R. *v.* N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672

N.T.C. Smokehouse Ltd. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of British Columbia,
the Canadian National Railway Company,
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.* N.T.C. Smokehouse Ltd.

File No.: 23800.

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

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Aboriginal rights -- Right to sell fish (salmon) -- Food processor charged for selling salmon contrary to regulations -- Large quantities of salmon purchased from natives -- Natives catching salmon under food fishing licence -- Regulations prohibiting sale or barter of fish caught under food fishing licence -- Whether an aboriginal right to sell salmon -- Whether the aboriginal right extinguished -- Whether aboriginal right infringed by regulations -- Whether any infringement justified -- Constitution Act, 1982, ss. 35(1), 52 -- British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4(5), 27(5) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1).

The appellant, a food processor, was charged under s. 61(1) of the *Fisheries Act* with selling and purchasing fish not caught under the authority of a commercial fishing licence, contrary to s. 4(5) of the *British Columbia Fishery (General) Regulations*, and with selling and purchasing fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the Regulations. The fish had been caught by Indian bands under authority of food fishing licences, sold to the appellant and resold by the appellant in the commercial market. Section 27(5) of the Regulations at the time prohibited the sale or barter of any fish caught under the authority of an Indian food fish licence and s. 4(5) prohibited anyone from purchasing such fish. The appellant was convicted and its appeal to the Court of Appeal was dismissed. The constitutional questions stated by this Court queried whether ss. 4(5) and 27(5) of the

Regulations were of no force or effect with respect to the appellant by operation of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of that Act.

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

The Aboriginal Right

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: Although the aboriginal right asserted was not one held by the appellant itself but rather held by native bands originally selling the fish, the appellant was entitled to raise the defence given that a conviction hinged on the natives' sale of the fish being illegal.

An activity, to be recognized as an aboriginal right, must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The Court must first determine the precise nature of the claim being made, taking into account such factors as the nature of the action allegedly done pursuant to an aboriginal right, the government regulation

allegedly infringing the right, and the practice, custom or tradition relied upon to establish the right. The Regulations prohibited all sales or trade of salmon caught without a commercial fishing licence. The sale of fish by the Indian bands in question was, however, extensive.

The claim to an aboriginal right to exchange fish commercially places a more onerous burden on the appellant than a claim to an aboriginal right to exchange fish for money or other goods in that the latter claim is subsumed by the larger claim to fish commercially. To prove the right to exchange fish for money or other goods, the appellant need only show that that exchange was integral to the distinctive native culture: however, to prove the right to exchange fish commercially, the appellant needs to go beyond that proof and demonstrate that that exchange, on a scale best characterized as commercial, was integral to the distinctive native culture. The aboriginal right claimed, therefore, was the right to exchange fish for money or other goods. The claim to the right to fish commercially need only be considered if this initial claim has been established.

The Court must 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 society of the aboriginal people in question. Normally, because the determination of whether or not an aboriginal right exists is specific to the particular aboriginal group claiming the right, distinctions between aboriginal claimants will be significant and important. Here, however, no significant distinction existed between the two bands selling the fish.

The determination of whether the aboriginal right claimed was an integral part of the distinctive native culture depends, in significant part, on the factual evidence. The findings of fact made by the trial judge should not, absent a palpable and overriding error, be overturned on appeal. A review of the evidence and transcripts demonstrated no such error.

The findings of fact made by the trial judge did not support the appellant's claim that, prior to contact, the exchange of fish for money or other goods was an integral part of the distinctive cultures of the native bands involved. The exchange of fish incidental to social and ceremonial occasions was not, itself, a sufficiently central, significant or defining feature of these societies to be recognized as an aboriginal right under s. 35(1) of the *Constitution Act, 1982*. The

exchange of fish, when taking place apart from the occasion to which such exchange was incidental, could not, even if that occasion were an integral part of the aboriginal society in question, constitute an aboriginal right. This conclusion also disposed of the aboriginal right to fish commercially.

Per L'Heureux-Dubé J. (dissenting): 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 facts did not support framing the issue in terms of commercial fishing. Transactions were not directed at providing an economic profit. The right claimed was the right to sell, trade and barter fish without more specification and not the right to fish commercially. Moreover, the impugned legislative provisions are not directed only at commercial fishing. They prohibit commercial and non-commercial sale, trade and barter of fish, including the sale, trade and barter of fish for livelihood, support and sustenance purposes. Consequently, the issue here is whether the band's right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

An aboriginal practice, custom or tradition, to be recognized as a constitutionally protected aboriginal right, must be sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time. The trial judge, when examining the historical evidence presented at trial, mischaracterized the aboriginal rights claimed, erred in his approach to the interpretation of the nature and extent of such rights, and misapplied the test in *Sparrow*. These palpable and overriding errors conferred on an appellate court the right to intervene and to substitute its own findings of fact.

The evidence showed that the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the native bands involved. The evidence also showed that they sold, traded and bartered fish for livelihood, support and sustenance purposes for a substantial continuous period of time. The type of

aboriginal practices, customs and traditions, the particular aboriginal culture and society, and the reference period of 20 to 50 years were considered. Here, trade and exchange of salmon existed long before the first Europeans arrived.

Per McLachlin J. (dissenting): The aboriginal right to sell fish is limited to equivalence with what the aboriginal people in question historically took from the fishery according to aboriginal law and custom. The native people here established that right. They did not need to prove that their traditional ways were identical to those used by them in the fishery to-day. Such a requirement would preclude the adaptation of aboriginal peoples to the modern era.

Extinguishment

Per L'Heureux-Dubé J. (dissenting): Aboriginal rights can be extinguished through a series of legislative acts. The intention to extinguish must nonetheless be clear and plain, in the sense that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. 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. Here, the legislation was insufficient to extinguish the aboriginal right to sell, trade and barter for livelihood, support and sustenance purposes. The statutes and regulations did not address aboriginal fishing in any way that demonstrates an intention to abolish aboriginal interest in the fishery.

Per McLachlin J. (dissenting): The aboriginal right to trade fish for sustenance was not extinguished for the reasons given in *R. v. Van der Peet*.

Prima Facie Infringement

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

Per McLachlin J. (dissenting): The evidence established an aboriginal right covering the activity at issue. The regulatory scheme infringed that right as it prohibited any sale of fish for sustenance and made no provision for satisfaction of the collective right. The size of the transaction alone did not rebut the *prima facie* infringement. The quantity of fish sold was relevant only in relation to the natives' sustenance needs. The aboriginal right was a collective one. Its infringement was established when the Crown failed to show that it had put in place a regulatory scheme that met the natives' collective right to trade in fish for sustenance.

Justification

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

Per McLachlin J. (dissenting): The infringement of the aboriginal right to sell fish for sustenance was not justified. To justify an infringement of an aboriginal right, the Crown must establish both that the law or regulation at issue was enacted for a "compelling and substantial" purpose, and that the law or regulation is consistent with the fiduciary duty of the Crown toward the aboriginal peoples. The Crown did not establish that the denial of the aboriginal right to sell fish for sustenance was required for conservation purposes or for other purposes related to the continued and responsible exploitation of the resource. Moreover, the total denial conflicted with the fiduciary duty of the Crown to permit exercise of a constitutionally guaranteed aboriginal right.

Cases Cited

By Lamer C.J.

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, rev'g (1993), 80 B.C.L.R. (2d) 75; **referred to:** *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

By L'Heureux-Dubé J. (dissenting)

R. v. Van der Peet, [1996] 2 S.C.R. 507, rev'g (1993), 80 B.C.L.R. (2d) 75; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Jones* (1993), 14 O.R. (3d) 421; *Delgamuukw v. British Columbia*,

[1993] 5 W.W.R. 97; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *R. v. Burns*, [1994] 1 S.C.R. 656; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941).

