Donald Gladstone and William Gladstone *Appellants*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of British Columbia,
the Attorney General for Alberta,
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.* Gladstone

File No.: 23801.

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 -- Natives approaching buyer with sample of fish product to determine if "interested" in buying -- Regulations requiring specific licence for harvesting and sale of fish product -- Natives not having proper licence to sell fish product -- Evidence indicating large scale trade in fish product prior to contact with Europeans -- Whether an aboriginal right to harvest and trade in fish product -- Whether the aboriginal right extinguished -- Whether aboriginal right infringed by regulations -- Whether any infringement justified -- Constitution Act, 1982, ss. 35(1), 52 -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) -- Pacific Herring Fishery Regulations, SOR/84-324, s. (3).

Commercial law -- Attempt to sell -- Natives approaching buyer with sample of fish product to determine if "interested" in buying -- Whether conduct amounting to attempt to sell.

The accused were charged under s. 61(1) of the *Fisheries Act* with attempting to sell herring spawn on kelp caught without the proper licence contrary to s. 20(3) of the *Pacific Herring Fishery Regulation*s. They had shipped a large quantity to the Vancouver area and approached a fish dealer with a sample to see if he was "interested". One of the accused, on arrest, produced an Indian food fish licence permitting him to harvest 500 pounds. The Supreme Court of British Columbia and the Court of Appeal upheld the convictions. The constitutional question before this Court questioned whether s. 20(3) of the *Pacific Herring Fishery Regulations* was of no force or effect in the circumstances, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of

the aboriginal rights within the meaning of s. 35(1) of the *Constitution Act, 1982.* Also raised was the sufficiency of their actions to constitute an attempt to sell in law.

Held (La Forest J. dissenting): The appeal should be allowed.

Whether an Attempt to Sell

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The accused attempted to sell herring spawn on kelp. Shipping it to the Vancouver area, taking a sample to the fish merchant and specifically asking him if he was "interested" had sufficient proximity to the acts necessary to complete the offence of selling herring spawn on kelp to move those actions beyond mere preparation to an actual attempt.

The Aboriginal Right

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: To be recognized as 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 that right. The first step is the determination of the precise nature of the claim being made, taking into account such factors as the nature of the action allegedly taken pursuant to an aboriginal right, the government regulation allegedly infringing the right, and the practice, custom or tradition allegedly establishing the right.

The regulations under which the accused were charged prohibited all sale or trade in herring spawn on kelp without a particular licence. The exchange of herring spawn on kelp for money or other goods was to an extent a central, significant and defining feature of the culture of the Heiltsuk prior to contact and best characterized as commercial. This exchange and trade was an integral part of the distinctive culture of the Heiltsuk prior to contact.

To merit constitutional protection, a practice, custom or tradition which is integral to the aboriginal community must be shown to have continuity with the practices, customs or traditions which existed prior to contact. The evidence satisfied this requirement. The commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact and was not incidental to social or ceremonial activities. An aboriginal right to trade herring spawn on kelp on a commercial basis was established.

Per L'Heureux-Dubé J.: Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives. Further, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Finally, but most significantly, aboriginal rights protected under s. 35(1) have to be viewed in the context of the specific history and culture of the native society and with regard to native perspective on the meaning of the rights asserted.

The "frozen right" approach focusing on aboriginal practices should not be adopted. Instead, the definition of aboriginal rights should refer to the notion of "integral part of distinctive aboriginal culture" and should "permit the evolution of aboriginal rights over time". Case law on treaty and aboriginal rights relating to trade supports the making of a distinction between the sale, trade and barter of fish for, on the one hand, livelihood, support and sustenance purposes and for, on the other, purely commercial purposes. The delineation of aboriginal rights must be viewed on a continuum.

The aboriginal right at issue falls on the part of the spectrum relating to the sale, trade and barter of fish for commercial purposes, not on the part dealing with livelihood, support and sustenance purposes. The legislative provision under constitutional challenge was aimed at both commercial and non-commercial sale, trade and barter of herring spawn on kelp. The sale, trade and barter of fish for commercial purposes was sufficiently significant and fundamental to the culture and social organization of the Heiltsuk for a substantial continuous period of time to have formed an integral part of their culture. Consequently, the criteria regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* are met in this case.

Per McLachlin J.: Evidence of an established trading network was clear in this case. The Heiltsuk derived their sustenance from trade derived from herring spawn on kelp; they relied on trade to supply them with the necessaries of life, principally other food products. An aboriginal right therefore existed.

Per La Forest J. (dissenting): The trial judge's findings of fact are to the effect that the Heiltsuk had been engaged in the bartering and trading of herring spawn on kelp prior to contact and that these activities, at times, involved very large quantities of fish. These activities had special significance to the Heiltsuk in that the Heiltsuk engaged in such trading activities on the basis that they valued sharing resources with other bands who did not have access to that resource. That special significance made bartering and trading in herring spawn on kelp a part of their distinctive culture. Therefore, the Heiltsuk did have an aboriginal right to barter and trade herring spawn on kelp to a certain degree. Without that special significance to the Heiltsuk, it cannot be said, based on the trial judge's findings of fact, that such activity constitutes an integral part of their distinctive culture and thus any trading and bartering not done in that context cannot in any way be said to form an integral part of the distinctive culture of the Heiltsuk society. The appellants' activities, which, the trial judge found, were done in a completely different context, accordingly did not form an integral part of the distinctive culture of the Heiltsuk and the aboriginal rights of the Heiltsuk were therefore not infringed.

Extinguishment

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The intention to extinguish an aboriginal right must be clear and plain. The varying regulatory schemes affecting the herring spawn on kelp harvest did not express a clear and plain intention to eliminate the aboriginal right. The regulations may have failed to recognize the aboriginal right and to give it special protection but they never prohibited aboriginal people from obtaining licences to fish commercially. More importantly, the government has, at various times, given preferences to aboriginal commercial fishing. Finally, the Regulation relied upon in arguing for extinguishment was of an entirely different nature than the document relied on for a finding of extinguishment in ***R. v. Horseman.***

Per L'Heureux-Dubé J.: As regards the issues of extinguishment and *prima facie* infringement, the reasons and conclusions of Lamer C.J. were agreed with for the most part. The Heiltsuk's aboriginal right to sale, trade and barter herring spawn on kelp for commercial purposes has not been extinguished by a "clear and plain intention" of the Sovereign. The approach where the aboriginal right is considered extinguished when it and the activities contemplated by the legislation cannot co-exist is irreconcilable with the "clear and plain intention" test favoured in Canada. The legislation was not sufficient to extinguish the aboriginal right to sell, trade and barter fish for commercial purposes. It merely regulates aboriginal activities and does not amount to extinguishment.

Per McLachlin J.: Order in Council P.C. 2539 did not extinguish the aboriginal right of the Heiltsuk people to use herring spawn on kelp as a source of sustenance. It did not manifest the necessary "clear and plain" intention. Their most likely purpose was to conserve. A measure aimed at conservation of a resource is not inconsistent with a recognition of an aboriginal right to make use of that resource. Indeed, there was no evidence that the measure was intended to relate to the aboriginal right at all.

Per La Forest J. (dissenting): The *Sparrow* decision only stands for the proposition that the Crown had not expressed a clear and plain intention to extinguish aboriginal rights regarding fishing for food, including social and ceremonial purposes. Order-in-Council P.C. 2539, which put in place restrictions on the native exploitation of this fishery, evinced a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries in British Columbia -- should they ever have existed. The Crown specifically chose to translate aboriginal practices into statutory rights and expressly decided to limit the scope of these rights. Aboriginal rights relating to practices that were specifically excluded were thereby extinguished.

Prima Facie Infringement

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The *Sparrow* test for determining whether the government has infringed aboriginal rights involves (1) asking whether the legislation has the effect of interfering with an existing aboriginal right and (2) determining whether the limitation (i) was unreasonable, (ii) imposed undue hardship, (iii) denied the right holders their preferred means of exercising that right. The test is partly determined by the factual context; in this case, the test must be applied not simply to s. 20(3) of the *Pacific Herring Fishery Regulations* but also to the other aspects of the regulatory scheme. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

The government's scheme for regulating the herring spawn on kelp fishery can be divided into four constituent parts: (1) the government determines the amount of the herring stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (herring roe, herring spawn on kelp and other herring fisheries); (3) the government allots the herring spawn on kelp fishery to various user groups (commercial users and the Indian food fishery); and (4) the government allots the commercial herring spawn on kelp licences. The appellants demonstrated a *prima facie* interference with their aboriginal rights. Prior to contact, the Heiltsuk could harvest herring spawn on kelp to the extent they themselves desired.

Under the regulatory scheme they can harvest for commercial purposes only to the limited extent allowed by the government.

Per L'Heureux-Dubé J.: Section 20(3) of the *Pacific Herring Fishery Regulations* directly conflicts, both by its object and by its effects, with native sale, trade and barter of herring spawn on kelp on a commercial basis and so violates the aboriginal right. This right has never been extinguished by a clear and plain intention of the Sovereign. Although in agreement with Lamer C.J. on the issue, the relatively low burden on the claimant of the right to demonstrate infringement on the face of the legislation was emphasized. Here, the appellants overwhelmingly discharged their burden in that regard.

Per McLachlin J.: An aboriginal person must establish a *prima facie* right to engage in the prohibited conduct at issue. The Crown may rebut the inference of infringement if it can demonstrate that the regulatory scheme, viewed as a whole, accommodates the collective aboriginal right in question. The Heiltsuk have a right to harvest and sell herring spawn on kelp for the purpose of sustenance and this right was evidently denied by the regulation under which the appellants stand charged. Thus, the first requirement of the test is met.

The evidence did not disclose whether the licence issued to the Heiltsuk was sufficient to satisfy their aboriginal right to sell herring spawn on kelp for sustenance. The case should be referred for a new trial so that this case can be resolved.

Justification

Per Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: Justification of infringements of aboriginal rights involves a two-part test. The government must demonstrate that: (1) it was acting pursuant to a valid legislative objective; and (2) its actions were consistent with its fiduciary duty towards aboriginal peoples.

Where the aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in *Sparrow*, makes sense. *Sparrow* did not contemplate situations other than that where the aboriginal right was internally limited. Where the aboriginal right has no internal limitation, however, the notion of priority, as articulated in *Sparrow*, would mean that an aboriginal right would become an exclusive one. Where the aboriginal right has no internal limitation, the doctrine of priority requires that the government demonstrate that it has taken the existence of aboriginal rights into account in allocating the resource and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource, and the actual allocation of the resource which results from that process, reflect the prior interest of aboriginal rights holders in the fishery. The content of this priority -- something less than exclusivity but which nonetheless gives priority to

the aboriginal right -- must remain somewhat vague pending consideration of the government's actions in specific cases.

Unlike *Sparrow*, which considered only the justifiability of conservation objectives, this case raises the question of whether other government objectives will justify limitations on aboriginal rights. The regulatory scheme at issue in this case -- the allocation of herring spawn on kelp -- does not involve conservation concerns: it makes no difference in terms of conservation who is allowed to catch the fish.

The purposes underlying aboriginal rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable. Because distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. 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. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

The evidence and testimony presented in this case was insufficient for the Court to determine whether the government's regulatory scheme was justified.

Per L'Heureux-Dubé J.: There was insufficient evidence to rule on the question of justification. Lamer C.J.'s comments on this issue, and particularly as regards the doctrine of priority and the decision in *Jack v. The Queen* were agreed with.

Per McLachlin J.: It was not necessary to reach the issue of justification. The question of whether such an infringement were justified should be decided at a new trial.

Cases Cited

By Lamer C.J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Deutsch*, [1986] 2 S.C.R. 2*;* *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; **considered:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; **distinguished:** *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v.*

Badger, [1996] 1 S.C.R. 771; **referred to:** *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75; *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153.

By L'Heureux-Dubé J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Jones* (1993), 14 O.R. (3d) 421; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *Jack v. The Queen*, [1980] 1 S.C.R. 294.

By McLachlin J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to**: *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

By La Forest J. (dissenting)

R. v. Van der Peet, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Heiltsuk Indian Band v. Canada* (1993), 59 F.T.R. 308; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771.

Statutes and Regulations Cited

British Columbia Fishery Regulations, SOR/54-659, s. 21A [ad. SOR/55-260, s. 3] (1) [repl. SOR/74-50, s. 9], (2) [repl. SOR/72-417, s. 7], s. 32.

British Columbia Fishery (General) Regulations, SOR/77-716, s. 29.

British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5) [ad. SOR/85-290, s. 5].

Canadian Charter of Rights and Freedoms, s. 1.

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

Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).

Fisheries Act, S.C. 1868, c. 60, s. 13(9).

Fisheries Act, R.S.C. 1927, c. 73, s. 39.

Fisheries Act, 1932, S.C. 1932, c. 42, s. 30.

Fisheries Act, S.C. 1952, c. 119, s. 30.

Fishery Regulations for the Province of British Columbia, March 8, 1894, P.C. 650, s. 1.

Natural Resources Transfer Agreement, s. 12 (confirmed by the *Constitution Act, 1930*, R.S.C., 1985, App. II, No. 26, Schedule 2).

Order in Council, P.C. 2539, September 11, 1917.

Pacific Fishery Registration and Licensing Regulations.

Pacific Herring Fishery Regulations, C.R.C., c. 825, s. 17 (rep. & sub. SOR/80-876, s. 8).

Pacific Herring Fishery Regulations, SOR/84-324, ss. 17(1)(*a*), (*b*), 20(2), (3).

Special Fisheries Regulations for the Province of British Columbia, 1915, P.C. 297, s. 8(2).

Special Fishery Regulations for the Province of British Columbia, 1922, P.C. 1918, s. 13(2).

Special Fishery Regulations for the Province of British Columbia, 1925, P.C. 483, s. 15.

Special Fishery Regulations for the Province of British Columbia, 1930, P.C. 512, s. 11(2).

Special Fishery Regulations for the Province of British Columbia, 1938, P.C. 899, s. 10(2).

Authors Cited

Black's Law Dictionary, 6th ed. St. Paul, Minn.: West Publishing Co., 1990, "*prima facie*".

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 133, 29 B.C.A.C. 253, 48 W.A.C. 253, [1993] 5 W.W.R. 517, [1993] 4 C.N.L.R. 75, dismissing an appeal from a judgment of Anderson J. (1991), 13 W.C.B. (2d) 601, dismissing an appeal from conviction by Lemiski Prov. Ct. J. for violating s. 20(3) of the *Pacific Herring Fishery Regulations*. Appeal allowed, La Forest J. dissenting.

Marvin R. V. Storrow, Q.C., and *Maria A. Morellato*, for the appellants.

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

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

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

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 Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

THE CHIEF JUSTICE --

I. Facts

1. Donald and William Gladstone, the appellants, are members of the Heiltsuk Band. The appellants were charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offences of offering to sell herring spawn on kelp 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 and of attempting to sell herring spawn on kelp not caught under the authority of a Category J herring spawn on kelp licence, contrary to s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324. Only the charges arising under s. 20(3) of the *Pacific Herring Fishery Regulations* are still at issue in this appeal.

