1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

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R. v. N.T.C. Smokehouse Ltd.

R. v. N.T.C. SMOKEHOUSE LTD.

British Columbia Court of Appeal

Taggart, Lambert, Hutcheon, Macfarlane and Wallace JJ.A.

Heard: October 7-11 and 15, 1991
Judgment: June 25, 1993
Docket: Doc. Vancouver CA 011962

Counsel: *David M. Rosenberg*

Jack Woodward, Louise Mandell for supporting intervenors, Sheshaht Band

Leslie Pinder, Arthur Pape, Brenda Gaertner for supporting intervenors, Alliance of Tribal Councils

Louise Mandell for supporting intervenors, Delgamuukw

Peter Grant, Christine Birnie for supporting intervenors, Jerry Benjamin Nikal

Peter T. Burns, Q.C., Marvin R.V. Storrow, Q.C., Maria A. Morellato for supporting intervenors, William and Donald Gladstone

John D. McAlpine, Q.C., C. Allan Donovan for supporting intervenors, Cape Mudge Indian Band

Arthur Pape for supporting intervenors, Carrier Sekani Tribal Council

S. David Frankel, Q.C., M. Marvyn Koenigsberg, Q.C.

Paul J. Pearlman, Norman J. Prelypchan for supporting intervenors, Attorney General of British Columbia

Christopher Harvey, Q.C. for supporting intervenors, Pacific Fisherman's Alliance

J. Keith Lowes for supporting intervenors, Fisheries Council of B.C.

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

Edward C. Chiasson, Q.C., Patrick G. Foy for supporting intervenors, Canadian National Railway Company

Subject: Constitutional; Public

Constitutional Law --- Distribution of legislative powers — Areas of legislation — Maritime law — Regulation of fisheries.

Native Law --- Constitutional issues — Hunting and fishing — Fishing offences — Application of federal statutes.

Native Law --- Hunting and fishing — Native rights — Fishing.

Native Law --- Hunting and fishing — Fishing offences — Licences — General.

Native law — Aboriginal rights — Hunting, trapping and fishing — Indian food fish licence restricting licensee to fishing for sole purpose of obtaining food for the licensed band's consumption or the licensed individual's family consumption — Licence and regulations effectively prohibiting sale of fish caught pursuant to licence — Regulations necessarily incidental to management and preservation of resource — Regulations intra vires Parliament — Regulations not infringing aboriginal right where band members not established as sellers or barterers of fish — Band by-law permitting sale of fish not applying to fishery located off reserve.

Constitutional law — Constitution Act, 1867 — Distribution of legislative powers — Seacoast and inland fisheries — Indian food fish licence restricting licensee to fishing for sole purpose of obtaining food for the licensed band's consumption or the licensed individual's family consumption — Licence and regulations effectively prohibiting sale of fish caught pursuant to licence — Regulations necessarily incidental to management and preservation of resource — Regulations intra vires Parliament.

Energy and natural resources — Fish and wildlife — Offences — Indian food fish licence restricting licensee to fishing for sole purpose of obtaining food for the licensed band's consumption or the licensed individual's family consumption — Licence and regulations effectively prohibiting sale of fish caught pursuant to licence — Regulations necessarily incidental to management and preservation of resource — Regulations intra vires Parliament — Regulations not infringing aboriginal right where band members not established as sellers or barterers of fish — Band by-law permitting sale of fish not applying to fishery located off reserve.

The accused company purchased 119,000 pounds of fish from an Indian band and sold the fish to a third party. It was convicted of buying fish not lawfully caught under a commercial fishing licence, and selling fish caught under the authority of an Indian food fish licence, contrary to regulations under the *Fisheries Act*. The accused appealed on the grounds that the section of the regulation under which the charges were laid was ultra vires Parliament; that the Indians who caught the fish were exercising an aboriginal right; and that the existence of a band council fish by-law provided an absolute defence to the charges. The appeal was dismissed. The accused appealed.

Held:

Appeal dismissed.

Per WALLACE J.A. (TAGGART and MACFARLANE JJ.A. concurring): An Indian food fish licence restricts the licensee to fishing for salmon for the sole purpose of obtaining food for the licensed band's consumption or the licensed individual's family consumption, as the case may be. The licence, in conjunction with the regulations, effectively prohibits the sale of fish caught pursuant to such licence. The regulations are necessarily incidental to achieving the objective of managing and preserving the resource. The regulations are primarily concerned with the protection and preservation of the fisheries as a public resource.

