

1-1-1995

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Recommended Citation

Stuart Gilby, "The Aboriginal Right to a Commercial Fishery" (1995) 4 Dal J Leg Stud 231.

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THE ABORIGINAL RIGHT TO A COMMERCIAL FISHERY

STUART GILBY†

This paper explores the issue of an Aboriginal right to a commercial fishery in Canada. Relevant case law and government policy are examined.

Historically, governments have excluded the First Nations from participation in the political and economic life of the country, with devastating results.¹ These problems continue to plague Aboriginal peoples in their dealings with the rest of Canada.

Traditionally, the courts have supported this exclusion. The justice system has been utilised to ensure the success of programs that dominate and marginalize Native peoples.²

† LL.B. anticipated in 1995.

¹ The Royal Commission on Aboriginal Peoples, *The Path to Healing: Report of the National Roundtable on Aboriginal Health and Social Issues* (Ottawa: Canada Communications Group, 1993) at 29:

the pre-contact Aboriginal population of Canada [was] 210,000 dropping to 80,000 in 1870 and recovering to 120,000 in the early 1900s.

And at 91:

Indigenous groups epitomized the state of human health and environmental harmony, with sophisticated systems of kinship and exacting medicinal practices. But with the encroachment of Euro-American influence, captivity and dysfunction resulted. Captivity is a complex web of geographic, economic, and legal isolation that significantly segregates Indigenous peoples so that they cannot benefit from the range and quantity of human resources enjoyed by other Canadians. Dysfunction is nowhere more evident than in the health status of Indigenous peoples.

² R. A. Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990) at 325.

In a series of seminal cases beginning with *Calder v. British Columbia (A.G.)*³ and culminating in *R. v. Sparrow*,⁴ the Supreme Court of Canada has moved away from precedent based on racial bias and contempt for values that are in conflict with European ideas of property and rights.⁵

Several lower court judges have used these Supreme Court cases, and the new concepts they entail, to broaden the law's understanding of what constitutes Aboriginal rights. The judgments of Lambert J.A. of the British Columbia Court of Appeal are prime examples of carefully considered applications of these new principles.

This paper concludes that there is a moral and legal duty for the rest of the country to recognize, and facilitate the exercise of, an Aboriginal right to a commercial fishery.

³ [1973] S.C.R. 313, 4 W.W.R. 1 [hereinafter *Calder* cited to S.C.R.].

⁴ [1990] 1 S.C.R. 1075, 4 W.W.R. 410 [hereinafter *Sparrow* cited to S.C.R.]. See also: *R. v. Guerin*, [1984] 2 S.C.R. 335, 6 W.W.R. 481; *R. v. Simon*, [1985] 2 S.C.R. 387, 71 N.S.R. (2d) 15 [hereinafter *Simon*]; *R. v. Sioui*, [1990] 1 S.C.R. 1025.

⁵ Eurocentric jurisprudence has built upon the racist premises inherent in theories of primitivism and the doctrines of *Terra Nullius*, Discovery, and Conquest. Traditional Canadian legal theory on Aboriginal rights is founded upon *The Royal Proclamation of 1763*; treaties dating from 1725; the U.S. cases: *Johnson and Graham Lesees v. MacIntosh* (1823), 21 U.S. (Wheaton) 543 (S.C.), *The Cherokee Nation v. The State of Georgia* (1831), 30 U.S. 1 (S.C.), *Worcester v. The State of Georgia* (1832), 31 U.S. (6 Peters) 515 (S.C.); and *Saint Catherine's Lumber and Milling Co. v. The Queen* (1888), 14 A.C. 46 (P.C.).

Of particular note is the racism that supported the views of Marshall C.J. of the U.S. Supreme Court in the cases listed above. In denying full and equal rights to First Nations he said in *Johnson* at 590:

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . .

The first statement seems at best incongruous. Surely it is Europeans who continue to exhibit a lust for war: the horrific mess in the Balkans attests to that fact. The second statement blithely ignores the agricultural societies established by a variety of indigenous groups in the Americas. The third underlines the conceptual problems that have brought the environment to its present precarious state. The combination is a poor foundation for establishing equitable jurisprudence.

I. SPARROW

The decision in *R. v. Sparrow*⁶ is the most important yet from the Supreme Court of Canada on Aboriginal rights and the fishery. It is also a major pronouncement on, and interpretation of, the constitutionality of all rights of the First Nations.

Mr. Sparrow was charged under the Regulations of the *Fisheries Act*⁷ for fishing with a drift net longer than was permitted under the Musqueam Band's Food Fishing Licence, issued by the Department of Fisheries and Oceans. He claimed that his right to fish was protected by subsection 35(1) of the *Constitution Act, 1982*,⁸ and that since the licence regulations were inconsistent with this protection, they were of no force or effect under section 52.

Essentially, the Crown's position was that the right had been extinguished by regulation.

Counsel for Mr. Sparrow argued before the Supreme Court that the issue should be viewed as one of a right to a commercial fishery.⁹ The Court said that it felt constrained to decide the matter only as it had been presented to the lower courts—as one relating solely to the food fishery.¹⁰ It is obvious that the Court side-stepped the commercial fishery issue in order to force Indigenous groups and the Government to resolve the issue outside of the judicial system.

