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ABORIGINAL FISHING RIGHTS: SUPREME COURT DECISIONS

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INTRODUCTION

In *Sparrow,*[1] the Supreme Court of Canada considered for the first time the scope of section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms the aboriginal and treaty rights of aboriginal peoples of Canada. Significantly, the court made it clear that the rights recognized and affirmed by section 35 are not absolute and outlined a test whereby the Crown may justify legislation that infringes on aboriginal rights. More recently, the Supreme Court of Canada, in a trilogy of cases dealing with commercial fishing rights (*R.* v. *Van Der Peet,*[2] *R.* v. *Smokehouse*[3] and *R.* v. *Gladstone*[4]), laid further groundwork on how aboriginal rights should be defined. In essence, the Court decreed that a purposive approach must be applied in interpreting section 35 of the *Constitution Act, 1982*; in other words, the interests that section 35 was intended to protect must be identified. To define an aboriginal right, one must identify the practices, traditions and customs central to aboriginal societies that existed in North America prior to contact with the Europeans - to be recognized as an aboriginal right, the practice, tradition or custom must be an integral part of the distinctive culture of aboriginal peoples. The Court reiterated that section 35 did not create the legal doctrine of aboriginal rights, but emphasized that they already existed under the common law. The Crown can no longer extinguish existing aboriginal rights, but may only regulate or infringe upon them consistent with the test laid out in the *Sparrow* decision.

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

(2) *R.* v. *Van Der Peet*, unreported, 21 August 1996, file no. 23803, Supreme Court of Canada.

(3) *R.* v. *Smokehouse*, unreported, 21 August 1996, file no. 23800, Supreme Court of Canada.

(4) *R.* v. *Gladstone*, unreported, 21 August 1996, file no. 23801, Supreme Court of Canada.

The following is a summary of the cases mentioned above, as well as the rulings of the Supreme Court of Canada in *Lewis*[5] and *Nikal,*[6] which examined "on reserve" fishing issues.

COMMERCIAL FISHING RIGHTS: A QUESTION OF FACTS

A. *Sparrow*

Ronald Sparrow, a member of the B.C.'s Musqueam band, was charged with fishing with a net longer than was permitted by his food fishing licence, in contravention of the *Fisheries Act*. Mr. Sparrow did not dispute the facts; on the contrary, he argued in his defence that he was exercising an existing aboriginal fishing right, constitutionally protected under section 35. While agreeing that members of the Musqueam band, including Mr. Sparrow, had an aboriginal right to fish, particularly for food and for social and ceremonial purposes, the Supreme Court of Canada ordered that certain constitutional questions be referred back to the trial court, and established the criteria that the trial judge should take into account while reviewing these matters. The Supreme Court strongly hinted that the government should enter into negotiations with aboriginal peoples regarding the management of the fisheries, in order to avoid future litigation.

Some general principles were established in *Sparrow*. First, the Court ruled that section 35 of the *Constitution Act, 1982* applies only to rights that existed at the time this provision came into force. In other words, the term "existing" means "unextinguished in 1982." The Supreme Court specified, however, that the way in which the right had been regulated until that time does not dictate the extent of that right; on the contrary, the term "existing aboriginal rights" must be interpreted flexibly, in order to allow these rights to evolve over time. It categorically rejected the "frozen rights" doctrine. (Some would argue, however, that the majority later revived the "frozen rights" doctrine in *Van Der Peet*). The Supreme Court of Canada emphasized that section 35 must be given a generous, liberal interpretation in light of its objectives.

As mentioned earlier, the Supreme Court concluded that members of the Musqueam band had an aboriginal right to fish, particularly for food and for social and

(5) *R.* v. *Lewis,* [1996] 1 S.C.R. 921.

ceremonial purposes. It also concluded that the Crown had been unable to demonstrate that this right had been extinguished by the Regulations accompanying the *Fisheries Act*. In order to extinguish an aboriginal right, the Crown must demonstrate a clear and plain intention to do so. The Supreme Court noted that neither the Act nor the Regulations revealed the required intent to extinguish a constitutional right. The fact that the Department of Fisheries and Oceans had issued licences to individuals at its own discretion indicated only an intent to manage the fisheries, rather than an attempt to define aboriginal fishing rights.