2. The charges arose out of events taking place in April of 1988. On approximately April 27, 1988 the appellants shipped 4,200 pounds of herring spawn on kelp from Bella Bella to Richmond, a suburb of Vancouver. On April 28, 1988 the appellants took a pail containing approximately 35 pounds of herring spawn on kelp to Seaborn Enterprises Ltd., a fish store in Vancouver. At Seaborn Enterprises Ltd. the appellants had a conversation with Mr. Katsu Hirose, the owner of the store, in which they asked Mr. Hirose if he was "interested" in herring spawn on kelp. Mr. Hirose informed the appellants that he did not purchase herring spawn on kelp from Native Indians. Upon leaving Seaborn Enterprises Ltd. the appellants, who had been under surveillance by fisheries officers throughout these events, were arrested and the entire 4,200 pounds of herring spawn on kelp was seized. Upon arrest the appellant William Gladstone produced an Indian food fish licence permitting him to harvest 500 pounds of herring spawn on kelp.

3. At the time at which the appellants were charged s. 20(3) of the *Pacific Herring Fishery Regulations* read:

> 20. . . .
>
> (3) No person shall buy, sell, barter or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

4. The appellants have not disputed the essential facts of the case. The essence of the appellants' defence is that, in these circumstances, the regulations violated the appellants' aboriginal rights as recognized and affirmed by s. 35(1) of the

Constitution Act, 1982 with the result that, by operation of s. 52 of the *Constitution Act, 1982*, the regulations are of no force or effect with respect to the appellants. The appellants also take the position that the facts related to the shipment of the herring spawn on kelp, and the conversation with Mr. Hirose, are insufficient to constitute an "attempt to sell" in law.

5. Section 35(1) of the *Constitution Act, 1982* reads:

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

II. Judgments Below

Provincial Court, Lemiski Prov. Ct. J.

6. At trial the appellants made a series of technical arguments related to the Crown's proof of the essential elements of the offences with which they were charged. The appellants also argued that the conditions placed on fishing licences constituted improper delegation and that the regulations were *ultra vires* the federal government. None of these arguments was successful at trial and they have all, with one exception, been abandoned on the appeal to this Court. As noted, the appellants have maintained their position that the facts do not support the Crown's contention that the appellants engaged in an "attempt to sell" herring spawn on kelp. The trial judge rejected this argument, holding that "the evidence of an ‘attempt to sell’ is overwhelming".

7. The appellants also argued at trial that, if they did attempt to sell herring spawn on kelp, they did so pursuant to an aboriginal right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The trial judge accepted this argument, finding as a matter of fact that the Heiltsuk people "continuously traded spawn on kelp over the years to the present time". The trial judge held, further, that this right had not been extinguished. Although regulations passed since 1927 had curtailed the herring spawn on kelp fishery, the trial judge cited *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1099, for the proposition that these regulations were "simply a manner of controlling the fisheries, not defining underlying rights"; given that this was the case, the trial judge held that the Crown had not demonstrated a clear and plain intention to extinguish the aboriginal right of the appellants to trade in herring spawn on kelp.

8. The trial judge held that the aboriginal rights of the appellants were infringed by the regulations. He held that it was unreasonable to limit the appellants' rights, that the regulations had the potential to cause hardship to the appellants and that the regulations interfered with the appellants' preferred means of exercising their aboriginal rights, with the result that the *Sparrow* test for infringement had been met.

9. The trial judge held, however, that the infringement of the appellants' aboriginal rights was justified. He held that the Crown had demonstrated a valid legislative objective in so far as there was a potential conservation concern with the herring spawn on kelp fishery. Further, he held that while the infringement of the appellants' rights was excessive in relation to the legislative objective, there had been consultation with the Native Brotherhood of B.C. In sum, he held that given the difference between the

appellants' actions and the aboriginal right they claimed to be acting pursuant to, the interference with their actions by the regulations was a justifiable interference with their rights. In the result, the trial judge convicted the appellants on both counts.

British Columbia Supreme Court, Anderson J. (1991), 13 W.C.B. (2d) 601

10. The appellants were partially successful on appeal to the British Columbia Supreme Court. Anderson J. held that the facts as found by the trial judge, while supporting the appellants' conviction for attempting to sell herring spawn on kelp in violation of s. 20(3) of the *Pacific Herring Fishery Regulations*, did not support the appellants' conviction for offering to sell herring spawn on kelp in violation of s. 27(5) of the *British Columbia Fishery (General) Regulations*. What the appellants said to Mr. Hirose was only an invitation to treat, not an offer to sell.

11. Anderson J. agreed with the trial judge that the effect of the regulations on the appellants' s. 35(1) rights was insufficient to invalidate the application of those regulations to the appellants. While he agreed with the trial judge that there was a traditional right to trade herring spawn on kelp, and that that right had not been extinguished, he held, in disagreement with the trial judge, that the fisheries regulations did not infringe the appellants' aboriginal rights. He held that the right of the appellants was not an "absolute and unfettered right to harvest herring spawn in any quantity and to sell the spawn so harvested commercially". The extent of the transaction to be engaged in by the appellants was inconsistent with the aboriginal rights on which they relied. The aboriginal right to trade in herring spawn on kelp is preserved by the operation of

the Indian food fishing licences and by the Category J licence issued to the Heiltsuk Band; the limitation of the herring spawn on kelp fishery beyond what is permitted by the regulations cannot be said to be an infringement of the appellants' aboriginal rights.

12. Anderson J. thus allowed the appeal in respect of the appellants' conviction for violating s. 27(5) of the *British Columbia Fishery (General) Regulations* but dismissed the appeal of the appellants' conviction for violating s. 20(3) of the *Pacific Herring Fishery Regulations*. The Crown has not appealed Anderson J.'s decision allowing the appeal of the appellants on the s. 27(5) issue.

British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 133

13. Hutcheon J.A., writing for a majority of the Court on this issue, rejected the appellants' argument that the Crown had failed to prove the essential elements of the offence of an attempt to sell herring spawn on kelp. Hutcheon J.A. held at para. 13, that the distinction between mere preparation and an attempt to sell is a "matter of ‘common sense’" and that, in this case, the evidence was sufficient to demonstrate that the appellants had been guilty of an attempt to sell. Hutcheon J.A. also rejected the appellants' argument that the regulations, in these circumstances, constituted an unconstitutional violation of their s. 35(1) rights. Hutcheon J.A. agreed with the trial judge that the appellants had demonstrated an aboriginal right to trade herring spawn on kelp and that the actions of the appellant were, given the historical evidence demonstrating extensive trade by the Heiltsuk prior to contact, consistent with the aboriginal right asserted. He also agreed with the trial judge that the regulations

constituted a *prima facie* interference with the aboriginal right to trade herring spawn on kelp but that that interference with the appellants' rights was justified.

14. Hutcheon J.A.'s reasons for upholding the interference with the appellants' rights as justified were different than those of the trial judge. Hutcheon J.A. held that the trial judge was in error in so far as he relied on the appellants' actions rather than on the impact of the regulations on the appellants. Considering the regulatory scheme itself, Hutcheon J.A. held that the consultation with the Native Indian Brotherhood of B.C., and the allocation of herring spawn on kelp to the Heiltsuk Band, demonstrated that the Crown had fulfilled its responsibility to the Heiltsuk and had not, as such, engaged in an unjustified interference with the appellants' aboriginal rights.

15. Macfarlane J.A., writing for himself and two others, agreed with Hutcheon J.A.'s disposition of the appellants' argument that the Crown had failed to demonstrate the essential elements of the offence. He disagreed, however, with Hutcheon J.A.'s analysis of the appellants' s. 35(1) arguments. In Macfarlane J.A.'s view, the appellants failed to demonstrate that the Heiltsuk Band had an aboriginal right to sell herring spawn on kelp commercially. Macfarlane J.A. held that the facts as found by the trial judge did not demonstrate that the trade of herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk. In Macfarlane J.A.'s view, at para. 50, "the quality and character of the activity in aboriginal times was quite different from that disclosed by the evidence in this case". Macfarlane J.A. also held, however, that if he were incorrect, and an aboriginal right to trade in herring spawn on kelp existed, he

would agree with Hutcheon J.A. that the Crown had met the burden of proof on the question of justification.

16. Lambert J.A. dissented. In his view, at para. 79, the appellants had an aboriginal right to trade herring spawn "in quantities measured in tons" which, he held, had been infringed by the fisheries regulations. Lambert J.A. held that this infringement was not justified. First, the herring spawn on kelp fishery, because not involving the death of the female fish as occurs in the herring roe fishery, does not create any conservation concerns beyond those dealt with in the regulation of the herring roe fishery. Second, the band was not compensated for what is, in effect, a confiscation of the herring spawn on kelp fishery. Finally, the only consultation that took place was with the Native Indian Brotherhood of B.C., not with the Heiltsuk Band itself; such consultation was inadequate to support the government's claim that the regulations were justified.

III. Grounds of Appeal

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

> Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants 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 appellants?

The appellants appealed on the basis that the courts below were in error in holding that the actions of the appellants were sufficient to constitute an attempt to sell in law. The appellants also appealed on the basis that, given that the evidence presented at trial

demonstrated the extent and significance of Heiltsuk trading activities, the Court of Appeal erred in holding that the appellants do not have an aboriginal right to trade and sell herring spawn on kelp. The appellants argued further that because the regulations constituted a total ban on the sale of any herring spawn on kelp, the Court of Appeal erred in not finding a *prima facie* infringement of the appellants' aboriginal rights. Finally, the appellants argued that the Crown did not adduce sufficient evidence to support its assertion that the regulations fulfilled a conservation objective and that the Crown had failed to fulfil its fiduciary obligation to the Heiltsuk Band, with the result that the Court of Appeal erred in finding that any infringement which did exist was justified.

IV. Analysis

Attempt to Sell

18. Before turning to the heart of the appellants' case -- the argument that their convictions constitute an unjustifiable infringement of the aboriginal rights recognized and affirmed by s. 35(1) -- it is necessary to dispose of their argument that the facts do not demonstrate an "attempt to sell" as required by s. 20(3) of the *Pacific Herring Fishery Regulations*. The basis of the appellants' position is that because the Crown only provided evidence to show that the appellants asked Mr. Hirose if he was "interested" in herring spawn on kelp, without providing any evidence that the appellants had discussed the quantity, quality, price or delivery date of the herring spawn on kelp with Mr. Hirose, the Crown only demonstrated that the appellants had

engaged in preparation for an attempt to sell; the Crown did not demonstrate that the appellants had actually attempted to sell herring spawn on kelp to Mr. Hirose.

19. This argument is without merit. In *R. v. Deutsch*, [1986] 2 S.C.R. 2, Le Dain J., writing for a unanimous Court on this issue, discussed the distinction between an attempt and mere preparation at pp. 22-23:

> It has been frequently observed that no satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment. . . . Despite academic appeals for greater clarity and certainty in this area of the law I find myself in essential agreement with this conclusion.
>
> In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

In this case the facts as found by the trial judge clearly demonstrate that the appellants attempted to sell herring spawn on kelp to Mr. Hirose. The appellants arranged for the shipment of the herring spawn on kelp to Vancouver, they took a sample of the herring spawn on kelp to Mr. Hirose's store and they specifically asked Mr. Hirose if he was "interested" in herring spawn on kelp. The appellants' actions have sufficient proximity to the acts necessary to complete the offence of selling herring spawn on kelp to move those actions beyond mere preparation to an actual attempt. I would note here that the appellants have not disputed the facts as found by the trial judge and that the courts

below were unanimous in finding that the actions of the appellant were sufficient to amount to an attempt to sell.

Section 35(1) of the Constitution Act, 1982

20. In *Sparrow, supra*, Dickson C.J. and La Forest J., writing for a unanimous court, held that an analysis of a claim under s. 35(1) has four steps: first, the 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 was extinguished prior to the enactment of s. 35(1) of the *Constitution Act, 1982*; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified.

21. This judgment will undertake the analysis required for the four steps of the *Sparrow* framework, taking into account the elaboration of that framework in the cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Nikal*, [1996] 1 S.C.R. 1013, all of which were heard contemporaneously with this appeal. I will also undertake to clarify the *Sparrow* framework as is required in order to apply that framework to the different circumstances of this appeal.

Definition

22. This appeal, like those heard contemporaneously in *N.T.C. Smokehouse* and *Van der Peet*, requires the Court to consider the scope of the aboriginal rights recognized and

affirmed by s. 35(1) of the *Constitution Act, 1982*. In this case it must be determined whether the appellants Donald and William Gladstone can, on the basis of the test laid out in *Van der Peet*, claim to have been acting pursuant to an aboriginal right when they attempted to sell herring spawn on kelp to Seaborn Enterprises Ltd. In *Van der Peet* the Court held, at para. 46, that to be recognized as 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". Thus, the appellants in this case must demonstrate that their attempt to sell herring spawn on kelp was an element of a practice, custom, or tradition integral to the distinctive culture of the Heiltsuk Band.

23. The first step in applying the *Van der Peet* test is the determination of the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the practice, custom or tradition relied upon to establish the right. At this stage of the analysis the Court is, in essence, determining what the appellants will have to demonstrate to be an aboriginal right in order for the activities they were engaged in to be encompassed by s. 35(1). There is no point in the appellants' being shown to have an aboriginal right unless that aboriginal right includes the actual activity they were engaged in; this stage of the *Van der Peet* analysis ensures that the Court's inquiry is tailored to the actual activity of the appellants.

24. This case, like *N.T.C. Smokehouse*, potentially creates problems at the characterization stage. The actions of the appellants, like the actions of the members of the Sheshaht and Opetchesaht bands in *N.T.C. Smokehouse*, appear to be best characterized as the

commercial exploitation of herring spawn on kelp. By contrast, the regulations under which the appellants were charged, like the regulations at issue in *N.T.C. Smokehouse*, prohibit all sale or trade in herring spawn on kelp without a Category J licence, appear, therefore, to be best characterized as aimed at the exchange of herring spawn on kelp for money or other goods, regardless of whether the extent or scale of that sale or trade could reasonably be characterized as commercial in nature. The means to resolve this difficulty in characterization, as was the case in *N.T.C. Smokehouse*, is by addressing both possible characterizations of the appellants' claim. This judgment will thus consider first, whether the appellants can demonstrate that the Heiltsuk Band has an aboriginal right to exchange herring spawn on kelp for money or other goods and will then go on to consider, second, whether the appellants have demonstrated the further aboriginal right of the Heiltsuk Band to sell herring spawn on kelp to the commercial market.

25. The second step in the *Van der Peet* test requires the Court to determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question. The Court must thus, as has just been noted, determine in this case whether the exchange of herring spawn on kelp for money or other goods, and/or the sale or trade of herring spawn on kelp in the commercial marketplace, were, prior to contact, defining features of the distinctive culture of the Heiltsuk.