The judgment implicitly warns both sides that having the court make such a decision may result in extreme disappointment. The greater warning is aimed at the Government. This unanimous ruling increases the scope of the fiduciary duty under which the Crown must operate when dealing with First Nations peoples. It is plain that the Court expects the Government to perform in an honourable manner and to respect the inherent rights of Natives.

For the first time, the court addressed the scope of subsection 35(1), which states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The decision first looks at the meaning of "existing" and determines that the rights involved are those in existence at the time that

⁶ *Supra* note 4.

⁷ R.S.C. 1970, c. F-14, s. 61(1).

⁸ Schedule B to the *Canada Act, 1982* (U.K.), c. 11.

⁹ W. I. C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" 15 *Queen's L.J.* 217 at 219.

¹⁰ *Supra* note 4 at 1100.

the *Act* came into effect. Rights previously extinguished in a valid manner are not revived, but “an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.” To do so would be to constitutionalise “a crazy patchwork of regulations.”¹¹

Aboriginal rights are not to be frozen in time but are to be interpreted in a flexible manner “so as to permit their *evolution*” and are to be viewed in their “*contemporary form* rather than in their simplicity and vigour”(emphasis added).¹²

The Crown’s argument that the *Fisheries Act* and Regulations constituted a complete code adverse to the existence of Aboriginal rights is firmly rejected. The Court found that a controlled right is not one which is extinguished.¹³ In a passage that dismisses the application of pre-1982 jurisprudence and its belief that extinguishment by statute was readily accomplished, the judgment adopts the words of Hall J. from *Calder*, that any statutory intent to extinguish must be clear and plain. Dickson C.J. says that the *Fisheries Act* and Regulations have no such intent.¹⁴

The Court interpreted the phrase “recognized and affirmed” found in subsection 35(1). The Bench clearly limits the concept of Aboriginal rights when finding that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”¹⁵ Obviously, in the Court’s opinion, Aboriginal rights or claims to land are not absolute.

This admonition is followed by a passage detailing how the decision in *Calder* caused a major shift in the negotiating policy of the Government. This in turn resulted in subsection 35(1) being enshrined in the Constitution. The latter point is seen as putting an end to “the old rules of the game” and “calls for a just settlement for aboriginal peoples.”¹⁶

Subsection 35(1) is to be construed purposively and “a generous, liberal interpretation of the words in the constitutional provi-

¹¹ *Supra* note 4 at 1091.

¹² *Ibid.* at 1093. The Court quotes with approval B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 782.

¹³ *Ibid.* at 1097.

¹⁴ *Ibid.* at 1099.

¹⁵ *Ibid.* at 1103.

¹⁶ *Ibid.* at 1106. The Court quotes N. Lyon, “An Essay on Constitutional Interpretation” (1988), 26 Osgoode Hall L.J. 95 at 100.

sion is demanded.”¹⁷ This results in an extension of the meaning and application of the concept of fiduciary duty. This duty is held to be incumbent upon the Crown in its dealings with indigenous peoples. A great deal of pressure is placed on the Crown by the Court:

the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and the aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship . . . the honour of the Crown is at stake in dealing with aboriginal peoples. The special trust relationship and the responsibility of the government vis-a-vis aboriginal peoples must be the first consideration in determining whether the legislation or action in question can be justified.¹⁸

There will be a great deal of difficulty for the legislative, executive, and administrative arms of Government to be successful before the Court unless they formulate new approaches in their dealings with Natives. This is made evident by statements to the effect that “federal power must be reconciled with federal duty” and that the Crown will be held “to a high standard of honourable dealing with respect to the aboriginal peoples.”¹⁹

The decision ends the application of the *Derricksan*²⁰ line of cases which had established that Aboriginal fishing rights were subject to regulation and consequent extinguishment.

Although subsection 35(1) is outside the *Charter* and beyond the reach of section 1 limitations, the Court develops an *Oakes*-like²¹ test to emphasize that Aboriginal rights are not absolute and can be regulated. This test is to be administered on a case-by-case basis and is meant to be applied rigorously when the Court scrutinizes legislation for compliance with the Constitution.²²

¹⁷ *Ibid.* at 1108.

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 1109.

²⁰ *R. v. Derricksan* (1976), 71 D.L.R. (3d) 159, [1976] 6 W.W.R. 480 (S.C.C.) [hereinafter *Derricksan*].

²¹ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-39, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].

²² As it was fashioned in the same vein as *Oakes*, it may be that it too will steadily be eroded. The Court has come under increasing pressure to defer to Parliament on

The *Sparrow* Test

There is an onus of proof on an indigenous group or individual claiming infringement of a fishing right to demonstrate that indeed the practice is an existing right under subsection 35(1). This right is not to be ascertained from the traditional European property viewpoint. Aboriginal fishing rights are collective rights and in keeping with earlier Court decisions are deemed *sui generis*. The courts are "to be sensitive to the aboriginal perspective."²³

In order to determine if there has been a *prima facie* infringement of a right, the courts are to ask:

First, is the limitation unreasonable? Secondly does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right?²⁴

Once the above-noted steps have been proved by the claimant alleging legislative infringement, the onus shifts to the Crown.

The issue of justification is then to be addressed. The Government is to show that the impugned legislation has a valid objective. While not exploring this issue in great detail and leaving the concept to be explored in each subsequent case, the Court accepts that conservation is indeed a valid objective but rejects the "public interest" argument as being too vague to deny a constitutional right.