By McLachlin J. (dissenting)

R. v. Van der Peet, [1996] 2 S.C.R. 507; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4(5), 27(1), (5) [ad. SOR/85-290, s. 5].

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

Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) [rep. & sub. S.C. 1976-77, c. 35, s. 18].

Indian Act, R.S.C. 1970, c. I-6, s. 81(1)(*o*) [am. S.C. 1985, c. 27, s. 15.1(2)].

Sheshaht Band Fish By-Law, SOR/82-471.

Authors Cited

Concise Oxford Dictionary of Current English, 7th ed. Edited by J.B. Sykes. Oxford: Clarendon Press, 1982, "commerce"..

New Encyclopaedia Britannica, vol. 6, 15th ed. Chicago: Encyclopaedia Britannica, 1990.

APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 158, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 5 W.W.R. 542, [1993] 4 C.N.L.R. 158, dismissing an appeal from a judgment of Melvin Co. Ct. J. (1990), 9 W.C.B. (2d) 439, dismissing an appeal from conviction by MacLeod Prov. Ct. J. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

David M. Rosenberg and *Hugh Braker*, for the appellant.

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

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

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

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

THE CHIEF JUSTICE --

I. Facts

1. The appellant, N.T.C. Smokehouse Ltd., is an incorporated company which owns and operates a food processing plant near Port Alberni, British Columbia. The appellant was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offences of selling and purchasing fish not caught under the authority of a commercial fishing licence, contrary to s. 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, and with the offences of selling and purchasing fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*.

2. The charges related to the purchase of salmon by the appellant arose out of a series of transactions between September 7, 1986 and September 23, 1986, in which the appellant purchased 119 435 pounds of chinook salmon caught by members of the Sheshaht and Opetchesaht bands. The Department of Fisheries and Oceans had issued Indian food fish licences authorizing members of both the Sheshaht and Opetchesaht bands to fish in the Somass River for three two-day periods between September 7, 1986 and September 23, 1986. All of the fish purchased by

the appellant were caught under the authority of these Indian food fish licences.

3. The charges related to the sale of salmon by the appellant arose out of a series of transactions between September 8, 1986 and October 24, 1986, in which the appellant sold approximately 105 302 pounds of the chinook salmon which it had purchased from the members of the Sheshaht and Opetchesaht bands. The salmon were sold to Jay Margetis Fish Ltd., Kingfisher Enterprises, Pacific Salmon Industries Ltd. and Maranatha Seafoods Ltd.

4. At the time at which the appellants were charged s. 27(5) of the *British Columbia Fishery (General) Regulations* read:

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

Section 4(5) of the *British Columbia Fishery (General) Regulations* read:

> 4. ...
>
> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing

> licence issued by the Minister or the Minister of Environment for British Columbia.

5. The appellant has not contested any of these facts, instead basing its defence on the position that, in these circumstances, the Regulations were in violation of the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* and were therefore, by operation of s. 52 of the *Constitution Act, 1982*, of no force or effect with respect to the appellant. 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

6. At trial the appellant argued that a by-law enacted by the Sheshaht Band, pursuant to s. 81(1)(*o*) of the *Indian Act*, R.S.C. 1970, c. I-6, rendered the Regulations inapplicable. This argument was rejected by the trial judge on the grounds that the by-law does not apply to fishing in the Somass River because the Somass does not fall within the

boundaries of the Sheshaht Reserve; this argument has not been pursued at this Court.

7. The appellant also argued that the Regulations violated the aboriginal rights of the Sheshaht and Opetchesaht to sell fish. The trial judge rejected this argument on the basis that while there was some evidence to suggest that exchange and trade of salmon had occurred amongst the Sheshaht and Opetchesaht, the evidence also suggested that "what sales were made were few and far between". In the result, the trial judge convicted the appellant of selling salmon caught pursuant to an Indian food fish licence, contrary to s. 27(5) of the Regulations, and of purchasing salmon that was not caught under the authority of a commercial licence, contrary to s. 4(5) of the Regulations. The other charges against the appellant were dismissed on the basis of the principle in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729.

County Court of Vancouver Island (1990), 9 W.C.B. (2d) 439

8. The appellant's conviction was upheld by the County Court of Vancouver Island. Melvin Co. Ct. J. rejected the appellant's argument, abandoned on appeal to this Court, that the Fisheries Regulations were *ultra vires* the

federal government. He also agreed with the trial judge that the Somass River fell outside of the boundaries of the Sheshaht Reserve, with the result that the Sheshaht by-law could not be used as a defence to the charges. Melvin Co. Ct. J. did not conclusively decide whether the appellant had established the aboriginal right of the Sheshaht and Opetchesaht to sell fish, disposing of the appellant's argument on this point on the basis that, even if such a right does exist, "the regulations as they exist are necessary for the proper management and conservation of the resource or in the public interest and as such are valid and enforceable". Melvin Co. Ct. J. did note, however, in agreement with the trial judge, that the evidence suggesting a right to exchange or sell salmon was "somewhat tenuous".

British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 158

9. Wallace J.A., writing for himself and two others, upheld the judgments of the courts below, agreeing in substance with Melvin Co. Ct. J.'s disposition of the appellant's challenge to the authority of the federal government to enact the Regulations and with Melvin Co. Ct. J.'s decision that the Somass River did not fall within the boundaries of the Sheshaht Reserve. With regards to

the aboriginal rights issue, Wallace J.A. held that the trial judge's ruling that the commercial sale of fish did not constitute an aboriginal right, because determined as a question of fact, should not be disturbed. Although unnecessary given his position on the existence of an aboriginal right, Wallace J.A. also briefly considered the question of whether the right had been extinguished. Wallace J.A. did not decide whether the government's actions would, if a right to sell fish had been found, have been sufficient to extinguish that right; however, he did hold, in disagreement with Lambert J.A., that this Court's decision in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, was not determinative of the issue.

10. Hutcheon J.A. concurred. With regards to the question of whether or not the appellant had demonstrated an aboriginal right, Hutcheon J.A., at p. 186, held that the question of whether the aboriginal rights of the Sheshaht and Opetchesaht included the right to sell fish is a "finding of fact based on the evidence" with the result that the Court of Appeal was "without jurisdiction to examine this ground of appeal".

11. Lambert J.A. dissented. He held that the trial judge made an error of law because only considering the situation

of the Sheshaht and Opetchesaht peoples prior to contact, with the result that the Court of Appeal did have jurisdiction to review the decision. Relying on his decision in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, and the position taken therein that aboriginal rights must be identified through considering the significance of the practices, traditions and customs to the aboriginal people in question, Lambert J.A. held at para. 159 that the Sheshaht and Opetchesaht peoples had the right to "*catch, and, if they wish, sell, themselves and through other members of the Sheshaht and Opetchesaht peoples, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood ...*" (italics in original). Lambert J.A. held, further, that the Crown had failed to demonstrate that the right had been extinguished, relying on the judgment in *Sparrow, supra*, for the proposition that fisheries regulations enacted by the federal government were insufficient to demonstrate a clear and plain intention to extinguish the right. Lambert J.A. also held at para. 163 that the rights of the Sheshaht and Opetchesaht had clearly been infringed by the legislation and that, since allowing people to catch on average 3/4 of a ton of fish, and not permitting the sale of that fish, "makes no sense", the infringement was not justified. In the result, Lambert J.A. would have allowed

the appeal and entered verdicts of acquittal on all counts against the appellant.

