Supreme Court Judgments

R. v. Sparrow

Collection:	Supreme Court Judgments
Date:	1990-05-31
Report:	[1990] 1 SCR 1075
Case number:	20311
Judges:	Dickson, Robert George Brian; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John
On appeal from:	British Columbia
Subjects:	Aboriginal law Constitutional law
Notes:	SCC Case Information: 20311

R. *v.* Sparrow, [1990] 1 S.C.R. 1075

Ronald Edward Sparrow *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The National Indian Brotherhood / Assembly of First Nations, the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., the Fisheries Council of British Columbia, the United

Fishermen and Allied Workers' Union,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General for Alberta
and the Attorney General of Newfoundland *Interveners*

indexed as: r. *v.* sparrow

File No.: 20311.

1988: November 3; 1990: May 31.

Present: Dickson C.J. and McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Aboriginal rights -- Fishing rights -- Indian convicted of fishing with net larger than permitted by Band's licence -- Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 -- Constitution Act, 1982, ss. 35(1), 52(1) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 34 -- British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

Indians -- Aboriginal rights -- Fishing rights -- Interpretation -- Indian convicted of fishing with net larger than permitted by Band's licence -- Whether or not net length restriction inconsistent with s. 35(1) of Constitution Act, 1982.

Appellant was charged in 1984 under the *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Appellant was convicted. The trial judge found that an aboriginal right could not be claimed unless it was supported by a special treaty and that s. 35(1) of the *Constitution Act, 1982* accordingly had no application. An appeal to County Court was dismissed for similar reasons. The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Its decision was appealed and cross-appealed. The constitutional question before this Court queried whether the net length restriction contained in the Band's fishing licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Held: The appeal and cross-appeal should be dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Section 35(1) applies to rights in existence when the *Constitution Act, 1982* came into effect; it does not revive extinguished rights. An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.

The Crown failed to discharge its burden of proving extinguishment. An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*. Nothing in the *Fisheries Act* or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian aboriginal right to fish. These fishing permits were simply a manner of controlling the fisheries, not of defining underlying rights. Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).

Section 35(1) of the *Constitution Act, 1982*, at the least, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples constitutional protection against provincial legislative power. Its significance, however, extends beyond these fundamental effects. The approach to its interpretation is derived from general principles of constitutional interpretation, principles relating to aboriginal

rights, and the purposes behind the constitutional provision itself.

Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights. The provision is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms*. Any law or regulation affecting aboriginal rights, however, will not automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The inquiry begins with a reference to the characteristics or incidents of the right at stake. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful to avoid the application of traditional

common law concepts of property as they develop their understanding of the "*sui generis*" nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.

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

Here, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. The issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. The "public interest" justification is so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. The justification of conservation and resource management, however, is uncontroversial.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified. There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may

give rise to conflict with the interests of others given the limited nature of the resource.

Guidelines are necessary to resolve the allocational problems that arise regarding the fisheries. Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority and guarantees that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

Cases Cited

Applied: *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **considered**: *R. v. Denny* (1990), 9 W.C.B. (2d) 438, Nova Scotia Court of Appeal, March 5, 1990; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), aff'g (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.); **distinguished**: *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); **referred to**: *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), aff'd [1973] S.C.R. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St.*

Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.); *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] S.C.R. 81; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Kruger v. The Queen*, [1978] 1 S.C.R. 104.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12(1), (2), 27(1), (4).

British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10, art. 13.

Canadian Charter of Rights and Freedoms, ss. 1, 33.

Constitution Act, 1867, ss. 91(12), (24), 109.

Constitution Act, 1930.

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

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

Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45.

Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

Wildlife Act, S.B.C. 1966, c. 55.

Authors Cited

Canada. Department of Indian Affairs and Northern Development. *In All Fairness: A Native Claims Policy - Comprehensive Claims*. Ottawa: 1981.