Once a valid objective has been established, focus moves to the conduct of the Crown in implementing its purpose. Again, the Court goes to great lengths to lay out the need for the Government to fulfil its fiduciary obligation and act in an honourable manner. A non-exhaustive list of indicia by which to measure Government action is given. Three points are brought out here:

1. Does the legislation impair the right as minimally as possible?

many issues and no longer rigorously upholds *Oakes*. For a discussion of the Court's retreat from its early assertion of *Charter* rights see D. Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions" (1993) 72 Can. Bar Rev. 417.

²³ *Supra* note 4 at 1112.

²⁴ *Ibid.* The third question implies recognition of an ability to exercise the right in a commercial fashion.

2. If there has been expropriation of the right, was fair compensation offered?
3. Has the Aboriginal group in question been consulted prior to implementation of the regulation or legislation?

If positive answers to these or similar questions can be found then the limitation of the right may be upheld.

It cannot be emphasized too strongly that Aboriginal rights are not considered absolute and may be subject to control. However, the court places much greater emphasis on the Government's need to fulfil its special obligations and to act honourably.

II. THE RESPONSE TO *SPARROW*

In the wake of this case much activity was undertaken at the Department of Fisheries and Oceans (DFO) to reorganize its dealings with Natives. A policy paper on the "Aboriginal Fisheries Strategy"²⁵ (AFS) was published and accompanied by a series of initiatives including establishment of:

1. Aboriginal Fishing Agreements, or contracts, between the Ministry and Indigenous groups;
2. Aboriginal Fishing Authorities which are Native-run bureaucratic bodies given management responsibilities by DFO;
3. Communal Licences which dictate the terms and methods of implementation of fishing activities;
4. A few pilot commercial projects, for the most part undertaken on the Pacific coast; and
5. Contribution Agreements which fund bands who join with DFO in fishery management plans.

The policy is patronizing, and for all its purported claims of negotiation, still manages to dictate ultimatums. It is possible to characterize this entire process as another carrot-and-stick approach used to obtain native compliance with Government strategy. The stick is to be wielded when agreement cannot be reached on a management plan. DFO *will* issue a Communal Licence on its last of-

²⁵ Department of Fisheries and Oceans, "Policy for the Management of Aboriginal Fishing" (Ottawa: Department of Fisheries and Oceans, 1991).

ferred terms.²⁶ Those in violation of the licence are subject to prosecution.

The Contribution Agreement is, of course, the carrot. For cash-starved bands that have experienced decades of astronomical levels of unemployment, the offer of a large sum of money is a compelling method of obtaining "agreement" with DFO programs. Rather than engender self-sufficiency this exercise only serves to extend the shadow of Government financial control through yet another social welfare program.

Nonetheless, there are some promising aspects to the undertaking. These include the development of joint conservation strategies and habitat enhancement programs through the Contribution Agreements and commercial pilot projects such as those in Quebec and British Columbia. These are operated by bands in conjunction with Indian Affairs and DFO.²⁷ For example, at Waswanipi, Quebec, DFO is working with the local Cree to establish commercial markets in Montreal for James Bay area whitefish, sturgeon and pickerel.²⁸

1. The West Coast

The Pacific commercial fishery was estimated in 1989 as having an annual gross income of \$500,000,000.²⁹ There has been Native participation in this fishery for some time. This participation has generally been on the open market and not tied to Aboriginal rights. The Native Brotherhood of British Columbia represents some 1500 indigenous workers involved in the industry. In 1985 it created the Native Fishing Association (NFA) to help finance Aboriginal groups and individuals attempting to enter the commercial system.

Both of these groups have worked in concert with a non-Native organisation, the United Fishermen and Allied Workers Union (UFAWU), on items of mutual interest. Occasional differences have arisen in the past over such things as the 1989 strike by the UFAWU.³⁰

²⁶ *Ibid.* at 2, 4.

²⁷ Indian and Northern Affairs Canada (INAC), "Annual Report 1990-1991" (Ottawa), states at 24 that 21 different projects were established in British Columbia alone, to which INAC contributed \$630,000.

²⁸ Information provided by B. Craik, Director of Federal Relations-Grand Council of the Crees of Quebec, in a telephone conversation in March of 1994.

²⁹ *Canadian Press* (Vancouver) (3 August 1989) (QL).

³⁰ *Ibid.*

The Government's response to *Sparrow* has resulted in greater open discord between Natives and other fishers on the west coast. In 1991, the NFA called for thirty percent of all commercial licences in British Columbia to be awarded to Aboriginals in an attempt to take control of a reasonable share of the market. Unfortunately, non-Indigenous organizations have expressed alarm at both the AFS and many NFA proposals, seeing them as a threat to the status quo.³¹ This acrimony is just as often an extension of long held misunderstandings, xenophobia, and racism, as it is a fear of losing economic security. These attitudes constitute a serious problem across the entire country and threats of violence are becoming more common.³²

2. Atlantic Canada

In the Maritimes, the Mi'kmaq have attempted to explain their view of history, the environment, the fishery, and the law, in a booklet entitled "Netukulimk."³³ Much of their position is based on the sanctity of treaties concluded with the British between 1725 and 1761:

All the treaties confirm the right of the Mi'kmaq to fish. The right to fish is one of many understandings forming the basis of the Treaty language. The Mi'kmaq over all of present-day Nova Scotia, including Cape Breton Island, signed treaties with the British. The Mi'kmaq today living throughout the Traditional Territory are the beneficiaries of these Treaties. As a result, the Mi'kmaq in Atlantic Canada continue to have the free liberty or

³¹ On January 29, 1993, the Pacific Blackcod Fisherman's Association issued a statement that it intended to sue DFO, its Minister, Deputy Minister, and Regional director over AFS plans to increase Indigenous peoples' participation in the blackcod fishery. One of the grounds alleged by the BFA was that Aboriginals had never participated in this fishery and therefore should be precluded from asserting any right to enter the current system. *Canadian Press* (Vancouver) (29, January 1993) (QL).