26. The facts as found by the trial judge, and the evidence on which he relied, support the appellants' claim that exchange of herring spawn on kelp for money or other goods was

a central, significant and defining feature of the culture of the Heiltsuk prior to contact. Moreover, those facts support the appellants' further claim that the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk. In his reasons Lemiski Prov. Ct. J. summarized his findings of fact as follows:

> It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.
>
> I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp. The exhibited Journal of Alexander McKenzie [*sic*] dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.
>
> The Crown conceded that there may have been some incidental local trade but questions its extent and importance. The very fact that early explorers and visitors to the Bella Bella region noted this trading has to enhance its significance. All the various descriptions of this trading activity are in accord with common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting. [Emphasis added.]

27. There was extensive evidence presented at trial to support Lemiski Prov. Ct. J.'s findings. In the journal of Alexander Mackenzie, referred to by the trial judge, is the following entry from 1793:

> The Indians who had caused us so much alarm, we now discovered to be inhabitants of the islands, and traders in various articles, such as cedar-bark, prepared to be wove [*sic*] into mats, fish-spawn, copper, iron, and beads, the latter of which they get on their own coast. For these they receive in exchange

> roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries. [Emphasis added.]

Similarly, the journal of Dr. William Tolmie, a fur trader, includes the following entry for April 16, 1834:

> From 15 to 20 large canoes of Wacash's people passed on their way to the Caughquil country -- the canoes were laden with boxes, hampers &c filled with dried herring spawn, which they are to barter for Oolaghens -- the covers of their boxes are fitted similarly to that of a bandbox -- hampers small & twisted of cedar bark. [Emphasis added.]

The defence expert, Dr. Barbara Lane, whose testimony was accepted by the trial judge, said in her report on the culture of the Heiltsuk people:

> Pacific herring spawn only in certain locations. Consequently, some native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. This partly explains the extensive trade in spawn among native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favored.
>
> After the spawn was processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and hampers. These canoes travelled for trading purposes from one tribe to another and were under the direction of their respective chiefs. [Emphasis added.]

All of this evidence supports the position of the appellants that, prior to contact, exchange and trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk.

28. In *Van der Peet*, at para. 62, this Court held that a claimant to an aboriginal right need not provide direct evidence of pre-contact activities to support his or her claim, but need only provide evidence which is "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". In *Van der Peet* this was described as the requirement of "continuity" -- the requirement that a practice, custom or tradition which is integral to the aboriginal community now be shown to have continuity with the practices, customs or traditions which existed prior to contact. The evidence presented in this case, accepted by the trial judge and summarized above, is precisely the type of evidence which satisfies this requirement. The appellants have provided clear evidence from which it can be inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade. The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as "commercial" prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial. The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in "tons". While this evidence relates to trade post-contact, the diary of Alexander Mackenzie provides the link with pre-contact times; in essence, the sum of the evidence supports the claim of the

appellants that commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact.

29. I would note that the significant difference between the situation of the appellants in this case, and the appellants in *Van der Peet* and *N.T.C. Smokehouse*, lies in the fact that for the Heiltsuk Band trading in herring spawn on kelp was not an activity taking place as an incident to the social and ceremonial activities of the community; rather, trading in herring spawn on kelp was, in itself, a central and significant feature of Heiltsuk society. In *Van der Peet* and *N.T.C. Smokehouse* the findings of fact at trial suggested that whatever trade in fish had taken place prior to contact was purely incidental to the social and ceremonial activities of the aboriginal societies making the claim; here the evidence suggests that trade in herring spawn on kelp was not an incidental activity for the Heiltsuk but was rather a central and defining feature of Heiltsuk society.

Extinguishment, Infringement and Justification

30. The appellants have demonstrated that they were acting pursuant to an aboriginal right to trade herring spawn on kelp on a commercial basis. I will therefore turn to the other three stages of the *Sparrow* analysis, that is, to the questions of whether the right under which the appellants were acting has been extinguished, whether that right was infringed by the actions of the government and, finally, whether that infringement was justified.

Extinguishment

31. The test for determining when an aboriginal right has been extinguished was laid out by this Court in *Sparrow*. Relying on the judgment of Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, the Court in *Sparrow* held at p. 1099 that "[t]he test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right". Further, the Court held that the mere fact that a right had, in the past, been regulated by the government, and its exercise subject to various terms and conditions, was not sufficient to extinguish the right. The argument that it did so (*Sparrow*, at p. 1097)

> confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.

The regulations relied on by the Crown in that case were, the Court held at p. 1099, "simply a manner of controlling the fisheries, not defining underlying rights".

32. The reasoning used to reject the Crown's argument in *Sparrow* applies equally to the Crown's argument in this case. To understand why this is so it will be necessary to review the legislation relied upon by the Crown in its argument that the Heiltsuk's right to harvest herring spawn on kelp on a commercial basis was extinguished prior to 1982.

33. There are two types of legislative action relied upon by the Crown: the provisions of the *Fisheries Act* which, prior to 1955, prohibited the destruction of the "fry of food fishes", and the provisions of the Fisheries regulations relating directly to the herring spawn fishery. The former are exemplified by s. 39 of the *Fisheries Act* of 1927 which stated

that "The fry of food fishes shall not be at any time destroyed"; identical provisions existed in the 1932 and 1952 *Fisheries Acts*. The latter first appeared in 1955. In 1955 the 1954 *British Columbia Fishery Regulations* were amended by SOR/55-260, s. 3, by the addition of a new s. 21A:

> 21A. No person shall take or collect by any means herring, eggs from herring spawning areas, and no person shall buy, sell, barter, process or traffic in herring eggs so taken; but an Indian may at any time take or collect herring eggs from spawning areas for use as food by Indians and their families but for no other purpose.

Similar prohibitions on the harvest and sale of herring spawn continued until 1974 (SOR/74-50, s. 9). At that time the section was amended so that the provision read

> 21A (1) Subject to subsection (2), no person shall, except by written permission of the Regional Director, by any means take or collect herring eggs from herring spawning areas, or buy, sell, barter, process or traffic in herring eggs so taken.
>
> (2) An Indian may at any time take or collect herring eggs from herring spawning areas for use as food for himself and his family (SOR/72-417, s. 7).

This regulatory scheme remained in place until 1980 when the provision (which had been transferred to s. 17 of the *Pacific Herring Fishery Regulations*, C.R.C., c. 825) was amended by SOR/80-876, s. 8 to read

17. No person shall

(*a*) take or collect herring roe except under authority of a licence issued pursuant to the *Pacific Fishery Registration and Licensing Regulations*; or

(*b*) possess herring roe unless it was so taken or collected.

According to the submissions of the Crown, no further modifications to this regulatory scheme took place prior to the enactment of the *Constitution Act, 1982*.

34. None of these regulations, when viewed individually or as a whole, can be said to express a clear and plain intention to extinguish the aboriginal rights of the Heiltsuk Band. While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme. In this instance, the regulations and legislation regulating the herring spawn on kelp fishery prior to 1982 do not demonstrate any consistent intention on the part of the Crown. At various times prior to 1982 aboriginal peoples have been entirely prohibited from harvesting herring spawn on kelp, allowed to harvest herring spawn on kelp for food only, allowed to harvest herring spawn on kelp for sale with the written permission of the regional director and allowed to take herring roe pursuant to a licence granted under the *Pacific Fishery Registration and Licensing Regulations*. Such a varying regulatory scheme cannot be said to express a clear and plain intention to eliminate the aboriginal rights of the appellants and of the Heiltsuk Band. As in *Sparrow*, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of aboriginal rights.

35. The Crown also argued, however, that even if the regulations do not extinguish the appellants' aboriginal rights, their rights were extinguished by the enactment of Order in Council, P.C. 2539, of September 11, 1917. Regulation 2539 reads as follows:

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 to this end subsection 2 of section 8 of the Special Fishery Regulations for British Columbia provides as follows: --

"2. Indians may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for themselves and their families, but for no other purpose; but no Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved."

And whereas notwithstanding this concession, great difficulty is being experienced in preventing the Indians from catching salmon in such waters for commercial purposes and recently, an Indian was convicted before a local magistrate for a violation of the above quoted regulation, the evidence being that he had been found fishing and subsequently selling fish. The case was appealed and the decision of the magistrate reversed, it being held that there was no proof that the fish caught by the Indian were those sold by him;

And whereas it is further represented that it is practically impossible for the Fishery Officers to keep fish that may be caught by the Indians in non-tidal waters, ostensibly for their own food purposes, under observation from the time they are caught until they are finally disposed of in one way or another;

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: --
>
> Subsection 2 of section 8 of the Special Fishery Regulations for the Province of British Columbia, adopted by Order in Council of the 9th February, 1915, is hereby rescinded, and the following is hereby enacted and substituted in lieu thereof: --
>
> "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. The Chief Inspector of Fisheries shall have the power in any such permit (a) to limit or fix the area of the waters in which such fish may be caught; (b) to limit or fix the means by which, or the manner in which such fish may be caught, and (c) to limit or fix the time in which such permission shall be operative. An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations. . . ." [Emphasis added.]

The language of the Regulation suggests that the government had two purposes in enacting the amendment to the existing scheme: first, the government wished to ensure that conservation goals were met so that salmon reached their "spawning grounds"; second, the government wished to pursue those goals in a manner which would ensure that the special protection granted to the Indian food fishery would continue. The government attempted to meet these goals by making it clear that no special protection was being granted to the Indian commercial fishery and that, instead, the Indian commercial fishery would be subject to the general regulatory system governing commercial fishing in the province.

36. Under the *Sparrow* test for extinguishment, this Regulation cannot be said to have extinguished the aboriginal right to fish commercially held by the appellants in this case.

The government's purpose was to ensure that conservation goals were met, and that the Indian food fishery's special protection would continue; its purpose was not to eliminate aboriginal rights to fish commercially. It is true that through the enactment of this regulation the government placed aboriginal rights to fish commercially under the general regulatory scheme applicable to commercial fishing, and therefore did not grant the aboriginal commercial fishery special protection of the kind given to aboriginal food fishing; however, the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.

37. That the government did not in fact have this intention becomes clear when one looks at the general regulatory scheme of which this Regulation is one part. First, aboriginal people were not prohibited, and have never been prohibited since the scheme was introduced in 1908, from obtaining licences to fish commercially under the regulatory scheme applicable to commercial fishing. Second, and more importantly, the government has, at various times, given preferences to aboriginal commercial fishing. For example, the government has provided for greatly reduced licensing fees for aboriginal fishers and has attempted to encourage aboriginal participation in the commercial fishery. I would note the statistics cited by the interveners the British Columbia Fisheries Survival Coalition and British Columbia Wildlife Federation to the effect that, in 1929, of the 13,860 commercial salmon licences issued 3,632 were held by aboriginal people and that, during and after World War II, there was a "substantial fleet of Indian-owned and operated seine boats, as well as gill-netters and trollers". The interveners assert that, today, aboriginal participation in the commercial fishery is at a

considerably higher percentage than the percentage of aboriginal people in the population as a whole. Such substantial encouragement of the aboriginal commercial fishery is not, in my view, consistent with the assertion that through enacting a Regulation aimed at ensuring conservation of the fishery in a manner which continues the special protection given to the aboriginal food fishery, the government had the clear and plain intention to extinguish the aboriginal rights to fish commercially held by some aboriginal peoples in the province.

38. Finally, I would note that the Regulation is of an entirely different nature than the document relied on for a finding of extinguishment in *R. v. Horseman,* [1990] 1 S.C.R. 901, at p. 933, (*per* Cory J.) and *R. v. Badger,* [1996] 1 S.C.R. 771, at para. 46 (*per* Cory J.). Section 12 of the *Natural Resources Transfer Agreement* (NRTA), the provision at issue in those cases, is a provision in a constitutional document, the enactment of which provides for a permanent settlement of the legal rights of the aboriginal groups to whom it applies. The Regulation, by contrast, was merely a statutory document dealing with an immediate conservation concern and was subject to amendment through nothing more elaborate than the normal legislative process. The NRTA was aimed at achieving a permanent clarification of the province's legislative jurisdiction and of the legal rights of aboriginal peoples within the province; the Regulation was aimed at dealing with the immediate problems caused by the fact that an insufficient number of salmon were reaching their spawning grounds. The intention of the government in enacting the Regulation must, as a consequence, be viewed quite differently from its intention in enacting the NRTA, with the result that while the NRTA can be seen as evincing the necessary clear and plain intention to extinguish aboriginal

rights to hunt commercially in the province to which it applies, the Regulation cannot be seen as evincing the necessary clear and plain intention to extinguish aboriginal rights to fish commercially in British Columbia.

Infringement

39. *Sparrow* also lays out the test for determining whether or not the government has infringed the aboriginal rights of the appellants (at pp. 1111-12):

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis.
>
> . . .
>
> 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.

The test as laid out in *Sparrow* is determined to a certain extent by the factual context in which it was articulated; the Court must take into account variations in the factual context of the appeal which affect the application of the test.

40. At the infringement stage, the primary distinction between the factual context of *Sparrow*, and the context of this appeal, is that the regulation impugned in *Sparrow* -- a

net length restriction -- was challenged independently of the broader fisheries management scheme of which it was a part. In this case, while the appellants' constitutional challenge is focused on a single regulation -- s. 20(3) of the *Pacific Herring Fishery Regulations* -- the scope of the challenge is much broader than the terms of s. 20(3). The appellants' arguments on the points of infringement and justification effectively impugn the entire approach taken by the Crown to the management of the herring spawn on kelp fishery.

41. The fact that the appellants' challenge to the legislation is broader than that of the appellant in *Sparrow* arises from the difference in the nature of the regulation being challenged. Restrictions on net length have an impact on an individual's ability to exercise his or her aboriginal rights, and raise conservation issues, which can be subject to constitutional scrutiny independent of the broader regulatory scheme of which they are a part. The Category J licence requirement, on the other hand, cannot be scrutinized for the purposes of either infringement or justification without considering the entire regulatory scheme of which it is a part. The requirement that those engaged in the commercial fishery have licences is, as will be discussed in more detail below, simply a constituent part of a larger regulatory scheme setting the amount of herring that can be caught, the amount of herring allotted to the herring spawn on kelp fishery and the allocation of herring spawn on kelp amongst different users of the resource. All the aspects of this regulatory scheme potentially infringe the rights of the appellants in this case; to consider s. 20(3) apart from this broader regulatory scheme for the herring fishery would distort the Court's inquiry.

42. The significance of this difference for the *Sparrow* test is that the questions asked by this Court in *Sparrow* must, in this case, be applied not simply to s. 20(3) but also to the other aspects of the regulatory scheme of which s. 20(3) is one part. In order to do this it will be necessary to consider, in some detail, the regulatory scheme being challenged by the appellants in this case. Before doing so, however, I have one further comment with regards to the test for infringement laid out by this Court in *Sparrow*.

43. The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

44. I now turn to the regulatory scheme challenged by the appellants in this case. I will consider this scheme both as it exists now and in terms of its historical development. The reason for this is that some aspects of the scheme challenged by the appellants go back to the introduction of the commercial herring spawn on kelp fishery in the early 1970s; as such, in order to scrutinize those aspects it is necessary to consider the regulation of the herring fishery from its inception.