The Supreme Court ruled that, when a legislative measure limits the exercise of an existing aboriginal right, there is *prima facie* infringement of section 35 of the *Constitution Act, 1982*. In order to determine whether there is indeed infringement, the following three questions must be asked:

- Is the limitation unreasonable?
- Does the regulation impose undue hardship?
- Does the regulation deny to the holders of the right their preferred means of exercising that right?

Once it is proved that an infringement has taken place, the next step is to determine whether the infringement was justified. Although the Supreme Court stated that aboriginal rights are not subject to the justification test as set out in section 1 of the Charter, the Court nevertheless applied a similar test, which requires, first of all, a valid legislative objective (for example, a valid objective of a regulation would be to ensure the proper management and conservation of a natural resource). Secondly, the justification test requires consideration of the federal government's fiduciary duty towards aboriginal people, an essential factor in resource allocation. The Supreme Court indicated the need for guidelines to solve resource allocation problems that would certainly arise in the future. The Court noted that subsistence fishing by aboriginal people should be given priority, after conservation requirements.

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(6) *R.* v. *Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.).

The Supreme Court refused to draw up an exhaustive list of factors in the justification test, but noted several points that a court should consider, including:

- whether there had been as little infringement as possible of the aboriginal right;
- whether fair compensation had been made to the aboriginal group concerned in cases of expropriation; and
- whether the aboriginal group concerned had been consulted about the conservation measure imposed.

In summary, the *Sparrow* doctrine requires a court to answer three main questions:

- Is there an aboriginal or treaty right?
- If so, does the regulation or legislation in question interfere with this right?
- If there is infringement of a right, is the infringement justified?

The Supreme Court noted that aboriginal people have the burden of proving the existence and infringement of their rights. The Crown, on the other hand, has the burden of proving justification; that is, it must demonstrate that the legislative measures are both valid and justifiable. The Supreme Court suggested that, in light of the government's fiduciary duty towards aboriginal people, it must limit the exercise of its legislative authority. The Court also specified that the final outcome would depend entirely on the findings of fact in a specific case. That essentially means that aboriginal rights will be determined on a case-by-case basis.

In *Sparrow*, the Supreme Court refused to examine the question of an aboriginal right to fish for commercial purposes since the issue had not been properly debated before the lower courts. The Supreme Court chose instead to restrict the scope of its analysis to the Musqueam's constitutional right to fish for food, social and ceremonial purposes. That is not to say that the Supreme Court ruled out the possibility that an aboriginal group could one day successfully claim a commercial fishing right; on the contrary, it intimated that such a claim would be a contentious issue in the future. A few years later, the thorny question of whether there existed a constitutionally protected aboriginal right to sell fish was once again before the Court (the *Van Der Peet*, *Gladstone* and *Smokehouse* trilogy). This time the Supreme Court did

not hesitate to examine the issue thoroughly.

B. *Van Der Peet*

Dorothy Van Der Peet, a member of the Sto:lo, was charged with illegally selling fish caught under an Indian food fish licence, contrary to section 27(5) of the *B.C. Fishery (General) Regulations*. As in similar constitutional challenges, the appellant did not contest these facts but argued in her defence that the regulations infringed her aboriginal right to sell fish and were therefore invalid. The trial judge held that the Sto:lo's aboriginal right to fish for food and ceremonial purposes did not include the right to sell the fish; consequently, he convicted the appellant. The majority of the Supreme Court of Canada upheld the conviction. In sum, the majority concluded that the aboriginal rights of the Sto:lo did not include the right to exchange fish for money or other goods. Both McLachlin J. and L'Heureux-Dubé J. issued dissenting opinions in which they expressed the opposite conclusion: the dissenters would have recognized that the Sto:lo retained an aboriginal right to sell, trade and barter fish for sustenance purposes.