Canada. Department of Indian Affairs and Northern Development. *Statement of the Government of Canada on Indian Policy*. Ottawa: 1969.

Clement, W. H. P. *The Law of the Canadian Constitution*, 3rd ed. Toronto: Carswells, 1916.

Little Bear, Leroy. "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.

Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95.

McNeil, Kent. "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court L.R.* 255.

Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1987), 22 *U.B.C. L. Rev*. 207.

Sanders, Douglas. "Pre-existing Rights: The Aboriginal Peoples of Canada," in Gérald A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. Toronto: Carswells, 1989.

Schwartz, Bryan. *First Principles, Second Thoughts: Aboriginal People, Constitutional Reform and Canadian Statecraft*. Montreal: Institute for Research on Public Policy, 1986.

Slattery, Brian. "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361.

Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1986), 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, [1987] 2 W.W.R. 577, allowing an appeal from a judgment of Lamperson Co. Ct. J., [1986] B.C.W.L.D. 599, dismissing an appeal from conviction by Goulet Prov. Ct. J. Appeal and cross-appeal dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Marvin R. V. Storrow, *Q.C.*, *Lewis F. Harvey* and *Joanne Lysyk*, for the appellant.

Thomas R. Braidwood, *Q.C.*, and *James E. Dorsey*, for the respondent.

Harry A. Slade, *Arthur Pape* and *Louise Mandell*, for the intervener the National Indian Brotherhood / Assembly of First Nations.

Christopher Harvey, for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild and the Deep Sea Trawlers' Association of B.C.

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

Ian Donald, *Q.C.*, for the intervener the United Fishermen and Allied Workers' Union.

J. T. S. McCabe, *Q.C.*, and *Michel Hélie*, for the intervener the Attorney General for Ontario.

René Morin and *Robert Décary*, *Q.C.*, for the intervener the Attorney General of Quebec.

E. Robert A. Edwards, *Q.C.*, and *Howard R. Eddy*, for the intervener the Attorney General of British Columbia.

Kenneth J. Tyler and *Robert G. Richards*, for the intervener the Attorney General for Saskatchewan.

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

S. Ronald Stevenson, for the intervener the Attorney General of Newfoundland.

//*The Chief Justice and La Forest J.*//

The judgment of the Court was delivered by

The Chief Justice and La Forest J. -- This appeal requires this Court to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and provides as follows:

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

The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the *Fisheries Act*, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether

Parliament's power to regulate fishing is now limited by s. 35(1) of the *Constitution Act, 1982*, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the *Fisheries Act* of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984 in Canoe Passage which is part of the area subject to the Band's licence. The licence, which had been issued for a one-year period beginning March 31, 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s. 35(1) of the *Constitution Act, 1982* and therefore invalid.

The Courts Below

Goulet Prov. Ct. J., who heard the case, first referred to the very similar pre-*Charter* case of *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), where this Court held that the aboriginal right to fish was governed by the *Fisheries Act* and regulations. He then expressed the opinion that he was bound by *Calder v. Attorney-General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), which held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document, a position that was not disturbed because of the divided opinions of the members of this Court on the appeal which affirmed that decision ([1973] S.C.R. 313). Section 35(1) of the *Constitution Act, 1982* thus had no application. The alleged right here was not based on any treaty or other document but was said to have been one exercised by the Musqueam from time immemorial before European settlers came to this continent. He, therefore, convicted the appellant, finding it unnecessary to consider the evidence in support of an aboriginal right.

An appeal to Lamperson J. of the County Court of Vancouver, [1986] B.C.W.L.D. 599, was dismissed for

similar reasons.

The British Columbia Court of Appeal (1986), 9 B.C.L.R. (2d) 300, found that the courts below had erred in deciding that they were bound by the Court of Appeal decision in *Calder*, *supra*, to hold that the appellant could not rely on an aboriginal right to fish. Since the pronouncement of the Supreme Court of Canada judgment, the Court of Appeal's decision has been binding on no one. The court also distinguished *Calder* on its facts.