III. Grounds of Appeal

12. Leave to appeal to this Court was granted on March 10, 1994: [1994] 1 S.C.R. ix. The following constitutional questions were stated:

> 1. Is s. 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?
>
> 2. Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

The appellant appealed on the basis that the Court of Appeal erred in differentiating between fishing for consumption and fishing for commercial purposes in delineating the scope of the Sheshaht and Opetchesaht's aboriginal rights. The appellant argued that this differentiation was a result of the Court of Appeal's failure

to view the problem from the aboriginal perspective. The appellant also argued that aboriginal rights should be "unlimited" in definition and that any limits on those rights must be justified by the Crown in accordance with the test laid out in *Sparrow*.

13. Delgamuukw et al. intervened on behalf of the appellant as did Howard Pamajewon et al. and the First Nations Summit. The Attorney General of British Columbia, the Fisheries Council of British Columbia, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation all intervened on behalf of the respondent.

IV. Analysis

14. The adjudication of the appellant's claim requires this Court to apply the principles articulated in its decision, released contemporaneously, in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. 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". The question that must be answered in this case, therefore, is whether the appellant has demonstrated that

the Sheshaht and Opetchesaht, in selling fish to the appellant, were exercising an aboriginal right.

15. As a preliminary matter, it should be noted that the aboriginal right asserted in this case is not one held by the appellant itself, but rather one argued to be held by the Sheshaht and Opetchesaht peoples. Given, however, that in order to convict the appellant it is necessary that the sale of the fish by the Sheshaht and the Opetchesaht have been illegal, the appellant is entitled to raise as a defence to the charges against it the existence of an aboriginal right, held by the Sheshaht and Opetchesaht, and recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, which would negate the illegality of the sale of salmon by members of the Sheshaht and Opetchesaht bands.

16. I now turn to the application of the *Van der Peet* test. As was held in that case, the first stage in the analysis of a claim to an aboriginal right requires the Court to determine the precise nature of the claim being made, taking into account such factors as the natue of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the tradition, custom or practice relied upon to establish the right.

17. In *Van der Peet* the claim to an aboriginal right was characterized not as a claim for the right to fish commercially but rather simply as a claim for the right to exchange fish for money or other goods. The right was so characterized on the basis that the transaction engaged in by Mrs. Van der Peet -- the sale of 10 salmon for $50 -- could only be characterized as "commercial" in the broadest sense of the word; moreover, the regulation under which she was charged prohibited all sale or trade of fish caught under the authority of an Indian food fish licence, regardless of the extent or nature of the transaction.

18. In the case at bar, however, the claim made by the appellant appears closer to a claim of a right to fish commercially than was the case in *Van der Peet*. The sale of in excess of 119,000 pounds of salmon by 80 people, an amount constituting approximately 1500 pounds of salmon per person, would appear to be much closer to an act of commerce -- "exchange of merchandise or services, esp. on a large scale" (emphasis added), *Concise Oxford Dictionary* (7th ed. 1982) -- than was engaged in by Mrs. Van der Peet, thereby suggesting that the claim being made by the appellant is, in fact, that the Sheshaht and Opetchesaht have the aboriginal right to fish commercially.

19. That being said, the Regulations under which the appellant was charged, like the regulation at issue in *Van der Peet*, prohibit all sale or trade of salmon caught under the authority of an Indian food fish licence or without the authority of a commercial fishing licence. This would suggest that, despite the scale and extent of the sale and trade by the Sheshaht and Opetchesaht, the claim they are making is best characterized in the manner suggested in *Van der Peet* -- i.e., as a claim to the right to exchange fish for money or other goods. If the regulations restrict all sale or trade, and the Sheshaht and Opetchesaht have an aboriginal right to exchange salmon for money or other goods, then it will be at least arguable that those regulations constitute an unjustifiable infringement of the aboriginal rights of the Sheshaht and Opetchesaht and are unconstitutional in their application to the appellant.

20. The difficulty in resolving the nature of the appellant's claim in this case can be avoided. The claim to an aboriginal right to exchange fish commercially places a more onerous burden on the appellant than a claim to an aboriginal right to exchange fish for money or other goods: to support the latter claim the appellant needs only to show that exchange of fish for money or other goods was integral to the distinctive cultures of the Sheshaht and Opetchesaht,

while to support the former claim the appellant needs to demonstrate that the exchange of fish for money or other goods, on a scale best characterized as commercial, was an integral part of the distinctive cultures of the Sheshaht and Opetchesaht peoples. Demonstrating that the exchange of fish occurred on a commercial scale would, necessarily, also demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht and Opetchesaht; because of this relationship between the two claims, should the appellant fail to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht, it will also have failed to demonstrate that the exchange of fish on a commercial basis was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht.

21. This judgment will thus characterize, at the outset, the claim of the appellant as a claim that the Sheshaht and the Opetchesaht have the right to exchange fish for money or other goods. It will turn to the claim that the Sheshaht and the Opetchesaht have the right to fish commercially only if the first claim to a right to exchange fish for money or other goods has been established.

22. The second stage of the *Van der Peet* analysis requires the Court to determine whether the practice, tradition or custom claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the aboriginal people in question. The Court must thus determine, in this case, whether the exchange of fish for money or other goods could be said to be a central, significant or defining feature of the distinctive cultures of the Sheshaht and Opetchesaht.

23. For the purposes of this analysis no distinction will be made between the cultures of the Sheshaht and Opetchesaht because no such distinction was made by the appellant in its factum nor in the decisions of the courts below. Further, the evidence presented at trial did not distinguish between the cultures and history of the two bands. Normally, because the determination of whether or not an aboriginal right exists is specific to the particular aboriginal group claiming the right, distinctions between aboriginal claimants will be significant and important; however, in this case it does not appear, as a factual matter, that any significant distinctions exist between the Sheshaht and the Opetchesaht.

24. I would also note with regard to the second stage of the *Van der Peet* analysis that the determination of whether the exchange of salmon is an integral part of the distinctive cultures of the Sheshaht and Opetchesaht will depend, in significant part, on the factual evidence that was before the trial court and, here at the appellate level, on the findings of fact made by the trial judge. I do not agree with the position adopted by the majority of the British Columbia Court of Appeal, that the trial judge's decision in this case was purely a determination of a question of fact; however, the outcome of the appeal will turn in large part on the facts as found by MacLeod Prov. Ct. J., the trial judge.

25. As was emphasized in *Van der Peet*, the findings of fact made by the trial judge should not, absent a palpable and overriding error, be overturned on appeal. It has not been argued in this case, and nor does a review of the evidence and transcripts demonstrate, that the trial judge made such an error in reviewing the evidence; therefore, the question that this Court must answer is, simply, whether the findings of fact made by the trial judge demonstrate that the exchange of fish for money or other goods by the Sheshaht and Opetchesaht was a sufficiently significant, central and defining feature of their cultures so as to constitute an aboriginal right.

26. At trial, MacLeod Prov. Ct. J., upon reviewing the evidence, made the following findings of fact with regards to the exchange of fish by the Sheshaht Band:

> I am satisfied that the Sheshaht Band has an aboriginal right to fish in the area, however, the evidence does not show to me that the Sheshahts in the period of their residence were sellers and barter[er]s of fish, and contrary, it appears that the Sheshaht over the past 200 years, what sales were made were few and far between. No doubt there were potlatches and meetings and exchanges of gifts of salmon, but these do not constitute an aboriginal right to sell the allotted fish contrary to the Regulations.

