Fisheries and Oceans Canada
South Coast Area

Douglas Treaty Workshop

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Fisheries and Oceans Canada
Douglas Treaty Workshop

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E-06692 Indians Canoeing Near Nanaimo

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CONVEYANCE OF LAND TO HUDSON'S BAY COMPANY BY INDIAN TRIBES

No. 1

Know all men, We the Chiefs and People of the Teechamitsa Tribe who have signed our names and made our marks to this Deed on the twenty ninth day of April, one thousand eight hundred and fifty do consent to surrender, entirely and for ever, to James Douglas, the Agent of the Hudson's Bay Company in Vancouvers Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situate and lying between Esquimalt Harbour and Point Albert, including the latter, on the Straits of Juan de Fuca, and extending backward from thence to the range of mountains on the Sanitch Arm, about ten miles distant.

The Condition of or understanding of this Sale, is this, that our Village Sites and enclosed Fields are to be kept for our own use, for the use of our children, and for those who may follow after us; and the land shall be properly surveyed hereafter; it is understood, however, that the land itself, with these small exceptions, becomes the Entire property of the White people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

We have received as payment Twenty seven pounds ten Shillings Sterling.

In token whereof, we have signed our names and made our marks at Fort Victoria 29th April 1850.

		his x mark
1.	See-sachasis	x
2.	Hay-hay-kane	x
3.	Pee-shaymoot	x
4.	Kals-ay-mit'	x
5.	Leoo-chaps	x
6.	Phlamie	x
7.	Chamutstin	x
8.	Tsatsulluc	x
9.	Coquymilt	x
10.	Kamostitchel	x
11.	Minay-iltui	x

Done in the presence of
Roderick Finlayson

Joseph William McKay

Ministry of Aboriginal Affairs, Province of British Columbia

Douglas Treaties: 1850-1854

By the time the colony of Vancouver Island was established in 1849, British administrators had developed a colonial policy that recognized aboriginal possession of land. In 1850 the Hudson's Bay Company, which was responsible for British settlement of Vancouver Island as part of its trading license agreement with the Crown, began purchasing lands for colonial settlement and industry from aboriginal peoples on Vancouver Island.

Between 1850 and 1854, James Douglas, as chief factor of Fort Victoria and governor of the colony, made a series of fourteen land purchases from aboriginal peoples. The Douglas Treaties cover approximately 358 square miles of land around Victoria, Saanich, Sooke, Nanaimo and Port Hardy, all on Vancouver Island.

Treaty negotiations by Douglas did not continue beyond 1854 due, in part, to a lack of funds and the slow progress of settlement and industry in the 1850s.

Douglas' policies toward aboriginal peoples and land were generally consistent with British principles. Those of his political successors, however, proved to be not as consistent.

The fourteen Douglas treaties are similar in approach and content. An area of land was surrendered "entirely and forever" in exchange for cash, clothing, or blankets. The signatories and their descendants retained existing village sites and fields for their continued use, the "liberty to hunt over unoccupied lands" and the right to "carry on their fisheries as formerly."

Douglas' land purchases have consistently been upheld as treaties by the courts (R. v. White and Bob, 1964; R. v. Bartleman, 1984; Claxton v. Saanichton Marina Ltd., 1989). In 1987 the Tsawout Band successfully obtained a permanent injunction restraining the construction of a marina in Saanichton Bay on the grounds that the proposed facility would interfere with fishing rights promised to them by their 1852 treaty.

The following is a list of the signatory tribes and their present-day names:

Saanich, Victoria, Metchosin and Sooke areas

- Teechamitsa now called Esquimalt Band
- Kosampson now called Esquimalt Band
- Whyomilth now called Esquimalt Band
- Swengwhung now called Songhees Band
- Chilcowitch now called Songhees Band
- Che-ko-nein now called Songhees Band
- Ka-ky-aakan now called Becher Bay Band
- Chewhaytsum now called Becher Bay Band
- Sooke now called Sooke Band
- Saanich (South) now called Tsawout and Tsartlip Bands
- Saanich (North) now called Pauqhachin and Tseycum Bands

Note: Due to the methodology used to determine present-day names, it is not definitely determined

that the descendants from the three tribes in Esquimalt territory are present-day Esquimalt Band members.

Nanaimo

- Saalequun now called Nanaimo Band

Port Hardy Area

- Queackar now called Kwakiutl (Kwawkelth) Band
- Quakiolth now called Kwakiutl (Kwawkelth) Band

Members of the Malahat Band, descendants of the South Saanich, share hunting and fishing rights with the Tsawout and Tsartlip Bands. The Nanoose Band has a similar relationship with the Nanaimo Band, as do the Nimkish (Nungis) with the Kwakiutl (Kwawkelth). Members of the Comox and Gwa'sala-Nakwaxda'xw Bands are also descendents of the Queackar and Quakiolth.

URL: http://www.aaf.gov.bc.ca/aaf/history/douglas.htm
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HISTORICAL REPORTS

THE DOUGLAS RESERVE POLICY

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Introduction

Between 1850 and 1864 Sir James Douglas as Governor and Chief Factor for the Hudson's Bay Company and later Governor of the Colonies of Vancouver Island and British Columbia developed a broad and consistent policy for resolving the Indian Land Question in the colonies. While the earlier aspects of this policy, effected mainly under the auspices of land conveyances for the Hudson's Bay company, are easily accessible through official documentation of the so-called Fort Victoria Treaties, Douglas's later efforts are frequently ambiguous and difficult to document for a number of reasons. The purpose of this memorandum is to outline the consistent, over-arching principles that informed Douglas's approach to aboriginal title, settlement problems and political ramifications of early colonial land policy. From Douglas's Fort Victoria land conveyances one can infer that his approach to reserves and land pre-emptions would have been more rational and less ambiguous had it been within his power. In particular he would have extinguished aboriginal title given adequate funds. Most importantly, the reserve policy implemented by Governor Douglas in the Fort Victoria treaties, and by extension in the later reserve system, was, insofar as he understood it, a consistent extension of both Imperial and later Dominion aboriginal policy. It constituted a recognition of the Royal Proclamation of 1763 and its alteration in the years following his tenure is illustrative of the development of an anomalous, indigenous British Columbia approach to Indian lands that diverged from those principles contained in the Proclamation.

The Hudson's Bay Company

The original Royal Charter incorporating the Hudson's Bay Company was granted by King Charles in 1670. The original members of the corporation were persons in royal favour. The first Governor, Prince Rupert of Bavaria, was a leader for the Stuarts in the English Civil War; the second Governor was James, Duke of York, afterwards James II of England, and the third was John Churchill, afterwards Duke of Marlborough. The original Hudson's Bay Charter did not include a grant to the company of the territory which included Vancouver Island; the Island was granted to the company on 13 January 1849. The provisions conveying Vancouver Island to the company were definitive and confirmatory of the Charter of 1670 and specifically dealt with the matter of colonization. It did not destroy but rather affirmed the aboriginal rights inherited from the Proclamation of 1763. As was the case in the Proclamation, the protection and welfare of the Indians was stressed. The wording of the Hudson's Bay Company's Charter of 1670 and the Royal Grant of 1849 suggested that the Governor, Factors and other officials of the company should exercise on behalf of the company all the powers necessary to make treaties with the Indians for the attainment of the objects of the Charter and the Grant.

> And whereas it would greatly conduce to the maintenance of peace, justice and good order, and the advancement of colonization and the promotion and encouragement of trade and commerce in, and also to the protection and welfare of the native Indians residing within that portion of our territory in North America called Vancouver's Island, if such Island were colonized by settlers from the British dominions, and if the property in the land of such island were vested for the purpose of such colonization in the said Governor and

Company of Adventurers of England trading into Hudson's Bay;...

(Hudson's Bay Company, Royal Grant of 1849)

During the Company's regime it did not presume that the Royal Grant gave it any title on Vancouver Island to lands in actual occupation of an Indian tribe, but the Company did assume and jealously exercise "the exclusive right of purchasing such lands as the natives were willing to sell." In December, 1849, Archibald Barclay, the Secretary of the Hudson's Bay Company, wrote from London outlining the general principles that the Governor and Committee authorized Douglas to adopt in dealing with the Indian tribes.

> With respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on, at the time when the island came under the individual sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purpose of colonization. Where any annual tribute has been paid by the natives to the Chiefs, a fair compensation for such payments is to be allowed.

~~~

> The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown. The right of hunting and fishing will be continued to them, and when their lands are registered, and they conform to the same conditions with which other settlers are required to comply, they will enjoy the same rights and privileges.
>
> (Barclay to Douglas, December, 1849)

On March 9, 1849 Richard Blanshard arrived as the first Governor of Vancouver Island, though Imperial authority continued in fact to be exercised by James Douglas. Blanshard departed in September, 1851 and Douglas was appointed Governor of the Vancouver Island Colony, holding for a time positions both as Chief Factor and Governor.

Douglas Policy as Governor of Vancouver Island Colony

Several factors informed Douglas's policy as Governor of the Colony of Vancouver Island. Among these was his desire to avoid unrest among the natives. Douglas wished to avoid antagonism between natives and whites which might lead to disturbances and interracial violence such as that experienced in the U.S. territories to the South. Particularly, he wished to prevent the need for a continuing Imperial military presence on the Island and to avoid curtailment of the lucrative fur-trade. In this early period, pressures of settlement posed few problems. Unlike other colonies, Vancouver Island had not been founded for the purpose of alleviating overcrowded conditions in Britain. By 1852 as few as 435 immigrants had been sent to the colony, only eleven had purchased land, and another nineteen had applied for land. In general, Douglas's course of action with regard to the Indians was consistent with his understanding of their rights under the Royal Proclamation of 1763. He adopted the same tone and attitude toward the Indians as did the Governors and officers in dealing with the Indians in eastern America.
~~~

First, the potential difficulties with Indians and the need for compromise without delay was of paramount consideration for Governor Douglas. As settlement became more widely dispersed in the Island Colony and settlers demanded increased protection from real or imaginary Indian aggression, Douglas sought to neutralize the problem through accommodation with the natives. Because of their potential power, the strain they put on scarce resources of the colony insofar as they increased the need for outlays for the maintenance of order, and the general disorder that disturbances between whites and Indians could bring, Douglas believed the hostility of the Indians was the worst calamity the infant colony could face:

> I shall nevertheless continue to conciliate the good will of the native Indian tribes by treating them with justice and forebearance and by rigidly protecting their civil and agrarian rights. Many cogent reasons of humanity and sound policy recommend that course to our attention and I shall therefore rely on your support in carrying such measures into effect. Their friendship is useful. Their enmity may become more disastrous than any other calamity to which the Colony is exposed.
>
> (12 August 1856, *Minutes of the House of Assembly of Vancouver Island*)

In addition to Douglas's personal respect for the natives, a regard well-documented in his personal correspondence, he felt it was prudent to foster the natives' goodwill. He saw them as potential allies in the event of conflict with Americans over the San Juan Islands:

> As friends and allies the Native races are capable of rendering the most valuable assistance to the Colony, while their enmity would entail on the settlers a greater amount of wretchedness and physical suffering, and more seriously retard the growth and material development of the Colony...
>
> (Douglas to Lytton, 14 march 1859, *Papers Connected...* p. 16)

Second, James Douglas was first and foremost a fur-trader, reflecting the mentality of that occupation. As Chief Factor for the Hudson's Bay Company his primary concern was for the Hudson's Bay Company his primary concern was for the uninterrupted operation of the profitable fur-trade economy of the Northwest Coast. The Indians were the primary suppliers of furs and the foundation on which the profits of the Company were based. To jeopardize this important source of supply would have undermined the entire raison d'etre of the Company in this area. Douglas's awareness of the need to compromise with a new economic order, however, upon the shift from a fur-trading to a primarily agrarian, settler economy, is foreshadowed in the following passage:

> The interests of the Colony, and Fur Trade will never harmonize, the former can only flourish through the protection of equal laws, the influence of free trade, the accession of respectable inhabitants; in short, by establishing a new order of things, while the Fur Trade must suffer by each innovation.
>
> (Douglas to Hudson's Bay Company, 18 October 1838, *McLoughlin's Letters*, First Series, p. 242)

As a man concerned primarily with the fur-trade and less attracted to the development of the new economic order of settlement, Douglas was predisposed to treat Indians differently than those later colonists who saw the natives as rivals for possession of good agricultural lands.

Third, Douglas wished to avoid the presence of an Imperial military force in the Colony. He made it a policy (following an earlier episode in which Governor Blanshard had raised the spectre of a military force in the colony for the speedy coercion of the natives) to treat Indian violence as the actions of individuals rather than sociological symptoms of native or racial flaws. He searched out native criminals and punished them according to British legal practices. Above all, Douglas felt the presence of troops in the Colony was an evil to be avoided at all costs.

Fourth, Douglas found the American model of Indian settlement repugnant in several aspects. In a Despatch from Douglas to Sir E.B. Lytton, Secretary of State for the Colonies, March 14, 1859, Douglas detailed his plan for the settlement of the land question and expressed his objection to following a system similar to the American:

> The plan followed by the Government of the United States, in making Indian settlements, appears in many respects objectionable; they are supported at an enormous expense, by Congress, which for the fiscal year ending June 30th, 1856 granted the sum of 358,000 dollars for the support and maintenance of the Indians of California alone, and for the four years ending with the thirtieth June, 1858, the total expenditure for that object came to the large sum of 1,104,000 dollars, and notwithstanding the heavy outlay, the Indians in those settlements are rapidly degenerating; neither would I recommend the system pursued by the founders of the Spanish missions in California.
> (Douglas to Lytton, 14 March 1859, *Papers Connected...*, p. 17)

In addition to his interpretation of the uneconomical results of the American model, Douglas felt that the system to the south contributed to interracial violence by unnecessarily breaking down traditional order and necessitating the application of large quantities of coercive force on the part of the government. In contrast to the consolidated reserve system operative in the United States, Douglas received guidance from Lytton suggesting the superiority of the separate villages scheme developed in the Cape colony by Sir George Grey (Lytton to Douglas, 30 December, 1858, *Papers Connected...*, p. 15).

The Fort Victoria Treaties

Between 1850 and 1854 Douglas made fourteen treaties with the Coast Salish natives in the immediate vicinity of Victoria, Fort Rupert and Nanaimo. Cash payments in the form of blankets were made for small portions of Vancouver Island, with reservation to the Indians of their village sites and enclosed fields. In the spring of 1850 Douglas concluded nine agreements covering Victoria, Metchosin and Sooke; in 1851, two at Fort Rupert; in 1852, two covering the Saanich peninsula; and in 1854, one at Nanaimo. The limited area covered by these treaties was due in large measure to Douglas's decision to conclude agreements only as pressures of settlement in various areas made treaties necessary. For instance, the Cowichans wanted during this period to sell their lands in the same way as they understood the Songhees to have done, but Douglas refused, on the grounds that settlement was not immediately moving into that region (Douglas to Barclay, 16 May, 1850, HBCA, A-11/72). As well, a scarcity of funds with which to purchase lands in the later period was a limiting factor on the concluding of treaties. It is clear, however, in the content of the Fort Victoria treaties, that Douglas and the Colonial Office shared the notion that the aboriginal race exercised some form of ownership over the land that needed to be extinguished by colonial power.

In the Despatch of December 1849, cited above, Barclay instructed Douglas as to the rights of the natives and the extent to which they were to be respected. Upon receipt of this Despatch, Douglas summoned the Chiefs and other influential men of the Songhees and other tribes to a conference in Victoria. After considerable discussion it was arranged that the whole of the lands should be sold to the Company with the exception of village sites and enclosed fields. Hunting and fishing rights were extended to natives on unoccupied land. Compensation was offered in the form of remuneration most frequently taken from the Bay stores usually in the form of blankets. Douglas was in favour of a series of annual payments, but according to his report to Barclay, the Indians pressed him for immediate payment of the entire sum, to which he finally agreed (Douglas to Barclay, 16 May, 1850, *HBC Letters 1849-1861*).

The treaties drawn up during this period were practically identical for the fourteen tribes with which agreements were concluded. Generally land was paid for in blankets valued at 16 shillings, 8 pence during that period. The compensation to the Indians reflected a retail price for the blankets and represented a mark-up of approximately 300 per cent over the wholesale price. Despite the apparent lucidity of the Fort Victoria treaties, some confusion has arisen over actual boundaries agreed to and the appropriateness of the European conception of land ownership to the colonial situation. The assumption that each group owned exclusively tracts of land identified by them, failed to take account of shared areas. For example, the Chekonein were designated as the owners of Cadboro Bay and therefore the Chilcowitch, who used it to the same degree, could not under European ideas of private property be considered owners as well. In addition, the fact that the treaties were signed at Fort Victoria, and not "on the ground" means that:

> the boundaries of tribal lands were settled on the basis of verbal description. It is doubtful that Douglas had an accurate map to work with, and even if he did, it is even more doubtful that the Indians could read it. Their mental maps and his had to be reconciled, as did any confusion which arose over landmarks, directions, and distance. Such confusions are apparent in several of the descriptions in the treaties, making it impossible to map the territories in anything more than a schematic way.
>
> (Wilson Duff, "The Fort Victoria Treaties", *BC Studies*, No. 3, Fall 1969, p. 24)

Despite these vagaries, Douglas was consistent, with few exceptions in maintaining the boundaries of land he had reserved to the natives, suggesting that he believed Indian consent was necessary for alteration of land allocated to the tribes.

On March 25, 1861, Douglas wrote to Newcastle, then Secretary of State for the Colonies, "praying for the aid of Her Majesty's Government in extinguishing the Indian title to the public lands in this Colony..." He argued that the natives had "distinct ideas of property in land, and mutually recognized their several exclusive rights in certain districts." He warned that failure to extinguish title and "the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, "would be perceived as national wrongs, engender feelings of irrigation against the settlers, and endanger the peace of the country." Douglas estimated that it would cost 3000 pounds sterling to extinguish title to the remaining settled districts of the Colony: He asked that the British Government extend a loan in the form of a grant to be repaid from the proceeds of consequent sale of public lands in the Colony (Douglas to Newcastle, 25 March 1861, *Papers Connected...*, p. 19). Newcastle replied:

> I am fully sensible of the great importance of purchasing without loss of time the native title to the soil of Vancouver Island, but the acquisition of the title is a purely colonial interest, and the Legislature must not entertain any expectation that the British taxpayer will be burthened to supply the funds or British credit pledged for the purpose. I would earnestly recommend, therefore, to the House of Assembly, that they should enable you to procure the requisite means, but if they should not think proper to do so, Her Majesty's Government cannot undertake to supply the money for an object which, whilst it is essential to the interests of the people of Vancouver Island, is at the same time purely colonial in character, and trifling in the charge that it would entail.

(Newcastle to Douglas, 19 October 1861, *Papers Connected...*, p. 20)

This episode, based on a Petition from Douglas and the Vancouver Island House of Assembly, illustrates recognition of aboriginal title by official bodies in the Colony and their understanding of the need to collaborate with the Imperial Government on extinguishment of that title.

From this time forward, his access to the Hudson's Bay Company stores cut off and his funds severely limited, Douglas was only able to reserve lands without compensation. No further treaties were concluded by Governor Douglas. Without requisite funds he was severely hampered in his plan to extinguish title both in the Colony on the Island and later as administrator for British Columbia. Lack of adequate funds also forced Douglas to order only the staking out of reserves in lieu of more accurate professional surveys. The critical importance of Douglas's financial straits is further illustrated by a letter from his secretary to the Chief Commissioner of Lands and Works emphasizing that "heavy pressure on the resources of the Colony" prevent Douglas from authorizing an outlay to surveyors for Indian reserves (William A.G. Young, Colonial Secretary, to Moody, 9 June 1862, *Papers Connected...*, p. 24). Inasmuch as the Royal Engineers, whose wages were defrayed by the Imperial Government, were usually occupied in the laying out of roads, Douglas frequently had to rely on persons unfamiliar with even rudimentary survey or land techniques for the allocation of reserves on the site.

Douglas Reserve Policy: 1858-1864

Douglas severed his ties with the Hudson's Bay Company in 1858 and took an appointment as Governor of both western colonies in the same year. Shortly afterwards, he formulated his general policy toward the native people along with a plan for extinguishment of Indian title. Communicated to Lytton in a Despatch dated 14 March 1859, Douglas's program provided for the "moral elevation of the native Indian races," the settlement of natives in self-supporting villages and the eventual inclusion of them in the economic and cultural milieu of the European colonizers. Lord Carnarvon, in the absence of Lytton, conveyed to Douglas his approval of the Colonial plan and suggested that "measures of liberality and justice may be adopted for compensating them for the surrender of the territory which they had been taught to regard as their own"(Carnarvon to Douglas, 11 April 1859, *Papers Connected...*, p. 18). Carnarvon's Despatch reflected a continuation of the far-reaching latitude and trust extended to James Douglas by both the Hudson's Bay Company and the Imperial Government. Virtually single-handedly, and without legal assistance, Douglas laid out a plan for the settlement of the Indian land question consistent with the principles of the Royal Proclamation and the intentions of Great Britain.

Despite the financial constraints under which Douglas was forced to operate in the years following 1858, there is no question that Douglas adopted a policy of "liberality and justice" as suggested to him in the Despatch from Carnarvon. Douglas intended that reserves marked out in this period were to give the Indians as much land as they wanted. This is a very clear thrust of Douglas's policy and there can be no disputing his intentions in this regard. In a letter from Charles Good (on behalf of the Colonial Secretary) to R.C. Moody, the Chief Commissioner of Lands and Works, it is clear that Governor Douglas instructed that the Indian reserves were to be "defined as they may be severally pointed out by the Natives themselves" (Good to Moody 5 March 1861, *Papers Connected...*, p. 21). The position established by the Governor with respect to the size of reserves was reaffirmed by Moody in a letter to (Assistant Commissioner of Lands) Cox on 6 March 1861:

> With regard to the former, I have received instructions from His Excellency to communicate with you on the subject and to request that you will mark out distinctly all the Indian Reserves in your District, and define their extent as they may be severally pointed out by the Indians themselves.
>
> (Moody to Cox, 6 March 1861, *Papers Connected...*, p. 21)

Furthermore, when word reached Douglas on several occasions about the inadequacies of reserves or native dissatisfaction with land allotted to them, he immediately ordered the re-staking of land to conform with their wishes:

> That reserve is so small, not exceeding 50 acres of land, as to be altogether insufficient to raise vegetables enough for their own use.
> I beg that you will, therefore, immediately cause the existing reserves to be extended in conformity with the wishes of the Natives, and to include therein an area so large as to remove from their minds all causes of dissatisfaction.
> Notwithstanding my particular instructions to you, that in laying out Indian Reserves, the wishes of the Natives themselves, with respect to boundaries should in all cases be complied with. I hear very general complaints of the smallness of the areas set apart for their use.
> (Douglas to Moody, 23 April 1863, *Papers Connected...*, pp. 26-7)

Douglas intended that the natives be treated no differently than British subjects. With respect to pre-emption rights, Douglas supported the right of Indians to pre-empt lands outside reserve boundaries in the same manner and by following the same procedures as could be effected by white men:

> With reference to your letter of the 27th ultimo, on the subject of the purchase of a Suburban Lot of Land by an Indian, on the same terms as it could be purchased by a white man, I am directed by the Governor to inform you that there can be no objection to your selling lands to the Natives on the same terms as they are disposed of to any purchasers in the colony whether British subjects or aliens.
> (Young to Moody, 18 June 1862, *Papers Connected...*, p. 24)

Furthermore, in a Despatch from Young, the Colonial Secretary to Moody on 5 April, 1861, it is clear that Douglas wished to minimize disputes about reserve boundaries by issuing for the publication of the position and extent of the reserves:

> His Excellency further directs me to convey to you his instructions that the position and extent of all spots of land, now set apart as Government or Indian Reserves, are to be forthwith published in three different places in each district where there may be such Reserves, and also in the local newspapers, and should it so happen that circumstances may afterwards render it expedient to relinquish any such reserve, notice of the same is to be likewise published for 2 months at least, before any sale or occupation of the reserve lands be permitted; and His Excellency requests you will furnish him, at your earliest convenience, with a rough general sketch of the country, exhibiting the different districts, and also as near as may be the land already alienated by the Government.
> (Young to Moody, 5 April 1861, *Papers Connected...*, p. 22)

Douglas was concerned to secure the protection of the Crown for the Indians. Acting under the authority and instructions of the Imperial Government, he recognized the Indian title and the tribal character of the title, but declared the title vested in the Crown by which he meant that the right of reversionary interest was with the Crown. The specifics of Douglas's intent are clearly illustrated in a letter written by Douglas in retirement following a dispute over amounts of acreage that arose in a later

administration. The letter states that "in laying out Indian reserves no specific number of acres was insisted on. The principle followed in all cases was to leave the extent and selection of land, entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular and to include in each reserve the permanent village sites, the fishing stations, and Burial grounds, cultivated land and all the favourite resorts of the tribes..." Douglas states that the intention of this procedure was the "securing to each community their natural or acquired rights; of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide against the occurrence of agrarian disputes with the white settlers." Douglas assures his questioner on these matters that it was never intended that the Indians were to be limited to ten acres per family and that "we were prepared, if such had been their wish, to have made for their use much more extensive grants."

> Moreover as a safeguard and protection to these Indian communities who might, in their primal state of ignorance and natural improvidence have made away with the land, it was provided that these reserves should be the common property of the tribes and that the title should remain vested in the Crown, so as to be unalienable by any of their own acts.

Douglas wisely added that "This letter may be regarded and trusted as an official communication." However, for reasons unknown, Douglas's important letter, written in October 1874, was not included in the *Papers Connected to the Indian Land Question*, appended to the Minutes of the Legislative Assembly, 1875.

Instructions for laying out the Douglas Reserves

The general background, then, to the Douglas reserve policy was that the Indians were to have as much land as they wanted, that the Indians themselves were to point out the position and extent of their lands, and that, in order to minimize disputes over pre-emption, reserve boundaries were to be published before settlement could take place.

The details of the Douglas reserve policy are further illustrated upon examination of the Governor's instructions to the individuals involved in marking out the reserves. In a letter from Parsons, of the Royal Engineers, instructing Sapper Turnbull as to the procedures to be followed in laying out reserves, it is stated that:

> You will take an early opportunity of staking and marking out in the District you are now stationed, all Indian villages, burial places, reserves, etc., as they may be pointed out to you by the Indians themselves, subject, however, to the decision of the District Magistrate as to the extent of the land so claimed by them. Make sketches of the locality and give dimensions of claim, sending them to this office after acquainting the Magistrate of what you have done. Be very careful to satisfy the Indians so long as their claims are reasonable, and do not mark out any disputed lands between whites and Indians before the matter is settled by the Magistrate, who is requested to give you every assistance.
>
> (Parsons to Turnbull, 1 May 1861, *Papers Connected...*, p. 22)

Another set of instructions issued by Douglas provided that the Indians were to have as much land as they wished and in no case was a reserve of less than 100 acres to be laid out (Mr. William McColl's Report, 16 May 1864, *Papers Connected...*, p. 43).

On occasion, complaints reached Douglas that reserves along the Fraser River were not extensive enough for cultivation of land to an adequate level. Without delay, Douglas ordered that the reserve be immediately enlarged:

> I beg that you will, therefore, immediately cause the existing reserve to be extended in conformity with the wishes of the Natives, and to include therein an area so large as to remove from their minds all causes of dissatisfaction.
>
> (Douglas to Moody, 23 April 1863, *Papers Connected...*, pp. 26-27)

It is virtually impossible to reconstruct from available historical records a comprehensive list of reserves laid out during the later years of the Douglas administration. In some cases, reserves were inadequately staked out due to adverse weather conditions, limited resources, and the pressure to complete the allocation of reserves in order that roads might be built to facilitate transportation to the gold fields of the Interior. Were they readily accessible, files from the Department of Lands, Parks and Housing might provide summary information regarding government reserves established during this period. In instances where sketches were made, they are of primarily artistic or historical interest.

In the years following Douglas's retirement, the policy established during his administration, was altered substantially. The effect of the failure to establish a self-perpetuating policy soon became apparent. Because his land policy had not been established by statute, it was subject to misinterpretation and manipulation when individuals less favourably disposed towards the Indians came to power.

Indian Land Policy in Transition

In 1864, James Douglas retired from the governorship and Joseph Trutch was appointed Chief Commissioner of Lands and Works. His appointment marked the beginning of profound shift in policy concerning Indian lands. With Douglas's retirement, the administration of the colonies was dominated by individuals who were much less favourably disposed towards the Indians than Douglas had been. Trutch was the leading figure among them.

In contrast with Douglas, Trutch held a pejorative view of North American Indians. AS early as 1850, while living in the United States, Trutch had described Indians as "the ugliest and laziest creatures I ever saw & we shod. as soon think of being afraid of our dogs as of them" (Trutch to Charlotte Trutch, 23 June 1850, *Trutch Papers*, folder A1.b). Douglas had most often referred to indigenous peoples as "Native Indians", but Trutch rarely described them as anything other than "savages" and was skeptical about their capacity for "improvement". "I have not yet met with a single Indian of pure blood whom I consider to have attained even the most glimmering perception of the Christian creed" (Trutch to Secretary of State for the Provinces, 26 September 1871, *Papers Connected...*, p. 101). Again, in 1872, after having been appointed the first Lieutenant Governor of the Province of British Columbia, Trutch told the Prime Minister of Canada that most of the British Columbia Indians were "utter Savages living along the coast, frequently committing murder and robbery amongst themselves, one tribe upon another, and on white people who go amongst them for the purpose of trade" (Trutch to Macdonald, 14 October 1872, *Sir John A. Macdonald Papers*, vol. 28, National Archives of Canada).

The appointment of Trutch as Chief Commissioner of Lands and Works in 1864 also parallels a shift form the dominance of the fur trade economy to that of a settler society. The number of settlers was increasing substantially and Trutch saw the Indians as obstacles in the way of development of the colonies by Europeans. His views on development closely reflected the needs of the settler population. Trutch believed that the future of the colonies lay in agriculture and he was determined that Indian claims to land could not be allowed to hinder land grants to settlers which would lay the foundation for agricultural development.

The actions of Trutch during his tenure constituted a repudiation of the Imperial policy that had been followed by Douglas. Imperial policy had recognized aboriginal title to territory that was occupied in

a regular way and then sought to extinguish Indian title prior to settlement. Douglas, who was aware that the Indians held concepts of territorial boundaries or ownership of specific areas, had implemented this policy in his dealings with the native population. Trutch, on the other hand, held a radically different view and went so far as to claim that the Indians did not have any right to the lands they occupied. The editor of the *British Columbian*, writing at the time that Governor Seymour assumed office in 1864, complained that many in the colony of British Columbia ignored altogether the rights of the Indian, that they held the American doctrine of "manifest destiny" and maintained that the native treaties were due to make way for the Anglo-Saxon race (New Westminster, *British Columbian* 21 May 1864). Trutch, who had spent a number of years in the United States as a surveyor and farmer, was influenced by the American experience in dealing with the Indian question. This may explain, to some extent, the policies he so aggressively pursued as Chief Commissioner of Lands and Works.

It is also true that Trutch filled something of a political vacuum that was left by Douglas's retirement. Douglas was succeeded by two men, Frederick Seymour in the Mainland Colony of British Columbia and Arthur Kennedy in Vancouver Island Colony, neither of whom had much interest or influence in Indian affairs. Although Kennedy believed that Indians should be "secured in the possession of their lands and prohibited from alienating them except for fair consideration" (Kennedy to Cardwell, 1 October 1864, Despatches to London, March 1864-November 1866), his view was not shared by the House of Assembly of Vancouver Island Colony and a stalemate on the question of Indian land policy marked Kennedy's administration. In 1866, with the union of the two colonies, Seymour became the first Governor. As had been the case in the Mainland Colony of British Columbia after 1864, Seymour entrusted Trutch with settling the Indian land question. Seymour seems to have been completely under the influence of Trutch in these matters and supported the actions of his Chief Commissioner of Lands and Works. Seymour stated openly that "the Indians have no right to any land beyond what may be necessary for their actual requirements" and that "they can have no claim whatever to any compensation for any of the land so excluded, for they really have never actually possessed it...." (Young to Trutch, 6 November 1867, *Papers Connected...*, p. 45).

Trutch's Indian Land Policy

Joseph Trutch denied that the Indians had any rights to land at all. In a key statement of his views written in 1867, Trutch argued that:

> The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them... It seems to me, therefore, both just and politic that they should be confirmed in the possession of such extents of lands only as are sufficient for their probable requirements for purposes of cultivation and pasturage, and that the remainder of the land now shut up in these reserves should be thrown open to pre-emption.
>
> (Trutch to Acting Colonial Secretary, 28 August 1867, *Papers Connected...*, p. 42)

This non-recognition of Indian title is a fundamental principle which formed the basis for Trutch's actions in this area and stands in distinct contrast with the policy followed by Douglas until his retirement. Trutch also attempted to distort Douglas's reserve policy with claims that those responsible for marking out the original reserves had either exceeded or misunderstood their instructions. In his letter to the Acting Colonial Secretary on 28 August 1867, Trutch stated that "verbal instructions" given by Governor Douglas personally to Mr. McColl constituted "indefinite authority" and that, accordingly,

> These figures, therefore, cannot be relied on, but it is certain that the extent of some of the reserves staked out by McColl

> is out of all proportion to the numbers or requirements of the tribes to which they were assigned.
>
> (Trutch to Acting Colonial Secretary, 28 August 1867, Papers Connected..., p. 42)

Trutch also stated that, with respect to Douglas's reserve policy, "there are no written directions on this subject in the correspondence on record in this office". Trutch chose to overlook written instructions to both McColl and Cox, for example, and was engaged in a deliberate falsification of the record to suit his own policy. When challenged on this important point, Mr. McColl made it clear that Trutch's assertion was untrue and that he had received both written and verbal instructions from Governor Douglas:

> I beg to inform you that, in addition to the written instructions, I had further verbal orders given to me by Sir James Douglas, to the effect that all lands claimed by the Indians were to be included in the reserve; the Indians were to have as much land as they wished, and in no cases to lay off a reserve under 100 acres.
>
> (Mr. McColl's Report, 16 May 1864, *Papers Connected...*, p. 43)

Trutch explicitly denied that the Fort Victoria treaties signed by Douglas provided a precedent for the purchase of Indian lands in B.C. Writing in 1870, Trutch stated that the treaties signed by Douglas were made "for the purpose of securing friendly relations between those Indians and the settlement of Victoria, then in its infancy, and certainly not in acknowledgement of any general title of the Indians to the land they occupy" (Trutch, Memorandum on a letter treating of conditions of the Indians in Vancouver Island, addressed to the Secretary of the Aboriginees Protection Society, by Mr. William Sebright Green, enclosure in Musgrave to Granville, 29 January 1870, *Papers Connected...*, p. 11). This understanding of the Fort Victoria treaties is a further example of Trutch's distortion of the Douglas policy. There is no question that Douglas was providing compensation to the Indians who signed the treaties for extinguishment of title.