45. The commercial herring spawn on kelp and herring roe fisheries, in the form in which they exist today, developed in British Columbia in the early 1970s. Prior to that time herring was exploited primarily for the purpose of reducing the fish to oil. The shift in the use of the herring fishery resulted from a confluence of factors; in particular, extensive overfishing had radically depleted the herring stock (in 1965 the reduction fishery was shut down indefinitely) in response to which the Department of Fisheries and Oceans shifted from a policy of taking the maximum sustainable yield of the herring stock each year to a policy of exploiting the herring fishery so as to maximize the economic and social benefits derived from that fishery for the people of Canada. As part of this policy shift the Department of Fisheries and Oceans encouraged the growth of a commercial herring spawn on kelp fishery. Because herring spawn on kelp is eaten as part of the traditional celebration of the new year in Japan, an export market for this product existed; the herring industry and the Department of Fisheries and Oceans believed that this market could be exploited lucratively.

46. From the time of the Department of Fisheries and Oceans' policy shift in the early 1970s, until 1982, the Department regulated the herring stock through the measurement

of spawn escapement (the calculation of the number of eggs spawned in a given year). In 1982, this means for measuring and controlling the herring stock was modified; at that time the Department adopted a policy of estimating the size of the herring stock in each year and of setting the allowable catch at 20 per cent of that stock. The 1982 stock measurement and allotment policy has been subject to only one amendment since its adoption: in 1988 the Department of Fisheries and Oceans qualified the constant harvest rate of 20 per cent so as to allow for minimum spawn escapement.

47. It should be noted that the measurement of the herring stock is a problem of considerable difficulty. As the defence expert, Dr. Gary Vigers, noted

> . . . in the real situation, fisheries management is full of uncertainty -- from the inability to identify primary governing forces at each stage of recruitment, to subjective (but unintentional) sampling bias of fisheries officers observations . . ., to extrapolation of assessments to entire populations. Each level of measurement has intrinsic errors which may be amplified at the next level of evaluation.
>
> . . .
>
> In my opinion, two major uncertainty factors that may defy quantification and are totally unaccounted for in the current methods of stock assessment are the predicted recruitment of eggs to larval populations, and the predicted recruitment of larval populations to juvenile populations. Examples abound to illustrate that hatching success of eggs is highly variable and affected by almost every physical factor conceivable in the nearshore environment. . . .

48. The 20 per cent allotted herring catch is distributed by the Department to the various herring fisheries, with the herring roe fishery (where the eggs are extracted from the female fish prior to spawning) bearing the brunt of variations in the herring stock. The Department sets the herring spawn on kelp fishery at a constant level of 2,275 tons;

other non-roe herring fisheries are, similarly, set at constant levels. The herring roe fishery, on the other hand, varies depending on the levels of the herring stock. The rationale for this allotment policy is that the herring roe fishery is agreed to be more destructive to the herring stock than the herring spawn on kelp and other herring fisheries; it is felt by the Department that, as such, the herring roe fishery should be the fishery most responsive to fluctuations in the herring stock. The only year in which there was a significant drop in the herring stock was 1986. The decrease in the stock in that year resulted in the closure of the herring roe fishery; the amount of herring allotted to the herring spawn on kelp fishery was also reduced.

49. Commercial herring spawn on kelp licences were first issued in 1975. At that time, applicants "were told that priority would be given to applicants who have previous experience in catching and live holding herring and to residents of remote coastal communities" (Department of Fisheries report, "1975 Herring Spawn on Kelp Fishery"). In a 1985 briefing note prepared by the Department of Fisheries and Oceans, the Department stated that the initial issuance of licences in 1975 evaluated applicants "considering the individual's previous experience and knowledge of herring, area of residence and citizenship status and/or membership in Native Indian Band. Thirteen permits were issued, each allowing 6 tons of production".

50. In 1988, the year relevant to this appeal, the herring stock was estimated at 350,000 tons, of which 160,000 tons were "fishable". The total allocation for the herring fishery was 40,000 tons, of which 2,275 tons was allotted to the herring spawn on kelp fishery. Of that 2,275 tons, 224 tons was allotted to Category J licence holders. There were 28

such licences issued in 1988, each with an 8-ton quota. Of those 28 licences 16 were held by Native Indian bands. One was held by the Heiltsuk Band.

51. To summarize, the government's scheme for regulating the herring spawn on kelp fishery can be divided into four constituent parts: (1) the government determines the amount of the herring stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (herring roe, herring spawn on kelp and other herring fisheries); (3) the government allots the herring spawn on kelp fishery to various user groups (commercial users and the Indian food fishery); and, (4) the government allots the commercial herring spawn on kelp licences.

52. Because each of these constituent parts has a different objective, and each involves a different pattern of government action, at the stage of justification it will be necessary to consider them separately; however, at the infringement stage the government scheme can be considered as a whole. The reason for this is that at the infringement stage it is the cumulative effect on the appellants' rights from the operation of the regulatory scheme that the court is concerned with. The cumulative effect of the regulatory scheme on the appellants' rights is, simply, that the total amount of herring spawn on kelp that can be harvested by the Heiltsuk Band for commercial purposes is limited. Thus, in order to demonstrate that there has been a *prima facie* infringement of their rights, the appellants must simply demonstrate that limiting the amount of herring spawn on kelp that they can harvest for commercial purposes constitutes, on the basis of the test laid out in *Sparrow*, a *prima facie* interference with their aboriginal rights.

53. In light of the questions posed by this Court in *Sparrow*, it seems clear that the appellants have discharged their burden of demonstrating a *prima facie* interference with their aboriginal rights. Prior to the arrival of Europeans in North America, the Heiltsuk could harvest herring spawn on kelp to the extent they themselves desired, subject only to such limitations as were imposed by any difficulties in transportation, preservation and resource availability, as well as those limitations that they thought advisable to impose for the purposes of conservation; subsequent to the enactment of the regulatory scheme described above the Heiltsuk can harvest herring spawn on kelp for commercial purposes only to the limited extent allowed by the government. To use the language of Cory J. in *R. v. Nikal, supra*, at para. 104, the government's regulatory scheme "clearly impinge[s]" upon the rights of the appellant and, as such, must be held to constitute a *prima facie* infringement of those rights.

Justification

54. In *Sparrow*, Dickson C.J. and La Forest J. articulated a two-part test for determining whether government actions infringing aboriginal rights can be justified. First, the government must demonstrate that it was acting pursuant to a valid legislative objective (at p. 1113):

> Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. 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, or other objectives found to be compelling and substantial.

Second, the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the government must demonstrate that it has given the aboriginal fishery priority in a manner consistent with this Court's decision in *Jack v. The Queen*, [1980] 1 S.C.R. 294, at p. 313, where Dickson J. (as he then was) held that the correct order of priority in the fisheries is "(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing". Dickson C.J. and La Forest J. elaborated this priority requirement as follows, at p. 1116:

> While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

55. Dickson C.J. and La Forest J. also held at p. 1119 that the Crown's fiduciary duty to aboriginal peoples would require the Court to ask, at the justification stage, such further questions as:

> . . . 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. . . .
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that

> recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

56. As was noted with regards to the question of infringement, the framework for analysing aboriginal rights laid out in *Sparrow* depends to a considerable extent on the legal and factual context of that appeal. In this case, where, particularly at the stage of justification, the context varies significantly from that in *Sparrow*, it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out in order to apply that test to the circumstances of this appeal.

57. Two points of variation are of particular significance. First, the right recognized and affirmed in this case -- to sell herring spawn on kelp commercially -- differs significantly from the right recognized and affirmed in *Sparrow* -- the right to fish for food, social and ceremonial purposes. That difference lies in the fact that the right at issue in *Sparrow* has an inherent limitation which the right recognized and affirmed in this appeal lacks. The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited -- at a certain point the band will have sufficient fish to meet these needs. The commercial sale of the herring spawn on kelp, on the other hand, has no such internal limitation; the only limits on the Heiltsuk's need for herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource. This is particularly so in this case where the evidence supports a right to exchange fish on a genuinely commercial basis; the evidence in this case does not justify limiting the right to harvest herring spawn on kelp on a commercial basis to, for example, the sale of herring spawn on kelp for the purposes of obtaining a "moderate livelihood". Even Lambert J.A., who used the

moderate livelihood standard in dissent in the *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, and *R. v. N.T.C. Smokehouse Ltd.* (1993), 80 B.C.L.R. (2d) 158, did not so confine the rights of the appellants in this case, defining their right at para. 79 as the right to "harvest herring spawn deposited on kelp . . . for the purposes of trade in quantities measured in tons, subject only to the need for conservation of the resource". I do not necessarily endorse this characterization; however, it supports the basic point that the aboriginal right in this case is, unlike the right at issue in *Sparrow*, without internal limitation.

58. The significance of this difference for the *Sparrow* test relates to the position taken in that case that, subject to the limits of conservation, aboriginal rights holders must be given priority in the fishery. In a situation where the aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in *Sparrow*, makes sense. In that situation it is understandable that in an exceptional year, when conservation concerns are severe, it will be possible for aboriginal rights holders to be alone allowed to participate in the fishery, while in more ordinary years other users will be allowed to participate in the fishery after the aboriginal rights to fish for food, social and ceremonial purposes have been met.

59. Where the aboriginal right has no internal limitation, however, what is described in *Sparrow* as an exceptional situation becomes the ordinary: in the circumstance where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that

right would become an exclusive one. Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in *Sparrow* would be to give the right-holder exclusivity over any person not having an aboriginal right to participate in the herring spawn on kelp fishery.

60. In my view, such a result was not the intention of *Sparrow*. The only circumstance contemplated by *Sparrow* was where the aboriginal right was internally limited; the judgment simply does not consider how the priority standard should be applied in circumstances where the right has no such internal limitation. That this is the case can be seen by a consideration of the judgment of *Jack*, *supra*, which was relied upon by Dickson C.J. and La Forest J. in their articulation of the notion of priority. While *Jack* undoubtedly stands for the proposition for which it was cited, it is interesting to note that in that case, Dickson J. specifically distinguished at p. 313 between food and commercial fishing:

> [The appellants'] position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument. Article 13 calls for distinct protection of the Indian fishery, in that pre-Confederation policy gave the Indians a priority in the fishery. <u>That priority is at its strongest when we speak of Indian fishing for food purposes, but somewhat weaker when we come to local commercial purposes</u>. [Emphasis added.]

In *Sparrow* it was obviously not necessary for Dickson C.J. and La Forest J. to address the distinction suggested by Dickson J. (as he then was) in *Jack*; that such a distinction

exists suggests, however, that *Sparrow* should not be seen as the final word on the question of priority, at least where the aboriginal right in question does not have the internal limitation which the right actually at issue in *Sparrow* did.

61. The basic insight of *Sparrow* -- that aboriginal rights holders have priority in the fishery -- is a valid and important one; however, the articulation in that case of what priority means, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances which arise when the aboriginal right in question has no internal limitations.

62. Where the aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

63. The content of this priority -- something less than exclusivity but which nonetheless gives priority to the aboriginal right -- must remain somewhat vague pending

consideration of the government's actions in specific cases. Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard "least drastic means" requirement on the government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis (see, for example, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pp. 526-27, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 285-86, *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 504-5), priority under *Sparrow*'s justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights. Under the minimal impairment branch of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), where the government is balancing the interests of competing groups, the court does not scrutinize the government's actions so as to determine whether the government took the least rights-impairing action possible; instead the court considers the reasonableness of the government's actions, taking into account the need to assess "conflicting scientific evidence and differing justified demands on scarce resources" (*Irwin Toy*, *supra*, at p. 993). Similarly, under *Sparrow*'s priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.

64. That no blanket requirement is imposed under the priority doctrine should not suggest, however, that no guidance is possible in this area, or that the government's actions will not be subject to scrutiny. Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. These questions, like those in *Sparrow*, do not represent an exhaustive list of the factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders; they give some indication, however, of what such an inquiry should look like.

65. Before turning to the second relevant difference between this case and *Sparrow*, I would note one or two points in favour of the interpretation of priority just adopted. As was emphasized in this Court's decision in *Van der Peet*, aboriginal rights are highly fact specific -- the existence of an aboriginal right is determined through consideration of the particular distinctive culture, and hence of the specific practices, customs and traditions,

of the aboriginal group claiming the right. The rights recognized and affirmed by s. 35(1) are not rights held uniformly by all aboriginal peoples in Canada; the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country. As a result, governments must not only make decisions about how to allocate fish between aboriginal rights holders and those who do not enjoy such rights, but must also make decisions as to how to allocate fish both between different groups of aboriginal rights holders and between different aboriginal rights. The government must, for example, make decisions as to how to allocate fish between those aboriginal peoples with the aboriginal right to fish for food, social and ceremonial purposes, and those aboriginal peoples who have aboriginal rights to sell fish commercially; it must also decide, where more than one aboriginal group has a right to sell fish commercially, how much fish each group will have access to.

66. The existence of such difficult questions of resource allocation supports the position that, where a right has no adequate internal limitations, the notion of exclusivity of priority must be rejected. Certainly the holders of such aboriginal rights must be given priority, along with all others holding aboriginal rights to the use of a particular resource; however, the potential existence of other aboriginal rights holders with an equal claim to priority in the exploitation of the resource, suggests that there must be some external limitation placed on the exercise of those aboriginal rights which lack internal limitation. Unless the possibility of such a limitation is recognized, it is difficult to see how the government will be able to make decisions of resource allocation amongst the various parties holding prioritized rights to participate in the fishery. And while this does not lead automatically to the conclusion that, as between

aboriginal rights holders and those who do not hold such rights, the notion of exclusivity must be rejected, it does point to some of the difficulties inherent in the recognition of such a concept in the context of this and similar cases.

67. It should also be noted that the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:

> . . . the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.
>
> . . .
>
> [I]t has been unquestioned law that since Magna Charta [*sic*] no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.

(*Attorney-General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, *per* Viscount Haldane.)

While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. As was contemplated by *Sparrow*, in the occasional years where conservation concerns drastically limit the availability of fish, satisfying aboriginal rights to fish for food, social and ceremonial purposes may involve, in that year, abrogating the common law

right of public access to the fishery; however, it was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.

68. That this should not be the case becomes particularly clear when it is remembered that, as was noted above, the existence of aboriginal rights varies amongst different aboriginal peoples, with the result that the notion of priority applies not only between aboriginals and other Canadians, but also between those aboriginal peoples who have an aboriginal right to use the fishery and those who do not. For aboriginal peoples like the Sheshaht, Opetchesaht and the Sto:lo, the fact that they were unable to demonstrate that their aboriginal rights include the right to sell fish on a commercial basis should not mean, if another aboriginal group is able to establish such a right, that the rights they hold in common with other Canadians -- to participate in the commercial fishery -- are eliminated. This could not have been intended by the enactment of s. 35(1).