The findings of fact made by the trial judge do not support the appellant's claim that, prior to contact, the exchange of fish for money or other goods was an integral part of the distinctive cultures of the Sheshaht or Opetchesaht. Sales of fish that were "few and far between" cannot be said to have the defining status and significance necessary for this Court to hold that the Sheshaht or Opetchesaht have an aboriginal right to exchange fish for money or other goods. Further, exchanges of fish at potlatches and at ceremonial occasions, because incidental to those events, do not have the independent significance necessary to constitute an aboriginal right. Potlatches and other ceremonial occasions may well be integral features of the Sheshaht and Opetchesaht cultures and, as such, recognized and affirmed

as aboriginal rights under s. 35(1); however, the exchange of fish incidental to these occasions is not, itself, a sufficiently central, significant or defining feature of these societies so as to be recognized as an aboriginal right under s. 35(1). The exchange of fish, when taking place apart from the occasion to which such exchange was incidental, cannot, even if that occasion was an integral part of the aboriginal society in question, constitute an aboriginal right.

27. This conclusion is also dispositive of the claim that the Sheshaht and Opetchesaht have an aboriginal right to fish commercially; given that the facts do not support a claim of a right to exchange fish for money or other goods the facts cannot be said to support a claim to fish commercially.

V. Disposition

28. In the result, the appeal is dismissed and the judgment of the Court of Appeal affirming the conviction of the appellant for violating s. 61(1) of the *Fisheries Act* is affirmed. There will be no order as to costs.

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

Question 1: Is s. 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer : No.

Question 2: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer : No.

The following are the reasons delivered by

30. L'HEUREUX-DUBÉ J. (dissenting) -- This appeal, as well as the appeals in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, in which reasons are being released concurrently, and the appeal in *R. v. Nikal*, [1996] 1 S.C.R. 1013, concern the definition of aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

31. This broad issue was dealt with in *Van der Peet*. Both cases involve mainly the definition of the nature and extent of aboriginal rights. In this case, the particular question is whether the Sheshaht and Opetchesaht peoples, from whom the appellant corporation purchased fish, possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

32. The Chief Justice is of the view that the Sheshaht and Opetchesaht peoples do not benefit from an existing aboriginal right to fish which includes the right to exchange fish for money or other goods and that, as a consequence, the appellant's convictions should be upheld. As in the case of *Van der Peet*, *supra*, I disagree with both the result he reaches and with his analysis of the issues at bar, specifically with regard to the approach to defining aboriginal rights and to the delineation of the aboriginal right claimed by the appellant.

33. N.T.C. Smokehouse Ltd. was charged with violating ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, thereby committing an offence under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14. Sections 4(5) and 27(5) of the Regulations read as follows:

> 4. ...
>
> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.
>
> 27. ...
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

Given that, in order to establish these offences, it must be determined whether the fish were lawfully sold, traded or bartered in the first place by the members of the Sheshaht and Opetchesaht bands, it is open to the appellant to raise as a defence that these aboriginal activities are part and parcel of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982*.

34. The facts surrounding the offence were agreed upon prior to trial and are contained in an agreed statement of facts which was filed as an exhibit at trial. The undisputed facts relevant to the issue at hand include:

> 1. N.T.C. Smokehouse Ltd. is a company duly incorporated pursuant to the laws of the Province of British Columbia and was duly authorized to carry on business as food processors during the year 1986. The processing plant of N.T.C. Smokehouse Ltd. was located near Port Alberni, British Columbia.
>
> ...
>
> 3. The members of the Sheshaht and Opetchesaht Bands have traditionally fished for salmon in the Somass River before the arrival of non-Indians, and more particularly in the tidal waters of the river at the "Paper Mill Dam" site.

4. The Department of Fisheries and Oceans for the year 1986, issued Indian Food Fishing licences pursuant to the regulations under the Fisheries Act for both the Sheshaht and Opetchesaht Bands. The Indian Food Fish licences permitted fishing during the month of September 1986 on the following times and days:

1. 12:00 noon September 7, 1986 to 12:00 noon September 9, 1986;

2. 12:00 noon September 14, 1986 to 12:00 noon September 16, 1986;

3. 12:00 noon September 21, 1986 to 8:00 a.m. September 22, 1986.

The quota for Indian food fish that was allocated from the Department of Fisheries and Oceans to the Bands was 13,000 Chinook salmon. Attached to this agreement as Exhibit "A" is a copy of the Food Fish licence. Subsequent to the Indian food fishery, the Sheshaht and Opetchesaht Bands reported in May of 1987 to the Department of Fisheries and Oceans that approximately 19,800 pieces of Chinook salmon were caught. These figures are unverified by the Department of Fisheries and Oceans.

5. No other fishery was permitted on the Somass River or in the Port Alberni Inlet during the month of September 1986, including commercial fishing, except for a sports fishery which was closed on September 14, 1986 through November 30, 1986, pursuant to the Fisheries Act and Regulations.

...

9. N.T.C. Smokehouse Ltd. between September 7 and 23, 1986 purchased approximately 119,435 pounds of Chinook salmon, which fish were caught and sold during the period of September 7 to 23, 1986 by approximately 80 natives Indians representing approximately 65 members of the Sheshaht Band and 15 members of the Opetchesaht Band, from the tidal waters of the Somass River at the "Paper Mill Dam" site.

10. N.T.C. Smokehouse Ltd. between September 8, 1986 and October 24, 1986 sold approximately 105,302 pounds of the Chinook salmon which it had purchased as set out in paragraph 9.

> 11. The average price of the Chinook salmon purchased by N.T.C. Smokehouse Ltd. was $1.15 per pound and the re-sale price of the said fish was approximately $1.58 per pound. It is agreed that the fish subsequently were disposed of by N.T.C. Smokehouse Ltd. to Jay Margetis Fish Ltd., Kingfisher Enterprises, Pacific Salmon Industries Ltd. and Maranatha Seafoods Ltd.
>
> ...
>
> 13. There are no other Indian Bands or tribes other than the Sheshaht Band and the Opetchesaht Band who occupy lands adjacent to the Somass River or upstream from the Somass River and there are no other Indians who claim aboriginal rights to fish in the Somass River.

35. At trial, in convicting the appellant for violating the *Fisheries Act*, MacLeod Prov. Ct. J.'s judgment centred on the issue of whether the Somass River was on the reserve; the appellant does not raise this ground before us. MacLeod Prov. Ct. J. also held that the evidence did not support the recognition of an aboriginal right to sell and barter fish. He found that over the past 200 years, the exchanges of fish in the Sheshaht and Opetchesaht communities were "few and far between".

36. On appeal to the County Court of Vancouver Island (1990), 9 W.C.B. (2d) 439, Melvin Co. Ct. J. held that, although an aboriginal right to sell, trade or barter fish does exist in this case, the evidence did not show that the Sheshaht and Opetchesaht traded in fish in such a magnitude as to cover the purchases of the appellant. According to him, the convictions of the appellant were

sustainable in any event because the Regulations were necessary for the proper management and conservation of the resource.

37. At the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 158, Wallace J.A. (Taggart and Macfarlane JJ.A. concurring), for the majority, held that the appellant had not demonstrated the existence of an aboriginal right to sell fish. Since, in his view, the identification of whether pre-sovereignty aboriginal practices amount to a current aboriginal right is a question of fact, Wallace J.A. held that the position taken by the trial judge in this case should not be disturbed. In his concurring judgment, Hutcheon J.A. agreed that the Court of Appeal was bound by the trial judge's findings that the evidence did not support the recognition of an aboriginal right to sell fish.

38. Lambert J.A. dissented, holding that the trial judge committed an error of law in considering only the pre-contact practices of the Sheshaht and Opetchesaht peoples. He concluded that the Sheshaht and Opetchesaht bands had an aboriginal right to sell, trade and barter fish in order to provide them with a "moderate livelihood".