In the majority ruling, general principles governing the legal relationship between the Crown and aboriginal peoples were reiterated. Given the fiduciary obligation the Crown owes aboriginal peoples, the Court restated that section 35(1) of the *Constitution Act, 1982* should be given a generous and liberal interpretation. Any doubt or ambiguity as to the scope and definition of section 35(1) must be resolved in favour of aboriginal peoples. The majority of the Court then went on to find that the purpose of section 35(1) is to recognize the prior occupation of North America by aboriginal peoples. To help define aboriginal rights, the majority enunciated a test: in order to be recognized as an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The majority further specified that practices, customs and traditions that constitute aboriginal rights are those that show continuity with the traditions, customs and practices that existed prior to the arrival of Europeans in North America. It was underlined, however, that pre-contact practices, customs and traditions that have evolved into modern forms may still be protected as aboriginal rights.

The majority highlighted several guiding factors that a court must consider in its assessment of aboriginal rights, including:

- the perspective of aboriginal peoples themselves,

- the precise nature of the claim being made,
- the central significance of the practice, custom or tradition to the aboriginal society in question,
- the relationship of aboriginal peoples to the land, and
- the distinctive societies and cultures of aboriginal peoples.

The majority further noted that a court must be flexible in applying rules of evidence, given the special nature of aboriginal claims. This is in recognition of the fact that the history of aboriginal peoples has been passed from one generation to another through oral traditions. Thus, the only "evidence" of past traditions, practices and customs may come in the form of elders' oral accounts. In addition, the majority stressed that aboriginal rights must be adjudicated on a specific rather than general basis. In other words, whether an aboriginal right exists will depend entirely on the traditions, customs and practices of the particular aboriginal community making the claim.

In light of these guiding principles, the majority felt it must defer to the trial judge's findings of fact, since there were no palpable or overriding errors on his part. It therefore accepted his conclusion that the appellant had failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society that had existed prior to European contact.

The dissenting opinions of McLachlin J. and L'Heureux-Dubé in *Van Der Peet* were quite critical of the analysis adopted by the majority, which they viewed as reviving the "frozen rights" doctrine. The dissenting judges were of the view that a practice, custom or tradition need not have been crystallized prior to European contact to be recognized as a constitutionally protected right today; rather, to be protected as an aboriginal right, an aboriginal activity need only have formed an integral part of the distinctive aboriginal culture for a substantial period of time.

C. *Smokehouse*

In this case, a company operating a food processing plant was convicted of purchasing and selling fish caught without the authority of a commercial fishing licence. The company had illegally purchased fish caught under the authority of Indian food fish licences.

The appellant did not dispute these facts but raised the constitutional argument that the *Fishery Regulations* infringed the aboriginal rights of the Sheshaht and Opetchesaht, from whom it had purchased the fish. Once again, the Supreme Court was divided on the issue: a majority affirmed the conviction, while McLachlin J. and L'Heureux-Dubé J. would have granted the appeal.

In essence, the majority applied the test it had earlier enunciated in *Van Der Peet*. It considered the right claimed in this case to be at first glance a right to fish commercially, given the volume of fish being caught and sold. The majority stated that the claim to an aboriginal right to fish commercially would be far more difficult to establish than the claim to an aboriginal right to exchange fish for money or other goods: to establish the former right, the claimant group would have had to demonstrate that the exchange of fish for money or other goods, on a commercial scale, formed an integral part of the distinctive culture of the Sheshaht and Opetchesaht peoples. In light of this onerous evidentiary hurdle, the majority decided to frame the claim at the outset as the right to exchange fish for money or other goods. Only if the appellant had been successful on this first claim would the majority then have proceeded to an examination of the right to exchange fish on a commercial basis. This second step of the analysis was never undertaken, however, since the appellant failed to convince the majority of the Court that the Sheshaht and Opetchesaht had a right to exchange fish for money.

