Regina v. Jones et al.

[Indexed as: R. v. Jones]

14 O.R. (3d) 421
[1993] O.J. No. 893

**Ontario Court (Provincial Division),
Fairgrieve Prov. Div. J.**

April 26, 1993

Aboriginal peoples — Hunting and fishing rights — Member of Indian band charged with taking more lake trout than permitted by band's commercial fishing licence contrary to Ontario Fishery Regulations, 1989 — Defendants established existing aboriginal and treaty rights to engage in commercial fishing with priority over all other groups after conservation needs met — Band's priority not considered and band not consulted in setting lake trout quota — Quota unjustifiably infringed defendants' existing aboriginal and treaty rights — Regulations of no force or effect — Charge dismissed — Ontario Fishery Regulations, 1989, SOR/89-93.

Aboriginal peoples — Indian bands — Member of band and chief of band charged with illegal fishing — Chief not engaged in fishing himself — Chief not vicariously liable for conduct of members of band — Charge against chief dismissed.

The defendants, members of the Chippewas of Nawash, were charged with taking more lake trout than permitted by the band's commercial fishing licence contrary to the Ontario Fishery Regulations, 1989. The defendants argued that the quota imposed by the band's licence constituted an unjustified interference with the exercise of its constitutionally protected aboriginal or treaty right to engage in commercial fishing. The defendants submitted that their treaty and aboriginal right to harvest fish commercially gave them priority over other user groups in the allocation of any surplus fishing resources, once the needs of conservation had been met.

Held, the defendants should be acquitted.

There was no evidence that the defendant J, the chief of the band, engaged in fishing himself or was a party to any offence committed by the defendant N. There is no doctrine of vicarious liability that would hold a chief responsible for the misconduct of other members of his or her band. The charges against J should be dismissed.

The Crown conceded that the defendants had "an aboriginal right of some sort to fish commercially" and the evidence established an existing aboriginal right to fish for commercial purposes. They also had a treaty right of access to, and use of, their traditional fishing grounds. The evidence did not establish a clear expectation on the part

of the band of exclusivity throughout the area which encompassed their traditional fishing grounds.

The lake trout quota infringed the defendants' existing aboriginal and treaty rights. The band quota had been reached only part way through the fishing season, so the restriction clearly limited the income which the band members would have received had they been permitted to continue fishing. The band's fishing income was a crucial part of what was essentially a subsistence economy. The quota constituted an infringement of s. 35(1) of the Constitution Act, 1982.

The infringement was not shown to be justified. The objective sought to be achieved by imposing the quota on lake trout was conservation and proper management of the fishery resources. That was clearly a valid objective. A consequence of the constitutional recognition and affirmation given by s. 35(1) to the defendants' aboriginal and treaty rights to fish for commercial purposes was that the Saugeen Ojibway Nation (of which the defendant's band formed a part) had priority over other user groups in the allocation of surplus fishery resources, once the needs of conservation were met. In allocating quotas under the existing regulatory scheme, no attempt was made to extend priority to the defendants' band. In fact, anglers and non-native commercial fishermen were favoured. Other methods were available to achieve the conservation objectives which could have accommodated the appropriate priorities, such as the closure of the fishery to anglers, or preventing them from catching lake trout, or imposing "catch and release" procedures. Inadequate efforts were made to enlist the participation of aboriginal peoples in the planning process. The regulation imposing the restriction was thus of no force or effect.

R. v. Sparrow, [1990] 1 S.C.R. 1075, 56 C.C.C. (3d) 263, [1990] 3 C.N.L.R. 160, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 111 N.R. 241, *apld*

Delgawuukw v. British Columbia, [1991] 3 W.W.R. 97, 79 D.L.R. (4th) 185 (B.C.S.C.); Jack v. R., [1980] 1 S.C.R. 294, 48 C.C.C. (2d) 246; R. v. Agawa (1988), 65 O.R. (2d) 505, 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 28 O.A.C. 201 (C.A.), leave to appeal to S.C.C. refused 58 C.C.C. (3d) vi, *consd*

Other cases referred to

Bisaillon v. Keable, [1983] 2 S.C.R. 60, 7 C.C.C. (3d) 385, 37 C.R. (3d) 289, 2 D.L.R. (4th) 193, 4 Admin. L.R. 205, 51 N.R. 81; Nowegijick v. R., [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041; R. v. Bombay (1993), 18 W.C.B. (2d) 441 (Ont. C.A.); R. v. Denny (1990), 55 C.C.C. (3d) 322, [1990] 2 C.N.L.R. 115, 94 N.S.R. (2d) 253, 247 A.P.R. 253 (C.A.); R. v. Duncan (1991), 65 C.C.C. (3d) 546 (B.C.S.C.); R. v. Horseman, [1990] 1 S.C.R. 901, 55 C.C.C. (3d) 353, [1990] C.N.L.R. 95, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 108 N.R. 1; R. v. MacDonald (1986), 1 W.C.B. (2d) 48 (Ont. Dist. Ct.); R. v. Martin (1991), 2 O.R. (3d) 16, 63 C.C.C. (3d) 71, 43 O.A.C. 378 (C.A.); R. v. Simon, [1985] 2 S.C.R. 387, 23 C.C.C. (3d) 238, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15,

171 A.P.R. 15, 62 N.R. 366; R. v. Sioui, [1990] 1 S.C.R. 1025, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127, 30 O.A.C. 280, 109 N.R. 22; R. v. Taylor (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.) [leave to appeal to S.C.C. refused [1981] 2 S.C.R. xi]; R. v. Trudeau (1991), 14 W.C.B. (2d) 224 (Ont. Gen. Div.); R. v. White (1965), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), affd (1965), 52 D.L.R. (2d) 481n (S.C.C.); Skoke-Graham v. R., [1985] 1 S.C.R. 106, 17 C.C.C. (3d) 289, 44 C.R. (3d) 289, 16 D.L.R. (4th) 321, 67 N.S.R. (2d) 181, 155 A.P.R. 181, 57 N.R. 321

Statutes referred to

Constitution Act, 1982, ss. 35(1), 52
Fisheries Act, R.S.C. 1985, c. F-14, s. 79(1), Part II
Indian Act, R.S.C. 1985, c. I-5.

Rules and regulations referred to

Ontario Fishery Regulations, 1989, SOR/89-93, ss. 4(a), 36(1), (2)

Treaties and proclamations referred to

Bond Head Treaty (1836)
Imperial Proclamation (1847)
Surrender No. 45-1/2 (1836)
Surrender No. 72 (1854)
Surrender No. 82 (1857)

Authorities referred to

Report of the Special Commissioners to Investigate Indian Affairs in Canada (1858)

TRIAL on charges of violating the Ontario Fishery Regulations, 1989, SOR/89-93.

Bruce E. Pugsley, for the Crown.

Peggy J. Blair, for defendants.

FAIRGRIEVE Prov. Div. J.:—At issue in this case is the constitutionality of a restriction imposed by the Ontario Ministry of Natural Resources upon commercial fishing by members of the Chippewas of Nawash Band.

Part of the Saugeen Ojibway First Nation, the Chippewas of Nawash live at Cape Croker, a reserve located on the west side of Georgian Bay on the Bruce Peninsula, a short distance northeast of Wiarton, Ontario. Both defendants are members of this band. The allegation is that they committed offences in 1989 by taking more lake trout than

permitted by the band's commercial fishing licence and that, by so doing, they engaged in fishing not authorized by their licence. While the alleged infractions may seem fairly minor from one perspective, the issues raised by the case are potentially of broader significance.

