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Peggy J. Blair*

Prosecuting the Fishery: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases

In Sparrow *and other decisions, the Supreme Court of Canada has outlined certain tests which must be met by the Crown and defence in the trial of aboriginal fishing cases where s.35 rights are at issue. This article describes the shifting burdens of proof which have resulted from those tests. The author argues that the Supreme Court of Canada has imposed procedural and substantive requirements of proof on the defence which may in themselves be unconstitutional.*

Dans Sparrow *comme dans d'autres décisions, la Cour suprême du Canada a exposé certains critères qui doivent être respectés par la Couronne et la défense dans le procès des causes de la pêche autochtone où les droits garantis par l'art. 35 sont en question. Cet article décrit la charge de la preuve qui est en mouvement à cause de ces critères. L'auteur argumente que la Cour suprême du Canada a imposé des exigences substantielles et procédurières de preuve sur la défense qui peuvent en elles-mêmes être inconstitutionnelles.*

Introduction

Aboriginal fishing prosecutions where the accused invokes an aboriginal or treaty rights defence differ significantly from other criminal and quasi-criminal prosecutions. In most prosecutions, the burden of proof remains on the Crown throughout trial.[1] However, where an aboriginal person who has been charged with such an offence raises section 35 of the *Constitution Act, 1982*[2] as a defence, the burden of proving an aboriginal or treaty right shifts to the accused once the Crown has established a *prima facie* offence.[3]

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1. *R.* v. *Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1314-17, 85 D.L.R. (3d) 161 [hereinafter *Sault Ste. Marie* cited to S.C.R.].
2. Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*].
3. There may be an exception to this general principle where specific provisions of legislation refer to a reverse onus. For example, in *R.* v. *Penasse* (1971), 8 C.C.C. (2d) 569, 7 C.N.L.C. 375 [hereinafter *Penasse* cited to C.C.C.], the Ontario Court, Provincial Division held that it

While the defence evidence of aboriginal or treaty rights is often characterized as reply evidence to the Crown's case, it actually results from a shifting burden of proof requiring the defence to prove the elements of a s. 35 right on the balance of probabilities. This differs fundamentally from the burden of proof in most cases, where the defence need only raise a reasonable doubt. It also imposes an enormous evidentiary burden on the defence, given the developing legal tests which the aboriginal parties are required to meet.

In *R.* v. *Sparrow*,[4] the Supreme Court of Canada referred with approval to one author's analysis of the effect of the *Constitution Act, 1982*:

> the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[5]

This paper attempts to outline the current burdens of proof within *Sparrow*-type proceedings, as well as the constitutional and other issues entailed by such procedures. This paper will examine the fundamental unfairness which has resulted from the Supreme Court of Canada's recent expansion of the *Sparrow* tests to apply civil burdens of proof on criminal defendants. When it comes to "prosecuting the fisheries," it will be submitted that the "old rules of the game" are still very much in play.

I. *The General Framework of Aboriginal and Treaty Rights Cases*

Aboriginal and treaty rights receive protection from ss. 35 and 52 of the *Constitution Act, 1982*, which state:

> 35(1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> 52(1). The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

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was incumbent on the Crown to bring the defendants within the sections of the Act which created an offence and to prove the non-applicability of a treaty with respect to a charge of selling pickerel, given the provisions of the *Game and Fish Act*, R.S.O. 1970, c. 186 [now R.S.O. 1990, c. G.1], which created a reverse onus on the accused to prove a "lawful taking" where the harvest, but not the sale of pickerel, was the subject of charges.

4. [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160 [hereinafter *Sparrow* cited to S.C.R.].

5. N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100, quoted in *ibid.* at 1105-1106.

There are two types of s. 35 rights, treaty rights and aboriginal rights. As noted by Judge Fairgrieve of the Ontario Court of Justice, Provincial Division in *R.* v. *Jones and Nadjiwon,*[6] aboriginal and treaty rights may exist together, the learned judge stating, "I accept that treaty rights and other aboriginal rights are not mutually exclusive and that a treaty can recognize pre-existing rights, as well as create new ones."[7]

Where an aboriginal rights defence under *Sparrow* is successful, legislation or actions[8] which are inconsistent with the right and which cannot be justified are declared unenforceable as being unconstitutional.

Section 1 of the *Canadian Charter of Rights and Freedoms,*[9] which renders *Charter* rights subject to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society, does not formally apply to s. 35 aboriginal and treaty rights. Nonetheless, the Supreme Court of Canada has developed a test of justification for infringements of s. 35 which is broadly analogous to s. 1. As noted earlier, in most prosecutions, the burden of proof remains on the Crown throughout the trial.[10] However, where an aboriginal person raises a s. 35 defence, the burden of proving the aboriginal or treaty right on a balance of probabilities shifts to the defence once the Crown has established a *prima facie* offence.[11] Once the defence establishes an aboriginal or treaty right and *prima facie* infringement of that right, the Crown may call reply evidence on the issue of extinguishment and must call evidence of justification or an acquittal will result. The Crown, of course, may also call evidence challenging the existence, nature and scope of the right itself.

The justification aspect of the Crown's case requires proof that the regulation, law or act infringing upon the s. 35 right is justifiable in accordance with the tests set out in *Sparrow,*[12] *Nikal,*[13] and *R.* v. *Van der Peet.*[14] It is invoked only after the defence has proven an aboriginal or treaty right. At the justification stage of a trial, the Court examines the

6. *R.* v. *Jones* (1993), 14 O.R. (3d) 421 [hereinafter *Jones*].
7. *Ibid.* at 439.
8. For example, in *R.* v. *Nikal,* [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658 [hereinafter *Nikal* cited to S.C.R.], the Supreme Court declared a specific licence issued in 1986 to be unconstitutional based on the management scheme in existence at the time.
9. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
10. *Sault Ste. Marie, supra* note 1.
11. There may be an exception to this general principle where specific provisions of legislation refer to a reverse onus. *Penasse, supra* note 3.
12. *Supra* note 4.
13. *Supra* note 8.
14. [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [hereinafter *Van der Peet* cited to S.C.R.].

management or regulatory scheme which has resulted in charges being laid to determine whether it is a justified infringement of the right.

The Supreme Court of Canada in *Nikal* has reaffirmed the applicability of the tests set out in *Sparrow* to the Crown's burden of proving justification in aboriginal food fishing cases, and has recently applied the same test to a case involving trade and barter.[15] However, the decision of the Court in *R.* v. *Gladstone*[16] released concurrently with *Van der Peet* and *N.T.C. Smokehouse Ltd.*[17] appears to diminish the Crown's burden of proving justification where commercial fisheries are involved. Since the Supreme Court has (arguably) not yet ruled on any case in which the Crown has led justification evidence at trial, there remains an absence of definitive guidelines as to the procedures to be followed and the degrees of proof required to meet the *Sparrow* and *Gladstone* tests.

II. *The Special Relationship Between the Crown and Aboriginal Peoples*

In a prosecution of an aboriginal accused where aboriginal and treaty rights are invoked, there is a special relationship between the Crown and aboriginal peoples at stake. This has been described by the Supreme Court of Canada as the "honour of the Crown."[18]

In any such prosecution, the Crown must prove that the government's dealings with the accused uphold the honour of the Crown with respect to its special trust relationship with aboriginal people. The principles associated with the honour of the Crown were first articulated in *R.* v. *Taylor and Williams*:[19]

> In approaching the terms of a treaty quite apart from the other considerations already noted, *the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.* Mr. Justice Cartwright emphasized this in his dissenting reasons in *R.* v. *George* where he said:
>
> > We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away

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15. *Ibid.*
16. [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone* cited to S.C.R.].
17. [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 [hereinafter *N.T.C. Smokehouse* cited to S.C.R.].
18. *Supra* note 4 at 1114.
19. *R.* v. *Taylor* (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.) [hereinafter *Taylor* cited to O.R.].

> by unilateral action and without consideration the rights solemnly assured the Indians and their posterity by treaty.[20]

This test was expanded and better defined by the Supreme Court of Canada in *Sparrow* to apply not only to legislation but also to government actions. The Supreme Court of Canada stated:

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals *is trust-like, rather than adversarial*, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
>
> ... [The] honour of the Crown is at stake *in dealings with* aboriginal people. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation *or action in question* can be justified.[21]

On the meaning of subsection 35(1) of the *Constitution Act, 1982* the Court held that:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power....
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians....
>
> ... The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.[22]

While the fiduciary obligation is held principally by the federal government, according to Brian Slattery, it is shared with the provincial governments in areas where the latter exercise constitutional jurisdiction.

> The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main

20. *Ibid.* at 360, quoting *R.* v. *George*, [1966] S.C.R. 267 at 279, 55 D.L.R. (2d) 386 [emphasis added, citations omitted].
21. *Sparrow*, *supra* note 4 at 1108, 1114 [emphasis added].
22. *Ibid.* at 1109, 1119, 1110 [emphasis added].

> burden of the fiduciary trust. *But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust.*[23]

Slattery also writes:

> The trust relationship attaches primarily to the Federal government but it also affects Provincial governments in certain contexts. Prior to Confederation, the Crown was bound in its capacity as head of the various colonies and territories making up British North America. The rearrangement of constitutional powers and rights accomplished at Confederation did not reduce the Crown's overall fiduciary obligations to First Nations. Rather these obligations tracked the various powers and rights to their destinations in Ottawa and the Provincial capitals. Since section 91(24) of the Constitution Act, 1867 makes the Federal government responsible for "Indians and Lands Reserved for the Indians," the main burden of the trust relationship clearly falls on its shoulders. *However, so long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations.*[24]

The Commissioners of the Aboriginal Justice Inquiry of Manitoba have also taken the position that the fiduciary obligation applies not only to the federal government, but is also a responsibility of the provincial Crowns:

> Our courts have established an entirely new approach toward the examination of Aboriginal legal issues, which includes the fiduciary obligation, the content of Aboriginal title, and the scope of Aboriginal and treaty rights. This approach applies to all legislation, whether or not Aboriginal peoples or their unique legal rights are mentioned. *The broad thrust of the law covers both federal and provincial legislation because both levels of government owe a fiduciary duty to all Indian, Inuit and Metis people.*[25]

The process by which the Crown is called upon to prosecute aboriginal people, who must then defend themselves by proving either rights through treaties entered into with the Crown, or by virtue of rights which pre-date Crown sovereignty, creates a situation rife with conflict. As noted in a recent report prepared for the Royal Commission on Aboriginal Peoples:

> First Nations find themselves in an untenable situation: due to the unique historical relationship between Aboriginal peoples and the Crown and to

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23. B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 755 [emphasis added].
24. "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 274 [emphasis added].
25. Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991) at 160-61, with thanks to Hutchins, Soroka and Dionne for bringing this reference to the author's attention (see *infra* note 26) [emphasis added].

> the policy of the British and later Canadian governments (enshrined in the Royal Proclamation of 1763) that Aboriginal lands could only be surrendered to the Crown, most claims by Aboriginal peoples are against the Crown. However, this unique relationship and restriction on alienation has also created a situation wherein the party against whom First Nations hold most of their grievances is also the party with whom they stand in a fiduciary relationship. . . .
>
> Crown counsel, however, functions within a context that is inherently skewed in favour of non-Aboriginal interest. It is not the intention here to criticize counsel conscientiously carrying out their mandate; it is rather to question the appropriateness and fairness of that mandate. To the extent that mandate involves continuing vigorously to prosecute Aboriginal persons for pursuing activities long recognized in treaties and by the courts or to argue outmoded precedents or the Crown's own turpitude to deny rights, that mandate must be questioned.[26]

That such litigation is often far from trust-like is clear from remarks made by Justice Wilson in *Guerin* v. *Canada.* Justice Wilson indicated that "the Crown's tactics . . . left a lot to be desired" and did not "exemplify the high standard of professionalism we have come to expect in the conduct of litigation."[27]

In a criminal prosecution, the rules of conduct have always been clear. The Crown must disclose well before trial information in its possession which may be relevant to the defence. The accused is entitled to an acquittal if a reasonable doubt is raised. The defence need not present any evidence by which to do so, and the accused is under no obligation to testify on his or her own behalf. Finally, if the Crown is unable to meet its burden of proof, an acquittal results. The criminal justice system does not afford second chances to the Crown who fails to adduce sufficient evidence at trial. Given the special fiduciary obligations owed by the Crown, the aboriginal accused facing charges in which s. 35 rights are raised should enjoy even greater procedural safeguards than other accused.

In aboriginal prosecutions, however, the Supreme Court has seen fit to impose a shifting burden of proof. This civil standard, it is submitted, is inappropriate in criminal proceedings. Not only does it avoid the requirements of disclosure, but it may lead to situations where accused persons are convicted notwithstanding the existence of a reasonable doubt. Moreover, there are many instances in which the Crown has not met its burden of proof, and has been granted a new trial to try again.

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26. See, for instance *Guerin* v. *Canada*, [1984] 2 S.C.R. 335 at 376, 387, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120 [hereinafter *Guerin* cited to S.C.R.], cited in Royal Commission on Aboriginal Peoples, *Renouncing the Old Rules of the Game* (Report) by Hutchins, Dionne & Soroka, (Ottawa: The Commission, n.d.) [hereinafter *Renouncing the Old Rules*] on this point.
27. *Guerin*, *ibid.* at 353.

III. *An Unfair Onus of Proof*

Although s. 35 does not impose an express burden of proof on the defence, such a burden was implicit in *Sparrow*. However, in developing a new and more stringent test for proof of an aboriginal right in *Van der Peet*, the Supreme Court took the position that the issue had not been addressed in *Sparrow*.

In fact, the Crown had argued before the Supreme Court of Canada in *Sparrow* that the defence evidence on the issue of aboriginal rights was insufficient to discharge the appellant's burden of proof. Indeed, the existence of an aboriginal right had been at issue throughout the proceedings. The trial court had found as a fact that "Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial" but that this did not prove an aboriginal right. The British Columbia Court of Appeal disagreed with the trial court's conclusion, finding that the existence of an aboriginal right was not in serious dispute. In its factum before the Supreme Court of Canada in *Sparrow*, the Federal Government insisted that:

> The burden of proof of the factual existence of the aboriginal right asserted by the Appellant on April 17, 1982 rests upon the Appellant. To discharge this burden, the Appellant is required to adduce *extensive and well-substantiated evidence.*[28]

The Supreme Court of Canada, however, upheld the British Columbia Court of Appeal's finding on this point, stating that while the evidence was not extensive, and between 1867 and 1961 was "scanty", it had not been disputed or contradicted in the courts below. This left sufficient evidence of continuity of the right to support the Court of Appeal's finding that an aboriginal right existed. Although the Supreme Court had, in *Sparrow*, expressly addressed the evidence of an aboriginal right which had been adduced at Sparrow's trial, it proceeded to outline a new and more onerous test to the accused in *Van der Peet*. In the first line of its judgment, the Court noted that the appeal raised the issue left outstanding in *Sparrow*, namely how aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act* were to be defined.[29] What had been implied with respect to an onus of proof on an accused claiming a s. 35 aboriginal right was now explicit. Justice L'Heureux-Dubé, dissenting on other grounds, stated that "[t]he onus is on the claimant to prove that he or she benefits from an existing aboriginal right."[30]

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28. Quoted in *Renouncing the Old Rules, supra* note 26 at 21 [emphasis added].
29. *Supra* note 14 at 526.
30. *Ibid.* at 585.