They inhibit "undue and injurious exploitation" of the resource and hence are not ultra vires the Parliament of Canada. The trial judge found that members of the Indian band in question were never established as sellers and barterers of fish and that finding was well supported by the evidence. Accordingly, it could not be said that the regulations prohibiting the sale of food fish constituted an infringement or an interference with an aboriginal right. As well, there was support for the finding of the trial judge that the river from which the fish were taken was not included in the reserve, and the band by-law did not apply to the fishery located in the river.

Per HUTCHEON J.A. (concurring): The words "on the reserve" in s. 81(1)(*o*) of the *Indian Act* could not be interpreted to include the fishery of the adjacent river. Having regard to the historical background of the legislative provision, it could not be concluded that Parliament intended to give the phrase "on the reserve" an expanded meaning so as to include the river adjacent to but not within the boundaries of the reserve. Accordingly, the band by-law, which included a right to sell fish, did not displace the regulations with their prohibition against sale.

Per LAMBERT J.A. (dissenting): The trial judge erred in concluding that the Indian band did not have an aboriginal right that encompassed the sale of fish. Once it was accepted that the band had an aboriginal right to catch and sell the salmon, there could be no doubt that the application of the regulations to them constituted a prima facie infringement of their aboriginal rights. The needs of conservation did not justify the application of the prohibition on sale. The accused, the corporate alter ego of the band, was exercising an aboriginal right when it bought and sold the fish and that right was infringed by the application of the regulations. On that ground, the accused was entitled to an acquittal. As well, the band had an aboriginal title to the bed of the river and to the enjoyment of the resources of the salmon fishery, owing nothing whatsoever to the ad medium filum aquae principle.

Cases considered:

Considered by majority:

British Columbia Packers Ltd. v. Canada (Labour Relations Board) (1975), [1976] 1 F.C. 375, *(*sub nom. *British Columbia Provincial Council, U.F.A.W.U. v. British Columbia Packers Ltd.)* 75 C.L.L.C. 14,307, *(*sub nom. *U.F.A.W.U. v. British Columbia Packers Ltd.)* 64 D.L.R. (3d) 522, affirmed [1978] 2 S.C.R. 97, [1978] 1 W.W.R. 621, 19 N.R. 320, 82 D.L.R. (3d) 182 — *considered*

Canada (Attorney General) v. Alberta (Attorney General), [1916] 1 A.C. 588, 10 W.W.R. 405, 25 Que. K.B. 187, 26 D.L.R. 288 (P.C.) — *referred to*

Canada (Attorney General) v. British Columbia (Attorney General), [1930] A.C. 111, [1929] 3 W.W.R. 449, *(*sub nom. *Re Fisheries Act, 1914)* [1930] 1 D.L.R. 194 (P.C.) — *considered*

Canada (Attorney General) v. Ontario (Attorney General), [1898] A.C. 700 (P.C.) — *referred to*

City National Leasing Ltd. v. General Motors of Canada Ltd., [1989] 1 S.C.R. 641, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332, 68 O.R. (2d) 512n — *referred to*

Delgamuukw v. British Columbia, [1993] 5 W.W.R. 97 (B.C.C.A.) — *considered*

R. v. Crane; R. v. Favel; R. v. Twin (1985), [1986] 1 W.W.R. 522, 41 Alta. L.R. (2d) 75, 65 A.R. 341, 23 C.C.C. (3d) 33, [1986] 2 C.N.L.R. 83 (C.A.) [leave to appeal to S.C.C. refused (1985), *(*sub nom. *R. v. Twin)* 40 Alta. L.R. (2d) liv, 64 N.R. 159n, 67 A.R. 240n] — *considered*

R. v. Fowler, [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 9 C.E.L.R. 115, 113 D.L.R. (3d) 513, 53 C.C.C. (2d) 97, 32 N.R.