69. I now turn to the second significant difference between this case and *Sparrow*. In *Sparrow*, while the Court recognized at p. 1113 that, beyond conservation, there could be other "compelling and substantial" objectives pursuant to which the government could act in accordance with the first branch of the justification test, the Court was not required to delineate what those objectives might be. Further, in delineating the

priority requirement, and the relationship between aboriginal rights-holders and other users of the fishery, the only objective considered by the Court was conservation. This limited focus made sense in *Sparrow* because the net-length restriction at issue in that case was argued by the Crown to have been necessary as a conservation measure (whether it was necessary as such was not actually decided in that case); in this case, however, while some aspects of the government's regulatory scheme arguably relate to conservation -- setting the total allowable catch at 20 per cent of the estimated herring stock, requiring the herring roe fishery to bear the brunt of variations in the herring stock because it is more environmentally destructive -- other aspects of the government's regulatory scheme bear little or no relation to issues of conservation. Once the overall level of the herring catch has been established, and allocated to the different herring fisheries, it makes no difference in terms of conservation who is allowed to catch the fish. Conservation of the fishery is simply not affected once, after the herring spawn on kelp fishery is set at 2,275 tons, 224 tons or 2,275 tons is allocated to the commercial fishery or to some other use. This is not to suggest that these decisions are unimportant or made pursuant to unimportant objectives, but simply that, whatever objectives the government is pursuing in making such decisions, conservation is not (or is only marginally) one of them. As such, it is necessary in this case to consider what, if any, objectives the government may pursue, other than conservation, which will be sufficient to satisfy the first branch of the *Sparrow* justification standard.

70. Considering this question is made more difficult in this case because, as will be discussed below, almost no evidence has been provided to this Court about the objectives the government was pursuing in allocating the herring resource as it did.

Absent some concrete objectives to assess, it is difficult to identify the objectives other than conservation that will meet the "compelling and substantial" standard laid out in *Sparrow*. That being said, however, it is possible to make some general observations about the nature of the objectives that the government can pursue under the first branch of the *Sparrow* justification test.

71. In *Oakes, supra*, Dickson C.J. observed at p. 136 that it is not only the case that the rights and freedoms protected by the *Charter* must be understood through the purposes underlying the protection of those rights, but that the limitations on rights allowed under s. 1 of the *Charter* must, similarly, be understood through the purposes underlying the *Charter*:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution. . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

Although the aboriginal rights recognized by s. 35(1) are, as was noted in *Van der Peet*, fundamentally different from the rights in the *Charter*, the same basic principle -- that the purposes underlying the rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable -- applies equally to the justification analysis under s. 35(1).

72. In *Van der Peet* the purposes underlying s. 35(1)'s recognition and affirmation of aboriginal rights were identified, at para. 43, 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.

In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or -- and at the level of justification it is this purpose which may well be most relevant -- at the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.

73. Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal

societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

74. The recognition of conservation as a compelling and substantial goal demonstrates this point. Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights.

75. Although by no means making a definitive statement on this issue, 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. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal

societies with the rest of Canadian society may well depend on their successful attainment.

76. I now turn to the application of the *Sparrow* justification test to the government regulatory scheme challenged in this case. As has already been noted, the government's regulatory scheme has four constituent parts, which, for ease of reference, I will reiterate here: (1) the government determines the amount of the herring stock that will be harvested in a given year; (2) the government allots the herring stock to the different herring fisheries (herring roe, herring spawn on kelp and other herring fisheries); (3) the government allots the herring spawn on kelp fishery to various user groups (commercial users and the Indian food fishery); and, (4) the government allots the commercial herring spawn on kelp licences.

77. Other than with regards to the first aspect of the government's regulatory scheme, the evidence and testimony presented in this case is insufficient for this Court to make a determination as to whether the government's regulatory scheme is justified. The trial in this case concluded on May 7, 1990, several weeks prior to the release of this Court's judgment in *Sparrow*. Perhaps as a result of this fact, the testimony, evidence and argument presented at the trial simply do not contain the information that is necessary for this Court to assess whether, in allocating the 40,000 tons of herring allotted to the herring fishery, the government has either acted pursuant to a compelling and substantial objective or has acted in a manner consistent with the fiduciary obligation it owes to aboriginal peoples. It is not that the Crown has failed to discharge its burden of demonstrating that the scheme for allocating the 20 per cent of the herring stock was

justified; it is simply that the question of whether or not that scheme of allocation was justified was not addressed at trial, at least in the sense necessary for this Court to decide the question of whether, under the *Sparrow* test, it was justified.

78. The lack of evidence is problematic with regards to both aspects of the *Sparrow* analysis. First, in so far as an evaluation of the government's objective is concerned, no witnesses testified, and no documents were submitted as evidence, with regards to the objectives pursued by the government in allocating the herring, and the herring spawn on kelp, amongst different user groups. As was noted above, there was evidence presented about the selection criteria used by the Department of Fisheries and Oceans in allocating herring spawn on kelp licences in 1975; however, no evidence was presented as to how or why those selection criteria were chosen or applied. Also, the evidence does not indicate whether those selection criteria changed over time (not all licences were allocated in 1975) or whether the emphasis placed on the different criteria varied. Clear evidence was presented at trial demonstrating that setting the total herring catch at 20 per cent was directed at conservation, but no evidence was presented regarding the objectives sought to be attained in allocating that 20 per cent amongst different user groups.

79. Second, with regards to priority, there is no evidence as to how much (if any) aboriginal participation there is in the herring roe fishery or as to whether there are any existing aboriginal rights to participate in the herring roe fishery, whether for food or commercial purposes. Whether the allocation of herring between the herring roe and herring spawn on kelp fishery meets the *Sparrow* test for priority will depend in part on

the existence (or non-existence) of such rights. There is, similarly, no evidence as to whether other aboriginal rights in the herring spawn on kelp fishery exist -- whether for food or commercial purposes -- and as to the number of such rights holders there might be.

80. Other evidentiary problems exist with regards to the priority analysis. There is no evidence as to how, between the different aboriginal bands holding Category J licences, allocation decisions are made. There is no evidence as to how, or to whom, the remaining 2,051 tons of herring spawn on kelp is allocated after the 224 tons of herring spawn on kelp is allocated to Category J licences. There is also no evidence as to how many aboriginal groups live in the region of the herring spawn on kelp fishery, what percentage aboriginal peoples are of the population in that region, and the size of the Heiltsuk Band relative to other aboriginal groups and the general population in the region.

81. In the courts below, the judges considering the justification issue avoided the difficulties created by the inadequacy of the evidentiary record in two ways: they either held that the nature of the appellants' actions rendered the government's actions justifiable (the approach of the trial judge) or they held that the allocation of 60 per cent of Category J licences to aboriginal groups demonstrated that the government’s regulatory scheme was justifiable. The problem with the first of these approaches is that the nature of the appellants' actions is not relevant to the inquiry into the constitutionality of the regulation under which they were charged. The problem with the second approach is that the fact that 60 per cent of the Category J licences were held by aboriginal people

does not demonstrate, in itself, that the licences were allocated in a manner which took into account the existence of aboriginal rights. It is, perhaps, consistent with that having taken place, but absent some further evidence as to how or why this result was reached, about the percentage of aboriginal people in relation to the population of the British Columbia coast as a whole, and about the other allocation issues in the herring roe and herring spawn on kelp fisheries, the fact that 60 per cent of the Category J licences are held by aboriginal peoples does not, on its own, serve to justify the government's actions.

82. Obviously a new trial will not necessarily provide complete and definitive answers to all of these questions; however, given that the parties simply did not address the justifiability of the government scheme, other than the setting of the herring catch at 20 per cent of the total herring stock, a new trial will almost certainly provide the court with better information than currently exists. Prior to *Sparrow* it was not clear what the government, or parties challenging government action, had to demonstrate in order to succeed in s. 35(1) cases; this lack of clarity undoubtedly contributed to the deficiency of the evidentiary record in this case. A new trial on the question of justification will remedy this deficiency.

83. A new trial is not, however, necessary with regards to the first aspect of the government's scheme; the evidentiary record clearly demonstrates that this aspect of the government's scheme was justified. Witnesses testified as to the conservation objectives of setting the stock at 20 per cent and as to the difficulties encountered by the herring fishery when the catch was set at much higher levels, as was the case in the

1960s. Moreover, the defence witness Dr. Gary Vigers testified that "fisheries management is full of uncertainty"; in the context of such uncertainty this Court must grant a certain level of deference to the government's approach to fisheries management.

84. Although the evidence regarding consultation is somewhat scanty, and more will hopefully be presented at a new trial on the justification issue, there is some evidence to suggest that the government was cognizant of the views of aboriginal groups with regards to the herring fishery. The correspondence between the Native Brotherhood and the Department is indicative of the existence of such consultation. Finally, the setting of the herring catch at 20 per cent of the fishable herring stock, because aimed at conservation, and not affecting the priority of aboriginal versus non-aboriginal users of the fishery, is consistent with the priority scheme as laid out in *Sparrow* and as elaborated in this judgment.

V. Disposition

85. In the result, the appeal is allowed and a new trial directed on the issue of guilt or innocence and, with regards to the constitutionality of s. 20(3), on the issue of the justifiability of the government's allocation of herring.

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

Question: Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants 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 appellants?

Answer:This question will have to be sent back to trial to be answered in accordance with the analysis set out in these reasons.

//*La Forest J.*//

The following are the reasons delivered by

1 LA FOREST J. (dissenting) --This appeal raises the issue of whether s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324 is, in the circumstances of this case, of no force or effect as infringing on s. 35(1) of the *Constitution Act, 1982*, by which the aboriginal rights of Canada's aboriginal people are recognized and affirmed. Section 20(3) prohibits buying, selling or bartering, or attempting to buy, sell or barter herring spawn on kelp not taken under the authority of a Category J. licence. The issue raised involves a consideration of whether the Heiltsuk people of British Columbia had at one time an aboriginal right to trade and sell herring spawn on kelp and its nature; whether, assuming there was such a right, it has been extinguished; and whether if such right continues to exist its infringement may be justified.

Background

1 The Chief Justice has set forth the facts and judicial history in some detail and I need only set them forth in brief terms here.

1 The appellants are members of the Heiltsuk people of British Columbia and were charged with having offered to sell and with having attempted to sell herring spawn on kelp contrary to s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, which provides that contravention of the Act or the regulations adopted thereunder is an offence punishable on summary conviction. The regulations, adopted by the Governor in Council in accordance with s. 34 of the Act, form a federal regulatory scheme relating to herring fishing in Canadian fisheries waters on the Pacific Coast. Section 20(3) of the regulations reads:

> 20. . . .
>
> (3) No person shall buy, sell, barter, or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

During the course of the proceedings, the appellants raised a number of issues relating to the evidence presented by the Crown and the elements of the offences with which they were charged. The appellants have abandoned most of these arguments, but nonetheless submitted before this Court that the Crown had failed to correctly prove an attempt to sell. On this issue, it is sufficient to say that I agree with the Chief Justice, and I shall therefore confine myself to the constitutional issues.

1 The appellants were initially convicted of both charges against them. Although the trial judge recognized that the Act and the regulations infringed the appellants' constitutional right to barter and sell herring spawn on kelp, he was of the opinion that such infringement was justified and, therefore, constitutionally valid. On

appeal to the Supreme Court of British Columbia, Anderson J. upheld the conviction on the second count (attempt to sell), concluding that the appellants' constitutional right to trade herring spawn on kelp was not infringed by the Act or its regulations. A majority of a five-judge panel of the Court of Appeal for British Columbia (1993), 80 B.C.L.R. (2d) 133, dismissed the appellants' appeal with respect to the second count, finding that they were not at the time the offences were allegedly committed exercising an aboriginal right. The appellants applied for and were granted leave to appeal to this Court. Subsequently, the Chief Justice stated the following constitutional question:

> Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants 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 appellants?

Analysis

1 It will, I think, be useful to set forth my conclusions at the outset. I have had the advantage of reading the reasons of the Chief Justice and those of my colleagues Justices L'Heureux-Dubé and McLachlin in the instant appeals and in the companion cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672. Although I am in general agreement with the framework articulated by the Chief Justice in *Van der Peet* pertaining to the definition of the nature and scope of aboriginal rights recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*, I cannot share his views regarding its application to the present case. As I see it, the appellants have failed to establish that when they took part in the activities giving rise to this litigation, they were exercising an aboriginal right. Moreover, even if

the appellants had demonstrated that the Heiltsuk of British Columbia did at some time benefit from the aboriginal right claimed, I am of the view that any such right would now be extinguished. I would therefore dismiss the appeals and answer the constitutional question in the negative, and I need not enter into the issue of justification.

1. *The Aboriginal Right Issue*

1 In the *Van der Peet* case, the Chief Justice proceeded to a purposive analysis of s. 35(1) of the *Constitution Act, 1982* in defining the content of aboriginal rights as they are recognized and affirmed in our Constitution. This provision reads:

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

The basis of aboriginal rights, he explained, lies in aboriginal occupation of the territory that is now Canada before the arrival of Europeans. As Judson J. had earlier put it in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 328, "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, as he added, is the foundation of Indian title and, I would add, of aboriginal rights generally. It follows that these rights, though (as *R. v. Sparrow*, [1990] 1 S.C.R. 1075, confirms) exercisable by modern instrumentalities, must in essence be integrally related to traditional Indian habits and mode of life. To use the Chief Justice's expression, an aboriginal right is the right to engage in a practice or activity that is integral to their distinctive culture as it existed when the Europeans arrived. To gain constitutional status, such a right must

not have been extinguished by the Crown before the coming into force of s. 35(1) in 1982.

1 The trial judge, Lemiski Prov. Ct. J., came to the conclusion that the Heiltsuk people of British Columbia did have an aboriginal right, within the meaning of s. 35(1), to barter and trade herring spawn on kelp, but that the activities the appellants engaged in at the time the offences were allegedly committed were very different from the traditional activities that had given rise to that aboriginal right. In coming to this conclusion, Lemiski Prov. Ct. J. had the benefit of this Court's decision in *Sparrow*, *supra*, and it is apparent that he, too, shared the view that an aboriginal right pertained to what formed an integral part of the distinctive culture of a given aboriginal society. His conclusions of facts explaining his position are stated in the following passage of his reasons:

> This is not a situation where a small quantity of spawn was openly sold, traded or bartered in the Bella Bella region.
>
> The Accused were attempting to sell a relatively large quantity of spawn in a surreptitious manner to a foreign buyer in a location far removed from the Heiltsuk Band's region. In the total context of the historical manner and extent of the herring spawn on kelp trade by the Heiltsuk Band and the present manner and extent of commercial trade Fisheries Officers were justified in interfering with this transaction.
>
> The overall justification lies within the broad definition of proper management and conservation of the resource. The special trust relationship cannot be applied to offset that because of the unique circumstances.
>
> I am satisfied that this transaction was totally out of character and context with respect to either any existing exercise of aboriginal rights to sell fish or any licensed sale. In *Sparrow* the Supreme Court of Canada said:

"Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group".

> There is no evidence before me that the Accused were conducting a transaction "in keeping with the culture and existence" of the Heiltsuk Band. [Emphasis added.]