The defendants' position, forcefully advanced by Ms. Blair, is that the quota imposed by the band's licence constituted an unjustified interference with the exercise of its constitutionally protected aboriginal or treaty right to engage in commercial fishing. The defendants submitted that their treaty and aboriginal rights to harvest fish commercially gave them priority over other user groups in the allocation of any surplus fishery resources, once the needs of conservation had been met. Ms. Blair argued that the restrictions imposed by the Ministry were invalid because, in failing to recognize the priority to which the band's right was entitled, the regulation imposing the lake trout quota was unjustified and inconsistent with s. 35(1) of the Constitution Act, 1982. As such, she argued, pursuant to s. 52, the quota was of no force or effect.

With equal skill and vigour on behalf of the Crown, Mr. Pugsley conceded that the defendants had "some sort" of aboriginal right to fish commercially, but took the position that the quota and geographical limitations imposed by the band's licence from the Ministry did not infringe that right. His further and alternative position was that even if the regulations did infringe the right in question, such infringement was justified on the basis of conservation and resource management. Briefly stated, the Crown's position is that the constitutional principle that requires that priority be given to an aboriginal right to fish for food and ceremonial purposes has no application to a native commercial fishery, and that the defendants' position amounts to an unwarranted and unjust claim to monopolize a natural resource in which other user groups are also entitled to share.

I think that before proceeding to make particular findings, and prior to accepting or rejecting any of the various submissions that were made, this would be the appropriate place to express my gratitude to both counsel for their very helpful presentation of the case. The evidence included hundreds of historical documents requiring careful organization and explanation. Ms. Blair was ably assisted by Professor Darlene Johnston of the University of Ottawa Faculty of Law, a member herself of the Chippewas of Nawash. I should say that the product of Professor Johnston's exhaustive research was presented fairly by her with scholarly detachment and professional skill. Both Mr. Pugsley and Ms. Blair demonstrated an impressive grasp not only of the historical material, but also of the technical evidence relating to fisheries conservation. Lengthy, detailed written submissions were filed by both counsel, extracting the pertinent evidence, assembling the relevant authorities, and developing their submissions. Their efforts on behalf of their respective clients have eased my task considerably.

THE CHARGES AND THE ONTARIO FISHERY REGULATIONS

Howard Jones and Francis Nadjiwon are jointly charged in the information that between June 28 and July 4, 1989, they unlawfully did

(1) . . .sell a quantity of lake trout, exceeding the quota of lake trout set out on Commercial Fishing Licence OS-1472 for 1989, contrary to Ontario Fishery Regulations, 1989, s. 36(2), made pursuant to the Fisheries Act, R.S.C. 1985, c. F-14;

(2) . . .take fish without authority of a licence, contrary to Ontario Fishing Regulations, 1989, s. 4(a), made pursuant to the Fisheries Act, R.S.C. 1985, c. F-14.

Section 4(a) of the Ontario Fishery Regulations, 1989, SOR/ 89-93, authorized by the Fisheries Act, R.S.C. 1985, c. F-14, provides that no person shall engage in fishing unless authorized by the appropriate licence. Section 36(1) of the same regulations provides that the Minister of Natural Resources for Ontario may impose in a commercial fishing licence terms and conditions respecting, inter alia, the waters from which fish may be taken and the number, size and species of fish that may be taken. Section 36(2) further states that no holder of a commercial fishing licence shall violate any of the terms or conditions of the licence. Pursuant to s. 79(1) of the Fisheries Act, a contravention of any regulation is a summary conviction offence punishable by a fine not exceeding $5,000 or by imprisonment for a term not exceeding 12 months or by both.

THE FACTS OF THE ALLEGED OFFENCES

To prove the alleged offences, the Crown filed an agreed statement of facts and called two witnesses, the operators of fish stores in Wiarton and Tobermory who bought fish from the Cape Croker Indians, a term that was used interchangeably in the evidence to refer to the Chippewas of Nawash.

As set out in the agreed statement, both defendants are members of the Chippewas of Nawash Band of Indians, a band within the meaning of the Indian Act, R.S.C. 1985, c. I-5. With the Chippewas of Saugeen, the two bands constitute the Saugeen Ojibway First Nation. At the relevant time, the defendant, Howard Jones, was the Chief of the Chippewas of Nawash Band.

Through their chiefs, the Chippewas of Nawash have held a commercial fishing licence since at least the institution of the federal Fisheries Act. The area covered by the licence is within the traditional fishing grounds of the band in the waters of Georgian Bay adjacent to the reserve. Until 1984, terms of these licences were not subject to quota restrictions, but in 1984 quotas were introduced.

A species of hybrid lake trout called splake, bred from a cross between speckled trout and lake trout, are considered lake trout for purposes of the charges. Terms of the licence define lake trout to include common lake trout, splake and backcross.

On February 1, 1989, a commercial fishing licence No. OS-1472, was issued to Howard Jones, the chief of the band, with an expiry date of December 31, 1989. The licence provided a quota restriction on lake trout of 10,022 lbs. of lake trout, which represented the total amount of lake trout which the Chippewas of Nawash could take under the terms

of the licence. The licence also set out the specific waters of Georgian Bay for which the licence was valid.

On June 28, 1989, Chief Howard Jones advised the band fishermen who are designates under the licence that the quota had been reached. By letter, he also advised the Ministry of Natural Resources district office in Owen Sound that he had informed all designates under the said licence that no more lake trout were to be taken pursuant to the licence.

Through its monitoring of the records of fish sales, the Ministry of Natural Resources determined that the defendant, Francis Nadjiwon, between June 28 and July 4, 1989, caught and sold 1,113 lbs. of splake in excess of the quota. It was acknowledged in the agreed statement that as licensee, Howard Jones had the responsibility of monitoring the commercial fishing activities of the persons named as "designates" on the licence. It was also agreed that the excess splake were caught within the area authorized by the licence.

In addition to filing the agreed statement, the Crown called brief viva voce evidence. Thomas Howell operates a fish store in Wiarton and supplies fish for distribution elsewhere in the Province. He identified the "Monthly Return of Fish Purchased" forms he completed for the Ministry for June and July, 1989, relating to fish purchased from what was named as "Giighnogammig Fisheries" on one form and "Cape Croker" on the other, both being references to the Chippewas of Nawash. The forms showed purchases of splake on the following dates: 172 lbs. on June 28, 160 lbs. on June 29, 110 lbs. on June 30, and 52 lbs. on July 4. Although someone else had added the name "Francis Nadjiwon" to the forms, Mr. Howell stated that he used a generalized form for the 20 or so Cape Croker families bringing in fish, and that he could not recall from whom specifically these fish had been purchased. Given the admission by the defence in the agreed statement, it was not necessary that Mr. Nadjiwon's involvement in particular commercial transactions be otherwise established. Significant, however, was Mr. Howell's evidence that he had never had any dealings with the defendant, Howard Jones, concerning the purchase of fish.

The other witness called by the Crown was Wayne Raney, who operated a fish store in Tobermory. Although Mr. Raney bought fish from other Cape Croker fishermen as well, he identified the Ministry "Monthly Return of Fish Purchased" forms he completed for June and July, 1989, which related specifically to purchases from Francis Nadjiwon. They showed splake purchases of 50 lbs. on June 28, 50 lbs. on June 30, 77 lbs., curiously, on June 31, 92 lbs. on July 1, 100 lbs. on July 3, and 68 lbs. on July 4. The price for all the purchases was indicated as $2 per pound.

Mr. Howell also described the previous popularity of splake with his store's customers. His supply was unable to keep up with the demand that developed for splake, however, and as a result of his inability to meet it, the demand had declined in recent years. Mr. Raney also testified that the supply of splake had fallen off since 1984 because of the quotas introduced that year.

The remainder of the evidence, consuming almost all of the time at trial, was directed to the constitutional issue, rather than to proof of the alleged offences.