230 — *referred to*

R. v. Horseman, [1990] 1 S.C.R. 901, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, 108 N.R. 1, 108 A.R. 1, [1990] 3 C.N.L.R. 95 — *applied*

R. v. Interprovincial Co-operative Ltd., [1976] 1 S.C.R. 477, [1975] 5 W.W.R. 382, 53 D.L.R. (3d) 321, 4 N.R. 231 — *referred to*

R. v. Jimmy, [1987] 5 W.W.R. 755, 15 B.C.L.R. (2d) 145, [1987] 3 C.N.L.R. 77 (C.A.) — *referred to*

R. v. Lewis, 80 B.C.L.R. (2d) 224, [1993] 5 W.W.R. 608 (C.A.) — *applied*

R. v. Robertson (1882), 6 S.C.R. 52, 2 Cart. B.N.A. 65 — *referred to*

R. v. Saul (1984), 55 B.C.L.R. 359, 13 C.C.C. (3d) 358, 10 D.L.R. (4th) 736, [1985] 2 C.N.L.R. 156 (S.C.) — *referred to*

R. v. Somerville Cannery Co., [1927] 3 W.W.R. 215, 39 B.C.R. 103, 49 C.C.C. 65, [1927] 4 D.L.R. 494 (S.C.) — *referred to*

R. v. Sparrow, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 3 C.N.L.R. 160, affirming (1986), [1987] 2 W.W.R. 577, 9 B.C.L.R. (2d) 300, 32 C.C.C. (3d) 65, [1987] 1 C.N.L.R. 145, 36 D.L.R. (4th) 246 — *considered*

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 109 N.R. 22, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127, 30 Q.A.C. 280 — *applied*

Considered in dissent:

Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C. 399 (P.C.) — *considered*

British Columbia Packers Ltd. v. Canada (Labour Relations Board) (1975), [1976] 1 F.C. 375, (sub nom. *British Columbia Provincial Council, U.F.A.W.U. v. British Columbia Packers Ltd.)* 75 C.L.L.C. 14,307, (sub nom. *U.F.A.W.U. v. British Columbia Packers Ltd.)* 64 D.L.R. (3d) 522 (C.A.) — *considered*

Canada (Attorney General) v. British Columbia (Attorney General), [1930] A.C. 111, [1929] 3 W.W.R. 449, (sub nom. *Re Fisheries Act, 1914)* [1930] 1 D.L.R. 194 (P.C.) — *considered*

Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654, 1 R.P.R. (2d) 105, 89 N.R. 325, [1989] 1 C.N.L.R. 47, 91 N.B.R. (2d) 43, 232 A.P.R. 43, 53 D.L.R. (4th) 487 — *considered*

Delgamuukw v. British Columbia, [1993] 5 W.W.R. 97 (B.C.C.A.) — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada)* 55 N.R. 161 — *considered*

Mabo v. Queensland (1992), 107 A.L.R. 1, 66 A.L.J.R. 408 (Aust. H.C.) — *considered*

R. v. Crane; R. v. Favel; R. v. Twin (1985), [1986] 1 W.W.R. 522, 41 Alta. L.R. (2d) 75, 65 A.R. 341, 23 C.C.C. (3d) 33,

[1986] 2 C.N.L.R. 83 (C.A.) [leave to appeal to S.C.C. refused (1985), *(*sub nom. *R. v. Twin)* 40 Alta. L.R. (2d) liv, 64 N.R. 159n, 67 A.R. 240n] — *considered*

R. v. Fowler, [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 9 C.E.L.R. 115, 113 D.L.R. (3d) 513, 53 C.C.C. (2d) 97, 32 N.R. 230 — *considered*

R. v. Gladstone, 80 B.C.L.R. (2d) 133, [1993] 5 W.W.R. 517 (C.A.) — *referred to*

R. v. Jack, [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, [1979] 2 C.N.L.R. 25, 28 N.R. 162 — *considered*

R. v. Jimmy, [1987] 5 W.W.R. 755, 15 B.C.L.R. (2d) 145, [1987] 3 C.N.L.R. 77 (C.A.) — *considered*

R. v. Northwest Falling Contractors Ltd., [1980] 2 S.C.R. 292, [1981] 1 W.W.R. 681, 9 C.E.L.R. 145, 53 C.C.C. (2d) 353, 32 N.R. 541, 113 D.L.R. (3d) 1, 2 F.P.R. 296 — *considered*