1 On this basis, I would conclude that the appellants have not established that they were exercising an aboriginal right at the time the alleged offences were committed. I am prepared to agree that the Heiltsuk had an aboriginal right to barter and trade herring spawn on kelp to a certain degree. The evidence demonstrated that the Heiltsuk had been engaged in such activities for some time before contact with the Europeans and those activities, at times, involved very large quantities of fish. As the evidence demonstrated, such activities had special significance to the Heiltsuk. After the resource had satisfied their own needs, they engaged in such trading activities only because they valued sharing resources with other bands who did not have access to such a resource. As the majority of the Court of Appeal put it, at para. 50: "[t]he aboriginal activity was rooted in a culture which gave significance to sharing a resource, to which one nation had ready access, while other Indian peoples did not." In that sense, the bartering and trading of herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk Band because of the distinctive significance such activities had for them. That special significance is what made bartering and trading in herring spawn on kelp a part of their distinctive culture.

1 It is important to underline that the trial judge's findings of fact are to the effect that the activity of bartering and trading historically engaged in by the Heiltsuk people was not in itself of a kind that can be characterized as forming an integral part of

their distinctive culture. Bartering and trading was integral to the distinctive culture of the Heiltsuk Band because of the context in which it occurred. Without it, such activity does not constitute an integral part of their distinctive culture and thus any trading and bartering that is not done in that context cannot in any way be said to form an integral part of the distinctive culture of the Heiltsuk society.

1 Accordingly, I agree with the trial judge and the majority of the Court of Appeal that the activities the appellants were engaged in when the offences were allegedly committed did not form an integral part of the distinctive culture of the Heiltsuk people. It is elementary that when the Heiltsuk trade herring spawn on kelp in large quantities to Japanese clients, they do so for the unique -- although quite legitimate -- purpose of satisfying their own financial interests and clearly not in pursuance of the values rooted in their cultural distinctiveness to which I have referred. Consequently, I do not think that the aboriginal rights of the Heiltsuk people are infringed because they cannot by virtue of such rights sell herring spawn on kelp as they wish to Japanese interests.

1 My conviction is strengthened by the fact that the evidence established that it was not before the 1970s that the Heiltsuk engaged in commercial activities involving herring spawn on kelp and that they did so in response to a strong demand for the product from Asian markets. The Heiltsuk herring spawn on kelp industry therefore developed in order to take advantage of an economic opportunity created by that strong demand (see also *Heiltsuk Indian Band v. Canada* (1993), 59 F.T.R. 308). We are light

years away from the ancient practice of sharing resources with fellow bands in furtherance of spiritual ideals.

1 In view of the different conclusion arrived at by the Chief Justice, however, it becomes important to examine in more detail the factual and evidentiary foundation that lies at the root of our disagreement. Briefly, the Chief Justice's conclusion is that the appellants had successfully established that when they offered to sell herring spawn on kelp -- the events that led to the charges -- they were exercising an aboriginal right. In his view, the facts as found by the trial judge, as well as the evidence he relied upon, supported the appellants' claim that the "exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the culture of the Heiltsuk prior to contact" (at para. 26). He also added that the facts supported the appellants' further claim that "the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk" (at para. 26). He referred to the trial judge's comments, found under sub-heading 2 "Ancestral Activity ('Existing Rights') of Part IV of his reasons, which I will for convenience repeat:

> It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.
>
> I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp. The exhibited Journal of Alexander McKenzie [*sic*] dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.
>
> The Crown conceded that there may have been some incidental local trade but questions its extent and importance. The very fact that early explorers and visitors to the Bella Bella region noted this trading has to enhance its significance. All the various descriptions of this trading activity are in accord with

> common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting.

1 With respect, I cannot agree with the Chief Justice's conclusion. On the contrary, as I indicated earlier, my understanding of the trial judge's reasons is that he found the appellants had failed to establish that they were exercising an aboriginal right when they attempted to sell the herring spawn on kelp. The findings of fact of the trial judge were so understood and accepted by both the British Columbia Supreme Court and the Court of Appeal. The appellants have not convinced me that these should be disturbed. As I see it, the confusion arises from the fact that the trial judge made some of his findings -- in the first of the passages from his reasons cited earlier (para. 7) -- in the course of addressing the issue of justification. These findings were relevant to the definition of the scope of the aboriginal right at issue rather than to the issue of justification and he should have concluded from these that the appellants had failed to establish that they were exercising an aboriginal right when they attempted to sell the herring spawn on kelp.

1 To fully understand the trial judge's reasoning, it is important to carefully review the passage from his reasons to which I have just referred. On the one hand, the trial judge found that the appellants established that the Heiltsuk people had had in a particular context an aboriginal right to barter and trade herring spawn on kelp to a certain extent, based on the findings of facts he made, and to which the Chief Justice referred. But he clearly was of the opinion that this is not what the appellants were doing here. The nature, the extent and the context in which the impugned transactions took place were such that they had absolutely no relationship to the traditional activities

of trading and bartering herring spawn on kelp that had given rise to an aboriginal right.

1 Anderson J. of the British Columbia Supreme Court also made comments relevant to the definition of the scope of the right at issue in the part of his reasons regarding justification. He first agreed with the trial judge that "the Heiltsuk Band historically had taken herring spawn on kelp for food and domestic purposes and also had engaged in inter-tribal trading and bartering of herring spawn and accordingly, that they had an aboriginal right to do so". But he added -- in the course of dealing with justification -- that he had not been able to "translate that right into an absolute and unfettered right to harvest herring spawn in any quantity and to sell the spawn so harvested commercially". The majority of the Court of Appeal correctly interpreted the scope of the trial judge's analysis that, at the end of the day, indicated that the appellants had failed to establish that they were exercising an aboriginal right when they offered to sell the herring spawn on kelp. Macfarlane J.A. had this to say, at paras. 49-52:

> It is clear that the trial judge and the summary appeal judge did not view the activity in question as being an integral part of the distinctive culture of the Heiltsuk people. I agree that the activity is different in nature and quality than the aboriginal right identified by the evidence.
>
> The case is not one that turns on quantity, although both judges below took account of the quantity involved. There was evidence of considerable quantities being transported to other Indians in aboriginal times. But the quality and character of the activity in aboriginal times was quite different from that disclosed by the evidence in this case. The aboriginal activity was rooted in a culture which gave significance to sharing a resource, to which one nation had ready access, while other Indian peoples did not.
>
> Both judges below said that the activity in question in this case was not of the same character as the activity which attracts protection as an aboriginal right.

> In my view, the appellants have not established that they were exercising an aboriginal right when they attempted to sell the product in Vancouver. [Emphasis added.]

1 As the Chief Justice explained in his reasons in *Van der Peet*, *supra*, taking into account the perspective of the aboriginal people is necessary because one of the purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. But it is also necessary to do so in order to properly delineate the scope of aboriginal rights. The perspective a given aboriginal people had regarding a given practice indicates its place within its society and, ultimately, whether it was integral to its distinctive culture and to what extent. This, I think, is clear from the reasons of the Chief Justice in *Van der Peet* (see para. 58) as I understand them, but, with respect, I do not think it was properly taken into account in his analysis here given the findings of fact made by the trial judge.

1 The conclusion arrived at by the Chief Justice to the effect that the facts supported the appellants' further claim that "the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk" people, therefore, seems to me wholly inconsistent with the findings of fact made by the trial judge and confirmed by both appellate courts to the effect that the impugned transactions lacked that fundamental element upon which it was found that historical trading and bartering practices was an aboriginal right. That is why I cannot agree with the Chief Justice's analysis and conclusion.

1 I would add that in *Van der Peet*, *supra*, the Chief Justice held, at para. 59, that a "practical way" to assess whether a given activity was integral to the distinctive culture of a given aboriginal society is to ask "whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is". I do not think it is possible in the present case to answer this question in the affirmative when the evidence and the findings of fact made by the trial judge upon it, and followed by both appellate courts, are properly taken into account. The impugned transactions occurred outside the particular context that constitutes the specific reason why ancient trading and bartering practices were considered integral to the distinctive culture of the Heiltsuk.

1 I, therefore, conclude that the appellants have failed to establish that, in engaging in the activities that have given rise to this litigation, they were exercising an aboriginal right.

2. *The Issue of Extinguishment*

1 Section 35(1) of the *Constitution Act, 1982* guarantees existing treaty and aboriginal rights. As this Court noted in *Sparrow*, *supra*, this implies that rights falling within the purview of s. 35(1) are those which had not been extinguished by the Crown pursuant to its power to do so when this provision came into force on April 17, 1982. The Court also made clear in *Sparrow* that the party invoking extinguishment has the onus of demonstrating that the Crown had expressed a clear and plain intention of extinguishing the aboriginal right at issue.

1 It is important at the outset to emphasize that, contrary to the views of Lambert J.A., the *Sparrow* decision only stands for the proposition that the Crown had not expressed a clear and plain intention to extinguish aboriginal rights regarding fishing for food, including social and ceremonial purposes, in British Columbia. This Court was very careful to confine its reasons to the specific circumstances of that case and it would be incorrect to hold that *Sparrow* stands for the proposition that the Crown has never expressed any intention to extinguish aboriginal rights -- assuming they exist -- relating to fishing for commercial or livelihood purposes. The Court stated, at p. 1101:

> In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes. [Emphasis in original.]

1 Before this Court, the Crown's argument was twofold. Its first submission was that Order in Council P.C. 2539 dated September 11, 1917, reveals a clear and plain intention on the part of the Crown to extinguish any aboriginal rights relating to commercial fisheries in British Columbia. Alternatively, it submitted that the fisheries regulations applicable in British Columbia regarding commercial harvesting of herring spawn on kelp before the coming into force of s. 35(1) of the *Constitution Act, 1982* intended to limit aboriginal activity in a way that indicates the required clear and plain intention to extinguish the aboriginal right at issue.

1 The Crown urges this Court to consider Order in Council P.C. 2539 carefully. The point, I think, is important, for in my view the Order in Council reveals a plain, clear and unequivocal intention on the part of the Crown to extinguish any aboriginal rights relating to commercial fisheries in British Columbia, and I shall first turn to that issue.

1 Order in Council P.C. 2539 amended s. 8(2) of the *Special Fishery Regulations for the Province of British Columbia* dated February 9, 1915 in order to give the fishing authorities more effective means to enforce the prohibition regarding commercial fisheries found at that time in the regulations relating to the Indian food fishing rights, while also vesting in the Chief Inspector of Fisheries the power to require permits for Indian fishing for food. As this Court held in *Sparrow*, *supra*, at p. 1096, "[t]he 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food" (emphasis added). The prohibition found in s. 8(2) had been introduced in the *1894 Regulations* (as s. 1), one of the very first enactments dealing with Indian Fisheries in British Columbia. Although I have found it useful to underline some key passages, it is necessary to consider Order in Council 2539 in its entirety in order to fully understand its meaning. It reads:

> 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 permitted to do so for their own food purposes only, and to this end subsection 2 of section 8 of the Special Fishery Regulations for British Columbia provides as follows: --

"2. Indians may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for themselves and their families, but for no other purpose; but no Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved."

And whereas notwithstanding this concession, great difficulty is being experienced in preventing the Indians from catching salmon in such waters for commercial purposes and recently, an Indian was convicted before a local magistrate for a violation of the above quoted regulation, the evidence being that he had been found fishing and subsequently selling fish. The case was appealed and the decision of the magistrate reversed, it being held that there was no proof that the fish caught by the Indian were those sold by him;

And whereas it is further represented that it is practically impossible for the Fishery Officers to keep fish that may be caught by the Indians in non-tidal waters, ostensibly for their own food purposes, under observation from the time they are caught until they are finally disposed of in one way or another;

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: --

Subsection 2 of section 8 of the Special Fishery Regulations for the Province of British Columbia, adopted by Order in Council of the 9th February, 1915, is hereby rescinded, and the following is hereby enacted and substituted in lieu thereof: --

"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. . . . An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations.
>
> (a) Proof of a sale or of a disposition by any other means by an Indian of any fish shall be prima facie evidence that such fish was caught by the said Indian, and that it was caught for a purpose other than to be used as food for himself or his family, and shall throw on the Indian the onus of proving that such fish was not caught under or pursuant to the provisions of any such permit.
>
> (b) No Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.
>
> (c) Any person buying any fish or portion of any fish caught under such permit shall be guilty of an offence against these regulations." [Emphasis added.]

1 The key to a proper understanding of the Order in Council lies in its preamble, in which the purpose and rationale of the prohibition is clearly stated. In the first two paragraphs of the preamble, there is an explicit reference to (a) the fact that the aboriginal peoples of British Columbia had been catching salmon by means of spears and otherwise "since time immemorial" and to (b) the fact that, in view of the great importance the aboriginal people of British Columbia attached to that practice, they have been permitted to do so for their own food purposes as provided for in s. 8(2) of the 1915 regulations. To me, this constitutes explicit recognition on the part of the Crown of the importance of allowing the aboriginal people of British Columbia to catch fish as they had been doing since time immemorial. Therefore, the permission provided for in s. 8(2) constitutes a positive legislative recognition of the aboriginal people's right to engage in fishing practices they had engaged in since time immemorial

and which had great importance to them. In other words, in light of this preamble, s. 8(2) constitutes the translation of an acknowledged aboriginal practice into a statutory right.

1 However, it is expressly noted in the preamble, as it is in s. 8(2), that this "concession" on the part of the Crown in favour of aboriginal peoples of British Columbia regarding traditional fishing practices was not to have any commercial dimension. In other words, the Crown refused to recognize that traditional aboriginal fishing practices could in any way translate into statutory rights relating to commercial fisheries while expressly providing that engaging in commercial practices in the exercise of the Indian statutory right to food fishing was prohibited and constituted a regulatory offence.

1 I cannot come to any other conclusion than that Order in Council P.C. 2539 evinces a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries -- should they ever have existed. When the Crown has specifically chosen to address the issue of the translation of aboriginal practices into statutory rights and has expressly decided to limit the scope of these rights, as was done in British Columbia in relation to Indian fishing practices, then it follows, in my view, that aboriginal rights relating to practices that were specifically excluded were thereby extinguished.

1 I also note that, as the respondent explained, s. 8(2) has always been a central feature of the regulatory scheme regarding the Indian food fishery in British

Columbia since 1894 (*Fishery Regulations for the Province of British Columbia*, P.C. 650); see, for example, s. 13(2) of the 1922 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 1918), s. 15 of the 1925 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 483), s. 11(2) of the 1930 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 512), s. 10(2) of the 1938 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 899), s. 32 of the 1954 Regulations (*British Columbia Fishery Regulations*, SOR/54-659), s. 29 of the 1977 Regulations (*British Columbia Fishery (General) Regulations*, SOR/77-716), s. 27 of the 1984 Regulations (*British Columbia Fishery (General) Regulations*, SOR/84-248). Thus, in light of the provision's rationale as stated explicitly in Order in Council 2539, it seems to me that it has always been a central feature of the regulatory scheme regarding the Indian food fishery in British Columbia that the Crown did not perceive the Indians' fishing rights rooted in practices integral to their distinctive culture for centuries as extending to commercial fisheries.