The court then dealt with the other issues raised by the parties. On the basis of the trial judge's conclusion that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished "from time immemorial", it stated that, with the other circumstances, this should have led to the conclusion that Mr. Sparrow was exercising an existing aboriginal right. It rejected the Crown's contention that the right was no longer existing by reason of its "extinguishment by regulation". An aboriginal right could continue, though regulated. The court also rejected textual arguments made to the effect that s. 35 was merely of a preambular character, and concluded that the right to fish asserted by the appellant was one entitled to constitutional protection.

The issue then became whether that protection extended so far as to preclude regulation (as contrasted with extinguishment which did not arise in this case) of the exercise of that right. In its view, the general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. Parliament retained the power to regulate fisheries and to control Indian lands under ss. 91(12) and (24) of the *Constitution Act, 1867* respectively. Reasonable regulations were necessary to ensure the proper management and conservation of the resource, and the regulations under the *Fisheries Act* restrict the right of all persons including Indians. The court observed, at p. 330:

> Section 35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under Head 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on 17th April 1982 may not be taken away.

The court rejected arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures. The right had always been and continued to be a regulated right. The court put it this way, at p. 331:

> The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on 17th April 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected, then reasonable regulations to ensure the proper management and conservation of the resource must be continued.

The court then went on to particularize the right still further. It was a right for a purpose, not one related to a particular method. Essentially, it was a right to fish for food and associated traditional band activities:

> The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption.

That right, the court added, has not changed its nature since the enactment of the *Constitution Act, 1982*. What has changed is that the Indian food fishery right is now entitled to priority over the interests of other user groups and that that right, by reason of s. 35(1), cannot be extinguished.

The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Observing that the conviction was based on an erroneous view of the law and could not stand, the court further remarked upon the existence of unresolved conflicts in the evidence, including the question whether a change in the fishing conditions was necessary to reduce the catch to a level sufficient to satisfy reasonable food requirements, as well as for conservation purposes.

The Appeal

Leave to appeal to this Court was then sought and granted. On November 24, 1987, the following constitutional question was stated:

> Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations* and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?

The appellant appealed on the ground that the Court of Appeal erred (1) in holding that s. 35(1) of the *Constitution Act, 1982* protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest", and (2) in failing to find the net length restriction in the Band's food fish licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before April 17, 1982, the date of commencement of the *Constitution Act, 1982*, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the Band and that the Band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups. Finally, it maintained that the conviction ought not to have been set aside or a new trial directed because the appellant failed to establish a *prima facie* case that the reduction in the length of the net had unreasonably interfered with his right by preventing him from meeting his food fish requirements. According to the respondent, the Court of Appeal had erred in shifting the burden of proof to the Crown on the issue before the appellant had established a *prima facie* case.

The National Indian Brotherhood / Assembly of First Nations intervened in support of the appellant. The Attorneys General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland supported the respondent, as did the B. C. Wildlife Federation and others, the Fisheries Council of British Columbia and the United Fishermen and Allied Workers' Union.

The Regulatory Scheme

The *Fisheries Act*, s. 34, confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section:

34. . . .

(*a*) for the proper management and control of the seacoast and inland fisheries;

(*b*) respecting the conservation and protection of fish;

(*c*) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

. . .

(*e*) respecting the use of fishing gear and equipment;

(*f*) respecting the issue, suspension and cancellation of licences and leases;

(*g*) respecting the terms and conditions under which a lease or licence may be issued;

Contravention of the Act and the regulations is made an offence under s. 61(1) under which the appellant was charged.

Acting under its regulation-making powers, the Governor in Council enacted the *British Columbia Fishery (General) Regulations*, SOR/84-248. Under these Regulations (s. 4), everyone is, *inter alia*, prohibited from fishing without a licence, and then only in areas and at the times and in the manner authorized by the Act or regulations. That provision also prohibits buying, selling, trading or bartering fish other than those lawfully caught under the authority of a commercial fishing licence. Section 4 reads:

4. (1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the *Wildlife Act* (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.