WHETHER THE OFFENCES HAVE BEEN PROVED

If a court can decide a case without having to consider any constitutional issues, it should do so: Bisaillon v. Keable, [1983] 2 S.C.R. 60 at p. 71, 7 C.C.C. (3d) 385; Skoke-Graham v. R., [1985] 1 S.C.R. 106 at pp. 121-22, 17 C.C.C. (3d) 289; R. v. Martin (1991), 2 O.R. (3d) 16 (C.A.) at p. 30, 63 C.C.C. (3d) 71 at p. 85.

Ms. Blair argued that there was no proof from the agreed statement or the testimony of the witnesses that the defendant, Howard Jones, either committed himself or was a party to either offence charged. Marshall Nadjiwon, one of the band fishermen called by the defence in relation to the constitutional issues, testified that Howard Jones had never fished in his life, and that he had simply been the chief at the time. I accept that evidence, and I agree with Ms. Blair's submission.

There is no doctrine of vicarious liability that would hold a chief responsible for the misconduct of other members of his or her band. While there was some evidence that at a meeting of the band's fishing committee which Chief Jones attended, it was decided that fishing beyond the terms of the licence would occur in order to produce a "test case" in which the band's claimed exemption from the Ministry's quotas might be litigated, the evidence fell short of establishing with the requisite degree of certainty that Chief Jones himself abetted or otherwise became a party to any offence subsequently committed by Francis Nadjiwon.

Mr. Pugsley cited the unreported judgment of Stortini D.C.J. in R. v. MacDonald (Ont. Dist. Ct., December 15, 1986) [summarized in 1 W.C.B. (2d) 48], as authority supporting his submission that as the named licence-holder, Chief Jones had a duty to supervise the designates under the licence and to see that its terms were enforced. In that case, however, Stortini D.C.J. made findings of fact that Mr. MacDonald, the licence-holder and owner of the tugboat used to fish outside the area permitted by his licence, had delegated his responsibilities as licensee to his employee, Mr. Greenslade, and that Mr. Greenslade was acting within the scope of his employment at the time the offence was committed. I do not think that the principle governing the vicarious liability of employers for the acts of their servants in the course of their employment has any application to imputing responsibility for a band member's infraction to the band's chief, even where the chief's name appears as the licence-holder on the band's commercial fishing licence.

That being the case, both charges against Mr. Jones are dismissed because the Crown has failed to prove that he is guilty of either offence.

Ms. Blair also submitted that Count 2 should be dismissed as against the defendant, Francis Nadjiwon, because the charge alleged the taking of fish "without authority of a licence", and the evidence established that at the relevant time there was in fact a licence. In my view, this submission is without merit. The charge that fish were taken "without

authority of a licence" is language completely apposite to an allegation that fish were taken outside, or in contravention of, the terms of a licence which may have been held. It has not been suggested that the defendants were misled by any ambiguity in the way the charge was framed, or that the charge was at any time misinterpreted by them as anything other than an allegation that fish were caught in excess of the limit specified in the licence. I see no ambiguity which could have produced any such misunderstanding.

While the rule prohibiting multiple convictions arising from the same delict would no doubt preclude Mr. Nadjiwon's convictions on both counts, I am satisfied that on the basis of the agreed statement of fact, the two offences charged against him have been proved beyond a reasonable doubt. In view of that finding, it will be necessary to consider the constitutional validity of the regulations violated by Francis Nadjiwon, which have been challenged by the defendants.

THE SPARROW ANALYTICAL FRAMEWORK

The issues raised here concerning the constitutionality of the government's regulation of a native fishery are of the same general nature as those considered by the Supreme Court of Canada in R. v. Sparrow, [1990] 1 S.C.R. 1075, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 111 N.R. 241. In their single judgment on behalf of all six judges who participated in the decision in that case, Dickson C.J.C. and La Forest J. examined the scope of s. 35(1) of the Constitution Act, 1982, provided a framework for analyzing whether a law or regulation infringed a constitutionally protected aboriginal right, and set out the analysis to be made to determine whether such interference was justified. Although Mr. Pugsley argued that many of the conclusions reached by the Supreme Court of Canada are not particularly relevant to a native commercial fishery, as opposed to the aboriginal right to fish for food or social and ceremonial purposes which was considered in that case, he does agree that the judgment provides a useful and appropriate framework for identifying and analyzing the issues arising here.

The starting point for any such analysis is s. 35(1) of the Constitution Act, 1982, found in Part II of the Act, entitled "Rights of the Aboriginal Peoples of Canada". It reads as follows:

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

In Sparrow, at p. 1106 S.C.R., pp. 285-86 C.C.C., Dickson C.J.C. and La Forest J. described how s. 35(1) applied to the assessment of aboriginal claims:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. . . . . .

> The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

The Supreme Court accepted that the principle applicable to the interpretation of Indian treaties and statutes, namely, a liberal construction and the resolution of doubtful expressions in favour of the Indians, should also apply to the interpretation of s. 35(1). Fairness to the aboriginal peoples should be the governing consideration. At p. 1108 S.C.R., p. 287 C.C.C., they stated the "general guiding principle" in the following terms:

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

In Sparrow, the court determined that reconciling the federal legislative power with the federal fiduciary relationship is achieved by demanding the justification of any government regulation that infringes upon or denies aboriginal rights. At p. 1110 S.C.R., p. 289 C.C.C., Dickson C.J.C. and La Forest J. stated:

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

Following the Sparrow analysis, the evidence called at this trial and the submissions made by counsel were directed to the questions identified by the Supreme Court there as the relevant ones:

1. Is there an existing aboriginal or treaty right to fish commercially?

2. If so, does the lake trout quota infringe or deny that right?

3. If there is an infringement, has it been justified?

There was no dispute that Sparrow clearly placed on the defendants both the burden of establishing a constitutionally protected aboriginal or treaty right, and the onus of proving that there was a prima facie infringement of it. Equally clearly, the onus of justifying any

such infringement is on the Crown. I will proceed to consider the three questions stated above, bearing in mind where the burden of proof lies in each case.

1. Is there an existing aboriginal or treaty right to fish for commercial purposes?

At the conclusion of the essentially undisputed historical and anthropological evidence called by the defence to establish a relevant aboriginal or treaty right on the part of the defendants, the Crown conceded, as already noted, that the defendants did indeed have "an aboriginal right of some sort to fish commercially". Mr. Pugsley submitted that because of this concession, it was unnecessary to consider whether the right arose as an "aboriginal right" or a "treaty right", since, in either case, the right would be given constitutional protection by s. 35(1). This accords with the recent judgment of the Ontario Court of Appeal in R. v. Bombay (January 28, 1993, as yet unreported) [summarized in 18 W.C.B. (2d) 441], wherein Austin J.A., at p. 5, held that while Sparrow dealt with aboriginal rights, its language and analytical framework also apply to treaty rights. Mr. Pugsley further submitted that his concession that the right was "existing", within the meaning of s. 35(1), also made it unnecessary to address the issue of whether the right had been "extinguished".

The Crown's concession was helpful as far as it went, and it certainly was in accordance with the evidence which preceded it. At the same time, Mr. Pugsley went on to argue that the Ministry regulation in issue did not unduly interfere with the defendants' right, and that in any event, if there was an infringement, it was justified. In taking that position, Mr. Pugsley asserted that commercial fishing by the Chippewas of Nawash has until recently been "sporadic" and "limited" in nature, and he referred to evidence that when the quotas were introduced in 1984, very few Cape Croker residents were still involved in the fishery. In other words, it seems to me, the Crown was seeking to have the existing aboriginal right defined in terms of how it had come to be exercised in the prevailing regulatory context. I do not think that that is the right approach to take. Nor do I think that the focus can shift directly to the justification for whatever infringement was caused without having a fairly clear sense of the nature, extent and consequences of the infringement, all of which, to some degree, will reflect the content of the aboriginal or treaty right which was infringed.