1 My colleague Justice McLachlin, in her reasons, expresses the opinion in *Van der Peet*, *supra*, that Order in Council P.C. 2539 did not extinguish aboriginal rights to fish commercially for two reasons. The first is that a clear and plain intention on the part of the Crown to extinguish an aboriginal right can only be found if three elements are present: acknowledgment of an aboriginal right, conflict of the right proposed with policy and resolution of the two. Order in Council P.C. 2539 fails to meet that test, she states, because "[t]here is no recognition in the words of the regulation of any aboriginal right to fish"; see para. 289. Her second reason is that

aboriginal peoples of British Columbia have never been totally prohibited from engaging in commercial fisheries since it has always been available to them to do so according to the regulatory scheme relating to commercial fisheries.

1 I do not agree with my colleague that finding a clear and plain intention should require an acknowledgment of the existence of an aboriginal right on the part of the Crown. Although the fiduciary nature of the relationship between the Crown and aboriginal peoples must be taken into account in assessing whether or not a clear and plain intention to extinguish an aboriginal right exists in a given scheme, one must be careful not to set standards that could realistically never be met by the Crown since this would, as a practical matter, render virtually meaningless the Crown's power to extinguish aboriginal rights. Historically, the Crown has always been very reluctant to recognize any legal effect to concepts such as "aboriginal rights" and "aboriginal title", as this Court discussed at length in *Sparrow*, *supra*, at pp. 1103 *et seq.* This historical reality cannot be ignored in assessing whether a plain and clear intention to extinguish an aboriginal right exists in a given context. To require specific acknowledgment of the existence of an aboriginal right by the Crown in the manner proposed by my colleague McLachlin J. would for that reason not, in my view, be realistic. Indeed such an approach has been implicitly rejected by this Court; see, for example, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654.

1 I also disagree with my colleague's reasoning that Order in Council P.C. 2539 does not constitute a clear and plain intention to extinguish an aboriginal right because aboriginal peoples had always been permitted to participate in commercial

fisheries in accordance with the distinct regulatory scheme relating to commercial fisheries. As I mentioned, I think the Order in Council speaks for itself. It seems to me that when, in regulations dealing specifically with the rights of the Indians to fish, it prohibited them from engaging in commercial fisheries, it must have intended to limit their rights *qua* Indians. I do not see that it is necessary for the Crown to prohibit them from fishing under regulations directed not only to Indians but also to all members of the public.

1 It is also important to note that although commercial fishing was, generally speaking, not totally prohibited, commercial harvesting of herring spawn on kelp was the subject of a total prohibition until 1974. For that reason, the considerations to be taken into account at this stage of the analysis are different from those in *Van der Peet, supra,* because in that case a general aboriginal right to commercial fisheries was claimed, as opposed to the more specific right to commercial harvesting of herring spawn on kelp claimed in the instant case. This leads me to discuss briefly the Crown's second submission.

1 The Crown argued that a clear and plain intention on the part of the Crown to extinguish the aboriginal right claimed by the appellants could be found in the regulatory scheme relating to commercial harvesting of herring spawn on kelp. That scheme has for many years prohibited commercial harvesting of herring spawn on kelp, as indicated by the Chief Justice and McLachlin J., although since 1974 the activity has been permitted to those to whom a licence has been issued for that purpose. The Crown urges this Court to distinguish the regulations at issue in *Sparrow, supra,* on the

basis that those regulations were concerned with protecting the food fishery for aboriginal people and were, therefore, found to constitute an affirmation of that right.

1 The Chief Justice dismissed the argument on the basis that the regulatory scheme relating to commercial harvesting of herring spawn on kelp was analogous to that discussed in *Sparrow*, *supra*. There, this Court addressed the question of extinguishment in the context of the aboriginal right of the Musqueam Indians of British Columbia to fish for food and ceremonial purposes. This Court's analysis demonstrated that, over the years, Indian fishing for food and ceremonial purposes had been progressively regulated; see pp. 1095 *et seq.* as well as the reasons of Dickson J. (as he then was) in *Jack v. The Queen*, [1980] 1 S.C.R. 294, at pp. 308 *et seq.* But, however regulated the activity became, this Court refused to find that the aboriginal right of fishing for food and social and ceremonial purposes had been extinguished. The Court had this to say, at pp. 1097 and 1099:

> At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.
>
> . . .
>
> There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

1 If this were all, I would be inclined to agree with the Chief Justice's position on this point. But I think there is an important distinction to be drawn between the regulations at issue here and those discussed in *Sparrow*. While commercial harvesting of herring spawn on kelp had been totally prohibited in British Columbia until 1974, Indian fishing for food including social and ceremonial purposes had never been prohibited when s. 35(1) of the *Constitution Act, 1982* came into force. For this reason, I would refrain from holding that the reasoning adopted by this Court in *Sparrow*, which was to the effect that mere regulation of a right does not amount to a clear and plain intention to extinguish an aboriginal right, would be determinative of the Crown's second argument in the present case.

1 However, I prefer not to discuss this issue in further detail and will not, therefore, discuss whether the prohibition relating to commercial harvesting of herring spawn on kelp in force until 1974 in itself indicates a plain and clear intention on the part of the Crown to extinguish the aboriginal right claimed by the appellants. It is not necessary for me to do so since I have already concluded that the Crown has expressed a clear and plain intention in Order in Council P.C. 2539 to extinguish any aboriginal rights relating to commercial fisheries in British Columbia -- assuming they ever existed. The question whether extinguishment of aboriginal rights can occur by necessary implication and if so, in what circumstances, is therefore left to another day.

1 On a final note, I wish to emphasize that our Court has recently held on two different occasions that s. 12 of the *Natural Resources Transfer Agreement* (confirmed by the *Constitution Act, 1930*, R.S.C., 1985, App. II, No. 26, Schedule 2) constituted a

clear and plain intention on the part of the Crown to extinguish treaty rights to commercial hunting; see *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 933 (*per* Cory J.), and *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 46 (*per* Cory J.). This provision reads:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

This provision is similar in many respects to Order in Council P.C. 2539. They both are provisions in which the Crown specifically effected a translation of traditional aboriginal practices into legal rights. In both cases, the rights were limited to sustenance purposes. However, in the Order in Council, fishing for commercial purposes was expressly excluded. This was not the case in s. 12 of the *Natural Resources Transfer Agreement* in which no mention is made of commercial practices. Nonetheless, our Court held that it sufficiently demonstrated a clear and plain intention on the part of the Crown to extinguish commercial rights to hunt for commercial purposes that had been recognized in a treaty. If s. 12 reveals a clear and plain intention to extinguish treaty rights relating to commercial hunting, it is difficult to see how this Court could conclude that Order in Council P.C. 2539 -- which is more explicit regarding the exclusion of any commercial component of fishing rights -- does not reveal a clear and plain intention on the part of the Crown to extinguish commercial fishing rights in British Columbia.

1 I am, therefore, of the view that the Crown has established that, assuming appellants were exercising an aboriginal right when they offered to sell herring spawn on kelp, such a right has been extinguished.

Conclusion

1 I would dismiss the appeals and answer the constitutional question in the negative.

//*L'Heureux-Dubé J.*//

The following are the reasons delivered by

2 L'HEUREUX-DUBÉ J. -- This appeal, as well as the appeals in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, in which reasons are being released concurrently, concern aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

3 This broad issue was dealt with in *Van der Peet*, released concurrently. Both cases involve mainly the definition of the nature and extent of aboriginal rights. In this case, the particular question is whether the Heiltsuk Band, of which the appellants are members, possesses an existing aboriginal right to fish which includes the right to sell, trade and barter fish for commercial purposes. If this right exists, the Court must then determine whether the *Pacific Herring Fishery Regulations*,

SOR/84-324, enacted pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14, constitute a *prima facie* infringement of such right and, if so, whether the infringement is justified.

4 The Chief Justice has set out the facts and judgments and there is no need to restate them here. I will refer only to the constitutional question that he formulated after leave to appeal was granted by this Court:

> Is s. 20(3) of the *Pacific Herring Fishery Regulations*, SOR/84-324, as it read on April 28, 1988, of no force or effect with respect to the appellants 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 appellants?

5 The Chief Justice is of the view that the Heiltsuk people do possess an aboriginal right to fish which includes the right to sell fish for commercial purposes. As well, referring to the *Sparrow* test, he holds that the aboriginal right to sell fish was not extinguished by a clear and plain intention and that s. 20(3) of the *Pacific Herring Fishery Regulations* constitutes a *prima facie* infringement of such right. He concludes, however, that the case should be remanded to trial on the question of justification because there is insufficient evidence to enable this Court to decide it. Lamer C.J. also opines that the elements of the infraction are all proven. I agree with the result reached by the Chief Justice and, generally, with the reasons he adopts subject, however, to the following remarks regarding mainly the definition of the nature and extent of aboriginal rights, and the delineation of the aboriginal right claimed in this case.

6 I pause here to note that this case is confined to the recognition of an aboriginal right and to the protection afforded to it under s. 35(1) of the *Constitution Act, 1982*. The appellants did not invoke by-laws applicable on reserve lands, nor did they rely on any aboriginal title or treaty rights. The appellants simply argue that the Heiltsuk possess an aboriginal right to fish — arising out of the historic occupation and use of their ancestral lands — which includes the right to sell, trade and barter fish for commercial purposes, and that this right benefits from the s. 35(1) constitutional protection.

7 It is also noteworthy that the questions at issue must be considered in light of the analytical framework for constitutional claims of aboriginal right set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In a nutshell, the *Sparrow* test 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. The case at bar involves all but the last step.

8 This being said, in the following discussion, I will briefly examine the approach to the interpretation of the nature and extent of aboriginal rights as well as the delineation of the aboriginal right claimed, and how they lead me to the same result as the Chief Justice on the question of the definition of the aboriginal right.

I. Interpretation of Aboriginal Rights

9 At the outset, I want to emphasize that when defining the nature and extent of constitutionally protected aboriginal rights, it is important to keep in mind the traditional and fundamental interpretative canons relating to aboriginal law and to s. 35(1) of the *Constitution Act, 1982*, which can be summarized as follows. Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives. Further, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Finally, but most significantly, aboriginal rights protected under s. 35(1) have to be viewed in the context of the specific history and culture of the native society and with regard to native perspective on the meaning of the rights asserted. I wish to point out, in passing, that although the Chief Justice claims to use these principles of interpretation, his approach to the definition of aboriginal rights appears to be somewhat restrictive.

10 The approach proposed by the Chief Justice centres on individualized practices of an aboriginal group of people which existed prior to contact with the Europeans. With respect, as I explained in detail in *Van der Peet*, *supra* — which reasons should be read as if herein recited at length — this position poses serious problems relating to both the characteristics and the time aspects of the definition of aboriginal rights.

11 In *Van der Peet*, after a detailed review of the possible approaches to the interpretation of aboriginal rights under s. 35(1), I concluded that the "frozen right" approach focusing on aboriginal practices should not be adopted. Instead, the

definition of aboriginal rights should refer to the notion of "integral part of their distinctive culture" and should "permit their [aboriginal rights'] evolution over time" (see *Sparrow*, *supra*, at pp. 1099 and 1093). I gave the following guidelines on this approach (at para. 180):

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

12 Before reviewing the evidence presented at trial to determine whether the distinctive aboriginal culture of the Heiltsuk supports the recognition of an aboriginal right, we have to delineate the aboriginal right claimed in this case. That I now propose to do.

II. The Delineation of the Aboriginal Right Claimed

13 At the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 133, as in *Van der Peet*, *supra*, the majority framed the issue as being whether the Heiltsuk possess an aboriginal right to fish which includes the right to make commercial use of the fish. As I discussed in *Van der Peet*, case law on treaty and aboriginal rights

relating to trade supports the making of a distinction 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: see *Sparrow*, *supra*; *R. v. Horseman*, [1990] 1 S.C.R. 901; and *R. v. Jones* (1993), 14 O.R. (3d) 421. In this regard, I agree with the Chief Justice that the delineation of aboriginal rights must be viewed on a continuum.

14 In this case, because of the type of transactions which led to the convictions, it appears that the aboriginal right at issue falls on the part of the spectrum relating to the sale, trade and barter of fish for commercial purposes, not on the part dealing with livelihood, support and sustenance purposes (see *Van der Peet*, *supra*, at para. 192).

15 The appellants were charged with violating s. 20(3) of the *Pacific Herring Fishery Regulations*, thereby committing an offence contrary to s. 61(1) of the *Fisheries Act*. These charges arose out of a series of events in April 1988 aimed at an attempt to sell herring spawn on kelp that was not harvested or sold under the authority of a Category J Licence. The appellants covertly transported 4,200 pounds of herring spawn on kelp from Bella Bella and then attempted to sell it to Mr. Hirose, the owner of Seaborn Enterprises Ltd. The appellants were arrested by Fisheries Officers after they returned from Mr. Hirose's store.

16 There is no evidence as to the purposes for which the appellants sold the herring spawn on kelp or as to the use that they were going to make of the money. However, from the overall evidence on the record, especially that of the quantity of

herring spawn on kelp that the two appellants wanted to sell, it is reasonable to find that the attempted transaction between the appellants and Mr. Hirose was directed at providing an economic profit. Besides, the appellants themselves argued both before the courts below and before this Court that the Heiltsuk possess an aboriginal right to fish for what amounts to be commercial purposes.

17 The legislative provision under constitutional challenge in this case is aimed at both commercial and non-commercial sale, trade and barter of herring spawn on kelp. Section 20(3) of the *Pacific Herring Fishery Regulations* reads as follows:

> 20. . . .
>
> (3) No person shall buy, sell, barter or attempt to buy, sell, or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

This provision prohibits any sale, trade or barter of herring spawn on kelp — whether for livelihood, support and sustenance purposes or for purely commercial purposes — except for that harvested under the authority of a Category J licence. If the facts giving rise to the offence indicated that the sale, trade and barter were for livelihood, support and maintenance, the question of the validity of s. 20(3) of the Regulations would raise a different issue, one which does not arise here. In the instant case, the aboriginal right claimed is the right to sell, trade and barter fish for commercial purposes and we must decide whether, in that respect, the provision under scrutiny complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

18 It is now necessary to look at the historical evidence to see whether the particular group of aboriginal people, the Heiltsuk Band, of which the appellants are members, have sold, traded and bartered fish for commercial purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time.

III. Definition of Aboriginal Rights

19 As I have already noted elsewhere, the approach I favour to interpret the nature and extent of aboriginal rights differs significantly from the one adopted by the Chief Justice. In my view, the question is whether the evidence reveals that the sale, trade and barter of herring spawn on kelp for commercial purposes have formed an integral part of the Heiltsuk people's distinctive aboriginal culture — i.e., to have been sufficiently significant and fundamental to their culture and social organization — for a substantial continuous period of time. Although the Chief Justice refers to the notion of "integral part of the distinctive aboriginal culture" in his interpretation of the aboriginal right at hand, he focuses on pre-contact individualized aboriginal practices, an approach from which I must distance myself.

20 The findings of fact by the trial judge as well as the substantial review of the evidence by the Chief Justice show that the trade of herring spawn on kelp for commercial purposes among the Heiltsuk and with other native people was extensive and organized in a market-type economy. More importantly, it appears, especially from a native perspective, that such activities formed part of, and was indeed integral to, the

distinctive aboriginal culture of the Heiltsuk. Put another way, to use the terminology of the test proposed in *Van der Peet*, *supra*, the sale, trade and barter of fish for commercial purposes was sufficiently significant and fundamental to the culture and social organization of the Heiltsuk people. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* is met in this case.