The Trutch Reductions

Given his views on the issue of Indian land rights, and supported in his actions by Governor Seymour, Joseph Trutch set in motion a systematic reduction of Indian reserves that had been laid out according to the reserve policy of the Imperial Government acting through James Douglas.

The first step in the process of reducing reserves was taken in 1865 with respect to Indians of the Thompson River area. In response to an inquiry made by Phillip Nind, the Gold Commissioner at Lytton, Trutch wrote that:

> I am satisfied from my own observation that the claims of Indians over tracts of land, on which they assume to exercise ownership, but of which they make no real use, operate very materially to prevent settlement and cultivation, in many instances besides that to which attention has been directed by Mr. Nind, and I should advise that these claims should be as soon as practicable enquired into and defined.
>
> (Trutch to Good, 20 September, 1865, *Papers Connected...*, p. 30)

This was followed a few months later by a statement from Trutch that the reserves in question "are entirely disproportionate to the numbers or requirements of the Indian Tribes" (Trutch to Good, 17 January 1866, *Papers Connected...*, p. 32). It is interesting to note that Trutch made this assessment without any accurate census information. By October, 1866, a notice appeared in the *Government Gazette* indicating that the reserves of the Kamloops and Shuswap Indians had been redefined. This "adjustment" meant that out of a forty mile stretch of the Thompson River the Indians were left with three reserves, each of between three and four square miles. The remainder of the land previously reserved for them was to be thrown open for pre-emption on 1 January 1867.

The Kamloops reductions provided Trutch with a precedent that he applied to Indian reserves in the lower Fraser River area. Again, he advanced the argument that the Indians were holding good land that they were not using productively. The reserves should, therefore, be reduced and the land made available to settlers. Trutch suggested two methods of carrying out the reductions:

> Two methods of effecting this reduction may be suggested – either (1) to disavow absolutely McColl's authority to make these reserves of the extravagant extent laid out by him, and instead to survey off the reserves afresh, either on the basis of Mr. Brew's letter of instructions to McColl, namely, ten acres to each grown man, or of such extent as may, on investigation, be determined to be proportionate to the requirements of each tribe, or- (2) to negotiate with the Indians for the relinquishment of the greater portion of these lands, which they now consider their own, on terms of compensation, in fact to buy the lands back from them.
>
> (Trutch to Acting Colonial Secretary, 28 August 1867, *Papers Connected...*, p. 42)

Having adopted the view that the "Indians really have no right to the land they claim", Trutch chose a simple resurvey of the lower Fraser reserves, without any compensation to the Indians.

Another major reversal of Douglas's policy initiated by Trutch came in regard to pre-emption rights. Under Douglas, Indians had the right to be treated as British subjects insofar as pre-emption was concerned. In 1866, this right was denied them. A Land Ordinance issued in that year prevented Indians from pre-empting land without the written permission of the Governor. Subsequently, there was only a single case of an Indian pre-empting land under this condition.

Another feature of the Trutch reduction policy, which once again provides a striking contrast with Douglas's policy, pertains to the controversy surrounding the size of reserves. Douglas had included in his directions to those individuals laying out reserves that if the area demanded by the Indians did not equal ten acres per family then the reserve was to be enlarged to that extent. However, Trutch used the ten acre figure as a maximum allotment.

> The extent of the land to be included in each of these reservations must be determined by you on the spot, with due regard to the numbers and industrial habits of the Indians living permanently on the land, and to the quality of the land itself, but as a general rule it is considered that an allotment of about ten acres of good land should be made to each family in the tribe.
>
> (Trutch to O'Reilly, 5 August 1868, *Papers Connected...*, p. 50)

That this policy initiated by Trutch was never intended by Douglas was documented in a letter from Douglas to Powell in 1874:

> It was however never intended that they should be restricted or limited to the possession of 10 acres of land, on the contrary, we were prepared, if such had been their wish to have made for their use much more extensive grants.
>
> (Douglas to Powell, 14 October 1874)

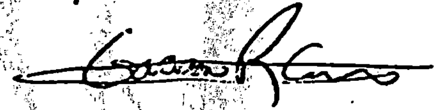
As it developed under Trutch, British Columbia's land policy was striking in two fundamental respects. First, non-recognition of aboriginal title and, second, the comparatively small amounts of land finally allocated to the Indians. This policy represented a dramatic reversal of Imperial policy as understood and implemented by Douglas and proved to be a source of discontent for the Indians of the province and cause for dispute between the federal and provincial governments.

A Note about Sources cited in this Report:

Most references are from *Papers Connected to the Indian Land Question, 1850-1875*, Richard Wolfenden, Government Printer, 1875. Other sources of information from this period include Hudson's Bay Company records and Colonial Correspondence and Colonial Office Correspondence from record groups at the BC Archives.

http://www.ubcic.bc.ca/docs/DouglasReservePolicy.doc

Received from Vern Jacks in Person
Nov. 2/94



THE NORTH SAANICH TREATY OF 1852

AND

INTERNATIONAL LAW

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INTRODUCTION

The purposes of this paper are to discuss the nature of the treaty rights of the North Saanich Peoples to fish and hunt for commercial purposes, the reasons why those treaty rights have never been implemented by the Province of British Columbia and the Government of Canada, and how international law relates to treaties with First Nations.

Section 27(5) of the British Columbia Fisheries (General) Regulations made pursuant to the Fisheries Act[1] prohibits the exercise of the treaty right to fish for commercial purposes. Section 23 of the Wildlife Act[2] prohibits the exercise of the treaty right to hunt for commercial purposes. The affected Treaty Indians are thereby denied an economic base in their own communities and in accordance with their own tribal laws and customs.

One Treaty Indian from the Prairies spoke eloquently of the need for an economic base in the following words:

> "...many of the non-Native people who have come and talked to us will always tell us, if you Indians and you half-breeds would begin to go to work and earn some money, you would be like us. They say, we came here and we had nothing when we came here, but look at us now. But my answer back to those people is always yes, you had nothing, and many of you people came from countries where there was oppression, where you were forced to leave because you did not like the system. And when you came to this country, you came with nothing. So where did you find the riches? You found them right here, right here in Canada. The resources that made people rich are right here in Canada. We feel those resources

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[1] R.S.C. 1985, c.F-14.

[2] S.B.C. 1982, c57.

are ours, and we want to share in those resources. We are not asking for everything. We want to share in those resources, so we can participate in the economy of this country. And you cannot tell me that democracy works if you do not have some sort of economic back-up in terms of our people being self-supporting.[3]

THREE FUNDAMENTAL ISSUES AND THE NORTH SAANICH TREATY OF 1852

There are three basic points of law upon which this paper is based.

1. The first point is that treaties entered into between indigenous peoples and a foreign power are the embodiment of customary international law and as such they are international treaties[4]. Although this point is disputed by the municipal courts of Canada,[5] it is submitted that

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[3] From a speech by Jim Sinclair, Saskatchewan Treaty Indian, to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, Ottawa, 1987 as quoted by Binnie, fn. 49, above.

[4] See Article 1 of the International Covenant on Economic, Social and Cultural Rights (1966), U.N. Doc. A/6316, p. 49 and more particularly the International Labour Conference (ILO) Convention 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Adopted by the Conference at its Seventy-Sixth Session, Geneva, 27 June 1989.

[5] Simon v. The Queen, [1985] 2 S.C.R. 387 at p.404: R. v. White and Bob (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at pp. 617-18, aff'd [1965] S.C.R. vi, 52 D.L.R. (2d) 481; Francis v. The Queen, [1965] S.C.R. 618 at p.631; Pawis v. The Queen, [1980] 2 F.C. 18, (1979), 102 D.L.R. (3d) 602 at p. 607.

the municipal courts of Canada are bound by customary international law as that law is adopted as part of Canadian law.[6]

In addition, the International Covenant on Civil and Political Rights provides that:

> 1(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> (2) All peoples may, for their own ends, freely dispose of the natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the priniciple of mutual benefit, and international law. In no case may a people be deprived of its own subsistence.[7]

As Canada has ratified the Covenant, it is binding on her. The Optional Protocol,[8] which was declared in force in Canada in 1979 ensures that the Covenant itself is binding on the provinces as well.

Furthermore, a reading of the common law authorities which deny that a First Nation's treaty is subject to international law reveals that the rationale behind each decision is unduly

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[6] Williams and de Mestral in *An Introduction to International Law* (1979), p. 30. Since customary international law is a customary rule that must be "in accordance with a constant and uniform usage practised by the states in question", it follows that indigenous laws, customs, traditions and rights which predate settlement since time immemorial and which continue today as expressed in treaties are classic examples of customary international law.

[7] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966.

[8] Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 200 A (XXI) of 16 December 1966.

flawed. It is a case of successive courts repeating a principle even though the genesis of the original dicta is without sufficient authority and without due reason.

The Supreme Court of Canada in Guerin v. The Queen[9], for example, referred to the aboriginal interest in land as sui generis or unique. Such language is used to justify discrimination on the basis of race and only incidentally as a "reason" to keep treaties away from international law. It is racist because no other segment of Canadian society is denied the right of ownership of his or her own property.

As a member of the United Nations, Canada and the municipal courts of Canada are also bound by Article 17 of the Universal Declaration of Human Rights:

> 17(1). Everyone has the right to own property alone as well as in association with others.
> (2) No one shall be arbitrarily deprived of his property.[10]

The assumption that "ownership" in precisely the same sense as fee simple was not a First Nations concept pre-settlement is self-serving. First Nations speak of the concept of "belonging" which means the same thing as ownership but lacks the neat trappings of a tenure system. First Nations peoples speak of ownership in terms of responsibility and how we are not separate from

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[9] [1985] 1 C.N.L.R. 120 at p.136

[10] Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1949.

our land and our land is not separate from us. Although tenure may not be recorded on paper, it is universally understood as a sacred trust from the Creator. How is that system less valuable then the Torrens System?

2. The second point is that international law on treaties, treaty-making and the implementation of treaties are political matters not legal issues. This is particularly relevant to Canada where municipal courts are frequently called upon to enforce treaties while the real mischief is the political failure to implement the treaties.[11] Notwithstanding the reality that Indian treaties are political, they are still justiciable and enforceable in the municipal courts contrary to the rule in Cook v. Sprigg.[12] The rule must accommodate a federal system in which First Nations sovereignty is sustained and where sovereignty is a divisible concept.The federal government is negotiating self-government with a number of First Nations across Canada. The Province of British Columbia has recently conceded that it recognizes the First Nations peoples inherent right of self-government. As the municipal courts of Canada are foreign to the governments of First Nations, the rule in Cook v. Sprigg is not offended as the First Nations treaty is not being enforced in a First Nations' municipal court.

[11] Evidence of this state of affairs is the fact that the Province of British Columbia has utterly failed to develop any policy or guidelines on how to honour and respect the Douglas treaties for over 150 years! Nor has the Government of Canada done anything to recognize or honour these treaties during the same period of time.

[12] [1899] A.C. 572 at 578-579 wherein the rule states that treaties do not create rights enforceable in municipal courts.

Yet the municipal courts are often called upon to negotiate or adjudicate political issues in the guise of quasi-criminal proceedings. The result is that these instruments of international law are either reduced to pawns for the federal government to barter with the provinces over resources [13] or once a court of law has pronounced the treaty as being effective against a province, the province ignores the law![14]

3. The third point is that the indigenous peoples of North America, like all peoples of the world, have their own laws, customs, languages, traditions and institutions. It is known and recognized within that body of law known as customary international law as the inherent right of self-government.[15]

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[13] See R. v. Horseman (1990), 1 S.C.R. 901.

[14] See R v. White and Bob (1964), 50 D.L.R. (2d) 481, where the Supreme Court of Canada decided that the Douglas treaties were binding treaties on the Crown. See also Bartleman, [1984] 3 C.N.L.R. 114. These cases illustrate how ineffective municipal courts are in enforcing or implementing treaties. The politics of treaty-making and implementation is the business of nations, not courts of law. Relying upon the courts to do their business is an abdication of state responsibility and simple avoidance.

[15] As noted above regarding Canada's international obligations including The Charter of the United Nations, October 25, 1945; and the Helsinki Accords of 1975. The federal and provincial governments of Canada not only recognize the inherent right of self-government but also claim to be negotiating a number of self-government arrangements with various First Nations throughout Canada.

Customary international law is said to derive from two conditions. The first is "the material aspect of the actual performance or behaviour of the state" and, secondly, "the psychological aspect or subjective conviction with which the state views its own behaviour".[16]

Hunting and fishing practices among indigenous peoples are spiritually and temporally based on complex rules devoted to the supply of food and other necessaries, the replenishment of the resources and cultural and social considerations (e.g. the importance of "gift giving"). These aspects of self-determination or self-governance have survived 100 years of interference and still flourish. Sacred ceremonies and celebrations evidence the conviction. It is on this basis that we must refer to the law of First Nations as part of customary international law.

One school of thought on the nature of international law is known as naturalist. In this theory, laws are found, they are not man-made. It is in the naturalist sense that indigenous laws are customary international law. Indigenous laws are natural law.[17]

This is particularly relevant in the context of treaty hunting and fishing rights.

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[16] Williams and de Mestral, p.16.

[17] Akehurst, *A Modern Introduction to International Law* (3rd ed., 1977), p.20, on the two schools of thought concerning the nature of international law. One theory is known as positivist, that is, laws are man-made. The other theory and the one which is most akin to the indigenous understanding of law is known as the naturalist theory.

When the treaties were signed, it was understood that the treaty right included not only the right to extract the resource but, more importantly, the right to do so in accordance with the laws of those peoples. All treaties between First Nations and the Crown are understood to include the right of the signatories to conduct their affairs including exercising or honouring treaty rights in accordance with customary international law.[18]

The customary international law is both the law of First Nations and any other customary law which defines relations between First Nations and other states or powers. The signatories to every treaty signed between a First Nation and the Crown in Canada specifically understood those treaty-contracts as incorporating the right of the First Nation and the Crown to conduct their affairs in accordance with the rules set out in the treaty. In the case of the North Saanich Treaty of 1852, those First Nations were expected to exercise their treaty hunting and fishing rights "as formerly".

On February 11, 1852, Governor James Douglas on behalf of the English Crown signed treaty with the North Saanich tribes of Vancouver Island. The North Saanich peoples, descendants of the signatories to that treaty, referred to in this paper as the Saanich tribes are composed of four First Nations at present. They are the X<u>W</u>Say' Q' ƏM Village, Tsawout, Tsartlip and Pauquachin First Nations. Among other promises, the treaty of 1852 provides that "it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our

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[18] According to Williams and de Mestral, supra, at p.15, where treaties are entered into between to or more states on a limited subject, such treaties are referred to as treaty-contracts. Furthermore, such treaties often provide evidence of the rules of customary international law.

fisheries as formerly". The North Saanich Treaty of 1852 was never completed. The document does not include an amount or description of what the tribes received as consideration for signing the treaty.

There is a central and fundamental issue of whether the Douglas treaties actually amount to the extinguishment of aboriginal title. Some treaties have that effect but others are only peace and friendship treaties as in the case of some of the Micmac on the East Coast or the Huron at Lorette (Quebec).

The Colony received vast amounts of land and resources while the Indians ultimately received only a small Indian reserve and a few blankets. The treaty signed by the North Saanich tribes was a blank piece of paper which Governor Douglas later filled in. No one from Douglas's time bothered to enter the amount paid for the North Saanich territory. It is almost as if they knew that the amount paid was a trifling and no one seriously believed that it was a real bargain except maybe the Indians and therefore there was no reason to record any amount.

We know that the treaty means far more to the Saanich tribes than it does to government by virtue of the oral history passed down through generations. In government, a researcher is hard pressed to find anyone who knows anything about the Douglas treaties.

It is difficult to imagine any Chief agreeing to sell his traditional lands and all of the resources in it by signing a blank piece of paper. The Saanich tribes knew that the settlers were

there already and that any agreement by the Chiefs was only an agreement to let the settlers stay on and to avoid hostilities. In other words, what was really being said in the words of the Chiefs was nothing more than - we'll agree that you and your settlers are moving in all around us and we'll agree that we need land on which to live and finally we'll agree that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

In that sense, the Douglas treaties may be properly characterized as peace and friendship treaties which include hunting and fishing rights. These rights are customary rules that in accordance with constant and uniform usage as practised by the Saanich tribes are set out in the North Saanich Treaty of 1852.

DEFINITIONS - THE CRITICAL FIRST STEP

There are some terms in law which require clarification. Although the premise of this paper is that treaties are political affairs, the fact remains that the federal and provincial governments often rely upon the municipal courts in order to avoid the implementation of a treaty or the exercise of treaty rights. It is in this context that some terms of law must be clearly articulated. For example, section 91(24) of the Canadian Constitution refers to "Indians, and lands reserved for Indians"[19]. This is the section referred to as the basis of Canada's responsibility for Indians and lands reserved for Indians.

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[19] Constitution Act, 1867.

The very definition of "Indians" is controversial and therefore it is not surprising that the term "lands reserved for Indians" is confusing.

Some people think that it means reservations.[20] In fact, the term refers to all lands reserved for Indians.

For example, the Royal Proclamation of 1763[21] reserved all of the country west of the settlements in Lower Canada. Those are "lands reserved for Indians". Whether the Proclamation applies to British Columbia is immaterial. The fact of the matter is that any land not ceded to the Crown is "land reserved for Indians". That was the intention of the Crown in 1763 and it is the common law today.

It is important to understand that the term "lands reserved for Indians" in this paper means all lands not ceded by treaty, including reservations, unoccupied Crown lands and other lands in which a particular First Nation may have a claim.

According to common law, there are several ways in which a treaty can be interpreted. The Ontario Court of Appeal in R. v. Taylor and Williams, said that "If there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such

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[20] The Department of Indian Affairs and Northern Development (Canada) and more importantly The Department of Justice (Canada) both share this view.

[21] [reprinted R.S.C., 1985, App. 11, No.1]

understanding and practice is of assistance in giving context to the term or terms"[22]. That rule of interpretation has been applied in a large number of decisions since then. It is considered settled law now.

A second rule of interpretation from the Supreme Court of Canada in Nowegijick v. The Queen , is that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian"[23]. As those principles and others equally guide the municipal courts in interpreting treaties, this paper will be guided by those same principles.

Furthermore, as Douglas himself wrote in 1850 concerning an identical treaty with the Songhees:

> "I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country".[24] *(emphasis added)*

It is this evidence by conduct or otherwise as to how the parties understood the treaty in 1852 that confirms our understanding of indigenous laws as customary international law.

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[22] (1981), 62 C.C.C. (2d) 227.

[23] (1983), 144 D.L.R. (3d) 193.

[24] In a letter Douglas wrote to Barclay, Secretary for the Hudson's Bay Company dated May 16, 1850. Cited in an article by Wilson Duff entitled *The Fort Victoria Treaties, BC Studies.*

COMMERCIAL RIGHTS IN GENERAL

Commercial rights in the context of treaty hunting and fishing rights simply refers to the right to engage in the sale or trade of the catch or the product of the hunt. Historically, all First Nations traded a part of their catch in order to survive. Bartering as a form of trade may pale in comparison to Dow Jones, but it is today and always has been a commercial activity.

As Mr. Justice Lambert writes in Regina v. Bartleman:

> "The Crown also accepts that, at the time of the treaties, it was a concern of the Colonial government not to disturb the Indian people in their traditional food-gathering activities. It was in the interest of the government of the Colony of Vancouver Island, and of the Indians, that the Indians should be able to support themselves in their traditional ways".[25]

Bartleman was a British Columbia Court of Appeal decision in which the North Saanich treaty was held to be effective against any charges laid under the Wildlife Act. The Bartleman case is an important decision in considering North Saanich treaty rights because it reiterated a standard which the state, in this case, the Province of British Columbia, failed to meet. That standard provides that "according to the Vienna Convention, article 26, treaties are binding upon the parties and their obligations must be performed in good faith."[26]

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[25] (1984), 12 D.L.R. (4th) 73 at page 85.

[26] Williams and de Mestral, p. 270-271.

Simon v. The Queen,[27] , a treaty hunting rights decision of the Supreme Court of Canada deals with a Micmac treaty in Nova Scotia where the wording of the treaty specifically includes commercial references. The Supreme Court of Canada had no difficulty in concluding that the treaty does include the commercial aspect. This case is in stark contrast to the myriad of other cases, treaty and non-treaty, in which the municipal courts not only deny the existence of a treaty commercial right, but indeed deny the existence of any commercial activity in the history of the relevant First Nation.

R. v. Horseman[28], was a decision of the Supreme Court of Canada in which commercial hunting rights were considered in respect of Treaty 8[29] in Alberta. The Court found that the treaty did in fact include commercial hunting rights and the Treaty 8 Indians did in fact practice commercial hunting in historical or pre-settlement times.

The Court, however, decided that the Natural Resource Agreement of 1930[30], signed between Canada and Alberta, without any consultation with the Treaty 8 Indians, modified the treaty right to the extent that it was no longer a hunting right for commercial purposes but only one for food. That Agreement is part of our Constitution. The critical point in this case is that

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[27] [1985] 2 S.C.R. 387.

[28] fn. 13, above.

[29] Treaty No. 8 (1899).

[30] [confirmed by the Constitution Act, 1930], para. 12.

commercial hunting was recognized as a treaty right until Canada and Alberta entered into the 1930 agreement. Whether that right could be affected by the 1930 agreement is still a question.

COMMERCIAL FISHING RIGHTS UNDER TREATY

"Conservation" is a popular word in the enforcement of government regulations. It is assumed that treaty Indians need to be told how many fish to take, where to take them from and how to take them because if they are not told, the stocks will disappear and there will no longer be any fish! There has been a failure to recognize and concede that the First Nations of British Columbia have successfully practised conservation long before Europeans arrived. If the First Nations of the West Coast had not practised conservation, it is unlikely that they would have thrived as they did prior to the arrival of Europeans. Notwithstanding the history which Government conveniently ignores, the First Nations of British Columbia and in particular the treaty Indians on Vancouver Island have never argued that their treaty rights are exempt from conservation rules. What they have objected to is arbitrary infringements of those treaty rights in the guise of conservation measures, when all interested parties know better. Treaty rights are exercised with the understanding that bona fide conservation measures continue to attach.

An earlier court decision in which treaty fishing rights were held to include commercial purposes is R v. Penasse and McLeod [31]. The 1850 Robinson Treaty[32] provided the treaty Indians

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[31] (1971), 8 C.C.C. (2d) 569 (Ontario Provincial Court).

with the "full and free privilege to hunt over the territory and to fish as they had heretofore been in the habit of doing". The comparison with the North Saanich Treaty of 1852 is obvious, where "it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly".

More recently R. v. Van der Peet (D.M.)[33] , R. v. Gladstone (W.) et al.[34] , R v. N.T.C. Smokehouse Ltd.[35] , R. v. Lewis [36] and R. v. Nikal[37] are five non-treaty British Columbia Court of Appeal decisions dealing with commercial fisheries, the territorial boundaries of the reserves for the purpose of fisheries and whether the licence requirements of the Fisheries Act constitutes an infringement of the aboriginal right to fish. None of these cases dealt with treaty rights. They are all concerned with aboriginal rights. The British Columbia Court of Appeal has ruled against the First Nations in every case. On the issue of commercial fisheries, the Court of Appeal refused to accept the historical evidence of the First Nations, preferring to rely on government evidence. On the issue of territorial boundaries, the Court of Appeal construed the evidence and the presumption ad medium filum aque (meaning to the middle of the river or stream) in such a way

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[32] 1850 Robinson Treaty, No. 61, Volume I, *Indian Treaties and Surrenders,* Ottawa, 1891, at p,149.

[33] (1993), 29 B.C.A.C. 211.

[34] (1993), 29 B.C.A.C. 263.

[35] (1993), 29 B.C.A.C. 299.

[36] [1993] 4 C.N.L.R. 98.

[37] [1993] 4 C.N.L.R. 117.

that reserve lands are suddenly altered to exclude the river and the river beds. On the issue of whether licensing requirements of the Fisheries Act constitute an unjustified infringement, the Court of Appeal failed to seriously consider this issue as if the notion of self-regulation was beyond their comprehension.

In Van der Peet, the accused argued that the Upper Sto:lo Nation had an aboriginal right to sell or barter fish. There was sufficient evidence before the court to find that such a right existed.

In a historic non-treaty case, the Supreme Court of Canada in R. v. Sparrow [38] recognized an aboriginal right to fish for food but specifically left open the question of whether an aboriginal right for commercial purposes existed. That issue was left for future litigation and therefore the British Columbia Court of Appeal was free to decide the matter on the evidence before it. Instead, the Court of Appeal decided to ignore the evidence and to rewrite the history of the Sto:lo Nation.

As none of these cases were based on existing treaties, their relevance is limited to the law of aboriginal rights outside of treaty and to the process in which legal issues are decided by municipal courts.

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[38] (1990), 1 S.C.R. 1075.

Only Mr. Justice Lambert in the British Columbia Court of Appeal during the recent fishing appeal cases seemed to recognize the fact that the Supreme Court of Canada in Sparrow very clearly decided that treaty and aboriginal rights to hunt and fish were not simply rights to hunt by bow and arrow, but were rights that would evolve to take advantage of the progress of technology[39]. As Hogg points out in his text on the *Constitutional Law of Canada*: "a right to trade in the form of barter would in modern times extend to the use of currency, credit and normal commercial facilities of distribution and exchange."[40]

If that is the law of Canada, why does the majority of the British Columbia Court of Appeal insist that the because the Sto:lo Nation bartering or selling in historical times was not on the scale of the fish markets today, it cannot be recognized as an aboriginal right? The answer is that cases like Van der Peet are not decided on the basis of law alone. Any case in which First Nations successfully claim a piece of the economic pie as an aboriginal right or as a treaty right involves displacements or reallocations to be followed by political consequences. Treaty claimants can point to the treaty and ideally negotiate implementation. The Government can defend itself against critics by pointing to legal obligations in the treaty. Non-treaty Indians are left to prove their claim in a municipal court where indigenous laws and customs are routinely disregarded.

Where the muncipal courts waffle on the scope of aboriginal rights to fish commercially in non-treaty cases, it will not be so easy in the context of a treaty right.

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[39] Gladstone at p.269; Van der Peet at p. 242 and Smokehouse at p. 318.

[40] Hogg, *Constitutional Law of Canada*, Third Edition, 1992, at p. 690.

Horseman[41] is a unique case in which commercial rights were denied not because of what the treaty contained or even because the history of the treaty Indians lacked commerce. All of that was proven.

The problem in Horseman is external to the treaty. It is a case of the federal government and the Province of Alberta renegotiating Treaty 8 rights on behalf of the Treaty 8 Indians without inviting Treaty 8 Indians to those discussions. It is perhaps one of the most serious breaches of a treaty responsibility in Canadian history and the Supreme Court of Canada was oblivious to it. It is unlikely that such a profound breach of treaty rights could happen again[42].

First of all, Horseman should be distinguished on its facts. The 1930 Transfer Agreement was designed "to modify the division of powers originally set out in the Constitution Act, 1867 (formerly the British North America Act, 1867). Section 1 of the Constitution Act, 1930 is unambiguous in this regard: "The agreements .... shall have the force of law notwithstanding anything in the Constitution Act, 1867...." " Secondly, some municipal courts act as if they create aboriginal rights. The trial decision of Delgamuukw et al. v. British Columbia et al.[43] is a good

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[41] (1990), 1 S.C.R. 901.

[42] see R. v. Badger [1993] 3 C.N.L.R. 143 at p. 147-153 wherein Mr. Justice Kerans of the Alberta Court of Appeal discloses his own disquiet with the decision of the Supreme Court of Canada in Horseman. Kerans J. refers to the loss of honour and respect paid to Treaty 8 Indians by the unilateral abrogation of Treaty 8 by the federal government. Such improprieties could not happen with the North Saanich Treaty of 1852 because the federal and the provincial government have barely conceded the existence of the North Saanich Treaty of 1852 much less attempting to dilute its affect by constitutional amendments.

[43] Delgammukw [1991] 3 W.W.R. 97

example where the trial judge rewrote history and 200 years of common law in order to arrive at a novel concept, his concept: that the Province of British Columbia owes the First Nations of British Columbia a fiduciary duty in exchange for title to British Columbia.[44] Apart from a constitutional incident as in Horseman, treaties are not easily rewritten.[45]

Treaty rights are not judge-made. The treaty embodies the customary international laws of the tribe in the sense that individual treaty Indians exercise their treaty rights in accordance with tribal laws, laws that have existed long before the common law appeared in British Columbia. Anyone can pick up a treaty and read it. But unlike an aboriginal right which pertains to the customs and traditions of a First Nation, the treaty reaches out to the courts, the governments and the world as a reminder of the promise. Treaties in Canada are almost universally in breach by government and yet they are still held in high regard by First Nations who are descendants of those who signed them or in the case of modern treaties, by the signatories themselves. It is the honour and respect paid to reciprocating nations and the solemnity of treaty making which

[44] This new rule of law was based on the premise that aboriginal title to British Columbia was extinquished by operation of colonial legislation without any reference to First Nations or extinquishment and without any consultation with First Nations. In return, the Province was bound, in an odd sort of fiduciary relationship, to protect the First Nations in meeting their sustenance needs but only if the Province was not predisposed to use those lands or resources for another purpose.

[45] A disturbing precedent is Attorney-General of Quebec v. Eastmain Band et al (1993), 99 D.L.R. (4th) 16, (Federal Court of Appeal) where a modern treaty and respective treaty rights are pitted against federal and provincial laws. The Court is convinced that First Nations and governments are now operating on a level playing field simply because both parties are now negotiating treaties with their own set of experts. It is a disturbing precedent because this is a modern treaty which, like the historical treaties, is being honoured more in the breach. Leave to appeal to the Supreme Court of Canada was recently denied.

commands such respect among First Nations. Some municipal courts are beginning to acknowledge that honour, respect and solemnity in treaty making. R. v. White and Bob, Simon v. The Queen, Saanichton Marina v. Tsawout Indian Band[46] and R. v. Sioui,[47] are cases in which treaty rights are recognized. In fact, the treaties speak for themselves.

The legal argument to support the treaty right to fishing for modern commercial purposes in Saanich is clear. The opposition, however, to the recognition of commercial treaty rights is based on political and economic reasons which unduly influence the judiciary, not legal argument. This state of affairs illustrates once again the nature of treaty-making and implementation as political matters not legal arguments.

One writer describes the opposition to the expansion of aboriginal rights in the following terms:

> "The fundamental obstacle to expanding the catalogue of activities that could be characterized as aboriginal rights is that such an expansion cannot now sit easily with the reality of constitutional entrenchment as interpreted by Sparrow. There are too many overlapping or conflicting interests (both political and economic) among communities of diverse origins across the country for the courts to permit broadly interpreted aboriginal rights to remain beyond the reach of otherwise competent federal and provincial legislation enacted, the courts will presume, in the interest of the population as a whole. The fact that Parliament in exercising its legislative power in relation to "Indians and land reserved for Indians" now does so limited by a fiduciary duty to aboriginal peoples merely underlines the potential

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[46] (1989), 57 D.L.R. (4th) 161.

[47] [1990] 1 S.C.R. 1025.

> constitutional gridlock that an expansive catalogue of s. 35 rights[48] could create. The Supreme Court, which seems to feel most comfortable when it is in a position to "balance rights", will not likely permit such a situation to develop."[49]

That type of a "gridlock" is similar to the reaction witnessed in the State of Washington when the Boldt decision came down.

In the U.S. District Court for the Western District of Washington State in State of Washington v. Washington State Commercial, Passenger, and Fishing Vessel Association,[50] (known as the Boldt decision), Mr. Justice Boldt decided that two treaties between the federal government and the Northwest Coast Indians meant that those tribes were entitled to 50% of the fisheries and that right included the right to engage in fisheries for commercial purposes.

Mr. Justice Boldt was then viciously attacked by politicians, big business and the general public for his decision and yet on appeal, he was vindicated.

There is no doubt that displacements occur when human rights or treaty rights are properly implemented, recognized and enforced. Those displacements are necessary if governments and other interested parties are ever to progress beyond the admonishment of the

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[48] Constitution Act, 1982.

[49] W.I.C. Binnie, *The Sparrow Doctrine: Beginning of the End or End of the Beginning?*, Toronto, (n.d.), p.18.

[50] 443 U.S. 658 (1979).

Supreme Court of Canada in Sparrow where the Court said "there can be no doubt that over the years the rights of the Indians were often honoured in the breach."[51]

Sparrow is Canada's version of the Boldt decision. Just as in Boldt , where the court imposed an allocation of the fisheries on the parties including the treaty Indians, Sparrow allocated top priority to the aboriginal right to fish for food subject to bona fide conservation measures. In theory, it is arguable that Sparrow is a more powerful rule than Boldt because top priority could easily exceed 50% when stocks are depleted or when certain species are low and the competing fisheries are prohibited from fishing.

It is important to recognize that the decision in Sparrow is based on the recognition that every First Nation needs an economic base as does every other segment of society. Treaties are signed for that very purpose. Treaty rights provide an economic base when no other opportunities arise. Treaty rights are the rights of First Nations peoples as they practised those rights since time immemorial.

Customary international law, as set out in the treaty, is binding on the governments and on the municipal courts as it is incorporated into the common law as well as the constitutional law. Treaty rights are neither judge-made or legally defined. They simply exist as defined by the treaty. To argue, as Binnie argues, that the competing interests are too great or too powerful is not an

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[51] Sparrow, p. 1103; see also Sparrow at p. 1109 where the Supreme Court of Canada suggests that its justificatory scheme is in keeping with the Court's "concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada."

argument against honouring the treaty. Rather, it is an argument for political solutions that include respect for treaties and treaty Indians and respect for those competing interests who may suffer displacement when a treaty is actually implemented.