In my view, one cannot usefully speak in the abstract about "some sort" of aboriginal right to fish commercially, without some understanding of its content and scope. As Dickson C.J.C. and La Forest J. stated in Sparrow at pp. 1111-12 S.C.R., p. 290 C.C.C.:

> The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. . . .
>
> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial

> to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

Although the difficulty in definition referred to may account for the Crown's reluctance here to state what the aboriginal right of the Chippewas of Nawash to fish commercially entails, I think some attempt must be made to delineate at least the general contours of what has been given constitutional protection. Despite the Crown's admission that the first of the Sparrow questions can simply be answered in the affirmative, that will not suffice as the complete answer. It will be necessary to determine what the admitted aboriginal right consists of.

Sparrow again provides some guidance as to how this right to fish commercially or for livelihood purposes might be ascertained. Dickson C.J.C. and La Forest J. stated, at p. 1091 S.C.R., p. 274 C.C.C., that the word "existing" in s. 35(1) made it clear that the protected rights were those which existed when the Act came into effect in 1982. At pp. 1092-93 S.C.R., pp. 275-76 C.C.C., they approved the conclusion of Blair J.A. in R. v. Agawa (1988), 65 O.R. (2d) 505 (C.A.) at p. 522, 43 C.C.C. (3d) 266 at p. 283, leave to appeal to S.C.C. refused 58 C.C.C. (3d) vi, that "existing" means "unextinguished", rather than defined according to the regulatory scheme in place in 1982. They also rejected a "frozen rights" approach, instead accepting that the phrase "existing aboriginal rights" must be given a flexible interpretation to permit their evolution over time. Dickson C.J.C. and La Forest J. agreed that the protected rights may be exercised in a contemporary manner "rather than in their primeval simplicity and vigour".

In Sparrow, the evidence established that the Musqueam Band had fished for salmon "from time immemorial" in an area of the mouth of the Fraser River, and that there was evidence of sufficient continuity of the exercise of the right to support the conclusion that the defendant was exercising an existing aboriginal right. After setting out the history of the regulation of fisheries in British Columbia, Dickson C.J.C. and La Forest J., at pp. 1097-99 S.C.R., pp. 279-80 C.C.C., rejected the Crown's contention that the regulations had displaced any aboriginal right:

> At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. . . . . .
>
> The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.
>
> There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguawh the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

The Supreme Court then went on to delineate the scope of what they found to be the existing Musqueam right to fish. The anthropological evidence established that their salmon fishery had always constituted an integral part of their distinctive culture, and that the Musqueam had always fished for reasons connected to their cultural and physical survival. The right to fish, they repeated, may be exercised in a contemporary manner.

The right at stake in this case differs from Sparrow in that the defendants here have asserted, and the Crown has conceded, an existing aboriginal or treaty right to fish for commercial or livelihood purposes. In Sparrow, the court confined itself to a constitutional recognition and affirmation of the Musqueams' existing aboriginal right to fish for food and social and ceremonial purposes which had been the focus of the inquiry by the courts below. Dickson C.J.C. and La Forest J. expressly declined, at pp. 1100-01 S.C.R., pp. 281-82 C.C.C., to expand their inquiry to include Mr. Sparrow's claim, disputed by the Crown, that he had an aboriginal right to fish commercially as well. What was disputed there has been admitted here. Ms. Blair has led considerable archival and historical evidence to establish the nature and scope of the defendants' admitted right to fish commercially.

Leaving aside for the moment the question of whether the right is properly characterized as aboriginal or treaty in nature, the right asserted by the defence amounted essentially to a claim that the Saugeen Ojibway First Nation as a whole, and not just the Chippewas of Nawash, have a collective ancestral right to fish for commercial and livelihood purposes in their traditional waters off the Bruce Peninsula, both in Georgian Bay on the east and in Lake Huron on the west. If that is accepted, it follows, I think, that any restrictions imposed on the exercise of this right, whether by means of geographical limitations, methods of fishing, quantity of fish harvested, or which members of the band may participate, would all constitute prima facie infringements that would have to be justified by the Crown according to the scheme in Sparrow. Having said that, I am inclined to agree with Mr. Pugsley that in the context of this particular prosecution, the issue is considerably narrower. The question to be decided is simply the constitutionality of the lake trout quota.

It is interesting that Mr. Pugsley has sought to characterize the defendants' claim as an exclusive right which would lead to a commercial monopoly throughout the area. Apart perhaps from waters immediately adjacent to the two reserves, I did not understand the defendants' position to be that no other users should be given access to the fishery. Rather, it seemed to me, what was being claimed was recognition of their constitutional priority and their right to participate in the management of the resource.

Ms. Blair argued that the right to be given constitutional recognition and protection here arises both as a treaty right and as an aboriginal right. The distinction is significant, she submitted, because a treaty right cannot be extinguished unilaterally, while an aboriginal right can be if there is a clear and plain intention on the part of the Sovereign to do so. I accept that treaty rights and other aboriginal rights are not mutually exclusive, and that a treaty can recognize pre-existing rights, as well as create new ones. While Mr.

Pugsley has conceded an aboriginal right, it may be significant to know whether there is also a treaty right at stake.

In R. v. Simon, [1985] 2 S.C.R. 387 at p. 409, 23 C.C.C. (3d) 238 at p. 256, Dickson C.J.C. rejected the contention that some form of land cession is necessary before an agreement can be described as a treaty, and accepted that "an exception, reservation or confirmation is as much a term of a Treaty as a grant". The Chief Justice also quoted with approval, at p. 410 S.C.R., p. 257 C.C.C., the following passage from the judgment of Norris J.A. in R. v. White (1965), 50 D.L.R. (2d) 613 at pp. 648-49, 52 W.W.R. 193 (B.C.C.A.); affirmed (1965), 52 D.L.R. (2d) 481n (S.C.C.):

> In the section [s. 88 of the Indian Act, R.S.C. 1970, c. I-6], "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.

Also at p. 410 S.C.R., p. 257 C.C.C., Dickson C.J.C. repeated the principle that "Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians". See also Nowegijick v. R., [1983] 1 S.C.R. 29 at p. 36, 144 D.L.R. (3d) 193 at p. 198.

In R. v. Horseman, [1990] 1 S.C.R. 901 at p. 907, 55 C.C.C. (3d) 353 at p. 357, Wilson J., dissenting in the result, stated:

> These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

Similar observations concerning the determination of whether a particular document is a treaty were made by Lamer J. in R. v. Sioui, [1990] 1 S.C.R. 1025, 56 C.C.C. (3d) 225. At p. 1035 S.C.R., p. 232 C.C.C., His Lordship stated that in determining the legal nature of a document recording a transaction with the Indians, the court should show "flexibility", taking into account "the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration". What is required, according to Lamer J., is "a broad and generous interpretation of what constitutes a treaty". At p. 1045 S.C.R., p. 240 C.C.C., he found the list of factors considered by the Ontario Court of Appeal in analyzing the historical background in R. v.

Taylor (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227, to be useful both to determine whether a document is a treaty and to its interpretation:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators,
5. the subsequent conduct of the parties.

Given Mr. Pugsley's reference to the recent "limited" nature of the exercise of the commercial fishing right by the defendants' band, Lamer J.'s comments, at p. 1066 S.C.R., p. 256 C.C.C., may also be relevant:

> Finally, the appellant argues that non-user of the treaty over a long period of time may extinguish its effect. He cites no authority for this. I do not think that this argument carries much weight: a solemn agreement cannot lose its validity merely because it has not been invoked. . . . Such a proposition would mean that a treaty could be extinguished merely because it had not been relied on in litigation, which is untenable.