39. Leave to appeal was granted by this Court ([1994] 1 S.C.R. ix) and the following two constitutional questions were formulated by the Chief Justice:

1. Is s. 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

2. Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

40. The particular question here is whether the historical evidence on the record supports the recognition of an existing aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes in light of the approach to defining the nature and extent of aboriginal rights that I set out in *Van der Peet*. As a preliminary matter, however, it is necessary to provide a general background by briefly reviewing the context of aboriginal claims under s. 35(1) as well as the *Sparrow* test, the approach to the interpretation of the nature and extent of aboriginal rights, and the delineation of the aboriginal right claimed in this case.

I. General Background

41. At the outset, it is useful to note that this case is confined to the recognition of an aboriginal right under s. 35(1) of the *Constitution Act, 1982*. The appellant has abandoned its claim that the *Sheshaht Band Fish By-Law*,

SOR/82-471, applicable on the reserve, could constitute a defence to the offences under the Regulations. Further, there is no contention relating to aboriginal title or to treaty rights. The appellant simply argues that the Sheshaht and Opetchesaht peoples 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 livelihood, support and sustenance purposes.

42. The analytical framework for constitutional claims of aboriginal rights protection under s. 35(1) was 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.

43. In the instant case, the issues relate only to the first step of the *Sparrow* test, dealing with the assessment and definition of aboriginal rights. Therefore, we must first determine the nature and extent of the Sheshaht and Opetchesaht peoples' aboriginal right to fish -- i.e., whether it includes the right to sell, trade and barter

fish for livelihood, support and sustenance purposes — and then whether such right has been extinguished by a clear and plain intention of the Crown. If it becomes necessary to proceed to the questions of *prima facie* infringement and justification, the case should be sent back to trial because there is insufficient evidence to enable this Court to decide those issues.

44. As regards the approach to defining the nature and extent of constitutionally protected aboriginal rights, it is important to keep in mind the traditional and fundamental principles of interpretation relating to aboriginal law and to s. 35(1) of the *Constitution Act, 1982*, which can be captured 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 construed in the context of the specific history and culture of the native society and with regard to the aboriginal

perspective on the meaning of the rights asserted. Again here, although the Chief Justice refers to these interpretative canons, he does not seem to apply them to his definition of the aboriginal right at hand.

45. In *Van der Peet, supra,* after a detailed review of the possible approaches to defining 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 be centred on the notion of "integral part of . . . distinctive [aboriginal] culture" and should "permit [the] evolution [of aboriginal rights] over time" (see *Sparrow, supra*, at pp. 1099 and 1093, respectively). I offered the following guidelines concerning 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.]

The Chief Justice also uses the notion of "integral part of distinctive aboriginal culture" in his interpretation of the aboriginal right at bar. However, I cannot but distance myself from his approach which, unlike the one I favour, focuses on pre-contact individualized aboriginal practices.

46. The next matter is the delineation of the aboriginal right claimed by the appellant in this case. At the British Columbia Court of Appeal, as in *Van der Peet*, *supra*, the majority framed the issue as being whether the Sheshaht and Opetchesaht possess an aboriginal right to fish which includes the right to make commercial use of the fish. The Chief Justice also seems to favour this finding, although he only examines whether the bands benefit from an aboriginal right to exchange fish for money or other goods.

47. 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 (Prov. Div.). Although I agree with the Chief Justice that the delineation of aboriginal rights must be viewed on a continuum, I diverge as to his conclusion to frame the aboriginal right here in terms of commercial fishing.

48. In my view, in light of the factual context, the contentions of the appellant and the legislative provisions under constitutional challenge, 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 livelihood, support and sustenance purposes" (emphasis added), not on the part dealing with commercial activities (see *Van der Peet*, *supra*, para. 191).

49. First, the facts underlying the instant case do not sustain the Court of Appeal's framing of the issue in terms of commercial fishing. The appellant, N.T.C. Smokehouse Inc., purchased approximately 119,435 pounds of chinook salmon which were caught and sold by approximately 80 natives of both the Sheshaht and Opetchesaht bands; there was no evidence presented by the Crown as to whether there were other transactions of that sort in 1986, the relevant year in this case. I note that, since an average chinook salmon (or king salmon) weighs 10 kilograms or 22 pounds (see *The New Encyclopaedia Britannica* (15th ed. 1990), vol. 6, at p. 873), the quantity of fish purchased represents approximately 5,425 chinook salmon, or 68 fish per person. Further, the quota allocated by the Department of Fisheries and Oceans to the two bands in respect of Indian food fish, pursuant to s. 27(1) of the Regulations, was 13,000 chinook salmon. Therefore, the amount of chinook salmon sold to the appellant represents approximately 40 percent of the Indian food fish permitted.

50. There is scanty evidence as to the purposes for which the members of the Sheshaht and Opetchesaht bands sold the fish to the appellant or as to the use that they were going to make of the money. Only Agnes Sam, a member of the Sheshaht Band who gave evidence at trial, testified that she sold the salmon to the appellant because she needed the

money to buy jars to can fish and to buy little things for her grandchildren. From the overall evidence on the record, however, it appears reasonable to find that the transactions between the band members and the appellant were not, on the part of the natives, activities directed at providing an economic profit.

51. On average, every native sold about 68 chinook salmon, weighing 22 pounds each, at a price of $1.15 per pound, for a total of approximately $1720. I doubt that such transactions can be fairly labelled as purely commercial. Further, the Department of Fisheries and Oceans has considered that a quota of 13,000 chinook salmon was sufficient for the maintenance of the Sheshaht and Opetchesaht peoples. In my view, selling approximately 40 percent of the quota allocated for food purposes does not amount to a commercial activity but constitutes an exchange of fish directed at providing livelihood, support and sustenance to band members and their families.

52. Second, the appellant did not argue in the courts below or before this Court that the Sheshaht and Opetchesaht peoples possess an aboriginal right to fish for commercial purposes. The contentions were limited to the recognition of an aboriginal right to fish which includes the right to sell, trade and barter fish, without more specification. I believe that the Court of Appeal misconceived the appellant's claim in framing the issue in terms of whether the bands have an aboriginal right to make commercial use of the fish.

53. Finally, the legislative provisions under constitutional challenge in this case are not directed only at commercial fishing; they prohibit both commercial and non-commercial sale, trade and barter of fish. Section 4(5) of the Regulations forbids the sale, trade and barter of fish other than fish lawfully caught under the authority of a commercial fishing licence. Section 27(5) of the Regulations forbids the sale, trade and barter of fish caught under the authority of an Indian food fish licence. In other words, these provisions prohibit any sale, trade or barter of fish, whether for livelihood, support and sustenance purposes or for purely commercial purposes. Therefore, the substance of the legislative provisions under constitutional scrutiny requires, on the facts giving rise to this case, that it be decided whether the Sheshaht and Opetchesaht peoples possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

54. Now that the *Sparrow* test under s. 35(1) of the *Constitution Act, 1982* has been set out, along with the approach to defining the nature and extent of aboriginal rights, and the delineation of the aboriginal right claimed, I can turn to the issue at bar, namely the assessment and definition of the alleged existing aboriginal right (including extinguishment). In that respect, I will first review the evidence to determine whether the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sheshaht and Opetchesaht's distinctive aboriginal culture for a substantial continuous period of time.

II. Definition of Aboriginal Rights

55. It is necessary here to look at the historical evidence to see whether the particular groups of aboriginal people, the Sheshaht and Opetchesaht bands, from whom the appellant purchased the salmon, have sold, traded and bartered fish for livelihood, support and sustenance purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time, enabling them to benefit from a constitutionally protected aboriginal right in that respect.

