined the scope of the Horse Lakes Indian Band's right to hunt under *Treaty No. 8*, 1899, as amended by the *Natural Resources Transfer Agreement*, 1930 (Alberta) ("*NRTA*"). In that case, the appellant, Bert Horseman, was charged with the offence of unlawfully "trafficking" in wildlife, contrary to s. 42 of the *Wildlife Act*, R.S.A. 1980, c. W-9, which was defined as "any single act of selling, offering for sale, buying, bartering, soliciting or trading". The appellant had killed a grizzly bear in self-defence, while legally hunting moose for food, and he sold the bear hide because he was in need of money to support his family.

Horseman argued that the *Wildlife Act* did not apply to him because he was within his *Treaty No. 8* rights when he sold the grizzly hide.

185. Cory J. (Lamer, La Forest and Gonthier JJ. concurring), for the majority, held that the *Treaty No. 8* right to hunt generally has been circumscribed by the *NRTA* to the right to hunt for "food" only. He made it clear, however, that before the *NRTA* (1930), the Horse Lakes people had the right to hunt for commercial purposes under *Treaty No. 8* (at pp. 928-29):

> The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life.
>
> . . .
>
> I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930. [Emphasis added.]

This passage recognizes that the practices, traditions and customs of the Horse Lakes people were not frozen at the time of British sovereignty and that when *Treaty No. 8* was concluded in 1899, their activities had evolved so that commercial hunting and fishing formed an "integral part" of their culture and society.

186. Furthermore, Cory J. upheld the findings of the courts below that the sale of the grizzly hide constituted a commercial hunting

activity which, as a consequence, fell outside the ambit of the treaty rights to hunt. He wrote at p. 936:

> It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. [Emphasis added.]

Cory J. concluded that the *Wildlife Act* applied and found the appellant guilty of unlawfully trafficking in wildlife.

187. Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring), dissenting, was of the view that, from an aboriginal perspective, a simple dichotomy between hunting for domestic use and hunting for commercial purposes should not be determinative of the treaty rights. Rather, *Treaty No. 8* and the *NRTA* should be interpreted so as to preserve the Crown's commitment to respecting the lifestyle of the Horse Lakes people and the way in which they had traditionally pursued their livelihood.

188. Contrary to Cory J., Wilson J. held that the words "for food" in the *NRTA* did not have the effect of placing substantial limits on the range of hunting activities permitted under *Treaty No. 8*. After

reviewing the decisions of this Court in *Frank v. The Queen*, [1978] 1 S.C.R. 95, and *Moosehunter, supra*, Wilson J. found that the treaty right to hunt "for food" amounted to a right to hunt for support and sustenance. She explained her view as follows, at p. 919:

> And if we are to give para. 12 [of the *NRTA*] the "broad and liberal" construction called for in *Sutherland*, a construction that reflects the principle enunciated in *Nowegijick* and *Simon* that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.
>
> And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit. [Emphasis added.]

Wilson J. concluded that the *Wildlife Act* could not forbid the activities which fall within the aboriginal traditional way of life and that are linked to the Horse Lakes people's support and sustenance. Consequently, she would have

acquitted the appellant because he sold the grizzly hide to buy food for his family, not for commercial profit.

189. As far as this case is concerned, there are two points which stand out from the foregoing review of the reasons in *Horseman*, *supra*. First, the Horse Lakes people's original practices, traditions and customs regarding hunting were held to have evolved to include, at the time *Treaty No. 8* was concluded, the right to make some commercial use of the game. Second, and more importantly, when determining whether a treaty right exists (which no doubt extends to aboriginal rights), there should be a distinction drawn between, on the one side, activities relating to the support and sustenance of the natives and, on the other, ventures undertaken purely for commercial profit. Such a differentiation is far from being artificial, as McLachlin J. seems to suggest, and, in fact, this distinction ought to be used in the context of s. 35(1) of the *Constitution Act, 1982* as in other contexts; in short, there are sales which do not qualify as commercial sales (see, for example, *Loi sur la protection du consommateur*, L.R.Q. 1977, c. P-40.1).

190. This differentiation was adopted by the Ontario Court (Prov. Div.) in *R. v. Jones* (1993), 14 O.R. (3d) 421. In that case, the defendants, members of the Chippewas of Nawash, were charged with the offence of taking more lake trout than permitted by the band's commercial fishing licence, *contrary* to the *Ontario Fishery Regulations, 1989*, authorized by the *Fisheries Act*. The defendants

argued that the quota imposed by the Band's licence interfered with their protected aboriginal right or treaty right to engage in commercial fishing. After referring to both the reasons of Cory J. and of Wilson J. in *Horseman*, *supra*, Fairgrieve Prov. Ct. J. reached the following conclusions at pp. 440-41:

> Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds. Apart from the waters adjacent to the two reserves and their unsurrendered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language [for the Defendants], the nature of the aboriginal right exercised is one directed "<u>to a subsistence use of the resource as opposed to a commercially profitable enterprise</u>". It is the band's continuing communal right to continue deriving "<u>sustenance</u>" from the fishery resource which has always been an essential part of the community's economic base. [Emphasis added.]

See also, *R. v. King*, [1993] O.J. No. 1794 (Ont. Ct. Prov. Div.), at para. 51, and *R. v. Fraser*, [1994] 3 C.N.L.R. 139 (B.C. Prov. Ct.), at p. 145, as well as the commentators Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", *supra*, at pp. 234-35, and Bowker, "*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal", *supra*, at p. 8.

191. In sum, as *Sparrow*, *supra*, suggests, when assessing whether aboriginal practices, traditions and customs have been sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people for a substantial continuing

period of time, the purposes for which such activities are undertaken should be considered highly relevant. An aboriginal activity can form an integral part of the distinctive culture of a group of aboriginal people if it is done for certain purposes — e.g., for livelihood, support and sustenance purposes. However, the same activity could be considered not to be part of their distinctive aboriginal culture if it is done for other purposes — e.g., for purely commercial purposes. The Chief Justice fails to draw this distinction, which I believe to be highly relevant, although he agrees that the Court of Appeal mischaracterized the aboriginal right here claimed.

192. This contemplation of aboriginal or treaty rights based on the purpose of the activity is aimed at facilitating the delineation of the rights claimed as well as the identification and evaluation of the evidence presented in their support. However, as in *Horseman*, *supra*, to respect aboriginal perspective on the matter, the purposes for which aboriginal activities are undertaken cannot and should not be strictly compartmentalized. Rather, in my view, such purposes should be viewed on a spectrum, with aboriginal activities undertaken solely for food, at one extreme, those directed to obtaining purely commercial profit, at the other extreme, and activities relating to livelihood, support and sustenance, at the centre.

193. This being said, in this case, as I have already noted elsewhere, the British Columbia Court of Appeal framed the issue as being one of whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. To state the question in that fashion not only disregards the above distinction between the purposes for which fish can be sold, traded and bartered but also mischaracterizes the facts of this case, misconceives the contentions of the appellant and overlooks the legislative provision here under constitutional challenge.

194. First, the facts giving rise to this case do not support the Court of Appeal's framing of the issue in terms of commercial fishing. The appellant, Dorothy Van der Peet, was charged with the offence of selling salmon which were legally caught by her common law spouse and his brother. The appellant sold 10 salmon. There is no evidence as to the purposes of the sale or as to what the money was going to be used for. It is clear, however, that the offending transaction proven by the Crown is not part of a commercial venture, nor does it constitute an act directed at profit. It would be different if the Crown had shown, for instance, that the appellant sold 10 salmon every day for a year or that she was selling fish to provide for commercial profit. This is not, however, the scenario presented to us and, as the facts stand on the record, it is reasonable to infer from them that the appellant sold the 10 salmon, not for profit, but for the support and sustenance of herself and her family.

195. Furthermore, the appellant did not argue in the courts below or before this Court that the Sto:lo possess an aboriginal right to fish for commercial purposes. The submissions were only to the effect that the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for their livelihood, support and sustenance. In fact, before this Court, the appellant relied on the dissenting opinion of Lambert J.A., at the Court of Appeal, who stated (at para. 150) that the Sto:lo had the right to "catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood" (italics omitted, underlining added). It is well settled that in framing the issue in a case courts cannot overlook the contentions of the parties; in the case at bar, the appellant did not seek the recognition and affirmation of an aboriginal right to fish for commercial purposes.