³² Nova Scotia lobster fisherman Wayne Spinney told Fisheries Minister Brain Tobin :

There are thousands of pounds of lobster being brought in illegally under the guise of the native fishery. Is it to be settled amongst ourselves by yelling and fighting and eventually guns and so on?

Canadian Press (Yarmouth) (17 March 1993) (QL).

³³ Native Council of Nova Scotia, *Mi'kmaq Fisheries, Netukulimk, Towards a Better Understanding* (Truro: 1993).

right to fish, and *sell fish* as protected through the Covenant Chain of Treaties (emphasis added).³⁴

The Mi'kmaq also place great faith in a series of liberal court decisions. For example, they have this to say of the decision handed down by the Nova Scotia Court of Appeal in *R. v. Denny*.³⁵

The Court has clarified that the Mi'kmaq of Nova Scotia, both on Cape Breton Island and the mainland, possess an aboriginal right to fish for food for themselves and their families, independent of any treaty-based right, both *on reserve and off reserve*. This right to take fish takes priority over the interests of recreational and commercial fisherman(emphasis in the original).³⁶

The official Mi'kmaq position concerning access to the commercial fishery espoused in this booklet is one of quiet determination. The Mi'kmaq affirm that such rights are guaranteed both as Aboriginal and Treaty rights in law. In addition, they claim commitment to a path of negotiation in an attempt to fully realize the potential that these rights hold. The booklet also provides a detailed list of the Mi'kmaq cooperative efforts with DFO and the Maritime Fisherman's Union.³⁷

However, there is evidence that if the pace of change is too slow, unilateral action will be taken. Donald Marshall has been charged with commercially fishing eels without a licence. The case is currently before the Provincial Court and evidence is not freely available. Apparently, he was offered a licence and refused it. The defence is predominantly based on the guarantees in the Treaty of 1752, that those taking its benefit

have free liberty of hunting and fishing as usual . . . [and] shall have complete freedom to bring for Sale to Halifax or any other Settlement . . . fish, or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best advantage.³⁸

³⁴ *Ibid.* at 11.

³⁵ (1990), 94 N.S.R. (2d) 253 (N.S.C.A.). The reasoning in this case was approved by the Supreme Court in *Sparrow*.

³⁶ *Supra* note 33 at 17.

³⁷ *Ibid.* at 54.

³⁸ *Treaty of 1752*, Article 4. There are also available defences related to subsequent treaties in the 1760s and an Aboriginal right to a commercial fishery as discussed in this paper.

Several other cases in the Atlantic Region awaiting trial deal with *Fisheries Act* violations and relate to defences of Aboriginal and Treaty rights. Mi'kmaq, Metis and non-Aboriginal persons are involved in a variety of situations. Some of these may be pre-determined by cases currently under appeal to the Supreme Court of Canada.

III. CASES SUBSEQUENT TO *SPARROW*

1. British Columbia

In 1993, a series of cases split the British Columbia Court of Appeal over the issue of Aboriginal food and commercial fishing rights. The majority and minority opinions displayed fundamentally opposing views of what constitutes an Aboriginal right and how that right may be legally exercised.³⁹ At this writing they are yet to be heard by the Supreme Court.

The future of more than the west coast fishery will hang in the balance. There is, of course, no guarantee that the indigenous peoples involved, if unsatisfied with the Supreme Court's decision, would not seek other avenues of resolution. These might include anything from appeals to the international community through the United Nations to civil disobedience and armed hostility. Younger members of the Aboriginal community, frustrated with their situation, are prepared to increase the level of confrontation first seen at Oka.⁴⁰

A case of immense complexity and importance, *Delgamuukw v. British Columbia*,⁴¹ concerns land claims and Aboriginal rights. The majority of the British Columbia Court of Appeal seems to be caught in an outdated and narrow interpretation of what constitutes aboriginal rights and how they may be exercised. MacFarlane J.A. states:

A practice which had not been integral to the organized society and its distinctive culture, but which became

³⁹ March 11, 1994 (QL).

⁴⁰ See G. York & L. Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Co., 1991).