(2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.

(4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

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

Minister or the Minister of Environment for British Columbia.

The Regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band", and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. Subsections 27(1) and (4) of the Regulations read:

> 27. (1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.
>
> . . .
>
> (4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

As in the case of other licences issued under the Act, such licences may, by s. 12 of the Regulations, be subjected to restrictions regarding the species and quantity of fish that may be taken, the places and times when they may be taken, the manner in which they are to be marked and, most important here, the type of gear and equipment that may be used. Section 12 reads as follows:

> 12. (1) Subject to these Regulations and any regulations made under the Act in respect of the fisheries to which these Regulations apply and for the proper management and control of such fisheries, there may be specified in a licence issued under these Regulations
>
> (*a*) the species of fish and quantity thereof that is permitted to be taken;
>
> (*b*) the period during which and the waters in which fishing is permitted to be carried out;
>
> (*c*) the type and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is to be used;
>
> (*d*) the manner in which fish caught and retained for educational or scientific purposes is to be held or displayed;
>
> (*e*) the manner in which fish caught and retained is to be marked and transported; and
>
> (*f*) the manner in which scientific or catch data is to be reported.
>
> (2) No person fishing under the authority of a licence referred to in subsection (1) shall contravene or fail to comply with the terms of the licence.

Pursuant to these powers, the Musqueam Indian Band, on March 31, 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" in areas which included

the place where the offence charged occurred, the waters of Ladner Reach and Canoe Passage therein described. The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length".

The appellant was found fishing in the waters described using a drift net in excess of 25 fathoms. He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

Analysis

We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"*Existing*"

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. A number of courts have taken the position that "existing"' means being in actuality in 1982: *R. v. Eninew* (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.), at p. 446, aff'd (1984), 12 C.C.C. (3d) 365 (Sask. C.A.) See also *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201.

Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in *Agawa*, *supra*, had this to say about the matter, at p. 214:

> Some academic commentators have raised a further problem which cannot be ignored. The **Ontario Fishery Regulations** contained detailed rules which vary for different regions in the province. Among other things, the **Regulations** specify seasons and methods of fishing, species of fish which can be caught

> and catch limits. Similar detailed provisions apply under the comparable fisheries **Regulations** in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s. 35(1) were those remaining after regulation at the time of the proclamation of the **Constitution Act, 1982**.

As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at pp. 781-82, has observed the following about reading regulations into the rights:

> This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

See also Professor McNeil, "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court L.R.* 255, at p. 258 (*q.v.*); Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207.

The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the *Constitution Act, 1982* had been enacted a few years earlier, any right held by the Musqueam Band, on this approach, would have been constitutionally subjected to the restrictive regime of personal licences that had existed since 1917. Under that regime, the Musqueam catch had by 1969 become minor or non-existent. In 1978 a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75 fathom net for a greater number of days than other people. Under this regime, from 1977 to 1984, the number of Band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats, while 10 other members of the Band fished under commercial licences. Before this regime, the Band's food fish requirement had basically been provided by Band members who were licensed for commercial fishing. Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the Band's 1978 licence.

The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," *supra*, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

The Aboriginal Right

We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the City of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the Band's right to fish in another area of the Fraser River estuary known as Canoe Passage in the South Arm of the river, some 16 kilometres (about 10 miles) from the reserve. The reserve and those waters are separated by the Vancouver International Airport and the Municipality of Richmond.

The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the Band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 307-308:

> Dr. Suttles was qualified as having particular qualifications in respect of the ethnography of the Coast Salish Indian people of which the Musqueams were one of several tribes. He thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the Fraser River, including the waters of the three channels by which that river reaches the ocean. 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 others.
>
> Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, was "not the subject of serious dispute". It is not surprising, then, that, taken with other circumstances, that court should find, at p. 320, that "the judgment appealed from was wrong in . . . failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right".