196. Finally, the legislative provision under constitutional challenge is not only aimed at commercial fishing, but also forbids both commercial and non-commercial sale, trade and barter of fish. For convenience, here is again s. 27(5) of the *British Columbia Fishery (General) Regulations*:

27. . . .

> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence. [Emphasis added.]

The scope of s. 27(5) encompasses any sale, trade or barter of fish caught under an Indian food fish licence. If the prohibition were directed at the sale, trade and barter of fish for commercial purposes, the question of the validity of the Regulations would raise a different issue, one which does not arise on the facts of this case since an aboriginal right to fish commercially is not claimed here. Section 27(5) prohibits the sale, trade and barter of fish for livelihood, support and sustenance, and we must determine whether, as it stands, this provision complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

197. An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. In other words, the above distinction based on the purposes of aboriginal activities does not impose an additional burden on the claimant of an aboriginal right. It may be that, for a particular group of aboriginal people, the practices, traditions and customs relating to some commercial activities meet the test for the recognition of an aboriginal right, i.e., to be sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time. This will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right. In fact, the

consideration of aboriginal activities based on their purposes is simply aimed at facilitating the delineation of the aboriginal rights claimed as well as the identification and evaluation of the evidence presented in support of the rights.

198. In the instant case, this Court is only required to decide whether the Sto:lo's right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, and not whether it includes the right to make commercial use of the fish. In that respect, it is necessary to review the evidence to determine whether such activities have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time so as to give rise to an aboriginal right. That is what I now propose to do.

V. The Case

199. The question here is whether the particular group of aboriginal people, the Sto:lo Band, of which the appellant is a member, has engaged in the sale, trade and barter of fish for livelihood, support and sustenance purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time, entitling them to benefit from a constitutionally protected aboriginal right to that extent.

200. At trial, after having examined the historical evidence presented by the parties, Scarlett Prov. Ct. J. arrived at the following conclusions (at p. 160):

> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John Dewhurst [*sic*] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.
>
> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic. This court concludes on the evidence, therefore, that the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. [Emphasis added.]

201. I agree with the Chief Justice that it is well established, both in criminal and civil contexts, that an appellate court will not disturb the findings of fact made by a trial judge in the absence of "some palpable and overriding error which affected his [or her] assessment of the facts" (emphasis added): see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; see also *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, *Lensen v. Lensen*, [1987] 2 S.C.R. 672, *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, *Ontario (Attorney General) v. Bear Island Foundation*, [1991]

2 S.C.R. 570, *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, *R. v. Burns*, [1994] 1 S.C.R. 656, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

202. At the British Columbia Supreme Court, Selbie J. was of the view that the trial judge committed such an error and, as a consequence, substituted his own findings of fact (at paras. 15 and 16):

> With respect, in my view the learned judge erred in using contemporary tests for "marketing" to determine whether the aboriginal acted in ways which were consistent with trade albeit in a rudimentary way as dictated by the times.
>
> In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes — the words "sell", "barter", "exchange", "share", are but variations on the theme of "disposing". It defies common sense to think that if the aboriginal did not want the fish for himself, there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by today's standards. I am satisfied that when the first Indian caught the first salmon he had the "right" to do anything he wanted with it — eat it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons, that "right" to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch — to do otherwise would court punishment by his god and by the people. One of the social changes that occurred was the coming of the white man, a circumstance, as any other, to which he must adjust. With the white man came new customs, new ways and new incentives to colour and change his old

> life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them — and he did. A money economy eventually developed and he adjusted to that also — he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it — the right evolves with the times: see *Simon v. R.*, [1985] 2 S.C.R. 387 . . . . So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and the like; he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. It is my view that the learned judge imposed a verdict inconsistent with the evidence and the weight to be given it. [Emphasis added.]

203. At the British Columbia Court of Appeal, Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., for the majority, took the position that an aboriginal right would be recognized only if the manifestations of the distinctive aboriginal culture — i.e., the particular aboriginal practices, traditions or customs — were particular to native culture and not common to non-aboriginal societies. Further, the evidence would need to show that the activities in question have been engaged in for time immemorial at the time sovereignty was asserted by Britain. Macfarlane J.A. wrote (at para. 21):

> To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they were said to have arisen. A modernized form of such a practice would be no less an aboriginal right. A practice which had not been integral to the organized society and its distinctive culture, but which became

> prevalent merely as a result of European influences, would not qualify for protection as an aboriginal right. [Emphasis added.]

The majority of the Court of Appeal agreed with the trial judge's findings and held that the Sto:lo's practices, traditions and customs did not justify the recognition of an aboriginal right to fish for commercial purposes.

204. Lambert J.A., in dissent, applied what he called a "social" form of description of aboriginal rights, one which does not "freeze" native practices, traditions and customs in time. In light of the evidence, he concluded that the distinctive aboriginal culture of the Sto:lo warranted the recognition of an aboriginal right to sell, trade and barter fish in order to provide them with a "moderate livelihood". He stated (at para. 150):

> *For those reasons I conclude that the best description of the aboriginal customs, traditions and practices of the Sto:lo people in relation to the sockeye salmon run on the Fraser River is that their aboriginal customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation including recognition of the need for conservation to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800.* [Italics in original; emphasis added.]

205. It appears from the foregoing review of the judgments that the conclusions on the findings of fact relating to whether the Sto:lo

possess an aboriginal right to sell, trade and barter fish varied depending on the delineation of the aboriginal right claimed and on the approach used to interpreting such right. The trial judge, as well as the majority of the Court of Appeal, framed the issue as being whether the Sto:lo possess an aboriginal right to fish for commercial purposes and used an approach based on the manifestations of distinctive aboriginal culture which differentiates between aboriginal and non-aboriginal practices and which "freezes" aboriginal rights in a pre-contact or pre-sovereignty aboriginal time. The summary appeal judge, as well as Lambert J.A. at the Court of Appeal, described the issue in terms of whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood. Further, they examined the aboriginal right claimed at a certain level of abstraction, which focused on the distinctive aboriginal culture of the Sto:lo and which was evolutive in nature.

206. As I have already noted elsewhere, the issue in the present appeal is whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Accordingly, the trial judge and the majority of the Court of Appeal erred in framing the issue. Furthermore, it is my view that the nature and extent of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* must be defined by referring to the notion of "integral part of a distinctive aboriginal culture", i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and

social organization of the particular group of aboriginal people for a substantial continuous period of time. Therefore, by using a "frozen right" approach focusing on aboriginal practice to defining the nature and extent of the aboriginal right, Scarlett Prov. Ct. J. and the majority of the Court of Appeal were also in error.

207. Consequently, when the trial judge assessed the historical evidence presented at trial, he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1) of the *Constitution Act, 1982*. He thus made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. It is also noteworthy that the first appellate judge, who asked himself the right questions, made diametrically opposed findings of fact on the evidence presented at trial.

208. The result of these palpable and overriding errors, which affected the trial judge's assessment of the facts, is that an appellate court is justified in intervening — as did the summary appeal judge — in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial: see *Stein v. The Ship "Kathy K"*, *supra*. I note also that this Court, as a subsequent appellate court in such circumstances, does not have to show any deference to the assessment of the evidence made by lower appellate courts. Since this Court is in no less advantageous or privileged

position than the lower appellate courts in assessing the evidence on the record, we are free to reconsider the evidence and substitute our own findings of fact (see *Schwartz v. Canada*, *supra*, at paras. 36-37). I find myself, however, in general agreement with the findings of fact of Selbie J., the summary appeal judge, and of Lambert J.A. Nonetheless, I will revisit the evidence to determine whether it reveals that the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time.

209. The Sto:lo, who are part of the Coast Salish Nation, have lived in their villages along the Fraser River from Langley to above Yale. They were an organized society, whose main socio-political unit was the extended family. The Fraser River was their main source of food the year around and, as such, the Sto:lo considered it to be sacred. It is interesting to note that their name, the "Sto:lo", means "people of the river": see Wilson Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia — Memoir No. 1)*, 1952, at p. 11.