In *Van der Peet*, Chief Justice Lamer wrote about the public interest in reconciliation between aboriginal societies and the Crown, stating:

> I would note that the legal literature also supports the position that s. 35(1) provides the constitutional framework for *reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty.*[31]

Having described the task as one of reconciliation, however, the Supreme Court has developed an onus of proof which does not honour the relationship it described. As well, it should be noted that Justice McLachlin stated that the majority had exceeded the Court's proper role in attempting to cut back on aboriginal rights in the interest of reconciliation and "social harmony":

> A large view of justification which cuts back the aboriginal right on the ground that this is required for reconciliation and social harmony should not be adopted. It runs counter to the authorities, is indeterminate and ultimately more political than legal. A more limited view of justification, that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use, should be adopted.[32]

Given the existing onus of proof, the defence is required to meet overwhelming and expensive tests of an aboriginal or treaty right before the Crown is required to respond on the justification issue. Frequently, the Crown has called little or no evidence on the issue for which it bears the burden of proof. Even so, the Supreme Court has required little or no evidence on which to decide that that justification has been proven.

In several instances, the Court proceeded to determine that justification has been met and that management schemes, about which it had heard no evidence, were justified. In *Nikal*, for example, the Court ruled that the requirement of a licence was not unreasonable since it was, at its most basic, simply a means by which rights-holders could be identified.[33] However, there was no evidence before the Court on the issue of rational connection between a licence and justification (there in fact was no licence in *Nikal*). There is no need for a fishing licence as a means of identifying a member of Mr. Nikal's band; band members carry status cards issued by the Department of Indian and Northern Affairs. Aboriginal fishing charges arise in circumstances where the issue is not the identity of the person charged, but rather the legality of the terms and conditions which would attach to licenses if issued or accepted. Furthermore, the communal licensing scheme which exists in provinces such as

31. *Ibid.* at 547 [emphasis added].
32. *Ibid.* at 520 (headnote summary of dissenting opinion).
33. *Nikal, supra* note 8 at 1060.

British Columbia and which was at issue in *Nikal* does not result in licences being issued to individuals in any event; they are issued to the community, since the rights at issue are held collectively and not by individuals.

In *Van der Peet*, no issue of justification arose, because the Court stated that "since the appellant has failed to demonstrate that the exchange of fish was an aboriginal right of the Sto:lo it is unnecessary to consider the tests for extinguishment, infringement and justification laid out by this Court in *Sparrow*. . . ."[34] Nonetheless, the majority of Supreme Court judges, in the absence of any evidence on the point, proceeded to develop and expand upon the test of justification first set out in *Sparrow*. In an extraordinary ruling, their conclusions have been described by a dissenting member of that same bench as both unnecessary and in themselves unconstitutional. Writing in dissent, Justice McLachlin spoke in *Van der Peet* of her discomfort with the majority decision:

> I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason why the broader view of justification should not be accepted. It is, in my respectful opinion, unconstitutional.
>
> The Chief Justice's proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.[35]

There is another fundamental unfairness in the manner in which the Supreme Court of Canada has repeatedly approached the issue of justification. Where Crown evidence of justification has not been presented

34. *Supra* note 14 at 571.
35. *Ibid.* at 667 [emphasis added].

at trial, the Court has frequently referred the case back to trial for further Crown evidence to be presented, even where the aboriginal accused has successfully proven a s. 35 right, citing the absence of clear rules for the Crown to follow at the time of the trial. The most recent examples are in *Gladstone*[36] and *R.* v. *Badger.*[37] In *Badger*, a new trial was ordered so that the Crown could introduce evidence of justification, the Court stating that "[i]n the absence of such evidence, it is not open to this Court to supply its own justification."[38] This raises the question of whether the Court should be looking for justification in the absence of evidence, or whether it should be determining that in the absence of evidence from the Crown on an essential element of its case, an acquittal might be more appropriate given the nature of the quasi-criminal proceedings involved.

In *Gladstone*, where some evidence of justification had been presented by the Crown, the Court actually directed a new trial so that the Crown could present *more* evidence of justification since that which the government had put forward was deemed insufficient to meet the new test. The Court observed that:

> The lack of evidence is problematic with regards to both aspects of the *Sparrow* analysis. First, in so far as an evaluation of the government's objective is concerned, no witnesses testified, and no documents were submitted as evidence, with regards to the objectives pursued by the government in allocating the herring, and the herring spawn on kelp, amongst different user groups. As was noted above, there was evidence presented about the selection criteria used by the Department of Fisheries and Oceans in allocating herring spawn on kelp licences in 1975; however, no evidence was presented as to how or why those selection criteria were chosen or applied. Also, the evidence does not indicate whether those selection criteria changed over time (not all licences were allocated in 1975) or whether the emphasis placed on the different criteria varied. Clear evidence was presented at trial demonstrating that setting the total herring catch at 20% was directed at conservation, but no evidence was presented regarding the objectives sought to be attained in allocating that 20% amongst different user groups. . . .
>
> Other evidentiary problems exist with regards to the priority analysis. There is no evidence as to how, between the different aboriginal bands holding Category J licences, allocation decisions are made. There is no evidence as to how, or to whom, the remaining 2,051 tons of herring spawn on kelp is allocated after the 224 tons of herring spawn on kelp is allocated to Category J licences. There is also no evidence as to how many aboriginal

36. *Supra* note 16.

37. *R.* v. *Badger*, [1996] 1 S.C.R. 771 at 823, 133 D.L.R. (4th) 324 [hereinafter *Badger* cited to S.C.R.]: "[T]he issue of justification was not considered by the courts below. Therefore a new trial must be ordered so that the issue of justification may be addressed."

38. *Ibid.* at 822.

> groups live in the region of the herring spawn on kelp fishery, what percentage aboriginal peoples are of the population in that region, and the size of the Heiltsuk Band relative to other aboriginal groups and the general population in the region. . . .
>
> Obviously a new trial will not necessarily provide complete and definitive answers to all of these questions; however, given that the parties simply did not address the justifiability of the government scheme, other than the setting of the herring catch at 20% of the total herring stock, a new trial will almost certainly provide the court *with better information than currently exists. Prior to Sparrow it was not clear what the government, or parties challenging government action, had to demonstrate in order to succeed in s. 35(1) cases; this lack of clarity undoubtedly contributed to the deficiency of the evidentiary record in this case. A new trial on the question of justification will remedy this deficiency.*[39]

In other words, while evidence *had* been presented in addressing the Crown's burden of proof in a quasi-criminal proceeding, that evidence had been insufficient to meet the Crown's burden of proof. Instead of directing an acquittal, however, the Court sent the matter back for the Crown to take a second kick at the cat. This is an extraordinary result in light of the purpose of a criminal prosecution which as stated by the same court in *R.* v. *Stinchcombe,* is "not to obtain a conviction", but to present "what the Crown considers to be credible evidence relevant to what is alleged to be a crime."[40] Even in *Sparrow*, the trial judge had found Crown evidence inadequate to meet the test of justification:

> Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length was justifiable as a necessary and reasonable conservation measure. The trial judge . . . did, however find that the evidence called by the appellant "[c]asts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. *That case was not fully met by the Crown."*[41]

Nonetheless, in *Sparrow* itself, the leading case on aboriginal rights, the Supreme Court of Canada ordered a new trial to determine whether infringement existed and whether it was "nonetheless consistent with s. 35(1)",[42] thus giving the Crown another opportunity to prove justifica-

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39. *Gladstone, supra* note 16 at 776-77 [emphasis added].
40. [1991] 3 S.C.R. 326 at 333, [1992] 1 W.W.R. 97 [hereinafter *Stinchcombe* cited to S.C.R.].
41. *Supra* note 4 at 1120 [emphasis added].
42. *Ibid.* at 1121.

tion (and another chance to convict) in circumstances where it was apparent that the issues had indeed been addressed at trial and the Crown had been unable to answer them.

However, where the *defence* has not met the proof of an aboriginal right at trial because of new tests developed by the Supreme Court of Canada at the appellate level, the Court has not sent the matters back for new defence evidence according to the new tests, but has convicted the accused.

For example, in *Van der Peet*, having reviewed the evidence and determined that Mrs. Van der Peet failed to meet a test which had not existed at the time she faced trial, the Court upheld her conviction rather than ordering a new trial. Mrs. Van der Peet was given no opportunity to argue issues which had not been considered by the lower courts or to present evidence at a new trial. In fact, the Supreme Court did not even consider that the defence might have liked an opportunity to address its mind to a new evidentiary test, given that the Supreme Court attributed the deficiencies of the lower court decision to the fact that it was rendered before the Supreme Court of Canada formulated the appropriate test. The Supreme Court stated:

> In adjudicating this case Scarlett Prov. Ct. J. obviously did not have the benefit of direction from this Court as to how the rights recognized and affirmed by s. 35(1) are to be defined, with the result that *his legal analysis of the evidence was not entirely correct. . . .*[43]

In *R.* v. *Howard*,[44] members of the Williams Treaties of 1923[45] were held by the Supreme Court of Canada to have had their rights extinguished as a result of a land surrender, a result which differed from the conclusions reached in the later decision of *R.* v. *Adams*[46] involving a similar surrender. An application by the accused in *Howard* to have the Supreme Court re-hear the matter, based on the decision in *Adams*, was refused. An application by the Appellant, Dorothy Van der Peet, for a new trial to present evidence in accordance with the new tests set out in *Van der Peet* was refused at the same time.[47]

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43. *Van der Peet*, *supra* note 14 at 566 [emphasis added].
44. [1994] 2 S.C.R. 299, 115 D.L.R. (4th) 312 [hereinafter *Howard*].
45. Williams Treaty of 1923, reproduced in R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica, 1995) at 213-20.
46. [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 [hereinafter *Adams* cited to S.C.R.].
47. Personal communications, Bill Henderson, appellate counsel in *Howard*. Both applications were dismissed on 16 January 1997.

It is difficult to understand why in each case where the lower courts have not had the benefit of directions from the Supreme Court, the Court has directed a new trial, to allow the Crown to present additional evidence to meet its burden of proof, but the accused has been denied the same opportunity.

Other issues arise from *Sparrow*. As a result of the shifting burden of proof, the Crown's justification evidence cannot be characterized as reply evidence, since it is presented in response to the defence having established a *prima facie* historical right to engage in certain practices and before the defence has called any evidence on the management or regulatory scheme in place. During the justificatory leg of the trial, the Crown supposedly bears the burden of proof beyond a reasonable doubt and the defence may or may not respond with expert or other evidence of its own in reply.

With the burdens of proof currently contemplated by the Supreme Court of Canada in *Sparrow*, a trial must proceed in a number of stages, each with rights of reply and surrebuttal and without clear direction as to the degree or timing of Crown disclosure with regard to each phase.[48] Even then, it appears the burden of disclosure rests with the accused and not with the Crown since it is the accused who must present historical evidence supporting the aboriginal or treaty right first, thereby giving the Crown an opportunity to retain experts to review the defence evidence and respond. Most recently, in *R.* v. *Finta*,[49] the Supreme Court stated that the Crown did not need to disclose expert evidence it intended to call as reply evidence prior to trial, even where the defence had disclosed its defence, so long as the defence was provided with a right of surrebuttal. The Court did not comment on the requirement that the Crown provide full disclosure prior to calling such evidence in accordance with its own decision in *R.* v. *Stinchcombe*.[50] The practical result of this is that the Crown has full disclosure of the defence historical evidence before it is called on to present historical evidence of its own, but is not required to disclose its own materials or expert evidence until it elects to present reply evidence.

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48. (1) The Crown must prove a *prima facie* offence; (2) the defence must prove the aboriginal or treaty right on the balance of probabilities; (3) the Crown may prove extinguishment of the right but must do so to the strict proof, or beyond a reasonable doubt; (4) the defence must prove interference with the right amounting to *prima facie* infringement, and (5) the Crown must prove justification for the infringement to the strict proof, or beyond a reasonable doubt.
49. [1994] 1 S.C.R. 701, 112 D.L.R. (4th) 513 [hereinafter *Finta* cited to S.C.R.].
50. *Supra* note 40.

Where new issues are raised through that reply evidence, the defence is called on to respond by presenting further evidence in surrebuttal, or to recall its initial witnesses, who are then exposed for a second time to cross-examination on evidence presented long before. This is precisely what happened in *R.* v. *Decaire,*[51] a trial relating to fishing charges in which a s. 35 defence was raised. After the close of the defence expert evidence of an aboriginal and treaty right, the Crown obtained a ten month adjournment to locate an expert to respond to the defence evidence. It was then granted a second eight month adjournment after the Crown's first expert witness had testified in order to find a second expert to address issues which the first Crown expert had not dealt with satisfactorily. Both Crown experts raised new issues which had not been the subject of cross-examination during the defence evidence-in-chief, requiring the defence to re-call its expert witness, who was then subjected to cross-examination on evidence given almost two years earlier. This was done despite defence objections.[52]

When the Supreme Court of Canada set out the burdens of proof in *Sparrow,* it appears that the Court did not consider the heavy onus which would be placed on aboriginal parties, or the *Charter* implications of reversing the onus of proof in s. 35 situations. Nor have any subsequent cases since raised the issue.

The tests developed by the Supreme Court of Canada to deal with such cases invoke a reverse onus of proof on the accused, to be proven on the balance of probabilities. Such procedures may in themselves be unconstitutional in light of the Supreme Court's conflicting rulings to the effect that any provision creating an offence which allows imprisonment notwithstanding the existence of a reasonable doubt on any essential element violates both ss. 7 and 11(d) of the *Charter.*[53] Reverse onus sections in the *Criminal Code*[54] have been held to be unconstitutional as an infringement on the presumption of innocence in s. 11(d) of the *Charter.*[55] It remains to be answered how it is that the shifting burden of proof outlined by *Sparrow* can be reconciled with s. 11(d).

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51. *R.* v. *Decaire* (3 February 1997), (Ont. Prov. Div.) [unreported].
52. In *Decaire, ibid.* the *Crown Submissions in support of the Admissibility of Dr. Surtee's Evidence* specifically stated that Dr. W.J. Eccles, the first Crown witness, had not given opinions in the area he had been requested to, and therefore an additional expert was required, paras. 11-13.
53. *R.* v. *Vaillancourt,* [1987] 2 S.C.R. 636 at 655-56, 47 D.L.R. (4th) 399; *Re s. 94(2) of the Motor Vehicle Act,* [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536; *R.* v. *Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161.
54. R.S.C. 1985, c. C-46.
55. *R.* v. *Oakes,* [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 24 C.C.C. 321 [hereinafter *Oakes*].

Certainly, the shifting of an onus of proof within a statute can be demonstrably justified under section 1 of the *Charter*, but s. 35 rights do not form part of Part I of the *Constitution Act* and are not subject to a s. 1 limitation. This was the subject of comment by Justice McLachlin in her dissent in *Van der Peet*:

> Put another way, the Chief Justice's approach might be seen as treating the guarantee of aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the *Charter*. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the *Charter*, this is appropriate because the *Charter* expressly states that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, in the case of aboriginal rights guaranteed by s. 35(1) of the *Constitutional Act, 1982* [*sic*], the framers of s. 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others--in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the constitution.[56]

There has been no argument addressed as to why a justificatory test analogous to that contained in s. 1 should apply to aboriginal cases, particularly given that the *Constitution* itself does not suggest such a restriction. The limits placed on aboriginal rights in terms of a justificatory test originate not from any statute or from the *Constitution*, as noted by Justice McLachlin, but from the Supreme Court of Canada. Similarly, the requirement that an accused aboriginal person prove that his or her s. 35 rights have been *prima facie* infringed in order to invoke s. 52 protection cannot be found in any statute.