R. v. Saul (1984), 55 B.C.L.R. 359, 13 C.C.C. (3d) 358, 10 D.L.R. (4th) 736, [1985] 2 C.N.L.R. 156 (S.C.) — *considered*

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

R. v. Vanderpeet, 80 B.C.L.R. (2d) 75, [1993] 5 W.W.R. 459 (C.A.) — *considered*

R. v. Vidulich (1987), 22 B.C.L.R. (2d) 238, [1988] 2 C.N.L.R. 145 (Co. Ct.) [reversed 37 B.C.L.R. (2d) 391, [1989] 3 C.N.L.R. 167 (C.A.)] — *considered*

United States v. State of Michigan, 471 F. Supp. 192 (U.S. Dist. Ct., 1979) [stay denied 623 F. 2d 448, on remand 89 F.R.D. 307, appeal after remand 653 F. 2d 277 (Circ. Ct., 1980), on remand 520 F. Supp. 207, (U.S. Dist. Ct., 1981), cert. denied 102 S. Ct. 971] — *considered*

United States v. State of Washington, 384 F. Supp. 312 (U.S. Dist. Ct., 1974) [motion denied 66 F.R.D. 477, affirmed, cause remanded 520 F. 2d 676 (U.S.C.A., 1975)] — *considered*

Washington v. Washington State Commercial, Passenger & Fishing Vessel Assn., 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979) — *considered*

Statutes considered:

Constitution Act, 1867}

s. 91(12)*referred to*

s. 92(13)*referred to*

Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

s. 35(1)*referred to*

Criminal Code, R.S.C. 1985, c. C-46

s. 839(1)*considered*

Fisheries Act, S.C. 1914, c. 8 — *referred to*

Fisheries Act, R.S.C. 1970, c. F-14

s. 33(2) [re-en. 1970, c. 17 (1st Supp.), s. 3(1)]*considered*

s. 33(3)*considered*

Fisheries Act, R.S.C. 1985, c. F-14

s. 2 "fishery" [am. 1991, c. 1, s. 1]*considered*

s. 43*considered*

Indian Act, S.C. 1951, c. 29

s. 80(o) [now s. 81(1)(o)]*referred to*

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

s. 81(1)(o) [am. 1985, c. 32 (1st Supp.), s. 15]*considered*

s. 82*referred to*

Indian Affairs Settlement Act, S.B.C. 1919, c. 32 — *referred to*

Interpretation Act, R.S.C. 1906, c. 1

s. 14*considered*

s. 40 [en. 1919 (2nd Sess.), c. 20]*considered*

Statutory Instruments Act, R.S.C. 1985, c. S-22 — *referred to*

Regulations considered:

Fisheries Act, R.S.C. 1970, c. F-14 — British Columbia Fishery (General) Regulations, C.R.C. 1978, c. 840

s. 37 [now s. 4(5)]

Fisheries Act, R.S.C. 1970, c. F-14 — British Columbia Fishery (General) Regulations, SOR/84-248

s. 4(5)

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

s. 27(5) [en. SOR 85/290, s. 5(2)]

Words and phrases considered:

on the reserve

Appeal from judgment of Melvin Co. Ct. J., [1990] B.C.W.L.D. 704, dismissing appeal from conviction on charges of buying fish not lawfully caught under commercial licence and selling fish caught under Indian food fish licence.

***Wallace J.A.* (*Taggart* and *Macfarlane JJ.A.* concurring):**

Table of Contents

Part I Introduction

2 The appellant, N.T.C. Smokehouse Ltd., was convicted before a Provincial Court judge on the following counts:

Count #2: that between the 7th of September and the 23rd of September, 1986, it did unlawfully buy fish to wit; 119,000 pounds, that were not lawfully caught under the authority of a commercial fishing licence.

Count #4: that between the 8th of September and the 24th of October, 1986, at Port Alberni, it did sell fish; to wit; approximately 105,000 pounds caught under the authority of an *Indian Food Fish Licence.*

3 N.T.C. Smokehouse Ltd. appealed this conviction to the County Court. The appeal was heard by County Court Judge Melvin (as he then was) who dismissed the appeal on the 9th of January, 1990 [[1990] B.C.W.L.D. 704].

4 Leave to appeal Judge Melvin's decision to this Court was granted on 15th of February, 1990.

Part II Issues

5 The following issues arise for determination on this appeal:

6 (1) Are ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* ultra vires the Parliament of Canada?