210. Archaeological evidence demonstrates that the Sto:lo have relied on the fishery for centuries. Located near the mouth of the Fraser River, the Sto:lo fishery consists of five species of salmon — sockeye, chinook, coho, chum and pink — as well as sturgeon, eulachons and trout. The Sto:lo used many methods and devices to

fish salmon, such as dip-nets, harpoons, weirs, traps and hooks. Both the wind and the heat retention capacity of the geography of the Fraser Canyon result in an excellent area for wind drying fish. Therefore, although fresh fish were procurable year around, they dried or smoked large amounts at the end of the summer to use for the hard times of winter.

211. The Sto:lo community is geographically located between two biogeoclimatic zones: the interior plateau region and the coastal maritime area. As such, they have long enjoyed the exchange of regional goods with the people living in these zones. See, in that respect, the report of Dr. Richard Daly, an expert in social and cultural anthropology called by the appellant and who gave expert opinion evidence on the social structure and culture of the Sto:lo, and also Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia*, *supra*, at p. 95.

212. The oral histories, corroborated by expert evidence, show a long tradition of trading relationships among the Sto:lo and with their neighbours, both before the arrival of Europeans and to the present day. Dr. Arnoud Henry Stryd, an expert in archaeology with a strong background in anthropology called by the respondent to give expert opinion evidence and to speak to the archaeological record, testified that exchanging goods has been a feature of the human condition from the earliest times:

Q. Yes. You say there's evidence for trade in non-perishable items throughout much of the archaeological record for British Columbia.

A. Well, that's right. In my point of view, the tendency to trade is one that's very human and if you have things that you have that you don't need and your neighbours have something that you would like that they are willing to, that they don't need, that it seems very obvious that some kind of exchange of goods would take place and the earliest part of the human condition to exchange items. [Emphasis added.]

213. Likewise, John Trevor Dewhirst, an anthropologist and ethno-historian called by the respondent, gave expert opinion evidence on the aboriginal trade of salmon of the Sto:lo. Although he insisted that there was no "organized regularized large scale exchange of salmon" in pre-contact or pre-sovereignty aboriginal time, he testified to the effect that the Sto:lo did exchange, trade and barter salmon among themselves and with other native people, and that such activities were rooted in their culture:

Q. We had reached the stage, sir, as I understand it where — we're now at the point with your evidence, sir, that the exchange of salmon amongst the Indians — you've mentioned that, sir, there was some exchange of salmon amongst the Indians?

A. Oh, yes, very definitely.

Q. Yes. Could you expand on that, please?

A. Yes. I think it's very clear from the — both from the historical record and — and from the anthropological evidence, the ethnographic evidence collected by various workers, Wilson Duff, Marion Smith, Dr. Daly and others whom we've mentioned — and Suttles — exchange of salmon for other foodstuffs and perhaps non-food items definitely took place amongst the Sto:Lo and was a definite feature of their society and culture.

What I'd like to do is go over some of that material evidence regarding the exchange of salmon and examine that in terms of — of

trade and the — try — try to determine — try to develop a context for in fact what was happening at least in some of these instances.

. . .

A. That — I believe that the record does not indicate the presence of an organized regularized large scale exchange of salmon amongst the Sto:Lo or between the Sto:Lo and other Native peoples and by this large scale exchange I — I think — rather, by the exchange of salmon I think it's important to look at this context and see if in fact there is a kind of a market situation. I mean, most cultures, most societies do exchange items between relatives and friends and so on. I think that this is debatable whether you can call this trade in — in the sense of a — of a kind of a marketplace and I'd like to turn now to some of the — some of the evidence that's been presented. [Emphasis added.]

214. It seems well founded to conclude, as the expert witnesses for the respondent did, that no formalized market system of trade of salmon existed in the original Sto:lo society because, as a matter of fact, organized large scale trade in salmon appears to run contrary to the Sto:lo's aboriginal culture. They viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependant on the fish resources. On the one hand, the Sto:lo pursued salmon very aggressively in order to get them for livelihood, support and sustenance purposes. On the other, however, they were sufficiently mindful not to exploit the abundance of the river and they taught their children a thoughtful attitude towards salmon and also how to conserve them.

215. As the social and cultural anthropologist Dr. Richard Daly explained at trial, the exchange of salmon among the Sto:lo and with

their neighbours was informed by the ethic of feeding people, catching and trading only what was necessary for their needs and the needs of face-to-face relationships:

> Q. Is the sale of fish or other foodstuff, in you opinion, also part of the Sto:lo culture?
>
> A. The way it is explained to me by people in the Sto:lo community, that it's all part of feeding yourself and feeding others. You're looking after your basic necessities. And today it's all done through the medium of cash. And you may not have anything to reciprocate when — when other native people from a different area come to you with say tanned hides from the Interior for making — for handicraft work. You may not have anything to give them in return at that time and you pay for it, like anyone else would. But then when you — you've put up your salmon or you're able to take them a load of fresh salmon you reciprocate and they pay you. But it's — it's considered to be a similar procedure as the bartering because it's satisfying the basic needs.
>
> And also people tell me that they go fishing in order to get the money for the gas to drive to the fishing sites, to look after the repair of their nets and to — to make some of the necessary amounts of cash needed for their day-to-day existence. And I have observed people going out to fish with an intention of selling. They don't go to get a maximum number of fish and sell them on the market for the — the going price. They sell it at the going price but they — they won't take any more fish than they have orders for because that's — that's the wrong attitude towards the fish and fishing. So I think in a sense it — it's very consistent with the type of bartering that has preceded it and it's sort of still couched in that same idiom, as well. [Emphasis added.]

216. The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sto:lo and with other native people and, more importantly, that such activities formed part of, and were undoubtedly rooted in, the distinctive aboriginal culture of the Sto:lo. In short, the fishery has always provided a focus for life and

livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sto:lo.

217. The period of intensive trade of fish in a market-type economy involving the Sto:lo began after the coming of the Europeans, in approximately 1820, when the Hudson's Bay Company established a post at Fort Langley on the Fraser River. Following that, the Sto:lo participated in a thriving commercial fishery centred around the trade of salmon. According to Jamie Morton, an historian called by the appellant to give expert opinion evidence on the history of the European trade with native people, approximately 1,500 to 3,000 barrels of salmon (with 60-90 fish per barrel) were cured per year, which the Hudson's Bay Company bought and shipped to Hawaii and other international ports. (See also Lambert J.A., at para. 121.)

218. This trade of salmon in a market economy, however, is not relevant to determine whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. I note, in passing, that such commercial use of the fish would seem to be intrinsically incompatible with the pre-contact or pre-sovereignty culture of the Sto:lo which commanded that the utilization of the salmon, including its sale, trade and barter, be

restricted to providing livelihood, support and sustenance, and did not entail obtaining purely commercial profit.

219. As far as the issue here is concerned, the sale, trade and barter of fish for livelihood, support and sustenance purposes have always been sufficiently significant and fundamental to the culture and social organization of the Sto:lo. This conclusion is no doubt in line with the perspective of the Sto:lo regarding the importance of the trade of salmon in their society. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* is met.

220. Furthermore, there is no doubt that these activities did form part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time. In that respect, we must consider the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and the reference period of 20 to 50 years. Here, the historical evidence shows that the Sto:lo's practices, traditions and customs relating to the trade of salmon for livelihood, support and sustenance purposes have existed for centuries before the arrival of Europeans. As well, it appears that such activities have continued, though in modernized forms, until the present day. Accordingly, the time requirement for the recognition of an aboriginal right is also met in this case.

221. As a consequence, I conclude that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. Under s. 35(1) of the *Constitution Act, 1982* this right is protected.

VI. Disposition

222. In the result, I would allow the appeal on the question of whether the Sto:lo possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. The question of the extinguishment of such right, as well as the issues of *prima facie* infringement and justification, must be remitted to trial since there is insufficient evidence to enable this Court to decide upon them. Consequently, the constitutional question can only be answered partially:

Question: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer: The aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant, are recognized and the question of whether s. 27(5) of the *British Columbia Fishery (General) Regulations* is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, will depend on the issues of extinguishment,

prima facie infringement and justification as determined in a new trial.