The Supreme Court of Canada has held in other cases that at minimum, the presumption of innocence requires that the accused be proven guilty beyond a reasonable doubt and that it is the state which bears the burden of proof.[57] Moreover, the Supreme Court has held that the real concern is not that the accused must disprove an element or prove an excuse, but

56. *Supra* note 14 at 662-63.
57. *Oakes*, *supra* note 55.

that an accused person might be convicted while a reasonable doubt exists. Where that possibility exists, the presumption of innocence is infringed.[58] In such cases, the issue then becomes whether the provision can be justified under s. 1 as a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society."

The Supreme Court in *Sparrow* directed that :

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is *trust-like, rather than adversarial,* and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[59]

It is extremely difficult to see how a reverse onus of proof on aboriginal parties can constitute a reasonable limit prescribed by law when it is simply an onus imposed by the Court itself. Indeed, if the government attempted to introduce regulations or rules which created a reverse onus of proof on aboriginal parties within federal or provincial statutes, it is extremely doubtful that these could pass the justificatory test set out in *Sparrow,* much less the requirements of criminal law. The objective behind the reverse onus must be closely connected with the purpose of the offence itself to be constitutional. For example, in *R.* v. *Keegstra,*[60] the reverse onus in the *Criminal Code* requiring the accused to prove the truth of his statements was held to be a reasonable limit since otherwise, the pressing and substantial objective of Parliament in preventing harm from hate propaganda would suffer unduly. But a requirement that the aboriginal parties to a prosecution prove that they are entitled to invoke s. 35 by placing the onus of proving the right on them is inconsistent with the principles of affirmation and recognition set out in *Sparrow*; indeed, it is inconsistent with the fiduciary duty on the Crown that the Crown uphold, recognize and affirm such rights:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words *"recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.*[61]

There are further issues of unfairness related to the onus of proof. Since the decision in *Van der Peet,* it is beyond question that the onus of proof of an aboriginal right lies upon the accused. But the Supreme Court has

58. *R.* v. *Whyte,* [1988] 2 S.C.R. 3, 51 D.L.R. (4th) 481, 42 C.C.C. (3d) 97 and *R.* v. *Keegstra,* [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 [hereinafter *Keegstra*].
59. *Supra* note 4 at 1108 [emphasis added].
60. *Keegstra, supra* note 58.
61. *Supra* note 4 at 1109 [emphasis added].

not ruled on the burden of proof in a treaty case, where it would seem that the Crown, as a party to the treaty, should bear the burden of proving its inapplicability, rather than the aboriginal party, as would be the case if any other contract were involved.[62] In *Penasse*,[63] a decision rendered well before the *Constitution Act, 1982*, a lower court held that in the absence of a specific reverse onus within legislation, the burden of proving that a treaty right did not protect the activity in question lay with the Crown. Judge Lunney of the Provincial Court of Ontario, Criminal Division held that where the sale of fish was involved, a reverse onus section within the Ontario *Game and Fish Act* which placed the onus on an accused where prosecuted for "taking, killing procuring or possessing fish" did not apply. As such, the court held:

> If the onus were on the defendants under s. 81 it might well be argued that to make out a defence under the treaty, they would have to show by evidence what were the actual fishing practices "heretofore" i.e. prior to the execution of the treaty in 1850 and that the actions of the defendants giving rise to the present charge against them came within the intent and meaning of the treaty. *The onus on the Crown does not shift, however, and the evidence must show beyond any reasonable doubt that the defendants are subject to the provisions of s. 64(2) of the* Game and Fish Act, 1961-62....
>
> It may be put forward that it is not incumbent on the Crown to negative any and every possible exception, excuse or exclusion of the provision of a general statute. To apply this principle here would be to put the cart before the horse. The treaty preceded the statute. The treaty secures substantive rights to the defendants. Those rights are theirs unless they have been subsequently abrogated, derogated from or otherwise diminished. In the trial of an issue involving Indians asserting rights under such a treaty where the treaty is older than the statute on which the prosecution is founded, it would seem that the *onus should be on the Crown to show that the statute abrogated, derogated from or diminished the treaty right asserted. . . . In the absence of the availability to the Crown of an onus section such as s. 81 of the* Game and Fish Act, 1961-62, *it is up to the Crown to bring the defendants within the statute and not the other way about.*[64]

The principles enunciated by the court in *Penasse* seem more consistent with the criminal law process than what has developed from *Sparrow*. The Crown's overall burden of proof is supposed to be proof beyond a reasonable doubt on the whole of the evidence for all but the rarest of

62. The author does not suggest that a treaty is a contract in the ordinary sense but the Supreme Court has indicated that the ordinary rules of proof should apply to extrinsic evidence where treaties are involved, as if they were contracts, *R.* v. *Horse*, [1988] 1 S.C.R. 187, 47 D.L.R. (4th) 526, [1988] 2 C.N.L.R. 112.
63. *Supra* note 3.
64. *Ibid.* at 572 [emphasis added].

offences involving absolute liability. In addition, the burden on the Crown of proving extinguishment of an aboriginal right has been described as one of "strict proof", while the Crown's proof of justification, at least in food fishing cases, has been described as a "heavy onus."[65] This suggests that the onus of proof beyond a reasonable doubt applies to the Crown at all stages of the trial, even where the reciprocal burden on the defence is that of a balance of probabilities. Yet there is no Supreme Court of Canada case involving the prosecution of aboriginal fishing in which the concept of "reasonable doubt" has even been mentioned. Nor has the Court characterized such cases as falling within the category of absolute liability or strict liability offences, a characterization which removes or alters certain elements, such as *mens rea*, from the definition of the offence which the prosecution must prove. Nor could the Court do so, in light of the defences first set out in *Sparrow*.

IV. *The Specific Requirements of Proof*

When the Supreme Court of Canada set out the burdens of proof in *Sparrow*, it is evident that some fragmentation of the evidence was contemplated. A typical prosecution entailing proof of the offence, defence evidence and Crown reply is not suitable for a *Sparrow*-type prosecution. It is not possible for the Crown to put forward reply evidence of extinguishment before the defence has called proof of an aboriginal right, and it is not possible for the defence to reply to evidence of justification before the Crown has presented its evidence in that regard. The procedural steps invoked in response to *Sparrow*, however, are fundamentally unfair to the defence.

V. *Prima Facie Proof of the Offence*

The Crown needs to present *prima facie* proof that an offence has occurred. Such proof is frequently admitted on an Agreed Statement of Facts in aboriginal and treaty rights cases, where the fact of the offence is not at issue. Where this is not the subject of agreement, the Crown must prove that the offence occurred, proving the elements of the offence according to the same burden of proof that would apply in any criminal or quasi-criminal proceeding.[66] This is not usually very difficult to do since the issue in aboriginal and treaty rights cases is not that a breach of

65. *Ibid.*

66. It is suggested that this is so whether the offence is one characterized as quasi-criminal or regulatory since the failure to make out a *prima facie* offence must result in an acquittal.

existing laws or regulations took place, but rather that such laws are unenforceable due to the provisions of s. 52 of the *Constitution Act, 1982*.

However, technical defences as to whether proof of the offence has been made out, unless resulting in a motion for non-suit, must await final argument. This means that aboriginal parties must present their s. 35 evidence and argue any technical defences at the end of the trial. If, in fact, the Crown has failed to establish any requisite element of the offence beyond a reasonable doubt, an acquittal will result; however, the aboriginal defendants will have been put through the enormous expense of raising constitutional issues and introducing complex evidence in circumstances where the merits of the constitutional argument were superfluous. The Supreme Court has itself held that if a court can decide a case without having to consider any constitutional issues, it should do so.[67]

Once the Crown has proven its *prima facie* case, as discussed, the burden of establishing an aboriginal or treaty right shifts to the defence. There is, at this time, no requirement that the Crown present its justificatory evidence as part of its *prima facie* case. Although the issue was raised by the defence in *Sparrow*, who had put the Crown on notice at trial that such issues should be addressed by the Crown as part of its *prima facie* case, the Court did not make the onus of proof clear, noting only that,

> [b]efore the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. . . . That case was not fully met by the Crown.[68]

VI. *Defence Requirement of Disclosure*

Where an aboriginal or treaty right defence under *Sparrow* is successful, legislation or actions[69] which are inconsistent with the right and which cannot be justified are declared unenforceable as being unconstitutional. Therefore, where legislation is being challenged, the defence is required to deliver a Notice of Constitutional Question both to the provincial and federal Attorneys General as well as the prosecutor with carriage of the proceedings. The Notice must set out the law to be challenged under s. 52 and the type of aboriginal or treaty rights to be invoked. It is not clear

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67. *Bisaillon* v. *Keable*, [1983] 2 S.C.R. 60 at 71, 7 C.C.C. (3d) 385; *R.* v. *Skoke-Graham*, [1985] 1 S.C.R. 106 at 121-22, 17 C.C.C. (3d) 289.

68. *Supra* note 4 at 1120.

69. For example, in *Nikal, supra* note 8, the Supreme Court declared a specific licence issued in 1986 to be unconstitutional based on the management scheme in existence at the time.

whether such a notice is required where it is not the legislation itself, but an action taken under legislative authority which is challenged. It is unlikely that such notice would be required where, for example, a fishing licence and not the legislation under which it was issued was being challenged by the defence as a *prima facie* infringement.

The requirements and formalities of notice vary from province to province and the degree of disclosure depends, for the most part, on which court is to hear the trial. Under the *Criminal Proceedings Rules of Ontario*,[70] for example, notice of application and constitutional issue is required to be made at least 15 days before trial where the application is to be made at trial and must state the documentary, affidavit and other evidence to be adduced at the hearing.[71] However, the *Rules* are only applicable to proceedings within the jurisdiction of the Ontario Court (General Division), which is a superior court, while most fishing cases proceed as offences under provincial legislation or under federal regulations to the *Fisheries Act*.[72] These cases are tried before justices of the peace or provincial judges who are not subject to the *Criminal Proceedings Rules*.[73]

There is certainly no obligation on the defence to raise a s. 35 defence until proof of the offence has been made out at trial. Proof of whether the Crown has lived up to its obligations under *Sparrow*, a factor in determining the constitutionality of the legislation, may not be known until the Crown has determined whether to call evidence of justification, and sometimes then not until Crown witnesses have testified and been cross-examined. As well, in *Sparrow*-type proceedings, neither the defence nor the Crown is required to call evidence on certain issues until a sufficient degree of proof has been adduced by the other side thereby invoking the other side's burden of proof.

As stated by the Supreme Court of Canada in *R.* v. *DeSousa*,[74] a motion to quash the indictment on grounds of constitutional invalidity may be brought at any time and the trial judge has the discretion to rule on the application when brought, or to reserve until the end of the case. Indeed, the general rule set out by the Supreme Court of Canada is that adjudication of such issues should not be conducted without a factual basis and the

70. *Ontario Court of Justice Criminal Proceedings Rules*, SI/92-99, C. Gaz. 1990.II.2298 [hereinafter *Criminal Proceedings Rules*].
71. *Ibid.*, r. 27.01.
72. R.S.C. 1985, c. F-14.
73. "Proceedings" are defined in the *Criminal Proceedings Rules*, *supra* note 70, to include summary conviction proceedings under s. 785 of the *Criminal Code*.
74. *R.* v. *DeSousa*, [1992] 2 S.C.R. 944, 95 D.L.R. (4th) 595.

trial should not be fragmented by interlocutory proceedings except where the evidence at trial would not assist in the resolution of the constitutional issue.

It is apparent that the notice requirement, at least insofar as Ontario is concerned, is intended to apply to pre-trial applications and hearings in which constitutional issues will be resolved. Nonetheless, the *Courts of Justice Act*[75] precludes the Court from ruling on a constitutional issue unless such notice has been given. This means that the defence must give the Crown notice of its substantive defence, a situation which should surely not apply within the context of a criminal or quasi-criminal prosecution. Procedural rules requiring advance disclosure of the evidence to be presented in support of an aboriginal or treaty right, such as those outlined in the *Criminal Proceedings Rules of Ontario*, create a situation where the defence could be required to disclose to the Crown its witnesses on issues such as justification which have not yet been raised by the Crown and, in most cases, before the defence or the Crown know what that evidence might be. A requirement that the defence disclose its witnesses prior to trial is inconsistent with *Stinchcombe*,[76] a Supreme Court of Canada decision confirming that the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial stance.

VII. *The Degree of Proof Required for a s. 35 Defence*

Unless and until a challenge is raised to the reverse onus of proof, the onus of proof of an aboriginal or treaty right remains with the defence. This was described in *Calder* v. *Canada (A.G.)* as a degree of proof leading the Court to conclude that the defence contention that an aboriginal right exists is "probably more correct than incorrect."[77] However, this does not mean that the accused's burden of proof is light.

In three British Columbia cases recently decided by the Supreme Court of Canada dealing with aboriginal commercial harvesting rights, historical, anthropological and ethno-historical evidence was called by the defence. In *Gladstone,* the defence called historical and anthropological evidence.[78] The defence in *N.T.C. Smokehouse* called an anthropolo-

75. R.S.O. 1990, c. C.43.
76. *Supra* note 40.
77. *Calder* v. *Canada (A.G.)*, [1973] S.C.R. 313 at 415, [1973] 7 C.N.L.R. 91 [hereinafter *Calder* cited to S.C.R.], Hall J. (dissenting on other grounds), quoting *Milirrpum* v. *Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141, [1972-73] A.L.R. 65.
78. *Gladstone* (1993), 80 B.C.L.R. (2d) 133 (C.A.).

gist and ethnologist.[79] In *Van der Peet,* the defence called an historian and an expert in social and cultural anthropology.

While the Supreme Court of Canada has suggested that proving s. 35 rights should not be impossible, it is submitted that the tests they have imposed make it virtually so. The Court has stated that the evidentiary burden on the defence relates to the pre-contact period, and not the assertion of sovereignty by the Crown. In *Van der Peet*, the Court stated as follows:

> That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.[80]

By moving the yardstick back from the assertion of sovereignty to the pre-contact period, at least so far as aboriginal rights are concerned, the Court has mandated that the defence produce evidence which may relate back several centuries. The assertion of sovereignty by the English over Indian territories took place with the *Royal Proclamation of 1763*.[81] First contact in many parts of Ontario, however, occurred with Jesuit missionaries in the 1640s and even earlier in Québec[82] and eastern Canada.

The Court in *Adams* described the appropriate period for determining pre-contact practices as being "the arrival of Samuel de Champlain in 1603 and the consequent establishment of effective control by the French over what would become New France."[83] Effective control over New France, however, was not achieved until 1701 when the Iroquois agreed to be neutral in any further contest between the English and French. Early treaties with aboriginal parties, such as those with the Iroquois described in *R.* v. *Ireland*,[84] were entered into in 1701 precisely because the

79. *Ibid.*
80. *Supra* note 14 at 555.
81. R.S.C. 1985, App. II, No. 1.
82. The contemporary record of first contact is set out in the seventy-two volumes of R. Thwaites, ed., *The Jesuit Relations and Allied Documents* (New York: Pageant Book, 1959).
83. *Supra* note 46 at 128.
84. *R.* v. *Ireland* (1990), 1 O.R. (3d) 577, [1991] 2 C.N.L.R. 120 (Ont. Gen. Div.).

European powers, France and England, did not have control or sovereignty. Each hoped that by asserting sovereignty over the Iroquois as their "subjects," they would obtain sovereignty over territory claimed by the Iroquois as against the other. The Supreme Court of Canada's decisions render it impossible to determine which test applies: pre-contact (before European arrival), first contact with the Europeans, or effective control by the Europeans. Each of these requires significantly different evidence. Although the Supreme Court has stated that the burden of proof should not be next to impossible to meet, it has created a test which is impossible to define.