⁴¹ [1993] 5 W.W.R. 97 (B.C.C.A.). This case has been given leave by the Supreme Court to wait the outcome of land claims negotiations between the Gitksan and the Province of British Columbia prior to being heard.

prevalent as a result of European influences would not qualify for protection as an aboriginal right.⁴²

He continues, "aboriginal rights are fact and site specific," any rights are to be determined by actual occupancy and use of specific areas of land. "Activities may be regarded as aboriginal if they formed an integral part of traditional Indian life *prior to sovereignty*" (emphasis added).⁴³

Much of this view is based on the decision in *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*,⁴⁴ a judgment that determined Aboriginal rights in a restrictive manner. It received criticism from the Supreme Court in *Ontario (A.G.) v. Bear Island Foundation*.⁴⁵

In summation, the British Columbia Court of Appeal lays out a three-part test of what it considers are relevant facts to prove the existence of an Aboriginal right. The right must be integral to the group in question. It must have been exercised for a sufficient length of time prior to, and at the assertion of, British sovereignty (in 1846 according to the Court).⁴⁶ The right must have been unextinguished as of 1982 in order to enjoy constitutional protection. With the exception of the last point, this definition is contrary to the spirit of the *Sparrow* judgment.

Lambert J.A., dissenting, held a much broader view of the concept of Aboriginal rights, one that is in keeping with *Simon*, *Sparrow*, and section 35 of the *Constitution Act, 1982*. It is also innovative and refreshing in the arid desert of formalistic legal thinking that continues to be the foundation for many judgments concerning indigenous peoples. He asserts that Aboriginal rights must be characterized in terms of Aboriginal society and not, as has been

⁴² *Ibid.* at 125.

⁴³ *Ibid.* at 129.

⁴⁴ (1979), 107 D.L.R. (3d) 513 (F.C.T.D.). The case sets out a four-part test which must be met to ensure the success of an aboriginal title claim: 1) The claimants and their ancestors are to be an organized society; 2) that society is to have occupied the specific area over which the claim is made; 3) occupation was to the exclusion of others, and; 4) occupation was an established fact at the time of the assertion of British sovereignty.

⁴⁵ [1991] 2 S.C.R. 570 at 575, 83 D.L.R. (4th) 381 at 384. The Court implies that the test in *Baker Lake* is overly restrictive and says that it prefers the tests it used in *Simon* and *Sparrow*.

⁴⁶ *Supra* note 41 at 177.

too often the case, solely in European terms.⁴⁷ He outlines six considerations that may be of help in determining what comprises an Aboriginal right.⁴⁸

First, the constitutional guarantee of section 35 is not to be seen as attempting to protect the rights of indigenous peoples as they were at the time of assertion of British sovereignty. Like other constitutional rights, they must evolve or grow over time but without further erosion.

Second, *rights not habits* are protected. These rights must be considered fundamental, significant, and distinctive by the group claiming them. Lambert adopts the phrase “an integral part of their distinctive culture” from *Sparrow* to illustrate the concept.

Third, Natives enjoy all of the same rights as other Canadians with Aboriginal rights being held in addition to these common freedoms. These additional rights are part of the common law and arise from “aboriginal occupation, possession, use and enjoyment of land, through the institutions of aboriginal society.”

Fourth, the existing rights as constitutionalised are *contemporary* rights capable of exercise in a modern way. “They are not to be frozen at the time of Sovereignty or any other time.”

Fifth, if the right is an “encompassing and general right” it is not to be defined by the particular method of its exercise. An example is given that a right of exclusive occupation, possession, and use of the land allows a group to establish a landfill site. That activity would not derive from a limited, modernized concept of the right to erect a midden.

Finally, if the Aboriginal society had recognized collective, small-group, or individual rights, those must be recognized today. There can be no blanket imposition of the idea that only collective rights apply to Natives.

These conceptual differences between Lambert J.A. and the majority of the court are highlighted in *R. v. Vanderpeet*,⁴⁹ wherein a member of the Sto:lo nation was charged with selling salmon caught under the authority of a Food Fishing Licence. The majority held that the relevant method of determining the scope of a right to fish was to examine the nature of the right as it existed prior to contact with Europeans. The fact that on contact the Sto:lo

⁴⁷ *Ibid.* at 277.

⁴⁸ *Ibid.* at 277–81.

⁴⁹ [1993] 5 W.W.R. 459 (B.C.C.A.).

had freely begun to barter in fish was deemed not to be a natural progression of an aboriginal right. Mrs. Van der Peet was held not to have a defence of exercising an Aboriginal right in answer to the charge.⁵⁰

In dissent, Lambert J.A. writes that the key to understanding Aboriginal rights is in correctly defining them. He finds at least three ways of relating the salmon fishery to Sto:lo customs, traditions, and practices.⁵¹

First, he looks at the purpose of the salmon fishery. If that purpose is solely to obtain food then the right should be so limited. Secondly, the court may adopt as applicable any limitation placed by the Sto:lo on the exercise of the custom of fishing. Finally, it is proper to look at the overall importance of the practice in the lives of the people involved.

This third "social" interpretation will give the superior interpretation of the right from the perspective of both an Aboriginal group and the common law, Lambert J.A. says. He finds that the salmon were central to the lives of the Sto:lo. Early trade with the Hudson Bay Company clearly depicts the scope of the right as seen by them and offers a basis for the validity of a claim to a commercial fishery. Mrs. Van der Peet was therefore exercising an unextinguished Aboriginal right and she has a sound defence to the charge.⁵²

In *R. v. Gladstone*,⁵³ members of the Heiltsuk band were charged with attempting to sell herring spawn without a licence. The majority of the Court held that the nature and scope of the Aboriginal right did not include the right to sell spawn. In the alternative, they said any *prima facie* infringement of such a right by the licensing scheme was justified by the need for conservation.⁵⁴

Lambert J.A. found that the evidence supported a claim to a commercial fishing right. The Heiltsuk had traditionally engaged in trading herring spawn with other Natives prior to the arrival of Europeans. Historical data and anthropological studies were examined in support of the claim. The only limitation to which this right was subject was that of a potential need for conservation. Lambert

⁵⁰ *Ibid.* at 468–74.