Sparrow decided that the Fisheries Act and the regulatory regime under that Act failed to extinguish the aboriginal right to fish for food.

Saanichton Marina decided that the North Saanich treaty provided protection against the impairment of fishing rights by provincially approved development projects.

Horseman (a treaty hunting case) decided that Treaty 8 included the commercial hunting right, but that right had been modified by the Natural Resource Transfer Agreement of 1930.

The North Saanich treaty has no such modification and yet the treaty fishing right for commercial purposes therein is prohibited without any evidence of extinguishment.

Based on Sparrow , it cannot be said that any North Saanich treaty rights have been extinguished. There is no clear and plain intention to extinguish in any instrument affecting that treaty. As in Bartleman (a treaty hunting case) by analogy, the North Saanich treaty is an effective bar against the Fisheries Act notwithstanding the fact that the Fisheries Act is a federal Act and therefore competent to deal with Indians under section 91(24) of the Constitution.

In effect, Saanichton Marina and Bartleman (treaty cases) are reinforced by section 35 of the Constitution because now the federal government is compelled to justify any modification or extinguishment of an existing treaty right in accordance with the Supreme Court of Canada's decision in Sparrow.[52]

Sparrow defined the word "existing" as it is used in section 35 of the Constitution:

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

The court wrote that the word "existing" means "unextinguished rather that exercisable at a certain time in history".[53] Therefore, neither fishing nor hunting are defined as rights regulated by the Wildlife Act or the Fisheries Act . They are defined by the history, culture and customs of the relevant First Nation. This is an important distinction because governments are forever arguing that an aboriginal or treaty right is defined by the regulations imposed on First Nations by the Province or the federal government. That is incorrect.

Aboriginal and treaty rights are to be identified and protected by section 35 through the justificatory scheme set out by Sparrow.[54] The First Nation alleging an infringement must first establish a prima facie infringement of the treaty fishing right for commercial purposes:

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[52] see fn. 56, above.

[53] Sparrow, p.1092.

[54] Sparrow, pp.1111-1115.

"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."[55]

The Saanich tribes are situated on coastal waters and have occupied these lands and fished these waters since time immemorial. Historically, the survival of these indigenous peoples depended on the extraction and trade of the fisheries. The fact that commercial or trade uses combined with sustained sustenance from the fisheries have been in existence since time immemorial leads to the conclusion that the Saanich tribes were also engaged in conservation. They would not have survived otherwise. The elements of trade during the pre-settlement period included but were not limited to established trade routes throughout Vancouver Island, the Gulf Islands and to the mainland. In the post-settlement period, trade increased with the Hudson's Bay Company and with the limited number of settlers. It was not until settlement reached much larger numbers, some writers claim in the 1920's, that the Saanich tribes were gradually stripped of their ability to trade on a large scale.

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[55] Sparrow, pp.1120-21.

In Van der Peet, Mr. Justice Macfarlane described the commercial interest in the following words:

> "it is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis. The result would be to give Indian fishers a preference or priority over other Canadians to seek a livelihood from commercial fishing".[56]

Though Van der Peet is a non-treaty case, this statement illustrates again how the issue regarding treaty fishing rights for commercial purposes is not a legal issue at all. As pointed out earlier, in the context of the North Saanich Treaty of 1852, it is a matter for the politicians to implement the treaty. It is an economic and political issue for which the courts are ill-equipped to negotiate a political solution. Instead, they must impute dishonest motives on the part of the aboriginal litigant as in the example quoted above when the Justice refers to the fish as being allocated for one purpose and then used for another. He utterly fails to note that if the aboriginal fisher believed that the right of a commercial fishery existed, any allocation was for that purpose.

When one considers the commercial issue in this light, it is easily compared with the colonial attitudes of people like Joseph Trutch who worked tirelessly to deny the existence of any aboriginal rights but in particular the right to land. Land barons, farmers, speculators and politicians successfully urged Trutch to pursue and defeat Native interests in land so that they could acquire the land themselves. It was racist then and it is racist now.

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[56] Van der Peet, p. 215.

In the recent British Columbia Court of Appeal decision of Delgamuukw[57], another non-treaty case, Mr. Justice Macfarlane was very careful to ensure that aboriginal rights are contained. He decided that a right which became prevalent as a result of European influences would not qualify for protection as an aboriginal right[58]. Why is European influence the highwater mark for aboriginal rights? The courts seem to think that Indians were tripping all over themselves trying to imitate Europeans. The fact that Europeans spent their first two or three hundred years in North America imitating the Indians in order to survive and eventually prosper is conveniently overlooked. Whatever means an aboriginal person or First Nation found or created to survive the invasion of Europeans should be an aboriginal right whether it existed before the Europeans arrived or after. In fact, the definition of aboriginal rights should be defined in consultation with aboriginal people and not by the courts. Again, that is the business of treaty-making or implementation.

As Sparrow makes it clear, the test of whether a law offends section 35 depends in part on the extent of the infringement.[59] Where the right is absolutely prohibited and not simply regulated and where that right is explicitly included in a treaty as it is in the North Saanich Treaty of 1852, the prohibition is an unconstitutional attempt to extinguish a treaty right. To refer to such governmental action as an infringement is an understatement.

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[57] (1993), 30 B.C.A.C. 1.

[58] Delgammuukw, (BCCA), p. 22.

[59] Sparrow, p.1119 where the question is "whether there has been as little infringement as possible in order to effect the desired result."

As the Fisheries Act prohibits exercising the treaty right in any form, it is clearly inconsistent with section 35 of the Constitution and therefore, of no legal force or effect in accordance with section 52 of the Constitution.

Although there can be no doubt that the treaty right to fish for commercial purposes has never been extinguished, there is concern that the treaty right may yet be redefined by the municipal courts. It is a theme repeated throughout this paper: the customary international law and the common law may protect treaty rights as they are written but the muncipal courts may resist ruling in favour of those rights. The reasons for this abuse of justice are related to economics, power and fear.

The "public interest"[60] should not be the criterion for interpreting treaties or aborignal rights. Fundamental or constitutional rights should be respected accordingly and not subjected to a balancing of the rights of business and local governments. It is not only a vague test. It is also unjust in the sense that business and local governments have never been excluded from participating in the mainstream economy through the denial of their right of ownership and the corresponding right of self-determination. Whereas the treaty Indians of North Saanich point to nearly a century of unfulfilled promises; business and local governments complain that if the treaty is implemented, there are adjustments to be made.

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[60] In Sparrow, p.1113, the Supreme Court of Canada wrote: "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."

Notwithstanding the opinions of writers like Binnie and decisions like Horseman, there are persuasive arguments which support the proposition that treaty fishing rights for commercial purposes have never been extinguished and that the honourable course for governments is to promote the exercise of those rights. The forum in which those arguments should unfold however, is not in a court of law. They are political matters to be discussed and decided upon by politicians, First Nations politicians, provincial and federal politicians. This is the business of treaty implementation.

COMMERCIAL HUNTING RIGHTS UNDER TREATY

It is my submission that the Province of British Columbia lacks jurisdiction over wildlife. In fact, it lacks jurisdiction over all land and resources as long as the issue of aboriginal title is unresolved. As the Douglas treaties cannot be taken as dealing with title, Vancouver Island is similar to other parts of the Province where treaties to surrender any rights in the land and resources do not exist. It is important to remember that provincial legislative powers including ownership are **not** an inherent rights or powers. The Province must derive its powers from some instrument or source in legislation or in the common law. This is where the First Nations of British Columbia part company with the Province.

In Horseman, the Supreme Court of Canada decided that, in Alberta, the transformation of Treaty 8 rights from commercial to food only was a *quid pro quo*:

"In addition, there was in fact a *quid pro quo* granted by the Crown for the reduction in the hunting right. Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. It can be seen that the quid pro quo was substantial. Both the area of hunting and way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments."[61]

It is an odd sort of *quid pro quo* when the party whose benefit is transformed substantially is left out of the negotiations. It is also curious how the Supreme Court of Canada assumes that an enlargement of the hunting grounds for food only is comparable to the establishment of an economic base. It is unfortunate that the Supreme Court of Canada resorts to an artificial rule of law[62] in order to prop up a treaty breach masquerading as a constitutional amendment. The customary international law, as articulated in the 1899 treaty known as Treaty 8, was binding on the Crown in 1899 when they signed it and in 1930 when they purported to unilaterally amend it contrary to the treaty and contrary to customary international law. In accordance with article 26 of the Vienna Convention, the events of 1930 and 1990 when the Supreme Court of Canada

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[61] Horseman, p.933.

[62] The term "artificial" refers to the Court's gratuitous notion of *quid pro quo* when the Court is fully aware of the fact that one of the parties to that bilateral treaty was never privy to the negotiations which led to those modifications of Treaty 8.

endorsed those events as "lawful" constitute at least two contraventions by Canada of international law.

Many foreign governments and indigenous peoples look to Canada as a Nation which has demonstrated honour and respect in its treatment of the indigenous peoples of Canada. One of the reasons for this perspective may be that our municipal courts have rarely denied all remedies. Even the infamous trial decision in Delgamuukw left the First Nations concerned and in fact all First Nations of British Columbia with a fiduciary duty owed to them by the Province.[63] This perspective has led foreign courts to cite Canadian authority as a basis for extending indigenous rights in a foreign land. The recent and historic decision of the High Court of Australia is an example.

Mabo v. Queensland[64] is a 1992 case of the High Court of Australia where one of the issues was the source and identity of the Crown's interest in the traditional lands of the Miriam peoples. The High Court of Australia is comparable to our Supreme Court of Canada. Queensland, a state within Australia, argued that it held sovereignty and proprietary rights over the traditional lands of the Meriam peoples. Sovereignty is also referred to as the radical or root title which permits the Crown to grant tenure to others. The High Court of Australia wrote that

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[63] Delgammukw, [1991] 3 W.W.R. 97 (B.C.S.C.)

[64] Mabo and Others v. The State of Queensland (1992), 107 A.L.R. 1, (H.C.); [1992], 5 C.N.L.R. 1.

the Crown may acquire sovereignty and proprietary rights over unalienated lands but where the lands are occupied by indigenous peoples, the Crown acquires only sovereignty:

> "By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquistion of radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the Indigenous inhabitants. If the land were desert and uninhabited, truly *terra nullius*, the Crown would take an absolute beneficial title (an allodial title) to the land for the reason given by Stephen C.J. in Attorney-General v. Brown: there would be no *other* proprietor. But if the land were occupied by the Indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the Indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant. The English legal system accommodated the recognition of rights and interests derived from occupation of land in a territory over which sovereignty was acquired by conquest without the necessity of a Crown grant."[65]

If the Province lacks a proprietary interest in unoccupied Crown land because the indigenous peoples rights and interests are unextinguished and recognized by common law, it follows that the Province lacks jurisdiction to regulate the wildlife on those lands as long as the unextinguished rights and interests are not dealt with by treaty. More importantly, where the Crown has entered into a solemn peace treaty promising that "it is also understood that we are at

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[65] Mabo, [1992], 5 C.N.L.R. 1, pp.40-41.

liberty to hunt over the unoccupied lands and to carry on our fisheries as formerly", the Province is faced with a positive duty to refrain from impairing those treaty rights apart from its total lack of jurisdiction.

It is necessary to discuss jurisdiction as the Province purports to legally regulate wildlife under the Wildlife Act., the regulations thereunder and the related policies. The only possible source of jurisdiction for the Province to regulate treaty hunting of wildlife is section 88 of the Indian Act:[66]

> "88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under the Act."

In Dick v. The Queen,[67] the Supreme Court of Canada decided that section 88 of the Indian Act has nothing to do with provincial laws which apply to Indians and Indian lands of their own force. The Court said that that section is only concerned with those provincial laws which affect the "Indianness" by frustrating the status or capacity of Indians.

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[66] Indian Act, R.S.C. 1985, c. I-5.

[67] [1985] 2 S.C.R. 309 at pages 326-327.

In Kruger and Manuel v. The Queen, while the Supreme Court of Canada decided that the British Columbia Wildlife Act was a law of general application, that is, it did not of itself affect the "Indianness" by frustrating the status or capacity of Indians, the court added that:

> "Section 88 of the Indian Act appears to be plain in purpose and effect. **In the absence of treaty protection** or statutory protection Indians are brought within provincial regulatory legislation". *(emphasis added)*[68]

Section 88 of the Indian Act, which first appeared in 1951, is a legal form of the practice known as federal off-loading. The federal government created section 88 in order to establish a provincial presence in what was perceived to be a legal vacuum. In fact, it was a series of political decisions which amounted to a form of genocide[69] and while families and communities were being fractured, the Government of Canada decided against providing relief. The federal government had the constitutional power to address these wrongs but lacked the commitment or political interest to do anything about it. Section 88 was created so that the provinces might step in and manage the "Indian problem".

The provinces jumped at the bait even though they resent being fingered for dealing with reserve Indians when the federal government is constitutionally responsible and when the federal government conveniently refuses to fund the provinces adequately. Eventually, the provinces

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[68] [1978] 1 S.C.R. 104 at page 112.

[69] Residential schools, the apprehension of Native children and their subsequent adoption into non-Native homes, inadequate or non-existent medical services on reserves and laws stripping Native women of the right to live among their people, and laws prohibiting potlatches are just some of the political decisions which continue to have a genocidal impact on the First Nations of British Columbia.

embraced section 88 because it purported to give them power over First Nations and in particular over the traditional lands of First Nations. The provinces have consistently employed section 88 to oppress First Nations, to take their children under the guise of the best interest of the child, to decimate traditional hunting and trapping grounds and to control and deny treaty and aboriginal hunting rights by arbitrary restrictions or prohibitions. An example of the arbitrariness of provincial regulation is the Wildlife Act and its application to treaty hunting rights for commercial purposes.

R. v. Alphonse (W.)[70] and R. v. Dick (H.T.)[71] are two recent decisions of the British Columbia Court of Appeal in which section 27(1)(c) of the Wildlife Act was found to discriminate against aboriginal peoples right to hunt because it affects the core of their "Indianness". These non-treaty decisions are based on section 35 of the Constitution and on the justification test set out in Sparrow[72]. As noted above, the Supreme Court of Canada established a justificatory scheme to be employed when a treaty or aboriginal right is alleged to have been infringed by law. Although the court was careful to caution against boiler plate analysis, the justificatory scheme as set out in Sparrow has been applied in almost every subsequent case dealing with section 35 rights.

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[70] (1993), 29 B.C.A.C. 184.

[71] (1993), 29 B.C.A.C. 201.

[72] see pp. 22 and 23 above.

In the case of a hypothetical treaty hunter who is charged with hunting out of season, the hunter would have the burden of first proving that the regulation constituted a prima facie infringement of the treaty hunting right. If the charge is selling or bartering wildlife, the hunter would need to prove that hunting for commercial purposes was a treaty right.

The Province would argue that a commercial treaty hunting right could not exist because the Province has always regulated wildlife to exclude such rights. The Province would introduce evidence of conservation officers harassing Indians in the nineteenth century and argue that that proves the provincial intention of restricting treaty Indians to hunting for food. The Province would argue that the Douglas treaties could never have included commercial hunting rights because the former Colony made that treaty specifically for the purpose of large scale settlement in the treaty area which was quickly realized. From the perspective of the Province's regulatory capacity under the Wildlife Act , commercial hunting by treaty Indians is simply infeasible on the Saanich Peninsula.

The short answer to the Province is what the Supreme Court of Canada wrote in Sparrow:

> "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".[73]

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[73] Sparrow, p.1101.

Once that treaty right is acknowledged, the absolute prohibition of exercising that right would constitute at a minimum, a prima facie infringement of the treaty right. The onus then shifts to the Crown which then must prove that the regulation (absolute prohibition) is justified:

The Court wrote:

> "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".[74]

At the core of the justificatory scheme lies the government's fiduciary duty to Indians as articulated in R. v. Guerin.[75] This means that the government cannot on the one hand allocate a commercial hunting right to selected groups and then on the other hand tell treaty Indians that they only qualify for hunting for food. If the honour of the Crown means anything, it means the treaty must be honoured as it is written and as it is understood.

CONCLUSION

The existing treaty rights of hunting and fishing including for commercial purposes have never been extinguished in law. The treaty rights of hunting and fishing at a minimum means that the treaty Indian receives top priority in the allocation of wildlife and fisheries subject only to conservation. The treaty rights of hunting and fishing for commercial purposes is the law of the

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[74] Sparrow, p.1121.

[75] [1984] 2 S.C.R. 335 at pp.348-49.

North Saanich tribes or put another way, customary international law as articulated in the North Saanich Treaty of 1852. It is binding on Canada and the Province of British Columbia as it is incorporated into the common law. The concept of a First Nations' priority comes from Sparrow which although it was not a treaty case, it did define the parameters of section 35 of the Constitution for the purpose of protecting treaty and aboriginal rights. There is every reason to expect the municipal courts to be more sensitive to the infringement of treaty rights as opposed to aboriginal rights and yet that sensitivity is long overdue in the context of commercial treaty rights in North Saanich.

Canada will continue to resist recognition of the treaty fishing right for commercial purposes because of the economic problems concerning the commercial fishing industry and the communities who depend on the industry to survive. This is particularly difficult to understand in light of what the Supreme Court of Canada had to say in Sparrow :

> "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."[76]

The municipal courts including the Supreme Court of Canada are bound by international standards ratified by Canada as well as the customary international law which complements the common law. These courts should not be permitted to rewrite aboriginal history in order to justify ruling against a legally enforceable treaty right to fish or hunt for commercial purposes. Racist

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[76] Sparrow, p.1110.

precepts such as sui generis should be overruled[77]. Proprietorship should lie where it belongs and sovereignty continued to be shared among the federal government, the provinces and the First Nations.

According to the law governing municipal courts, the federal and provincial governments are in clear violation of section 35 of the Constitution and as a result, any law, order or other instrument created or used to prohibit, obstruct or deny the treaty fishing or hunting right for commercial purposes is of no force and effect in accordance with section 52 of the Canadian Constitution.

But there are political matters which must be addressed. These matters are ownership of the lands and resources and secondly the need for an economic base within First Nations. Arguably, the ownership issue may be resolved in British Columbia once treaty negotiations are resolved in respect of most of the Province's land mass. However, in reality, the negotiations are moving so slow now, it is more likely that many First Nations of British Columbia will be waiting another generation or two before the ownership issue is addressed. Despite that time frame, the ownership issue and the need for an economic base are not being addressed by the municipal courts and certainly not by the provinces or the Government of Canada. A new international

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[77] The High Court of Australia overruled authority which supported the racist concept of *terra nullius*; see Mabo [1992], 5 C.N.L.R. 1, p.48.

instrument is required to speed the Government of Canada and the Province of British Columbia toward honourable treaty-making and toward the implementation of existing treaties.[78]

Many independent states and some indigenous peoples of the world including many from Canada[79] have worked for years towards the development of the new International Labour Conference (ILO) Convention 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries.[80] It is an interesting Convention because it is not particularly concerned with labour matters but rather with the rights of indigenous peoples. Canada has not ratified this Convention though consultations with the provinces are completed.[81] As the Convention relates to a number of issues over which the provinces are said to be sovereign, Canada claims to be unable to ratify this convention without the agreement of the provinces and territories. The provinces may resist ratification on the basis of the ownership issue being unresolved and their inability or unwillingness to promote an economic base for First Nations.

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[78] The Government of Canada and the Province of British Columbia often refer to "interim measures" as initiatives or opportunities which tend to assure the relevant First Nations that some of the land and some of the resources will be left by the time a treaty is signed. One of the problems with these initiatives or opportunities is that they are often foreign to the aboriginal culture and they are imposed on First Nations as opposed to recognizing the institutions and laws of the First Nation. It is in this sense that an economic base is critical and how commercial fishing and hunting treaty rights are the natural means of creating that base.

[79] See *Indigenous Peoples Response to the Proposed Revised Convention on Indigenous and Tribal Populations Convention, 1957 (N0.107)*, Indigenous Peoples Working Group (Canada), November, 1988.

[80] see fn. 4, above.

[81] From a telephone conversation on September 27, 1994 with Allan J. Torobin, Senior International Officer, Human Resource Development, International Affairs, Human Resources Development Canada.

Article 23, for example, provides that:

> 23(1) Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, **shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development.** Government shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
>
> (2) Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development. *(emphasis added)*

Part 1 of the Convention provides that indigenous peoples must have the right to sustain or establish their own cultural or legal institutions, to decide their own priorities and to have the necessary resources provided by governments. Part II deals with traditional land where indigenous peoples have the right of ownership in addition to the right of possession. In British Columbia, where almost the entire province is unceded and in which the indigenous peoples of British Columbia have the right of ownership, there should be no problem with concurrence. As the Province of British Columbia owns nothing, they have nothing over which to exercise jurisdiction.

It is submitted that neither the provinces nor the federal government are prepared to ratify ILO Convention 169 because it specifically provides that indigenous peoples have a right of ownership over their lands. It should be recalled that the common law, customary international law, and Canadian constitutional law support the right of indigenous peoples to own their own

lands, those lands which have never been ceded by treaty. First Nations, provincial, territorial and federal politicians have a responsibility to resolve this issue and to ratify ILO Convention 169.

In the meantime, it is submitted that the implementation of the North Saanich Treaty of 1852 in relation to the exercise of those treaty rights of hunting and fishing for commercial purposes is somewhat overdue. As a respected Treaty elder from North Saanich once said, "you guys are all asleep".

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The North Saanich Treaty of 1852

Constitution Act, 1867

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Natural Resource Agreement of 1939 [confirmed by the Constitution Act 1930] para.12

Proclamation of 1763 [reprinted R.S.C., 1985, App.11, No.1]

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Indigenous Peoples Response to the Proposed Revised Convention on Indigenous and Tribal Populations Convention, 1957 (No. 107), Indigenous Peoples Working Group (Canada), November, 1988

INFORMATION

COURT FILE NUMBER: 49395C 49396C ~~49397C~~

POLICE FILE NUMBER:

CANADA:
PROVINCE OF BRITISH COLUMBIA

This is the information of STEFAN ULRICH BECKMANN (the "informant")

(occupation) A Fishery Officer on behalf of HER MAJESTY THE QUEEN of Victoria, British Columbia

The informant says that he has reasonable and probable grounds to believe and does believe that

JOSEPH EDWARD ELLSWORTH and
JOHN JOSEPH SAMPSON and
CRAIG SAMPSON, being then and there together

on or about the 26th day of October, A.D., 1988,

at or near Victoria, in the Province of British Columbia

did unlawfully fish without the authority of a licence or permit, in contravention of Section 4.(1) of the BRITISH COLUMBIA FISHERY (GENERAL) REGULATIONS, thereby committing an offence

CONTRARY TO SECTION 61(1) OF THE FISHERIES ACT, BEING CHAPTER 14 OF THE REVISED STATUTES OF CANADA, 1970 AS AMENDED

SWORN BEFORE ME

28 DAY OF DECEMBER 19 88

AT Victoria British Columbia

A Justice of the Peace in and for the Province of British Columbia

(Signature of informant)

PROCESS ~~Appearance Notice~~ CONFIRMED
Previous process applied all three accused

A Justice of the Peace in and for the Province of British Columbia

DATE DD MMM YY	COUNTS					
		ELECTION	☐ PROV COURT JUDGE	☐ JUDGE	☐ JUDGE & JURY	Before ____ Signature of Judge
		RE-ELECTION	☐ PROV COURT JUDGE	☐ JUDGE	☐ JUDGE & JURY	
JUN 89	1	PLEA	☐ GUILTY	☒ NOT GUILTY (all)		Before ____ Signature of Judge
		PROCESS STOPPED	☐ WITHDRAWN	☐ STAY OF PROCEEDINGS		
		PRELIM INQUIRY	☐ DISCHARGED	☐ ORDERED TO STAND TRIAL		
NOV 17 1989	1	TRIAL FINDINGS	☒ DISMISSED (all accused)	☐ FOUND GUILTY		
DATE		SENTENCE	☐ SUSPENDED	☐ FINE $ ____	TERM	
			☐ DEFAULT ____	☐ TTP ____		
		DISCHARGE	☐ ABSOLUTE	☐ CONDITIONAL		
			☐ PROBATION	☐ CONDITIONS		
			☐ JAIL	☐ INTERMITTENT		D. Henry, Clerk for
			☐ FEDERAL INSTITUTION			

1 17 November 1989
2 Victoria, B.C.
3
4 THE CLERK: Joseph Edward Ellsworth, John Joseph Sampson,
5 Craig Sampson, on Information 49395-C.
6 MR. HALL: Scott Hall for the Crown Federal, Your Honour.
7 THE COURT: Thank you.
8 MR. MacLEAN: I see John Sampson here. I'll just make sure
9 the other two are present, Your Honour.
10 All three are present now, Your Honour.
11 THE COURT: Thank you.
12 The matter before the Court is for decision today,
13 following two days of extremely interesting evidence in
14 this particular matter which were led previously. During
15 the leading of that evidence and during the arguments in
16 this particular matter, several issues were identified
17 which I think should be dealt with one after the other.
18 The first issue is a factual issue: Has the Crown
19 placed sufficient evidence before the Court to prove
20 beyond a reasonable doubt that the accused were fishing
21 on the evening in question as alleged in the information
22 before the Court? It is my view on this issue the only
23 inference that can be drawn from all of the facts proven
24 is that the three persons observed in the river over
25 several hours' fishing were the three accused persons who
26 were apprehended and are today before the Court.
27 The second issue is whether the Douglas treaty of
28 1852 gives Native people who are descendants of the
29 signatories of that treaty a right to fish unimpeded by
30 regulation such as the one upon which the present charge
31 is based. The facts herein show that in the 1850s
32 Governor Douglas, then an employee of the Hudson's Bay
33 Company, was empowered to enter into agreements with
34 Native persons present on the Saanich Peninsula and in
35 other areas to purchase whatever title those people
36 possessed in the land so that the area of Southern
37 Vancouver Island and adjacent areas could be settled.
38 It is clear that the Native people had rights to those
39 lands because several examples were led in evidence of
40 the settlers requesting the use of land and/or products,
41 to wit, timber therefrom, for the settlers' uses and the
42 settlers obtained those particular rights or products
43 from the Native leaders.
44 It is also clear the areas purchased were set out in
45 the agreements that were arrived at and compensation was
46 paid therefor. Further, the Native people's right to
47 hunt on unoccupied land and to "carry on fisheries as

formally" were expressly reserved within those agreements.

I believe the answer to that argument is contained in Regina v. Simon, a decision of the Supreme Court of Canada, (1985) 2 S.C.R. 387, and in a decision of the British Columbia Court of Appeal which I shall refer to as the Saanichton Marina case, its number being V000613, Victoria Registry.

In Regina v. Simon, Chief Justice Dickson makes it clear that he was not prepared to accept an argument that the signatories to the Micmac treaty in Nova Scotia lacked capacity to enter into an enforceable treaty. He held the treaty was made for the benefit of the signatories and acted upon by the parties to it. He also held the decision in Regina v. Syliboy, (1929) 1 D.C.R. 307, in the Nova Scotia County Court represented the type of reasoning that is not appropriate in the present era, where a sensitivity to Native rights in Canada is necessary.

In the Saanichton Marina case, the B.C. Court of Appeal, speaking through Mr. Justice Hinkson, dealt with essentially the same treaty relied upon in this matter. In my view, it is unnecessary to reiterate the facts relied upon by that Justice in his decision because they are essentially identical with the facts in the case at bar. It is further unnecessary to reiterate the law relied upon in that decision in this matter because it is fully canvassed and leads to That is held by Mr. Justice Hinkson at page 6 of his judgment.

Mr. Justice Hinkson thereafter interprets the said treaty and the meaning of the word " He concludes the agreement, now treaty, as it did the right to hunt. He also says at page 16 of that judgment:

> I conclude that the right granted to the Indians by treaty is unique in the sense that it is difficult to describe it within the framework of traditional legal terminology.

[illegible]

-- and in that case in the shelter of the Saanichton Bay.

In this matter, I find that the Saanich Indians at the time of the 1852 treaty fished in the Goldstream River and had done so for as long as anyone could remember. They used spears, gaffs, nets, and weirs to do so. It is clear the settlers recognized that traditional fishing because a special area at the mouth of the river was reserved to the Indians for that use by the Joint Federal/Provincial Indian Reserve Commission of 1877.

[illegible]

[illegible]

The only issue which remains in this matter is whether the defendants are descendants of the signatories of the above-mentioned treaty. It is clear from the evidence John Joseph Sampson and Craig Sampson are direct descendants.

It is not so clear in the case of Joseph Edward Ellsworth. He is a person who apparently has returned to the Tsartlip band recently, and according to the testimony of Tom Sampson, an elder of the band, both Ellsworth's grandmother and grandfather were members of the band. On the evidence before the Court, I am able to find he is also a direct descendant.

On all of the evidence herein, I find the defendants, and all of them, are [illegible]

Gentlemen, I therefore find you all not guilty of the charges that have been laid.

MR. MacLEAN: Thank you very much, Your Honour.

MR. HUNT: Thank you, Your Honour. That completes those

1 matters which I have before Your Honour this afternoon.
2 THE COURT: Thank you, Mr. Hall.
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4 (PROCEEDINGS CONCLUDED)
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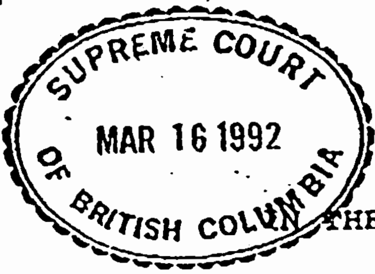


No. 49395-C
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
HER MAJESTY THE QUEEN	
APPELLANT	REASONS FOR JUDGMENT
AND:	OF THE HONOURABLE
JOSEPH EDWARD ELLSWORTH, JOHN JOSEPH SAMPSON and CRAIG SAMPSON	MR. JUSTICE MURPHY
RESPONDENTS	

Kelly R. Doerksen	Counsel for the appellant
Malcolm O. Maclean	Counsel for the respondents
Date and Place of Hearing	February 9, 1992 Victoria, B. C.

This is an appeal by the Crown from the acquittal by His Honour Judge Filmer on 17 November 1989 of the respondents on a charge on or about 26 October 1988 at or near Victoria in the Province of British Columbia, they did unlawfully fish without the authority of a license or permit contrary to s. 4(1) of the British Columbia Fishery (General) Regulations.

The respondents are native Indians, members of the Tsartlip village. They are direct descendants of the signatories of the Douglas Treaties of 1852 as so found by Judge Filmer. The relevant portion of the treaty in question provides:

> It is also understood that we are at liberty ... to carry on our fisheries as formerly.

The trial judge found that the respondents were fishing at the relevant time in the Goldstream River which is at the head of the Saanich Inlet. At the time in question the Goldstream River was closed for the catching of coho and chinook salmon by any method and by any user group.

In 1988, the year in which the offence occurred, a total of only nineteen chinook salmon and two hundred and ninety-five coho had returned to the Goldstream River to spawn. There was an abundance of chum salmon, a species different from coho and chinook, returning to the Goldstream River to spawn. Indian food fish licenses were available to native Indians to harvest chum salmon from the Goldstream River during the closure period.

At page 3 of his judgment, Judge Filmer stated:

> In this matter, I find that the Saanich Indians at the time of the 1852 treaty fished in the Goldstream River and had done so for as long as anyone could remember. They used spears, gaffs, nets, and weirs to do so. It is clear the settlers recognized that traditional fishing because a special area at the mouth of the river was reserved to the Indians for that use by the Joint Federal/ Provincial Indian Reserve Commission of 1877.
>
> It is further my view that the right to fish "as formerly" clearly encompasses the Goldstream River and the fishing can be carried on by the descendants of the Saanich

> Indians as represented by the Tsartlip Band who reside in Central Saanich.
>
> It is further my view that the right to fish "as formerly" includes the right to fish unimpeded by regulation such as are relied upon by the Crown in this case. It is clear no such scheme of regulations and permits existed in 1852, and they are an impediment inconsistent with the intent of the agreement, now treaty, entered into at that time.
>
> ...
>
> On all of the evidence herein, I find the defendants, and all of them, are direct descendants of the Saanich Indians, are entitled to the benefit of the 1852 treaty, and are therefore entitled to fish in the Goldstream River unimpeded by regulation.

Following are the grounds of appeal by the Crown as set out in its amended notice of appeal:

> 1. That the learned trial judge erred in law in holding that the treaty in question guarantees to the Respondents the right to fish unimpeded by the regulations relied upon by the Crown in the case at bar.
>
> 2. That the learned trial judge erred in law in finding that the treaty in question entitles the Respondents to fish in the Goldstream River unimpeded by regulation.

There is no doubt that with respect to the meagre number of chinook and coho returning to the Goldstream River to spawn that conservation measures were necessary. Judge Filmer's decision was delivered, however, prior to the decision of the Supreme Court of Canada in <u>Regina</u> v. <u>Sparrow</u> (1990), 56 C.C.C. (3d) 263.

The decision in Sparrow related to the aboriginal rights of native Indians as opposed to treaty rights as in this case. However, even with respect to the latter I do not think it is correct to say that the native Indians, and particularly the respondents in this case, have the right to fish unimpeded nor that the treaty gives them this absolute right. On the one hand, it is the position of the respondents that the Douglas Treaty of 1852 is their license to fish and that no other license is required. On the other hand, the Indian people themselves impeded their right in that they practised conservation in Goldstream by the use of a weir. Chief David Paul, the administrator and chief of the Tsartlip Band, testified (page 52 of the transcript):

Q Could you tell the court how those fish were caught before the white man came?

A Yes, with a weir.

Q How big was a weir?

A Depending on what you were doing with the fish, whether you were letting them up, or whether you were catching them, depending on what type of weir you wanted to use. I mean, there was four different types of weirs.

Q And what were they made of?

A They were made out of the trees cut right from the area there, and they were poked into the ground and you could sort out the different sizes of fish through the weirs. It was a form of conservation.

Q How -- how was it a form of conservation?

A Well, the -- the ones that you would let up were the ones that were a better species of fish.

Q Did you say "better"?

A Yep.

Q And -- and is it fair to assume from that that you would trap the ones that were not better species? Or do I miss what you're saying?

A Yes, I think you do. When -- it's like anything else if you do a -- when you're breeding you take the better ones for breeding.

Q Then what would happen to the ones that couldn't get up?