The undisputed historical evidence led by the defence here has established that for centuries prior to the arrival of European settlers, the Saugeen Ojibway had occupied a vast area of what is now southwestern Ontario, encompassing all of what was known as the Saugeen, now the Bruce Peninsula, and including the area south of Georgian Bay and extending west to the eastern shore of Lake Huron. The Ojibway in that area were involved in a very productive fishery from, as is said, time immemorial. Specifically, the evidence established that they made use of numerous fishing stations on both sides of the peninsula, including the islands immediately offshore from the present Saugeen Ojibway reserves located at Cape Croker on the east side and Saugeen on the west. Their fishing was not prosecuted by individual fishermen merely to feed their own families, but rather was a community-based, collective activity in which the benefits were shared amongst the members of the community generally and directed to the subsistence of the group as a whole. Moreover, the Crown concedes, their fishing operation is accurately described as "commercial" in nature. Not only did the native groups trade among themselves, but after the arrival of the Europeans, fish was bartered with the fur traders for what became essential items. The trade developed further with the growing population of settlers and became an essential source of the band's "sustenance". The continuity of the exercise of the right from the very distant past to the present was established.

In Horseman, supra, despite the differing conclusions as to whether earlier treaty rights had been extinguished by a subsequent agreement, both the majority and dissenting judgments recognized the commercial nature of the original treaty right to hunt "for food". At pp. 928-29 S.C.R., pp. 373-74 C.C.C., Cory J. held that the treaty in question reserved hunting rights which included hunting for commercial purposes:

> The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based on those hunting rights. . . . . .
>
> The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life. . . . . .
>
> I am in complete agreement with the finding . . . that the original Treaty right clearly included hunting for purposes of commerce.

In Wilson J.'s dissenting judgment, at p. 908 S.C.R., p. 358 C.C.C., she referred to the dangers of "drawing neat distinctions between hunting for domestic use and hunting for commercial purposes". Her Ladyship saw the treaty as providing protection for the source of the Indians' livelihood, not limited simply to personal food consumption, stating at p. 919 S.C.R., p. 367 C.C.C.:

> The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit.

In this case, it has not been suggested that the evidence discloses any commercial activity by the Chippewas of Nawash which was directed at anything other than "sustenance" in this sense. Mr. Pugsley raised the spectre that the commerce needed to provide a meagre livelihood for the band could, if unregulated, develop into a profit-oriented monopoly, but that is not the aboriginal right which has been claimed or for which protection is sought.

To establish that the right should be characterized as a treaty right, Ms. Blair referred specifically to what came to be known as Surrender No. 45-1/2. By that agreement in 1836, the Saugeen Ojibway surrendered much of their territory, retaining as a reserve only the area north of a line that extended roughly from Owen Sound to the present site of Southampton. This area included all of the Bruce Peninsula. Chief Metigwob at the time stated that the principal men of the Saugeen Band had accepted this northward withdrawal "as there were many fish in the area", and that Sir Francis Bond Head, the Lieutenant Governor, had stated to the Saugeen Indians that they "own all the islands in

the vicinity of that neck or point of land he was about to reserve for them and that he would remove all the white people who were in the habit of fishing on their grounds". James Morrison, an expert in Ojibway history called by the defence, agreed that Bond Head had explained the purpose of the agreement as being, from one side, the acquisition of valuable agricultural land available for settlement by the increasing white population and, from the other, protecting the Indians from "the encroachments of the whites" and giving them "proper assistance" to enable them to become civilized. Mr. Morrison expressed his opinion that the Surrender of 1836 was meant to reserve the fisheries to the Saugeen, while excluding others from them.

During the 1830s, the Saugeen continued to enter into arrangements directly with third parties for the leasing of their fishing islands by directors of the Huron Fishing Company, which were then affirmed by licences of occupation by the Crown. No licences of occupation were issued to confirm the arrangement in 1845 that the Saugeen chiefs made with one Cayley, whose name figured prominently in the documents from that period. Mr. Lytwyn, an historical geographer called by the defence, gave his opinion that the colonial government could issue such licences in respect of Crown lands, but could not do so in relation to the Saugeen's fisheries because they had not been surrendered.

The historical evidence supports the conclusion that, from the aboriginal perspective, the 1836 treaty had confirmed their exclusive right to their traditional fisheries in the area. When the Chief Superintendent of Indian Affairs visited the settlement the next year, he wrote:

> The fishing is bountifully supplied and has attracted the notice of white people who annoy the Indians by encroaching on what they consider their exclusive right and on which they rely much for provisions.

Chief Superintendent Jarvis also wrote in 1838:

> This fishery has attracted the notice of the white traders who resort hither at certain seasons to the great annoyance of the resident Indians who claim the exclusive privilege of fishing at the spot.

According to the correspondence that was filed, a delegation of chiefs went to Toronto in 1839 to present a petition alleging that they had been "defrauded" by persons who had taken possession of their fishing grounds, and seeking protection "from the intrusions and frauds of wicked white men". The band also sought a "written paper" that they could "show to any white man who attempted to settle upon the Indian land".

In the Imperial Proclamation, dated June 29, 1847, evidently intended as a response to the request for documentary confirmation of their title, the Ojibway were granted a deed of title to a tract of land described to include the entire peninsula "bounded on the north, east and west by Lake Huron, including any Islands in Lake Huron within seven miles of . . . the mainland". Mr. Lytwyn testified that the seven-mile limit and all the islands within that limit essentially captured the entire fishery at the time since, in 1847, there

was no deep-water fishing in Lake Huron or Georgian Bay. He also described the "unique" declaration as "the clearest expression [he had] ever seen" to protect the Indians' traditional fishing grounds.

In 1851, the Governor General made a further proclamation setting apart certain tracts of land for the Indians, and providing for legislation to protect them from trespass. With respect to the Saugeen and Owen Sound Indians, specific reference was made again to the peninsula "together with all the Islands within seven miles of the coast".

In 1854, by Surrender No. 72, most of the land on the peninsula and the area to the south were surrendered to the Crown, with five much smaller reserves being retained, including Cape Croker, the Saugeen reserve, and the Owen Sound reserve. The surrender stated expressly, however, that "no islands are included in this surrender". Three years later, in 1857, as a result of Surrender No. 82, the Owen Sound reserve was ceded to the Crown, with the people from the reserve moving north to Cape Croker.

Although the Saugeen Ojibway Nation had by this time been divided into separated reserves, there was evidence of continuing recognition of their joint interest in the fisheries around the peninsula. Funds obtained from the rent for the Fishing Islands on the west side continued to be paid jointly to the Saugeen and Cape Croker Indians. The 1858 Report of the Special Commissioners to Investigate Indian Affairs in Canada referred to the Cape Croker reserve as "common to the Saugeen and Owen Sound Bands", but also stated that the 1854 surrender "made them distinct Bands, recognized as having separate and exclusive interests in the different Reserves on the two sides of the Peninsula". As part of the information concerning the "Chippewas of Newash or Owen's Sound", the report observed that "the fisheries, though not equal to those on the western side of the Peninsula, are considerable, and will consititute no inconsiderable part of the means of subsistence available for the Band". The same report also referred to the three principal islands off the Cape Croker reserve, White Cloud Island, Griffiths Island and Hay Island, as "unsurrendered".

In 1894, the Indian agent at Cape Croker wrote to the Deputy Superintendent of Indian Affairs in connection with the surrender of White Cloud Island and the assurances given to the Indians that "it would in no way affect their fishing limits". Band council minutes confirmed their view that the fishing rights around the island had been reserved, although there were claims by lessees that they were "molested" and "annoyed" by Cape Croker Indians.