21 Also, the evidence reveals that the Heiltsuk have sold, traded and bartered fish for commercial purposes 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 (see *Van der Peet*, *supra*, at para. 178). Here, there is ample evidence showing that the Heiltsuk have traded herring spawn on kelp, in large enough amounts to be for commercial purposes, for centuries before the coming of the Europeans. Further, as the trial judge found after considering the historical record and expert evidence, such commercial activities have continued, though in modernized forms, until the present day. Therefore, the time requirement for the recognition of an aboriginal right is also met.

22 As a result, I agree with the Chief Justice that the Heiltsuk people, of which the appellants are members, possess an aboriginal right to sell, trade and barter fish for commercial purposes, which is protected under s. 35(1) of the *Constitution Act, 1982*. It remains to be determined, under the *Sparrow* test, whether such right is extinguished and whether the *Pacific Herring Fishery Regulations* infringe upon this right.

IV. Extinguishment and Infringement

23 As regards the issues of extinguishment and *prima facie* infringement, I agree for the most part with the reasons of the Chief Justice and the conclusions he reaches.

24 The Heiltsuk's aboriginal right to sale, trade and barter herring spawn on kelp for commercial purposes has not been extinguished by a "clear and plain" intention of the Sovereign (see *Sparrow*, *supra*, at p. 1099). In *N.T.C. Smokehouse*, *supra*, I emphasized that the hurdle to extinguish aboriginal rights is high indeed (at para. 78):

> I am prepared to accept that the extinguishment of aboriginal rights can be accomplished through a series of legislative acts. However, *Sparrow* specifically stands for the proposition that the intention to extinguish must nonetheless be clear and plain. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to extinguish it. Clear and plain means that the Government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. [Emphasis in original.]

25 In the case at bar, the respondent argues that the test is met when the aboriginal right and the activities contemplated by the legislation cannot co-exist. Such an approach, based on the view adopted by the United States Supreme Court in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), is irreconcilable with the "clear and plain intention" test favoured in Canada. As a result, the legislation relied upon by the respondent is insufficient to extinguish the aboriginal right to sell, trade and

barter fish for commercial purposes. In fact, as in *Sparrow*, *supra*, such legislation merely regulates aboriginal activities and does not amount to extinguishment.

26 Furthermore, as regards the question of *prima facie* infringement, s. 20(3) of the *Pacific Herring Fishery Regulations* no doubt violates such aboriginal right since it directly conflicts, both by its object and by its effects, with native sale, trade and barter of herring spawn on kelp. In *Sparrow*, Dickson C.J. and La Forest J. provided the following guidelines regarding infringement (at p. 1112):

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

27 Although I agree with the analysis of the Chief Justice on this issue, I want to emphasize that the burden to demonstrate that legislation infringes upon an existing aboriginal right, which is borne by the claimant, is fairly low. *Sparrow* speaks of "*prima facie*" infringement, which is defined in the *Black's Law Dictionary* (6th ed. 1990) as follows (at p. 1189): "Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably". Therefore, the aboriginal right claimant does not even have to prove on the balance of probability that

the impugned legislation constitutes an infringement, and surely not that it "clearly impinges" upon the right, as the Chief Justice seems to suggest. The only thing that the claimant must show is that, on its face, the legislation comes into conflict with a recognized aboriginal right, either because of its object or its effects. In the instant case, the appellants overwhelmingly discharged their burden in that regard.

28 Consequently, I conclude that the Heiltsuk Band's aboriginal right to sell, trade and barter fish for commercial purposes is "existing", as it has not been extinguished by a clear and plain intention of the Sovereign, and that s. 20(3) of the *Pacific Herring Fishery Regulations* constitutes a "*prima facie* infringement" of this aboriginal right, as *per* the *Sparrow* test.

29 As to the question of justification, I agree with the Chief Justice that there is insufficient evidence to rule on it and I agree as well with his comments on this issue, particularly as regards the doctrine of priority and our decision in *Jack v. The Queen*, [1980] 1 S.C.R. 294.

V. Disposition

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

//*McLachlin J.*//

The following are the reasons delivered by

31 MCLACHLIN J. -- This appeal concerns the right of the Heiltsuk of Bella Bella to sell herring spawn on kelp that is harvested from that region. The appellants, William and Donald Gladstone, harvested herring spawn on kelp near Bella Bella, transported it to Vancouver, and attempted to sell it there. The sale of herring spawn on kelp without a licence is prohibited. The appellants made a number of arguments in their defence before the lower courts. The only issue left to be decided by this Court is whether the Regulations prohibiting the sale of herring spawn on kelp are invalid because they infringe the appellants' aboriginal right, as per s. 35 of the *Constitution Act, 1982*. If the Regulations violate the appellants' aboriginal right, they will be invalidated to the extent of the conflict by s. 52 of the *Constitution Act, 1982*.

32 This case was heard with *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, released contemporaneously. In *Van der Peet*, I detail the approach I would adopt to the interpretation of aboriginal rights to use a fisheries resource. This decision applies the principles set out in *Van der Peet*.

33 The questions posed by this appeal are as follows:

1.Do the Heiltsuk possess an aboriginal right under s. 35(1) of the *Constitution Act, 1982* which entitles them to sell herring spawn on kelp?

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

(b) If so, has it been extinguished?

2.If the right is established, do the government Regulations prohibiting the sale of herring spawn on kelp infringe that right?

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

34 My conclusions in this appeal may be summarized as follows. Following the reasons I set out in *Van der Peet, supra,* the appellants, as members of the Heiltsuk Band, have established that they have an aboriginal right to harvest and sell herring spawn on kelp for sustenance purposes. That right was not extinguished by any regulatory legislation prior to 1982, and is therefore confirmed by the *Constitution Act, 1982*. The right is limited by the Heiltsuk's traditional reliance on the resource, which was to secure sustenance. It is also limited by the power of the Crown to limit or prohibit exploitation of the resource that is incompatible with its continued use. There is insufficient evidence to determine whether the current regulatory framework satisfies the sustenance needs of the Heiltsuk people. Therefore, the questions of whether the Heiltsuk's right to sell herring spawn on kelp for sustenance was infringed and, if so, whether any such infringement is justified by the Crown, must be decided at a new trial.

1. Has the Right of the Heiltsuk to Trade Herring Spawn on Kelp Been Established?

35 The test for determining whether an aboriginal people possesses an aboriginal right to trade fish is discussed in the companion case of *Van der Peet*. I there concluded, at paras. 278-79, that there is an aboriginal right

> to obtain from the river or the sea . . . 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.
>
> . . .
>
> 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.

36 The historical evidence in this case is somewhat different from the companion cases of *Van der Peet*, *supra*, and *N.T.C. Smokehouse*, *supra*. In those cases, the Sto:lo, Sheshaht and Opetchesaht peoples claimed the right to continue to sell fish from salmon fisheries off which they traditionally lived. The evidence in both cases indicated that there had been trade in fish with other aboriginal bands and with European settlers when they arrived. The trade that had occurred historically was on a small scale. Much of the trade was in the form of barter for other necessities such as other kinds of food and clothing, and other goods when trade expanded to European settlers. Some of the trade occurred at traditional potlatches, where social relations were formed and agreements made for peaceful cohabitation among different tribes. In

these cases, the evidence was that the peoples in question relied heavily on the salmon resource for their food needs, as well as for barter.

37 In this case, the Heiltsuk claim an aboriginal right to continue to trade in herring spawn on kelp from the Bella Bella region, where they have lived for at least two centuries. The appellants claim that the Heiltsuk relied on the herring spawn on kelp both as a food source and for trade. There is extensive evidence of historical trading of herring spawn on kelp between the Heiltsuk and the neighbouring aboriginal peoples. The trade that took place was on a large scale, involving quantities of herring spawn on kelp of at least 15 tonnes. As the trial judge put it:

> It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.
>
> I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp. The exhibited Journal of Alexander McKenzie dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.

The developed trading patterns of the Heiltsuk trade in herring spawn on kelp was undisputed. An expert witness for the defence put it this way:

> For at least two centuries the Heiltsuk have been the hub of a trade network, exporting herring spawn to almost all of the surrounding native people.
>
> . . .
>
> Herring spawn harvested, processed, and packaged by the Heiltsuk was traded to their Tsimshian, Kitimat, and Bella Coola neighbors on the mainland and to Kwakiutl on Vancouver Island. Some of these trade relations were noted in accounts written by the first white men to visit the central coast. Those of Alexander Mackenzie (1793), William Tolmie

> (1835) and James Douglas (1840) documenting Heiltsuk trade of herring spawn to Bella Coola, Kwakiutl, and Tsimshian, respectively, are corroborated by other accounts describing the same patterns of trade at much later dates.
>
> These early accounts describe a trade which was already established. This attests not only to the aboriginal nature of the trade, but also the existence of regularized relations between the groups engaged in these trading patterns.

The appellants' factum also cited expert evidence of the large quantities of trade in herring spawn on kelp:

> Pacific herring spawn only in certain locations. Consequently, some native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. This partly explains the extensive trade in spawn among native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favoured.
>
> After the spawn were processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and hampers.

38 The Court of Appeal, reviewed evidence of the diary of Alexander Mackenzie which indicated that, in exchange for the herring spawn on kelp, the Heiltsuk received "roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries". Lambert J.A. noted that food products were the principal commodity obtained by the Heiltsuk in exchange for the herring spawn on kelp. Other goods received in exchange for herring spawn on kelp included elk skins for clothing, blankets, and seaweed.

39 Thus, evidence of an established trading network is clear in this case. The Heiltsuk derived their sustenance from trade derived from the herring spawn on kelp

resource; they relied on trade to supply them with the necessaries of life, principally other food products.

40 The next question is whether the Heiltsuk's use of the resource of herring spawn on kelp was confined to sustenance or whether the trade in question allowed the band to accumulate wealth beyond that required for a basic standard of living. The evidence indicates that large quantities of herring spawn on kelp were traded -- amounts that would yield great wealth today because of large demand for herring spawn on kelp by foreign markets. However, the right to derive from a resource what was traditionally derived from that resource is not necessarily a right to harvest the same quantity of fish from that resource as was traditionally harvested. The right is rather to take from the fishery enough to secure "the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery".

41 Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. It follows that the aboriginal right to trade in herring spawn on kelp from the Bella Bella region is limited to such trade as secures the modern equivalent of sustenance: the basics of food, clothing and housing, supplemented by a few amenities.

2. Has the Heiltsuk Right to Sell Herring Spawn on Kelp Been Extinguished?

42 The Crown argued that if the Heiltsuk did have an aboriginal right to sell herring spawn on kelp, it was extinguished prior to 1982. The Crown refers to the regulatory scheme put in place in 1908, and Order in Council P.C. 2539 of 1917. This is the same regulatory scheme that the Crown put forth in *Van der Peet, supra*, to make the argument that any aboriginal right to fish commercially was extinguished prior to 1982. As discussed there, it does not support extinguishment.

43 The Crown also referred to provisions of the *Fisheries Act* of 1867-68 pertaining to the "young" of fish (S.C. 1868, c. 60, s. 13(9)): "No person shall fish for, catch, kill, buy, sell or possess the young of any of the fish named in this Act, or in any Regulation or Regulations under it". Because herring was a fish named under the Act, the prohibition extended to herring spawn on kelp. An exception provided for the harvesting of fish spawn by Indians for food purposes. This prohibition on the harvesting fish spawn continued until 1974, when the harvesting of fish spawn for sale was allowed with a permit. The Crown argues that these regulations extinguished any aboriginal right to sell herring spawn on kelp.

44 I cannot conclude that these regulations extinguished the aboriginal right of the Heiltsuk people to use herring spawn on kelp as a source of sustenance. The regulations do not manifest the "clear and plain" intention required to extinguish an aboriginal right. The most likely purpose of these regulatory measures was to conserve the young of the resource in order to foster the growth of the fisheries. A measure aimed at conservation of a resource is not inconsistent with a recognition of an

aboriginal right to make use of that resource. Indeed, there is no evidence that these regulations were intended to relate to the aboriginal right at all.

3. Does the Current Regulatory Scheme Infringe the Aboriginal Right to Fish commercially for Sustenance?

45 In *Van der Peet, supra*, at para. 298, I framed the question to be asked in order to determine whether the government has infringed the aboriginal right to fish for sustenance as follows: does the current regulatory scheme have the effect of "interfering with an existing aboriginal right"? The right is that of the Heiltsuk to sell herring spawn on kelp for sustenance purposes.

46 To demonstrate that an aboriginal right has been interfered with, an aboriginal person must establish a *prima facie* right to engage in the prohibited conduct at issue. However, the Crown may rebut the inference of infringement if it can demonstrate that the regulatory scheme, viewed as a whole, accommodates the collective aboriginal right in question.

47 As discussed above, the appellants, as members of the Heiltsuk, have a right to harvest and sell herring spawn on kelp for the purpose of sustenance, a right apparently denied by the regulation under which the appellants stand charged. Thus, the first requirement of the test is met.

48 However, the Crown denies infringement of the aboriginal right on the ground that the sale in question took place within a regulatory scheme which

sufficiently accommodates the right of the Heiltsuk to sell herring spawn on kelp. The Heiltsuk possessed a "Category J" licence to harvest and sell herring spawn on kelp at the time that the attempted sale at issue in this case took place. That licence was one of 28 licences issued to harvest and sell herring spawn on kelp during the 1988 season. It entitled the Heiltsuk to harvest 16,000 pounds of herring spawn on kelp, and the price per pound that year was between $25 and $28. The licence was issued in the name of one designated member of the Heiltsuk Band, but it was for use of the band as a whole. In short, in this case, unlike *Van der Peet* and *N.T.C. Smokehouse*, *supra*, the Crown argues that it has put in place a regulatory scheme that satisfies the aboriginal right.

49 The evidence does not disclose whether the "Category J" licence issued to the Heiltsuk was sufficient to satisfy the Heiltsuk's aboriginal right to sell herring spawn on kelp for sustenance. In order to determine whether the quantity of herring spawn on kelp allocated by the licence issued to the band was sufficient to satisfy the sustenance needs of the Heiltsuk, information as to their sustenance needs is required. I would refer the case for a new trial for determination of whether the projected revenue from the herring spawn on kelp sold pursuant to the "Category J" licence suffices to meet the Heiltsuk's sustenance needs.

4. Is the Limitation Placed on the Heiltsuk Right to Sell Herring Spawn on Kelp Justified?

50 Because of my position on the infringement issue, I do not reach this question. If infringement were established at a new trial, the question of whether such

an infringement was justified should be decided at that point, according to the principles set out in *Van der Peet*, *supra*.

5. Conclusion

51 I would allow the appeal to the extent of confirming the existence of an aboriginal right of the Heiltsuk to sell herring spawn on kelp for sustenance purposes. I would order a new trial in order to decide whether that right has been infringed, and if so, whether such an infringement has been justified.

Appeal allowed, LA FOREST J. *dissenting*.

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