223. There will be no costs to either party.

McLachlin J.\\

The following are the reasons delivered by

224. MCLACHLIN J. (dissenting) -- This appeal concerns the right of the Sto:lo of British Columbia to sell fish caught in the Fraser River. The appellant, Mrs. Van der Peet, sold salmon caught under an Indian food fishing licence by her common law husband and his brother. The sale of salmon caught under an Indian food licence was prohibited. Mrs. Van der Peet was charged with selling fish contrary to the Regulations of the *Fisheries Act*, R.S.C. 1970, c. F-14. At trial, she raised the defence that the regulations under which she was charged was invalid because it infringed her aboriginal right, confirmed by s. 35 of the *Constitution Act, 1982* to catch and sell fish. If so, s. 52 of the *Constitution Act, 1982* acts to invalidate the regulation to the extent of the conflict.

225. The inquiry thus focuses on s. 35(1) of the *Constitution Act, 1982*, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section 35(1) gives constitutional protection not only to

aboriginal rights codified through treaties at the time of its adoption in 1982, but also to aboriginal rights which had not been formally recognized at that date: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, per Dickson C.J. and La Forest J., at pp. 1105-6. The Crown has never entered into a treaty with the Sto:lo. They rely not on a codified aboriginal right, but on one which they ask the courts to recognize under s. 35(1).

226. Against this background, I turn to the questions posed in this appeal:

1. Do the Sto:lo possess an aboriginal right under s. 35(1) of the *Constitution Act, 1982* which entitles them to sell fish?

   (a) Has a *prima facie* right been established?

   (b) If so, has it been extinguished?

2. If a right is established, do the government regulations prohibiting sale infringe the right?

3. If the regulations infringe the right, are they justified?

227. My conclusions on this appeal may be summarized as follows. The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as

fundamental aboriginal rights. These encompass the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of this right. The right endures until extinguished by treaty or otherwise. The right is limited to the extent of the aboriginal people's historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. Applying these principles, I conclude that the Sto:lo possess an aboriginal right to fish commercially for purposes of basic sustenance, that this right has not been extinguished, that the regulation prohibiting the sale of any fish constitutes a *prima facie* infringement of it, and that this infringement is not justified. Accordingly, I conclude that the appellant's conviction must be set aside.

1. Do the Sto:lo Possess an Aboriginal Right to Sell Fish Protected under Section 35(1) of the *Constitution Act, 1982*?

A. *Is a Prima Facie Right Established*?

228. I turn first to the principles which govern the inquiry into the existence of an aboriginal right.

(i) General Principles of Interpretation

229. This Court in *Sparrow*, *supra*, discussed the dual significance of s. 35(1) of the *Constitution Act, 1982* in the context of fishing. Section 35(1) is significant, first, because it entrenches aboriginal rights as of the date of its adoption in 1982. Prior to that date, aboriginal rights to fish were subject to regulation and extinguishment by unilateral government act. After the adoption of s. 35, these rights can be limited only by treaty. But s. 35(1) is significant in a second, broader sense. It may be seen as recognition of the right of aboriginal peoples to fair recognition of aboriginal rights and settlement of aboriginal claims. Thus Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105:

> . . . s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible. . . . Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

Quoting from Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, at p. 100, Dickson C.J. and La Forest J. continued at p. 1106:

> . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

230. It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest, s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

231. Following these precepts, this Court in *Sparrow* decreed, at pp. 1106-7, that s. 35(1) be construed in a generous, purposive and liberal way. It represents "a solemn commitment that must be given meaningful content" (p. 1108). It embraces and confirms the fiduciary obligation owed by the government to aboriginal peoples (p. 1109). It does not oust the federal power to legislate with respect to aboriginals, nor does it confer absolute rights. Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of aboriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard

of honourable dealing which the Constitution and the law imposed on the government in its relations with aboriginals (p. 1109).

232. To summarize, a court approaching the question of whether a particular practice is the exercise of a constitutional aboriginal right under s. 35(1) must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country. Finally, I would join with the Chief Justice in asserting, as Mark Walters counsels in "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, at pp. 413 and 412, respectively, that "a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.

(ii) <u>The Right Asserted -- the Right to Fish for Commercial Purposes</u>

233. The first step is to ascertain the aboriginal right which is asserted by Mrs. Van der Peet. Are we concerned with the right to fish, the right to sell fish on a small sustenance-related level, or commercial fishing?

234. The Chief Justice and Justice L'Heureux-Dubé state that this appeal does not raise the issue of the right of the Sto:lo to engage in commercial fishery. They argue that the sale of one or two fish to a neighbour cannot be considered commerce, and that the British Columbia courts erred in treating it as such.

235. I agree that this case was defended on the ground that the fish sold by Mrs. Van der Peet were sold for purposes of sustenance. This was not a large corporate money-making activity. In the end, as will be seen, I agree with Justice L'Heureux-Dubé that a large operation geared to producing profits in excess of what the people have historically taken from the river might not be constitutionally protected.

236. This said, I see little point in labelling Mrs. Van der Peet's sale of fish something other than commerce. When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains. On the view I take of the case, the critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise

of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

237. Making an artificial distinction between the exchange of fish for money or other goods on the one hand and for commercial purposes on the other, may have serious consequences, if not in this case, in others. If the aboriginal right at issue is defined as the right to trade on a massive, modern scale, few peoples may be expected to establish a commercial right to fish. As the Chief Justice observes in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, "[t]he claim to an aboriginal right to exchange fish commercially places a more onerous burden" on the aboriginal claimant "than a claim to an aboriginal right to exchange fish for money or other goods" (para. 20). In the former case, the trade must be shown to have existed pre-contact "on a scale best characterized as commercial" (para. 20). With rare exceptions (see the evidence in *R. v. Gladstone*, [1996] 2 S.C.R. 723, released concurrently) aboriginal societies historically were not interested in massive sales. Even if they had been, their societies did not afford them mass markets.

(iii) Aboriginal Rights versus the Exercise of Aboriginal Rights

238. It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the

centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.

239. If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right.

240. This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The exercise of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right

to adapt, as all peoples must, to the changes in the society in which they live.

241. I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.

242. To constitute a right under s. 35(1) of the *Constitution Act, 1982*, the right must be of constitutional significance. A right of constitutional significance may loosely be defined as a right which has priority over ordinary legal principles. It is a maxim which sets the boundaries within which the law must operate. While there were no formal constitutional guarantees of aboriginal rights prior to 1982, we may nevertheless discern certain principles relating to aboriginal peoples which were so fundamental as to have been generally observed by those charged with dealing with aboriginal peoples and with making and executing the laws that affected them.

243. The activity for which constitutional protection is asserted in this case is selling fish caught in the area of the Fraser River where the Sto:lo traditionally fished for the purpose of sustaining the people.

The question is whether this activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized.

(iv) The Time Frame

244. The Chief Justice and L'Heureux-Dubé J. differ on the time periods one looks to in identifying aboriginal rights. The Chief Justice stipulates that for a practice to qualify as an aboriginal right it must be traceable to pre-contact times and be identifiable as an "integral" aspect of the group's culture at that early date. Since the barter of fish was not shown to be more than an incidental aspect of Sto:lo society prior to the arrival of the Europeans, the Chief Justice concludes that it does not qualify as an aboriginal right.

245. L'Heureux-Dubé J., by contrast, minimizes the historic origin of the alleged right. For her, all that is required is that the practice asserted as a right have constituted an integral part of the group's culture and social organization for a period of at least 20 to 50 years, and that it continue to be an integral part of the culture at the time of the assertion of the right.

246. My own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being aboriginal. Those things which

have in the past been recognized as aboriginal rights have been related to the traditional practices of aboriginal peoples. For this reason, this Court has always been at pains to explore the historical origins of alleged aboriginal rights. For example, in *Sparrow*, this Court began its inquiry into the aboriginal right to fish for food with a review of the fishing practices of the Musqueam Band prior to European contact.