56. The trial judge considered the documentary and expert evidence on the Sheshaht and Opetchesaht peoples' practices, traditions and customs, and reached the following conclusions:

> There's no doubt that the Sheshaht Band has the aboriginal rights to catch the fish returning in the area that they do fish. There is some evidence of barter exchange between the different bands and Mr. Inglis is unable to find any record of the selling of fish to the settlers. In 1882, the population of the Band totalled some 176. Its needs were easily accomplished in obtaining sufficient food. There is evidence that other foods were supplied.
>
> ...
>
> I am satisfied that the Sheshaht Band has an aboriginal right to fish in the area, however, the evidence does not show to me that the Sheshahts in the period of their residence were sellers and barter[er]s of fish, and contrary, it appears that the Sheshaht over the past 200 years, what sales were made were few and far between. No doubt there were potlatches and meetings and exchanges of gifts of salmon, but these do not constitute an aboriginal right to sell the allotted fish contrary to the Regulations. [Emphasis added.]

57. On appeal, the County Court judge substantially revisited the evidence on the record and found that the Sheshaht and Opetchesaht peoples engaged in the sale, trade and barter of fish both prior to and after the coming of Europeans. He concluded, however, that the offending transactions at hand were commercial in nature and that the Regulations were necessary for the management and conservation of the fishery. He stated:

> Consequently, there was evidence, albeit of a limited nature, before the learned Provincial Court Judge that the Band traded in fish.
>
> The evidence in the case at bar, when one considers the magnitude of the sale to the appellant, in my opinion, it tends to lift the disposition to commercial proportions, rather than the disposition of fish for societal needs as touched on in *Sparrow* v. *R.*
>
> In any event, I am satisfied that the regulations as they exist are necessary for the proper management and conservation of the resource or in the public interest and as such are valid and enforceable and the appellant's argument fails. [Emphasis added.]

58. The majority of the British Columbia Court of Appeal was of the view that the test for identifying aboriginal rights was whether the manifestations of the distinctive aboriginal culture were unique to native culture as it existed at the time of British sovereignty. Wallace J.A., referring to his reasons in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97, explained his position as follows (quoted from *R. v. N.T.C. Smokehouse Ltd.,* at paras. 40-44):

In *Delgamuukw v. British Columbia* (the reasons for judgment are filed at this time), I set out in some detail the nature and scope of aboriginal rights as recognized by the common law. It may be convenient to refer again to pertinent passages from that decision:

At para. 389:

> As previously noted, aboriginal peoples are accorded by the adjusted common law additional or special aboriginal rights over and above the rights enjoyed by all citizens of Canada. What then makes these rights "aboriginal" and distinguishes them from the other rights which the aboriginal people enjoy along with other residents of British Columbia?

Further, at para. 392:

> It is the traditional practices and ways of the aboriginal people associated with this occupation which attract common law protection. In *Sparrow* at p. 1099, Dickson C.J. and La Forest J. said the protection of aboriginal rights extended to those practices which were "an integral part of their distinctive culture". <u>This feature of aboriginal rights imports an historical dimension, which requires that the practices receiving protection be part and parcel of the pre-sovereignty aboriginal society</u>.

Further, at para. 393:

> Thus, aboriginal rights are intimately connected to pre-sovereignty aboriginal practices. They are site and activity specific and their existence turns on the particular facts of each case: *R. v. Kruger*, [1978] 1 S.C.R. 104 at 109. For example, while the netting of fish in a certain location in a certain way might well constitute the exercise of an aboriginal right, the same activity under different circumstances might not be so characterized. <u>The precise character of an aboriginal right turns on the nature of the activity, the site at which the activity takes place, and the activity's connection to the particular aboriginal community's traditional way of life</u>.

These passages reflect the principles of the common law which determine the criteria which activities must satisfy in order to constitute aboriginal rights. [Emphasis added.]

The majority held that the pre-sovereignty aboriginal practices were questions of fact and that the trial judge's findings should not be overturned.

59. Lambert J.A., dissenting, referred to his reasons in *Van der Peet*, and used a "social" form of description of aboriginal rights, which does not "freeze" in time aboriginal practices, traditions and customs. After reviewing the evidence presented at trial, he concluded (*N.T.C. Smokehouse Ltd.*, *supra*, at para. 159):

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

60. This review shows that the findings of fact relating to whether the Sheshaht and Opetchesaht peoples possess an aboriginal right to sell, trade and barter fish rest on a mischaracterization of the aboriginal right claimed, a misconception of the proper approach to the interpretation of the nature and extent of such rights, as well as a confusion on the threefold test propounded in *Sparrow*, *supra*.

61. The trial judge erred, in my view, in formulating the question in terms of commercial fishing, in looking at the particular practices unique to the Sheshaht and Opetchesaht in order to define the right at stake, and in considering whether the Regulations were justifiable when assessing the aboriginal right at stake. Similarly, the County Court judge

mischaracterized the issue and confused the definition step with the justification step of the *Sparrow* test. The majority of the British Columbia Court of Appeal was also in error in framing the issue as being whether an aboriginal right to fish commercially existed and in using a "frozen right" approach focusing on individualized native practices in order to define the nature and extent of the aboriginal right.

62. As I have noted at the outset, the issue in the present appeal is whether the Sheshaht and Opetchesaht's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. The nature and extent of aboriginal rights under s. 35(1) of the *Constitution Act, 1982* must, in my view, be defined by referring to the notion of "integral part of a distinctive aboriginal culture", i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time.

63. As a consequence, when the trial judge examined the historical evidence presented at trial, he asked himself the wrong questions and thus made no useful finding of fact on the Sheshaht and Opetchesaht's distinctive aboriginal culture regarding the sale, trade and barter of fish for livelihood, support and sustenance purposes. These palpable and overriding errors, which affected the trial judge's assessment of the fact, confer on an appellate court the right to intervene and to substitute its

own findings of fact: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; see also *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *R. v. Burns*, [1994] 1 S.C.R. 656; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

64. As well, it is noteworthy that this Court, as a subsequent appellate court in such circumstances, does not have to show any deference to the assessment of the evidence made by lower appellate courts and, therefore, is free to reconsider the evidence and substitute its own findings of fact: see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 36-37. This is the task to which I now turn.

65. Does the evidence reveal that the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sheshaht and Opetchesaht peoples' distinctive aboriginal culture for a substantial continuous period of time?

66. The Sheshaht and Opetchesaht are Nuu-chah-nulth tribes which occupy the West Coast of Vancouver Island. The Somass River fishery was and still is an integral part of their culture, economy and society. The Sheshaht traditional fishery occurred at all accessible locations in the lower Somass from the estuary to the river forks. Upstream fishing areas beyond this place were for the use of the neighbouring Opetchesaht

under an agreement made between the two tribes. Today the Sheshaht and the Opetchesaht share the fishing grounds near the mouth of the river and cooperate in many ways.

67. The Somass River is a highly productive salmon fishing river known for the quality of the fish it supplies. It has major runs of three pacific salmon species: the sockeye, the chinook and, less importantly, the coho. According to their own account and to the available historic and ethnographic evidence, the Sheshaht and Opetchesaht peoples have continuously utilized the Somass River salmon runs as their major source of winter food production since at least the beginning of the nineteenth century. See the report of Patricia A. Berringer, an anthropologist and archival researcher called by the appellant to give expert opinion evidence with respect to the traditional and modern utilization of the Somass River fishery.

68. The Sheshaht and Opetchesaht traditionally relied on Somass River salmon for their principal supplies of storage foods. After the catch was smoke dried it was packed and bundled for transport back to the winter villages. Supplies piled high were loaded onto cedar plank platforms supported between large dugout canoes. Sufficient quantities were needed both to meet winter food requirements and to provide dried salmon for the winter feasts and ceremonies. Cured salmon and sea foods were also used for purposes of trade and barter among themselves and with neighbouring tribes.