A Well, we'd use them.

Q All right. So they would be trapped or caught or eaten?

A I don't think we ever used the word "trapped". I think that we used the word, for conservation purposes; that we would let the ones up and take the ones. We never used the word "trapped" though. I don't know if you know what a weir is. It's not a trap.

Q Well, perhaps you could explain it.

A It's a -- it's a thing that you put down like that in the water and -- and it's not a trap. You -- it allows the fish to go through.

Dr. Barbara Lane, an anthropologist having special expertise with respect to the culture of the Saanich people of which the Tsartlip is a part, gave evidence in the court below. She described a weir as follows (page 10 to 11 of the transcript):

A Generally speaking, and again there are a number of ways of constructing weirs and different materials can be used, but in general a weir is simply a structure which is usually built from bank to bank across a stream or a river. And it's more like a fence than a dam; although the term "dam" is sometimes used, I think inappropriately, because, unlike a dam, the weir does not obstruct the passage of water. The water flows freely through, and depending upon how the dam is constructed it either can stop almost all fish or it can be built so as to select by size and allow small fish to pass through but larger ones to be stopped. And all the weir does is either impede or slow down the passage of fish. It's a kind of a fence, if you will. To take the fish you then have to have something else, either traps built into the weir, which is sometimes done, or set down next to the weir, which is sometimes done, or you have to take the fish which are stopped at the weir by some other means, such as spearing them or gaffing them or taking them out with a dip net or lift net, two different terms used to indicate the same thing, a net at the end of a long pole which is dipped down into the water and then lifted out with the fish in it. Or you can take them with other devices, such as a leister (phonetic) or a harpoon, whatever. But generally speaking in this area, and if you'd like me to speak about Goldstream, gaffing and dip-netting would have been the two most likely or most common ways of taking the fish when they were stopped at a weir, if there was a weir there.

Given the foregoing, it is my opinion that the right, "... to carry on our fisheries as formerly" includes conservation. Or, to put it another way, carries with it the obligation to conserve the fish.

In addition, it seems to me that, "... to carry on our fisheries as formerly" involves an examination of the purpose on which the fisheries were carried on. [illegible] were used for food and ceremonial and other purposes [illegible] fish not required for such purposes would not be a right guaranteed by the treaty. The respondents did not testify in the court below; consequently, there is no direct evidence as to why they were fishing. There is some indirect evidence from which I can infer that the fish in this case were taken for food. Mr. Tom Sampson, a member of the Tsartlip Indian Band, and chairman of a group called the Saanich Tribal Fishery Council, testified as follows:

> Q All right. I'm going to give you a situation, then, where there are nineteen chinook that are returning to the Goldstream. Should one of those chinook be taken?
>
> A Chinook or coho?
>
> Q Chinook.
>
> A How many did you say there were, nineteen?
>
> Q Nineteen.
>
> A Nineteen chinook?
>
> Q Yes.
>
> A Knowing what our situation is in our village, if someone said, "I want to take one of those for my -- to feed my family," I would say yes. I would say yes.
>
> Q Do you think more than one chinook could be taken out of the nineteen?

A If -- because of what I know about my village and our families, I would probably say, "Yes, take one or two more, but be reasonable about that." Because our village -- our village is in tough shape. All of our people, at least ninety percent of them are on welfare, and usually we don't take that unless we really have to.

Q What about coho then? I'm going to pose the same question. If there are approximately three hundred coho returning, would you say that seven would be a reasonable number to take in one night?

A If the situations are the same, I would probably agree with a person going there to get food for his family, but we would be very careful about what would happen after that, because we do -- we do try to police ourselves, even though we can't afford to do it. We do try to do everything within our power to police or to try to make sure that what everyone -- anyone takes has got to be solely for the purpose of their family.

In actual fact, the respondents had seven coho and one chinook in their possession when accosted by the fisheries officer.

With respect to the use made of the fish by the Indian people, Dr. Lane testified as follows:

Q Now, at the time of the signing of the treaty with the North and -- or the signing of the North and South Saanich treaties, what was the status of the fishery in this area. Essentially, who was fishing in this area?

A The Indians were the people who were fishing.

Q And from the evidence that you've seen in your studies, what were the Indians doing with the fish [illegible] white man?

A The Indians were continuing to support themselves in the way that they always had, by taking the fish for their own use which was the economic base of their subsistence. But they also were selling fish to the whites, who were using the fish to eat also and we[illegible] to -- the Hudson Bay Company used it to provision their fur brigades. They also salted and barrelled fish and exported it to other places, acting as middlemen to -- in a commercial trade in the fish. The Indians were the fishermen, and the Hudson Bay Company had entered into a commerce in fish. In fact, although Fort Langley had been set up as a fur post, it rapidly derived more income from export of fish than it did from furs.

Q Now ...

A Fort Victoria, when it became established a little bit later, served as the depot, and fish from the Fraser River and from the island were shipped out from Fort Victoria on the company's vessels.

I infer from the high unemployment rate testified to by Mr. Sampson that the fish taken were to be used for food.

I conclude therefore that when the Indian people by the Douglas Treaty were given a right, "... to carry on our fisheries as formerly" this included fishing, conservation and the use of the fish by the Indian people for whatever purpose the fish were used by the signatories to the treaty. One of these purposes was for food obviously.

While the treaty does not purport to pre-empt other users of fish the interpretation given to Indian treaties must be looked at. In Claxton et al v. Saanichton Marina Ltd. et al (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.), Hinkson J.A., at pages 84 - 85, indicated the approach to the interpretation of Indian treaties as follows:

> In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:
>
> The treaty should be given a fair, large and liberal construction in favour of the Indians;
>
> Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
>
> As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
>
> Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.
>
> Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

Although not specifically referred to, Dr. Lane gave the following evidence which would apply to subparagraphs (b) and (e):

> Q Can you state what the Indian oral history is as it relates the treaties and

what they perceived the treaties to import?

A Yes, they certainly understood and again if I may expand my earlier comments, the only thing that we know about what the Indian could have understood at that time is what Douglas tells us he told them, and you just ready what he said about the fisheries, and that seems clear in the oral history to have been the understanding of the Saanich people, as well as other Indian parties to the Douglas treaties, that they were assured they could continue to support themselves, to continue their fisheries, which as the mainstay of their economy, as they had done prior to the treaties. In other words, [illegible] to them their economic independence.

In this respect on May 16, 1850 Governor Douglas reported back to England:

> I informed the Natives that they would not be disturbed in possession of their village sites and enclosed fields, which are of small extent, that they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom [illegible] were the sole occupants of the country. (my emphasis)

Although Sparrow dealt with aboriginal rights, I think it goes without saying that even with respect to treaty rights conservation is necessary to protect the resource for the benefit of the Indian people if for no other reason. And as well, the Indian people themselves practised conservation as previously mentioned by use of a weir and latterly by widening the channels in the Goldstream

River in order to allow more fish to go upstream. Such measures are ineffectual if there are no fish left to go up the Goldstream River to spawn as a result of interception of chinook and coho destined for Goldstream River by the sports and commercial fishery.

In this respect I quote from the testimony of Stefan Beckmann, fisheries officer (pages 24 to 26 of the transcript):

Q And the sports fisherman catch, or are permitted to catch coho and chinook in the Inlet, correct?

A In most of the Inlet, yes. There is a boundary which is in effect -- I don't know if you are familiar with the area, from Christmas Point, it closes off the southern half of Finlayson Arm, giving a sanctuary to the coho and chinook.

Q All right. So part of the Inlet is closed off?

A For sports fishing.

Q But the rest of the Inlet is open for sports fishing of chinook and coho?

A That's correct.

Q And of course, there is a commercial fishery for chinook and coho further out in the strait, correct?

A Uh -- no, that's not correct.

Q All right.

A Well, partially, they do fish for coho.

Q Where?

A There's a troll fishery that takes place in the Strait of Georgia.

Q Yes?

A Then there is -- there is net fishing that goes on in Johnson Strait, Juan de Fuca Strait, and there is interception of various coho and chinooks, although the primary target usually is chum and sockeye.

Q And the interception of those coho and chinook by the commercial fishermen would have to include some of the coho and chinook destined for the Goldstream, correct?

A That would be correct, yes.

Q And some of the coho and chinook that are caught by the sports fishermen are coho and chinook that are destined for the Goldstream, correct?

A Correct.

Q And with that interception by the commercial fishery and the sports fishery, that helps in reducing the numbers of fish returning to the Goldstream, correct?

A Yeah, it's a partial cause, yes. There's also Indian Food Fishing that also takes place up and down the coast which also causes interception of those stocks.

Q Would you have any idea, Officer, and if it's beyond your area of expertise, please say so, but do you have any idea how many say pieces of coho and chinook are caught by the commercial fleet in the Strait of Georgia, Johnson Strait?

A I wouldn't know. May Ron Kehl might be able to answer your question.

Q It would be in the thousands though?

A Oh, yes.

Q Would it be in the tens of thousands?

A Uh -- you're talking coho or chinook?

Q Coho and chinook combined.

A Combined. The interception of all the stocks of --

Q Yes.

A I'm sure it will be over -- oh, yes. But I mean, those might be U.S. fish as well.

Q Yeah, because you can't tell because the stocks haven't broken off at that point, correct? It would be very difficult to determine where the fish are going?

A Yes.

Q Yes.

A It's very difficult to tell. We have various tagging programs that help us estimate, but the mixing of stocks is very, very severe and it's difficult to manage. And only through extensive record keeping and tagging programs has it been found out where certain fish stocks move about, and based on our knowledge of where the fish move that's where we would have a commercial fishery with intent of targeting only on that species of fish that is destined to a river that is expecting a surplus. The aim of commercial fisheries is to harvest surplus only and minimize any other interception fishing.

Q Now, the sports fishery that takes place in the Inlet, we know that that (sic) there is some restriction as to the area. Is there a restriction per fisherman?

A Yes.

Q Of coho and chinook?

A Yes.

Q And is there a restriction as to the number of fishermen out there?

A No.

Q So we could have an unlimited number of fishermen and each one would have the same limit on the number of fish to be caught?

A That's correct.

Q How many fish are the sports fishermen allowed each of coho?

A Four coho salmon per person per day. But the Regulations state four salmon per day. So if they were lucky enough to catch or hook into four coho, that would be their limit.

Q Or they could have a chinook thrown in?

A Yeah, two of those four salmon might be chinook.

Q Is that the limit on the chinook in the Inlet, is two?

A Yes. But maybe I should point out that chinook salmon and coho that are headed back to the Goldstream lose their feeding instinct.

Q Yes?

A The closer they get to the river, therefore fishermen who are fishing as such for Goldstream chinook or coho would likely not have all that much success the lower they get into Saanich Inlet anyways.

With respect to conservation, the Supreme Court of Canada in Sparrow stated at page 31:

> 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 allocations 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 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 the conservation measures would be borne by the practices of sport fishing and commercial fishing.

To carry the foregoing to its logical conclusion, if no fish were available at all beyond the numbers required for spawning there would be no fish to allocate to the Indian people which would appear to be the case with respect to coho and chinook at the time of the taking of the chinook and coho by the respondents.

[illegible] follows that conservation measures in the Inlet and in Georgia Strait or wherever else Coldstream chinook and coho may be found must take into account the treaty rights of the Tsartlip Band to ensure an adequate return of these species to the Coldstream [illegible] may be to accomplish this." ... is a task that must be left to those having expertise in the area ..."

Although the Goldstream chinook and coho lose their feeding instinct as they approach Goldstream, and the number of fish that may be taken in any one day by sports fishermen is restricted, the lack of any restriction on the number of licenses issued creates a somewhat negative impact on the daily restriction. The dwindling number of coho and chinook returning to the Goldstream River in 1988 would seem to confirm this. The measure taken, therefore, fail to take into account rights of the Tsartlip Band under the Douglas Treaty. To do so obviously requires restrictions further away from the mouth of the Goldstream. This, of course, is no easy task and could spell ruination for both the sports fishing industry and commercial fishing and would be unwarranted if there was a surplus of chinook and coho from other streams and rivers. However, "allocations of maritime resources", whatever they may be, have to take into account the treaty rights.

As mentioned previously, there was an abundance of chum salmon which was available to the Tsartlip people (leaving aside for the moment the question of whether they were required to obtain a license). In addition, the ancestors of the Tsartlip people fished outside of their territory for other species, e.g. sockeye and pink. In addition they also fished in the Inlet and still do. The Crown submits that since chinook and coho are available in the Inlet and that the Indian people fish there and outside of their territory and there is an abundance of chum that their treaty rights are not thereby impaired by the Goldstream closure.

However, the treaty gave the Indian people the right to carry on their fisheries as formerly. That included the right to fish for coho and chinook in Goldstream as well as a right to take other species and to fish elsewhere. ~~Conservation measures that do not take into account this particular right cannot be justified by an abundance of other species also taken by the [illegible] abundance of the same species elsewhere, i.e., the Inlet and outside their territory or other species further afield, e.g. sockeye and pink.~~ To do so would be in violation of paragraphs (a) and (b) of the approach referred to in Claxton.

In addition to the foregoing, with respect to chum salmon, I quote from the testimony of Chief Paul:

Q Chief Paul, does your band still rely upon the various species of salmon to provide food for your people?

A Yes, we do.

Q And you have observed the fish in the river, in the Goldstream River?

A Yes, we have.

Q Can you tell His Honour the condition that the chum salmon, for example, when they reach the point of the bridge in the river, in this area here, what condition are they in?

A They're not in very good condition.

Q How do they compare, say, with the coho or chinook?

A The chinook and coho are in better shape on that side farther up.

Q Do your people rely upon the coho and chinook for food?

A Sure do.

Mr. Sampson testified:

Q And from the -- in the river, would you fish in all parts of that river, traditionally?

A Yes, we fished the whole river, because when you're doing fish there're certain things we know about the certain species, specially the chum salmon. The chum was the easiest to take, and he was probably the best to smoke, because they didn't have too much fat in them. And it would last longer. The other species of fish we took for immediate eating purposes, although --

Q And -- sorry.

A Although we did smoke the chinook and the coho, but it -- because they're too fat, you know, ordinarily we wouldn't do as much as we would do the chum salmon.

Q So the coho and the chinook or the spring would be used for immediate eating purposes?

A Yes.

Mr. Tom Sampson agreed that Indian fisheries should be regulated but not until such time as some agreement has been reached between the Indian people and the Federal Government in that respect. I quote from his testimony:

Q It's fair to say, then, that both sport and commercial fishery should be regulated, as far as you're concerned?

A For the reasons I gave.

Q Yes. But that the Indian fishery in any way, shape, and form should not be regulated?

A Oh, I never said that.

Q Oh, do you believe that the Indian fishery should be regulated?

A Of course it should be, but you have a treaty in place that has to be talked about.

Q And who is going to regulate that treaty?

A Well, it's with the Federal government, the government of Canada.

Q Is it your evidence, the, that the Federal government should regulate your fishing rights as Indians under the treaty?

A No, no, what I said was we have a treaty in place that gives us the right to fish out there, and until such time as we -- until such time as we sit down with the Federal government Fisheries or -- an arrive at some reasonable agreement of some kind, then obviously the treaty can get regulated, but not before that.

I confirm the acquittal but not on the basis of the trial judge's decision, if what he is saying is that since no such scheme of regulations and permits existed in 1852, they are therefore an impediment inconsistent with the treaty. An impediment in the form of conservation is required but must be justified according to the tenets set out in *Sparrow* and provided that it allows the Indian people to "carry on our fisheries as formerly".

I dismiss the appeal on the ground that the conservation regulations in 1988 did not take into account the right granted to the Indian people, in particular in this case the Tsartlip Band, by the Douglas Treaty of 1852 to carry on their fisheries as formerly.

While this involves the dismissal of a charge of fishing without a license it is not to be construed as confirming that Indian people do not require licenses or that the treaty itself is a license to fish. When and if conservation measures are in effect which take into account the rights of the Indian people under the Douglas Treaty it may be necessary to require that the Indian people be licensed in order to regulate those conservation measures. That is an issue, however, that will have to be resolved when the time comes.

K.C. Murphy
J.

March 16, 1992

Victoria, British Columbia

Provincial Court file 12465

Nanaimo Registry
criminal division

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

vs

Anthony Clark SEWARD, McCardy Charles JONES,
Mervin Bennet SEWARD, Rodney Dwayne SEWARD,
Gregory Wayne SEWARD & Randolf Keith SEWARD

Reasons for Judgment

These six Accused, Anthony Clark Seward, McCardy Charles Jones, Mervin Bennet Seward, Rodney Dwayne Seward, Gregory Wayne Seward and Randolf Keith Seward,who are all native Indians, are charged with two offences against the B.C. Fisheries Regulations which are made pursuant to the "Fisheries Act" of Canada.

These offences, one of fishing by means of a set salmon net, and of fishing by means of a net without a valid licence, are alleged to have occurred on or about the 22nd day of September, 1983 at or near a place known as the 'Bore Hole' on the Nanaimo River, in the County of Nanaimo, Province of British Columbia.

The Accused, through their counsel, admit the Crown's case.

Their defence is that they all being native Indians, and members of the Nanaimo Indian Band, have the benefit of a Treaty made by their ancestors with the Hudson's Bay Company, which

preserved their right to fish in the area where they were found. It is their view that the Regulations they are alleged to have breached do not apply to them because of the special status accorded to them by the Crown through these treaties. They also argue that their treaty rights have been confirmed and re-established by the enactment of the Constitution Act of 1982, and that the parliament of Canada had no right to abrogate or infringe upon those rights by enacting the Regulations under the Fisheries Act.

The Crown's argument put simply, as I understand it, is that while recognizing the treaty rights of these Accused persons . . that these rights are subject to regulations lawfully enacted by the Parliament of Canada. That legal jurisprudence has affirmed that position, and that Special rights have been afforded to native Indians in the Regulations for the food fishery permits.

The very same treaty that we are dealing with in the case at bar was first considered in 1964 by the British Columbia Court of Appeal. Mr. Justice Norris, in reviewing the background to the Treaty, started with the Royal Proclamation of 1763 at page 218 of the 52 Western Weekly Reports:

> "The royal proclamation of 1763 was declaratory and confirmatory of the aboriginal rights and applied to Vancouver Island. For the British, the proclamation of 1763 dealt with a new situation arising from the war with the French in North America, in which Indians to a greater or less degree took an active part on both sides, and, incidentally, from the Treaty of Paris of

> 1763 which concluded that war. The problem which then faced the British was the management of a continent by a power, the interests of which had theretofore been confined to the sea coast. As exploration advanced, the natives of the interior and western reaches must be pacified, trade promoted, sovereignty exercised and justice administered even if only in a general way, until such time as British settlement could be established. It was a situation which was to face the Imperial power in varying degree and in various parts of the continent until almost the close of the 19th century. In the circumstances, it was vital that aboriginal rights be declared and the policy pertaining thereto defined. This was the purpose and the substance of the royal proclamation of 1763. The principles there laid down continued to be a charter of Indian rights through the succeeding years to the present time -- recognized in the various treaties with the United States in which Indian rights were involved and in successive land treaties made between the crown and the Hudson's Bay Company with the Indians."

The Royal proclamation has been recognized for many years as having the effect of a statute, and so far as the rights of the Indians are concerned, it has never been repealed. (see <u>Rex v. McMaster</u> (1926) Ex CR.

The effect of the proclamation is that it not only gave recognition to the Indians as a separate nation, but it also was an acknowledgement of the protectorate obligation the Crown felt that it owed toward the Indians. It furthermore recognized that the lands possessed by the Indians anywhere in North America are reserved to them unless and until ceded to the Crown. At the time of the Royal Proclamation, the separate territory of Vancouver Island was not even known to exist.

The colony of Vancouver Island was granted to the Hudson's Bay Company by a charter dated January 13th, 1849. Again, this charter recognizes the Indians as a separate and distinct nation and gives, as one of the reasons for the colonization of the Island, "the protection and welfare of the native Indians residing on Vancouver Island." Sir James Douglas was appointed Governor of this new colony, and granted Letters Patent by the monarch on May 16th, 1851. These detail his power and authority to colonize Vancouver Island. In it he is given, "the power and authority to make such laws and ordinances as may from time to time be required for the 'peace, order and good government of the Colony'".

Prior to the enactment by the British Parliament of the Act authorizing the colonization of Vancouver Island by Sir James Douglas, his immediate superior, E.B. Lytton, the Colonial Secretary in London wrote to Governor Douglas on July 31, 1850, outlining in some detail the policies he hoped and expected the Governor would carry into effect in the process of colonization. In particular, Governor Douglas was enjoined:

> "to consider the best and most humane means of dealing with the Native Indians. The feelings of this country (he goes on to say) would be strongly opposed to the adoption of any arbitrary or oppressive measures toward them. I am reluctant (he adds) at this distance and with the imperfect means of knowledge I possess, to offer as yet any suggestion as to the prevention of affrays between the Indians and the immigrants. This question is of such a local character that it must be solved by your knowledge and experience and I commit it to you in the full persuasion that you will pay every regard to the interests of the natives which enlightened humanity can suggest. Let me not omit to observe that it should be an invariable condition in all bargains or treaties with the natives for the cessation of

lands possessed by them that subsistence should be supplied to them in some other shape, and above all that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of 'civilization among the natives.'"

A similar view is expressed almost a year later, on April 11th, 1859, in a letter from Lord Carnarvon, Assistant Colonial Secretary to Governor Douglas. He says, in part:

"I am glad to perceive that you have directed the attention of the House to that interesting and important subject, the relations of Her Majesty's Government and of the Colony to the Indian race. Proofs are unhappily still too frequent of the neglect which Indians experience when the white man obtains possession of their country, and their claims to consideration are forgotten at the moment when equity most demands that the hand of the protector should be extended to help them. In the case of the Indians of Vancouver Island and British Columbia, Her Majesty's Government earnestly wish that when the advancing requirements of colonization preys upon the lands occupied by members of that race, measures of liberality and justice be adopted for compensating them for the surrender of the Territory which they have been taught to regard as their own."

Some two years later, on March 25, 1861, Governor Douglas in a letter forwarding a petition from the Legislature to the Colonial Secretary in London asking for more money to pay the Indians for their land, had this to say:

"as the native Indian population on Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country."

Sir James Douglas negotiated some 14 treaties on Vancouver Island and they have become to be known as the "Douglas Treaties."

Eleven of these were made at Fort Victoria, two at Fort Rupert, and one at Nanaimo. These were negotiated between 1850 and 1875. Apart from the description of the lands surrendered by the tribes to the Hudson's Bay Company, and the amount of money paid, each treaty contains the same conditions, namely:

> "the condition of, or understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, and for the use of our children, and for those who follow after us; and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people forever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."

In the case of the Nanaimo Indian Band, the land surrendered and conveyed was "the country extending from Commercial Inlet twelve miles up the Nanaimo River."

To compare the wording in the Douglas Treaties quoted aforesaid, there has been entered in evidence, Treaty #8, made on June 21, 1899. It was made as to land in the North Easterly section of B.C. This Treaty, it should be borne in mind, was made almost twenty-five years after the Douglas Treaties. In this treaty, Her Majesty agreed with "the Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered, 'subject to such regulations as may from time to time be made by the Government of the Country.'"

There was a significant paragraph in the report sent by the Indian Treaty Commissioner to the Superintendent of Indian Affairs

in Ottawa on September 22, 1899. In this report, they outline in some considerable detail, the negotiations they carried on with the Indians before the treaties were signed:

> "Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it."

The chief significance of this Treaty is, of course, that there has now been inserted, twenty-five years after the Douglas Treaties had been concluded, the words "subject to such regulations as may from time to time be made by the Government." No such reservation is contained in the Douglas Treaties, or the one negotiated with the Nanaimo Indians.

In contrast, how did the Americans deal with their natives? The Treaty concluded in 1855 in Whatcom County in the State of Washington was entered as an exhibit in this case. It was quite different than the British Columbia treaties insofar as fishing is concerned. Article 111 says, in part:

> "the right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all the citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the

> privilege of hunting, gathering roots and berries and pasturing their horses in open and unclaimed lands;"

Governor Douglas, in a letter dated May 16, 1850, wrote to Archibald Barclay, the Hudson's Bay Company secretary in London. In this letter, he advises that he has informed the Indians on the Island . . .

> "that they would not be disturbed in the possession of their village sites and enclosed fields, which are of small extent, and they were at liberty to hunt over the unoccupied lands, and to carry on their fisheries with the same freedom as when they were the sole occupants of the country"

Finally, we have in evidence an extract from the Journals of the Legislature of Vancouver Island for Tuesday, February 8, 1859. An enquiry had been made by one of the members to Governor Douglas as to whether certain Indians could be removed from a piece of land inside Victoria Harbour. Governor Douglas, in his reply, referred to the reservations set aside for the Indians, and also described the rights reserved to them in the following language:

> "They (the Indians) were to be protected in their original right of fishing in the Coasts and in the Bays of the Colony, and of hunting over all unoccupied lands;"

The expert called by Counsel for the defence, Mr. David Henry Gottesman, who has done considerable work and research on historical land material and on the Douglas Treaties, expressed his opinion that the fishing rights enjoyed by the Nanaimo Indian Band were unrestricted and that they have the right to fish as they did prior to the conclusion of the Treaty with Governor Douglas.

I also heard viva voce evidence from members of the Band. One of the elders described their system of government and explained that the traditions, customs and usages of the tribe have been handed down orally from father to child. That their oral traditions have always maintained that they have the right to fish in the area of the Nanaimo River because this was within the area surrendered by their treaty. They also fished in the salt water in the vicinity of Nanaimo, such as Nanoose Bay, Five Fingers and Snake Island. The methods of fishing have changed little from the olden days. With the advent of modern materials, cotton and hemp have given away to nylon, etc. The Nanaimo Band consists of four different reserves, all clustered around the Nanaimo River because it has always been considered one of the greatest and abundant salmon rivers in the Province. More than fifty percent of the diet of the Indians in the Band consists of fish, even to this day. A good percentage of the Band rely upon social assistance as their only source of income, and to be able to fish and hunt for food is very important to maintain their diet. In addition, they also find that fish occupies an important part of their cultural activities, such as the potlach. We also learned through one of the elders that they can now obtain from the Fisheries Department, a permit to catch fish for food during certain months of the year. In addition, a seiner is made available to allow them to obtain more fish for food if they wish to avail themselves to it. The Band Assistant Manager told us that there were six hundred and forty-five members in the Band, of which four hundred and nine actually live on reserves in the Nanaimo area.

There is no question in my mind that the Douglas Treaties, of which the Treaty in the case at bar is one, takes precedence over

Provincial Laws and Regulations. The principle was first established in the White and Bob case quoted earlier. It has also been enunciated most recently in our British Columbia Court of Appeal in the case of Regina v. Bartleman (1984) 13CCC (3d) 488. The chief obstacle to be surmounted by the Accused is that, on the basis of jurisprudence thus far, it would appear that the weight of judicial opinion has favoured the interpretation that treaties may be abrogated, or at least made subject to the terms of any Federal Statutes or Regulations made by authority of an Act of the Parliament of Canada. Several cases dealing with the "Migratory Birds Convention Act", an Act of the latter category have decided that it has precedence over Treaty rights possessed by Indians in the territory affected.

Section 88 of the Indian Act provides:

> "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any Province are applicable to and in respect of Indians in the Province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

The Treaty that we are dealing with in this case, is a treaty within the meaning of Section 88 quoted above. (see White & Bob (1964) 50 DLR (2d) 613.) For some period of time after the above section was enacted in 1951, there was a body of opinion that the words, "all laws of general application from time to time in force in any Province" could include acts of the Parliament of Canada. Indeed, Professor (as he then was) K. Lysyk, in an article entitled "Indian Hunting Rights" (1966) 2 UBC Law Rev. 401 said of that section at pg. 409:

> "It may be noted that by the terms of Section 87 (as it then was) the laws which are stated to be subject to the terms of any treaty are described not as 'all provincial laws of general application', but as 'all laws of general application from time to time in force in any province.'"

The words actually used in the section are capable of being construed to include more than just provincial laws in the sense of enactments of the provincial legislature since entry into Confederatio . . . Further, until very recently, it was arguable that the phrase, "All laws . . . in force in any Province" should be read so as to include federal laws in force in the Province, . . i.e., enactments of the Parliament of Canada."

The argument has now been put to rest as a result of the decision of the Supreme Court of Canada in Regina v. George (1966) SCR 267. In that case, Mr. Justice Martland, speaking for the majority of the Court held that this section was not intended to be a declaration of the paramouncy of treaties over Federal legislation. He was of the view that the reference to treaties was incorporated in a section, the purpose of which was to make provincial laws applicable to Indians so as to preclud any interference with rights under treaties resulting from the impact of provincial legislation. This decision has been the subject of some controversy and criticism. (see Annotation entitled, "the Unilateral Abrogation of Indian and Eskimo Treaty Rights" (1966) 47 CR 395 by C.A.G. Palmer). The dissenting judgment of Mr. Justice Cartwright in this case has also been quoted with approval by many scholars who disagree with the conclusions reached by the majority. At page 393 of the 47 CR report, he reaches these conclusions:

> "We should, I think, endeavour to construe the treaty. . . and those Acts of Parliament which bear upon the question before us in such a

> manner that the honour of the Sovereign may be upheld and Parliament not subject to the reproach of having taken away by unilateral action and without consideration, the rights solemnly assured to the Indians and their posterity by treaty. Johnson, J.A. with obvious regret, felt bound to hold that Parliament had taken away those rights, but I am now satisfied that on its true construction, section 87 of the Indian Act shews that Parliament was careful to preserve them. At the risk of repetition, I think it is clear that the effect of section 87 is two-fold. It makes Indians subject to the laws of general application in force in the Province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in the case of conflict between the provisions of the law and the terms of the treaty, the latter shall prevail."

The cases of Regina v. Cooper, George and George, decided in the British Columbia Supreme Court by Mr. Justice Brown in 1968, and reported in (1969) 1 DLR (3d) 113, involved offences committed against the Fisheries Act, the same statute as we are considering in the case at bar. The Treaty involved was one of the Douglas Treaties concluded with the Sooke Tribe on Vancouver Island. It is identical to the Treaty in this case. Mr. Justice Brown felt bound to follow the majority judgment of the Supreme Court of Canada in the George case, and held that the Fisheries Act and Regulations may impinge on treaty rights. He noted, with regret, that he was unable to distinguish that case merely on the ground that it dealt with the Migratory Birds Convention Act and Regulatio

Counsel for the Accused, while recognizing that the foregoing cases clearly seem to establish that Federal legislation can cut down or modify treaty rights, argue that there has, as yet, been no clear decision deciding under what circumstances can such a curtailment take place.

Also since the enactment of the Constitution Act 1982,

which recognizes and affirms existing treaty and aboriginal rights, questions are now arising as to two matters, viz. (a) what is the definition of treaty rights? Are they rights which are, by their very definition, subject to Federal legislation? and (b) If Federal legislation had the capacity prior to 1982 of curtailing treaty rights, which treaty rights exist now and are protected by the Charter?

The Constitution Act 1982 was enacted into law on April 27, 1982. It consists of several parts. Part I is the Charter of Rights and Freedoms which provides:

> Section 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claim settlement.

Part II of the Act deals with the rights of the Aboriginal Peoples of Canada

> Section 35(1): The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2): In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Part VII of the Act contains Section 52, which provides:

> Section 52(1): The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

Counsel for the Accused relies upon the case of Regina v. Hare and Debassige, a decision of His Honour Judge C.T. Murphy of the

District Court of Manitoulin pronounced on September 9, 1983, and reported at (1983) 8 CCC (3d) 541 as the correct way to analyze and determine the rights of the Accused in this case. This case has been decided since the enactment of the Constitution Act. There were involved in that case, two native Indians who were charged with breaches of the Ontario Fishing Regulations made pursuant to the Fisheries Act of Canada, as are the Accused in this case. The fish were taken on lands covered by the Manitoulin Treaty of 1862. This gave the Indians the same right to take fish over the area as the white settlers had. At the trial, the Judge held that the rights possessed by the Indians varied as the regulations changed so as to affect them as the white settler was affected.

His Honour Judge Murphy concluded that the Treaty of 1862 gave the forefathers of the Accused, and therefore the Accused as well, the right to take fish from the Lake by using a gill net. He then proceeded to determine whether or not that right had been extinguished or over-ridden by subsequent legislation. He considered the _George_ and _Sikyea cases_ and found that they established three things beyond a doubt:

(1) the opening words of section 88 of the Indian Act are not to be construed as a declaration of the paramountcy of treaties over federal legislation; nor do they make any legislation of the Parliament of Canada subject to the terms of any treaty;

(2) Parliament has the power to breach Indian treaties if it so wills;

(3) Parliament did, in fact, breach some hunting rights contained in Indian Treaties when it passed the Migratory Birds Convention Act and Regulations.

Judge Murphy distinguished both the _George_ and _Sikyea cases_

because his case did not involve the application of the opening words of Section 88 of the Indian Act or the Migratory Birds Convention Act. He, therefore, restricted his considerations to the second proposition, viz., Parliament has the power to breach Indian Treaties if it wishes. He thought that the two questions to be addressed were:

(a) by what means may such treaties be breached or the rights granted thereunder be abrogated or varied; and

(b) does the Fisheries Act and regulations passed thereunder comply with any such requirements?

Judge Murphy went on to consider how Parliament could exercise its right to abrogate or breach the Treaty of 1862.

He concluded that Indian Treaties have gained considerable stature since 1897 when Lord Watson said that they were nothing more than a personal obligation by the Governor of the old Province. He stated that while the majority judgment of Mr. Justice Martland in the George case found that Parliament did abrogate certain treaty rights by passing the Migratory Birds Convention Act and Regulations, he (Mr. Justice Martla did not deal with the observations of Chief Justice McRuer as set out in the dissenting Judgment of Cartwright, J. to the effect that if it is within the power of Parliament to abrogate the treaty right (a point which he left open and did not decide) that power could only be exercised by legislation expressly and directly extinguishing the right and that it certainly could not be extinguished by Order-in-Council.

Judge Murphy says at page 553:

> "that while there may have been some doubts in the minds of jurists regarding the extent and validity of the treaty rights of Indians as they were called upon to interpret them in earlier years, there can be no such doubt in the mind of anyone called upon to deal with these rights today in the light of section 35(1)

of the Constitution Act which, while not creating any new rights for the Indian people, recognizes and affirms existing rights.