In this Court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*.

The history of the regulation of fisheries in British Columbia is set out in *Jack v. The Queen*, [1980] 1 S.C.R. 294, especially at pp. 308 *et seq.*, and we need only summarize it here. Before the province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal *Fisheries Act* was only proclaimed in force in the province in 1876 and the first *Salmon Fishery Regulations for British Columbia* were adopted in 1878 and were minimal.

The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in *Jack v. The Queen*, *supra*, at p. 310:

> The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food; see P.C. 2539 of Sept. 11, 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous sixty years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a Band food fishing licence, while retaining comprehensive specification of conditions for the exercise of licences.

It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. For this proposition, he particularly relied on

St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.); *Calder v. Attorney-General of British Columbia*, *supra*; *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); and *Attorney-General for Ontario v. Bear Island Foundation*, *supra*. The consent to its extinguishment before the *Constitution Act, 1982* was not required; the intent of the Sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The *Fisheries Act* and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first fisheries case, *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the *Constitution Act, 1867* is vested in the provinces (and so falls to be regulated *qua* property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-13):

> . . . the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically

extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, *supra*, at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also *Attorney-General for Ontario v. Bear Island Foundation*, *supra*, at pp. 439-40. That in Judson J.'s view was what had occurred in *Calder*, *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be `clear and plain'". (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for

subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. The Court of Appeal thereby defined the right as protecting the same interest as is reflected in the government's food fish policy. In limiting the right to food purposes, the Court of Appeal referred to the line of cases involving the interpretation of the Natural Resources Agreements and the food purpose limitation placed on the protection of fishing and hunting rights by the *Constitution Act, 1930* (see *R. v. Wesley*, [1932] 2 W.W.R. 337, *Prince and Myron v. The Queen*, [1964] S.C.R. 81; *R. v. Sutherland*, [1980] 2 S.C.R. 451).

The Court of Appeal's position was attacked from both sides. The respondent for its part, argued that, if an aboriginal right to fish does exist, it does not include the right to take fish for the ceremonial and social activities of the Band. The appellant, on the other hand, attacked the Court of Appeal's restriction of the right to a right to fish for food. He argued that the principle that the holders of aboriginal rights may exercise those rights according to their own discretion has been recognized by this Court in the context of the protection of treaty hunting rights (*Simon v. The Queen*, [1985] 2 S.C.R. 387) and that it should be applied in this case such that the right is defined as a right to fish for any purpose and by any non-dangerous method.

In relation to this submission, it was contended before this Court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand

rises and tensions increase.

Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

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

"*Recognized and Affirmed*"

We now turn to the impact of s. 35(1) of the *Constitution Act, 1982* on the regulatory power of Parliament and on the outcome of this appeal specifically.

Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood / Assembly of First Nations, is that the right to regulate is part of the right to use the resource in the Band's discretion. Section 35(1) is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms* nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of the *Constitution Act, 1982* and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by

any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures might qualify" (emphasis added) -- where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the *Charter*.

In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see *Johnson v. M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); *Calder*, *supra*, *per* Judson J., at p. 328, Hall J., at pp. 383 and 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even

recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal Government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis added.) See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; see also *In All Fairness: A Native Claims Policy - Comprehensive Claims* (1981), pp. 11-12; Slattery, "Understanding Aboriginal Rights" op. cit., at p. 730. As recently as *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the federal government argued in this Court

that any federal obligation was of a political character.

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, *supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed., especially at p. 730).

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, says the following about s. 35(1), at p. 100:

> . . . 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.

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court said the following about the perspective to be adopted when interpreting a constitution, at p. 745:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 322:

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future. . . . To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29. . . .

In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36, the following principle that should govern the interpretation of Indian treaties and statutes was set out:

> . . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

In *R. v. Agawa*, *supra*, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:

"The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. 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."