69. In Sheshaht and Opetchesaht communities, salmon was consumed for sustenance, ceremonial and social purposes. Salmon was also an article of trade which was used to provide for livelihood, support and sustenance. Richard Ian Inglis, an expert in anthropology and curator of the Provincial Museum called by the appellant to give expert opinion evidence on the trade relations of West Coast people, testified that trade in salmon occurred among Sheshaht and Opetchesaht as well as with other native people:

> Q. Now, in your observations of the Sheshaht people, and with your knowledge of the traditions of these peoples, can you describe certain situations in which salmon would have been traded or bartered, or sold. Just give the court examples of that.
>
> ...
>
> A. Aboriginally salmon was traded between groups. It was traded to peoples who had territories that did not have salmon rivers. It was given out as a major foodstuff in potlatches to visiting groups. Salmon in the rivers, Native people have a very different system of evaluating salmon, and I have been told a number of times about the salmon from this particular creek, or this particular river, or particular run, being better and better tasting than other types of salmon. And that is — this is repeated over and over again amongst other coastal groups as well. Salmon was sold to the first fur traders that came into the region. It was sold to early settlers, to early store owners. It was sold to traders, starting at least in the 1840s, probably through many of the decades of the 1800s to independent traders coming on the coast and then taking the salmon to Fort Victoria and then transshipped to Hawaii. Salmon was sold to the canneries and formed a major — a major part of the wage earning ability of the Native people. Throughout this period salmon has always been traded, or has always been exchanged between Native groups and given out at ceremonies and served at feasts to visiting groups, and also provided to members of the community who have moved away. That is family, friends. The salmon has been traded with those people, as well, and provided, as a family obligation. [Emphasis added.]

70. Likewise, Berringer reported that, although there was no formalized market system of trade of salmon in the Sheshaht and Opetchesaht societies, exchanges of fish were part of their distinctive aboriginal culture:

> The reciprocal nature of traditional exchange systems mark them as essentially different from "market systems" in which a "surplus" is sold. Typically the Sheshaht and other Nuu-chah-nulth tribes entered into systems of exchange within a regional social network, that is, with local groups related by marriage and other ties of kinship, or with tribes with whom marriage ties are sought. As articles of food and wealth are exchanged, the bonds of social and political relations are strengthened. [Emphasis added.]

71. Finally, it appears that the sale, trade and barter of fish for livelihood, support and sustenance among the Sheshaht and Opetchesaht peoples and with their neighbours remain distinctive aboriginal activities today. The expert witness Richard Ian Inglis testified at trial on the contemporary exchanges of salmon by band members:

> Q. Today what trade exists in the community?
>
> A. Salmon is the major food stuff that is obtained from the landscape and is provided to non-members of the community who are not residents in the community. It is exchanged in Native ceremonies, such as potlatches where salmon is presented and given out to other groups as well. [Emphasis added.]

72. The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sheshaht and Opetchesaht and with other native people both prior to and after the arrival of Europeans. It appears also,

especially from a native perspective, that these activities formed part of their distinctive aboriginal culture. Put another way, the evidence shows that the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sheshaht and Opetchesaht bands. Consequently, the criterion regarding the characteristics of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* is met in this case.

73. As well, the evidence shows that the Sheshaht and Opetchesaht peoples have sold, traded and bartered fish for livelihood, support and sustenance purposes for a substantial continuous period of time. In that regard, 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. 177). Here, both Inglis and Berringer testified at trial that trade and exchange of salmon existed in Sheshaht and Opetchesaht communities long before the first settlers came to British Columbia. Further, no doubt trading activities have changed, evolved and modernized over the past decades and that selling chinook salmon to a food processing corporation is far from the traditional exchanges of salmon among natives. However, since aboriginal rights are not "frozen" in time and that the aboriginal practices, traditions and customs in question have existed for centuries, the time requirement for the recognition of an aboriginal right under s. 35(1) is also met.

74. As a result, I am of the view that the Sheshaht and Opetchesaht peoples, from whom the appellant purchased the fish, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes, which is protected under s. 35(1) of the *Constitution Act, 1982*. The next step in assessing and defining an existing aboriginal right is the question of extinguishment, to which I now turn.

III. Extinguishment

75. In *Sparrow, supra*, the Crown's main argument was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations enacted pursuant to the *Fisheries Act*. This Court explained that the regulation of an aboriginal activity must not be confused with its extinguishment. In accordance with a well-established line of cases on aboriginal matters (see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Simon v. The Queen*, [1985] 2 S.C.R. 387; and *Horseman, supra*), Dickson C.J. and La Forest J. set the hurdle to extinguish aboriginal rights quite high (at p. 1099):

> The 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. [Emphasis added.]

In that case, the Court concluded that the Crown failed to discharge its burden because the *Fisheries Act* and its regulations did not demonstrate a clear and plain intention to extinguish the Musqueam's aboriginal right to fish for food, social and ceremonial purposes.

76. In the instant case, the respondent argues that the test is met when the aboriginal right and the activities contemplated by the legislation cannot co-exist. It is suggested that the American standard adopted in *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941), at p. 347, where the United States Supreme Court held that extinguishment occurred "by the exercise of complete dominion adverse to the right of occupancy", should inform the "clear and plain intention" test in Canada.

77. The respondent refers to the legislative history of the statutes and regulations applicable to the fishery in British Columbia and submits that the government intended thereby to extinguish aboriginal rights to sell, trade or barter fish. Contrary to the situation in *Sparrow*, *supra*, it is argued that the regulations in this case are part of a scheme which has for many years prohibited the sale, trade and barter of fish except by those to whom a licence has been issued for that purpose. Put another way, the respondent submits that it has been the intention of the government to allow no trade in salmon with the exception of those persons, both aboriginal and non-aboriginal, who have been duly authorized.

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.

79. Here, the legislation relied upon by the respondent is insufficient to extinguish the aboriginal right to sell, trade and barter for livelihood, support and sustenance purposes. The statutes and regulations do not address aboriginal fishing in any way that demonstrates an intention to abolish aboriginal interest in the fishery. In fact, the legislation referred to does not differ in any significant manner from the legislation which was before this Court in *Sparrow*, *supra*. The regulations have required those who want to sell, trade and barter fish to obtain a licence issued by the Department of Fisheries and Oceans and they have also regulated the times, places, manners and quantities of fish that can be taken for these purposes. This is not extinguishment; it is the regulation of aboriginal activities.

80. As a consequence, I conclude that the Sheshaht and Opetchesaht peoples' right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes and, further, that this is an existing aboriginal right under s. 35(1) of the *Constitution Act, 1982* as it was not extinguished by a clear and plain intention of the Sovereign.

IV. Disposition

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

Question 1: Is s. 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer : The aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant, are recognized and the question of whether s. 4(5) of the *British Columbia Fishery (General) Regulations* is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, will depend on the issues of *prima facie* infringement and justification as determined in a new trial.

Question 2 : Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

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

82. There will be no costs to either party.

The following are the reasons delivered by

MCLACHLIN J. (dissenting) --

Introduction

83. This is an appeal from a conviction of N.T.C. Smokehouse Ltd., a corporation which operates a fish processing plant in British Columbia. The appellant was convicted on the charge of selling fish without a commercial fishing licence contrary to s. 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, and of selling fish caught pursuant to an Indian food fish permit, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*. The appellant raises the defence that the fish in question were purchased from members of the Sheshaht and Opetchesaht

bands, who possess an aboriginal right to sell fish caught from the Somass River.

84. The sole question to be decided by this appeal is whether these Regulations, as they apply in the circumstances of this case, violate the aboriginal rights of the Sheshaht and Opetchesaht peoples to sell fish caught in the Somass River contrary to s. 35(1) of the *Constitution Act, 1982.* If so, the Regulations are invalid to the extent of the conflict, as *per* s. 52 of the *Constitution Act, 1982*.

