NO. CA005325
VANCOUVER REGISTRY

ABORIGINAL RTS

COURT OF APPEAL

ON APPEAL FROM THE COUNTY COURT OF VANCOUVER FROM THE JUDGMENT OF THE HONOURABLE JUDGE LAMPERSON, PRONOUNCED THE 20TH DAY OF DECEMBER, 1985.

BETWEEN:

RONALD EDWARD SPARROW

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

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PART 1

STATEMENT OF FACTS

1. The Attorney General of British Columbia accepts the facts as stated by the Appellant with the addition that the offence was alleged and proved as occurring at Canoe Pass. It is common ground the offence was committed in the Fraser River estuary, which is tidal water.

A.B. p.1; Tr. p. 56-57; Tr. p. 25

App. Fac. p.1 l.41

2. Notice of Constitutional Question was served on the Attorney General of British Columbia on 5 October 1984 in relation to the proceedings in Provincial Court. Notice of Constitutional Question was served in relation to these proceedings on 11 August 1986. The Attorney General of British Columbia appears as intervenor pursuant to the Constitutional Question Act, R.S.B.C. 1979, c.63, s.8.

A.B. p. 3

PART 2

ISSUE ON APPEAL

1. Did the coming into effect of s.35 of the Constitution Act,1982, restrict Parliament's authority to regulate fishing by the Appellant, an Indian?

PART 3

ARGUMENT

1. It is the position of the Attorney General of British Columbia that the coming into effect of s.35 of the Constitution Act, 1982, in no way restricted or limited Parliament's authority to regulate fishing by the Appellant, an Indian, and that this case is accordingly governed by the decision of the Supreme Court of Canada in R. v. Derricksan (1976) 71 D.L.R. (3d) 159; 6 W.W.R. 480. Derricksan was decided by the Supreme Court of Canada three years after its split decision in Calder v. AGBC [1973] S.C.R. 313.

2. The issue for determination in this case, like Derricksan, supra, and R. v. Kruger and Manuel, ante, is not the existence or extinguishment of aboriginal rights, but the extent to which such rights, if they exist, may be subject to regulation.

> Derricksan, supra, p.160
>
> R. v. Kruger and Manuel; [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434, [1977] 4 W.W.R., 300

3. The Attorney General of British Columbia does not concede that the Appellant enjoys an aboriginal right to fish as alleged, nor that any such right is "an essential incident" of any "interest in the Reserve."

A.F. p.10, ll. 27-33

4. The alleged right can have no relationship to a reserve. In tidal waters, the Crown lacked the power to create a several fishery appurtenant to a reserve. English law as introduced into British Columbia as of 19 November 1858 recognized no private right of incorporeal fishery in tidal waters. The grant of such a fishery was beyond the prerogative powers of the Crown. The right asserted by the Appellant to be an "essential incident" appurtenant to "the reserve" is therefore unknown to the common law. It could only have been created with express statutory authority. No authority for such a grant, nor any such grant exists.

Law and Equity Act, RSBC 1979 c.224 s.2

AGBC v. AG Canada (Railway Belt Reference) [1914] A.C. 153

LaForest Natural Resources and Public Property under the Canadian Constitution 155-56 (1969)

PART 3

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5. Even if such an interest had been legislatively created as appurtenant to the Musqueam reserve, the fishery so created would be neither an aboriginal nor a treaty right and it would not therefore be "recognized and affirmed" or otherwise affected by s.35 of the Constitution Act, 1982. It would be a merely statutory right subject to federal regulatory jurisdiction under section 91(12) of the Constitution Act, 1867 (Sea Coast and Inland Fisheries).

6. Apart altogether from its alleged appurtenance to a Reserve, the existence or non-existence from time immemorial of a fishery by the Musqueam in the tidal waters of the Fraser River is irrelevant. Assuming such a fishery exists as a matter of aboriginal right, it is nevertheless subject to regulation under the Derricksan case, supra, which held that, assuming an aboriginal right to fisheries could be established, any such right was subject to the federal Fisheries Act and regulations thereunder.