I agree with the defendants' submission that the evidence supports the conclusion that the Bond Head Treaty of 1836, confirmed by the Imperial Proclamation of 1847, extended treaty protection of the Saugeen Ojibway's use of their traditional fishing grounds surrounding the peninsula. Ms. Blair described the treaty right as a "right of ownership and possession". I think it is more accurately stated as a right of access to, and use of, their traditional fishing grounds. Apart perhaps from the waters immediately adjacent to their settlements and the fishing islands reserved to themselves and used as

fishing stations, the evidence did not establish a clear expectation on their part of exclusivity throughout the area which encompassed their traditional fishing grounds.

I also think Ms. Blair's submission that in addition to the treaty right, the defence had also proved that "aboriginal title to the waters surrounding the Bruce Peninsula remains with the Saugeen Ojibway First Nation" overreaches in a similar way. There is a distinction to be drawn between the nature of a right to fish in waters which constitute traditional fishing grounds and aboriginal title at common law in relation to land. In my view, it is again not a question of "title" or "ownership", it is a question of the right to fish in those waters and to enjoy the benefit of the resource to be found there: see R. v. Denny (1990), 55 C.C.C. (3d) 322, [1990] 2 C.N.L.R. 115 (N.S.C.A.).

Given the Crown's concession that there is an aboriginal right to fish for commercial purposes which has not been extinguished, it is not necessary to review the historical evidence leading to that conclusion. Ms. Blair set it out in considerable detail in her written submissions, and it has not been contested by the Crown. What the evidence disclosed was a relentless, incremental restriction and regulation of the admitted aboriginal right, despite continuing protests, petitions, objections and resistance by the defendants' band. Much of the conflict appeared to have its source in the apparently inadvertent failure of the first Fishery Act to make any special provision for the treatment of native fisheries or existing treaty rights. The evidence documented as well a protracted intragovernmental policy clash between Fisheries and Indian Affairs. The former generally prevailed, and the fisheries came under increasingly stricter controls. The Crown did not suggest that the evidence established any clear and plain intention on the Sovereign's part to extinguish the Saugeen Ojibway's aboriginal commercial fishing right. Neither did it disclose any consent on the Ojibways' part to the restriction of their right by the licensing system and the controls placed on the waters that could be fished, the species and amounts that could be taken, and which members were authorized to participate in the fishery.

Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds. Apart from the waters adjacent to the two reserves and their unsurrendered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language, the nature of the aboriginal right exercised is one directed "to a subsistence use of the resource as opposed to a commercially profitable enterprise". It is the band's continuing communal right to continue deriving "sustenance" from the fishery resource which has always been an essential part of the community's economic base.

2. Does the lake trout quota infringe the defendants' existing aboriginal or treaty right?

The next question to consider is whether the restriction placed on the number of lake trout infringed that right. In Sparrow, supra, at pp. 1111-12 S.C.R., pp. 289-90 C.C.C., Dickson C.J.C. and La Forest J. stated:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of the s. 35(1) analysis. . . . . .

To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. . . . Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

The regulation in issue in Sparrow was, as just stated, a net length restriction, and the questions posed by the Supreme Court in relation to whether it constituted a prima facie infringement of the Musqueams' food fishing right are not necessarily the most appropriate when the restriction is a lake trout quota allegedly infringing a commercial fishing right.

It is to be noted that in the first paragraph of the passage just quoted, Dickson C.J.C. and La Forest J. appeared to equate "interference" with an existing aboriginal right with a "prima facie infringement of s. 35(1)". On the next page, in the second quoted paragraph, they set out a list of questions directed at determining whether the interference in fact amounts to an infringement. The questions listed include the "reasonableness" of the restriction, whether the hardship caused by the regulation was "undue", and whether the infringement "unnecessarily" infringed the protected interests. All of these questions might have appeared more relevant to the question of whether the interference was justified, not whether any interference occurred. In any event, Their Lordships ultimately concluded that if the regulation had an "adverse restriction" on the exercise of their right to fish for food, then it would be found to be a "prima facie interference". In R. v. Bombay, supra, the Court of Appeal, per Austin J.A. at p. 5, cited Sparrow as authority simply for the proposition that "if interference is established, that will constitute a prima facie infringement of s. 35(1)".

In the context of the Cape Croker Band's right to fish commercially, there can be little doubt that the limit on the number of lake trout they could lawfully catch imposed an "adverse restriction" on the exercise of their right. The band's quota had already been

reached by the end of June, only part way through the fishing season, and had the direct consequence of terminating the exercise of their right in relation to the species the band preferred to harvest. The restriction clearly limited the income which the band members would have received had they been permitted to continue fishing for splake.

In terms of assessing whether the quota caused "undue hardship", it is difficult both to know what degree of hardship was "due" and to isolate the impact of the lake trout quota from the other restrictions imposed as part of the same regulatory scheme. The financial hardship caused to the band by the curtailed commercial activity, however, was documented by the evidence. The band's fishing income is a crucial part of what was essentially a subsistence economy. More limited access to the resource caused by the quota produced greater deprivation and, predictably, contributed to the negative consequences of increased unemployment and poverty on both an individual and communal level.

There can be no doubt that the quota had a serious adverse restriction on the exercise of the band's right and, as such, constituted an infringement of s. 35(1). That finding leads inevitably to what both parties regarded as the real issue in this case.

3. Has the infringement been justified?

In Sparrow, at p. 1109 S.C.R., p. 287 C.C.C., Dickson C.J.C. and La Forest J. made clear that "[l]egislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1)". At p. 1111 S.C.R., p. 289 C.C.C., in stressing the importance of "context and a case-by-case approach to s. 35(1)", they stated:

> Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

While there is, then, no single test of universal application, the Supreme Court of Canada did go on to make certain general statements applicable to this stage of the inquiry. At p. 1113 S.C.R., pp. 290-91 C.C.C., Their Lordships stated:

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

> exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial. . . . . .
>
> The justification of conservation and resource management . . . is surely uncontroversial. . . . . .
>
> . . .it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

The defendants here did not challenge the Crown's position that the objective sought to be achieved by imposing the quota on lake trout was conservation and proper management of the fishery resources. Lake trout is a particularly vulnerable species. Due to over-fishing and natural causes, lake trout were virtually wiped out by the 1950s, and more recently fell prey to the lamprey eel. The Ministry of Natural Resources biologists explained that the lake trout quotas placed on commercial fishermen were an important part of the effort aimed at reducing mortality rates for lake trout and encouraging the rehabilitation of a self-sustaining population. The restriction clearly had a valid objective.

In Sparrow, at pp. 1114-15 S.C.R., pp. 291-92 C.C.C., Dickson C.J.C. and La Forest J. went on to explain the second part of the justification analysis, once a valid legislative objective has been found. Because the Supreme Court was also dealing with a fishing right, albeit not for commercial purposes, many of the court's statements bear directly on the issues in this case and warrant repetition at some length:

> 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 interpretative principle derived from Taylor, supra and Guérin [Guérin v. R., [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321]. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocation problems that arise regarding the fisheries.

Dickson C.J.C. and La Forest J. then accepted the statement made by Dickson C.J.C. in Jack v. R., [1980] 1 S.C.R. 294 at p. 313, 48 C.C.C. (2d) 246 at p. 261, where he expressed agreement with the "general tenor" of the appellant's position

> . . . which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

At p. 1116 S.C.R., p. 293 C.C.C., the court applied this order of priorities to the aboriginal right at issue in Sparrow:

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

While the focus in that passage was the Musqueams' food requirements, the earlier reference to the Jack order of priorities suggests that "Indian fishing", coming immediately after "conservation", would include native commercial fishing protected by s. 35(1) as well. If it did not, it would be difficult to see any sense in which it had special constitutional status. Moreover, Jack's reference to the lower priorities to be given "non-Indian commercial fishing" and "non-Indian sports fishing" suggests that Indian fishing rights of either nature are to be included in "Indian fishing" generally and given priority, again assuming that they are protected by s. 35(1).