The burden on the accused to prove the right is, at its highest, according to the "balance of probabilities." However, the tests which the accused must address in order to meet the burden are overwhelming. In *Van der Peet,* the Supreme Court stated that in order to be an aboriginal right, the practice, custom or tradition must be of central significance to the aboriginal society in question:

> To satisfy the integral to a distinctive culture test the aboriginal claimant *must do more than demonstrate that a practice, tradition or custom was an aspect of, or took place in, the aboriginal society of which he or she is a part.* The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive--*that it was one of the things that truly made the society what it was.*[85]

And further:

> This aspect of the integral to a distinctive culture test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is *to what makes those societies distinctive* that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to *the defining and central attributes of the aboriginal society in question.* It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).[86]

In the circumstances of *Van der Peet,* Dorothy Van der Peet, a member of the coastal Sto:lo tribe, was charged with selling ten fish. Her claim to

85. *Supra* note 14 at 553 [first emphasis added].
86. *Ibid.* [second emphasis added].

a s. 35 right to "trade and barter," an activity surely distinctive and integral to aboriginal societies throughout North America, was held not to be an aboriginal right on the basis that it was not "distinctive and integral" to the Sto:lo culture and society.

It appears that the quality of "distinctive and integral" is left to be determined on the facts of each case.[87] The Supreme Court indicated in *Van der Peet* that such rights are not general and universal and must be determined on a case-by-case basis, because the existence of the right is specific to each community.[88] Each community is then forced to place its history and membership under a microscope in order to prove the distinctive and integral nature of its values and activities. It is of interest to ask the question, as has one aboriginal author and academic, of just how many Canadian cultural values and practices could survive such scrutiny.[89]

VIII. *Proof of Rights which may not be Linked to Land*

The Supreme Court has suggested that the basis of aboriginal rights is a link to the land:

> [W]hat section 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies with their own practices, traditions and cultures[90] is acknowledged and reconciled with the sovereignty of the Crown.
>
> . . . [T]he purpose underlying section 35(1) [is] . . . the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions; the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies.[91]

It seems from *Van der Peet* that the Supreme Court considered aboriginal rights to be confined territorially to previously used or occupied lands. Yet they have stated elsewhere that such rights are severable from aboriginal title. It is possible to conceptualize some rights which are not necessarily land-based, such as trade and barter, which may have been

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87. A case-by-case analysis was first referred to in *Sparrow*, *supra* note 4.
88. *Supra* note 14 at 559.
89. D. Johnston, "The perspective of an aboriginal person on recent S.C.C. decisions" (Address to the Canadian Bar Association-Ontario/Canadian Aquatic Resources Society Conference, Aboriginal Fishing, Traditional Values and Sustainable Resource Development, Wahta Mohawk First Nation, 29-30 September 1996) [unpublished].
90. *Supra* note 14 at 539.
91. *Ibid.* at 548.

exercised well away from occupied or used lands. For example, the Nipissing and Huron are known to have traded with the Pitchibourenik, a people dwelling at the entrance to what the Jesuits described as the great Bay of the North, "where they procured a great abundance of Beavers in exchange for hatchets, cleavers, knives and other like commodities, which they carried thither."[92] Whether the great Bay of the North was Hudson's Bay or James Bay, it was a long way from Huronia and Lake Nipissing, where these traders lived, yet the trading patterns of both aboriginal peoples are well-known and distinctive features of their societies.[93] What link to the land would these nations have to prove in order to defend their trading practices against prosecution as the exercise of s. 35 rights?

It is further submitted that the test in *Van der Peet* places far too much weight on historical and archival materials as a validation of aboriginal practices. There are some practices, to use trade and barter again as an example, which were of only incidental importance to the European observers because they were ubiquitous,[94] but which were distinctive features of aboriginal societies at large. Where practices were widespread and commonplace, they were not the subject of interest by European observers, who noted only what was of importance to them. It is difficult to understand why the constitutionality of such practices should be determined based on their importance to those observing them instead of their importance to those practising them.

Nor is the Supreme Court of Canada consistent in its application of these tests. Trade and barter in the *Van der Peet* case was seen as *incidental* to other practices and opportunistic, and therefore not protected. However, in *Adams*,[95] the Supreme Court of Canada held that the use of lands by Mohawks either to fish during periods of warfare or as hunting grounds, established an aboriginal right:

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92. *Supra* note 82, vol. 45, at 205. Toby Morantz, an historian, believes that this is probably a reference to trade with the Cree southeast of James Bay; personal communications with Dr. Victor Lytwyn.

93. The literature supporting the trading networks of the Hurons and Nipissings is immense. See, for example G. Day, "Nipissing" in B.G. Trigger, ed., *Handbook of North American Indians: Vol. 15 Northeast* (Washington: Smithsonian Institute, 1978) at 787-91, and C. Heidenreich, "Re-establishment of Trade, 1654-1666", Plate 37 in R.C. Harris, ed., *Historical Atlas of Canada: Vol. 1 From the Beginning to 1800* (Toronto: University of Toronto Press, 1987).

94. Personal communications, Jim Morrison, historian. See also evidence of Dr. Valerius Geist, zoologist, in *R.* v. *Decaire, supra* note 51, Transcript, October 25, 1996. Dr. Geist testified it was impossible to determine the taxonomies of some species as a result of this deficit of information.

95. *Supra* note 46.

> From 1603 to the 1650s the area was the subject of conflict between various aboriginal peoples, including the Mohawks. During this period, the Mohawks clearly fished for food in the St. Lawrence River, either because the Mohawks exercised military control over the region and adopted the territory as fishing and hunting grounds or because the Mohawks conducted military campaigns in the region during which they were required to rely on the fish in the St. Lawrence and Lake St. Francis for sustenance.
>
> This general picture, regardless of the uncertainty which arises because of the witnesses' conflicting characterizations of the Mohawks control and use over this area from 1603 to 1632 supports the trial judge's conclusion that the Mohawks have an aboriginal right to fish for food in Lake St. Francis. Either because reliance on the fish in the St. Lawrence for food was a necessary part of their campaigns of war or because the lands of this area constituted Mohawk hunting and fishing grounds, the evidence presented at trial demonstrates that *fishing for food in the St. Lawrence River and in particular, in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain into the area.* The fish were not significant to the Mohawks for social or ceremonial reasons; however, they were an important and significant source of subsistence for the Mohawks. This conclusion is sufficient to satisfy the *Van der Peet* test.[96]

According to the outcome in *Van der Peet*, however, it should be Mohawk warfare that received the benefit of constitutional protection as being distinctive and integral, and not the incidental use of lands for subsistence purposes during those military campaigns. Having determined that one activity which was important (but incidental to other activities) deserved protection as an aboriginal right, it becomes much more difficult to understand why the Supreme Court of Canada convicted Dorothy Van der Peet of selling ten fish on the basis that such trade and barter was merely incidental and opportunistic to other practices such as potlatch.[97]

Nor can one make sense of the Supreme Court's decision to review Mrs. Van der Peet's activities on the basis of the test they wished to develop for commercial activities. The Court had itself determined that the proper characterization of Mrs. Van der Peet's claim was that of trade and barter, and not commercial or market-based sale:

> I would note here by way of illustration that, in my view, both the majority and the dissenting judges in the Court of Appeal erred with respect to this aspect of the inquiry. The majority held that the appellant's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right and, in part, rejected her claim on the basis that the evidence did

96. *Ibid.* at 127-128.
97. See *supra* note 14 at 567.

> not support the existence of such a right. With respect, this characterization of the appellant's claim is in error; *the appellant's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was...*[98]
>
> That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold ten salmon for $50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, *cannot be said to constitute a sale on a "commercial" or market basis.* These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.[99]

However, the Court upheld Mrs. Van der Peet's conviction on the basis that she had failed to produce sufficient evidence that the tribe had engaged in commercialized or market-based activities to satisfy the trial judge. The trial judge's decision, the Court determined, ought not to be overturned in the absence of palpable error:

> *This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense.* Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [*sic*] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.[100]

Quite apart from the absurdity of requiring evidence of an exchange of fish for money arising in pre-contact (and therefore pre-money) times, the Supreme Court first defined what the test of an aboriginal right ought *not* to be and then convicted Mrs. Van der Peet for failing to meet it.

It is interesting that in doing so, the Court applied the criminal law requirement that findings of fact by trial courts should not be reversed in the absence of error, even as they introduced a new civil standard of proof.

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98. *Ibid.* at 552 [emphasis added].
99. *Ibid.* at 563 [emphasis added].
100. Reasons of Scarlett Prov. Ct. J., [1991] 3 C.N.L.R. 155 at 160, quoted by the Supreme Court in *ibid.* at 567 [emphasis added].

As has been noted, the same judge whose trial facts were upheld in *Van der Peet* was found to have applied an incorrect legal analysis to those facts. Moreover, where a trial judge is dealing with historical "facts," the appellate court should be in just as good a position as the trial judge to review the materials filed and draw its conclusion on those facts. The Court's reasoning, to adopt Justice McLachlin's dissenting analysis in a slightly different context, "does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary."[101]

IX. *Something other than Aboriginal Title*

While the Supreme Court of Canada has not clearly defined what kinds of evidence of an aboriginal right will meet the tests set out in *Van der Peet*, the Court has at least clarified that aboriginal title is a sub-category of, and not an interchangeable term for, aboriginal rights.[102] While the decision is not clear on this point, the Court in *Van der Peet* stated it was important not to confuse aboriginal title and aboriginal rights:

> As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.[103]

The elements of proof of aboriginal title were established in a case known as *Baker Lake*.[104] In *Baker Lake*, Justice Mahoney of the Federal Court held that an aboriginal title to territory carries with it the right to move about and hunt and fish over it. The test of aboriginal title was that the plaintiffs prove:

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101. *Ibid.* at 667.
102. *Ibid.* at 562 & 579.
103. *Ibid.* at 562.
104. *Baker Lake (Hamlet)* v. *Canada (Min. of Indian Affairs and Northern Development)* (1979), 107 D.L.R. (3d) 513 [hereinafter *Baker Lake*].

1. That they and their ancestors were members of an organized society;
2. That the organized society occupied the specific territory over which they asserted aboriginal title;
3. That the occupation was to the exclusion of other organized societies; and
4. That the occupation was an established fact at the time sovereignty was asserted by England.[105]

Sparrow did not discuss the *Baker Lake* test, although it clearly found a requirement of occupation to the exclusion of other organized societies to be inapplicable to the aboriginal rights proven by the Musqueam, who shared the fishing grounds in question with other First Nations.[106] As a result, decisions had conflicted on this issue and the defence was left to try and prove exclusivity and occupation according to the *Baker Lake* test.

In *Adams*,[107] the Court finally clarified what it had implied in *Van der Peet*; namely, that *Baker Lake* does not apply to aboriginal rights, and that the tests of *Baker Lake* relate to a sub-category of aboriginal rights, namely aboriginal title.[108] In making this statement, the Court apparently reversed that aspect of *Baker Lake* which held that aboriginal rights were incidents of aboriginal title, although again, this is not clearly spelled out.

In *Adams*, the appellant was a Mohawk charged with fishing without a licence in the St. Regis region of Québec. The issue before the Court was whether the constitutional protection of s. 35(1) extended to aboriginal customs, practices and traditions which had *not* achieved legal recognition under the colonial regime of New France prior to the transition to British sovereignty in 1763, and where aboriginal title might not exist as a matter of law.[109] In argument, the Attorney General of Québec asserted among other things that the mere non-exclusive frequentation of a territory could not serve as the basis for an Indian title or an aboriginal right,[110] that the sporadic frequentation of a territory did not possess the characteristics of permanence and exclusivity necessary for the recognition of an aboriginal right, and that the occasional frequentation of a

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105. *Ibid.* at 542.

106. The Court noted that ninety-one other tribes, comprising over 20,000 people obtain their food fish from the Fraser River and some or all of these bands may have an aboriginal right to fish there, a clear indication that the aboriginal rights may exist where the *Baker Lake* test has not been met.

107. *Supra* note 46.

108. This still raises the question of whether aboriginal title can be a sub-category of aboriginal rights if aboriginal rights do not require proof of exclusivity and aboriginal title does.

109. The *Royal Proclamation of 1763*, *supra* note 81, specifically excluded portions of Québec, and there was some issue as to whether the French colonial regime recognized aboriginal title at all.

110. Argument of the Respondent Attorney General of Québec in *Adams*, *supra* note 46, at 8.

territory was not sufficient historical possession upon which to base an aboriginal right. The Attorney General argued that if the ancestors of the appellant fished in the region of Lake St. Francis, it was in a context other than that of an aboriginal occupation. As such, it was urged that an aboriginal fishing right could not be inferred in the absence of a traditional or historical possession of lands by the community alleging the right.

The Supreme Court held that aboriginal rights do not require proof of aboriginal title. Justice Lamer, speaking for the unanimous Court, held that "while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out."[111]

However, the recent decisions of the Supreme Court of Canada in *Van der Peet* and *Adams* are anomalous, in that aboriginal title according to the *Baker Lake* test requires proof of the requisite elements as at the assertion of sovereignty. Aboriginal rights, which were supposed to be incidents of aboriginal title, now require proof from pre-contact times. It is indeed a strange situation whereby an aboriginal group might have sufficient proof to establish aboriginal title according to the onerous test of *Baker Lake*, and yet be precluded from proving aboriginal rights within the same territory because their evidence did not reach back to pre-contact times. If it was the Supreme Court's intention to replace the *Baker Lake* test with the new one set out in *Van der Peet*, it would not have been necessary for the Court to declare aboriginal rights severable from aboriginal title, as it suggested in *Van der Peet* and clarified in *Adams*. *Baker Lake* would simply no longer have been good law. As a result of *Adams*, it is no longer clear just what the test of aboriginal title is. Does it require proof of occupation as at the assertion of sovereignty or from pre-contact times? Are aboriginal rights still incidents of (and therefore a sub-category of) aboriginal title or is aboriginal title, as suggested by the Supreme Court, a sub-category of aboriginal rights? If the latter obtains, the test for proving aboriginal title becomes more onerous. The Supreme Court has unfortunately done little more than to add confusion to an area which was already in some doubt.

While it is also not apparent what degree of occupation is required for the defence to meet the test in *Van der Peet*, it is submitted that the defence should not have to prove exclusive use, which would be required for proof of aboriginal title. In *Nikal*,[112] Mr. Nikal was acquitted of a charge of

111. *Ibid.* at 14.
112. *Supra* note 8.

fishing without a licence even though the Supreme Court of Canada expressly found that his band had not proven any right to exclusivity within the fisheries in which Mr. Nikal was fishing. In *Sparrow*, defence evidence also indicated that the precise location at issue was shared, rather than exclusive. The Court noted that,

> as part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of the others.[113]

Exclusivity aside, questions remain despite *Van der Peet, N.T.C. Smokehouse* and *Gladstone* about the extent to which an aboriginal right must be linked to traditional territories. The Supreme Court did not need to address itself to this issue, in light of the particular facts of the cases before it, all of which involved territories occupied by the defendants since "time immemorial." It seems, however, that actual "occupation," in the sense of clearing lands and erecting shelters should not be required. While *Adams* is vague on this point, the Crown had argued in *Adams* that non-permanent occupation of a territory described as a "combat zone" could not serve as the basis of an aboriginal right.[114] In finding that an aboriginal right had been proven to exist in the territory, as a result of military campaigns, the Supreme Court implicitly held that it could.[115]

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113. Summary of evidence given by W.P. Suttles, anthropologist, before the B.C. Court of Appeal, (1986) 9 B.C.L.R. (2d) 300 at 307-308, quoted by the Supreme Court, *supra* note 4 at 1094.