85. This case was heard with *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, released contemporaneously. In *Van der Peet, supra*, I have set out the approach to the interpretation of aboriginal rights in this context in some detail. This decision summarizes that approach and applies the principles set out in *Van der Peet.*

86. The questions posed in this appeal are as follows:

1. Do the Sheshaht and Opetchesaht peoples possess an aboriginal right under s. 35(1) of the *Constitution Act, 1982* which entitles them to sell fish?

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

   (b) If so, has it been extinguished?

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

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

87. My conclusions in this appeal may be summarized as follows. Following the approach that I set out to determine the scope of an aboriginal right in *Van der Peet*, the Sheshaht and Opetchesaht peoples possess an aboriginal right to sell fish for the purpose of obtaining sustenance from the fishery at the Somass River. That right was not extinguished prior to 1982, and is therefore confirmed by the *Constitution Act, 1982*. The right is limited by the Sheshaht and Opetchesaht peoples' traditional reliance on the resource, and by the power of the Crown to limit or prohibit exploitation of the resource that is incompatible with its continual use. The Regulations at issue in this case infringe the Sheshaht and Opetchesaht peoples' exercise of this right, and that infringement has not been demonstrated to be justified. The conviction should accordingly be set aside.

1(a) <u>Has the Right of the Sheshaht and Opetchesaht Peoples to Trade Fish for Sustenance Purposes Been Established</u>?

88. The question of whether there is an aboriginal right to trade fish for sustenance was addressed in *Van der Peet*. I there held that the question to be posed is whether the current use of the fishery satisfies needs of the aboriginal people that were traditionally met by the fishery. The aboriginal right to sell fish is limited to equivalence with what the aboriginal people in

question historically took from the fishery according to aboriginal law and custom.

89. In this case, the essential facts were not in dispute; the parties disputed only the characterization of the evidence that was led at trial. Even in the version of facts put forth by the Crown, there is ample evidence from which to conclude that the Sheshaht and Opetchesaht peoples made their living off the Somass River.

90. The trial judge found that the Sheshaht have been in the area of the Somass River for approximately 200 years, and that they moved to the River from the outer islands because of the salmon resource. He found that "[p]rior to the whites arriving, the Sheshaht contacted other bands and traded commodities -- having potlatches and probably intermarried". Later in his reasons, he stated:

> There's no doubt that the Sheshaht Band has the aboriginal rights to catch the fish returning in the area that they do fish. There is some evidence of barter exchange between the different bands and Mr. Inglis is unable to find any record of the selling of fish to the settlers. In 1882, the population of the Band totalled some 176. Its needs were easily accomplished in obtaining sufficient food. There is evidence that other foods were supplied.

91. The evidence indicates that the Sheshaht and Opetchesaht used their fishery on the Somass River for food, as well as to secure relations with neighbouring tribes and the goods that they needed from those tribes. In other words, the Sheshaht and Opetchesaht made their living from the fishery. It is not necessary to prove that the ways that the Sheshaht and

Opetchesaht traditionally made their living are identical to the ways that they use the fishery to make their living today. Such a requirement, as I discussed in *Van der Peet*, would preclude the adaption of aboriginal peoples to the modern era. I conclude that the Sheshaht and Opetchesaht peoples have established an aboriginal right to sustenance from the Somass River.

1(b) Has the Sheshaht and Opetchesaht Right to Fish Commercially for Sustenance Been Extinguished?

92. The Crown argues that any aboriginal right of the Sheshaht and Opetchesaht bands to the Somass fishery has been extinguished on the grounds asserted in *Van der Peet.* For the reasons there set out, I find that the aboriginal right of the Sheshaht and Opetchesaht peoples to trade fish for sustenance on the Somass River has not been extinguished.

2. Does the Current Regulatory Scheme Infringe the Aboriginal Right to Fish Commercially for Sustenance?

93. As discussed in *Van der Peet*, the question is whether the regulatory scheme has the effect of interfering with the aboriginal right of the Sheshaht and Opetchesaht peoples to sell fish to the extent required to provide the sustenance they took from the Somass river by aboriginal law and custom. The inquiry has two stages. The first stage requires the person asserting the right to establish *prima facie* inference with an aboriginal right covering the

activity at issue. That established, infringement is established unless the Crown shows that the regulatory scheme as a whole satisfies the right.

94. N.T.C. Smokehouse Ltd. asserts the aboriginal right of the Sheshaht and Opetchesaht bands to sell fish from the Somass River for sustenance. The evidence, as discussed above, establishes this right. The Regulation under which N.T.C. Smokehouse Ltd. stands charged prohibits the sale. It cannot be asserted that regulatory scheme satisfies the right, since it prohibits any sale of fish for sustenance and makes no provision for satisfaction of the collective right.

95. The transaction at issue was large, involving approximately 119,000 pounds of chinook salmon. The size of the transaction alone, however, does not rebut the *prima facie* infringement. The quantity of fish sold is relevant only in relation to the sustenance needs of the Sheshaht and Opetchesaht peoples. In addition, a further difficulty stems from the collective nature of the aboriginal right. Evidence of commercial fishing by individual members of the Sheshaht and Opetchesaht bands pursuant to ordinary commercial fishing licences obtained on an equal basis with non-aboriginal fishers, does not permit the inference that the group right has been satisfied. This is so even if the scale of fishing by individual band members would be of a quantity that would meet the sustenance needs of the band. It is for the Crown to show that it has put in place a regulatory scheme that meets the collective right of the Sheshaht and Opetchesaht peoples to trade in fish for

sustenance. This it has not done. I conclude the infringement of the aboriginal right is established.

3. Is the Limitation Placed on the Aboriginal Right by the Regulation Justified?

96. This Court accepted in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, that the government may limit the methods of exercising aboriginal rights in certain circumstances. The inquiry into justification is an inquiry into whether the limitation placed on the exercise of aboriginal rights by the government is within the permissible range of limitations.

97. To establish that the exercise of an aboriginal right is justified, the Crown must establish both that the law or regulation at issue was enacted for a "compelling and substantial" purpose, and that the law or regulation is consistent with the fiduciary duty of the Crown toward the aboriginal peoples. As I wrote in *Van der Peet*, the limitations envisaged by the concept of justification developed in *Sparrow* reflect the nature and purpose of the right, and have as their object its preservation and responsible use.

98. In the case at bar, as in *Van der Peet*, the Crown has not established that the denial of the aboriginal right to sell fish for sustenance is required for conservation purposes or for other purposes related to the continued and responsible exploitation of the resource. Moreover, the total denial of the right may be seen to conflict with the fiduciary duty of the Crown to permit exercise of a constitutionally guaranteed aboriginal right. It follows that the

infringement of the aboriginal right to sell fish for sustenance has not been justified.

Conclusion

99. I would allow the appeal to the extent of confirming the existence in principle of an aboriginal right to sell fish for sustenance purposes. I would set aside the conviction of the appellant and enter an acquittal. The answer to the constitutional questions should be as follows:

1. Section 4(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, as invoked by the appellant.

2. Section 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in September of 1986, is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, as invoked by the appellant.

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

Solicitors for the appellant: Rosenberg & Rosenberg, Vancouver.

Solicitors for the respondent: The Attorney General of Canada, Ottawa.

Solicitors for the intervener the Attorney General of British Columbia: Fuller, Pearlman, Victoria.

Solicitors for the intervener the Canadian National Railway Company: Ladner, Downs, Vancouver.

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

Solicitors for the interveners the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation: Russell & DuMoulin, Vancouver.

Solicitors for the intervener the First Nations Summit: Ratcliff & Company, North Vancouver.

Solicitors for the interveners Delgamuukw et al.: Rush, Crane, Guenther & Adams, Vancouver.

Solicitors for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner: Pape & Salter, Vancouver.