7. An alleged aboriginal title or right, whether in respect of hunting, fishing or the title itself is subject to competent regulatory legislation.

R. v. Kruger and Manuel; supra

R. v. Derricksan, supra

Hamlet of Baker Lake v. Min. of Indian Affairs and Northern Development, [1980] 1 F.C. 518, 566, 568, 576, 577

8. This is so whether the right is asserted as aboriginal or is based on an "Indian treaty".

R. v. George [1966] S.C.R. 267, 55 D.L.R. (2d) 386

R. v. Sikyea [1964] S.C.R. 642, 50 D.L.R. (2d) 80, 49 W.W.R. 306

R. v. Kruger and Manuel, supra

9. Section 35 of the Constitution Act, 1982, was not intended to and did not revive interests which had been extinguished or subject to regulatory jurisdiction.

R. v. Steinhauer (1985) 63 A.R. 381, 15 C.R.R. 175 (Q.B.)

AG Ont. v. Bear Island Foundation, (1984) 15 D.L.R. (4th) 321,

Hogg, Constitutional Law of Canada, (1985 - 2d ed) p.565

10. The word existing in s.35 did not freeze the capacity of legislatures to enact competent legislation regulating the hunting, fishing and other activities of aboriginal peoples as of 1982.

R. v. Eninew (1984), 10 D.L.R. (4th) 137, 12 CCC (3d) 365, 32 Sask. R.237 (CA)

R. v. Hare and Debassige (may 9, 1985) 14 W.C.B. (Ont. C.A.)

Hogg, supra, p.566

11. The Appellant appears to concede that his fishing activities remain subject to federal legislative jurisdiction, but only to the extent that any restriction placed on those activities can be justified as a "necessary and reasonable conservation measure".

A.F. p.18 ll. 21-35

12. This limitation on the exercise of federal legislative power to regulate Indian fishing is argued to

result from the coming into effect of s.35 of the Constitution Act, 1982. Such a limitation is entirely inconsistent with the conclusion of the Supreme Court of Canada in Kruger, supra, at p. 111-112:

> However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority.

13. The rights referred to in this passage were those existing when s.35 of the Constitution Act, 1982 came into effect. Though "recognized and affirmed" by that section they were, and remain, "subject to regulation and curtailment by the appropriate legislative authority."

14. The subsequent passage on p. 112 of the Supreme Court of Canada's Kruger judgment, suggests a possible limitation on provincial authority to regulate Indian hunting based on division of powers considerations. A Province might, in exercising its jurisdiction over wildlife conservation, make a law with a "special impact" on Indians. Such a law might then not be one of "general application" applicable to Indians of its own force. This was the effect of the application of the Wildlife Act to Indians contended for in R. v. Dick, (1986) 23 D.L.R. (4th) 33. In that case

the Supreme Court of Canada was prepared to assume the same Wildlife Act provision considered in Kruger had a "special impact" on Indians, i.e. that it did "impair [their] Indianness".

> While it is assumed that the Wildlife Act impairs the status or capacity of Appellant, it has not been established that the legislative policy of the Wildlife Act singles out Indians for special treatment or discriminates against them in any way.
>
> Dick, supra, p.59

15. The Court in Dick concluded that even if (as was assumed) the provincial law had the effect of regulating the Appellant "qua-Indian" it was nevertheless constitutionally operable by referential incorporation under s.88 of the Indian Act, that is, that it took its force from federal legislation.

16. It follows, a fortiori that federal legislation which regulates Indian hunting and fishing (as does the regulation here in issue) is constitutionally valid. In other words, Indian hunting and fishing rights prior to s.35 of the Constitution Act, 1982, coming into effect were

not unrestricted but were subject to whatever "regulation or curtailment" the federal Parliament deemed appropriate to impose.