247. I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. As Brennan J. (as he then was) put it in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, at p. 58, "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." The French version of s. 35(1) aptly captures the governing concept. "*Les droits existants -- ancestraux ou issus de traités* --" tells us that the rights recognized and affirmed by s. 35(1) must be rooted in the historical or ancestral practices of the aboriginal people in question. This Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, adopted a similar approach: Dickson J. (as he then was) refers at p. 376 to "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment

of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.

248. My concern is that we not substitute an inquiry into the precise moment of first European contact -- an inquiry which may prove difficult -- for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th centuries A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining

the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion in s. 35(1) of the *Constitution Act, 1982* of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women.

249. Not only must the proposed aboriginal right be rooted in the historical laws or customs of the people, there must also be continuity between the historic practice and the right asserted. As Brennan J. put it in *Mabo*, at p. 60:

> The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial. Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.

250. While aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practised

will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures, like all cultures, change and adapt with time. As Dickson C.J. and La Forest J. put it in *Sparrow*, at p. 1093 "[t]he phrase 'existing aboriginal rights' [in s. 35(1) of the *Constitution Act, 1982*] must be interpreted flexibly so as to permit their evolution over time".

(v) The Procedure for Determining the Existence of an Aboriginal Right

251. Aboriginal peoples, like other peoples, define themselves through a myriad of activities, practices and claims. A few of these, the *Canadian Charter of Rights and Freedoms* tells us, are so fundamental that they constitute constitutional "rights" of such importance that governments cannot trench on them without justification. The problem before this Court is how to determine what activities, practices and claims fall within this class of constitutionally protected rights.

252. The first and obvious category of constitutionally protected aboriginal rights and practices are those which had obtained legal recognition prior to the adoption of s. 35(1) of the *Constitution Act, 1982*. Section 35(1) confirms "existing" aboriginal rights. Rights

granted by treaties or recognized by the courts prior to 1982 must, it follows, remain rights under s. 35(1).

253. But aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982. As noted above, this Court has held that s. 35(1) "is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples": *Sparrow*, at p. 1106, quoting Noel Lyon, "An Essay on Constitutional Interpretation", *supra*, at p. 100. This poses the question of what new, previously unrecognized aboriginal rights may be asserted under s. 35(1).

254. The Chief Justice defines aboriginal rights as specific pre-contact practices which formed an "integral part" of the aboriginal group's "specific distinct culture". L'Heureux-Dubé J., adopting a "dynamic" rights approach, extends aboriginal rights to any activity, broadly defined, which forms an integral part of a distinctive aboriginal group's culture and social organization, regardless of whether the activity pre-dates colonial contact or not. In my respectful view, while both these approaches capture important facets of aboriginal rights, neither provides a satisfactory test for determining whether an aboriginal right exists.

(vi) <u>The "Integral-Incidental" Test</u>

255. I agree with the Chief Justice, at para. 46, that to qualify as an aboriginal right "an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". I also agree with L'Heureux-Dubé J. that an aboriginal right must be "integral" to a "distinctive aboriginal group's culture and social organization". To say this is simply to affirm the foundation of aboriginal rights in the laws and customs of the people. It describes an essential quality of an aboriginal right. But, with respect, a workable legal test for determining the extent to which, if any, commercial fishing may constitute an aboriginal right, requires more. The governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights.

256. My first concern is that the proposed test is too broad to serve as a legal distinguisher between constitutional and non-constitutional rights. While the Chief Justice in the latter part of his reasons seems to equate "integral" with "not incidental", the fact remains that "integral" is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did. *The Shorter Oxford English Dictionary*, vol. 1 (3rd ed.1973), offers two definitions of "integral": **1.** "Of or pertaining to a whole . . . constituent, component"; and **2.** "Made up of component parts which together constitute a unity". To establish a practice as "integral" to

a group's culture, it follows, one must show that the practice is part of the unity of practices which together make up that culture. This suggests a very broad definition: anything which can be said to be part of the aboriginal culture would qualify as an aboriginal right protected by the *Constitution Act, 1982*. This would confer constitutional protection on a multitude of activities, ranging from the trivial to the vital. The Chief Justice attempts to narrow the concept of "integral" by emphasizing that the proposed right must be part of what makes the group "distinctive", the "specific" people which they are, stopping short, however, of asserting that the practice must be unique to the group and adhere to none other. But the addition of concepts of distinctness and specificity do not, with respect, remedy the overbreadth of the test. Minor practices, falling far short of the importance which we normally attach to constitutional rights, may qualify as distinct or specific to a group. Even the addition of the notion that the characteristic must be central or important rather than merely "incidental", fails to remedy the problem; it merely poses another problem, that of determining what is central and what is incidental to a people's culture and social organization.

257. The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different

ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.

258. Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assuming that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all.

259. The Chief Justice recognizes the all or nothing logic of the "integral" test in relation to commercial fishing rights in his reasons in *Gladstone*, *supra*. Having determined in that case that an

aboriginal right to commercial fishing is established, he notes at para. 61 that unlike the Indian food fishery, which is defined in terms of the peoples' need for food, the right to fish commercially "has no internal limitations". Reasoning that where the test for the right imposes no internal limit on the right, the court may do so, he adopts a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise as envisioned in *Sparrow*, to permit partial reallocation of the aboriginal right to non-natives. The historically based test for aboriginal rights which I propose, by contrast, possesses its own internal limits and adheres more closely to the principles that animated *Sparrow*, as I perceive them.

(vii) The Empirical Historic Approach

260. The tests proposed by my colleagues describe qualities which one would expect to find in aboriginal rights. To this extent they may be informative and helpful. But because they are overinclusive, indeterminate, and ultimately categorical, they fall short, in my respectful opinion, of providing a practically workable principle for identifying what is embraced in the term "existing aboriginal rights" in s. 35(1) of the *Constitution Act, 1982*.

261. In my view, the better approach to defining aboriginal rights is an empirical approach. Rather than attempting to describe *a priori* what an aboriginal right is, we should look to history to see what

sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?". This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.

262. Just as there are two fundamental types of scientific reasoning -- reasoning from first principles and empirical reasoning from experience -- so there are two types of legal reasoning. The approach adopted by the Chief Justice and L'Heureux-Dubé J. in this appeal may be seen as an example of reasoning from first principles. The search is for a governing principle which will control all future cases. Given the complexity and sensitivity of the issue of defining hitherto undefined aboriginal rights, the pragmatic approach typically adopted by the common law -- reasoning from the experience of decided cases and recognized rights -- has much to recommend it. In this spirit, and bearing in mind the important truths captured by the "integral" test proposed by the Chief Justice and L'Heureux-Dubé J., I turn to the question of what the common law and Canadian history tell us about aboriginal rights.

(viii) The Common Law Principle: Recognition of Pre-Existing Rights and Customs

263. The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread -- the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.

264. For centuries, it has been established that upon asserting sovereignty the British Crown accepted the existing property and customary rights of the territory's inhabitants. Illustrations abound. For example, after the conquest of Ireland, it was held in *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516, that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in *In re Southern Rhodesia*, [1919] A.C. 211, at p. 233 that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [pre-existing aboriginal rights] and forborne to diminish or modify them". Again, Lord Denning affirmed the same rule in *Oyekan v. Adele*, [1957] 2 All E.R. 785, at p. 788:

> In inquiring . . . what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law. . . . [Emphasis added.]

265. Most recently in *Mabo*, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: "an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited'. . . ." Once the "fictions" of *terra nullius* are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the indigenous people.

266. In Canada, the Courts have recognized the same principle. Thus in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 328, Judson J. referred to the asserted right "to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished". In the same case, Hall J. (dissenting on another point) rejected at p. 416 as "wholly wrong" "the proposition that after conquest or discovery the native peoples

have no rights at all except those subsequently granted or recognized by the conqueror or discoverer". Subsequent decisions in this Court are consistent with the view that the Crown took the land subject to pre-existing aboriginal rights and that such rights remain in the aboriginal people, absent extinguishment or surrender by treaty.

267. In *Guerin*, *supra*, this Court re-affirmed this principle, stating at pp. 377-78:

> In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), and *Worcester v. State of Georgia*, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.
>
> In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. [Emphasis added.]