Mr. Pugsley cited R. v. Agawa, supra, to support his contention that a valid conservation purpose itself was sufficient to justify a limitation on an aboriginal right. I note that the Court of Appeal's judgment was given prior to Sparrow's justification analysis. Although Mr. Pugsley argued that the refusal of leave to appeal in Agawa expressed the court's implicit approval of it, I am inclined to speculate that the refusal reflected the court's reluctance to revisit issues that had already been authoritatively decided in Sparrow a few months earlier.

Mr. Pugsley also argued that I was bound by R. v. Trudeau, Ontario Court (General Division), October 18, 1991, unreported [summarized in 14 W.C.B. (2d) 224], a summary conviction appeal where DiSalle J. found that no treaty commercial fishing right had been established, but stated that if it had been, licence and quota restrictions were necessary reasonable limits based on conservation and resource management in accordance with "the test in R. v. Agawa and R. v. Sparrow". The Supreme Court has stated that whether the justificatory test has been met will depend on the particular facts and context of each case, so I do not think that Mr. Justice DiSalle's conclusion in that case necessarily dictates the result here. It may be of significance, however, that DiSalle J. did acknowledge the applicability of the Sparrow test to a treaty commercial fishing right.

In Sparrow, at pp. 1117-18 S.C.R., p. 294 C.C.C., Dickson C.J.C. and La Forest J. also quoted with approval from the decision of the Nova Scotia Court of Appeal in R. v. Denny, supra, per Clarke C.J.N.S. at pp. 340-41 C.C.C., concerning the link between allocation and justification:

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

The guidance provided by the Supreme Court of Canada as to the scrutiny of a conservation plan according to the justificatory standard again merits lengthy quotation. At p. 1119 S.C.R., p. 295 C.C.C., Dickson C.J.C. and La Forest J. stated as follows:

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

> question 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.
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> 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.

There has been some resistance in the case law to the application of the justification analysis to native commercial fishing. In Delgamuukw v. British Columbia, [1991] 3 W.W.R. 97 at p. 392, 79 D.L.R. (4th) 185 (B.C.S.C.), McEachern C.J.B.C. expressed what he described as "an early judicial opinion", and one that was clearly obiter, on the subject:

> In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is, to hunt and fish and collect the products of the land and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices. . . . . .
>
> In my view, using fishing as an example, it would be contrary to the rational evolution of aboriginal rights, and contrary to principle, to enhance an aboriginal right by providing priority over all other users (after justified conservation), and then to enlarge or extend the prioritized aboriginal right to commercial activities when many aboriginals are already employed in this industry. It would be foolish to suggest, for example, that the prioritized aboriginal rights of an Indian participating in the commercial fishing industry would be exempt from the regulations which govern non-Indian licensees.

McEachern C.J.B.C. concluded that the aboriginal rights established in that case did not include commercial practices.

What distinguishes the situation here is that the Crown has conceded that the Chippewas of Nawash have constitutional protection of a right which does include commercial practices. It is not, therefore, a matter of "enhancing" or "enlarging" the right protected by s. 35(1), but of giving the right that already exists appropriate recognition and affirmation. I disagree with McEachern C.J.B.C.'s reference to many aboriginals being employed elsewhere in the industry as relevant to either the delineation of an existing aboriginal right or to the protection of the exercise of that right by the aboriginals who choose to exercise it. I do not think that a constitutional claim to priority for a collective right can be ignored merely because some aboriginal people work elsewhere in

the fisheries. That could itself merely reflect restrictions on the native fishery having limited employment opportunities there or result from any number of personal reasons quite unrelated to the native fishery. It seems entirely possible that if priority were given to their community's right, people in such circumstances might decide to participate in, and benefit from, its exercise in a way that had not formerly been feasible. In any event, while Sparrow has acknowledged the difficulties in applying the justification test to infringements of a right to fish for commercial purposes, I do not see any support there for a different principle that would allow the constitutional status of aboriginal rights which include commercial practices simply to be disregarded.

In McEachern C.J.B.C.'s view, the underlying purpose of recognizing aboriginal rights is "to sustain existence in an aboriginal society". If by that His Lordship means simply the physical survival of the communal group in a state of what has been referred to as "primeval simplicity", I do not think that view is consistent with the recognition of a right which includes commercial practices and the sharing of the economic benefit of a resource to which the priority of their claim has been acknowledged.

The issue, again, is not whether regulation, in general, of the defendants' commercial fishing right can be justified on the basis of conservation and resource management. That much is conceded. Rather, the question is whether the particular restrictions imposed, and specifically, the lake trout quota imposed by the band's 1989 licence, have been justified by the Crown.

I accept that a consequence of the constitutional recognition and affirmation given by s. 35(1) to the defendants' aboriginal and treaty rights to fish for commercial purposes is that the Saugeen Ojibway Nation has priority over other user groups in the allocation of surplus fishery resources, once the needs of conservation have been met. I am also satisfied that the evidence relating to the allocation of the quotas under the existing regulatory scheme has made no attempt to extend priority to the defendants' band. Scrutiny of the government's conservation plan discloses that anglers and non-native commercial fishermen have in fact been favoured, and that the allocation of quotas to the Chippewas of Nawash, much less the Saugeen Ojibway as a whole, did not reflect any recognition of their constitutional entitlement to priority over other competing user groups.

It is apparent that the quota system is rationally connected to the valid regulatory objective of conservation, in that it bears directly on the goals of reducing the mortality rates for lake trout and other species, and achieving a self-sustaining fish stock. The evidence also establishes that the Ministry has identified a surplus in the stock of lake trout. If that had not been the case, the management plan would presumably not have permitted the growth of the recreational fishery without effective controls on the number of fish which can be taken by anglers, who are subject only to daily catch limits of three fish without any overall restrictions. In the absence of a surplus, the plan would also not have allowed non-native commercial fishermen to harvest lake trout either, even as part of so-called "incidental" catches.

While the conservation objective could justify on biological grounds a management plan which included total, across-the-board quotas for various species, the evidence suggests that specific quotas for individual licensees were fixed arbitrarily. Donald Hughes, a M.N.R. biologist, conceded in cross-examination that the quotas imposed for particular species, and their allocation among different licence-holders, were not biological decisions, but reflected the political and social realities at the time. Biologists, he testified, take a global perspective and are concerned with the size of the whole pie, not who gets which slice. As a practical matter, the activities of tens of thousands of sports fishermen could not be controlled as readily as the limited number of commercial fishermen. Moreover, the anglers had certain expectations concerning their entitlement to the proceeds of the publicly financed fish planting program which were difficult for the managers of the plan to ignore. The commercial fishery, then, was more easily targeted to bear the brunt of the conservation effort, and the native fishery was evidently regarded as just one part of the industry to be treated in the same way as other commercial licence-holders.

While the allocation process adopted when the quota system was introduced in 1984 may have reflected social and political realities at the time, it is not at all apparent that the constitutional realities played any role at all. Neither has it been demonstrated that since that time appropriate adjustments have been made in response to a belated recognition of the priority of the band's right.

The initial quotas imposed in 1984 became the reference point for later, albeit uneven increases to various licence-holders. The initial quotas were intended to reflect the average catch for the best three of the previous six years, regardless of what was the desirable surplus according to biological considerations. The Cape Croker fishery, like most other native fisheries, had incomplete production records for the years examined by the M.N.R. for purposes of fixing the quotas, and there were no data at all for the years 1977 to 1980. When the lake trout quota was allocated in 1984, the evidence suggests that despite the fact that the band was the only commercial licence-holder covering an entire community, and despite the fact that the band's fishery was the only one in the area dependent on lake trout for its livelihood, the band was simply given an incidental quota, not a production quota, in the same way and of a similar magnitude as other individual commercial licence-holders. The evidence does not support a finding that any special regard was given to the nature of the band's fishery operation, quite apart from the question of any constitutional priority over other users.