⁵¹ *Ibid.* at 495–504.

⁵² *Ibid.* at 506–11.

⁵³ [1993] 5 W.W.R. 517 (B.C.C.A.).

⁵⁴ *Ibid.* at 528–30.

J.A. found that the evidence did not support a conclusion that conservation was needed.⁵⁵

*R. v. N.T.C. Smokehouse*⁵⁶ involved a corporate entity of the Sheshaht and Optchesaht bands. It was accused of buying fish not lawfully caught under a commercial licence, and also of selling fish caught under an Indian Food Fishing Licence. The majority found that there was no validity to a claim of an Aboriginal right to a commercial fishery as, historically, the bands were not established as barterers or sellers of fish. Moreover, they said that the imposition of the licensing scheme was for the benefit of the resource and was a necessary infringement of any rights.⁵⁷

Justice Lambert found that the trial judge had erred in concluding that there was no commercial fishery right held by the band. As the group had such a right, it was evident that the licensing and regulating scheme were a *prima facie* infringement of that right as per *Sparrow*, and a prohibition on sale of fish could not be justified for conservation purposes given the state of the particular fishery.⁵⁸

*R. v. Nikal*⁵⁹ does not specifically deal with commercial fishing but the reasons given by Lambert J.A., again in the minority, offer an excellent understanding of the relationship between the *Sparrow* test and the imposition of licensing and regulating schemes.

In 1986, Mr. Nikal, a member of the Gitskan-Wet'suwet'en, was accused of fishing without a DFO Indian Food Fishing Licence (he was in possession of a licence issued under band by-laws). He was acquitted at trial in Provincial Court. The trial judge declared the band licence offered a complete defence to the charge. The Crown appealed and, at summary appeal court, the acquittal was upheld on the alternate ground that the Fisheries regulation constituted a *prima facie* infringement of Mr. Nikal's right to fish for food and was not justified.

Justice Lambert agreed that the imposition of the DFO licensing scheme constituted a *prima facie* infringement under the *Sparrow* test. He declared that in order for the resource to be adequately maintained one single authority should control the entire system, including the river and the sea. This entity would need to consult

⁵⁵ *Ibid.* at 532–41.

⁵⁶ [1993] 5 W.W.R. 542 (B.C.C.A.).

⁵⁷ *Ibid.* at 555–61.

⁵⁸ *Ibid.* at 587–97. Note especially the comments at 593.

⁵⁹ [1993] 5 W.W.R. 629 (B.C.C.A.) [hereinafter *Nikal*].

with all resource users and might involve developing a licensing system. In 1986, the regulating scheme did not recognize any right to the fishery for Aboriginals other than for food. This limited recognition did not even allow barter of fish for other food to ensure a balanced diet.⁶⁰

At the time the Gitskan-Wet'suwet'en were in the process of launching their land claim and were not prepared to submit to the licensing process. The Crown was convinced that any Native acceptance of the regulating scheme indicated that Aboriginal rights had been abandoned.

As the parties were at polar opposites on the licensing program, the manner of implementing the scheme was found by Lambert J.A. to be contrary to the minimum impairment principles enunciated in *Sparrow*. The majority allowed the Crown's appeal and reversed the acquittal, holding that the impugned scheme was not a *prima facie* infringement of Aboriginal rights nor did it cause undue hardship. It was also stated that band regulation of a fishery can only be valid if authority is delegated by Parliament.⁶¹

2. Quebec

The Quebec Court of Appeal holds views similar to the majority of the British Columbia Court in *Nikal*. In *R. v. Deconti*,⁶² five members of the Desert River Algonquin band were charged with fishing without a licence as required under subsection 4(1) of the *Quebec Fisheries Regulations*.⁶³ They claimed an Aboriginal right protected by subsection 35(1) of the Constitution. In addition, they asserted a right protected by the *Treaty of Swegatchy* and section 88 of the *Indian Act*,⁶⁴ which allowed them to hunt and fish in traditional territory without being subject to Government regulation. The Court of Appeal agreed that the Treaty gave a right to fish and hunt in the territory, but the Government demand for a licence did not constitute an undue hardship on those rights. The accused have been granted leave to appeal to the Supreme Court of Canada.⁶⁵

⁶⁰ *Ibid.* at 663.

⁶¹ *Ibid.* at 639-43.

⁶² [1993] A.Q. No. 846 (QL).

⁶³ (1978) 115 G.O.C. II, 2561.

⁶⁴ R.S.C. 1985, c. I-5, s.88.

⁶⁵ Leave granted (3 March 1994) S.C.C.A. (QL).

3. Ontario

Two cases highlight the effect that *Sparrow* has had on treaty rights and their interpretation by the courts. *R. v. Bombay*⁶⁶ dealt with members of the Rainy River band of the Saulteaux Tribe of the Ojibway Nation, *Treaty Number 3*, and the *Fisheries Act*. The accused were charged with fishing out of season, fishing with a prohibited net, and selling fish out of season. They claimed a treaty right to a commercial fishery. At trial, the judge found that a treaty right to a commercial fishery did exist but that it was subject to regulation. The case was decided prior to *Sparrow*. The appeal was heard following that judgment.