17. Nothing in section 35 can be taken to limit federal legislative jurisdiction in this regard. The limitation on that jurisdiction contended for by the Appellant - that it can be used to impose only those restrictions on Indian fishing which are "necessary and reasonable conservation measures" - is nowhere found in s.35 nor can it be implied from s.35. It is clearly advanced to mitigate the rigour of the Appellant's submission, which is effectively that s.35 places aboriginal and treaty rights as at April 17, 1982, beyond the power of Parliament or a provincial legislature to "regulate or curtail".

18. The Appellant's argument amounts to an attempt to give constitutional force under s.35 to the minority opinion of Dickson J. (as he then was) in R. v. Jack, [1980] 1 S.C.R. 294 at 313 to the effect that Indian fishing could only be regulated so as to "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."

19. The limitation on Parliament's legislative power inherent in this ordering of priorities was not advanced in the Jack case as inherent in any aboriginal right to fish, but rather as reflecting pre-confederation colonial policy which had been given constitutional force by virtue of Article 13 of the Terms of Union. The proposition that this colonial policy had such constitutional force was expressly rejected by all members of the Court except Dickson, J. How s.35 of the Constitution Act, 1982, can have given constitutional force to a policy which the Supreme Court of Canada has said in Jack, supra, has no such force, the Appellant has entirely failed to demonstrate. There is simply no constitutional basis for such a limitation on the "regulation or curtailment" of aboriginal and treaty rights by the "appropriate legislative authority."

20. While the Appellant argues that since s.35 is not subject to s.1 or s.33 of the Charter, it imposes limitations on legislative jurisdiction to "regulate or curtail" the exercise of aboriginal or treaty rights in a manner which entrenches those rights more securely than rights guaranteed

by the Charter, it is submitted the situation of s.35 in the Constitution Act, 1982, leads to precisely the opposite conclusion.

A.F. p. 17, para. 28

21. Section 35 is not part of the Charter at all. It forms Part II of the Constitution Act, 1982; the Charter forms Part I. Sections 1 and 33 are in Part I, the Charter, and have no application to Part II.

Constitution Act, 1982, ss.1, 33, 34, 35

22. The Charter articulates specific individual and group rights and entrenches them, that is, protects those rights from legislative or executive infringement. The rigour of that protection is mitigated by s.1 and s.33.

23. The rights so protected are articulated in positive terms - "every citizen has the right", "everyone has the right", "any person charged has the right" and with relative specificity. The intended affect of the Charter is to protect those rights specifically articulated from governmental infringements, subject to s.1 and s.33.

Bhindi et al v. B.C. Projectionists' Local 348, (1986) 4 BCLR 145 (BCCA)

24. Section 35 by contrast does not articulate or specify rights in positive terms but merely recognizes and affirms unspecified rights. That this recognition and affirmation is not found in the Charter, and is unqualified by ss. 1 and 33 of the Charter, indicates it was unintended as a restriction on the power of provincial legislatures or Parliament. The identification and definition of aboriginal rights and the question of what constitutional force they may be given is the subject of the constitutional review process mandated by s.37 of the Constitution Act 1982.

25. It is inconceivable that the mere affirmation and recognition of unidentified and undefined aboriginal and treaty rights which had hitherto been subject to legislative regulation or curtailment (subject only to the division of legislative powers under ss.91 and 92 of the Constitution Act, 1867) should place those rights in a position where they are effectively immune from any legislative modification, no matter how "demonstrably justifiable" that infringement might be.

Bhindi, supra, p.154

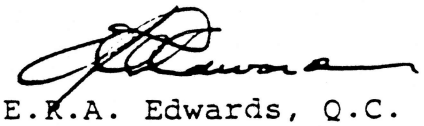
26. Even in a circumstance where Parliament or a legislature was prepared to declare itself as intending to override those rights under s.33, this would be impossible under the Appellant's interpretation of s.35. Further, that interpretation would, for example, require a constitutional amendment to alter treaty rights, even if the Indians involved consented.

27. Section 35 "recognizes and affirms". It does no more. It does not entrench and secure aboriginal and treaty rights against legislative regulation or curtailment. That interpretation, placed on s.35 by the Appellant, is both implausible and unworkable.