This Court's judgment in *Sparrow*, *supra*, re-affirmed that approach.

(ix) The Nature of the Interests and Customs Recognized by the Common Law

268. This much is clear: the Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported. At one time it was suggested that only legal interests consistent with those recognized at common law would be recognized. However, as Brennan J. points out in *Mabo*, at p. 59, that rigidity has been relaxed since the decision of the Privy Council in *Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, "[t]he general principle that the common law will recognize a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title".

269. It may now be affirmed with confidence that the common law accepts all types of aboriginal interests, "even though those interests are of a kind unknown to English law": *per* Lord Denning in *Oyekan*, *supra*, at p. 788. What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case, *per* Brennan J. in *Mabo*, at p. 58. It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land

and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.

270. This much appears from the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1, which set out the rules by which the British proposed to govern the territories of much of what is now Canada. The Proclamation, while not the sole source of aboriginal rights, recognized the presence of aboriginals as existing occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the aboriginal people of Canada of their pre-existing rights; the maxim of *terra nullius* was not to govern here. Moreover, the Proclamation evidences an underlying concern for the continued sustenance of aboriginal peoples and their descendants. It stipulated that aboriginal people not be permitted to sell their land directly but only through the intermediary of the Crown. The purpose of this stipulation was to ensure that the aboriginal peoples obtained a fair exchange for the rights they enjoyed in the territories on which they had traditionally lived -- an exchange which would ensure the sustenance not only of the current generation but also of generations to come. (See *Guerin*, *supra*, at p. 376; see also Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.)

271. The stipulation against direct sale to Europeans was coupled with a policy of entering into treaties with various aboriginal peoples. The treaties typically sought to provide the people in question with a land base, termed a reserve, as well as other benefits enuring to the signatories and generations to come -- cash payments, blankets, foodstuffs and so on. Usually the treaties conferred a continuing right to hunt and fish on Crown lands. Thus the treaties recognized that by their own laws and customs, the aboriginal people had lived off the land and its waters. They sought to preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement.

272. These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding -- the *Grundnorm* of settlement in Canada -- was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them. (In making this comment, I do not foreclose the possibility that other arguments might be made with respect to areas in Canada settled by France.)

273. The same notions held sway in the colony of British Columbia prior to union with Canada in 1871. An early governor, Governor Douglas, pronounced a policy of negotiating solemn treaties with the aboriginal peoples similar to that pursued elsewhere in Canada. Tragically, that policy was overtaken by the less generous views that accompanied the rapid settlement of British Columbia. The policy of negotiating treaties with the aboriginals was never formally abandoned. It was simply overridden, as the settlers, aided by administrations more concerned for short-term solutions than the duty of the Crown toward the first peoples of the colony settled where they wished and allocated to the aboriginals what they deemed appropriate. This did not prevent the aboriginal peoples of British Columbia from persistently asserting their right to an honourable settlement of their ancestral rights -- a settlement which most of them still await. Nor does it negate the fundamental proposition acknowledged generally throughout Canada's history of settlement that the aboriginal occupants of particular territories have the right to use and be sustained by those territories.

274. Generally speaking, aboriginal rights in Canada were group rights. A particular aboriginal group lived on or controlled a particular territory for the benefit of the group as a whole. The aboriginal rights of such a group inure to the descendants of the group, so long as they maintain their connection with the territory or resource in question. In Canada, as in Australia, "many clans or groups of indigenous people have been physically separated from

their traditional land and have lost their connextion with it" (p. 59). But "[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connextion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence" (*Mabo*, at pp. 59-60).

275. It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*.

(x) The Right to Fish for Sale

276. Against this background, I come to the issue at the heart of this case. Do aboriginal people enjoy a constitutional right to fish for commercial purposes under s. 35(1) of the *Constitution Act, 1982*? The answer is yes, to the extent that the people in question can show that it traditionally used the fishery to provide needs which are being met through the trade.

277. If an aboriginal people can establish that it traditionally fished in a certain area, it continues to have a similar right to do so, barring extinguishment or treaty. The same justice that compelled those who drafted treaties with the aboriginals in the nineteenth century to make provision for the continuing sustenance of the people from the land, compels those dealing with aboriginals with whom treaties were never made, like the Sto:lo, to make similar provision.

278. The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in

their modern form. However, if the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

279. The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities -- the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers. On this principle, where the aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a "moderate livelihood" from the fishery may be established (as Lambert J.A. concluded in the British Columbia Court of Appeal). However, there is no automatic entitlement to a moderate or any other livelihood from a

particular resource. The inquiry into what aboriginal rights a particular people possess is an inquiry of fact, as we have seen. The right is established only to the extent that the aboriginal group in question can establish historical reliance on the resource. For example, evidence that a people used a water resource only for occasional food and sport fishing would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood. There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took. This conclusion echos the suggestion in *Jack v. The Queen*, [1980] 1 S.C.R. 294, approved by Dickson C.J. and La Forest J. in *Sparrow*, of a "limited" aboriginal priority to commercial fishing.

280. A further limitation is that all aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. These aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. So maintenance of the land and the waters comes first. To this may be added a related limitation. Any right, aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, aboriginal or non-aboriginal. It is up to the Crown to

establish a regulatory regime which respects these objectives. In the analytic framework usually used in cases such as this, the right of the government to limit the aboriginal fishery on grounds such as these is treated as a matter of justifying a limit on a "*prima facie*" aboriginal right. Following this framework, I will deal with it in greater detail under the heading of justification.

(xi) Is an Aboriginal Right to Sell Fish for Commerce Established in this Case?

281. I have concluded that subject to conservation needs, aboriginal peoples may possess a constitutional right under s. 35(1) of the *Constitution Act, 1982*, to use a resource such as a river site beside which they have traditionally lived to provide the modern equivalent of the amenities which they traditionally have obtained from the resource, whether directly or indirectly, through trade. The question is whether, on the evidence, Mrs. Van der Peet has established that the Sto:lo possessed such a right.

282. The evidence establishes that by custom of the aboriginal people of British Columbia, the Sto:lo have lived since time immemorial at the place of their present settlement on the banks of the Fraser River. It also establishes that as a fishing people, they have for centuries used the fish from that river to sustain themselves. One may assume that the forest and vegetation on the land provided some of their shelter and clothing. However, their history indicates that

even in days prior to European contact, the Sto:lo relied on fish, not only for food and ceremonial purposes, but also for the purposes of obtaining other goods through trade. Prior to contact with Europeans, this trade took place with other tribes; after contact, sales on a larger scale were made to the Hudson's Bay Company, a practice which continued for almost a century. In summary, the evidence conclusively establishes that over many centuries, the Sto:lo have used the fishery not only for food and ceremonial purposes, but also to satisfy a variety of other needs. Unless that right has been extinguished, and subject always to conservation requirements, they are entitled to continue to use the river for these purposes. To the extent that trade is required to achieve this end, it falls within that right.

283. I agree with L'Heureux-Dubé J. that the scale of fishing evidenced by the case at bar falls well within the limit of the traditional fishery and the moderate livelihood it provided to the Sto:lo.

284. For these reasons I conclude that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right, unless that right has been extinguished.

B. *Is the Aboriginal Right Extinguished*?

285. The Crown has never concluded a treaty with the Sto:lo extinguishing its aboriginal right to fish. However, it argues that any right the Sto:lo people possess to fish commercially was extinguished prior to 1982 through regulations limiting commercial fishing by licence. The appellant, for her part, argues that general regulations controlling the fishery do not evidence the intent necessary to establish extinguishment of an aboriginal right.

286. For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow*, *supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

287. Following this approach, this Court in *Sparrow* rejected the Crown's argument that pre-1982 regulations imposing conditions on the exercise of an aboriginal right extinguished it to the extent of the regulation. To accept that argument, it reasoned at p. 1091, would be to elevate such regulations as applied in 1982 to constitutional

status and to "incorporate into the Constitution a crazy patchwork of regulations". Rejecting this "snapshot" approach to constitutional rights, the Court distinguished between regulation of the exercise of a right, and extinguishment of the right itself.