At the Court of Appeal a unanimous bench held that the *Sparrow* principles apply to Treaty rights. Consequently, the Court found that the restrictions interfered with the preferred method of exercising the right and caused an undue hardship. The Crown did not argue that the Government could justify its regulation as demanded by *Sparrow*. The appeal was allowed and the convictions quashed.

*R. v. Jones and Nadjiwon*⁶⁷ dealt with members of the Chippewas of Nawash who are part of the Saugeen Ojibway Nation, the *Bondhead Treaty of 1836*, and the *Fisheries Act*. The accused were charged with taking and selling more fish than allowed under their commercial licence quota. The evidence established that the band had both an Aboriginal and Treaty right to fish for commercial purposes. This right was of vital importance to the economic needs of this group.⁶⁸

The Crown submitted that the Ojibway were seeking recognition of an exclusive right to the fishery. Fairgrieve J. found the band had a constitutional priority over other users, but were not putting forward any kind of exclusive claim.⁶⁹ The quota infringed the right but was deemed to have a valid conservation objective. The Saugeen Ojibway priority came into effect after the conservation objectives were met. The quota system, as applied by the Government, favoured all other users before the Ojibway. The trial judge also found that there was no consultation with the Chippewas over the

⁶⁶ [1993] O.J. No. 164 (C.A.) (QL).

⁶⁷ (1993), 14 O.R. (3d) 421, [1993] 3 C.N.L.R. 182 (Prov. Ct.).

⁶⁸ *Ibid.* at 441.

⁶⁹ *Ibid.* at 434. The case leaves the impression that the Crown may have been fear-mongering or succumbing to the same.

quota system.⁷⁰ As a result, the regulations were found to be of no force or effect, and the accused were acquitted.

Obviously, this case opens the door to other Native peoples living under treaty to seek recognition in the courts of the right to a commercial fishery. The language used in this particular treaty is common to many of the numbered treaties.⁷¹

The Government of Ontario has decided not to appeal the decision, declaring that any appeal would likely fail. The Provincial Attorney General said that it was in the public interest to negotiate rather than use costly, time-consuming litigation to settle such issues.⁷² The Minister of Natural Resources said that those who want the Government to regulate Natives in a "tougher manner" and use the courts to oppose Aboriginal rights are still in a "denial stage."⁷³

Subsequent to these remarks, the Province established a resource centre to collect data for efficient fisheries management. The primary goal conservation management. Secondly, it is hoped that this signals the end of acrimony and court battles and the beginning of meaningful negotiation and cooperation. Government, Native and non-Aboriginal commercial fishery workers, anglers, conservation groups, and tourist operators will all be involved in the process.⁷⁴

IV. CONCLUSION

At the time of contact with Europeans, most indigenous nations were completely self-sufficient and maintained a complex web of economic, religious, and social customs in concert with the environment. This relationship was severely disrupted by the newcom-

⁷⁰ *Ibid.* at 448-53.

⁷¹ The Treaties commonly use the phrase, "And further, Her Majesty agrees that her said Indians shall have the right to pursue their avocation of hunting, trapping and fishing throughout the tract surrendered, subject to such regulation as may from time to time be made by the Government of the country acting under the authority of Her Majesty, and save and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes under grant, or other right given by Her Majesty's said Government." Such clauses will, as was done here, be read in light of *Sparrow*, *Sioui*, and the Constitution.

⁷² *Canadian Press* (Toronto) (21 May 21 1993) (QL).

⁷³ *Ibid.*

⁷⁴ This announcement was made a scant two months after Fairgrieve J.'s decision. *Canadian Press* (Toronto) (21 June 21 1993) (QL).

ers. The imposition of a capitalist market economy and the wholesale derogation of the environment have wreaked havoc with the ability of indigenous peoples to maintain their original economic independence.

It is absurd to suggest that constitutional recognition and affirmation of Aboriginal and Treaty rights is intended to limit those rights to merely subsistence levels. Simply because indigenous societies lacked a market in its current form does not mean that there was an absence of an economic aspect to their lives. Entry into the modern marketplace is in keeping with decision in *Sparrow* that rights evolve and are not to be frozen in time.

For groups whose entire culture was built around the salmon, such as many of the British Columbia Nations, or who combined fishing and hunting as the mainstay of their society, as did the Mi'kmaq, it seems only too obvious that their rights have an essential commercial facet. Governments and the larger society must come to grips with this reality and accept that accommodations are to be made in the current system.

The process that the Supreme Court began in *Calder* is far from finished. Across the entire country, Governments and Aboriginal groups are engaged in battles over the extent and meaning of all forms of Aboriginal rights. Amongst these are many court cases concerning the right to participate in a commercial fishery.

The fiduciary responsibility placed on the Crown in its dealings with indigenous peoples requires that honourable and sensible steps be taken to resolve these issues outside of the courts. As the Government of Ontario said following *Jones and Nadjiwon*, it is a waste of time and money to continue this perpetual litigation. In addition, continuous legal wrangling fosters ill-will and racism in the larger community. Governments must begin to act responsibly and honestly represent the best interests of everyone concerned.