In my view, those treaties should be treated with the same solemnity and seriousness as are treaties entered into with foreign sovereign states and as being as valid and binding as an Act of the Parliament of Canada. (In fact, s. 88 of the Indian Act in effect gives the treaties equal status with Acts of Parliament vis-a-vis Acts of the provincial Legislatures.) There is no doubt that Parliament can unilaterally abrogate any such treaty, just as it can unilaterally abrogate any treaty with a foreign country or repeal one of its own statutes. It is equally clear that Parliament can unilaterally vary any such treaty just as it can amend one of its own statutes.

However, it is my opinion that any abrogation, derogation or variance of treaty rights must be accomplished by legislation which is (a) clear and unequivocal in its terms; (b) gives some indication that Parliament was aware of the existence of the rights upon which it seeks to infringe; and (c) reflects an intention on the part of Parliament to exercise its power of abrogation, derogation or variation."

(b) Does the Fisheries Act and regulations made thereunder conform with the above requirements?

Judge Murphy was unable to find anything in the Fisheries Act or the Regulations which indicated to him that Parliament even remotely considered in any way the treaty right bestowed upon various bands of Native people in Canada. At the bottom of page 554, he says,

" There is nothing in the Act or regulations that indicates to me either that Parliament or the Governor in Council even recognized the existence of such treaty rights, much less that they intended to unilaterally abrogate or derogate from those rights when the Act was passed and amended or when the amending regulations were promulgated."

> "To illustrate, let us assume the Treaty of 1862 had been signed with the Government of the United States of America. I believe it highly unlikely that the Government of Canada could legally enact legislation which would have the effect of unilaterally derogating from or varying American fishing rights under such a treaty without specifically and unequivocally spelling out that intent in the relevant statute. When one considers the true meaning of the word "treaty" and the recognition that Indian treaties have been accorded in the Constitution Act, 1982, one would be hard pressed to hold that a treaty entered into by the representatives of the Government of Canada with representatives of Canada's native peoples should be considered less seriously and with less respect or concern than a treaty entered into with a foreign government."

Judge Murphy found that the Crown in his case had failed to satisfy the onus it had to satisfy him, beyond a reasonable doubt, that the fishing rights which he found had been given the forefathers of the Accused in the 1862 Treaty had been abrogated or varied by the Parliament of Canada.

In the result, Judge Murphy found that while the Accused, in this case, were violating the Fisheries Regulations at the time and place referred to in the Informations, they were exempted from these regulations by the rights and benefits conferred on them under the Treaty and aquitted the Accused.

As persuasive as the reasoning is in this case, I am unable to reach the conclusion as His Honour Judge Murphy did as to the binding effect of the case of Regina v Cooper et al decided by Mr. Justice Brown in the Supreme Court of British Columbia.

He did not feel constrained to follow this decision inasmuch as it was reached after considering the majority decision of the Supreme

Court of Canada in Regina v. George.

In my opinion, despite a strong inclination to be able to rule otherwise, I consider that I am bound by the case of Regina v Cooper et al because:

(a) It dealt with a treaty identical in form and content to the Nanaimo Treaty;

(b) It dealt with changes laid under the Regulations made pursuant to the Fisheries Act of Canada, as does the case at bar;

As to the effect of section 35(1) of the "Constitution Act 1982", the reasoning of Mr. Justice Gerein of the Saskatchewan Court of Queen's Bench in the case of Regina v. Eninew reported in (1983) 7 CCC (3d) 443 is persuasive. Although the case dealt with the "Migratory Birds Convention Act" and considered a treaty which in itself was subjec to such regulations as the Government might from time to time have passed, the grammatical analysis made of Section 35(1) therein,

> " To begin, the word 'existing' must relate to the entire phrase 'aboriginal and treaty rights' and not, as submitted on behalf of the appellant, only the word "aboriginal". Section 35 deals with the rights of the aboriginal peoples of Canada. The whole reason for the section is to safeguard certain rights. However, the section is not intended to safeguard any and all rights whatsoever of the aboriginal peoples but only certain rights, namely, aboriginal rights and treaty rights. The word 'rights', as used in the section is qualified by the word 'aboriginal' and 'treaty'. To divorce the word 'aboriginal' from the word 'rights' would bring about a nonsensical result. One would be left with the question -- aboriginal what? Thus, the words 'aboriginal and treaty rights' must be viewed as one phrase in which the prime word is 'rights' as qualified and described by the words 'aboriginal and treaty'. This being so, the word 'existing' must relate to the entire

> phrase as a whole. In fact, in my mind, the word 'existing' has reference to the word 'rights', albeit as qualified by the words 'aboriginal' and 'treaty'.
> What then is the effect of the word 'existing'? In my opinion, it circumscribes the rights of the aboriginal peoples of Canada. It limits the rights of those peoples to those rights which were in being or which were in actuality at the time when the Constitution Act, 1982 came into effect, namely, April 17, 1982. Were it to be otherwise, Parliament would have used the word 'original' or some like word or would have utilized some other device such as a date."

The Crown's final argument is based on the principle that the Fisheries Act and Regulations are enacted for the purpose of conservation and management of the fishery. That the need to conserve the fishery is obvious and to limit the right of even Indians to fish whenever they wish without restriction makes no sense.

Furthermore, as I understand their argument, the limitations and prohibitions in the Fisheries Act and Regulations come under the subject clause of Section 1 of the Charter of Rights and Freedoms as "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".

In conclusion, and with a large measure of regret and reluctance, I have concluded that the defence put forward by the Accused cannot succeed.

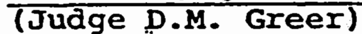
While it is quite evident that the treaty rights given by the Douglas Treaties are the widest of any which have been considered

during the arguments in this case, the inevitable conclusion is that based on the jurisprudence thus far, which is binding authority upon this Court, those rights may be abrogated by Parliament.

If there is to be any change in this rule of law, in my view, Parliament must do so. Perhaps one might hope it will do so now that further constitutional conferences seem to be in the offing.

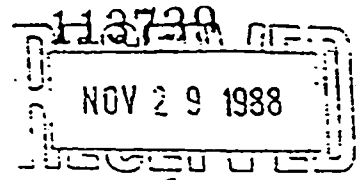
In the result, I must find each of the Accused guilty as charged.

Judgment accordingly.



January 30, 1985

(Judge D.M. Greer)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Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DAVID PAUL, CHIEF OF THE TSARTLIP INDIAN BAND, LOUIS CLAXTON, CHIEF OF THE TSAWOUT INDIAN BAND, TOM HARRY, CHIEF OF THE MALAHAT INDIAN BAND, ED MITCHELL, CHIEF OF THE PAUQUACHIN INDIAN BAND, DAVID BILL, CHIEF OF THE TSEYCUM INDIAN BAND, each on their own behalf and on behalf of each of the members of their respective bands

PLAINTIFFS

AND:

PACIFIC SALMON FOUNDATION, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF FISHERIES AND OCEANS

DEFENDANTS

AFFIDAVIT

I, BARBARA LANE, Anthropologist, of 4151 San Mateo Place, in the City of Victoria, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am an Anthropologist specializing in the ethnography and ethnohistory of native people of the Northwest Coast. Now produced and shown to me and marked Exhibit "A" to this my Affidavit is a photocopy of my curriculum vitae which sets out a partial list of my academic credentials, experience and publications.

2. I have given expert opinion evidence in the Courts of British Columbia, Alaska, Washington State and elsewhere on anthropological questions concerning the histories and cultures of some of the native peoples of Western North America. I have studied the culture and history of the people comprising the Indian Bands which are the Plaintiffs in this action.

3. I am familiar with the Saanich people inhabiting the Saanich Peninsula area of Vancouver Island. I have read the available published and unpublished anthropological literature concerning these people, studied the archeological and historical records, and I have done ethnographic field work with members of the Tseycum, Pauquachin, Tsartlip, Tsawout and Malahat Bands. The following are my opinions based upon study of the anthropological evidence concerning these people. My opinions are based upon the best evidence available. Within the professional anthropological community of which I am a part, I believe my opinions given here would generally be accepted.

4. It is my opinion that the ancestors of the people known as the Tseycum, Pauquachin, Tsartlip, Tsawout and Malahat Bands were known as the Saanich Tribe and that they traditionally occupied villages at bays around Saanich Peninsula and Saanich Inlet in addition to villages at bays and inlets on Saltspring Island and other Gulf Islands. They were coastal people whose living sites were located on the shores of the salt water. In contrast to many of the neighboring coastal Indians who lived along major river systems, the Saanich had a marine rather than a riverine orientation. Salt water fisheries were the basis of Saanich economy in the

mid-nineteenth century and had been for a very long time. The waters at the mouth of the Goldstream River, Saanich Inlet, and Satellite Channel are all within territory traditionally occupied by the Saanich people.

5. The Goldstream River drains into the south end of the Saanich Inlet. The Saanich Inlet separates the Saanich Peninsula from the main body of Vancouver Island. Satellite Channel separates the north tip of Saanich Peninsula from the south end of Saltspring Island. Salmon returning to the Goldstream River pass through Satellite Channel and Saanich Inlet to reach Goldstream.

6. The Saanich people had villages and camps on both sides of Saanich Inlet, on both sides of Satellite Channel, and at Goldstream itself. Goldstream is the only salmon stream of any size in the Saanich area. It also provided the major spawning area for Chum salmon in Saanich territory. The Saanich people depended upon the fall Chum salmon runs to Goldstream for a major portion of their winter food supply. They took these fish at various places in the salt water along their migration route.

7. In 1851 James Douglas, then Chief Factor of the Hudson's Bay Company on Vancouver Island, was appointed Governor of the Colony of Vancouver Island. On February 7 and 11 1852, James Douglas concluded two Treaties with the representatives of the Saanich Tribe in the North and South Saanich Treaties. The signatories of the Treaties are the ancestors of the Tseycum, Pauquachin, Tsartlip, Tsawout and Malahat Indian Bands. Now produced and shown to me and marked

Exhibit "B" to this my Affidavit is a printed copy of the texts of the North and South Saanich Treaties. Now produced and shown to me and marked Exhibit "C" to this my Affidavit is a copy of the handwritten text of the North Saanich Treaty.

8. It is my opinion, based upon Saanich ethnohistory and ethnography, that Chum salmon heading for Goldstream were taken by Saanich fishermen in the Satellite Channel, Saanich Inlet and Goldstream area prior to the mid-nineteenth century.

9. The Goldstream Chum salmon fishery was of particular importance to the Saanich people. Goldstream was the major Chum salmon stream for all these people. Salmon was, and still is, a staple food used in daily consumption and a feast food served at religious ceremonies which were and still are held throughout the winter season. Enormous quantities of salmon were preserved to provide food during the winter and early spring and also to provide food for the hundreds of guests invited to participate in winter ceremonies. Chum salmon were the preferred fish for smoke-drying because they had better keeping qualities than other salmon.

10. The superior keeping qualities of Chum salmon and the fact that Goldstream was a major Chum spawning ground in Saanich territory combined to make the Goldstream Chum salmon fishery a particularly important fishery for all the Saanich people.

11. It is my opinion that in 1852 there were no non-Indians fishing in the waters set out in paragraph 6 herein.

12. I base the foregoing opinion on the lack of non-Indian settlement in the Saanich area up to 1852. The few settlers who were in the area north of Victoria were attempting to farm. None of the settlers at that date were attempting to fish. Contemporaneous written documents report that the Indians were the sole fishermen in the area in 1852. For example, in 1857 a Parliamentary Select Committee heard testimony relating to the activities of the Hudson's Bay Company on Vancouver Island. Mr. John Miles, who had been in Vancouver Island as an employee of the Hudson's Bay Company, testified that he had been on Vancouver Island a fortnight in 1852 and six months in 1854. He further testified that he had been about fifteen miles north of Victoria and that he had visited Saanich Inlet. Mr. Miles was asked about the fisheries. The question and his response were as follows:

> "4658. With regard to the fisheries, do you think that they are likely to be very productive? — They will be in course of time, when you begin to know how to fish there; but at present they are not much used, excepting the salmon and herring round the island by the Indians themselves."

13. Now produced and shown to me and marked Exhibit "D" to this my Affidavit is an extract from the Parliamentary Select Committee dated 9 June 1857. Exhibit "D" contains the testimony of Mr. Miles quoted above.

14. Another witness before the Select Committee was The Honourable C.W.W. Fitzwilliam, M.P., who had visited the Saanich area in 1853. This witness also testified that the Indians were the only fishermen at the time of his visit and that no non-Indians had entered into the fisheries at that time. Portions of his testimony are set out in questions 2259, 2260 and 2366 in paragraph 17 below.

15. It is my opinion that the Saanich Indians were fishing as commercial fishermen in 1852 and had been doing so for a long time prior to that date.

16. The facts upon which I base the foregoing opinion are as follows. Fish, cured salmon in particular, was a commodity which was widely traded among Indian groups prior to the arrival of non-Indians. After non-Indians arrived, this commerce was expanded to include sale of fish to the Hudson's Bay Company, to settlers, and others who exported the fish. Fort Langley was established by the Hudson's Bay Company in 1827. Initially salmon and other fish were purchased from the Indians to provision the fort and the fur brigades, but soon an export trade developed and the Company shipped salted fish in barrels to Hawaii (then the Sandwich Islands) and elsewhere. Large amounts of salmon were purchased from the Indians for shipment overseas. The Fort Langley Journal of 1827 and 1828 mentions Saanich Indians coming from their sockeye fishery at Point Roberts to trade at Fort Langley.

17. Fish were exported from Fort Victoria in the early 1850s. Again, we find contemporaneous documentation in the testimony given in 1857 before the

Select Committee on the Hudson's Bay Company. The Hon. C.W.W. Fitzwilliam, Member of Parliament and a member of the Committee, testified that he visited Vancouver Island in March and April of 1853. He noted that he had been up the east coast of the Island as far as Nanaimo and along the coast about ten miles west of Victoria. The Saanich territory lies between Victoria and Nanaimo. He was asked about the fisheries.

> 2259. What opinion have you of that country with regard to its resources, as to fisheries? — Nobody who has not seen the enormous quantity of fish can possibly credit the value and extent of the fisheries. I do not know the number of barrels, but many thousand barrels of salt salmon are sent annually from Victoria to the Hudson's Bay Company's depot at the Sandwich Islands.
>
> 2260. Do the neighbouring seas abound with other fish, besides salmon? — Herring are very numerous indeed. To give some idea of how numerous they are, the method of catching herrings is, that two Indians go in a canoe, one paddling in the stern and the other standing in the bow. The Indian in the bow has a lath of wood about eight or nine feet long, studded with nails. He scoops down into the water and impales the fish on those nails. In two or three hours they get a fair load in the canoe.
>
> . . .
>
> 2366. Is there any speculation in those fisheries of which you spoke, further than the mere fishing in canoes; is there any appearance of companies being formed, for the purpose of speculating in these fisheries? — None whatever. The Hudson's Bay Company traded the fish from the Indians, and annually sent down a great deal of salt fish to their depot at the Sandwich Islands.

13. Now produced and shown to me and marked Exhibit "E" to this my Affidavit is an extract from the Parliamentary Select Committee dated 5 March 1857. Exhibit "E" contains the testimony of Mr. Fitzwilliam.

19. These passages quoted from Mr. Miles and Mr. Fitzwilliam are accounts based on first hand observation by men who had visited the Saanich area. Mr. Fitzwilliam had been there in 1853 about a year subsequent to the negotiation of the North Saanich and South Saanich treaties. Mr. Miles visited Saanich in 1854.

20. Both Mr. Miles and Mr. Fitzwilliam reported that the Indians were the only ones engaged in the fisheries and that they sold great quantities of fish to the Hudson's Bay Company. We know that the Saanich Indians had been selling fish to the Hudson's Bay Company at Fort Langley at least as early as 1827 or 1828.

21. It is my opinion, based upon the evidence before the Select Committee in 1857, that Indian fishermen availed themselves of new material to improve their traditional fishing devices or to make their construction easier. For example, it is interesting to note in the description of herring fishing that the Indians were using nails to impale the fish on the rake in place of the sharpened wooden teeth implanted in the shaft of the rake formerly.

22. The foregoing opinions and supporting evidence have been focussed primarily upon the Goldstream Chum fishery as of 1852. What has been said above regarding the importance to the Saanich people of the Goldstream Chum salmon fishery applies as well to the time intervening between 1852 and the present. I also note that in 1877 the joint Federal-Provincial Indian Reserve Commission visited the Saanich District and reported on the importance of this fishery to the Saanich people.

23. Gilbert Malcolm Sproat, the joint commissioner representing both governments, addressed an official report to the Minister of the Interior, dated 29 March 1877. In that report the following passage appears:

Saanich

> There were few questions between white men and Indians in this district. An unsurveyed and at present unoccupied pre-emption at Goldstream appears to be close to the old fishing station of the Saanich Indians, near the mouth of the Goldstream, which is the only salmon river in the Inlet. Such a spot could not be legally pre-empted. The Indians said that the pre-emptor some years attempted to prevent them from fishing. The Commissioners marked off a suitable area for the Indians on the bank of the stream, and told them that nobody could interfere with their fishing rights.

The above quoted report refers to the fishing station of the Saanich Indians near the mouth of the Goldstream River as the "old fishing station". It also supports my opinion that the Commission recognized the importance of the Goldstream fishery to the Saanich people and assured the Indians that the rights to this fishery would be protected. Now produced and shown to me and marked Exhibit "F" is a copy of the handwritten report by Gilbert Sproat.

SWORN BEFORE ME at the City of Victoria, in the Province of British Columbia, this 25th day of October, 1988.

A Commissioner for taking Affidavits for British Columbia.

JOHN MULLIN
LAWYER
223 - 1930 ... STREET

BARBARA LANE

No. JOHN PAUL GAUTHIER Assistant District Administrator OCT 27 1988

IN THE FEDERAL COURT OF CANADA

TRIAL DIVISION

BETWEEN:

DAVID PAUL, CHIEF OF THE TSARTLIP INDIAN BAND, LOUIS CLAXTON, CHIEF OF THE TSAWOUT INDIAN BAND, TOM HARRY, CHIEF OF THE MALAHAT INDIAN BAND, ED MITCHELL, CHIEF OF THE PAUQUACHIN INDIAN BAND, DAVID BILL, CHIEF OF THE TSEYCUM INDIAN BAND, each on their own behalf and on behalf of each of the members of their respective bands

PLAINTIFFS

AND:

PACIFIC SALMON FOUNDATION, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF FISHERIES AND OCEANS

DEFENDANTS

AFFIDAVIT

I, BARBARA LANE, Anthropologist, of 4151 San Mateo Place, in the City of Victoria, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am an Anthropologist specializing in the ethnography and ethnohistory of native people of the Northwest Coast. Now produced and shown to me and marked Exhibit "A" to this my Affidavit is a photocopy of my curriculum vitae which sets out a partial list of my academic credentials, experience and publications.

2. I have given expert opinion evidence in the Courts of British Columbia, Alaska, Washington State and elsewhere on anthropological questions concerning the histories and cultures of some of the native peoples of Western North America. I have studied the culture and history of the people comprising the Indian Bands which are the Plaintiffs in this action.

3. I am familiar with the Saanich people inhabiting the Saanich Peninsula area of Vancouver Island. I have read the available published and unpublished anthropological literature concerning these people, studied the archeological and historical records, and I have done ethnographic field work with members of the Tseycum, Pauquachin, Tsartlip, Tsawout and Malahat Bands. The following are my opinions based upon study of the anthropological evidence concerning these people. My opinions are based upon the best evidence available. Within the professional anthropological community of which I am a part, I believe my opinions given here would generally be accepted.

4. It is my opinion that the ancestors of the people known as the Tseycum, Pauquachin, Tsartlip, Tsawout and Malahat Bands were known as the Saanich Tribe and that they traditionally occupied villages at bays around Saanich Peninsula and Saanich Inlet in addition to villages at bays and inlets on Saltspring Island and other Gulf Islands. They were coastal people whose living sites were located on the shores of the salt water. In contrast to many of the neighboring coastal Indians who lived along major river systems, the Saanich had a marine rather than a riverine orientation. Salt water fisheries were the basis of Saanich economy in the

mid-nineteenth century and had been for a very long time. The waters at the mouth of the Goldstream River, Saanich Inlet, and Satellite Channel are all within territory traditionally occupied by the Saanich people.

5. The Goldstream River drains into the south end of the Saanich Inlet. The Saanich Inlet separates the Saanich Peninsula from the main body of Vancouver Island. Satellite Channel separates the north tip of Saanich Peninsula from the south end of Saltspring Island. Salmon returning to the Goldstream River pass through Satellite Channel and Saanich Inlet to reach Goldstream.

6. The Saanich people had villages and camps on both sides of Saanich Inlet, on both sides of Satellite Channel, and at Goldstream itself. Goldstream is the only salmon stream of any size in the Saanich area. It also provided the major spawning area for Chum salmon in Saanich territory. The Saanich people depended upon the fall Chum salmon runs to Goldstream for a major portion of their winter food supply. They took these fish at various places in the salt water along their migration route.

7. In 1851 James Douglas, then Chief Factor of the Hudson's Bay Company on Vancouver Island, was appointed Governor of the Colony of Vancouver Island. On February 7 and 11 1852, James Douglas concluded two Treaties with the representatives of the Saanich Tribe in the North and South Saanich Treaties. The signatories of the Treaties are the ancestors of the Tseycum, Pauquachin, Tsartlip, Tsawout and Malahat Indian Bands. Now produced and shown to me and marked

Exhibit "B" to this my Affidavit is a printed copy of the texts of the North and South Saanich Treaties. Now produced and shown to me and marked Exhibit "C" to this my Affidavit is a copy of the handwritten text of the North Saanich Treaty.

8. It is my opinion, based upon Saanich ethnohistory and ethnography, that Chum salmon heading for Goldstream were taken by Saanich fishermen in the Satellite Channel, Saanich Inlet and Goldstream area prior to the mid-nineteenth century.

9. The Goldstream Chum salmon fishery was of particular importance to the Saanich people. Goldstream was the major Chum salmon stream for all these people. Salmon was, and still is, a staple food used in daily consumption and a feast food served at religious ceremonies which were and still are held throughout the winter season. Enormous quantities of salmon were preserved to provide food during the winter and early spring and also to provide food for the hundreds of guests invited to participate in winter ceremonies. Chum salmon were the preferred fish for smoke-drying because they had better keeping qualities than other salmon.

10. The superior keeping qualities of Chum salmon and the fact that Goldstream was a major Chum spawning ground in Saanich territory combined to make the Goldstream Chum salmon fishery a particularly important fishery for all the Saanich people.

11. It is my opinion that in 1852 there were no non-Indians fishing in the waters set out in paragraph 6 herein.

12. I base the foregoing opinion on the lack of non-Indian settlement in the Saanich area up to 1852. The few settlers who were in the area north of Victoria were attempting to farm. None of the settlers at that date were attempting to fish. Contemporaneous written documents report that the Indians were the sole fishermen in the area in 1852. For example, in 1857 a Parliamentary Select Committee heard testimony relating to the activities of the Hudson's Bay Company on Vancouver Island. Mr. John Miles, who had been in Vancouver Island as an employee of the Hudson's Bay Company, testified that he had been on Vancouver Island a fortnight in 1852 and six months in 1854. He further testified that he had been about fifteen miles north of Victoria and that he had visited Saanich Inlet. Mr. Miles was asked about the fisheries. The question and his response were as follows:

> "4658. With regard to the fisheries, do you think that they are likely to be very productive? — They will be in course of time, when you begin to know how to fish there; but at present they are not much used, excepting the salmon and herring round the island by the Indians themselves."

13. Now produced and shown to me and marked Exhibit "D" to this my Affidavit is an extract from the Parliamentary Select Committee dated 9 June 1857. Exhibit "D" contains the testimony of Mr. Miles quoted above.

14. Another witness before the Select Committee was The Honourable C.W.W. Fitzwilliam, M.P., who had visited the Saanich area in 1853. This witness also testified that the Indians were the only fishermen at the time of his visit and that no non-Indians had entered into the fisheries at that time. Portions of his testimony are set out in questions 2259, 2260 and 2366 in paragraph 17 below.

15. It is my opinion that the Saanich Indians were fishing as commercial fishermen in 1852 and had been doing so for a long time prior to that date.

16. The facts upon which I base the foregoing opinion are as follows. Fish, cured salmon in particular, was a commodity which was widely traded among Indian groups prior to the arrival of non-Indians. After non-Indians arrived, this commerce was expanded to include sale of fish to the Hudson's Bay Company, to settlers, and others who exported the fish. Fort Langley was established by the Hudson's Bay Company in 1827. Initially salmon and other fish were purchased from the Indians to provision the fort and the fur brigades, but soon an export trade developed and the Company shipped salted fish in barrels to Hawaii (then the Sandwich Islands) and elsewhere. Large amounts of salmon were purchased from the Indians for shipment overseas. The Fort Langley Journal of 1827 and 1828 mentions Saanich Indians coming from their sockeye fishery at Point Roberts to trade at Fort Langley.

17. Fish were exported from Fort Victoria in the early 1850s. Again, we find contemporaneous documentation in the testimony given in 1857 before the

Select Committee on the Hudson's Bay Company. The Hon. C.W.W. Fitzwilliam, Member of Parliament and a member of the Committee, testified that he visited Vancouver Island in March and April of 1853. He noted that he had been up the east coast of the Island as far as Nanaimo and along the coast about ten miles west of Victoria. The Saanich territory lies between Victoria and Nanaimo. He was asked about the fisheries.

> 2259. What opinion have you of that country with regard to its resources, as to fisheries? — Nobody who has not seen the enormous quantity of fish can possibly credit the value and extent of the fisheries. I do not know the number of barrels, but many thousand barrels of salt salmon are sent annually from Victoria to the Hudson's Bay Company's depot at the Sandwich Islands.
>
> 2260. Do the neighbouring seas abound with other fish, besides salmon? — Herring are very numerous indeed. To give some idea of how numerous they are, the method of catching herrings is, that two Indians go in a canoe, one paddling in the stern and the other standing in the bow. The Indian in the bow has a lath of wood about eight or nine feet long, studded with nails. He scoops down into the water and impales the fish on those nails. In two or three hours they get a fair load in the canoe.
>
> . . .
>
> 2366. Is there any speculation in those fisheries of which you spoke, further than the mere fishing in canoes; is there any appearance of companies being formed, for the purpose of speculating in these fisheries? — None whatever. The Hudson's Bay Company traded the fish from the Indians, and annually sent down a great deal of salt fish to their depot at the Sandwich Islands.

18. Now produced and shown to me and marked Exhibit "E" to this my Affidavit is an extract from the Parliamentary Select Committee dated 5 March 1857. Exhibit "E" contains the testimony of Mr. Fitzwilliam.

19. These passages quoted from Mr. Miles and Mr. Fitzwilliam are accounts based on first hand observation by men who had visited the Saanich area. Mr. Fitzwilliam had been there in 1853 about a year subsequent to the negotiation of the North Saanich and South Saanich treaties. Mr. Miles visited Saanich in 1854.

20. Both Mr. Miles and Mr. Fitzwilliam reported that the Indians were the only ones engaged in the fisheries and that they sold great quantities of fish to the Hudson's Bay Company. We know that the Saanich Indians had been selling fish to the Hudson's Bay Company at Fort Langley at least as early as 1827 or 1828.

21. It is my opinion, based upon the evidence before the Select Committee in 1857, that Indian fishermen availed themselves of new material to improve their traditional fishing devices or to make their construction easier. For example, it is interesting to note in the description of herring fishing that the Indians were using nails to impale the fish on the rake in place of the sharpened wooden teeth implanted in the shaft of the rake formerly.

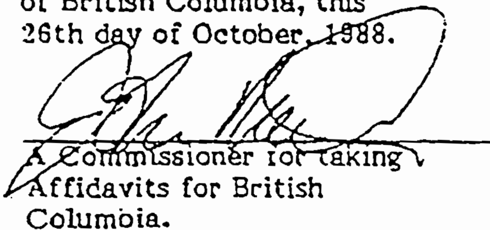
22. The foregoing opinions and supporting evidence have been focussed primarily upon the Goldstream Chum fishery as of 1852. What has been said above regarding the importance to the Saanich people of the Goldstream Chum salmon fishery applies as well to the time intervening between 1852 and the present. I also note that in 1877 the joint Federal-Provincial Indian Reserve Commission visited the Saanich District and reported on the importance of this fishery to the Saanich people.

23. Gilbert Malcolm Sproat, the joint commissioner representing both governments, addressed an official report to the Minister of the Interior, dated 29 March 1877. In that report the following passage appears:

> Saanich
>
> There were few questions between white men and Indians in this district. An unsurveyed and at present unoccupied pre-emption at Goldstream appears to be close to the old fishing station of the Saanich Indians, near the mouth of the Goldstream, which is the only salmon river in the Inlet. Such a spot could not be legally pre-empted. The Indians said that the pre-emptor some years attempted to prevent them from fishing. The Commissioners marked off a suitable area for the Indians on the bank of the stream, and told them that nobody could interfere with their fishing rights.

The above quoted report refers to the fishing station of the Saanich Indians near the mouth of the Goldstream River as the "old fishing station". It also supports my opinion that the Commission recognized the importance of the Goldstream fishery to the Saanich people and assured the Indians that the rights to this fishery would be protected. Now produced and shown to me and marked Exhibit "F" is a copy of the handwritten report by Gilbert Sproat.

SWORN BEFORE ME at the City)
of Victoria, in the Province)
of British Columbia, this)
26th day of October, 1988.)



BARBARA LANE

A Commissioner for taking Affidavits for British Columbia.

JOHN MULLIN
LAWYER
223 - 3930 SHELBOURNE STREET

EXHIBIT "A"

This is Exhibit A referred to in the affidavit of Barbara Lane sworn before me this 26 October 1988

A Commissioner for taking Affidavits in British Columbia

CURRICULUM VITAE

BARBARA LANE

CONSULTING ANTHROPOLOGIST

Address

4151 San Mateo Place, Victoria, B.C., Canada V8N 2J9
(604) 477-4952

Academic Training

1946	A.B. (Anthropology)	University of Michigan
1948	M.A. (Anthropology)	University of Michigan
1953	Ph.D. (Anthropology)	University of Washington
1953-54	Postdoctoral Study	Australian National University

Doctoral Dissertation

An analytic and comparative study of some aspects of Northwest Coast Indian Religion. University of Washington, Seattle, Washington. 1953.

Ethnographic Field Research

Coast Salish Indians
Cowichan and Saanich of Vancouver Island 1948-52, 1963—.

Dene Indians
Chilcotin of west central British Columbia 1950.

India Tribal
Hill Saora of Orissa, India 1954.

Melanesians
Central and Northern New Hebrides (now Vanuatu) 1953-54, 1957-58.

Faculty Positions

1950-51	University of Washington
1956-57	University of Hawaii
1963-64	University of Pittsburgh
1964-65, 1969	University of British Columbia
1968, 1969-70	University of Victoria
1972-73	Western Washington State University (Fairhaven College)

1975	University of Washington (American Indian Studies Program)
1981-88	University of Washington (American Indian Studies Program and Department of Anthropology)

Administrative and Research Posts

1955-56	Research Associate. Far Eastern and Russian Institute, University of Washington.
1957-59	Research Fellow, Bernice P. Bishop Museum, Honolulu.
1961-63	Associate Editor, Ethnology, an international journal of anthropology.
1967	Co-Director, Ethnographic Field Training Program for Graduate Students in Anthropology, U.S. National Science Foundation.
1971-72	Curriculum Development Specialist, Indian Association of Alberta.
1973-74	Research Co-ordinator, Land Claims Centre, Union of British Columbia Indian Chiefs, Victoria, B.C.
1970-76	Board of Directors, Institute for the Development of Indian Law (Washington, D.C.)
1971—	Editorial Board. Northwest Coast volume, Handbook of American Indians. Smithsonian Institution.
1976-77	Director, Quinault Indian Bicentennial Project (History and Culture)
1978-79	Co-Director, Muckleshoot Indian Historical Research Training Program

Retained as Expert Witness (partial listing)

1968	Superior Court for King County (Wash.)	State v. Moses
1974	U.S. Federal Power Commission	White River Project
1974	U.S. Indian Claims Commission	Makah Tribe v. U.S.
1974	U.S. District Court (Washington)	U.S. v. Washington (I)
1975	Provincial Court of B.C. (Duncan)	Regina v. Jack, et al
1975	Quinault Tribal Court (Washington)	Quinault Tribe v. Long
1976	District Court of Alaska (Fairbanks)	Alaska v. Frank
1977	U.S. Federal Power Commission	Nisqually Power Project
1977	U.S. Court of Claims	Mitchell et al v. U.S.
1977	U.S. Federal Power Commission	Elwha Power Project
1977	U.S. District Court (Oregon)	Umatilla v. Alexander
1977	U.S. District Court (Washington)	U.S. v. Washington (II)
1979	Provincial Court of B.C. (Duncan)	Regina v. Bartleman/August

1979	Provincial Court of B.C. (Lillooet)	Regina v. Bradley Bob
1979	Provincial Court of B.C. (Victoria)	Regina v. Charlie/Jack
1980	U.S. Department of the Interior	U.S. v. Lincoln
1980	Provincial Court of B.C. (Lillooet)	Regina v. Adolph
1980	U.S. District Court (Washington)	Muckleshoot Tribe v. Transcanada Enterprises
1981	U.S. District Court (Washington)	Puyallup Tribe v. Port of Tacoma
1981	U.S. District Court (Washington)	Swinomish Indian Tribal Community & U.S. v. Burlington Northern Railroad & Transmountain Pipeline
1982	U.S. Federal Energy Regulatory Comm.	Kootenay Falls Project
1983	Provincial Court of B.C. (Duncan)	Regina v. Joe & Bill
1984	Provincial Court of B.C. (Kamloops)	Regina v. Adolph et al.
1985	Supreme Court of B.C. (Vancouver)	Martin et al. v. The Queen
1985	Supreme Court of B.C. (Vancouver)	Pasco et al. v. Canadian National Railway
1986	U.S. District Court (Washington)	Muckleshoot Tribe v. Puget Power
1986	Provincial Court of B.C. (Smithers)	Regina v. Williams
1987	U.S. District Court (Washington)	U.S. v. Aam
1987	Supreme Court of B.C. (Vancouver)	Delgamuukw v. The Queen
1987	Supreme Court of B.C. (Victoria)	Claxton v. Saanichton Marina & the Province of British Columbia

Publications (partial listing)

1956 "A Reinterpretation of the Anomalous Six-Section Marriage System of Ambrym, New Hebrides." Southwestern Journal of Anthropology, vol. 12 pp. 406-414.