Once again, the majority endorsed the trial judge's conclusions; these were that since sales of fish were "few and far between" and "incidental" to potlatches and ceremonies, they did not constitute an aboriginal right to sell fish. The majority saw no compelling reason to overturn the trial judge's findings of fact that the exchange of fish for money or other goods did not form an integral part of the distinctive cultures of the Sheshaht and Opetchesaht.

The dissenting opinions in *Smokehouse* followed a common approach, but differed in their results. L'Heureux-Dubé J. would have characterized the aboriginal right claimed as the right to sell, trade and barter fish for livelihood and sustenance purposes, not on a commercial basis. In her opinion, the trial judge had erred in formulating the question in terms of commercial fishing. As a result of these palpable and overriding errors, L'Heureux-Dubé J. felt she could substitute her own findings of fact. In her view, the evidence showed that the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sheshaht and Opetchesaht to be recognized as an aboriginal right. She also concluded that the disputed

legislation did not extinguish this aboriginal right. L'Heureux-Dubé J. would have referred the questions regarding the infringement of the right and the validity of the regulations back to the trial judge. McLachlin J., on the other hand, would have ruled in favour of the appellant on all counts on the grounds that the Sheshaht and Opetchesaht people possessed an aboriginal right to sell fish for the purpose of obtaining sustenance from the fishery; that the right had not been extinguished by the Crown; that the Regulations in question infringed the claimants' ability to fully exercise their right; that the infringement of their right could not be justified by the Crown; and that, as a result, the Regulations in question were invalid.

D. *Gladstone*

The *Gladstone* ruling clearly illustrates that the recognition of an aboriginal right comes down to findings of fact as assessed by the trial judge. At issue at the Supreme Court was whether section 20(3) of the *Pacific Herring Fishery Regulations*, which prohibited the sale of any herring spawn on kelp without a proper licence, was invalid since it violated the aboriginal rights of the appellants. The majority (including L'Heureux-Dubé J. and McLachlin J., who issued concurrent reasons) recognized and endorsed the findings of the trial judge that the commercial trade in herring spawn on kelp had been an integral part of the distinctive culture of the Heiltsuk prior to European contact. The evidence presented at trial established that trade was not an incidental activity for the Heiltsuk but rather a central and defining feature of their society. The majority ruled that the disputed Regulations (both past and current) did not express a clear and plain intention on the part of the Crown to extinguish the aboriginal rights of the Heiltsuk to fish commercially. The Crown had demonstrated only that it had intended to control the fisheries. The majority also found that the disputed regulatory scheme impinged upon the rights of the appellants, and constituted a *prima facie* infringement of their aboriginal rights. Because of the lack of evidence on the issue, the Supreme Court felt it could not properly assess whether the Regulations could be justified as a reasonable limitation of these rights. That matter was sent back to be determined at trial.

Judge La Forest was the lone dissenter in the *Gladstone* case; he found that the appellants had failed to establish that they had been exercising an aboriginal right at the time of the offences, since their activities had been different from the traditional activities that had given rise to their aboriginal right. Even if the Heiltsuk had at some time benefited from the aboriginal

right claimed, La Forest J. concluded that the right had since been extinguished by the intervening regulatory scheme. La Forest J. found that the disputed Regulations showed the Crown's clear and plain intention to extinguish aboriginal rights relating to the commercial fisheries.