114. Factum of the Attorney General of Québec, paras. 20, 35-40; Factum of the Attorney General of Canada, paras. 18-19 in *supra* note 96.

115. In *Adams*, *supra* note 46, the Supreme Court held that the use of lands by Mohawks to fish either during periods of warfare for subsistence or as hunting grounds established an aboriginal right. At 127-28:

> From 1603 to the 1650s the area was the subject of conflict between various aboriginal peoples, including the Mohawks. During this period, the Mohawks clearly fished for food in the St. Lawrence River, *either because the Mohawks exercised military control over the region and adopted the territory as fishing and hunting grounds* or *because the Mohawks conducted military campaigns in the region during which they were required to rely on the fish in the St. Lawrence and Lake St. Francis for sustenance.*
>
> This general picture, regardless of the uncertainty which arises because of the witnesses' conflicting characterizations of the Mohawks' control and use over this area from 1603 to 1632 supports the trial judge's conclusion that the Mohawks have an aboriginal right to fish for food in Lake St. Francis. *Either because reliance on the fish in the St. Lawrence for food was a necessary part of their campaigns of war* or *because the lands of this area constituted Mohawk hunting and fishing grounds. . . .* [emphasis added]

X. *The Aboriginal Perspective and Oral History*

There is no point in discussing a burden of proof without examining exactly what evidence the party who bears that burden must present in order to meet it. In the case of aboriginal defendants, the onus of proof requires that they reach back into pre-contact times and establish the defining features of their society, as first observed by Europeans. While the Supreme Court of Canada has referred to oral history and the need to be sensitive to aboriginal perspectives, it is clear that neither oral history nor the aboriginal perspective receive much judicial weight unless validated by observations of Europeans in the form of contemporary documentary evidence.

In *Sparrow*, the Supreme Court of Canada referred with approval to the Ontario Court of Appeal decision in *Taylor*,[116] a case which held that in determining the effect of a treaty, it is important to consider the history and oral traditions of the tribes concerned and the surrounding circumstances at the time of the treaty, since "cases on Indian or aboriginal rights can never be determined in a vacuum." Indeed, in *Sparrow*,[117] the Court held that it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake, a position adopted by the Supreme Court of Canada in *Van der Peet*.[118] The court also held in *Van der Peet* that

> a court should approach the rules of evidence and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[119]

Oral evidence is frequently the only evidence that can be put forward due to inadequate or incomplete historical records for certain periods of time. Indeed, in other contexts, hearsay has been admitted as an exception where necessary and reliable[120] and where required for full answer and defence.[121]

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116. *Supra* note 19.
117. *Supra* note 4 at 1112.
118. *Supra* note 14 at 550.
119. *Ibid.* at 559.
120. *R.* v. *Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92.
121. *R.* v. *Miller* (1991), 5 O.R. (3d) 678 at 692, 68 C.C.C. (3d) 517 (Ont. C.A.). In *Finta, supra* note 49, the Court admitted statements made on a solemn occasion by a person with peculiar knowledge of events as described to a person adverse to the party seeking leave to tender the evidence.

However, in virtually all cases in which oral history has been successfully used in the context of litigation the aboriginal perspective has been supported by documents written by Europeans.[122] The author has been unable to locate a single case in which oral history in itself, without some kind of documentary support—a contradiction in terms—has been sufficient to make out an aboriginal right.

When documentary records prepared by European observers are required before aboriginal parties can establish pre-contact practices, it is clear that the test by which an aboriginal right is proven still rests heavily on eurocentric views. Indeed, this is evidenced in *Van der Peet*, where the Court stated:

> Having thus identified the nature of the appellant's claim, I turn to the fundamental question of the integral to a distinctive culture test: *Was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans?*[123]

To ask the question in that form is to answer it. The concept of "money or other goods" as currency is European, not aboriginal. Money would certainly not have formed a distinctive or integral part of Sto:lo culture pre-contact, evidencing a test which by its very definition reflects eurocentric cultural biases.

The Court went on to consider the trial judge's findings that the "natives did not fish to supply a market" and that "[t]rade in dried salmon with [Fort Langley] was clearly dependent upon the Sto:lo first satisfying their own requirements for food and ceremony."[124] Taking no more than one needs is fundamental to aboriginal culture, yet the Supreme Court has determined that since the Sto:lo people failed to engage in profit-making, they had no distinctive, integral trade in fish. This, it is submitted, so clearly engages European concepts of ownership and commercialization as to render the test of an aboriginal right to trade virtually impossible to prove.

The importance of trade to the Sto:lo people according to the aboriginal perspective on the importance of such activities was noted by the Court but apparently not understood. The Court observed that

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122. For example, in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, 3 C.N.L.R. 127 [hereinafter *Sioui* cited to S.C.R.], dispatches and minutes of meetings with the Huron Chiefs was accepted as evidence of a treaty. In *Jones*, *supra* note 6, the journal of an observer reporting the statement of Chief Metigwob to his principal men outlining the terms of a surrender was accepted as evidence of a treaty.

123. *Supra* note 14 at 564 [emphasis added].

124. *Ibid.* at 567.

> such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. . . . Mr. Dewhurst testified that the exchange of goods was related to the maintenance of family and kinship relations.[125]

For a culture whose systems of government were founded on kinship, it is difficult to conceive of what could possibly be considered more distinctive and integral than the means by which such ties were maintained, without which practice, tradition or custom—to apply the Supreme Court's own test—the culture would have been other than what it was. Instead, the Court found that exchanges as part of the interaction of kin and family were not of independent significance to the culture and therefore did not suffice to ground a claim to an aboriginal right. In so doing, the Court revealed a complete ignorance of the foundations of Sto:lo society and the kinship ties on which it rested.

The Court stated that Sto:lo culture was not defined by a trade in salmon prior to contact[126] and this is correct. But what the Court ignored is evidence that the Sto:lo culture was *maintained* by a trade in salmon, a trade without which the kinship ties necessary to maintain it would have deteriorated. As such, it formed a distinctive and integral feature of the society in question according to the "practical" test set out by the Supreme Court in the *Van der Peet* decision itself.

Van der Peet reflects a troubling tendency of the courts to place enormous weight on the observations of European traders over the views of aboriginal peoples themselves. In *Gladstone*, for example, the Supreme Court decided that it was satisfied that the band engaged in inter-tribal trading and barter of herring spawn not because of oral history or the "aboriginal perspective" that such trading had taken place, but because it was noted in the 1793 Journal of Alexander MacKenzie and other early explorers and visitors to the Bella Bella region:

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

125. *Ibid.* at 568.
126. *Ibid.* at 570.

> of this trading activity are in accord with common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting. . . .
>
> All of this evidence supports the position of the appellants that, prior to contact, exchange and trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk.[127]

One must ask, however, why the fact that Europeans observed and recorded activities somehow enhances the significance of these events, if the test is whether the activities were "distinctive and integral" to aboriginal, rather than European, society?

This test places inordinate weight on what Europeans felt was important enough to note in their reports and journals. The function of clan mothers in Iroquois culture and political systems, for example, was (and is) of fundamental importance to Iroquois society, yet it is not mentioned once within the Jesuit Relations[128] or the journals of La Potherie,[129] Charlevoix[130] or other early historians of New France. Either they were not aware of it, or it was not important to them, yet few would argue that Iroquois society could have functioned as it did in the absence of clan mothers, whose role included selecting the Confederacy Chiefs.[131]

Similarly, there is little mention of food fishing in the majority of journals kept by traders, because the activity was ubiquitous and therefore not worthy of note.[132] Absence of evidence is not evidence of absence, a point understood by most historians; however, absence of evidence in a court of law is fatal to the proof of an aboriginal or treaty right. Furthermore, new information is always coming to light causing historians to revise their interpretations of historical "fact." Even so, it is left to aboriginal people to prove that their rights exist through the opinion of a third party expert, such as an historian or anthropologist, whose interpretation of their rights will be accepted only if that expert can produce documentation to verify their oral history. Sensitivity to the

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127. Reasons of Lemiski, Prov. Ct. J., quoted in *Gladstone, supra* note 16 at 743-46 [first emphasis added].

128. *Supra* note 82. These were journals kept by Jesuit missionaries in the 1600s.

129. "A Narrative of Remarkable Occurrences" in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of New York*, vols. 9 and 10 (Albany: Weed Parsons, 1856 [microform imprints]).

130. P.F.X. Charlevoix, *History and General Description of New France*, J.G. Shea, ed. (New York: Francis P. Harper, 1902).

131. See for example E. Tooker, "The League of the Iroquois: Its History, Politics and Ritual" in N.B. Trigger, ed., *Handbook of North American Indians*, vol. 15 (Washington: Smithsonian Institute, 1978).

132. Dr. Victor Lytwyn, personal communications [on file with the author].

aboriginal perspective, according to the current tests, first requires validation from documentary sources reflecting the non-aboriginal perspective.

It is worth noting that history from an aboriginal perspective as a subject of academic interest is of relatively recent origin. In 1987, a French colonial historian, W. J. Eccles, challenged historians to examine events from the aboriginal point of view. However, as will be discussed, Dr. Eccles himself has attested that he places little or no weight on aboriginal oral history. A Provincial Court in Ontario recently held that Iroquois oral history, where not supported by primary documents, was "scanty" and entitled to little weight and that an unpublished expert opinion was not of much use either. The court thereby added yet another requirement to expert testimony, namely, that it undergo peer scrutiny before being advanced in court.[133]

Having noted that the Supreme Court of Canada held that Mohawk peoples had aboriginal rights as a result of their military campaigns and the harvesting activities that took place during such campaigns, the Court in *Decaire*[134] held that the Iroquois had failed to prove that they had engaged in warfare north of Lake Superior. The area at issue was not known to European observers at the time of such warfare as it involved a region which Europeans had not yet explored, such that documentary evidence referring to the specific area at issue was impossible to produce. Little weight, however, was placed on an aboriginal oral history indicating that warfare between Iroquois warriors and the Cree and Ojibway of northern Ontario had taken place north of Lake Superior. The court stated:

> [B]ased on the evidence that goes toward showing on balance the aboriginal right advanced, that is the right of Mr. Decaire to hunt and fish within areas in which his ancestors had conducted military campaigns or had occupied or used as a hunting ground, I have the Constance Lake oral tradition. I must find it scanty. It is also undated, as oral traditions don't come with dates and in reference to time, usually are said to have occurred a long time ago.[135]

As the Court was aware, in the summer of 1977, archaeologist Christopher Trott had recorded an oral history of Iroquois raids while conducting archaeological investigations near the confluence of the Cheepay (Ghost) River and the Albany River of northern Ontario. Trott identified an archaeological site where arrowheads and burned bone were located and

133. *R.* v. *Decaire, supra* note 51.
134. *Ibid.*
135. *Ibid.* at 8.

noted that "people at Constance Lake tell a story that a 'battle' between the local Cree and Iroquois took place in this area."[136] In 1995, Douglas Ellis edited a volume of Cree oral history gathered in the 1950s from elders living on the west coast of Hudson's Bay. It confirmed that Iroquois warfare had extended into the Hudson's Bay lowlands. One oral tradition, entitled "How the Ghost River got its name" was told by Cree elder John Wynn of Fort Albany. He said:

> The Iroquois and the [Cree] people must have come to make war on each other. They had been looking into the future because they wanted to know how far from each other they were in their approach. So then it was made known to him (the conjuror) where they were from their forecasting by their conjurings.
>
> So the people prepared ... to lie in wait for the Iroquois for them to drift downstream.
>
> And they killed many then by doing this, having foreseen where they would lie in wait for them. They also took many slaves. And this is the reason why Ghost River is today called Ghost River.[137]

Ellis indicated that while Cree oral history takes many forms, the one relayed in this instance was known as *tipacimonwine* or *acimowina* "which record real or supposedly real events."[138]

In yet another oral history, not put before the Court,[139] John Silas, an elder from the James Bay coastal community of Kashechewan is recorded as having reported an encounter with warring Iroquois in an oral history taped by John Long at Moose Factory on 26 March 1985 as follows:

> One hundred miles upstream from the river we live on, known as the Albany River, is a place called Ghost River. It was earlier known as the Sturgeon River. . . .
>
> One time there were thirty men plus women and children camped at the Sturgeon River. This was at the time when guns were first introduced and

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136. C. Trott as quoted in V. Lytwyn, *The Hudson's Bay Lowland Cree in the Fur Trade to 1821, A Study in Historical Geography* (PhD Dissertation, University of Manitoba, 1993) [unpublished] at 62.

137. C.D. Ellis, ed., *atalohkana nest tipacimowina: Cree Legends and Narratives from the West Coast of James Bay* (Winnipeg: University of Manitoba Press, 1995) at 177.

138. *Ibid.* at xxi. Ellis also noted that "the Iroquois were reported to tunnel under the river banks and come up suddenly in the settlement surprising the people and felling them with arrows, spears and tomahawks, and that many of the small creeks and gullies running to the bank are attributed to tunnelling operations of the Iroquois in a bygone age." The presence of such pits and trenches was noted as recently as 1906 near Mattawapik Falls, Temagami River, "where the Iroquois lay in ambush for their enemies, the Ojibways, as they passed down the river on their way to the trading posts," Diary of James Bay Treaty (no.9), summer of 1906, Samuel Stewart, National Archives of Canada, RG 10, vol. 11, 399, file 2 (microfilm reel T-6924).

139. This oral history was located after the ruling in *Decaire, supra* note 51.

> used by the people; they had begun to replace the bow and arrow by this time. It was while they were at this camp that one of the men from one of the families set out in his canoe. He paddled up the Sturgeon River to visit others who were camped further upstream, inland on another river. The river they were camped on was called *Momoowimatawao*, known today as the English River. There was another branch of the river nearby where these people were living, also trapping fish with the weir. This far upstream the river banks were quite high. As the paddler rounded a bend on the river, he saw canoes which were very large. He knew that these people were strangers because they never made canoes as large as the ones he saw.
>
> Quickly, unseen, he turned his canoe around. He beached his canoe a safe distance away and returned on foot to take a closer look. When he got closer, he quietly scouted the camp to investigate this [*sic*] sound. He had never heard such a cry of a person in agony; because of this he was very cautious. There, before his eyes, he saw the people responsible for this agony. These were the ones called *Natoowaywuk* (Iroquois).[140]

Silas described an ambush set by the Cree for the Iroquois raiders which resulted in the Sturgeon River becoming known as Ghost River, "because of the ambush and the common sight of bones, usually after spring break-up. Then why not call this place Ghost River? Was this not the place where many perished?"[141]

The time period "when guns were first introduced and used by the people" places the oral history of warfare at Ghost River within the late 1600s. Iroquois warriors defeated the Hurons and other nations in the period known as the Great Dispersal (1648-1653) with the advantage of firearms obtained from their Dutch allies, which these other nations did not yet have.

In September 1668, representatives of the Hudson's Bay Company settled at the mouth of Rupert's River at what became known as Charles Fort. The English traders made several trips inland visiting camps of Nodways [Iroquois], Kilistinons [Cree] and others, commenting that these "Indians use bow and arrows, living in tents which they move from one place to another."[142] In fact, Thomas Gorst, the Hudson's Bay's accountant postulated that the Indians of the Bay with whom he spoke had been driven north by the Iroquois since "the Indians at the Bottom of the Bay, like the rest is [*sic*] distinguished by several dialects."