1958 "The Evolution of Ambrym Kinship." Southwestern Journal of Anthropology, vol. 14 pp. 107-135. (with Robert B. Lane)

1959 "On the Development of Dakota-Iroquois and Crow-Omaha Kinship Terminologies." Southwestern Journal of Anthropology, vol. 15 pp. 254-265. (with Robert B. Lane)

1959 "Varieties of Cross-Cousin Marriage and Incest Taboos: Structure and Causality." In Essays in the Science of Culture, edited by Dole and Carneiro. Thomas Y. Crowell. New York, N.Y. pp. 254-265.

1961 "Structural Contrasts Between Symmetric and Asymmetric Marriage Systems: A Fallacy." Southwestern Journal of Anthropology, vol. 17, pp. 49-55.

1962 "Implicit Double Descent in Southeastern Australia and the Northeastern New Hebrides." Ethnology, vol. 1, pp. 46-52. (with R. B. Lane)

1962 "Jural Authority and Affinal Exchange." Southwestern Journal of Anthropology, vol. 18, pp. 184-197.

1965 "The Education of Indian Children." British Columbia School Trustee, vol. 21, pp. 6-10.

1966 "Public Health in British Columbia — Some Anthropological Reflections." Public Health News and Views, September, pp. 1-6.

1967 Review of "Indians of the North Pacific Coast" edited by Tom McFeat. Pacific Northwest Quarterly, vol. 58, p. 46.

1968 "Aspects of Contemporary Indian Culture with Emphasis on Implications for Teachers," (in The Indian Child and his Education). University of British Columbia. Vancouver, B.C., pp. 32-39.

1970 "The Education of Indian Children — Five Years Later," British Columbia School Trustee, vol. 26, no. 1, pp. 2-14. Reprinted in Alberta School Trustee, Spring issue, 1971.

1973 Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid-Nineteenth Century. U.S. Department of the Interior. Portland, OR. 526 pp.

1975 Federal Recognition of Indian Fishing Rights in British Columbia: the Fort Fraser Agreement of June 5, 1911 and the Fort St. James Agreement of June 13, 1911. U.B.C.I.C., Victoria, B.C.

1975 Chehalis River Treaty Council and the Treaty of Olympia. Robert B. Lane and Barbara Lane. Institute for the Development of Indian Law. Washington, D.C. 33 pp.

1975 Western Washington Treaty Proceedings. Robert B. Lane and Barbara Lane. Institute for the Development of Indian Law. Washington, D.C. 37 pp.

1975 The Treaties of Puget Sound: 1854-1855. (with R. B. Lane) Institute for the Development of Indian Law. Washington, D.C. 27 pp.

1977 Handbook on Legislation and Litigation Affecting the Quinault Reservation. Bud Ullman, Barbara Lane and Hazel Smith. Taholah, WA. 107 pp.

1977 Indians and Indian Fisheries of the Skagit River System. (with R. B. Lane) Skagit Salmon Study, vol. 1, Anthropological Background. Mount Vernon, WA pp. 1-169.

1977 "Background of Treaty Making in Western Washington." American Indian Journal. vol. 3, no. 4. pp. 2-11.

1981 Review of Salmon Fishers of the Columbia by Courtland L. Smith. Pacific Northwest Quarterly. vol. 72. no. 2.

1984 Review of Sliammon Life. Sliammon Lands by Dorothy Kennedy and Randy Bouchard. BC Studies, no. 64, Winter 1984-1985, pp. 88-89.

1988 Ethnographic article on the Coast Salish, co-authored with Wayne Suttles, to appear in Northwest Coast volume, Handbook of the North American Indians. Smithsonian Institution, Washington, D.C. (in press)

RECEIVED NOV 2 3 1988

Dr. Barbara Lane
4151 San Mateo Place
Victoria, British Columbia
V8N 2J9

28 October 1988

Mr. Malcolm Maclean
Davis & Company
Barristers & Solicitors
2800 Park Place
666 Burrard Street
Vancouver, B.C.
V6C 2Z7

Dear Mr. Maclean:

Re: David Paul et al v Pacific Salmon Foundation et al

This is further to my Affidavit dated 26 October 1988 in connection with the above matter.

With this letter I send you two memoranda. In the first, I draw your attention to an inadvertent omission in the text of my Affidavit. The material which I neglected to discuss in the text is included in Appendix "E" attached to my Affidavit. It was my intent to highlight this material by quoting it in the text. I base my opinion that in the 1850s the Indians were acting as independent commercial fishermen in part on statements such as this. I alert you of my omission in case you wish to draw the Court's attention to this point.

Second, I note for your information additional testimony before the Parliamentary Select Committee on the Hudson's Bay Company which I intentionally did not cite in my Affidavit. The nature of this testimony and the reasons for not including it in the context of a prima facie showing are discussed in the second memorandum.

Attached to the second memorandum is a copy of the complete testimony of Mr. James Cooper given before the Select Committee on the Hudson's Bay Company, 21 May 1857.

If you should wish to contact me further regarding these matters, I can be reached in Victoria Monday and Tuesday next, but will be out of town for the balance of the week.

Yours truly,

Barbara Lane

3 encl.

M E M O R A N D U M

To: Malcolm Maclean
From: Barbara Lane
Re: Indian Commerce in Fish in the 1850s
Date: 23 October 1988

I recently supplied you with an Affidavit dated 26 October 1988 in which I set out certain opinions regarding Saanich Indian fisheries prior to and up to 1852.

In paragraph 15 of my Affidavit I stated my opinion that "the Saanich Indians were fishing as commercial fishermen in 1852 and had been doing so for a long time prior to that date."

In paragraphs 16 and 17 I noted some of the kinds of evidence on which I relied for that opinion.

In paragraph 17 of my Affidavit I quoted from the testimony of Mr. C.W.W. Fitzwilliam before the Parliamentary Select Committee on the Hudson's Bay Company in 1857. The quoted material in the text of my Affidavit ends with question and answer 2366. I meant to include question and answer 2367 which follow immediately after, but I failed to do so. My opinion stated in paragraph 15 relies in part on statements such as that in 2367. It is a clear and succinct statement that the Indians were not fishing as employees of the Company, but acted as independent commercial fishermen trading their fish to the Company.

The material which I neglected to quote in the body of my Affidavit is included in Appendix "E" to my Affidavit at 2367 on page 119. It reads as follows:

> 2367. Do the Company claim a monopoly of that fishery; do they claim the exclusive right of fishery upon the coasts of Vancouver Island? — **They do not fish themselves; the Indians are the fishermen, and they trade their fish to the Company.**
>
> (emphasis added, not in original)

MEMORANDUM

To: Malcolm Maclean
From: Barbara Lane
Re: Testimony of James Cooper before Select Committee on HBC
Date: 28 October 1988

I recently supplied you with an Affidavit dated 26 October 1988 in which I set out certain opinions regarding Saanich Indian fisheries prior to and up to 1852.

In paragraph 12 of my affidavit, I quoted from testimony given in 1857 by Mr. John Miles before a Parliamentary Select Committee on the Hudson's Bay Company. Mr. Miles' testimony was attached to my Affidavit as Appendix "D".

In paragraphs 14 and 17 I commented on testimony given by Mr. C.W.W. Fitzwilliam, M.P. before the same Select Committee. Mr. Fitzwilliams' testimony was attached to my Affidavit as Appendix "E".

I note for your information that there was another witness whose testimony before the Select Committee included statements concerning fisheries in the waters around Vancouver Island. This witness was Mr. James Cooper, an independent settler on Vancouver Island from 1851 to 1857. I did not refer to or cite Mr. Cooper's testimony in my Affidavit.

My primary reason for not doing so is that some of Mr. Cooper's statements need to be understood within the larger context of his commercial relations with the Hudson's Bay Company. This context is alluded to, but is not adequately set out in the course of his testimony before the Select Committee. To provide adequate background and context for some of his statements would have entailed more extended discussion than appeared appropriate for a prima facie showing of the bases for my opinions. As well, extended discussion would have required the attachment of a large number of supporting documents.

Attached to this memorandum is a copy of the entire text of Mr. Cooper's testimony given 21 May 1857 before the Select Committee.

In the remainder of this memorandum I provide an abbreviated glimpse of relevant background data. Immediately following are extracts of the Cooper testimony which deal with fisheries matters. In closing, I briefly comment briefly

on two statements which could be misleading if read without understanding of the relevant background materials.

Brief Background Notes on Captain James Cooper

Captain James Cooper entered the service of the Hudson's Bay Company in 1844, as master of a vessel sailing between London and Fort Vancouver. In 1849 he was master of the bark Columbia. He left the service of the Company and came out to Vancouver Island in 1851 as an independent settler, intending to trade with the Indians. For this trade, he brought out from England, in sections, a small iron vessel which was put together in Victoria. In 1852 the vessel went to the Fraser River where Cooper purchased cranberries and potatoes from the natives and shipped them to San Francisco. The export of cranberries was a lucrative trade, initiated by Cooper, and one which was immediately taken over by the Company. Cooper was prevented from trading with natives on the mainland. He was particularly bitter about the Company's claim of exclusive trading rights on the mainland. Cooper had interpreted those rights to apply only to the fur trade, and not to other commodities such as fish, potatoes, and cranberries.

Cooper had to confine his operations to trade with the Indians on Vancouver Island, where the Company held no exclusive rights of trade. He experienced severe financial reverses because of actions taken by the Company to thwart his commercial ventures. The Company managed to hold the monopoly of trade both to San Francisco and Honolulu, markets in which Cooper had hoped to launch a successful business career. He was resident on Vancouver Island between 1851 and 1857 and is the "opposition" trading at Cowichan, noted in Mr. Fitzwilliam's response to question 2368. Cooper's testimony before the inquiry into the Hudson's Bay Company needs to be read against this background.

Mr. Cooper's statements, given 21 May 1857, refer to fishery matters in the context of the Reciprocity Treaty between Great Britain and the United States, offer comparisons of the relative value of the fisheries of Vancouver Island and Fraser River, and include observations regarding the nature and value of the fisheries markets in San Francisco and Honolulu. These are all matters beyond the scope of the opinions in my Affidavit. However, his comments about the unimportance of fisheries at Vancouver Island and the smallness of the market for fish in Honolulu need to be assessed in light of his business failures and his frustration at being excluded from the Fraser River business by the Company.

The following are extracts from Mr. Cooper's testimony which bear on fisheries.

3585. Is there any export at all of produce to the Californian market now from Vancouver's Island? . . .

. . .

3587. You would chiefly send bread-stuffs and timber? — And coal and salt fish.

. . .

3589. The rivers and waters of Vancouver's Island abound in fish. I believe? — They do; there are no rivers in Vancouver's Island of any extent; but the Straits of Juan de Fuca and all the salt water inlets around Vancouver's Island abound in fish.

3590. Are there not salmon in the rivers? — Salmon are caught in salt-water, and also in Fraser's River on the mainland, in respect of which the Hudson's Bay Company have the exclusive right of trade, very much to the drawback of the settlers and colonists there.

. . .

3738. Was there any impediment thrown in your way as a colonist in that country? — Yes.

3739. What? — I was exclusively confined to my operations on Vancouver's Island. I had the impression when I went there first, that the mainland also was open for trade for settlers; but I found afterwards that it was not.

3740. What sort of trade? — In fishing, for instance. There are large fisheries in Fraser's River, which exclusively belong to the Hudson's Bay Company.

3741. And you are prohibited from using that fishery? — Yes.

. . .

3733. Chairman.] Do the Indians get their subsistence chiefly by fishing? — Yes: all the Indians on Vancouver's Island subsist by fish as the staple article.

. . .

3337. The duty which you mentioned is upon fishing, is it not? — No, there is no duty whatever, either import or export, in Vancouver's Island, excepting the 10d. a load mentioned above.

. . .

3380. You mentioned something about the fishing; will you give a little information on that subject? — There is no fishing of importance on Vancouver's Island, only on the rivers and coasts of the mainland; and there the Hudson's Bay Company hold the exclusive right of trade, according to their charter, of the mainland.

3381. In the Fuca Strait what is the case? — It is all open there.

3382. Any one may fish there? — Yes; but in Fraser's River, which is the only inlet to the mainland, in fact, no one is allowed to fish.

3883. Is that where the salmon is principally taken? — It is.

3384. Chairman] That is a very valuable fishery, is it not? It is.

3385. 3885. Mr. Grogan] If any quantity of fish were taken by any of the emigrants that chose to devote their attention to it, what would become of it; have they the means of exporting and selling it? — Not very ample means.

3386. Have they means at all? — No; they would have probably to charter an American vessel to take it to some port south, or to the Sandwich Islands.

3387. Have the Company any vessels that trade in fish themselves? — Yes; but they very often refuse to take freight.

. . .

-6. Mr. Grogan] With respect to the fish, we understand it is extremely abundant there? — Yes.

397. And that there would be a ready sale for it in the Sandwich Islands? — To a certain extent; it is only a small market in the Sandwich Islands.

3898. Has any attempt ever been made by the colonists to open a market there for fish? — Yes.

3899. Has it succeeded? — Yes.

3900. And there is no impediment whatever in the way of sending any quantity of fish which the colonists could sell into this market if they pleased? — No, I believe not.

3901. You have never known any instances of that kind? — No.

. . .

3966. Mr. J.H. Gurney] With reference to the fisheries in the Straits, what are the fish caught there? — Salmon.

3967. The same as in the River Fraser? — Yes.

Mr. Cooper's characterization of the relative value of the fisheries of Fraser River and Vancouver Island is correct in that the Fraser River fisheries were more extensive and contributed the bulk of the cured fish used in the export trade. However. Saanich Indians and other Indians on the Island had been trading fish and fish products (such as oil) to Fort Victoria since before the Treaty of 15 June 1846 when Britain asserted sovereignty over Vancouver Island.

While the Fraser River fisheries were more important in terms of amount of fish cured and shipped. Cooper's statement (see 3880 above) that "There is no fishing of importance on Vancouver's Island, only on the rivers and coasts of the mainland: . . . " could be misleading, if taken literally. I think his statement needs to be read in the context of his frustration at being excluded from trading with the Indians at Fraser River. See his statement (at 3783) that "all the Indians on Vancouver's Island subsist by fish as the staple article." Compare also his statement (see 3589 above) that "all the salt water inlets around Vancouver Island abound in fish".

Similarly, his statement (at 3897) that "it is only a small market at the Sandwich Islands" needs to be understood in the context of efforts by Victoria merchants to have the Colony of Vancouver Island included in the Reciprocity Treaty. Exports to the San Francisco market and to markets in Washington and Oregon Territories were severely handicapped because of the duties imposed at

these American ports. While it is true that the San Francisco market was larger than the Hawaiian market, I think Cooper may have downplayed the potential of the Hawaiian market because his ship was really suited only to the coastwise trade. Just as he wanted to be able to participate in the trade with Indians at the Fraser River, he wanted to be able to compete in the San Francisco trade.

Barbara Lane

EXHIBIT "B"

This is Exhibit B referred to in the Affidavit of Barbara Lane sworn before me this 26 October 19 88

A Commissioner for Affidavits in British Columbia

BRITISH COLUMBIA.

PAPERS

CONNECTED WITH THE

INDIAN LAND QUESTION.

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PROTECTED/SOLICITOR-CLIENT PRIVILEGE

DATE: June 16, 1995

Memorandum To: Distribution

From: Hugh A. MacAulay, Counsel
DOJ - Vancouver Regional Office

Subject: **Reasons for Judgment:** ***R. v. Hunt***
Our File: 134247 & 118354 & 131553

I am enclosing, for your information, a copy of the Reasons for Judgment of the Honourable Judge Saunderson in *R. v. Hunt* which were released today. This important case involved the interpretation of right to "carry on fisheries as formerly" under the Douglas Treaty and, in particular, whether that right encompasses the right to fish commercially. Saunderson, P.C.J., in refreshingly brief reasons, made the following significant rulings:

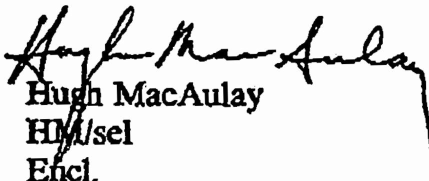
1) That there is no commercial component to the Douglas Treaty permitting Douglas Treaty signatories to sell fish;

2) That the Douglas Treaty does not include the right to engage in a deep water interception fishery for chum salmon stocks;

3) That had a Douglas Treaty right to fish commercially been found to exist, that right was extinguished; and

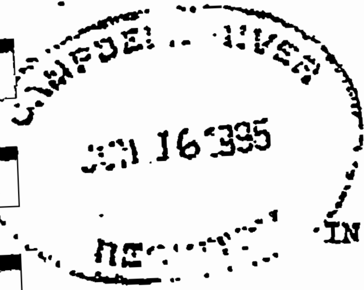
4) That if it had been proven that Douglas Treaty rights had been infringed, any such infringement would be justified pursuant to the Supreme Court of Canada's decision in *R. v. Sparrow*.

Judge Saunderson concluded that the Douglas Treaty right to "carry on fisheries as formerly" was analogous to the aboriginal right to fish as interpreted by the majority of the British Columbia Court of Appeal in *R. v. Van der Peet*.



Hugh MacAulay
HM/sel
Encl.

Canada



No. 20050TC
Campbell River Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA v. DAVID J. HUNT, ROY CRANMER, MABLE KNOX, AND PETER KNOX	)	REASONS FOR JUDGMENT OF THE HONOURABLE JUDGE SAUNDERSON

Counsel for the Crown	Thomas J. Bishop and Norman W.P. Fraser
Counsel for the Defendant	Kim C. Roberts
Place of Trial	Campbell River
Dates of Trial	November 14 to 17, 21 to 23, 28 to 30, 1994

---

1. The defendants are charged with various offences under the Fisheries Act in October of 1992. In defence they assert that the impugned activities are permitted by treaties made between the Quakeolth and Queackar tribes of Fort Rupert and Chief Factor James Douglas on behalf of the Hudson's Bay Company, and that they are entitled to the benefit of those treaties.

The issue for the court is whether the treaties can be construed as permitting Indian involvement in today's commercial chum salmon fishery, with the priority afforded by s.35(1) of the Constitution Act, 1982.

FACTS

3. Many facts have been agreed by counsel, and certain others are not seriously disputed. Briefly, on October 22, 1992 the Kwakiutl Band council, through its manager, the defendant David Hunt, instructed the defendant Roy Cranmer to 'engage in a food fishery for societal and ceremonial purposes for the support of the Native Brotherhood convention to be held the following month in Fort Rupert.' A few days later Mr. Cranmer, operating a commercial seine vessel near the western entrance to Johnstone Strait, on the north coast of Vancouver Island, caught 1,636 chum salmon weighing 16,040 pounds, by means of a purse seine. He delivered the catch to a fish-packing vessel operated by the defendants Peter and Mable Knox who, it appears, either accepted the fish for sale on consignment, or acted as brokers to affect a sale of the fish to purchasers. The Kwakiutl Band realized just over $11,000 from the sale, a transaction which was unquestionably commercial in nature. Those sale proceeds were used by the Band to cover expenses for air fares, hotel accommodation, and meals incurred by delegates attending the Native Brotherhood convention in Fort Rupert in November 1992.

4. At the times and places the fish were caught, there was a closure in effect for the commercial salmon fishery.

5. The treaties provide for the surrender to the Hudson's Bay Company of a two mile wide strip of land along the coast of northern

Vancouver Island between what are now Port McNeill and Port Hardy. The land includes Fort Rupert, which today is an Indian reservation adjacent to the easterly limit of Port Hardy. For the benefit of the Indians, the treaties contain the following words:

> *It is understood that we are at liberty ... to carry on our fisheries as formerly.*

6. From the report of John Dewhirst I am satisfied that the Kwakiutl Band is the present name given to the Kwakwala speaking tribes of Fort Rupert, among them the Quakeolth and Queackar, signatories to the treaties in question. Mr. Dewhirst is an anthropologist called as a defence witness. I am also satisfied, through admissions of the Crown, Mr. Dewhirst's report, and the testimony of Emily Baker, that Messrs. Cranmer, Hunt, and Knox are descendants of known signatories of the treaties, and therefore that the defendants and the Kwakiutl Band enjoy the benefits of the treaties.

CHARGES

7 The Crown has laid the following four charges under the Fisheries Act against the defendants:

Count 1 Roy Cranmer, abetted by David Hunt, fished for chum salmon in a closed area.

Count 2 Messrs. Cranmer and Hunt unlawfully sold chum salmon which were not legally caught.

Count 3 Mable and Peter Knox unlawfully purchased illegally caught chum salmon.

Count 4 The Knoxes and Mr. Cranmer were in possession of illegally caught chum salmon.

PRELIMINARY CONSIDERATIONS

8. Section 35(1) of the Constitution Act, 1982 provides:

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

The Supreme Court of Canada in R. v. Sparrow (1990), 56 C.C.C. (3d) 263 at p. 289 stated, "We wish to emphasise the importance of context and a case-by-case approach to s. 35(1)."

9. In British Columbia, aboriginal rights are based on activities and practices in which natives were involved before the assertion of sovereignty by England. In R. v. Dick (unreported, February 16, 1993, B.C.P.C. Campbell River Registry no. 16,555) this court found that Captain Vancouver asserted British sovereignty over the area around Vancouver Island in 1792, and that in any event such sovereignty occurred not later than 1846, when the Treaty of Oregon was implemented between Canada and the United States of America. The Douglas Treaties in question were therefore signed no more than fifty-nine years after sovereignty.

10. I raise the matter of aboriginal rights because the Crown asserts that "...Douglas Treaty rights to carry on fisheries as formerly are intimately connected to aboriginal practices" (written argument, p. 5). In support, the Crown relies on the passage from

Melvin C.C.J. (as he then was) in R. v. Brown (unreported, November 15, 1989, County Court of Vancouver Island, Nanaimo Registry no. 0469) at p. 10:

> *It is difficult to see how the right to "carry on our fisheries as formerly" in the treaty under consideration can be anything more than a recognition of the aboriginal right to fish that existed at the time the Nanaimo Band entered into the treaty with Governor Douglas in 1854. Whatever rights they had at that time were assured to them, by virtue of that treaty.*

Of a different treaty, Wilson J., disagreeing with the result but apparently reflecting the view of the entire court, wrote, "The whole emphasis of Treaty 8 was on the preservation of the Indian's traditional way of life": R. v. Horseman, [1990] 4 W.W.R. 97 at p. 111 (S.C.C.). That treaty contained the words, " ... the said Indians ... shall have the right to pursue their usual vocations of hunting, trapping and fishing ...." The analogy to the case at bar is evident.

1. The Defendants argue that treaty rights are not necessarily identical to aboriginal rights. I agree. A treaty is nothing more or less than a contract. If its meaning is clear, one need not look beyond its terms; otherwise, one must try to discern the intention of the contracting parties.

2. In this case, the meaning of "carry on our fisheries as formerly" is not explained in the treaties, and there is no evidence of what the signatories understood it to mean. Absent such information, it seems reasonable to conclude that the parties must have

contemplated the continuation of the Indians' traditional fishing practices. Since the treaties were concluded within such a short time of the assertion of British sovereignty, one can only look to aboriginal practices for an understanding of what activities the treaties protect. In this regard I can find no conflict with the principles of treaty interpretation compiled by the British Columbia Court of Appeal in Saanichton Marina Ltd. v. Claxton (1989), 57 D.L.R. (4th) 161.

13. It should be added that the principles of interpretation in the Saanichton decision refer to the manner in which the treaty is construed. They do not affect the court's fact-finding function relating to whether a given practice existed before the treaty was made.

14. The last of the preliminary considerations is to determine what types of activity are protected by the treaties. It would appear that not all activities or practices qualify for protection; rather, only those which are found to have been integral to native society, not incidental to it. In the words of Macfarlane J.A. in R. v. Van der Peet (1993), 80 B.C.L.R. (2d) 75 at p. 89,

> *... the question of what is an aboriginal right deserving protection is not determined necessarily by reference to the activities in which aboriginal persons were engaged in 1846. The test is whether such activities or practices were integral to the distinctive culture of the aborigines, an enquiry which may or may not need to pre-date contact with the Europeans.*

IS THERE A COMMERCIAL COMPONENT TO THE TREATIES?

15. Having provided the legal framework in which the principal factual issue will be considered, I shall turn to the evidence. The burden is on the defendants to prove, on a balance of probabilities, that the Douglas Treaties contemplated the commercial sale of chum salmon: R. v. Sparrow (above). That entails an examination of the evidence as it relates to the aboriginal practices of the defendants' ancestors. Mr. Dewhirst provided the evidence for the defence on this subject.

16. The section of Mr. Dewhirst's report which deals with trade begins with the assertion, "Trade -- buying and selling — was an intrinsic part of Kwakiutl sustenance." He then gives specific examples of Kwakiutl trade occurring before the treaties came into being:

> In 1841, the Komkiutis traded furs to the Hudson's Bay Company in return for blankets, tobacco, files, guns, ammunition, and other items.
>
> In 1792, the Nimpkish traded furs and mountain goat wool to the Nootka for Spanish muskets.
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> In 1838, the Coquilt began to compete with Europeans by trading guns and ammunition to Indians at Fort Langley.
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In 1849, the Koskimo traded salmon and halibut to the Hudson's Bay Company at Fort Rupert.

In 1850, the Fort Rupert Indians (presumably the Quakeolth and Queackar) supplied deer, wildfowl, and fish to the Hudson's Bay Company.

In 1850, the same Indians traded blankets for canoes and carved artifacts from other tribes.

The influence of the Europeans is obvious in most of those transactions; they either participated in the trade themselves, or their products were the subject of trade. In either case these cannot, by definition, be aboriginal practices. Even giving the defendants the benefit of the doubt by interpreting R. v. Brown as permitting recognition of fishing practices between the time of assertion of sovereignty and the date of the treaties, one must enquire whether the practices were "integral to the distinctive culture of the aborigines." That involves a determination of how salmon -- particularly chum salmon -- were used by the Kwakiutl, and whether that use was integral to their distinctive culture.

17. Dr. Sheila Robinson is an anthropologist specializing in the ethnography and ethnohistory of northwest coast Indians. She testified on behalf of the Crown as to the nature of the exchange of goods by the Kwakiutl. In her opinion, the principal context in which exchange occurred was the potlatch, which was "governed by and subordinate to kinship needs and relations." The potlatch fulfilled the function of "political and social glue," by 'cementing and validating relations, and reinforcing rights to use each other's resources.' With the exception of eulachon oil,

foodstuffs were not considered valuables for the purpose of exchange. Salmon was certainly a food staple for the Kwakiutl; chum more so than the other salmon species, for once it was cured, being lean it preserved well. It was consumed for subsistence, and served at feasts and other social and ceremonial occasions, such as the potlatch.

18. While no doubt there were instances of barter of salmon, as pointed out by Mr. Dewhirst, these appear to have been incidental to the central Kwakiutl use of salmon. Dr. Robinson has provided the canvas from which a more complete picture emerges. All the evidence persuades me that trade in salmon cannot be said to have been integral to Kwakiutl culture.

19. There is also the undisputed fact that no cash economy existed in the area before 1851. There can be no analogy between a prehistoric barter system to satisfy food, social, and ceremonial needs and a modern commercial fishery catering to provincial, national, and foreign markets.

20. In sum, I am persuaded by Crown and defence evidence that there is no commercial component to the Douglas Treaties.

THE NATURE OF THE ABORIGINAL KWAKIUTL FISHERY

21. Can "carry on our fisheries as formerly" be interpreted to include the right to engage in a deep water interception fishery involving passing chum salmon stocks? The answer to the question must take into account that the aboriginal right to fish is "site and activity specific": R. v. Van der Peet (above) at p. 99.

22. In the section of his report entitled "The Annual Round", Mr. Dewhirst writes, "In September and October, tribes moved to their fishing stations at the mouths of rivers to catch chum or dog salmon. Traditionally, most chum salmon were taken in nets, weirs and traps." Duncan Stacey was qualified by the Crown as an expert in several areas, one of which is aboriginal fishing practices on the coast of British Columbia. His evidence was that chum salmon were taken by Indians in rivers and their estuaries, not in the open ocean. Crown and defence witnesses are thus in substantial agreement that the aboriginal chum salmon fishery was riverine.

23. No evidence was put before the court suggesting the Kwakiutl were involved in a deep water fishery as described above. That is, the defendants have not proved that their ancestors participated in the specific type of activity in which Mr. Cranmer was involved and which has resulted in the charges against him -- a deep water net fishery for chum salmon. That activity is not, therefore, protected by the treaties.

24. The finding of an aboriginal riverine, as opposed to deep water, fishery for chum salmon determines the 'site specific' aspect of proof required for the existence of an aboriginal right. In other words, Mr. Cranmer's involvement in a deep water ocean fishery is inconsistent with his aboriginal right only to participate in a riverine fishery, since the latter by definition excludes the former. Were the outcome of this issue to turn on whether the Quakeolth and Queackar carried on their aboriginal fisheries in the general area in which Mr. Cranmer was fishing in October 1992, the result would be different. The chum salmon in this case were taken at locations known as Glory Hole, Parson Bay, Cracroft Point, and Freshwater Bay at or near the western entrance to Johnstone Strait. While the supporting evidence is not without weaknesses, I accept Mr. Dewhirst's opinion that the four fishing locations are within the defendants' ancestral territory, which included their villages of origin, fall fishing stations, and winter villages.

EXTINGUISHMENT

25. Had a treaty right to fish commercially been found to exist, the Crown would then bear the burden of proving that Parliament has extinguished that right. This court decided that issue in favour of the Crown in R. v. Dick, in the context of a claim for an aboriginal, not a treaty, right. The law relating to extinguishment was summarized in that case, and counsel have provided extensive written argument on the point in the case at bar. I do not intend

to repeat the arguments here, as there has been no change in the law since R. v. Dick which would dictate a different decision in relation to these treaties. Defence counsel invite me to adopt the dissenting opinions of Hutcheon and Lambert JJ.A. in R. v. Van der Peet. I respectfully decline to do so.

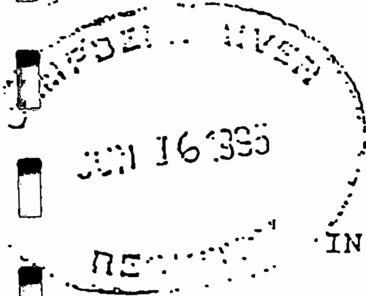
INFRINGEMENT AND JUSTIFICATION

26. If I had found in favour of the defendants on the issue of extinguishment, and had the defendants proved that the commercial fishing closure infringed their treaty rights (about which I make no finding), I am satisfied that any such infringement is justified on the criteria in R. v. Sparrow.

VERDICT

27. The defence having failed to establish that the Douglas Treaties give them a constitutional right to fish commercially for chum salmon in priority to other commercial fishermen, I find them guilty of the charges. Counsel may wish to address the court on whether convictions should be entered on all counts.

Campbell River, B.C.
June 16, 1995



No. 20050TC
Campbell River Registry

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA	)	REASONS FOR JUDGMENT
	)	
v.	)	OF THE HONOURABLE
	)	
DAVID J. HUNT, ROY CRANMER, MABLE KNOX, AND PETER KNOX	)	JUDGE SAUNDERSON

Counsel for the Crown	Thomas J. Bishop and Norman W.P. Fraser
Counsel for the Defendant	Kim C. Roberts
Place of Trial	Campbell River
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3. Many facts have been agreed by counsel, and certain others are not seriously disputed. Briefly, on October 22, 1992 the Kwakiutl Band council, through its manager, the defendant David Hunt, instructed the defendant Roy Cranmer to 'engage in a food fishery for societal and ceremonial purposes for the support of the Native Brotherhood convention to be held the following month in Fort Rupert.' A few days later Mr. Cranmer, operating a commercial seine vessel near the western entrance to Johnstone Strait, on the north coast of Vancouver Island, caught 1,636 chum salmon weighing 16,040 pounds, by means of a purse seine. He delivered the catch to a fish-packing vessel operated by the defendants Peter and Mable Knox who, it appears, either accepted the fish for sale on consignment, or acted as brokers to effect a sale of the fish to purchasers. The Kwakiutl Band realized just over $11,000 from the sale, a transaction which was unquestionably commercial in nature. Those sale proceeds were used by the Band to cover expenses for air fares, hotel accommodation, and meals incurred by delegates attending the Native Brotherhood convention in Fort Rupert in November 1992.

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THE NATURE OF THE ABORIGINAL KWAKIUTL FISHERY

21. Can "carry on our fisheries as formerly" be interpreted to include the right to engage in a deep water interception fishery involving passing chum salmon stocks? The answer to the question must take into account that the aboriginal right to fish is "site and activity specific": R. v. Van der Peet (above) at p. 99.

22. In the section of his report entitled "The Annual Round", Mr. Dewhirst writes, "In September and October, tribes moved to their fishing stations at the mouths of rivers to catch chum or dog salmon. Traditionally, most chum salmon were taken in nets, weirs and traps." Duncan Stacey was qualified by the Crown as an expert in several areas, one of which is aboriginal fishing practices on the coast of British Columbia. His evidence was that chum salmon were taken by Indians in rivers and their estuaries, not in the open ocean. Crown and defence witnesses are thus in substantial agreement that the aboriginal chum salmon fishery was riverine.

23. No evidence was put before the court suggesting the Kwakiutl were involved in a deep water fishery as described above. That is, the defendants have not proved that their ancestors participated in the specific type of activity in which Mr. Cranmer was involved and which has resulted in the charges against him -- a deep water net fishery for chum salmon. That activity is not, therefore, protected by the treaties.

4. The finding of an aboriginal riverine, as opposed to deep water, fishery for chum salmon determines the 'site specific' aspect of proof required for the existence of an aboriginal right. In other words, Mr. Cranmer's involvement in a deep water ocean fishery is inconsistent with his aboriginal right only to participate in a riverine fishery, since the latter by definition excludes the former. Were the outcome of this issue to turn on whether the Quakeolth and Queackar carried on their aboriginal fisheries in the general area in which Mr. Cranmer was fishing in October 1992, the result would be different. The chum salmon in this case were taken at locations known as Glory Hole, Parson Bay, Cracroft Point, and Freshwater Bay at or near the western entrance to Johnstone Strait. While the supporting evidence is not without weaknesses, I accept Mr. Dewhirst's opinion that the four fishing locations are within the defendants' ancestral territory, which included their villages of origin, fall fishing stations, and winter villages.