BAND BY-LAWS CANNOT REGULATE FISHERY

A. *Lewis*

Members of the Squamish Indian Band were convicted of illegal "net fishing" on the Squamish River in an area immediately contiguous to the reserve, contrary to the *B.C. Fishery (General) Regulations*. At trial, the appellants had argued that an Indian band by-law authorized band members to fish in the area. Under section 81(1)(o) of the *Indian Act*, a band may enact by-laws "for the preservation, protection and management of fish on the reserve." The Supreme Court of Canada upheld the convictions, in essence ruling that the band by-law did not apply to the fishery in the Squamish River at the reserve, and consequently, could not be used successfully as a defence to charges under the *B.C. Fishery (General) Regulations.*

Significantly, the Supreme Court ruled that the fishery itself did not form part of the reserve. In addition, it was noted that the Crown did not historically grant exclusive use of any public waters; rather, the Crown's policy was to treat Indians and non-Indians equally as to the use of the water. Further, the Supreme Court decreed that the Crown had fulfilled its fiduciary obligation to the Squamish Band by providing fishing stations for their use.

With regard to validity of the band by-law, the Supreme Court noted that the phrase "on the reserve" in the context of s. 81(1)(o) of the *Indian Act* should be interpreted as meaning "within the reserve," "inside the reserve," or "located within the boundaries of the reserve." The Supreme Court stated that Parliament had never intended that a band by-law would have an extra-territorial effect; if Parliament had intended to grant broad regulatory powers to bands beyond the limits of their reserves, it would have specifically delineated these powers. Accordingly, the management of the Squamish River is governed by the *Fisheries Act* and *regulations*, not the band by-law.

B. *Nikal*

The appellant had been charged with fishing salmon without a licence, contrary to the *B.C. Fishery (General Regulations).* (Under the regulations, native persons were entitled to a "free" licence to fish for salmon in the manner they preferred). Mr. Nikal argued that the licensing scheme infringed his aboriginal rights as protected under section 35(1) of the *Constitution Act, 1982*. He also argued that, since the river was part of his reserve, he need comply only with the band by-law which allowed members unrestricted fishing on the river.

For the Supreme Court of Canada, there were two main issues in dispute:

- whether the band's fishing by-law applied to the Bukley River because it flowed in part through the band's reserve; and
- whether the licensing requirement under the *General Fishery Regulations* infringed the appellant's aboriginal rights under section 35.

Regarding the band by-law, the Supreme Court reiterated that it had not been the Crown's intention when creating the reserve to grant the band an exclusive fishery. Despite the band's claim of being misled on that point, the Supreme Court maintained that the historical facts established the Crown's intention to allot only the land of the reserve and not the river. Consequently, a band by-law could not apply to the river bed.

Although ruling that the requirement to obtain a licence did not infringe the appellant's aboriginal rights, the Court found that the mandatory conditions set out in the licence did *prima facie* violate his right to fish. Some of the conditions imposed were seen as unreasonable. They dictated that aboriginal persons:

- fish for food only;
- fish during certain times subject to change by public notice;
- fish for themselves or their families; and
- fish for salmon only.

The Supreme Court concluded that since the government had adduced no evidence to justify these conditions, the licence and its conditions were both invalid. Consequently, the Supreme Court restored the original order of acquittal of the appellant.

CONCLUSION

The recent decisions by the Supreme Court of Canada on aboriginal fishing rights have been the focus of much media attention. Those advocating the recognition of an aboriginal right in the commercial fishery and those opposed to such an initiative have both claimed victory in these landmark rulings. If the truth be told, however, the Supreme Court has essentially left the issue open for further debate. It has clearly established the analytical framework for assessing future claims to an aboriginal right to sell fish, and has stressed that such an assessment will hinge upon the particular customs, traditions and practices of the claimant group that existed prior to European contact. Although the Supreme Court did recognize an aboriginal right to fish commercially in one case (*Gladstone*), it also stressed that future claimants will have to discharge a heavy evidentiary burden in order to show that the exchange of fish for money or other goods, on a commercial basis, formed an integral part of their distinctive culture.

With regard to the band by-laws regulating fisheries on public waters, the Supreme Court has made it clear that such by-laws will be considered invalid. Although a band has no power to regulate fishing beyond the limits of its reserve, this does not mean the federal government has unfettered discretion in the management of the fisheries. If the federal fishery regulations unduly restrict an aboriginal right to fish, they may also be struck down as invalid instruments.