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140. J. Wesley, *Stories from the James Bay Coast*, N. Wesley & A. Faries, eds. (Ontario: Highway Book Shop, 1996) at 1-8.

141. *Ibid.* at 9.

142. C. Bishop, "The First Century: Adaptive Changes Among the Western James Bay Cree Between the Early Seventeenth and Early Eighteenth Centuries" in S. Krech, ed., *The Subarctic Fur Trade: Native Social and Economic Adaptations* (Vancouver: University of British Columbia Press, 1984) at 26.

Defence evidence established that in 1671-72, the Iroquois extended their raids to the north and were at that time reported to be at Lake Nemiscau, a mere eighty miles east of Charles Fort.[143] By the winter of 1672-1673, Jesuit missionaries expressed concern that Iroquois and Mississauga warriors were hunting together in the territory of Hudson's Bay.[144] In 1674, the Jesuits reported that Iroquois warriors were in the vicinity of Lake Mistassini and "fear reigned everywhere."[145] Ottawas coming with furs from the neighbourhood of Lake Superior had been ambushed twice by Iroquois warriors on their way to Montréal.[146]

The Iroquois wars had severed trade relations between the Moose River Cree and their trading partners, the Nipissing, and had driven some Algonquin groups to the shores of James Bay.[147] The court was apprised of warfare at Moose River involving Cree and Iroquois. John Oldmixen, a contemporary observer, reported that "as they passed Moose River, about ten day's journey from Rupert's [Rupert's House, the Hudson's Bay Company Post], they saw some dead bodies of Indians which they supposed to be Onachanoes, most of that nation being destroyed by the Nottaways [Iroquois]." The Moose River Cree usually wintered in the area northwest of Lake Superior.[148]

In 1674, the "Nodways" (the Cree term for Iroquois, meaning "enemy") were threatening the Indians who traded at Rupert's River. This group of "Nodways" were reported to be wintering just south of James Bay.[149]

While the oral history of warfare may be undated, the contextual information supplied to the Court identified the time period fairly clearly. Moreover, if an oral history supported by contextual information contained in the Jesuit Relations, confirmed by a contemporary observer, repeated by elders from different communities and supported by physical evidence at an archaeological site is considered "scanty," it is difficult to imagine what oral history will ever meet the test of sufficiency.

As well, it is important to be aware that historians themselves may be biased against oral history, and accord it little weight in their testimony. W. J. Eccles, for example, testified on behalf of the Crown in *Decaire*. At issue was a treaty entered into in 1700 and ratified in 1701 at Montréal in which the defence suggested an agreement had been reached among

143. *Ibid.* at 28.
144. *Supra* note 82, vol. 57 at 21-23.
145. *Ibid.* vol. 59 at 39.
146. *Ibid.* vol. 49 at 245.
147. Bishop, *supra* note 142.
148. *Ibid.*
149. *Ibid.* at 28.

aboriginal nations to share hunting grounds. Dr. Eccles testified there was no evidence of such an agreement within the historical record.[150]

The Minutes of the Montréal treaty involving the French, Five Nations and a number of French Indian allies, as translated by Dr. Eccles, reflect the presentation by Iroquois Chiefs of a series of porcelain collars, or wampum belt. Such belts were the means by which Iroquois peoples recorded their speeches. The second and sixth belt stated:

> When we came here the last time we planted the tree of peace, now you plant the roots that will extend to the western nations. In order that it should be strengthened, we hereby add the leaves so that in their shade we can discuss our affairs more agreeably. . . .
>
> The last time we spoke together here we gave gifts to the Algonquins because we had spent the winter hunting; they spoke with us again later and told us that since Onontio [the French Governor] joined us together in peace we should eat our meat together when we encountered each other; they told us that they would be here when we returned, but since none of them are here, here is a collar that I place down to thank them and tell them that we desire nothing better than to share a common cooking pot when we encounter each other.[151]

The metaphor of the "tree of peace" and "common cooking pot," or "dish with one spoon," appeared in the historical record with remarkable consistency over the next two hundred years with reference to the Montréal agreement. On 7 April 1757, Thomas Butler wrote of a meeting between the French and the Iroquois on 18 March 1757:

> They Inds Said we Cant write but know all that has past between us having Good Memories. After the Warrs & troubles we together met you at this place where Every trouble was burred & a fire kindled here. Where was To Meet and Treat peaceably; you are now working Distbances and Seem to Forget the old agreemt. &c: The Tree semes to be falling. let it be now put up the Roots spread and the leves flowrish as before. you formerly said. take this bool and this meat with this Spoon let us Eat allways frindly together out this one Dish . . .[152]

In 1765, Daniel Claus, Deputy Agent for Indian Affairs, wrote to Sir William Johnson, stating the "Cognawageys" (the Iroquois of Caughnawaga) wished Johnson, the Superintendent of Indian Affairs to

> remind those Nations [the Mohawks, Oneidas and Onondagas] of the old Agreement made before the French Governor many Years ago, in the Presence of the Five Confederate [Five Nations] and all the other Nations

150. Transcript (2 April 1996), *Decaire*, *supra* note 51.
151. W.J. Eccles, Translation of the Montréal 1700 Peace Negotiations [unpublished].
152. Letter from Thomas Butler (7 April 1757) in *The Papers of Sir William Johnston*, vol. 2 (Albany: University of New York, 1922) at 705.

> in Canada. That when a general Peace was made and concluded between these Nations, the Governor told them that as they were become one body and one mind, the Woods and Hunting Grounds could be no otherwise than common, and free to one nation as to another, in the same manner as a large Dish of Meat would be to a company of People who were invited to eat it, when every Guest had liberty to cut as he pleased, wherefore they hoped you would make these Nations abide by this agreement.[153]

In 1765, Daniel Claus reported that he had attended a meeting of the Iroquois at Caneghsady [Kanestake], where the latter expressed their wish to

> . . . renew the old Agreemt made by their forefathers which was that all the Nations in Canada should enjoy a free hunting wherever they thought proper that there should be no claim of property of any particular Spot but all Indns in General should equally enjoy the Liberty of hunting in the woods wch their wise forefathers concerted and agreed upon. . . . And therefore gave them their advice to use the Wood with the same freedom as they would a Kettle with Victuals when invited to a feast and with one Spoon & one Knife to eat all together sociably & without begrudging those that had a better appetite & eat more than the others.[154]

In 1793, Iroquois spokesman Joseph Brant remembered the 1701 conference, stating that:

> Upwards of one hundred years ago a moon of Wampum was placed in this Country with four Roads leading to the Centre for the convenience of Indians from Different Quarters to come and settle or hunt here a Dish with one Spoon was likewise put here with the moon of Wampum, this shews that my Sentiments respecting the Lands are not New.[155]

Peter Jones, an Ojibway missionary reported in 1840 that Iroquois Chief John Buck, an Onondaga,[156] had apparently made a speech:

> [He] exhibited the wampum belts, the memorials of the old treaties and explained the talks contained in them. There were four belts, or string of wampum. The first contained the first treaty made between the Six Nations and the Ojebways. This treaty was made many years before. . . . The belt was in the form of a dish or bowl in the centre which the chief said represented that the Ojebways and the Six Nations were all to eat out of the same dish; that is, to have all their game in common.[157]

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153. Extract of a letter from Daniel Claus, Esq. Deputy Agent for Indian Affairs in Canada, to Sr. Wm. Johnson (Montréal, 30 August 1765) in *The Papers of Sir William Johnson*, vol. 11 (Albany: University of New York, 1953).
154. Journal of Daniel Claus (4 October 1767) in *The Papers of Sir William Johnston*, vol. 13 (Albany, University of New York: 1962) at 431.
155. Letter of Joseph Brant to Alexander McKee (4 August 1793) in E.A. Cruikshank, ed., *The Correspondence of Lieut. Gov. John Graves Simcoe*, vol. 5 (Toronto: Ontario Historical Society, 1931) at 66-67.
156. Onondaga being one of the nations forming the Five, and later Six Nations.
157. *History of the Ojebway Indians* (London: A.W. Bennett, 1861) at 119.

In 1887, an archaeologist, Dr. David Boyle was shown a wampum belt from the conference. Chief Buck, the Iroquois firekeeper explained:

> Chief Buck, on whom devolved the highest office in the gift of the Iroquois, that of firekeeper, had it as his duty never to let them out of his sight, day or night. . . . The firekeeper told the first belt, all white except a round purple patch in the centre. This represents all the Indians on the continent. They have entered into one great league and contract that they will be all one and have one heart. The pot in the centre is a dish of beaver, indicating that they will have one dish and what belongs to one will belong to all. The second strip was a long narrow one of white. This strip was made in token of peace that was then made between tribes on the continent.[158]

Dr. Eccles, on being presented with this evidence reflecting a remarkably consistent interpretation of the Montréal treaty, dismissed the accounts as unreliable, stating that "Well, you're putting far more emphasis on the validity of an Indian in 1887 to interpret a wampum belt from 1701 than I would. I prefer to rely on the documents themselves."[159]

The aboriginal perspective on such histories and mnemonic guides such as wampum belts is, of course, that they should be accorded weight in and of themselves. The notion that these oral histories require "independent validation" by experts who may not understand the aboriginal perspective or who may have had their own biases or points of view, is in itself eurocentric. In many instances, it calls for an impossible level of proof in that written records may not exist, or where they do exist, may not have been the subject of academic interest.

For example, it has been repeatedly held that aboriginal accuseds must prove themselves to be part of an "organized society" to prove aboriginal rights. However, anthropologist Charles Bishop writes:

> Although the origins of present conditions are of considerable interest to anthropologists, the reconstruction of lifeways at the moment of external influence is of no easy task. Both archival and archaeological data are very incomplete, and there has been little collaboration between prehistoric archaeologists and historically minded ethnologists in the Northern Algonquin area, partly because intensive archaeology and ethnohistory only began in the 1960s.[160]

In most of Ontario and northern Manitoba, the Iroquois wars themselves resulted in major dislocations of tribal groups in the post-contact period:

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158. D. Boyle, "What is Wampum? Explained by Chief John Buck, Firekeeper, June 20, 1887" in Ontario, *Archaeological Report*, Appendix to the Report of the Minister of Education, Ontario (Toronto: King's Printer, 1929) at 48-50.
159. Transcript (2 April 1996), *Decaire, supra* note 51 at 32, lines 20-25.
160. *Supra* note 142 at 22.

> Beginning with the historical information, most evidence that we have for tribal distribution during the early historic period, i.e., the 17th century, comes from the records of Jesuit priests and French explorers. The early Algonkian-speakers north of the Great Lakes are named and located, although it is only with much difficulty that we are able to tie early historic appellations with their modern representatives. This is due to the major population shifts precipitated by the Iroquois wars and the fur trade which led to movements and mixing of groups so that by the middle of the eighteenth century, many original tribal and group designations were lost. Therefore, various Algonkian groups in northern Ontario today must be understood as blends and amalgamations of earlier distinct groups.[161]

Since much of the historical and anthropological research in this field is yet to be done, previously unknown archival information casting new light on aboriginal rights and providing insight into individual aboriginal societies is being located and identified every day. The *Imperial Proclamation of 1847*,[162] for example, on which the Chippewas of Nawash relied in *R.* v. *Jones*[163] in establishing a treaty promise to commercial fishing rights in the Great Lakes was discovered by the Fisheries Resource Co-ordinator for the band in 1991, and had not been previously identified by any historian as of significance to aboriginal rights in the fisheries.[164]

When historical documentary evidence is the only accepted basis on which such rights may be proven, and not all the existing archival or documentary materials have been examined, understood or catalogued by scholars, the danger in taking materials out of context or determining that there is "no evidence" to support aboriginal and treaty rights should be evident. In such circumstances, there is no good reason why written historical documents should be considered inherently more reliable than the wampum belts, porcelain collars, talking sticks, pictographs or birch scrolls used by aboriginal people to record events at the time in metaphors or symbols capable of consistent interpretation. Arguably, the fact that the courts have imposed the requirement of documentary proof of aboriginal history in itself imposes a eurocentric test.

Furthermore, it is of great concern that the Supreme Court has decided that where such historical records are put forward for the first time on

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161. C. Bishop & M.E. Smith, "Early Historic Populations in Northwestern Ontario" (1975) 40:1 Am. Antiquity 54.
162. *Supra* note 81.
163. *Supra* note 6.
164. Personal communications, Darlene Johnston, Chippewas of Nawash. There is a reference to this document in P. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: U. of Toronto, 1991), but the year of the Proclamation is incorrect and its contents are not recited, Dr. Schmalz having not apparently appreciated its significance at the time.

appeal, the appellate court possesses the expertise to review such materials and to draw accurate inferences from their contents by way of "judicial notice" simply because the documents are public in nature. This practice is fundamentally flawed.

Certainly, a *trial* court is entitled to take judicial notice of certain historical facts contained in authoritative sources such as published maps[165] and articles. Where introduced through an expert, such documents form the basis for the opinion expressed and may be admitted as evidence without prior notice. Copies of historical documents are also admissible *at trial* if certified by the official in whose custody the document is placed. Imperial Proclamations, treaties and other documents may be proven *at trial* "in the same manner as they may be provable in any court of England" or where published, by production of the Canada Gazette or Queen's Printer copies.[166]

But the Supreme Court is not a trial court. It does not hear *viva voce* evidence from experts who frequently offer conflicting opinions derived from the same historical documents. The discipline of history is an evolving one, and opinions change as new materials are found and new disciplines, such as ethno-history and historical geography, develop. More importantly, if the Supreme Court of Canada gets its facts wrong by behaving as a court of first instance, there is no remedy to correct the wrong, no higher court to which to appeal.

Yet the Supreme Court of Canada determined in *Sioui*[167] that it could entertain historical information for the first time on appeal and even conduct its own historical research. It has recently re-affirmed its capacity to entertain historical documentation for the first time on appeal in *Nikal*. In *Sioui*, Justice Lamer had written:

> I am of the view that all the documents to which I will refer whether my attention was drawn to them by the intervenor or as a result of my personal research are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris, J.A. said in *White and Bob*: "The Court is entitled 'to take judicial notice of the facts of history. . . .'"[168]

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165. See *R.* v. *Bartleman* (1984), 55 B.C.L.R. (4th) 78, 12 D.L.R. (4th) 73, 13 C.C.C. (3d) 488 (B.C.C.A.); *R.* v. *Zundel* (1987), 31 C.C.C. (3d) 97 (Ont. C.A.) leave to appeal to S.C.C. ref'd 61 O.R. (2d) 588n, and with regard to maps, *R.* v. *Jameson*, [1896] 2 Q.B. 425. See also *Sioui*, *supra* note 122 at 1050, with regard to the admissibility of historical documents on the basis of judicial notice.
166. *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 20.
167. *Sioui*, *supra* note 122.
168. *Ibid.* at 1050 [citation omitted].