NATURE OF ORDER SOUGHT

28. The Attorney General of British Columbia seeks an order dismissing the appeal.

All of which is repsectfully submitted



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Attorney General of British Columbia

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INDEX

PART I - STATEMENT OF FACTS

1. Further to the facts stated by the Appellant, the Respondent refers to the following additional facts.

2. During 1983 and 1984, the Appellant did not live on the Musqueam Indian Reserve but resided in Tsawwassen, British Columbia.

T.S. p. 43 ll. 1-11

3. On May 25, 1984, at 2:40 p.m., Fishery Officers observed the Appellant fishing in the waters of the Fraser River, being Canadian fisheries waters, in the upper end of Canoe Passage, at or near the Municipality of Richmond in the Province of British Columbia. The Appellant was operating a 34' aluminum gillnet fishing vessel called the "Sherry Lee". There was a drift net extended from the stern of the vessel into the water. That net measured 44 fathoms in length.

T.S. pp. 56-59

4. At this time, Chinook salmon migrating up river would have been the only salmon species present in these waters.

T.S. p. 62 ll. 29-31

5. These waters that the Appellant was fishing are at least 15 kilometres from the Musqueam Indian reserve. The reserve and these waters are separated by the properties of the Vancouver International Airport and the Municipality of Richmond.

See: Exhibit 14 (Map)

6. These waters were open to fishing only for the purposes of the Indian food fishery between the hours of 12:00 noon on May 25, 1984 and 12:00 noon on May 26, 1984.

T.S. p. 56, ll. 33-35; p. 62 ll. 10-25.
A.B. p. 4 (Exhibit 3)

7. The Appellant was fishing under the authority of the 1984-1985 Indian Food Fishing Licence issued to the Musqueam Indian Band which provided, inter alia, that a 25 fathom length drift net was to be used in such fishing.

A.B. p. 4 (Exhibit 3)

8. Pursuant to the provisions of the British Columbia Fishery (General) Regulations and the policy of the Department of Fisheries and Oceans (hereinafter referred to as D.F.O.), the D.F.O. regulates an Indian food fishery in the Fraser River.

T.S. p. 120

9. The objective of D.F.O.'s management in this regard has been to provide a sufficiently long open fishing period to allow Indian fishermen to catch fish to meet their individual family's reasonable food fish needs.

T.S. p. 120 ll. 22-26

10. D.F.O.s management of the Indian food fishery has evolved over time with recognition of traditional fishing techniques. Such management includes specification of gear type, times for fishing and catch sites. A number of factors affect the management of the Indian food fishery:

(i) stocks vary at different locations, along the Fraser River (e.g. further up river fewer fish are available for harvest whereas at the mouth of the river all fish stocks spawn in the river are available);

(ii) river morphology varies throughout the course of the river.

T.S. p. 120-121

11. There are 92 Indian Bands, including the Musqueam, consisting of approximately 20,000 people located along the Fraser river that participate in the aforesaid Indian food fishery.

T.S. p. 120 ll. 11-13; p. 135 ll. 31-39

12. The D.F.O. have asked these Indian Bands, including the Musqueam, to indicate their reasonable food fish needs. D.F.O. have not been provided this information.

T.S. p. 121 ll. 34-47; p. 122 ll. 1-11; p. 127 ll. 13-22; p. 138 ll. 8-17

13. Prior to 1978, the D.F.O. regulated the Musqueam Indian Band's participation in this Indian food fishery by way of special permit. Pursuant to this permit and under the

supervision of the local fishery officer, a Band member would use a commercial fishing vessel and catch the Band's entire food fish supply for the year.

T.S. p. 122 ll. 29-47

14. Since 1978, the D.F.O. has regulated the Band's food fishery on an "experimental" basis subject to a review from time to time. The Band was then permitted to use a 75 fathom length drift net at least 1.5 days per week.