EXTINGUISHMENT

5. Had a treaty right to fish commercially been found to exist, the Crown would then bear the burden of proving that Parliament has extinguished that right. This court decided that issue in favour of the Crown in R. v. Dick, in the context of a claim for an aboriginal, not a treaty, right. The law relating to extinguishment was summarized in that case, and counsel have provided extensive written argument on the point in the case at bar. I do not intend

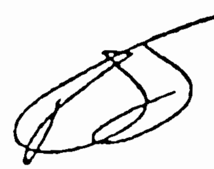
to repeat the arguments here, as there has been no change in the law since R. v. Dick which would dictate a different decision in relation to these treaties. Defence counsel invite me to adopt the dissenting opinions of Hutcheon and Lambert JJ.A. in R. v. Van der Peet. I respectfully decline to do so.

INFRINGEMENT AND JUSTIFICATION

26. If I had found in favour of the defendants on the issue of extinguishment, and had the defendants proved that the commercial fishing closure infringed their treaty rights (about which I make no finding), I am satisfied that any such infringement is justified on the criteria in R. v. Sparrow.

VERDICT

27. The defence having failed to establish that the Douglas Treaties give them a constitutional right to fish commercially for chum salmon in priority to other commercial fishermen, I find them guilty of the charges. Counsel may wish to address the court on whether convictions should be entered on all counts.



Campbell River, B.C.

June 16, 1995

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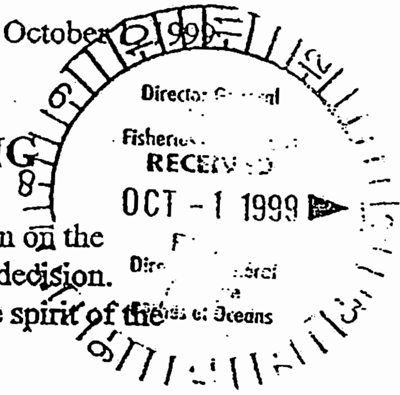
STATEMENT BY HERB DHALIWAL MINISTER OF FISHERIES AND OCEANS

cc: REC

October [illegible] 1999



UPDATE ON MARSHALL CASE RULING

As you know, two weeks ago the Supreme Court handed down its decision on the Marshall case. I want to reassure you that we respect the Supreme Court decision. Whatever action we take, whatever decisions are made, they will be in the spirit of the judgement.

For the past two weeks there has been much confusion and tension. But, along with this uncertainty, there has also been good will and restraint.

I applaud those who have led the call for calm, for restraint, and for patience – your leadership has been invaluable, and we know that we can count on your continued support, and all communities working together.

This issue is my top priority. I believe that through the cooperation and dialogue that has taken place between all groups, aboriginal and non-aboriginal alike, we have made positive steps towards clarifying this complicated situation.

This has been an extremely difficult time for so many. I understand the fears, and that we are all facing uncertainty. But we must remember that we share many goals - conserving the resource, respect for the law, ensuring access to the resource for all, and producing certainty. This step today will not give us all the answers, but it will be a positive step towards reaching these goals.

As I've said over the past two weeks, we must not do what is easiest, but what is right. We will figure this out, but it won't be easy, and it won't be immediate. It will take time, and it will only happen if we work together.

Since the Supreme Court announcement of September 17, the interpretation and assessment of what it means in practical terms has been a preoccupation for me personally, and all who have an interest in the Atlantic fishery.

While there are many outstanding issues which are not yet resolved, the dimensions of the judgement as it pertains to the fishery, are becoming clearer.

My intent today, as the Minister responsible for the conservation and management of the fishery, is to explain our approach as we move forward to give effect to this judgement in a step by step and responsible manner.

First, let me summarize what we understand about the judgement.

The Court has affirmed that the beneficiaries of the Treaty have a right to, among other things, fish, hunt and gather, and trade the products of these activities for "necessaries".

Translated into modern terms, the judgement indicates this right entitles the beneficiaries to have the opportunity to gain a "moderate livelihood" from the exercise of their fishing, hunting and gathering activities.

The Court has also told us that the right is limited; it does not extend to the open-ended accumulation of wealth, nor does it provide for an unregulated harvest.

While the Court has made it clear that there is a Treaty right to fish, it has also made it clear the exercise of the right is subject to regulation by Government. Catch limits that would reasonably be expected to provide a moderate livelihood can be enforced without infringing the Treaty right.

There are many considerations that will be central to our efforts as we move forward in concert with all parties.

For example, we consider this to be a communal right and not an individual right. To be clear, even if the right is exercised by individuals, it is for the benefit of the collective.

Another issue is fundamental to the interpretation of the judgement – in order to accommodate the Treaty right we must understand who are the current beneficiaries of the right.

The Supreme Court of Canada's judgement indicates that the Treaty applies to the Aboriginal communities that best represent the "modern manifestation" of the original signatories.

We will start to work initially with Bands on issues related to Treaty eligibility so that enforcement measures can be taken with regard to fishing activities beyond the scope of the Treaty right. We will also talk to other organizations to clarify this matter.

I will be instructing my staff to take enforcement action against fishing activity of those who are not the beneficiaries of the Treaty.

We now need to focus on putting in place a process that will allow us to accommodate the Treaty right. We will involve in this process all who are directly concerned with the sustainability and viability of the Atlantic fishery.

Through this process, we will continue to develop a more contemporary relationship among government, Aboriginal communities and the traditional fishing sector. That process must take a long-term view. It will not be quick or easy. It will depend on good will, mutual respect and a shared commitment to conservation and sustainability of the resource.

I will not attempt to place timeframes on this process - this is too important to rush, but I know that the task will not be completed in days or even weeks. This will be a significant challenge for all of us.

In developing the new framework for the Atlantic fishery, I will be guided by the following principles:

First: Conservation

Future well-being of the fishery resource will not be compromised; fishing arrangements must be designed to ensure, above all, conservation requirements will be respected. As Minister, I have the responsibility to protect the resource. Actions that jeopardize conservation will be addressed through appropriate enforcement response.

Second: Fairness

Fisheries must be managed in a manner consistent with the Marshall decision. In developing the framework for the fishery, the government will be sensitive to the impacts on individuals and on the viability of the commercial fishery. We will, as part of the process, carefully consider the impacts on those directly and most affected by changes.

Third: Transparency

The process of dialogue and negotiation will be conducted in an open and inclusive manner to avoid uncertainty and surprise.

Fourth: Partnership

As we proceed, my Department will work collaboratively with Aboriginal communities, the commercial fishing sector, Provincial governments and other federal Departments.

Having spoken about the long-term, I am also keenly aware of the immediate need for an orderly fishery.

There are questions that cannot await the conclusion of our broader consultations. The rights affirmed by the highest Court of the country apply now.

To ask those who have awaited that decision for so long to simply forgo legitimate opportunities to begin exercising rights that have been affirmed by the Court, is asking too much. However, this fishery must be conducted in an orderly and regulated manner, consistent with conservation. I will not allow a free for all on the water.

Consultations will begin immediately with Bands and other fishing organizations with a view to reaching agreement quickly on short term interim fishing arrangements. Our aim is to ensure that Treaty beneficiaries have access to the resource in a manner that is consistent with these objectives. We will take into account the interest of those who may be directly affected.

I want to state very clearly that such interim arrangements will not influence or prejudice the outcome of the longer-term process. Meetings are already being arranged and we will proceed as expeditiously as possible.

Although we do not have answers to all the questions today, we are making progress. We respect the Treaty right for access to the fishery.

We have clarified who are the beneficiaries of this Treaty right. We are initiating as of today a short and long-term strategy to manage this decision. We have outlined the authority of the federal government to regulate this fishery and ensure that conservation is not compromised.

Every challenge is an opportunity. The opportunity here is for all of us to demonstrate some of the values that make this country great: our tolerance, our generosity, our willingness to work together, and our respect for the law and the Supreme Court.

Chief Federal Representative
200 Kent Street
Ottawa, Ontario
K1A 0E6

November 29, 1999

Mr. John G. Paul
Atlantic Policy Congress
P.O. Box 36
Amherst, Nova Scotia
B4H 3Y6

Dear Mr. Paul:

Attached for your information is a copy of the document "The *Marshall* Decision: Interpretation, Implications and Interim Guidelines". The document outlines DFO's position and approach with respect to the Supreme Court of Canada's decision in *R. v. Marshall* on September 21st and the Court's subsequent decision on November 21st, 1999.

The document is being provided to DFO Regional Director Generals as well as to DFO field staff to provide guidance in their actions.

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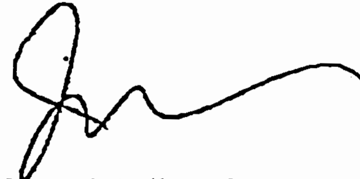
1 Crabbe



James MacKenzie

Attachment

THE *MARSHALL* DECISION:

Interpretation, Implications and Interim Guidelines

1. Context

The Department of Fisheries and Oceans' policies regarding Aboriginal fishing in Canada have rapidly evolved since 1990 when the Supreme Court found in *R. v. Sparrow* that an Aboriginal right existed to fish for food, social, and ceremonial purposes. As a result, a regulatory and policy framework is currently in place that is flexible and allows DFO and Aboriginal communities to co-manage a wide variety of activities ranging from subsistence to commercial fisheries.

The *Marshall* decision is a significant step towards increased Aboriginal involvement in commercial fisheries. As with the *Sparrow* decision before it, the *Marshall* decision will require a re-examination of existing policies and management regimes as discussions with Aboriginal groups and the commercial industry proceed.

2. The *Marshall* Decision: What It Said

The Supreme Court found that a 1760 Treaty of Peace and Friendship between the British Crown and the Mi'kmaq, affirmed the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing, and gathering activities and trading them for what in 1760 were described as "necessaries". The Court noted that the genesis of this Mi'kmaq trade clause came from earlier negotiations with the Maliseet and Passamaquoddy, who lived in present-day New Brunswick. The Mi'kmaq agreed to "make peace upon the same conditions."

The Court concluded that in today's terms securing "necessaries" is equivalent to a "moderate livelihood". In turn, this was interpreted to include basics such as food, clothing and housing supplemented by a few amenities. It does not extend to the accumulation of wealth. The Court went on to conclude that in order to exercise this right to trade in a meaningful way, the Treaty beneficiaries have an implied right to hunt, fish and gather in order to have something to trade for necessaries. It added that

this right to harvest and trade for necessaries can be regulated by Government and contained within limits.

On November 17, 1999, in its reasons for dismissing a motion for a rehearing of the *Marshall* appeal and a stay of the judgement, the Court explained and clarified a number of aspects of its earlier decision. For example, the Court emphasized the regulatory authority of federal government to regulate the treaty right. It clarified that treaty rights are collective in nature, but may be exercised by members of the communities holding these rights under the authority of these communities. Further, it noted that the exercise of treaty rights is limited to the area traditionally used by the local community with which the particular treaty was made and in connection to wildlife, fish and resources traditionally "gathered" in an Aboriginal economy.

3. The Marshall Decision, Interpretation

The Department of Fisheries and Oceans' view is that the following points are clear from the *Marshall* decision and reaffirmed in the reasons for judgement in previous case law:

- The Treaty benefits apply to the Canadian successor groups of those Mi'kmaq, Maliseet, and Passamaquoddy groups that signed the Treaty of 1760 and similar treaties in 1761.
- Treaty beneficiaries have the right to harvest fisheries resources so that they can sell fish in support of a "moderate livelihood" but not for the accumulation of wealth,
- The right is communal in nature. Although individuals may fish under the right, the right is held by the collective/community and it may only be exercised in the area traditionally used.
- The right can be regulated and not all regulations infringe the right.
- Even in cases where regulation of the right may infringe the right to some extent, such infringement can take place for legitimate reasons such as conservation, public health and safety, maintaining the orderly management of the fisheries, regional and economic fairness, and taking into account historical reliance on the fishery by others.
- In regulating the right, with justification, criteria can be established with respect to the area to be fished, the amount to be fished, the gear to be used, monitoring and reporting requirements, and closed seasons.

- The treaty right does not have to be satisfied ahead of all other users. What is required is "equitable access" to the resource for the purpose of treaty beneficiaries earning a moderate living.

4. The *Marshall* Decision, Implications

Under the Aboriginal Fisheries Strategy, DFO has provided Aboriginal groups with access to fish for food, social, and ceremonial purposes, as well as access to commercial fisheries through the Allocation Transfer Program and other means. The *Marshall* decision will require DFO to provide Treaty beneficiaries with additional access to fisheries in response to the Treaty right.

Most commercial fisheries are more-or-less fully subscribed, and participation in them is limited by licence. The accommodation of new entrants into such fisheries will need to be carefully managed. In addition, previous Supreme Court decisions emphasize the importance of Government discussing issues such as access with Aboriginal people involved. DFO is also committed to consult with commercial interests on the best way of accommodating new entrants to fully subscribed fisheries. These discussions will take time to complete.

The *Marshall* decision will result in significant adjustment to the commercial fishery in Atlantic Canada. In the course of discussions, alternative fisheries management models may be proposed. DFO is open to new approaches to fisheries management provided they are fair and effective, and meet government standards regarding health and safety of the food supply.

5. Response

The Minister of Fisheries and Oceans has appointed Mr. James MacKenzie as Chief Federal Representative responsible for discussions on new fishing arrangements for Aboriginal groups. These discussions are currently underway and are initially focused on the process to be followed over the course of the winter.

Discussions will take place over the winter to reach interim agreements between Aboriginal groups and the Federal Government on fishing arrangements for the year 2000 fisheries. It is hoped that these fishing arrangements can be completed by April 2000 to provide commercial harvesters, both Aboriginal and non-Aboriginal, with stability in the coming year.

To assist Mr. MacKenzie, Mr. Gilles Thériault has been appointed as Assistant Federal Representative. It is his job to liase and facilitate consultations with commercial and other interests. He reports directly to Mr. MacKenzie and represents an integral part of the overall process, which seeks to fairly accommodate new entrants into fully subscribed fisheries.

Fishing by some Aboriginal groups commenced immediately after the September 17th, 1999 Supreme Court decision. Pending the completion of agreements between Aboriginal groups and DFO on fishing arrangements, interim measures must be adopted to ensure, among other things, that conservation goals are met, that the fishery is orderly, and that the interests of other users of the resource are considered. These interim measures will be based on the existing policy and regulatory framework as adjusted to accommodate the Treaty right.

While these measures are intended to accommodate the Treaty right in the near-term, they do not preclude changes to fisheries management regimes in the longer-term that may arise in the course of discussions to accommodate Aboriginal access.

6. Interim Guidelines

DFO will be guided by the following interim guidelines that will apply, pending the outcome of discussions Aboriginal groups. These interim arrangements are without prejudice to the legal positions of DFO and Aboriginal groups, or the longer-term arrangements to be agreed upon in the ongoing discussions.

DFO will respect the Treaty right in the following manner:

- DFO will negotiate access to commercial fisheries with Aboriginal groups.
- DFO will provide interim fisheries access to Aboriginal groups on a case by case basis taking into account:
  - The primary importance of conservation goals and the precautionary approach when developing ways to accommodate new entrants.
  - The displacement or impact upon existing harvesters and economic and regional fairness issues.
- DFO will consult with Aboriginal groups on the management of their fisheries, and where agreements are reached, ensure that steps are taken to have their communities play a role in the management of their fisheries consistent with the agreement and communal licence.
- In cases where no agreement is reached, DFO will issue a communal licence. The licence will establish conditions for harvest.

Pending the outcome of discussions on fishery access, DFO will regulate all fisheries, including those conducted with respect to the Treaty right, in the following manner:

Fishing activity in fisheries managed by DFO must be authorised by DFO. In the commercial fishery, this is achieved through licences issued to individual or corporate fishers and fishing enterprises, and in Aboriginal fisheries through communal licences issued to Aboriginal groups (unless alternative means become available). To accommodate the Treaty right on an interim basis, DFO will:

- Issue communal licences that:
  - establish enforceable conservation measures such as type and quantity of fishing gear,
  - establish an agreed-upon quantity/quota for the fisheries, or in the absence of an agreement, establish a reasonable quantity/quota for the fisheries,
  - establish the time and area of harvest where required,
  - establish monitoring and reporting procedures.
- In addition to the fisheries management measures described above, harvesting will be conducted in compliance with regulations relating to public health and safety.
- To protect the integrity of the Treaty right and to ensure the orderly management of the fishery, if requested by either a Guardian or a Fishery

Officer, those persons fishing under the authority of a communal licence must provide proof of designation by the Aboriginal group that has been authorised to fish.

- Unless otherwise agreed to between an Aboriginal group and DFO, normal enforcement procedures will apply to non-Aboriginal people on board a vessel used to fish outside of authorised, licensed commercial fisheries.
- Unauthorised entry into, and fishing in, Canadian waters by persons who are not citizens of Canada will be subject to enforcement action under the *Coastal Fisheries Protection Act* regardless of any claim by them to be Treaty beneficiaries.

7. Next Steps

DFO will continue discussions with Aboriginal groups and commercial interests and will be moving toward establishing fishing agreements between DFO and Aboriginal groups for 2000. This process is not meant to yield final arrangements that define the Treaty right. Rather its purpose is to establish practical fishing arrangements to accommodate fishing interests of Aboriginal groups. The interim measures noted above will remain in effect until they are superceded by revised management measures derived from the discussion process.

PART II - GROUP WORK

INSTRUCTIONS: (30 minutes)

After you have finished the rank order procedure, you will form 3 or 4 groups of 5 or 6 individuals. Your group work task is to develop consensus on the five things your group believes are the most important aspects of the relationship between Canada and Aboriginal people.

In developing consensus the group should attempt to achieve unanimous support from all group members on the five things. This may require some compromising based on a good "give and take" discussion process.

After your group has arrived at its consensual position, a member of the group should be appointed to report the results.

1. ______________________________

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2. ______________________________

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3. ______________________________

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4. ______________________________

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5. ______________________________

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Supreme Court of Canada | Cour suprême du Canada

September 17, 1999 | le 17 septembre 1999

JUDGMENT | JUGEMENT

DONALD JOHN MARSHALL, JR. v. HER MAJESTY THE QUEEN - and - THE ATTORNEY GENERAL FOR NEW BRUNSWICK, THE WEST NOVA FISHERMEN'S COALITION, THE NATIVE COUNCIL OF NOVA SCOTIA and THE UNION OF NEW BRUNSWICK INDIANS (26014) (N.S.)

CORAM: The Chief Justice and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Binnie JJ.

The appeal is allowed and an acquittal on all charges is ordered, Gonthier and McLachlin JJ. dissenting. The constitutional question is answered as follows:

Question: Are the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish, contained in ss. 4(1)(*a*) and 20 of the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations*, inconsistent with the treaty rights of the appellant contained in the Mi'kmaq Treaties of 1760-61 and therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

Answer: Yes. Gonthier and McLachlin JJ. would answer in the negative.

Le pourvoi est accueilli et l'acquittement est ordonné à l'égard de toutes les accusations. Les juges Gonthier et McLachlin sont dissidents. La question constitutionnelle reçoit la réponse suivante:

Question: L'interdiction de prendre et de garder du poisson sans permis, ainsi que celles de pêcher pendant la période de fermeture et de vendre du poisson sans permis, prévues respectivement par l'al. 4(1)*a*) et l'art. 20 du *Règlement de pêche des provinces maritimes* ainsi que par le par. 35(2) du *Règlement de pêche (dispositions générales)*, sont-elles incompatibles avec les droits conférés à l'appelant par les traités conclus par les Micmacs en 1760 et 1761 et, par conséquent, inopérantes à son endroit, par l'effet du par. 35(1) et de l'art. 52 de la *Loi constitutionnelle de 1982*?

Réponse: Oui. Les juges Gonthier et McLachlin répondraient par la négative.

C.J.C.
J.C.C.

26014

Supreme Court of Canada

Cour suprême du Canada

DONALD JOHN MARSHALL, JR.

v.

HER MAJESTY THE QUEEN

and

THE ATTORNEY GENERAL FOR NEW BRUNSWICK,
THE WEST NOVA FISHERMEN'S COALITION,
THE NATIVE COUNCIL OF NOVA SCOTIA and
THE UNION OF NEW BRUNSWICK INDIANS
(26014)

CORAM:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Gonthier
The Hon. Mr. Justice Cory
The Hon. Madam Justice McLachlin
The Hon. Mr. Justice Iacobucci
The Hon. Mr. Justice Binnie

Appeal heard:
November 5, 1998

Judgment rendered:
September 17,1999

Reasons for judgment by:
The Hon. Mr. Justice Binnie

Concurred in by:
The Rt. Hon. Antonio Lamer, P.C.
The Hon. Mme Justice L'Heureux-Dubé
The Hon. Mr. Justice Cory
The Hon. Mr. Justice Iacobucci

DONALD JOHN MARSHALL, JR.

c.

SA MAJESTÉ LA REINE

et

LE PROCUREUR GÉNÉRAL DU NOUVEAU-BRUNSWICK,
LA WEST NOVA FISHERMEN'S COALITION,
LE NATIVE COUNCIL OF NOVA SCOTIA et
L'UNION OF NEW BRUNSWICK INDIANS
(26014)

CORAM:
Le très hon. Antonio Lamer, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Gonthier
L'honorable juge Cory
L'honorable juge McLachlin
L'honorable juge Iacobucci
L'honorable juge Binnie

Appel entendu:
le 5 novembre 1998

Jugement rendu:
le 17 septembre 1999

Motifs de jugement:
L'honorable juge Binnie

Souscrivent à l'avis de l'honorable juge Binnie:
Le très hon. Antonio Lamer, c.p.
L'honorable juge L'Heureux-Dubé
L'honorable juge Cory
L'honorable juge Iacobucci

Dissenting reasons by:
The Hon. Madam Justice McLachlin

Concurred in by:
The Hon. Mr. Justice Gonthier

Counsel at hearing:

For the appellant:
Bruce H. Wildsmith, Q.C.
Eric A. Zscheile

For the respondent:
Michael A. Paré
Ian MacRae
Gordon Campbell

For the intervener the Attorney General for New Brunswick:
Bruce Judah, Q.C.

For the intervener the West Nova Fishermen's Coalition:
A. William Moreira, Q.C.
Daniel R. Pust

For the intervener the Native Council of Nova Scotia:
D. Bruce Clarke

For the intervener the Union of New Brunswick Indians:
Henry J. Bear

Motifs dissidents:
L'honorable juge McLachlin

Souscrit à l'avis de l'honorable juge McLachlin:
L'honorable juge Gonthier

Avocats à l'audience:

Pour l'appelant:
Bruce H. Wildsmith, c.r.
Eric A. Zscheile

Pour l'intimée:
Michael A. Paré
Ian MacRae
Gordon Campbell

Pour l'intervenant le procureur général du Nouveau-Brunswick:
Bruce Judah, c.r.

Pour l'intervenante la West Nova Fishermen's Coalition
A. William Moreira, c.r.
Daniel R. Pust

Pour l'intervenant le Native Council of Nova Scotia:
D. Bruce Clarke

Pour l'intervenante l'Union of New Brunswick Indians:
Henry J. Bear

Citations	Références
N.S. Prov. Ct.: [1996] N.S.J. No. 246 (QL).	C. prov. N.-É.: [1996] N.S.J. No. 246 (QL).
N.S.C.A: (1997), 159 N.S.R. (2d) 186, 468 A.P.R. 186, 146 D.L.R. (4th) 257, [1997] 3 C.N.L.R. 209, [1997] N.S.J. No. 131 (QL).	C.A.N.-É.: (1997), 159 N.S.R. (2d) 186, 468 A.P.R. 186, 146 D.L.R. (4th) 257, [1997] 3 C.N.L.R. 209, [1997] N.S.J. No. 131 (QL)

AVIS/NOTICE

La version française des motifs de jugement n'est pas disponible pour l'instant. Elle le sera dans les meilleurs délais.

The French version of the reasons for judgment is not available at this time. The French version will be issued at the earliest possible time.

r. v. marshall

Donald John Marshall, Jr. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for New Brunswick,
the West Nova Fishermen's Coalition,
the Native Council of Nova Scotia
and the Union of New Brunswick Indians *Interveners*

Indexed as: R. v. Marshall

File No.: 26014.

1998: November 5; 1999: September 17.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Binnie JJ.

on appeal from the court of appeal for nova scotia

Indians -- Treaty rights -- Fishing rights -- Accused, a Mi'kmaq Indian, fishing with prohibited net during close period and selling fish caught without a licence in violation of federal fishery regulations -- Whether accused possessed treaty right to catch and sell fish that exempted him from compliance with regulations -- Mi'kmaq

Treaties of 1760-61 -- Maritime Provinces Fishery Regulations, SOR/93-55, ss. 4(1)(a), 20 -- Fishery (General) Regulations, SOR/92-53, s. 35(2).

The accused, a Mi'kmaq Indian, was charged with three offences set out in the federal fishery regulations: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. He admitted that he had caught and sold 463 pounds of eels without a licence and with a prohibited net within close times. The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 that exempted him from compliance with the regulations. During the negotiations leading to the treaties of 1760-61, the aboriginal leaders asked for truckhouses "for the furnishing them with necessaries in exchange for their peltry" in response to the Governor's inquiry "whether they were directed by their Tribes to propose any other particulars to be treated upon at this time". The written document, however, contained only the promise by the Mi'kmaq not to "traffick, barter or exchange any commodities in any manner but with such persons or the managers of such truck houses as shall be appointed or established by His Majesty's Governor". While this "trade clause" is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals, the trial judge found that it reflected a grant to them of the positive right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. He also found that when the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. The accused was convicted on all three counts. The Court of Appeal upheld the convictions. It concluded that the trade clause does not grant the Mi'kmaq any rights, but represented a mechanism imposed upon them to help ensure that the peace between the Mi'kmaq and the British was a lasting one, by obviating the need of the Mi'kmaq to trade with the enemies of the British or unscrupulous traders.

Held (Gonthier and McLachlin JJ. dissenting): The appeal should be allowed and an acquittal entered on all charges.

Per Lamer C.J. and L'Heureux-Dubé, Cory, Iacobucci and Binnie JJ.: When interpreting the treaties the Court of Appeal erred in rejecting the use of extrinsic evidence in the absence of ambiguity. Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Secondly, extrinsic evidence of the historical and cultural context of a treaty may be received even if the treaty document purports to contain all of the terms and even absent any ambiguity on the face of the treaty. Thirdly, where a treaty was concluded orally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written ones.

There was more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses. While the treaties set out a restrictive covenant and do not say anything about a positive Mi'kmaq right to trade, they do not contain all the promises made and all the terms and conditions mutually agreed to. Although the trial judge drew positive implications from the negative trade clause, such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the treaty document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people. The trial judge's narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. It is the common intention of the parties in 1760 to which effect must be given. The trade clause would not have

advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to a harvest of wildlife to trade.

This appeal should be allowed because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained. If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. An interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. The trade arrangement must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations. The promise of access to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

There is a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the

same activity. A general right enjoyed by all citizens can be made the subject of an enforceable treaty promise. Thus the accused need not show preferential trading rights, but only treaty trading rights. Following the enactment of the *Constitution Act, 1982*, the fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.

The accused's treaty rights are limited to securing "necessaries" (which should be construed in the modern context as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. Thus construed, however, they are treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*. The surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test. What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits. Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. Such regulations would accommodate the treaty right and would not constitute an infringement that would have to be justified under the *Badger* standard.

The accused caught and sold the eels to support himself and his wife. His treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Accordingly, the close season and the imposition of a discretionary licencing system would, if enforced, interfere with the accused's treaty

right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.

Per Gonthier and McLachlin JJ. (dissenting): Each treaty must be considered in its unique historical and cultural context, and extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. It may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, insofar as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading.

The treaties of 1760-61 do not grant a general right to trade. The core of the trade clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade. Nor does the historic and cultural context in which the treaties were made establish such a right. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. On the historical record, moreover, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade. To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they

possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. The finding that both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them, and replaced the expensive truckhouses with licenced traders in 1762. The system of licenced traders, in turn, died out by the 1780s. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the accused from the application of the fisheries regulations.

R. *v*. Marshall

Donald John Marshall, Jr. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General for New Brunswick,
the West Nova Fishermen's Coalition,
the Native Council of Nova Scotia
and the Union of New Brunswick Indians *Interveners*

Indexed as: R. *v*. Marshall
File No.: 26014.
1999: November 17.
Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Binnie JJ.
MOTION FOR REHEARING AND STAY
Indians -- Treaty rights -- Fishing rights -- Accused, a Mi'kmaq Indian, acquitted of charges of fishing in violation of federal fishery regulations -- Accused found to possess treaty rights exempting him from compliance with regulations -- Whether accused should have been acquitted absent new or further trial to determine justification of regulations -- Whether government can regulate treaty right to fish by licensing regulations and closed seasons -- Scope of government power to regulate treaty right --Whether judgment should be stayed pending disposition of rehearing if so ordered.
Appeals -- Supreme Court of Canada -- Jurisdiction -- Rehearing --Intervener in appeal applying for rehearing -- Whether Supreme Court has jurisdiction to entertain application -- Rules of Supreme Court of Canada, SOR/83-74, r. 1 "party".
An intervener in the *Marshall* appeal, the West Nova Fishermen's Coalition, applied for a rehearing of the appeal and, if granted, for a stay of the judgment pending the rehearing. The Coalition also sought a further trial limited to the issue whether the application of the fisheries regulations to the exercise of a Mi'kmaq treaty right could be justified on conservation or other grounds. The parties and other interveners opposed the rehearing and any further trial. The intervener's application was primarily directed to the presumed effects of the Court's judgment on the lobster fishery. The *Marshall* appeal, however, related to fishing eel out of season contrary to federal fishery regulations. In its judgment of September 17, 1999, a majority of the Court concluded that Marshall had established the existence and infringement of a local Mi'kmaq treaty right to carry on small scale commercial eel fishery. The Crown had not attempted to justify either the licensing restriction or the closed season to limit the exercise of the appellant's treaty right. The appellant was therefore acquitted. The issue of justification was a new issue neither raised by the parties nor decided in this Court nor dealt with in the courts below.
Held: The motion for a rehearing and stay of the judgment should be denied.

In light of the extended definition of "party" in Rule 1 of the Supreme Court Rules, this Court has jurisdiction to entertain an intervener's application for a rehearing but will only do so in exceptional circumstances. Not only are there no such circumstances here but the intervener's application also violated the basis on which an intervener is permitted to participate in the appeal in the first place, namely acceptance of the record as defined by the Crown and the defence. In so far as the Coalition's questions are capable of being answered on the trial record in this case, the responses are already evident in the majority judgment and the prior decisions of this Court referred to therein.

The Crown elected not to try to justify the licensing or closed season restriction on the eel fishery in this prosecution, but the resulting acquittal cannot be generalised to a declaration that licensing restrictions or closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish". The factual context for justification is of great importance and the strength of the justification may vary depending on the resource, species, community and time.

The federal and provincial governments have the authority within their respective legislative fields to regulate the exercise of a treaty right where justified on conservation or other grounds. The *Marshall* judgment referred to the Court's principal pronouncements on the various grounds on which the exercise of treaty rights may be regulated. The paramount regulatory objective is conservation and responsibility for it is placed squarely on the Minister responsible and not on the aboriginal or non-aboriginal users of the resource. The regulatory authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups. Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights. The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified on conservation or other grounds.

The Coalition's application is based on a misconception of the scope of the Court's majority judgment of September 17, 1999 and the appellant should not have his acquittal kept in jeopardy while issues much broader than the specifics of his prosecution are litigated.

Cases Cited

Distinguished: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *M. v. H.*, [1999] 2 S.C.R. 3; **applied:** *R. v. Badger*, [1996] 1 S.C.R. 771; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Côté*, [1996] 3 S.C.R. 139.