In *Nikal*, the Court permitted the Crown to introduce new materials, over the objections of the aboriginal defendants, stating that the documents were public, and that each party had an opportunity to review them and make submissions. With respect, this was unfair to the aboriginal parties, who had not been made aware of such evidence until the matter reached the Supreme Court and therefore had little opportunity to review it through further research. Moreover, the fact that documents are public entirely ignores the context which surrounds them and the potential for gross misunderstandings as a result. As discussed, the "facts" of history, particularly where these reflect cross-cultural perspectives and an incomplete record, and where these are not agreed upon, ought not to be the subject of judicial notice. That this has occurred is in itself inconsistent with the Court's recognition that aboriginal cultures are vastly dissimilar from European cultures, as noted in the following excerpt calling for the need to incorporate both perspectives:

> *The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures*; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.[169]

It is suggested that it is also inappropriate for the Court to make findings of fact based on historical evidence contained in affidavits or referred to in argument which were not subjected to cross-examination. Such evidence cannot be properly assessed without the benefit of hearing and evaluating expert opinions concerning its context or content. This is particularly so when expert historical opinions differ, as they do in these cases. In *Nikal*, for example, the Supreme Court decided that the band had not proven that it could exercise by-law authority within its fisheries because the Court determined that there was a clear policy against granting exclusive fishing rights, not just in British Columbia but in Upper Canada as well. This finding was based on the 1866 opinion of James Cockburn, Solicitor General of the Province of Canada. The Court then quoted Cockburn as follows:

> With reference to the claim of the Indians to exclusive fishing rights, my opinion is that they have no other or larger rights over the public waters of this province than those which belong at common law to Her Majesty's subjects in general. . . . I should say that without an Act of Parliament

169. M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412-13, quoted in *Van der Peet*, *supra* note 14 at 547 [emphasis added in S.C.R.].

> ratifying such a reservation no exclusive right could thereby be gained by the Indians as the Crown could not by treaty or act of its own (previous to the recent statute) grant an exclusive privilege in favour of individuals over public rights such as this, in respect of which the Crown only holds as trustee for the general public.[170]

However, the Supreme Court either was unaware of, or did not cite the middle portion of the same memorandum which stated that:

> Previous to the recent statute, the Crown could not legally have granted an exclusive right of fishing on the lakes and Navigable waters but under the 3rd section of that Act the power is conferred on the Commissioner of Crown Lands of granting licences for fishing in favour of private persons, wheresoever such Fisheries are situated, *the only exception is "where the exclusive right of fishing does not already exist by law in favour of private persons."* This exception was intended as I understand to exclude the application of the Act from certain Fishing rights which had been granted under the French law in Lower Canada before the Conquest; it certainly does not apply to the Indian tribes who have acquired no such rights by law *unless it may be contended that in any of those treaties or instruments for the cession of Indian Territory there are clauses reserving the Exclusive right of fishing. . . .*[171]

As for the Court's conclusion that the Crown had a policy against recognizing exclusive fishing rights, and that such rights did not exist prior to the *Fisheries Act*, there are at least two instances wherein First Nations within Ontario were recognized as having exclusivity by the Imperial Government and collected rents for the use of their fishing grounds by white men.[172] In one case, recognition took the form of leases between the First Nation and Europeans affirmed by the Imperial Government well before the enactment of the fisheries legislation.[173]

It is submitted that the Supreme Court of Canada ought not to be rendering decisions on the basis of evidence which has not been presented within a procedural context that permits the defence to respond to and amplify the history around the documents. Such research can take years, and should not be thrust upon the defence at the appeal level and certainly not where the interpretation of "public" historical documents is very much in dispute among historians themselves.

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170. See P.J. Blair, "Solemn Promises and *Solum* Rights: The Saugeen Ojibway Fishing Grounds and *R.* v. *Jones and Nadjiwon*" (1997) 28 Ottawa L. Rev. 125.

171. National Archives of Canada, Record Group 10 (RG 10) vol. 323 p. 216137-216138 Reel C-9577, A. Russell, Assistant Commissioner of Crown Lands to Indian Branch attaching copy of opinion of James Cockburn, Solicitor General, 8 March 1866.

172. *Supra* note 170 at note 160.

173. The case of the Saugeen Ojibway leases is the subject of discussion in *ibid.*, while the rental of fishing grounds by Mohawks at Deseronto has come to light through recently released files contained in the RG 10 series of the National Archives, Ottawa.

XI. *Existing vs. Unextinguished Right?*

The defence must also prove the right is an existing one. This has always been a confusing burden because proof of extinguishment of such rights lies upon the Crown. The court in *Sparrow* stated that "existing" means "unextinguished" rather than exercisable at a certain time in history.[174] For defence purposes, this probably means proving that the right has not been surrendered or given up by the aboriginal peoples asserting it rather than attempting to negate Crown evidence of extinguishment; otherwise, the defence would be put in the position of having to rebut reply evidence not yet called by the Crown.

However, the burden of proof imposed as a result of the Supreme Court's decisions is impossible to decipher. If the defence burden of proving that the right is existing involves proof on the balance of probabilities, then the Crown proof that the right is not existing should also be on the balance of probabilities. However, proof of "extinguishment" of the right lies upon the Crown. If extinguishment is tantamount to disproving the existence of the right, the test as it currently stands makes no sense. Indeed, in *Sparrow*, the Crown had argued that the appellant's evidence had been insufficient to prove an aboriginal right.[175] The Supreme Court recast the Crown's argument to state that what the Crown "really insisted on, both in this court and the court below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.[176]

With respect, the Crown's argument made more sense than the Supreme Court's interpretation of it. An aboriginal right which has been extinguished is not an "existing" right, and had the Crown's evidence of extinguishment been accepted, the accused might have failed to prove that his right was an existing one according to the requisite standard of proof. If the Crown's onus of extinguishment is greater than the accused's onus of proving an existing right, then the accused does not have to prove the existence of the right on a balance of probabilities, but according to some lower standard. The Supreme Court accepted, however, that the "onus of proving the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain.'"[177] In cases where an aboriginal right has not been proven to exist, evidence of extinguishment is not necessary. Where the right is proven to be existing,

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174. *Supra* note 4 at 1092.
175. *Ibid.* at 1095.
176. *Ibid.*
177. Dissenting judgment of Hall J. in *Calder*, *supra* note 77 at 404, quoted in *Sparrow*, *supra* note 4 at 1099.

evidence of extinguishment has not been persuasive. Because of the Supreme Court's comments, it is not possible to determine who has the onus of proving the existence of the right—the person who asserts its existence or the Crown who denies it.

After the defence has proven an aboriginal or treaty right, and even before it is called upon to present proof of *prima facie* infringement, the Crown may call evidence of extinguishment.[178]

In *Sparrow,* the Supreme Court followed its ruling in *R.* v. *Simon,*[179] to the effect that "[g]iven the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand the strict proof of the fact of extinguishment in each case where the issue arises."[180] Proof of the extinguishment of a treaty right requires even greater proof than the extinguishment of an aboriginal right, since a treaty cannot be extinguished without the express consent of the aboriginal parties. The Supreme Court stated in *Sioui*:

> It must be remembered that a treaty is a solemn agreement . . . an agreement the nature of which is sacred. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned.[181]

Where aboriginal rights rather than treaty rights are involved, the onus lies on the Crown and the intention to extinguish must be "clear and plain."[182] Assuming that the test of extinguishment of an aboriginal right is the same for that of aboriginal title, it has been widely held that aboriginal title can only be extinguished by surrender to the Crown or by competent legislative authority, and only then by specific legislation.

Evidence of extinguishment of aboriginal rights after 1982 is very difficult for the Crown to prove, since any infringement of s. 35 rights post-1982 imposes a requirement of consultation on the part of the Crown and is subject to other tests in *Sparrow*. However, in proceedings before the Supreme Court of Canada in *N.T.C. Smokehouse*[183] in October 1995, counsel for the British Columbia Attorney General argued that the detailed regulation of food fishing under the *Fisheries Act* and regulations amounted to an extinguishment of aboriginal commercial fishing rights

178. Since this would result in yet another leg of the trial, it is suggested that the defence call evidence of *prima facie* infringement together with evidence of the s. 35 right, before the Crown calls extinguishment evidence.
179. [1985] S.C.R. 387
180. *Ibid.* at 405-6.
181. *Sioui, supra* note 165 at 1063.
182. *Supra* note 4 at 1099.
183. *Supra* note 17.

by necessary implication. With respect, this argument ignores the oft-cited contemporaneous protests by the Department of Indian Affairs to such legislation as an unwarranted interference with aboriginal and treaty rights.[184] It is submitted that where two Crown departments disagree over the effect of legislation, the Crown cannot demonstrate a clear and plain intention of the Sovereign to extinguish aboriginal rights.

In *Gladstone*, the majority of the Supreme Court of Canada held that:

> None of these regulations, when viewed individually or as a whole, can be said to express a clear and plain intention to extinguish the aboriginal rights of the Heiltsuk band. While to extinguish an aboriginal right, the Crown does not perhaps have to use language which refers expressly to the extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme. . . . [T]he failure to recognize an aboriginal right and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.[185]

Nonetheless, Justice La Forest was prepared to find that extinguishment had occurred by virtue of the Crown having regulated the activity of fishing. He dissented:

> I cannot come to any other conclusion than that Order in Council P.C. 2539 evinces a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries—should they ever have existed. When the Crown has specifically chosen to address the issue of the translation of aboriginal practices into statutory rights and has expressly decided to limit the scope of these rights, as was done in British Columbia in relation to Indian fishing practices, then it follows, in my view, that aboriginal rights relating to practices that were specifically excluded were thereby extinguished.[186]

This is perhaps unsurprising in light of Justice La Forest's prior opinion that, despite the provisions of the *Royal Proclamation*,[187] "there is complete authority to deal with the [Indian] lands, for the federal Parliament and possibly the federal government, without statutory authorization, could even abolish the Indian title. *A fortiori,* the federal Parliament may negate or modify Indian hunting or fishing rights."[188]

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184. See, for example V. Lytwyn, "The Usurpation of Aboriginal Fishing Rights: A Study of the Saugeen Nation's Fishing Islands Fishery in Lake Huron" in B. Hodgins, S. Heard & J.S. Milloy, eds., *Co-existence?: Studies in Ontario-First Nations Relations* (Peterborough: Trent University, 1993) at 81-103.
185. *Supra* note 16 at 750, 753.
186. *Ibid.* at 795.
187. *Supra* note 81.
188. G.V. La Forest, *Water Law in Canada - The Atlantic Provinces* (Ottawa: Dept. of Regional Economic Expansion, 1973).

Yet it was Justice La Forest for the majority in *Sparrow* who, with Justice Dickson, held that the detailed regulation of a right cannot amount to extinguishment of it.[189] As stated in *Sparrow*:

> At bottom the [Crown's] argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.[190]

Because inland and coastal fisheries remain under federal jurisdiction, and the *Fisheries Act* prior to 1982 contained no express extinguishment of aboriginal sustenance activities, it is difficult to foresee how the Crown can prove extinguishment of an aboriginal right in the absence of express consent on the part of the aboriginal parties affected, since the legislation does not reveal a clear and plain intention of the Sovereign to extinguish such rights.[191] Indeed, it can be argued that amendments to the *Fisheries Act* in 1993[192] enabling aboriginal communal fishing licences to be issued for purposes including commercial fishing negates any argument that either subsistence or commercial fishing activities have been extinguished by necessary implication. The fact that one judge of the Supreme Court was prepared to find such extinguishment in *Gladstone*, without even referring to legislation protecting such rights, is deeply troubling.

XII. *Prima Facie Infringement*

Having proven the right, the accused must show that the preferred means of exercising the right has been infringed. As set out in *Sparrow,* certain questions must be asked in determining this question, such as whether the limitation is unreasonable, whether it imposes undue hardship and whether it denies to the rights holders their preferred means of exercising the right. Frequently, this involves conditions of licence.

The most recent decision dealing with the question of *prima facie* infringement on the issue of licensing is *Nikal.* In that case, the Crown argued that if one is charged with fishing without a licence, it is no defence to say that if the accused had obtained a licence, the conditions attached to it would have constituted a *prima facie* infringement of s. 35(1). In

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189. *Supra* note 4 at 1097.

190. *Ibid.*

191. In Ontario, management of fisheries has been delegated by the federal government to the province. However, the *Ontario Fishery Regulations* are still federal Orders-in-Council under the federal *Fisheries Act*: *Ontario Fishery Regulations, 1989*, SOR/89-93.

192. The *Aboriginal Communal Fishing Agreement Regulations*, SOR/92-415, of the *Fisheries Act* were replaced with the *Aboriginal Communal Fishing Licence Regulations*, SOR/93-332, on 16 June 1993. The Regulatory Impact Statement notes that terms and conditions of such licences could authorize the sale of fish harvested under the licence.

Nikal, the British Columbia Court of Appeal held that the accused was unable to prove such an infringement. The licence in *Nikal* was framed to suit individual members of the band, was issued free of charge, permitted the use of traditional equipment, contained no restrictions as to number of fish that could be caught, and permitted fishermen to select members of their extended family who could use and consume the fish caught. The majority view of the British Columbia Court of Appeal was that

> [i]n the context of an aboriginal rights case, I do not think that the licence and its conditions can be separated. If it can be shown that a licence was not obtained because the conditions would be unreasonable, would constitute an undue hardship or deprive an Indian of the preferred means of exercising his or her aboriginal rights, then the requirement that one hold a licence subject to such conditions would constitute a *prima facie* infringement of an aboriginal right. In such a case, the licensing requirements would be unconstitutional, and a charge based on that requirement would fail.[193]

The Supreme Court of Canada followed this line of reasoning, holding that the conditions of licence are not severable from a licence. The Supreme Court of Canada (7:2) held that four of the conditions were *prima facie* infringements of Mr. Nikal's aboriginal rights, requiring the Crown to meet the onus of justification.[194] Because the Crown had not done so, the licence was unconstitutional and no offence could exist under it.

> [The conditions] are an integral and essential part of the licence. They stipulate the conditions or terms upon which the licence is issued and the holder may use it. A licence holder is required to abide by the conditions. The licence is issued on that basis. The conditions are unconstitutional. As a result of the conditions the licence is invalid. It follows that there cannot be an offence of fishing without a licence in 1986. The licence as issued in 1986 pursuant to section 4(1) of the British Columbia Fishery (General) Regulations is as invalid as any other Act or Regulation which is found to be unconstitutional or *ultra vires*. . . . [A]n invalid act or regulation cannot create an offence.[195]

The case is puzzling in that Mr. Nikal did not have a licence. The court apparently imputed to Mr. Nikal conditions of licence which appeared on a communal fishing licence that had been developed by the Department of Fisheries and Oceans after consultation with Mr. Nikal's band, but which the band declined to renew on the advice of their elders, preferring

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193. (1993), 80 B.C.L.R. (2d) 245 at 258, MacFarlane, Taggart, and Wallace JJ.A. concurring on this point.
194. *Supra* note 8.
195. *Ibid.* at 1066.

to direct their own fishermen as to when and where to fish. As such, it is hard to understand the Court's rationale for determining that the conditions of licence were nonetheless infringements of Mr. Nikal's rights, particularly when it was not the conditions of licence which were put in issue by the defence but Mr. Nikal's aboriginal rights to defer to his elders, an issue not addressed by the Supreme Court at all.