T.S. p. 123 ll. 7-17

15. In 1977, the Band's catch was 3,878 fish. In 1982, the catch was 58,287 fish.

T.S. p. 123 ll. 22-24
A.B. p. 103 (Exhibit 14)

16. In 1982, the D.F.O. conducted it's first review of the Musqueam Indian Band's "experimental" food fishery. D.F.O. concluded that the fishery had become very efficient when compared to the pre-experimental period. There was a high catch level due to the use of the 75 fathom length drift net in constricted channel areas where every stock of fish that spawns in the Fraser River must pass.

T.S. p. 123 ll. 32-47

17. In 1982, the annual catch per person for the Musqueam Indian Band was 120 fish. Between 1978-1982, the annual average catch for the Band was 19,593 fish. The average annual catch per person was 40.3 fish.

T.S. p. 124 ll. 1-39
A.B. p. 103 (Exhibit 14)

18. In 1982, the annual catch of the other 91 Indian Bands participating in the Fraser River Indian food fishery was 478,451 fish. The catch per person was 24 fish. Between 1978-1982 the annual average catch for these Bands was 329,335 fish. The average annual catch per person was 18.6 fish.

T.S. p. 124 ll. 1-39
A.B. p. 103 (Exhibit 14)

19. D.F.C. became concerned with the Musqueam Band's catch levels when compared with those of the other Bands along the Fraser River. D.F.O.'s concern was that these Bands would demand equal access to the fish and thereby "disrupt the orderly harvest of the resource and specifically the orderly harvest of the resource by the native community in the Fraser River and that disruption could potentially cause a severe conservation problem".

T.S. p. 125 ll. 1-12

20. D.F.O. attached specific importance to the Chinook salmon runs in the Fraser River. At that time the Chinook were a major conservation concern for the D.F.C.. In addition, these salmon are considered a "prize" fish by the Indian. D.F.O. feared that such increased catch levels by the other Bands would cause a severe conservation concern and wipe out the Chinook.

T.S. p. 125 ll. 22-44; p. 129 ll. 21-38

21. Dr. C.J. Walters, called by the Appellant, stated that D.F.O.'s conservation concern for the Chinook was valid. Dr. Walters testified that "every user group of stocks particularly the Chinook is currently insisting on a larger share of the catch...by every means available to them".

T.S. p. 95 ll. 20-47; p. 96 l.1; p. 111 ll. 3-23

22. D.F.O. applied specific Chinook conservation restrictions to the fishing outside in the waters outside the Fraser River. In addition D.F.O. decided to apply conservation measures to the River's Indian food fishery.

T.S. p. 126 ll. 9-14

23 On May 12, 1983, D.F.O. advised the Musqueam Indian Band that it was reducing the permitted 75 fathom length drift net to 25 fathoms. The Band's 1983-84 Indian Food Fishing Licence indicated that change.

A.B. p. 6 (Exhibit 6)
A.B. p. 7 (Exhibit 7)

24. On February 8, 1984, D.F.O. advised the Musqueam Indian Band that the 25 fathom length drift net was sufficient. The 1984-85 licence reflected this decision.

T.S. p. 131 ll. 18-47; p. 132 ll. 4-18
A.B. p. 4 (Exhibit 3)
A.B. p. 10-12 (Exhibit 11)

25. D.F.O. viewed the restrictions as to fishing times, net size, and drift net length size referred to in the letter of February 8, 1984 and as indicated in the 1984-85 licence as valid conservation measures specifically with respect to Chinook salmon migrating up the Fraser River.

T.S. p. 131 ll. 18-47; p. 132 ll. 4-18

26. Between June and October, 1982 the D.F.O. conducted an investigation along the Fraser River with respect to illegal

catch and sale of salmon. This was an undercover investigation using a fishery officer who posed as a representative of a company interested in purchasing salmon.

T.S. p. 142 ll. 30-47; p. 143 ll. 1-2; p. 151 ll. 29-36

27. During this investigation this Fishery officer attended the Musqueam Indian reserve over a period of six days in September, 1982.