288. In this case, the Crown argues that while the regulatory scheme may not have extinguished the aboriginal right to fish for food (*Sparrow*) it nevertheless extinguished any aboriginal right to fish for sale. It relies in particular on Order in Council, P.C. 2539, of September 11, 1917, which provided:

> Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;
>
> And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only . . . .
>
> And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;
>
> And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;
>
> Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows: --
>
> > 2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose . . . .

289. The argument that Regulation 2539 extinguished any aboriginal right to fish commercial faces two difficulties. The first is the absence of any indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the "clear and plain" test. There is no recognition in the words of the regulation of any aboriginal right to fish. They acknowledge no more than an aboriginal "practice" of fishing for food. The regulation takes note of the aboriginal position that the regulations confining them to food fishing are "ineffective". However, it does not accept that position. It rather rejects it and affirms that free fishing by natives for sale will not be permitted. This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgment of right, conflict of the right proposed with policy, and resolution of the two.

290. The second difficulty the Crown's argument encounters is that the passage quoted does not present a full picture of the regulatory scheme imposed. To determine the intent of Parliament, one must consider the statute as a whole: *Driedger on the Construction of Statutes* (3rd ed. 1994). Similarly, to determine the intent of the Governor in Council making a regulation, one must look to the effect of a regulatory scheme as a whole.

291. The effect of Regulation 2539 was that Indians were no longer permitted to sell fish caught pursuant to their right to fish for food.

However, Regulation 2539 was only a small part of a much larger regulatory scheme, dating back to 1908, in which aboriginal peoples played a significant part. While the 1917 regulation prohibits aboriginal peoples from selling fish obtained under their food rights, it did not prevent them from obtaining licences to fish commercially under the general regulatory scheme laid down in 1908 and modified through the years. In this way, the regulations recognized the aboriginal right to participate in the commercial fishery. Instead of barring aboriginal fishers from the commercial fishery, government regulations and policy before and after 1917 have consistently given them preferences in obtaining the necessary commercial licences. Far from extinguishing the aboriginal right to fish, this policy may be seen as tacit acceptance of a "limited priority" in aboriginal fishers to the commercial fishery of which Dickson J. spoke in *Jack* and which was approved in *Sparrow*.

292. Evidence of the participation in commercial fishing by aboriginal people prior to the regulations in 1917 in commercial fishing was discussed by Dickson J. in *Jack*, *supra*. That case was concerned with the policy of the Colonialists prior to Confederation. Without repeating the entirety of that discussion here, it is sufficient to note the conclusion reached at p. 311:

> . . . the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents.

293. This limited priority for aboriginal commercial fishing is reflected in the government policy of extending preferences to aboriginals engaged in the fishery. The 1954 Regulations, as amended in 1974, provided for reduced licensing fees for aboriginal fishers. For example, either a gill-net fishing licence that would cost a non-aboriginal fisher $2,000, or a seine fishing licence that would cost a non-native fisher $200, would cost a native fisher $10. Moreover, the evidence available indicates that there has been significant aboriginal participation in the commercial fishery. Specifically, a review of aboriginal participation in the commercial fishery for 1985 found that 20.5 per cent of the commercial fleet was Indian-owned or Indian-operated and that that segment of the commercial fleet catches 27.7 per cent of the commercial catch. Since the regulatory scheme is cast in terms of individual rights, it has never expressly recognized the right of a particular aboriginal group to a specific portion of the fishery. However, it has done so implicitly by granting aboriginal fishers preferences based on their membership in an aboriginal group.

294. It thus emerges that the regulatory scheme in place since 1908, far from extinguishing the aboriginal right to fish for sale, confirms that right and even suggests recognition of a limited priority in its exercise. I conclude that the aboriginal right of the Sto:lo to fish for sustenance has not been extinguished.

295. The remaining questions are whether the regulation infringes the Sto:lo's aboriginal right to fish for trade to supplement the fish they took for food and ceremonial purposes and, if so, whether that infringement constitutes a justifiable limitation on the right.

2. Is the Aboriginal Right Infringed?

296. The right established, the next inquiry, following *Sparrow*, is whether the regulation constitutes a *prima facie* infringement of the aboriginal right. If it does, the inquiry moves on to the question of whether the *prima facie* infringement is justified.

297. The test for *prima facie* infringement prescribed by *Sparrow* is "whether the legislation in question has the effect of interfering with an existing aboriginal right" (p. 1111). If it has this effect, the *prima facie* infringement is made out. Having set out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising that right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the *prima facie* right; as the Chief Justice notes in *Gladstone* (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a *prima facie* violation. In any

event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a *prima facie* infringement.

298. The question is whether the regulatory scheme under which Mrs. Van der Peet stands charged has the "effect" of "interfering with an existing aboriginal right", in this case the right of the Sto:lo to sell fish to the extent required to provide for needs they traditionally by native law and custom took from the section of the river whose banks they occupied. The inquiry into infringement in a case like this may be viewed in two stages. At the first stage, the person charged must show that he or she had a *prima facie* right to do what he or she did. That established, it falls to the Crown to show that the regulatory scheme meets the particular entitlement of the Sto:lo to fish for sustenance.

299. The first requirement is satisfied in this case by demonstration of the aboriginal right to sell fish prohibited by regulation. The second requirement, however, has not been satisfied. Notwithstanding the evidence that aboriginal fishers as a class enjoy a significant portion of the legal commercial market and that considerable fish caught as "food fish" is illegally sold, the Crown has not established that the existing regulations satisfy the particular right of the Sto:lo to fish commercially for sustenance. The issue is not the quantity of fish currently caught, which may or may not satisfy the band's sustenance requirements. The point is rather that the Crown, by denying the Sto:lo the right to sell <u>any</u> quantity of fish, denies their

limited aboriginal right to sell fish for sustenance. The conclusion of *prima facie* infringement of the collective aboriginal right necessarily follows.

300. The Crown argued that regulation of a fishery to meet the sustenance needs of a particular aboriginal people is administratively unworkable. The appellant responded with evidence of effective regulation in the State of Washington of aboriginal treaty rights to sustenance fishing. I conclude that the sustenance standard is not so inherently indeterminate that it cannot be regulated. It is for the Crown, charged with administering the resource, to determine effective means to regulate its lawful use. The fact that current regulations fail to do so confirms the infringement, rather than providing a defence to it.

3. Is the Government's Limitation of Mrs. Van der Peet's Right to Fish for Sustenance Justified?

301. Having concluded that the Sto:lo possess a limited right to engage in fishing for commerce and that the regulation constitutes a *prima facie* infringement of this right, it remains to consider whether the infringement is justified. The inquiry into justification is in effect an inquiry into the extent the state can limit the exercise of the right on the ground of policy.

302. Just as I parted company with the Chief Justice on the issue of what constitutes an aboriginal right, so I must respectfully dissent from his view of what constitutes justification. Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: *Gladstone*, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required. I will elaborate on each of these difficulties in turn, arguing that they suggest a more limited view of justification: that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use.

303. I turn first to the authorities. The doctrine of justification was elaborated in *Sparrow*. Dickson C.J. and La Forest J. endorsed a two-part test. First, the Crown must establish that the law or regulation at issue was enacted for a "compelling and substantial" (p. 1113) purpose. Conserving the resource was cited as such a purpose. Also valid, "would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves" (p. 1113). Second, the government must show that the law or regulation is consistent

with the fiduciary duty of the Crown toward aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the Crown must demonstrate that it has given the aboriginal fishery priority in a manner consistent with the views of Dickson J. (as he then was) in *Jack*: absolute priority to the Crown to act in accordance with conservation; clear priority to Indian food fishing; and "limited priority" for aboriginal commercial fishing "over the competing demands of commercial and sport fishing" (p. 311).

304. The Chief Justice interprets the first requirement of the *Sparrow* test for justification, a compelling and substantial purpose, as extending to any goal which can be justified for the good of the community as a whole, aboriginal and non-aboriginal. This suggests that once conservation needs are met, the inquiry is whether the government objective is justifiable, having regard to regional interests and the interests of non-aboriginal fishers. The Chief Justice writes in *Gladstone* (at para. 75):

> . . . I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. [Emphasis added.]