Because conditions of licence which affected Mr. Nikal were *prima facie* infringements of his aboriginal rights, and were not justified by the Crown, the entire licence was held to be invalid. It is suggested that based on *Nikal*, the presence of any condition which cannot be justified by the Crown and which infringes an aboriginal right will be sufficient to render the entire licence invalid. It appears that would be so even if the condition is not fundamental, a point noted by Justice McLachlin, who dissented from the majority decision, but who noted with distress that the practical result of the decision was that the unconstitutionality of any one condition of licence was sufficient to render the entire licence invalid.[196]

The Supreme Court of Canada in *Nikal* reiterated the tests set out in *Sparrow* and concluded that on facts before it, the simple requirement of a licence was not unreasonable. The second test of "undue hardship" was not met by proving mere inconvenience. The third test, whether the rights holder is denied the preferred means of exercising the right, could not be affected by a licence alone without its conditions, since the Court ruled that a licence, at its most basic, was simply a means of identification.[197]

However, the Court held that the government is required to justify conditions of licence which on their face infringe the s. 35 right to fish. These included the restriction of fishing to fishing for food only, the restriction to fishing for the fisherman's family only, the restriction to fishing for salmon only and the requirement that food fishing at certain dates be licensed by a conservation officer.[198] Other terms of licence which provided for prescribed waters in which fishing could take place, the type of gear which could be used and the times and days at which fishing might occur could be infringements depending on whether they infringed the appellant's aboriginal rights. Since the trial judge had not found that the appellant's aboriginal rights included the right to determine when fishing should occur and the method and manner of such fishing, the Court was unable to say whether the appellant's aboriginal rights had been infringed.[199]

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196. Dissenting Reasons of McLachlin J., *ibid.* at 1071.
197. *Ibid.* at 1060.
198. *Ibid.* at 1061-62.
199. *Ibid.* at 1063.

Fishing licences are usually subject to restrictions as to catch limits, closed seasons, sizes of fish that can be taken and types of equipment that can be used. In *R.* v. *Bombay*, the Ontario Court of Appeal suggested that any interference will amount to *prima facie* interference.[200] The Supreme Court in *Nikal* has indicated that more is required than mere inconvenience.[201]

XIII. *Crown Justification Evidence*

The onus of proof of justification on the Crown has already been discussed. The various tests of justification where food fishing is at issue are set out in *Sparrow*. The Crown bears the burden of justifying any legislation that has some negative effect on any aboriginal right protected by s. 35(1). This includes proving a valid legislative objective,[202] that top priority has been given to aboriginal food fishing, minimal infringement in order to effect the desired result, the availability of fair compensation in a situation of expropriation, and consultation with the aboriginal group in question with respect to the conservation measures being implemented.[203] As well, the honour of the Crown must be the first consideration in determining whether justification had been proven.[204]

However, as a result of the Supreme Court decision in *Nikal*, the concept of reasonableness has been added and now forms the lens through which the *Sparrow* test of justification is to be viewed. The Crown, then, may simply need to prove that the infringements created by the licensing scheme are in the end result, reasonable.

The Supreme Court of Canada in *Nikal* held that in considering whether there has been minimal infringement, the infringement must be looked at in the context of the situation presented. If the context is such that the infringement could reasonably be considered to be as minimal as possible, then it will meet the test.[205] The Supreme Court has most recently held that the mere fact that there may be other solutions that might amount to lesser infringement should not, in itself, lead to an automatic finding that infringement cannot be justified.[206] The Court has also noted that the greater the urgency and the graver the situation, the

200. *R.* v. *Bombay* (1993), 61 O.A.C. 312, [1993] 1 C.N.L.R. 92.
201. *Supra* note 8 at 1060.
202. *Supra* note 4 at 1114.
203. *Ibid.* at 1119.
204. *Ibid.* at 1114.
205. *Supra* note 8 at 1065.
206. *Ibid.*

more reasonable strict measures may appear.[207] This in itself is inconsistent with *Sparrow*, which had clearly delineated the test of "as little infringement as possible in order to effect the desired result."[208]

In proving justification, the Crown must prove that it has a valid legislative objective, such as conservation. The Supreme Court, however, has assumed a valid legislative objective when no evidence has been advanced to provide a rational connection between the regulatory scheme and the objective of conservation. For instance, licensing was upheld in *Nikal* as being "nothing more than a form of identification."[209] The issue should surely not be an inquiry into whether the requirement of a licence meets the objective of conservation but whether the impugned conditions are necessary to effect the legislative objective.[210]

An existing aboriginal right gives the members of the band involved a priority over other user groups in the allocation of any surplus once the needs of conservation have been met. While a treaty right may contain a promise of exclusivity,[211] the Supreme Court has yet to deal with a treaty case involving fishing rights. To date, however, the Court has been loathe to recognize more than the priority set out in *Sparrow*:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery. . . . I agree with the tenor of this argument.[212]

Thus, according to *Sparrow*, the Crown must first establish that the management scheme in place accords with the *Sparrow* priority and that

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207. *Ibid.* at 1065.
208. *Supra* note 4 at 1119.
209. *Nikal, supra* note 8 at 1060.
210. In *R.* v. *Agawa* (1988), 65 O.R. (2d) 505, 53 D.L.R. (4th) 101, [1988] C.N.L.R. 73, leave to appeal ref'd [1990] 2 S.C.R. v, cited with approval in *Nikal, supra* note 8, the Ontario Court of Appeal held that the requirement of a commercial fishing licence was a reasonable restriction on the band's treaty right to fish as it served a valid conservation purpose. However, in *Jones, supra* note 6 the court held that a quota restriction on a commercial licence was not a reasonable restriction on the band's treaty and aboriginal rights to fish, even where the species at issue was considered vulnerable, where expert evidence established that the quota could have been doubled without any effect on conservation, *Jones, ibid.*
211. In *Jones, ibid.* the court found there was a promise of exclusivity but upheld only a priority allocation.
212. *R.* v. *Jack*, [1980] 1 S.C.R. 294 at 313, 100 D.L.R. (3d) 193, [1979] 2 C.N.L.R. 25, quoted in *Sparrow, supra* note 4 at 1115-1116.

it contains no underlying unconstitutional objective of shifting the resource to lower ranked users.[213] To meet this burden of proof, the Crown would have to establish that the management scheme was not weighted in favour of non-aboriginal or commercial users of the resource and that the aboriginal priority within the resource has been recognized. In *Van der Peet*, however, the Supreme Court decided that since commercial fishing rights lacked "internal limits" and were determined solely by market conditions, these must not result in a priority of the type recognized in *Sparrow*.

Again, Justice McLachlin dissented, focusing her concerns both on the essentially subjective basis of the test of "distinctive and integral" as uncertain, and the fundamental unfairness of re-allocating constitutional rights to non-natives once a s. 35 right had been proven. Justice McLachlin clearly believed that although purporting to follow and enhance the *Sparrow* test, the Chief Justice had, in fact, contradicted it. She stated:

> Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assuming that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all.
>
> The Chief Justice recognizes the all or nothing logic of the "integral" test in relation to commercial fishing rights in his reasons in *Gladstone*. Having determined in that case that an aboriginal right to commercial fishing is established, he notes that unlike the Indian food fishery, which is defined in terms of the peoples' need for food, the right to fish commercially "has no internal limitations". Reasoning that where the test for the right imposes no internal limit on the right, the court may do so, he adopts a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise as envisioned in *Sparrow*, to permit partial reallocation of the aboriginal right to non-natives. The historically based test for aboriginal rights which I propose, by contrast, possesses its own internal limits and adheres more closely to the principles that animated *Sparrow*, as I perceive them.[214]

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213. *Sparrow*, *supra* note 4 at 1121.

214. *Supra* note 14 at 639-40 [citations omitted].

Where commercial activities are at issue, a broader justification test was outlined by the Supreme Court of Canada, based on the notion that food fishing contains "internal limits" which do not apply to commercial fishing. Commercial fishing, the Court held, would otherwise be limited only by market and availability of the resource. This decision again reflects eurocentric views of the use of "resources." Aboriginal people have a very different view of their relationship with fish and game than has been suggested by the Court. As stated by anthropologist Ronald Trosper:

> The difference between [North] American Indians and the dominant culture regarding the man/nature orientation is probably the best known. Most tribes share the idea that man should live in harmony with his surroundings. Indian spirituality demands respect for the natural world. Failure to preserve balance in one's interaction with nature can be dangerous. Christian spirituality, following its early roots in Greece and Judea, allows man to dominate in the natural world.[215]

It is suggested that Western society sees resources such as fish as commodities with an economic value based on the ability to utilize them. Western society measures such resources through their sustainability and productivity based on their capture; even fish populations are measured by escapement, that is, how many fish manage to get away. Trosper notes that "[c]ompartmentalizing knowledge and dominating nature, the dominant society can see in a forest only the few useful products—wood fibre, game animals, water—that can be marketed."[216] However, the aboriginal world view of its relationship with such "resources" is markedly different. One aboriginal person explained:

> In terms of Anishnabe people, these animals were better understood as our relatives. Many of them are clan totems of our people. We have our own ways of speaking about them and relating to them. Our knowledge of our animals is often expressed in the language of our ceremonies. But it reflects a great complexity and sophistication which the MNR bureaucrats and scientists do not know about. Our knowledge has arisen out of relationships to our lands and animals.
>
> All of the white man's science used to make management decisions for quotas was based on their relationships with the land. It was against our relationships to our land and each other as Anishnabe people on our lands. This science is not objective. It is a tool of the white man that reflects *his* understanding of the land. It reflects *his* social relationships to the land.[217]

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215. R. Trosper, "Mind Sets and Economic Developments" in S. Cornell & J. Kalt, eds., *What Can Tribes Do?* (Los Angeles: University of California, 1992) at 310.
216. *Ibid.* at 318.
217. R. Ross, *Returning to the Teachings* (Toronto: Penguin Books, 1996) at 262.

Ross Waukey, an Ojibway elder from an Ontario fishing community in which commercial fishing rights have been recognized as both an aboriginal and a treaty right[218] put it this way:

> In Indian thinking, any living thing on earth is just like people. We live together and work together. Fish are living too. Everything works together. We cannot destroy things. Anything nature provides cannot be destroyed because you're destroying yourself at the same time.[219]

The Supreme Court made a number of assumptions about how aboriginal communities would conduct themselves in the pursuit of an aboriginal fishery. These assumptions did not take into account aboriginal cultural values, but applied eurocentric values without questioning their applications to a very different culture.

The suggestion that aboriginal societies are incapable of setting internal limits for their fishers except where these are defined by "need" demonstrates a lack of appreciation for the capacity of aboriginal societies to self-regulate. Nor does the decision reflect any recognition that aboriginal peoples have been engaged in commercial fishing activities for hundreds of years. Many archaeological sites on the Great Lakes, dating back to 1000 A.D. contain huge deposits of whitefish and lake trout bones, attesting to the effectiveness of the gill net fishery which evolved as commercial fishing activities developed. As anthropologist Charles Cleland describes:

> So thoroughly were the native peoples of the Upper Lakes adapted to the gill net fishery that their population density, social system and seasonal movement was geared to this resource.[220]

In the seventeenth and eighteenth centuries, the Anishnabeg (Algonquin-speaking people including the Chippewa, or Ojibway) traded and bartered fish to the French and British and were thoroughly integrated into the market economy. The Supreme Court did not seem to understand that commercial fishing activities have been part of aboriginal economies for hundreds of years. Instead, the Court assumed that if these rights were recognized as entitled to constitutional protection, aboriginal peoples would abuse them. There was no evidence before the Court upon which such a conclusion could be based.

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218. Ross Waukey is a member of the Chippewas of Nawash Band of Indians, whose aboriginal and treaty rights to commercially fish were affirmed in *Jones*, *supra* note 6.
219. Ross Waukey, as related by D. Johnston, "Aboriginal Fishing: Traditional Knowledge and Evolving Resource Stewardship" (Paper given at Canadian Bar Association – Ontario/Canadian Aquatic Resources Society Conference, Aboriginal Fishing, Traditional Values and Sustainable Resource Development, Wahta Mohawk First Nation, 29-30 September 1996) [unpublished] note 186.
220. *Ibid.*

The Court also determined that aboriginal people engaged in commercial activities deserved no greater right to share in the fishery than non-aboriginal users. In *Gladstone*,[221] the Court was dealing with an aboriginal right which according to *Sparrow*, results in recognition of a priority interest rather than an exclusive one. In *Gladstone*, the Supreme Court indicated the test for "commercial fishing" is vague but involves an examination of government actions to see whether the government has taken into account the existence and importance of such rights.[222] The Court held, however, that this priority is to be determined, in part, on the percentage of aboriginal people within the general population, stating:

> Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, *the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example) how important the fishery is to the economic and material well-being of the band in question*, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. . . . These questions, like those in *Sparrow*, do not represent an exhaustive list of the factors that may be taken into account in determining whether the government can be said to have give priority to aboriginal rights holders; they give some indication, however, of what such an inquiry should look like.[223]

It is submitted that the questions relating to relative participation by aboriginal peoples in a fishery, or their economic and material well-being relative to non-aboriginal users, should be irrelevant. At best, they establish equivalency rather than an aboriginal priority. Before reaching the test of justification, a court is required to determine the existence of an aboriginal right both distinctive and integral to the aboriginal culture in question. As such, any examination based on proportionate participation in the fishery as a test of justification ignores the disproportionate value of the activity to the particular aboriginal society relative to the general population. After all, it was precisely this overwhelming cultural

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221. *Supra* note 16.
222. *Ibid.* at 767.
223. *Ibid.* at 768.

importance which the aboriginal accused was required to prove in order to establish the right in the first place.

Indeed, the Court in *Adams*[224] recognized that fishing activities are not of overwhelming importance to the general public where food fishing is involved, although the Court suggested that the outcome could be different if evidence of a meaningful economic dimension (to non-aboriginal users) was involved.

> I have some difficulty in accepting in the circumstances of this case that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" to warrant the limitation of aboriginal rights.[225]

The Court does not explain how the participation by other users in an aboriginal fishery resulting in an economic benefit to those users should result in the denial of an aboriginal priority which might transfer that economic benefit to the people most entitled to it. Indeed, applying a test of economic proportionality might well result in a less than just allocation of the resource to an aboriginal population which has been denied historic access to that resource on the basis that its current level of participation suggests the fishery is not important to its economic or material wellbeing.

Similarly, using the proportional participation level of aboriginal peoples in a fishery as a determinant of justification assumes that all members of a band or tribal council could have had access to the fishery if they so desired. The reality is that many aboriginal communities with strong cultural links to the fisheries have been systematically excluded as a result of quota restrictions and licence restrictions which have favoured non-aboriginal parties.[226] The test proposed by the Court would perpetuate rather than remedy such injustices. As suggested by Justice McLachlin

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224. *Supra* note 46.

225. *Supra* note 96 at 34.

226. In *Jones, supra* note 6, there were only two or three aboriginal fishermen in the water as a result of quota restrictions limiting the total catch for the community to 10,000 lbs., with a total value of approximately $20,000.

in her dissenting judgment in *Van der Peet*, there is no legal basis for this approach, which would serve to negate the aboriginal right itself:

> [Considering] matters like economic and regional fairness and the interests of non-aboriginal fishers . . . would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*. . . .
>
> Such an approach, I fear, has the potential to violate not only the Crown's fiduciary duty toward native peoples, but to render meaningless the "limited priority" to the non-commercial fishery endorsed in *Jack* and *Sparrow*.[227]

Conclusion

The defence of aboriginal fishing charges frequently involves a reliance on s. 35 rights. A review of recent Supreme Court of Canada cases, however, reveals the imposition of unattainable burdens of proof on the defence and a relaxation of the burden of proof on the Crown in what are supposed to be criminal or quasi-criminal proceedings. The Supreme Court has introduced new elements of proof which are inconsistent with the justificatory analysis contained in *Sparrow* and which serve to favour the Crown. In so doing, the Supreme Court of Canada has imposed new procedural and substantive requirements on aboriginal accuseds which themselves are potentially unconstitutional. The result of these new tests is to advance political, rather than legal, objectives at the expense of constitutionalized aboriginal and treaty rights.

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227. *Supra* note 14 at 661-62.