T.S. p. 143 ll. 3-32; p. 144 ll. 13-20

28. In the late evening and early morning hours of September 11, 12, 17, 18 and 19, 1982, this fishery officer purchased and took delivery of 17 tons of salmon from 18 individuals on the Musqueam Indian reserve. The officer paid these persons $7.00 per fish for a total amount of $36,174.50.

T.S. p. 144 ll. 13-20; p. 145 ll. 6-10; p. 148 ll.27-41; p. 150 ll. 3-7 and 34-37

29. The 17 tons of salmon purchased consisted of:

(i) 5,422 Sockeye/Coho
(ii) 68 Chinook
(iii) 10 Chum
(iv) 4 Steelhead trout

These fish were fresh, in the round, had net marks, and were without snout and dorsal fin.

T.S. p. 144-147, 149-151

30. In September 1982, the effective provisions of the British Columbia Fishery (General) Regulations required that fish

caught pursuant to an Indian food fish licence had to be marked by cutting off the snout and dorsal fin prior to removing the fish from the fishing site. In addition the Regulations, supra, prohibited the sale or barter of fish unless the fish were lawfully caught under a commercial fishing licence.

See: Sec. 29(5) and 37 of the British Columbia Fishery (General) Regulations C.R.C. 1978 c. 840, as amended.

PART II

ISSUES ON APPEAL

31. Did the Musqueam Indian Band on April 17, 1982 enjoy an aboriginal right to fish at their traditional fishing grounds.

32. Does S. 35 of the Constitution Act, 1982, recognize and affirm aboriginal rights that had been taken away by valid legislation.

PART III

ARGUMENT

Did the Musqueam Indian Band on April 17, 1982 enjoy an aboriginal right to fish at their traditional fishing grounds.

33. The prime incident of an aboriginal right to fish necessarily includes the unrestricted right to fish or to hunt freely:

> Hamlet of Baker Lake v. Ministry of Indian Affairs and Northern Development (1979) 107 D.L.R. (3d) 513 at p. 551 (1975) 20 C.C.C. (2d) 157 at 166

The aboriginal right to fish freely or unrestrictedly which the Indians hitherto enjoyed before the coming of the European settlers was taken away by the imposition of fishing restrictions pursuant to federal fisheries legislation through the various Fisheries Acts and Regulations since Confederation. Re Southern Rhodesia [1919] A.C. 211.

34. In R. v. Dericksan (1977) 71 D.L.R. (3d) 160, the Supreme Court of Canada authoritatively stated that aboriginal fishing rights are subject to fisheries legislation. Similarly, in Kruger and Manuel v. The Queen [1978] 1 S.C.R. 104, (1977) 75 D.L.R. (3d) 434, Indians were hunting on their traditional hunting grounds and were convicted of hunting contrary to the Wildlife Act of British Columbia. The Supreme Court of Canada held that the right of the Indians to hunt and to fish were subject to regulation and curtailment by the appropriate legislative authority.

In R. v. George [1966] S.C.R. 267, 55 D.L.R. (2d) 386, the Supreme Court of Canada stated that it did not require any express provisions in the Indian Act to make Indians subject to the provisions of federal statutes.

In Sikyea v. The Queen [1984] S.C.P. 642 the Supreme Court of Canada affirmed the decision of the Northwest Territories Court of Appeal which held that the rights given to the Indians by their treaties insofar as they apply to migratory birds were taken away by the Migratory Birds Convention Act and the regulations made pursuant thereto. Hogg, CONSTITUTIONAL LAW OF CANADA, (1985) at p. 563 referred to these authorities and opined that native rights were subject to change or abolition by the action of competent legislative authority. This Court came to the same conclusion in Regina v. Billy, March 21, 1977 (unreported).

35. More recently in Nowegijick v. The Queen [1983] 1 S.C.R. 29, (1983) 144 D.L.R. (3d) 193, the question arose as to whether s.87 of the Indian Act exempted an Indian from paying taxes in respect of personal property on a reserve. The Supreme Court of Canada held that because of the wording of s.87 of the Indian Act, the personal property of an Indian on a reserve was exempted from taxation. At page 198, Dickson, J., (as he then was) said this:

> Indians are citizens and, in affairs not governed by treaty or the Indian Act, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.