305. Leaving aside the undefined limit of "proper circumstances", the historical reliance of the participation of non-aboriginal fishers in the fishery seems quite different from the compelling and substantial

objectives this Court described in *Sparrow* -- conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves. These are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights. Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can be permitted to exercise rights in a way that will harm others. For example, in the domain of property, the common law has long provided remedies against those who pollute streams or use their land in ways that detrimentally affect others.

306. Viewed thus, the compelling objectives foreseen in *Sparrow* may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right. It may be that future cases may endorse limitation of aboriginal rights on other bases. For the purposes of this case, however, it may be ventured that the range of permitted limitation of an established aboriginal right is confined to the exercise of the right rather than the diminution, extinguishment or transfer of the right to others. What are permitted are limitations of the sort that any property owner or right holder would reasonably expect -- the sort of limitations which must be imposed in a civilized society if the

resource is to be used now and in the future. They do not negate the right, but rather limit its exercise. The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

307. The Chief Justice, while purporting to apply the *Sparrow* test for justification, deviates from its second requirement as well as the first, in my respectful view. Here the stipulations are that the limitation be consistent with the Crown's fiduciary duty to the aboriginal people and that it reflect the priority set out by Dickson J. in *Jack*. The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest, but also manage it well: *Guerin*. The Chief Justice's test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony

and reconciliation of aboriginal and non-aboriginal interests. Moreover, the Chief Justice's scheme has the potential to violate the priority scheme for fishing set out in *Jack*. On his test, once conservation is satisfied, a variety of other interests, including the historical participation of non-native fishers, may justify a variety of regulations governing distribution of the resource. The only requirement is that the distribution scheme "take into account" the aboriginal right. Such an approach, I fear, has the potential to violate not only the Crown's fiduciary duty toward native peoples, but also to render meaningless the "limited priority" to the non-commercial fishery endorsed in *Jack* and *Sparrow*.

308. Put another way, the Chief Justice's approach might be seen as treating the guarantee of aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the *Charter*. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the *Charter*, this is appropriate because s. 1 of the *Charter* expressly states that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, in the case of aboriginal rights guaranteed by s. 35(1) of the *Constitutional Act, 1982*, the framers of s. 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine

of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others -- in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the Constitution.

309. A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be expected, the Chief Justice suggests, not to be overly strict in their review; as under s. 1 of the *Charter*, the courts should not negate the

government decision, so long as it represents a "reasonable" resolution of conflicting interests. This, with respect, falls short of the "solid constitutional base upon which subsequent negotiations can take place" of which Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105.

310. My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the "reconciliation" of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise. It is common ground that ". . . a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal cultures": Walters, *supra*, at pp. 413 and 412, respectively. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation

of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

311. My reasons are twofold. First, as suggested earlier, if we adopt a conception of aboriginal rights founded in history and the common law rather than what is "integral" to the aboriginal culture, the need to adopt an expansive concept of justification diminishes. As the Chief Justice observes, the need to expand the *Sparrow* test stems from the lack of inherent limits on the aboriginal right to commercial fishing he finds to be established in *Gladstone*. On the historical view I take, the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities. This accords with the "limited priority" for aboriginal commercial fishing that this Court endorsed in *Sparrow*. Beyond this, commercial and sports fishermen may enjoy the resource as they always have, subject to conservation. As suggested in *Sparrow*, the government should establish what is required to meet what the aboriginal people traditionally by law and custom took from the river or sea, through consultation and negotiation with the aboriginal people. In normal years, one would expect this to translate to a relatively small percentage of the total

commercial fishing allotment. In the event that conservation concerns virtually eliminated commercial fishing, aboriginal commercial fishing, limited as it is, could itself be further reduced or even eliminated.

312. On this view, the right imposes its own internal limit -- equivalence with what by ancestral law and custom the aboriginal people in question took from the resource. The government may impose additional limits under the rubric of justification to ensure that the right is exercised responsibly and in a way that preserves it for future generations. There is no need to impose further limits on it to affect reconciliation between aboriginal and non-aboriginal peoples.

313. The second reason why it is unnecessary to adopt the broad doctrine of justification proposed by the Chief Justice is that other means, yet unexploited, exist for resolving the different legal perspectives of aboriginal and non-aboriginal people. In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process -- the stage of defining aboriginal rights -- the courts have an important role to play. But that is not the end of the matter. The process must go on to consider the non-aboriginal perspective -- how the aboriginal right

can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process -- definition of the rights guaranteed by s. 35(1) followed by negotiated settlements -- is the means envisioned in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

314. I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason

why the broader view of justification should not be accepted. It is, in my respectful opinion, unconstitutional.

315. The Chief Justice's proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.

316. I therefore conclude that a government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Specifically, limits that

have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified. Short of repeal of s. 35(1), such transfers can be made only with the consent of the aboriginal people. It is for the governments of this country and the aboriginal people to determine if this should be done, not the courts. In the meantime, it is the responsibility of the Crown to devise a regulatory scheme which ensures the responsible use of the resource and provides for the division of what remains after conservation needs have been met between aboriginal and non-aboriginal peoples.

317. The picture of aboriginal rights that emerges resembles that put forward by Dickson J. (as he then was) in *Jack* and endorsed in *Sparrow*. Reasoning from the premise that the *British Columbia Terms of Union*, R.S.C., 1985, App. II, No. 10, required the federal government to adopt an aboriginal "policy as liberal" as that of the colonial government of British Columbia, Dickson J. opined at p. 311:

> . . . one could suggest that "a policy as liberal" would require clear priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource -- effectively unknown to the regulatory authorities prior to 1871 -- should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen.

318. The relationship between the relative interests in a fishery with respect to which an aboriginal right has been established in the full

sense, that is of food, ceremony and articles to meet other needs obtained directly from the fishery or through trade and barter of fish products, may be summarized as follows:

1. The state may limit the exercise of the right of the aboriginal people, for purposes associated with the responsible use of the right, including conservation and prevention of harm to others;

2. Subject to these limitations, the aboriginal people have a priority to fish for food, ceremony, as well as supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times;

3. Subject to (1) and (2) non-aboriginal peoples may use the resource.

319. In times of plentitude, all interests may be satisfied. In times of limited stocks, aboriginal food fishing will have priority, followed by additional aboriginal commercial fishing to satisfy the sustenance the fishery afforded the particular people in ancestral times. The aboriginal priority to commercial fishing is limited to satisfaction of these needs, which typically will be confined to basic amenities. In this sense, the right to fish for commerce is a "limited" priority. If there is insufficient stock to satisfy the entitlement of all aboriginal peoples after required conservation measures, allocations must be made between them. Allocations between aboriginal peoples may

also be required to ensure that upstream bands are allowed their fair share of the fishery, whether for food or supplementary sustenance. All this is subject to the overriding power of the state to limit or indeed, prohibit fishing in the interests of conservation.

320. The consequence of this system of priorities is that the Crown may limit aboriginal fishing by aboriginal people found to possess a right to fish for sustenance on two grounds: (1) on the ground that a limited amount of fish is required to satisfy the basic sustenance requirement of the band, and (2) on the ground of conservation and other limits required to ensure the responsible use of the resource (justification).

321. Against this background, I return to the question of whether the regulation preventing the Sto:lo from selling any fish is justified. In my view it is not. No compelling purpose such as that proposed in *Sparrow* has been demonstrated. The denial to the Sto:lo of their right to sell fish for basic sustenance has not been shown to be required for conservation or for other purposes related to the continued and responsible exploitation of the resource. The regulation, moreover, violates the priorities set out in *Jack* and *Sparrow* and breaches the fiduciary duty of the Crown to preserve the rights of the aboriginal people to fish in accordance with their ancestral customs and laws by summarily denying an important aspect of the exercise of the right.

4. Conclusion

322. I would allow the appeal to the extent of confirming the existence in principle of an aboriginal right to sell fish for sustenance purposes, and set aside the appellant's conviction. I would answer the constitutional question as follows:

Question: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Answer: Section 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, as invoked by the appellant.

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

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

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