There appear to be other ways as well in which the Ministry failed to take into account the nature of the Cape Croker fishery. At the same time that the band's licence imposed a tight restriction on the lake trout harvest, the band's "preferred" species and focus of its fishery operation, the licence authorized substantial quotas for other species which the band was unable to utilize. While perhaps more anecdotal than scientific, one of the band fishermen, Marshall Nadjiwon, testified that they could only take a fraction of their whitefish allotment because the bountiful splake had driven the whitefish out of the waters in which the band members were permitted to fish. Similarly, although there was a large quota for chub, a deep-water fish, the Cape Croker fishery was essentially an

inshore fishery without a deep water capacity. The band's boats were too small, and they lacked the other equipment needed to take their chub allowance under the licence.

The defendants challenged not only the quotas, but the geographical restrictions imposed by the licence as well. It was argued that in scrutinizing the management plan, it would not be realistic to compartmentalize the various restrictions without recognizing the impact of the licensing scheme as a whole. I am inclined to agree. The waters in which the band members were permitted by their licence to fish were limited to a small area adjacent to the Cape Croker reserve, much smaller than their traditional fishing grounds which extended to waters on both sides of the peninsula and within which native fishermen had traditionally been free to follow the fish to find the most productive places for fishing. The area covered by their licence did not extend far enough to allow them to take their chub quota, even if they had been equipped to do so. Moreover, although the licensing scheme gave the band exclusive commercial fishing rights in the small area authorized by the licence, it did not exclude sport fishermen or prevent their taking lake trout from those waters.

Considerable evidence and much argument was directed to the defendants' assertion that the aboriginal commercial fishing right at issue extends to the Saugeen Ojibway Nation as a whole, and not simply to the Chippewas of Nawash or the few band fishermen named as designates on the band's commercial fishing licence. I think Mr. Pugsley is probably right when he suggests that, strictly speaking, that issue is irrelevant to the Cape Croker fishery's lake trout quota impugned here. At the same time, I accept that exclusion of aboriginal fishermen from the fishery by the licensing scheme can be considered as one more indication of the reasonableness of the conservation plan. What is suggested is that in refusing to authorize commercial fishing by band members living on the Saugeen reserve on the west side of the peninsula, the Ministry displays the same indifference to the constitutional status of their right which allowed them to impose the specific lake trout quota. The same point is applicable, I think, to the Ministry's effort to limit the number of Cape Croker residents who can fish under authority of the licence. Despite the collective nature of their aboriginal and treaty rights, and also despite the legislative changes in 1982 allowing women who had married outside the band to return to the reserve, leading to an increase in the reserve population from 900 to 1600 persons, the 1989 licence still authorized fishing by only the chief and eight designated fishermen. Again taking the position that it was incumbent on the Crown to justify only the lake trout quota, Mr. Pugsley really made no attempt to justify all the other regulatory restrictions.

I accept the defendants' submission that the evidence established that the effect of the Ministry's quota system has been to allocate to non-native fishermen the vast preponderance of fish available for commercial harvest. The failure to regulate the recreational fishery in accordance with the same conservation plan has had the inevitable effect of shifting a greater share of the resource to that user group. In neither respect has the Crown demonstrated that the plan or, in the case of the largely uncontrolled sport fishery, the developments permitted outside the plan, recognized that s. 35(1) required that priority be given to the aboriginals' stake in the fishery resource.

The evidence also established that other methods were available to achieve the conservation objectives, which could have accommodated the appropriate priorities. Reference was made to programs including the closure of the fishery to anglers or preventing them from catching lake trout specifically, or imposing "catch and release" procedures, all of which have evidently been implemented successfully in the Parry Sound area, although they have not been used in southern Georgian Bay. It may be that for political reasons such programs would not be popular, but that does not permit the constitutional priorities to be overlooked. If there is a perceived need to maintain and encourage a sport fishing industry for other economic reasons, altogether outside the aim of conservation, it may warrant consideration of compensation to the band for the diversion of its proper share of the resource to another user group. It seems to me that the transfer of the economic benefit of the fishery achieved by the regulatory scheme is tantamount to "expropriation", and considering the factors suggested by Sparrow, the absence of "fair compensation" weighs against the Crown.

It has also not been proved that there was appropriate consultation with the Saugeen Ojibway at the time the conservation measures were adopted. Instead, the evidence suggests inadequate efforts to enlist the participation of the aboriginal peoples in the planning process, and certainly a failure to respond to the protests and objections made when the band considered its rights to have been disregarded. In the years since the imposition of the quotas, even following the clarification of the effect of s. 35(1) by the Supreme Court of Canada, the evidence does not disclose any serious attempt by the Ministry to reconsider the restrictions imposed at a time when their constitutional implications were perhaps not so clearly understood.

In assessing the conservation plan, I think the evidence compels the conclusion that the measures adopted have not infringed the protected right as little as possible. While the evidence was conflicting on the question, it is not at all clear that the lake trout quota has played a significant role in stabilizing the mortality rate for that species in the area. Dr. Spangler, a Fisheries Professor from the University of Minnesota called by the defence, testified that the quota allocated to the Cape Croker fishery could have been doubled or tripled without adversely affecting the rate of rehabilitation for lake trout. That being the case, it is impossible to characterize the restriction as infringing the right as little as possible.

Even making allowances for the complexities and difficulties from the perspective of the Ministry, the evidence does not provide the requisite justification of the infringement of the defendants' constitutionally protected right by the limit imposed on their harvest of lake trout. It follows that the regulation imposing the restriction is of no force or effect.

CONCLUSION

In my view, it is not the function of a summary conviction trial court hearing charges under the Ontario Fishery Regulations, 1989 to state what scheme for allocating fishery resources might meet the appropriate justificatory standard. Apart from lacking the technical expertise, there are other users with claims to be made and interests to be

considered who have no standing in a prosecution of this nature: see R. v. Duncan (1991), 65 C.C.C. (3d) 546 (B.C.S.C.). In the particular context of the Georgian Bay and Lake Huron fishery, there are complications arising from the fact that certain fish stocks, and lake trout specifically, currently depend on government hatcheries and plantings. It may also be that the aboriginal community derives direct or indirect economic benefit from a tourist industry that operates in part as a result of the recreational fishing available. Quantifying that benefit may be problematic. All these matters are undoubtedly appropriate subjects to be considered during the process of negotiation and consultation between the government and the Saugeen Ojibway, a process that does not involve the court.

What should be stated, however, is that a high-handed and adversarial stance on the part of the Ministry will neither meet the constitutional requirements with which, one would expect, it would consider itself duty-bound to comply, nor will it provide an enforceable regulatory scheme capable of achieving the conservation goals which it seeks. It is self-evident, I think, that s. 35(1) of the Constitution Act, 1982, particularly after the judgment of the Supreme Court of Canada in Sparrow, dictated that a new approach be taken by the government to ensure that its policies discharge the obligations assumed by its constitutional agreement. I do not think it was ever suggested that there would necessarily be no adjustments required or no costs attached.

As a practical matter, the court cannot compel good faith or recognition of changed constitutional realities. All that can be done here is to state the conclusion that the quota restrictions do not meet current constitutional standards and are, accordingly, unenforceable against the defendants. The imposition of a prohibition against the purchase of lake trout from band members pending negotiations and a new arrangement which recognizes the priority of their aboriginal and treaty rights would, in my view, also be unconstitutional. It would also fail to reflect the high standard of honourable dealing which the public expects its government to take in respect of the rights of aboriginal people.

Howard Jones and Francis Nadjiwon are found not guilty, and the charges are dismissed.

Defendants acquitted.