This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see **Guerin v. The Queen**, [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.

In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the 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.

We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick*, *Taylor and Williams* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content (Lyon, op. cit.; Pentney, op. cit.; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35 -- `What's in the Box?' and `What Kind of Box?'", Chapter XXIV, in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*; Slattery, op. cit.; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 *Am. J. of Comp. Law* 361).

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

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. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

We refer to Professor Slattery's "Understanding Aboriginal Rights", *supra*, with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. 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. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

Taking the above framework as guidance, we propose to set out the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the *Constitution Act, 1982*, renders the authority of *R. v. Derriksan*, *supra*, inapplicable. In that case, Laskin C.J., for this Court, found that there was nothing to prevent the *Fisheries Act* and the Regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the *Derriksan* line of cases established that, before April 17, 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguishment. The new constitutional status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, *supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," [1982] 5 *Can. Legal Aid Bul.* 99.)

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial. In *Kruger v. The Queen*, [1978] 1 S.C.R. 104, the applicability of the B.C. *Wildlife Act*, S.B.C. 1966, c. 55, to the appellant members of the Penticton Indian Band was considered by this Court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.

While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. 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.

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J., as he then was, in *Jack v. The Queen*, *supra*, for such guidelines.

In *Jack*, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the *British Columbia Terms of Union* imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this Court, we point out that this case concerns a different constitutional promise that asks this Court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal rights. We therefore repeat the following passage from *Jack*, at p. 313:

> 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 general tenor of this argument. . . . With respect to whatever salmon are to be caught, then

> priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

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

The decision of the Nova Scotia Court of Appeal in *R. v. Denny* (1990), 9 W.C.B. (2d) 438, unreported, judgment rendered March 5, 1990, addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the rights. Clarke C.J.N.S., for a unanimous court, found that the Nova Scotia *Fishery Regulations* enacted pursuant to the federal *Fisheries Act* were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the *Constitution Act, 1982*, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at pp. 22-23:

> I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account. . .

> To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at p. 25:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

In light of this approach, the argument that the cases of *R. v. Hare and Debassige*, *supra*, and *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In *Hare and Debassige*, which addressed the issue of whether the *Ontario Fishery Regulations*, C.R.C. 1978, c. 849, applied to members of an Indian Band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with respect to taking fish, Thorson J.A. emphasized the need for priority to be given to measures directed to the management and conservation of fish stocks with the following observation (at p. 17):

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the *Constitution Act, 1982*, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.
>
> The prohibitions found in ss. 12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly, it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

In *Eninew*, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are

reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

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.

Application to this Case -- Is the Net Length Restriction Valid?

The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an

analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

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 restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He 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."

According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this Court. We also would order a re-trial which would allow findings of fact according to the tests set out in these reasons.

The appellant would bear the burden of showing that the net length restriction constituted a *prima facie* infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians.

In conclusion, we would dismiss the appeal and the cross-appeal and affirm the Court of Appeal's setting aside

of the conviction. We would accordingly affirm the order for a new trial on the questions of infringement and whether any infringement is nonetheless consistent with s. 35(1), in accordance with the interpretation set out here.

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

Question Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations* and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982* ?

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

Appeal and cross-appeal dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the respondent: Braidwood, MacKenzie, Brewer & Greyell, Vancouver.

Solicitors for the intervener the National Indian Brotherhood / the Assembly of First Nations: Pape & Salter, Vancouver.

Solicitors for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C.: Russell & DuMoulin, Vancouver.

Solicitors for the intervener the Fisheries Council of British Columbia: Mawhinney & Kellough, Vancouver.

Solicitors for the intervener the United Fishermen and Allied Workers' Union: Rankin & Company, Vancouver.

Solicitor for the intervener the Attorney General for Ontario: The Deputy Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Department of the Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland, St. John's.

---

*McIntyre J. took no part in the judgment.