36. Accordingly, it is respectfully submitted that the Fisheries Act and the regulations made pursuant thereto apply to the Appellant in the case at bar notwithstanding that he was fishing at traditional Indian fishing grounds., In short, Indians of the Musqueam Indian Band did not have an unrestricted or free right to fish as they pleased as of April 17, 1982 and, accordingly, they did not have an aboriginal right to fish at that time.

37. The recent decision of Guerin v. The Queen [1984] 6 W.W.R. 481 did not alter this principle of statutory extinction

of aboriginal hunting and fishing rights. In Guerin, the Supreme Court of Canada decided that upon surrender of reserve land as stated in ss. 37-41 of the Indian Act, a fiduciary relationship arose between the Indians and the Federal Crown whereupon the Crown must deal with the land for the benefit of the surrendering Indians. The court pointed out that before surrender the Crown did not hold the land in trust for the Indians and indeed, even after surrender a trust did not spring into being. Upon surrender a distinctive fiduciary obligation arose on the part of the Crown to deal with the land for the benefit of the surrendering Indians.

38. In coming to this conclusion the Court examined the basis and the nature of aboriginal title. In discussing these two aspects of Indian title the Court reviewed the Royal Proclamation of 1763 and concluded at page 497 (W.W.R.) that the Indian interest in their lands was a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(1) of the Indian Act or any other executive order or legistative provision.

39. With regard to the nature of Indian title the Court concluded that Indians have a legal right to occupy and possess certain lands, reserves, the ultimate title to which is in the Crown. Additionally, the Indians' interest in their reserves were inalienable except to the Crown. Accordingly, when the Indians surrendered their interest in their land to the Crown a distinctive fidiciary relationship arose on the Crown to deal with the land for the benefit of the surrendering Indians.

40. There is nothing whatsoever in Guerin that derogates from the principle that aboriginal hunting and fishing rights were extinguished by valid legislation as enunciated in the authorities of the Supreme Court of Canada earlier referred to.

Indeed, in relying on Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823) Dickson, J., quoted from Marshall C.J. in Johnson v. Re M'Intosh at page 497-498 (W.W.R.) as follows:

> All are institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy,

The concluding words to this sentence in Johnson v. M'Intosh at page 588 are as follows:

> a) and recognized the absolute title of the Crown to extinguish that right.

41. The Royal Proclamation of 1763 did not apply geographically to British Columbia. In looking at the Indian provisions of the Royal Proclamation it is clear that it is concerned with "the several nations or tribes of Indians, with whom we are connected, and who live under our protection". In Re Labrador Boundary (1927) 2 D.L.R. 401, at page 421, the Judicial Committee of the Privy Council, in explaining why the Royal Proclamation did not apply to Labrador, indicated that the Proclamation applied only to those tribes of the six nations who were settled around the Great Lakes.

42. In St. Catharines' Milling and Lumber Company v. The Queen (1889) 14 A.C. 46, at page 54, the Judicial Committee indicated that the Royal Proclamation applied to all Indian tribes then living under the sovereigtry and protection of the British Crown.

43. Recently, Dickson, J., (as he then was), on behalf of the Supreme Court of Canada in Re Attorney General of Canada and the Attorney General of British Columbia et al, (1984) D.L.P.

161 at 173-175, reviewed the history of British Columbia prior to 1871. It is clear from Dickson, J.'s reasons that there was no British claim to what is now known as British Columbia until 1774. Accordingly, it was never contemplated by the drafters of the Royal Proclamation of 1763 that it would encompass the lands now known as British Columbia.