Statutes and Regulations Cited

Aboriginal Communal Fishing Licences Regulations, SOR/93-332 [am. SOR/94-390].
Constitution Act, 1982, s. 35.
Fisheries Act, R.S.C., 1985, c. F-14, ss. 7(1), 43 [am. 1991, c. 1, s. 12].
Fishery (General) Regulations, SOR/93-53, s. 35(2).
Maritime Provinces Fishery Regulations, SOR/93-55, Sch. III, item 2.
Rules of the Supreme Court of Canada, SOR/83-74, Rules 1, 27.
Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

MOTION FOR REHEARING AND STAY of *R. v. Marshall*, rendered September 17, 1999. Motion dismissed.
Written submissions by *A. William Moreira, Q.C.*, for the applicant the West Nova Fishermen's Coalition.
Written submissions by *Bruce H. Wildsmith, Q.C.*, for Donald John Marshall, Jr., respondent on the motion.
Written submissions by *Graham Garton, Q.C.*, and *Robert J. Frater*, for Her Majesty the Queen, respondent on the motion.
Written submissions by *D. Bruce Clarke*, for the Native Council of Nova Scotia, respondent on the motion.
Written submissions by *Henry J. Bear*, for the Union of New Brunswick Indians, respondent on the motion.
Solicitors for the applicant the West Nova Fishermen's Coalition): Daley, Black & Moreira, Halifax.
Solicitor for Donald John Marshall, Jr., respondent on the motion: Bruce H. Wildsmith, Barss Corners, Nova Scotia.
Solicitor for Her Majesty the Queen, respondent on the motion: The Attorney General of Canada, Ottawa.
Solicitors for the the Native Council of Nova Scotia, respondent on the motion: Burchell, Hayman, Barnes, Halifax.
Solicitors for the Union of New Brunswick Indians, respondent on the motion: Getty, Bear, Fredericton.
éTHE COURT:
1 The intervener, the West Nova Fishermen's Coalition ("the Coalition"), applies for a rehearing to have the Court address the regulatory authority of the Government of Canada over the east coast fisheries together with a new trial to allow the Crown to justify for conservation or other purposes the licensing and closed season restriction on the exercise of the appellant's treaty right, and for an order that the Court's judgment, dated September 17, 1999, be stayed in the meantime. The application is opposed by the Crown, the appellant Marshall and the other interveners.
2 Those opposing the motion object in different ways that the Coalition's motion rests on a series of misconceptions about what the September 17, 1999 majority judgment decided and what it did not decide. These objections are well founded. The Court did not hold that the Mi'kmaq treaty right cannot be regulated or that the Mi'kmaq are guaranteed an open season in the fisheries. Justification for conservation or other purposes is a separate and distinct issue at the trial of one of these prosecutions. It is up to the Crown to decide whether or not it wishes to support the applicability of government regulations when prosecuting an accused who claims to be exercising an aboriginal or treaty right.
3 The Attorney General of Canada, in opposing the Coalition's motion, acknowledges that the Crown did not lead any evidence at trial or make any argument on the appeal that the licensing and closed season regulations which restricted the exercise of the treaty right were justified in relation to the eel fishery. Accordingly, the issue whether these restrictions could have been justified in this case formed no part of the Court's majority judgment of September 17, 1999, and the constitutional question posed in this prosecution was answered on that basis.
<u>The September 17, 1999 Acquittal</u>

4 In its majority judgment, the Court acquitted the appellant of charges arising out of catching 463 pounds of eel and selling them for $787.10. The acquittal was based on a treaty made with the British in 1760, and more particularly, on the oral terms reflected in documents made by the British at the time of the negotiations but recorded incompletely in the "truckhouse" clause of the written treaty. The treaty right permits the Mi'kmaq community to work for a living through continuing access to fish and wildlife to trade for "necessaries", which a majority of the Court interpreted as "food, clothing and housing, supplemented by a few amenities".
5 The Coalition argues that the native and non-native fishery should be subject to the same regulations. In fact, as pointed out in the September 17, 1999 majority judgment, natives and non-natives *were* subject to the unilateral regulatory authority of successive governments from 1760-61 to 1982. Until adoption of the *Constitution Act, 1982*, the appellant would clearly have been subject to regulations under the federal *Fisheries Act* and predecessor enactments in the same way and to the same extent as members of the applicant Coalition unless given a regulatory exemption as a matter of government policy.
6 As further pointed out in the September 17, 1999 majority judgment, the framers of the Constitution caused existing aboriginal and treaty rights to be entrenched in s. 35 of the *Constitution Act, 1982*. This gave constitutional status to rights that were previously vulnerable to unilateral extinguishment. The constitutional language necessarily included the 1760-61 treaties, and did not, on its face, refer expressly to a power to regulate. Section 35(1) simply says that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". In subsequent cases, some aboriginal peoples argued that, as no regulatory restrictions on their rights were expressed in plain language in the Constitution, none could be imposed except by constitutional amendment. On the other hand, some of the Attorneys General argued that as aboriginal and treaty rights had always been vulnerable to unilateral regulation and extinguishment by government, this vulnerability was itself part of the rights now entrenched in s. 35 of the *Constitution Act, 1982*. In a series of important decisions commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1057, which arose in the context of the west coast fishery, this Court affirmed that s. 35 aboriginal and treaty rights *are* subject to regulation, provided such regulation is shown by the Crown to be justified on conservation or other grounds of public importance. A series of tests to establish such justification was laid out. These cases were referred to in the September 17, 1999 majority judgment, but the applicable principles were not elaborated because justification was not an issue which the Crown chose to make part of this particular prosecution, and therefore neither the Crown nor the defence had made submissions respecting the government's continuing powers of regulation. The Coalition recognizes that it is raising a new issue. It submits "that it is plain in the Reasons for Judgment, and in the earlier decisions of the Provincial Court of Nova Scotia at trial and of the Nova Scotia Court of Appeal on initial appeal, that that issue [of regulatory justification] has been neither considered nor decided."
7 The Coalition nevertheless says it would be an "injustice" to its members if the appellant is not put through a new trial on the issue of justification. The Coalition asks the Court in effect to transform the proceeding retroactively into an advisory reference or declaratory action. The Attorney General of Canada objects to this transformation. It was the Crown's decision to proceed against the appellant by way of an ordinary prosecution.

The appellant responded to the Crown's evidence. He was found not guilty of the case put against him.

No Stay of Judgment

8 The appellant, like any other accused who is found to be not guilty, is ordinarily entitled to an immediate acquittal, not a judgment that is suspended while the government considers the wider implications of an unsuccessful prosecution. The Attorney General of Canada did not at the hearing of this appeal, and does not now in its response to the Coalition's motion, apply for a stay of the effect of the Court's recognition and affirmation of the Mi'kmaq treaty right. Should such an application be made, the Court will hear argument on whether it has the jurisdiction to grant such a stay, and if so, whether it ought to do so in this case.

Status of the West Nova Fishermen's Coalition

9 Those in opposition challenge the status of the Coalition to bring this application. It is argued that the Coalition, being an intervener, does not have the rights of a party to ask for a rehearing. The Coalition was added as an intervener to this proceeding by order dated April 7, 1998. Pursuant to s. 1 of the *Rules of the Supreme Court of Canada*, SOR/83-74, as pointed out by the Coalition in its Reply, an intervener enjoys the status of a party to the appeal unless the text of a particular rule provides otherwise or unless the context of a particular rule does not so permit. While it would only be in exceptional circumstances that the Court would entertain an intervener's application for a rehearing, the extended definition of "party" in s. 1 of the Rules gives the Court the jurisdiction to do so. Not only are there no such exceptional circumstances here, but also the Coalition's motion violates the basis on which interveners are permitted to participate in an appeal in the first place, which is that interveners accept the record as defined by the Crown and the defence. Moreover, in so far as the Coalition's questions are capable of being answered on the trial record in this case, the responses are already evident in the September 17, 1999 majority judgment and the prior decisions of this Court therein referred to. The Crown, the appellant Marshall and the other interveners all oppose a new trial on the issue of justification. They are right to do so, for the reasons which follow.

10 The Coalition requests a rehearing on the following issues:

1 Whether the appellant is entitled to have been acquitted on a charge of unlicensed sale of fish, contrary to s. 35(2) of the *Fishery (General) Regulations*, in the absence of a new (or further) trial on the issue of whether that Regulation is or can be justified by the government of Canada;

2 Whether the appellant is entitled to have been acquitted on a charge of out-of-season fishing, contrary to Item 2 of Schedule III of the *Maritime Provinces Fishery Regulations*, in the absence of a new (or further) trial on the issue of whether those Regulations are or can be justified by the government of Canada;

3 Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the appellant, of their treaty right to fish through the imposition of licensing requirements;

4 Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the appellant, of their treaty right to fish through the imposition of closed seasons;

5 In any event, what is the scope of regulatory power possessed by the government of Canada for purposes of regulating the treaty right; and

6 ... pursuant to section 27 of the *Rules of the Supreme Court of Canada*, requests an Order that [the Court's] judgment pronounced herein on the 17th day of September, 1999 be stayed pending disposition of the rehearing of the appeal, if ordered.
11 These questions, together with the Coalition's request for a stay of judgment, reflect a basic misunderstanding of the scope of the Court's majority reasons for judgment dated September 17, 1999. As stated, this was a prosecution of a private citizen. It required the Court to determine whether certain precise charges relating to the appellant's participation in the eel fishery could be sustained. The majority judgment of September 17, 1999 was limited to the issues necessary to dispose of the appellant's guilt or innocence.
12 An order suspending the effect of a judgment of this Court is infrequently granted, especially where (as here) the parties have not requested such an order. This was not a reference to determine the general validity of legislative and regulatory provisions, as was the case, for example, in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, where the Court suspended its declaration of invalidity of Manitoba enactments until "the expiry of the minimum period required for translation, re-enactment, printing and publishing". Nor was this a case where the Court was asked to grant declaratory relief with respect to the invalidity of statutory provisions, as in *M. v. H.*, [1999] 2 S.C.R. 3, where the Court suspended the effect of its declaration of invalidity of the definition of "spouse" for the purpose of s. 29 of the Ontario *Family Law Act*, R.S.O. 1990, c. F. 3, for a period of six months to enable the legislature to consider appropriate amendments.
13 Here the Crown elected to test the treaty issue by way of a prosecution, which is governed by a different set of rules than is a reference or a declaratory action. This appeal was directed solely to the issue whether the Crown had proven the appellant guilty as charged. In his defence, the appellant established that the collective treaty right held by his community allowed him to fish for eels in what was described as "a small-scale commercial activity to help subsidize or support himself and his common-law spouse", and that the existing regulations under the *Fisheries Act*, R.S.C., 1985, c. F-14, had not recognized or accommodated that treaty right.
14 As stated in para. 56 of the September 17, 1999 majority judgment, the treaty right was "to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test" (emphasis added). The *Badger* test (*R. v. Badger*, [1996] 1 S.C.R. 771) will be discussed below. The Crown, as stated, did not offer any evidence or argument justifying the licensing and closed season restrictions (referred to in the statute and regulations as a "close time") on the appellant's exercise of the collective treaty right, such as (for example) a need to conserve and protect the eel population. The eel population may not in fact require protection from commercial exploitation. Such was the assertion of the Native Council of Nova Scotia in opposition to the Coalition's motion:
... Mr. Marshall was fishing eels. There are no possible conservation issues involving the eel fishery. They are not an endangered species and there is no significant non-native commercial fishery. They are a traditional harvest species, being harvested by Mr. Marshall in a traditional method and in relatively small quantities. There is simply no justificatory evidence that the Crown could have led.
The Attorney General of Canada's written argument on the appeal to this Court specifically stated that "[s]ince no such treaty rights have been established in this case, then there was no requirement for the Crown to justify its *Fisheries Act* regulations in

accordance with *R. v. Sparrow*, [*supra*], or *R. v. Gladstone*, [[1996] 2 S.C.R. 723]". The written argument of the Attorney General for New Brunswick did not refer to the issue of justification at all, and neither the Attorney General of Nova Scotia nor the Attorney General of Prince Edward Island intervened on the appeal. The majority judgment delivered on September 17, 1999, therefore directed the acquittal of the appellant on the evidence brought against him. The issue of justification was not before the Court and no judgment was made about whether or not such restrictions could have been justified in relation to the eel fishery had the Crown led evidence and argument to support their applicability.

Grounds on which the Coalition Seeks a Rehearing

1. *Whether the appellant is entitled to have been acquitted on a charge of unlicensed sale of fish, contrary to s. 35(2) of the Fishery (General) Regulations, in the absence of a new (or further) trial on the issue of whether that Regulation is or can be justified by the government of Canada.*

15 The appellant, as any other citizen facing a prosecution, is entitled to know in a timely way the case he has to meet, and to be afforded the opportunity to answer it. The Coalition seeks a new trial on a new issue. The September 17, 1999 majority decision specifically noted at para. 4 that the treaty right

... was always subject to regulation. The Crown does not suggest that the regulations in question accommodate the treaty right. The Crown's case is that no such treaty right exists. Further, no argument was made that the treaty right was extinguished prior to [enactment of the *Constitution Act, 1982*], and no justification was offered by the Crown for the several prohibitions at issue in this case. [Emphasis added.]

The Attorney General of Canada affirms in opposition to the Coalition's motion the limited nature of the issues raised at trial:

In this case, the intervener wishes to contest the appellant's entitlement to an acquittal by raising issues as to whether the regulations under which the appellant was charged could be justified in accordance with the test in *R. v. Sparrow*. That would clearly be a new issue in the proceedings. It is not open to the intervener to raise an issue that did not arise between the parties to the appeal. [Emphasis added.]

In its Reply, the Coalition argues that to require the parties to deal with the issue of regulatory justification in the same trial as treaty entitlement "would be to impose an unreasonable and unworkable burden in aboriginal rights litigation at the trial level". Whatever may be the advantages or disadvantages of splitting these issues into a two-stage trial, no such proposal was made to the trial judge by the parties, and no such procedure was considered, much less adopted, in this case. As stated, the Crown here opposes a rehearing and opposes a new trial. The issues of concern to the Coalition largely relate to the lobster fishery, not the eel fishery, and, if necessary, can be raised and decided in future cases that involve the specifics of the lobster fishery. It is up to the Crown to initiate enforcement action in the lobster and other fisheries if and when it chooses to do so.

2. *Whether the appellant is entitled to have been acquitted on a charge of out-of-season fishing, contrary to Item 2 of Schedule III of the Maritime Provinces Fishery Regulations, in the absence of a new (or further) trial on the issue of whether those Regulations are or can be justified by the government of Canada.*

16 The Coalition argues that a rehearing and a further trial are necessary because of "uncertainty" about the authority of the government to manage the fisheries. The Attorney General of Canada, acting on behalf of the federal government which regulates the fisheries, opposes the Coalition's position.

17 In the event of another prosecution under the regulations, the Crown will (as it did in this case) have the onus of establishing the factual elements of the offence. The onus will then switch to the accused to demonstrate that he or she is a member of an aboriginal community in Canada with which one of the local treaties described in the September 17, 1999 majority judgment was made, and was engaged in the exercise of the community's collective right to hunt or fish in that community's traditional hunting and fishing grounds. The Court's majority judgment noted in para. 5 that no treaty was made by the British with the Mi'kmaq population as a whole:

... the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence. The trial judge, Embree Prov. Ct. J., found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. [Emphasis added.]

The British Governor in Halifax thus proceeded on the basis that local chiefs had no authority to promise peace and friendship on behalf of other local chiefs in other communities, or to secure treaty benefits on their behalf. The treaties were local and the reciprocal benefits were local. In the absence of a fresh agreement with the Crown, the exercise of the treaty rights will be limited to the area traditionally used by the local community with which the "separate but similar" treaty was made. Moreover, the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs, and their exercise is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries".

18 The September 17, 1999 majority judgment further pointed out that the accused will be required to demonstrate (as the appellant did here) that the regulatory regime significantly restricts the exercise of the treaty right. The majority judgment concluded on this point, at para. 64, that:

In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(*a*)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test. [Emphasis added.]

19 At the end of the day, it is always open to the Minister (as it was here) to seek to justify the limitation on the treaty right because of the need to conserve the resource in question or for other compelling and substantial public objectives, as discussed below. Equally, it will be open to an accused in future cases to try to show that the treaty right was intended in 1760 by *both* sides to include access to resources other than fish, wildlife and traditionally gathered things such as fruits and berries. The word "gathering" in the September 17, 1999 majority judgment was used in connection with the types of the resources traditionally "gathered" in an aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties. While treaty rights are capable of evolution within limits, as discussed below, their subject matter (absent a new agreement) cannot be wholly transformed. Certain unjustified assumptions are made

in this regard by the Native Council of Nova Scotia on this motion about "the effect of the economic treaty right on forestry, minerals and natural gas deposits offshore". The Union of New Brunswick Indians also suggested on this motion a need to "negotiate an integrated approach dealing with all resources coming within the purview of fishing, hunting and gathering which includes harvesting from the sea, the forests and the land". This extended interpretation of "gathering" is not dealt with in the September 17, 1999 majority judgment, and negotiations with respect to such resources as logging, minerals or offshore natural gas deposits would go beyond the subject matter of this appeal.

20 The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right "to gather" anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower. No evidence was drawn to our attention, nor was any argument made in the course of this appeal, that trade in logging or minerals, or the exploitation of off-shore natural gas deposits, was in the contemplation of either or both parties to the 1760 treaty; nor was the argument made that exploitation of such resources could be considered a logical evolution of treaty rights to fish and wildlife or to the type of things traditionally "gathered" by the Mi'kmaq in a 1760 aboriginal lifestyle. It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife. Other resources were simply not addressed by the parties, and therefore not addressed by the Court in its September 17, 1999 majority judgment. As acknowledged by the Union of New Brunswick Indians in opposition to the Coalition's motion, "there are cases wending their way through the lower courts dealing specifically with some of these potential issues such as cutting timber on Crown lands".

21 The fact the Crown elected not to try to justify a closed season on the eel fishery at issue in this case cannot be generalised, as the Coalition's question implies, to a conclusion that closed seasons can never be imposed as part of the government's regulation of the Mi'kmaq limited commercial "right to fish". A "closed season" is clearly a potentially available management tool, but its application to treaty rights will have to be justified for conservation or other purposes. In the absence of such justification, an accused who establishes a treaty right is ordinarily allowed to exercise it. As suggested in the expert evidence filed on this motion by the Union of New Brunswick Indians, the establishment of a closed season may raise very different conservation and other issues in the eel fishery than it does in relation to other species such as salmon, crab, cod or lobster, or for that matter, to moose and other wildlife. The complexities and techniques of fish and wildlife management vary from species to species and restrictions will likely have to be justified on a species-by-species basis. Evidence supporting closure of the wild salmon fishery is not necessarily transferable to justify closure of an eel fishery.

22 Resource conservation and management and allocation of the permissible catch inevitably raise matters of considerable complexity both for Mi'kmaq peoples who seek to work for a living under the protection of the treaty right, and for governments who seek to justify the regulation of that treaty right. The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time. As this and other courts have pointed out on many occasions, the process of accommodation

of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation. The Chief Justice emphasized in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (a case cited in the September 17, 1999 majority decision), at para. 207:

On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.

23 The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case. The decision in this particular prosecution is authority only for the matters adjudicated upon. The acquittal ought not to be set aside to allow the Coalition to address new issues that were neither raised by the parties nor determined by the Court in the September 17, 1999 majority judgment.

3. *Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the appellant, of their treaty right to fish through the imposition of licensing requirements.*

24 The Government's power to regulate the treaty right is repeatedly affirmed in the September 17, 1999 majority judgment. In addition to the reference at para. 4 of the majority decision, already mentioned, that the treaty right "was always subject to regulation", the majority judgment further stated, at para. 7,

In my view, the treaty rights are limited to securing "necessaries" (which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*, and are subject to regulations that can be justified under the *Badger* test.... [Emphasis added.]

At para. 38, the majority judgment noted that:

Dr. Patterson went on to emphasize that the understanding of the Mi'kmaq would have been that these treaty rights were subject to regulation, which I accept.

At para. 58, the limited nature of the right was reiterated:

What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits. [Emphasis added.]

At para. 64, the majority judgment again referred to regulation permitted by the *Badger* test. The Court was thus most explicit in confirming the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives, discussed below.

25 With all due respect to the Coalition, the government's general regulatory power is clearly affirmed. It is difficult to believe that further repetition of this fundamental point after a rehearing would add anything of significance to what is already stated in the September 17, 1999 majority judgment.

26 As for the specific matter of licences, the conclusion of the majority judgment was *not* that licensing schemes as such are invalid, but that the imposition of a licensing restriction on the appellant's exercise of the treaty right had not been justified for conservation or other public purposes. The Court majority stated at para. 64:

... under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions ... are inoperative against the appellant unless justified under the *Badger* test. [Emphasis added.]

27 Although no evidence or argument was put forward to justify the licensing requirement in this case, a majority of the Court nevertheless referred at para. 64 of its September 17, 1999 decision to *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J., for the Court, dealt with a licensing issue as follows, at paras. 91 and 92:

With respect to licensing, the appellant [aboriginal accused] takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group is [*sic*] necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society.

28 The justification for a licensing requirement depends on facts. The Crown in this case declined to offer evidence or argument to support the imposition of a licensing requirement in relation to the small-scale commercial eel fishery in which the appellant participated.

4. *Whether the government of Canada has power to regulate the exercise by Mi'kmaq persons, including the appellant, of their treaty right to fish through the imposition of closed seasons.*

29 The regulatory device of a closed season is at least in part directed at conservation of the resource. Conservation has always been recognized to be a justification of paramount importance to limit the exercise of treaty and aboriginal rights in the decisions of this Court cited in the majority decision of September 17, 1999, including *Sparrow*, *supra*, and *Badger*, *supra*. As acknowledged by the Native Council of Nova Scotia in opposition to the Coalition's motion, "Conservation is clearly a first priority and the Aboriginal peoples accept this". Conservation, where necessary, may require the complete shutdown of a hunt or a fishery for aboriginal and non-aboriginal alike.

30 In this case, the prosecution of the appellant was directed to a "closed season" in the eel fishery which the Crown did not try to justify, and that is the precise context in which the majority decision of September 17, 1999 is to be understood. No useful purpose would be served for those like the Coalition who are interested in justifying a closed season in the lobster fishery if a rehearing or a new trial were ordered in this case, which related only to the closed season in the eel fishery.

5. In any event, what is the scope of regulatory power possessed by the government of Canada for purposes of regulating the treaty right?

31 On the face of it, this question is not raised by the subject matter of the appeal, nor is it capable of being answered on the factual record. As framed, it is so broad as to be incapable of a detailed response. In effect, the Coalition seeks to transform a prosecution on specific facts into a general reference seeking an advisory opinion of the Court on a broad range of regulatory issues related to the east coast fisheries. As was explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the Court's jurisdiction to give advisory opinions is exceptional and can be invoked only by the Governor in Council under s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26. In this instance, the Governor in Council has not sought an advisory opinion from the Court and the Attorney General of Canada opposes the Coalition's attempt to initiate what she calls a "private reference".

32 Mention has already been made of "the *Badger* test" by which governments may justify restrictions on the exercise of treaty rights. The Court in *Badger* extended to treaties the justificatory standard developed for aboriginal rights in *Sparrow*, *supra*. Cory J. set out the test at para. 97 as follows:

In *Sparrow*, at p. 1113, it was held that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

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....

At page 1114, the next step was set out in this way:

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....

Finally, at p. 1119, it was noted that further questions might also arise 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. (Emphasis added [by Cory J. in *Badger*].)

33 The majority judgment of September 17, 1999 did not put in doubt the validity of the *Fisheries Act* or any of its provisions. What it said, in para. 66, was that, "the close

season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal" (emphasis added). Section 43 of the Act sets out the basis of a very broad regulatory authority over the fisheries which may extend to the native fishery where justification is shown:

REGULATIONS

43 The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(*a*)for the proper management and control of the sea-coast and inland fisheries;

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

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

(*d*)respecting the operation of fishing vessels;

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

(*e*.1)respecting the marking, identification and tracking of fishing vessels;

(*e*.2)respecting the designation of persons as observers, their duties and their carriage on board fishing vessels;

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

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

(*g*.1)respecting any records, books of account or other documents to be kept under this Act and the manner and form in which and the period for which they shall be kept;

(*g*.2)respecting the manner in which records, books of account or other documents shall be produced and information shall be provided under this Act;

(*h*)respecting the obstruction and pollution of any waters frequented by fish;

(*i*)respecting the conservation and protection of spawning grounds;

(*j*)respecting the export of fish or any part thereof from Canada;

(*k*)respecting the taking or carrying of fish or any part thereof from one province to any other province;

(*l*)prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those powers and duties; and

(*m*)where a close time, fishing quota or limit on the size or weight of fish has been fixed in respect of an area under the regulations, authorizing persons referred to in paragraph (*l*) to vary the close time, fishing quota or limit in respect of that area or any portion of that area.

[Emphasis added.]

(Pursuant to this regulatory power, the Governor in Council had, in fact, adopted the *Aboriginal Communal Fishing Licences Regulations*, discussed below.) Although s. 7(1) of the *Fisheries Act* purports to grant the Minister an "absolute discretion" to issue or not to issue leases and licences, this discretion must be read together with the authority of the Governor in Council under s. 43(*f*) to make regulations "respecting the issue, suspension and cancellation of licences and leases". Specific criteria must be established for the exercise by the Minister of his or her discretion to grant or refuse licences in a manner that recognizes and accommodates the existence of an aboriginal or treaty right. In *R. v.*

Adams, [1996] 3 S.C.R. 101, also cited in the September 17, 1999 majority judgment, the Chief Justice stated as follows at para. 54:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. [Emphasis added.]

While *Adams* dealt with an aboriginal right, the same principle applies to treaty rights.

34 The *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, referred to in the September 17, 1999 majority judgment, deal with the food fishery. These regulations provide specific authority to impose conditions where justified respecting the species and quantities of fish that are permitted to be taken or transported; the locations and times at which landing of fish is permitted; the method to be used for the landing of fish and the methods by which the quantity of the fish is to be determined; the information that a designated person or the master of a designated vessel is to report to the Minister or a person specified by the licence holder, prior to commencement of fishing; the locations and times of inspections of the contents of the hold and the procedure to be used in conducting those inspections; the maximum number of persons or vessels that may be designated to carry on fishing and related activities; the maximum number of designated persons who may fish at any one time; the type, size and quantity of fishing gear that may be used by a designated person; and the disposition of fish caught under the authority of the licence. The Governor in Council has the power to amend the *Aboriginal Communal Fishing Licences Regulations* to accommodate a limited commercial fishery as described in the September 17, 1999 majority judgment in addition to the food fishery.

35 Despite the limitations on the Court's ability in a prosecution to address broader issues not at issue between the Crown and the defence, the majority judgment of September 17, 1999 nevertheless referred to the Court's principal pronouncements on the various grounds on which the exercise of treaty rights may be regulated. These include the following grounds:

36 (a) *The treaty right itself is a limited right.* The September 17, 1999 majority judgment referred to the "narrow ambit and extent of the treaty right" (para. 57). In its written argument, the Coalition says that the only regulatory method specified in that judgment was a limit on the quantities of fish required to satisfy the Mi'kmaq need for necessaries. This is not so. What the majority judgment said is that the Mi'kmaq treaty right does not extend *beyond* the quantities required to satisfy the need for necessaries. The Court stated at para. 61 of the September 17, 1999 majority judgment:

Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard. [Emphasis by underlining added.]

37 In other words, regulations that do no more than reasonably define the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification.
38 Other limitations apparent in the September 17, 1999 majority judgment include the local nature of the treaties, the communal nature of a treaty right, and the fact it was only hunting and fishing resources to which access was affirmed, together with traditionally gathered things like wild fruit and berries. With regard to the Coalition's concern about the fishing rights of its members, para. 38 of the September 17, 1999 majority judgment noted the trial judge's finding that the Mi'kmaq had been fishing to trade with non-natives for over 200 years prior to the 1760-61 treaties. The 1760-61 treaty rights were thus from their inception enjoyed alongside the commercial and recreational fishery of non-natives. Paragraph 42 of the September 17, 1999 majority judgment recognized that, unlike the scarce fisheries resources of today, the view in 1760 was that the fisheries were of "limitless proportions". On this point, it was noted in para. 53 of the September 17, 1999 majority judgment:
It was established in *Simon*, [*Simon v. The Queen*, [1985] 2 S.C.R. 387], at p. 402, that treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal" practice, and *Sundown* [R. v. Sundown, [1999] 1 S.C.R. 393], at para. 32, confirms that courts should not use a "frozen-in-time" approach to treaty rights. The Mi'kmaq treaty right to participate in the largely unregulated commercial fishery of 1760 has evolved into a treaty right to participate in the largely regulated commercial fishery of the 1990s. The notion of equitable sharing seems to be endorsed by the Coalition, which refers in its written argument on the motion to "the equal importance of the fishing industry to both Mi'kmaq and non-Mi'kmaq persons". In its Reply, the Coalition says that it is engaged in discussions "with representatives of the Acadia and Bear River Bands in southwestern Nova Scotia and takes pride that those discussions have been productive and that there is reason to hope that they will lead to harmonious and mutually beneficial participation in the commercial lobster fishery by members of those Bands". Equally, the Mi'kmaq treaty right to hunt and trade in game is not now, any more than it was in 1760, a *commercial* hunt that must be satisfied before non-natives have access to the same resources for recreational or commercial purposes. The emphasis in 1999, as it was in 1760, is on assuring the Mi'kmaq equitable access to identified resources for the purpose of earning a moderate living. In this respect, a treaty right differs from an aboriginal right which in its origin, by definition, was *exclusively* exercised by aboriginal people prior to contact with Europeans.
39 Only those regulatory limits that take the Mi'kmaq catch *below* the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the *Badger* test.
40 (b)*The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource.* The September 17, 1999 majority decision referred to *Sparrow*, *supra*, which affirmed the government's paramount authority to act in the interests of conservation. This principle was repeated in R. v. Gladstone, [1996] 2 S.C.R.

723, *Nikal*, *supra*, *Adams*, *supra*, R. v. *Côté*, [1996] 3 S.C.R. 139, and *Delgamuukw*, *supra*, all of which were referred to in the September 17, 1999 majority judgment.

41 (c) *The Minister's authority extends to other compelling and substantial public objectives which may include economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.* The Minister's regulatory authority is not limited to conservation. This was recognized in the submission of the appellant Marshall in opposition to the Coalition's motion. He acknowledges that "it is clear that limits may be imposed to conserve the species/stock being exploited and to protect public safety". Counsel for the appellant Marshall goes on to say, "Likewise, Aboriginal harvesting preferences, together with non-Aboriginal regional/community dependencies, may be taken into account in devising regulatory schemes" (emphasis added). In *Sparrow*, *supra*, at p. 1119, the Court said "We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification". It is for the Crown to propose what controls are justified for the management of the resource, and why they are justified. In *Gladstone*, *supra* (cited at para. 57 of the September 17, 1999 majority judgment), the Chief Justice commented on the differences between a native *food* fishery and a native *commercial* fishery, and stated at para. 75 as follows:

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

[Emphasis in original.]

This observation applies with particular force to a treaty right. The aboriginal right at issue in *Gladstone*, *supra*, was by definition exercised exclusively by aboriginal people prior to contact with Europeans. As stated, no such exclusivity ever attached to the treaty right at issue in this case. Although we note the acknowledgement of the appellant Marshall that "non-Aboriginal regional/community dependencies ... may be taken into account in devising regulatory schemes", and the statements in *Gladstone*, *supra*, which support this view, the Court again emphasizes that the specifics of any particular regulatory regime were not and are not before us for decision.

42 In the case of any treaty right which may be exercised on a commercial scale, the natives constitute only one group of participants, and regard for the interest of the non-natives, as stated in *Gladstone*, *supra*, may be shown in the right circumstances to be entirely legitimate. Proportionality is an important factor. In asking for a rehearing, the Coalition stated that it is the lobster fishery "in which the Applicant's members are principally engaged and in which, since release of the Reasons for Judgment, controversy as to exercise of the treaty right has most seriously arisen". In response, the affidavit evidence of Dr. Gerard Hare, a fisheries biologist of some 30 years experience, was filed. The correctness of Dr. Hare's evidence was not contested in reply by the Coalition. Dr. Hare estimated that the non-native lobster fishery in Atlantic Canada, excluding Newfoundland, sets about 1,885,000 traps in in-shore waters each year and "[t]o put the

situation in perspective, the recent Aboriginal commercial fisheries appear to be minuscule in comparison". It would be significant if it were established that the combined aboriginal food and limited commercial fishery constitute only a "minuscule" percentage of the non-aboriginal commercial catch of a particular species, such as lobster, bearing in mind, however, that a fishery that is "minuscule" on a provincial or regional basis could nevertheless raise conservation issues on a local level if it were concentrated in vulnerable fishing grounds.

43 (d)*Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights*. The Court has emphasized the importance in the justification context of consultations with aboriginal peoples. Reference has already been made to the rule in *Sparrow*, *supra*, at p. 1114, repeated in *Badger*, *supra*, at para. 97, that:

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 special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in *Delgamuukw*, *supra*, at para. 168:

The nature and scope of the duty of consultation will vary with the circumstances.

This variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.

44 (e)*The Minister has available for regulatory purposes the full range of resource management tools and techniques, provided their use to limit the exercise of a treaty right can be justified.* If the Crown establishes that the limitations on the treaty right are imposed for a pressing and substantial public purpose, after appropriate consultation with the aboriginal community, and go no further than is required, the same techniques of resource conservation and management as are used to control the non-native fishery may be held to be justified. Equally, however, the concerns and proposals of the native communities must be taken into account, and this might lead to different techniques of conservation and management in respect of the exercise of the treaty right.

45 In its written argument on this appeal, the Coalition also argued that no treaty right should "operate to involuntarily displace any non-aboriginal existing participant in any commercial fishery", and that "neither the authors of the Constitution nor the judiciary which interprets it are the appropriate persons to mandate who shall and shall not have access to the commercial fisheries". The first argument amounts to saying that aboriginal and treaty rights should be recognized only to the extent that such recognition would not occasion disruption or inconvenience to non-aboriginal people. According to this submission, if a treaty right would be disruptive, its existence should be denied or the treaty right should be declared inoperative. This is not a legal principle. It is a political argument. What is more, it is a political argument that was expressly rejected by the political leadership when it decided to include s. 35 in the *Constitution Act, 1982*. The democratically elected framers of the *Constitution Act, 1982* provided in s. 35 that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized *and affirmed*" (emphasis added). It is the obligation of the courts to give

effect to that national commitment. No useful purpose would be served by a rehearing of this appeal to revisit such fundamental and incontrovertible principles.

6. ... *pursuant to section 27 of the Rules of the Supreme Court of Canada, requests an Order that [the Court's] judgment pronounced herein on the 17th day of September, 1999 be stayed pending disposition of the rehearing of the appeal, if ordered.*

46 At no stage of this appeal, either before or after September 17, 1999, has any government requested a stay or suspension of judgment. The Coalition asks for the stay based on its theory that the ruling created broad gaps in the regulatory scheme, but for the reasons already explained, its contention appears to be based on a misconception of what was decided on September 17, 1999. The appellant should not have his acquittal kept in jeopardy while issues which are much broader than the specifics of his prosecution are litigated. The request for a stay of the acquittal directed on September 17, 1999, is therefore denied.

A Stay of the Broader Effect of the September 17, 1999 Majority Judgment

47 In the event the respondent Attorney General of Canada or the intervener Attorney General for New Brunswick should determine that it is in the public interest to apply for a stay of the effect of the Court's recognition and affirmation of the Mi'kmaq treaty right in its September 17, 1999 majority judgment, while leaving in place the acquittal of the appellant, the Court will entertain argument on whether it has the jurisdiction to grant such a stay, and if so, whether it ought to do so in this case.

Disposition

48 The Coalition's motion is dismissed with costs.

Motion dismissed.

Solicitors for the applicant the West Nova Fishermen's Coalition): Daley, Black & Moreira, Halifax.

Solicitor for Donald John Marshall, Jr., respondent on the motion: Bruce H. Wildsmith, Barss Corners, Nova Scotia.

Solicitor for Her Majesty the Queen, respondent on the motion: The Attorney General of Canada, Ottawa.

Solicitors for the Native Council of Nova Scotia, respondent on the motion: Burchell, Hayman, Barnes, Halifax.

Solicitors for the Union of New Brunswick Indians, respondent on the motion: Getty, Bear, Fredericton.éé

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