Aboriginal groups must be given an opportunity to regain self-sufficiency and contribute in a meaningful way to the economic and environmental health of the country. The Supreme Court has expressed its desire to see the process completed by negotiation and consultation. Few governments have responded fully.

Nova Scotia, for example, has recognized that there needs to be a completely new approach taken in its dealings with the Mi'kmaq. The Premier has stated that negotiations will be conducted on a nation to nation basis, that mere recognition of Aboriginal rights is

not enough, and that due to past betrayal the Government must earn the trust of Natives.⁷⁵ However, there is no coherent provincial policy regarding Aboriginal or Treaty rights to a commercial fishery, in spite of Governmental concern over the potential for violence in the disputed lobster fishery.⁷⁶

Frustrated by the lack of concrete Government action, many Natives have acted unilaterally to exercise their rights, or have launched court cases to force recognition of those rights. The response of the lower courts to these actions has been mixed but generally conservatism reigns.

Lambert J.A., of the British Columbia Court of Appeal, has laid out well considered guidelines on the meaning and extent of Aboriginal rights. It is his liberal interpretation that should govern application and implementation of those rights by governments. The statements in *Guerin* and *Sparrow* suggest he will be vindicated by the Supreme Court when it hears the relevant appeals.

There is a great fear in the non-Native community that an Aboriginal right to the commercial fishery would be exercised as an exclusive right. Much of this fear is unfounded. As Fairgrieve J. found in *Jones and Nadjiwon*, there was not any demand for exclusiveness made. The Native Fishing Association has asked for a reasonable thirty percent portion of the British Columbia fishery. Aboriginal people have a well-established history of sharing their wealth with others. As Elijah Harper has said, "As Indigenous peoples we had no alternative but to fulfil our vision and intent to share the land and the resources with Europeans. We intended that the arrangement would be to respect and support each other."⁷⁷ This has not been reciprocated. Colonialism, domination, abuse, and gross neglect have characterized the policies of this country's Governments. Change is long overdue:

many of the non-native people who have come and talked will always tell us, if you Indians and you half-breeds would begin to go to work and earn some money, you would be like us. They say, we came here and we

⁷⁵ From a statement made to the 19th General Assembly of the Native Council of Nova Scotia by Premier John Savage October 2, 1993.

⁷⁶ P. Underwood, Nova Scotia Deputy Minister of Fisheries, "Discussion of Nova Scotia Provincial Fisheries Policies" (Address at Dalhousie Law School, 10 March 1994) [unpublished].

⁷⁷ E. Harper (Address at Dalhousie Law School, 11 March 1994) [unpublished].

had nothing when we came here, but look at us now. But my answer back to those people is always yes, you had nothing and many of you people came from countries where there was oppression, where you were forced to leave because you did not like the system. And when you came to this country, you came with nothing. So where did you find the riches? You found them right here, right here in Canada. The resources that made people rich are right here in Canada. We feel that those resources are ours, and we want to share in those resources, so we can participate in the economy of this country and the democracy of this country. And you cannot tell me that democracy works if you do not have some sort of economic back-up in terms of our people being self-supporting.⁷⁸

The Future?

There remains the issue of implementing an Aboriginal right to a commercial fishery. In what order of priority will such access to the fishery be set? The cases discussed above have declared that the needs of conservation are to come first. Other valid government objectives may fit into the scheme at various places dependent upon their weight. Aboriginals exercising food and ceremonial rights come before all other users.

A Native commercial fishery would likely fall below the food and ceremonial rights and ahead of recreational fishing. Balancing the rights and needs of non-native commercial fishers with indigenous rights will be problematic. Much care will have to be taken by Government to meet its fiduciary duty to Natives while attempting to maintain credibility in the larger community. There is also the very real threat of violence to consider.

Wide-ranging and inclusive negotiations are vital if any process is to be successful. A co-management scheme would work best, apportioning the fishery in line with the needs of individual communities. Aboriginal peoples have, as discussed earlier, a moral imperative to share resources. They are open to sensible solutions.

⁷⁸ Statement made by Jim Sinclair before a Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord, quoted by Binnie, *supra* note 8 at 218.

Some non-natives presently engaged in the commercial fishery may choose to be "bought out." Some First Nations may elect compensation for the surrender of their claims. Neither of these options are likely.

The Supreme Court has offered a potential answer to the question in a recent case, *Quebec (A.G.) v. Canada (National Energy Board)*.⁷⁹ The Court voiced its opinion that the fiduciary duty owed by the Government to Aboriginal peoples operates less stringently when a quasi-judicial administrative tribunal is involved:

The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.⁸⁰

Following wide-ranging and *meaningful* consultation with all interested parties it would be possible to create a tribunal similar to the present Labour Boards across the country. Ideally, this new body would be a tripartite group, constituted of representatives from Government, Aboriginal groups, and the fishing industry. It would be charged with administration of any agreement worked out by the consultation process.

This country has a demonstrated ability to employ the concept of cooperative federalism which involves sharing the constitutional responsibilities of the Federal and Provincial Governments. It is accomplished through complementary legislation and often through delegation of powers to administrative boards. It should not be too difficult to include Indigenous peoples within this process immediately. It is time to end a history that reeks of acrimony, paternalism, and arrogance.

⁷⁹ [1994] S.C.J. No. 13, S.C.C. File No. 22705 (QL).

⁸⁰ *Ibid.* para. 34.