44. It is submitted that the applicability of the Royal Proclamation of 1763 to the proceedings herein is of no moment in as much as Dickson, J., in Guerin categorically stated at page 497 that the Indians' interest in their lands was a pre-existing legal right which was not created by the Royal Proclamation, by s.18(1) of the Indian Act, or by the any other executive order or legislative provision. At page 500 Dickson, J., indicated that s. 18(1) of the Indian Act confirmed the historic responsibility which the Crown had undertaken to place upon itself as an intermediary with regard to the disposition of lands reserved for the Indians. He indicated that this responsibility was confirmed in the Royal Proclamation and transformed this responsibility into a fiduciary one. It should be noted however that the fiduciary relationship only arises upon surrender of the reserve to the Crown pursuant to the provisions of the Indian Act.

Conservation

45. A question of "a necessary and reasonable conservation measure" raised at paragraph 30 of the Appellant's factum is misconceived and is one that need not concern us here. Federal power in relation to fisheries comes from s.91(12) of the Constitution Act, 1867 wherein the exclusive legislative control over sea coast and inland fisheries is given to Parliament.

There is no constitutional limitation placed upon that power that requires such legislation to have a conservation purpose. In The Queen v. Robertson (1882) VI S.C.R. at 120 and 121 the Supreme Court of Canada indicated that federal legislative power extends to the regulation, protection and preservation of fisheries. In A.G. Can. v. A.G. Ont. et al [1898] A.C. 700 at page 713 the Privy Council stated that even though the fisheries power might amount to a practical confiscation of property, this factor did not warrant the imposition by the courts of any limit on the absolute power given to the Federal Crown. This proposition was reiterated by the Privy Council in A.G.B.C. v. A.G. Canada [1914] A.C. 153, and A.G. Canada v. A.G. Quebec [1921] 1 A.C. 413. Additionally, Federal power in relation to Indians comes from s.91(24) of the Constitution Act, 1867. There is no constitutional limitation placed on this power that it be exercised in relation to conservation of fish. Additionally, the regulation herein could be sustained on the basis of s.91(24) Indians, and Lands reserved for the Indians, and the authorities of the Supreme Court of Canada previously mentioned.

46. The American decisions referred to by the Appellant are not applicable to the circumstances that prevail in Canada. The United States Indian Claims Commission established in 1946 is empowered to make decisions based on matters of political considerations that are not based on the law: Hamlet of Baker Lake (supra) @ p. 545.

Does Section 35 of the Charter Recognize and Affirm Aboriginal Rights which have been extinguished.

47. In considering s. 35 of the Charter it is useful to review the changes in the drafting of the section before it was enacted in its final form. This can be used as an aid to the interpretation as to its meaning: Bhindi and London v. British Columbia Projectionists Local 348 et al, (1986) 4 B.C.L.R. (2d) 145.

48. Section 35(1) and 35(2), except for the word "existing" mentioned in subsection (1), were added in an amendment made by the special committee on January 30, 1981. Section 35 was deleted when the resolution was reintroduced following the Federal-Provincial agreement. Section 35(1) and (2) were restored with the addition of the word "existing" in an amendment made by the House of Commons on November 26, 1981: Canadian Charter of Rights, amended, Vol II, 29-1,

49. Accordingly, with the addition of the word "existing" it is manifest that Parliament in enacting sec. 35, did not contemplate aboriginal rights as they existed prior to the coming of the European settlers but only as at the date of the Constitution Act 1982, namely April 17, 1982. Hogg, Constitutional Law of Canada, 1985, 2nd Ed., at page 565 concludes that the word "existing" in s.35 means "unextinguished".

50. Hogg's conclusion is substantiated by R. v. Eninew (1984) 7 C.C.C. (3d) 443 (Sask. Q.B.); R. v. Hare and Debassige, (1985) 20 C.C.C. (3d) 1, (Ont. C.A.); and A.G. Ont. v. Bear Island Foundation et al (1985) 15 D.L.R. (4th) 321 at p. 447. (Ont. H.C.).

51. There being no aboriginal fishing rights extant as of April 17, 1982 for the Musqueam Indians, s. 35 of the Charter did not prevent the operation of the Fisheries Act and the regulations. Accordingly, the Appellant was rightfully convicted of the charge.

PART IV

ORDER SOUGHT

52. THAT the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

COUNSEL FOR THE RESPONDENT

LIST OF AUTHORITIES