7 (2) Does the aboriginal right of the Sheshaht and Opetchesaht Bands to fish for sustenance and ceremonial purposes include the commercial sale of such fish?

8 (3) Does the Somass River form part of the Tsah-ah-eh Reserve #1 so as to make the Sheshaht Band Fish By-law SOR-82-471 applicable to the Somass River fishing and the commercial purchase and sale of fish by the appellant, thereby providing a complete defence to the charges?

9 No issue arises in this appeal concerning the aboriginal right of the Indians to fish for food, the extinguishment of aboriginal rights, or the infringement of aboriginal rights by the *Fishery Regulations*.

Part III Facts

10 N.T.C. Smokehouse Ltd. owned and operated a food processing plant near Port Alberni, British Columbia. The Sheshaht and Opetchesaht Indian Bands have reserve lands adjacent to the Somass River which runs into Port Alberni Inlet. The members of the Bands traditionally fished for salmon in the Somass River adjacent to their reserves. The taking of salmon from the Somass River was integral to the Band's cultural and traditional way of life.

11 N.T.C. Smokehouse Ltd. between September 7 and 23, 1986, purchased approximately 119,435 pounds of Chinook salmon, which fish were caught under the authority of Indian Food Fishing licences from the tidal waters of the Somass River at the "Paper Mill Dam" site and were sold during the period of September 7 to 23, 1986, by approximately 80 Native Indians comprising approximately 65 members of the Sheshaht Band and 15 members of the Opetchesaht Band.

12 The Department of Fisheries and Oceans issued Indian Food Fish licences, pursuant to regulations under the *Fisheries Act*, for both the Sheshaht and Opetchesaht Bands. The licences permitted fishing during certain specified days and hours. The quota allowed for Indian food fish for the Bands in 1986 was 13,000 Chinook salmon.

13 The Sheshaht Band Council passed a Fish By-law on March 19, 1982, which was registered and not disallowed by the Minister of Indian Affairs. Accordingly it had the force and effect of a federal regulation throughout the period relevant to this offence. (See *R. v. Jimmy*, [1987] 5 W.W.R. 755 [15 B.C.L.R. (2d) 145] (B.C.C.A.).) The pertinent sections of the by-law are set out later in these reasons.

14 At the hearing of this appeal counsel for the appellant, to avoid referring to supporting material, stated further facts with which the respondent Crown agreed. They include, inter alia, the following:

Statement of Facts

1. The Sheshaht Indians have lived on the land adjacent to the Somass River, near Port Alberni, as an organized society

since long before the coming of European settlers.

2. The taking of salmon from the Somass River was part of the Sheshaht culture and remains so to this day.

3. For the Sheshaht, the salmon fishery has always constituted a part of their distinctive culture. Salmon was consumed for subsistence. Salmon was consumed on ceremonial and social occasions. Salmon was also an article of trade which was used by the Sheshaht for livelihood purposes. Richard Inglis, curator of the Provincial Museum and renowned authority with respect to trade relations of West Coast People stated:

> The Somass River Fishery was and still is an integral part of the Sheshaht economy ... The Fishery was to be used not only as a food supply but also as a means to earn a livelihood.

4. Commissioner Patrick O'Reilly was appointed Indian Reserve Commissioner for the Province of British Columbia and in that capacity, he allotted Reserves including Sheshaht Reserve #1 TSAH AH EH. The letter of appointment and instructions to Commissioner O'Reilly from the Department of Indian Affairs dated August 9, 1890 stated that:

> You should in making allotments of lands for Reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.

6. The first non-Indian to make contact with the Sheshaht People was Charles Barclay in 1787. He traded metal with the Sheshaht for fresh salmon.

7. The Sheshaht traded fresh fish to the first European traders. That fish was shipped to the Hudson Bay Company in Victoria and was transshipped to the Sandwich Islands or the Hawaiian area. When asked about the Sheshaht trading, bartering, or selling salmon from the Somass River, Richard Inglis gave *viva voce* evidence as follows:

> Salmon was sold to the first fur traders that came into the region. It was sold to early settlers, to early store owners. It was sold to traders, starting at least in the 1840s, probably through many of the decades of the 1800s to the independent traders coming on the coast and then taking the salmon to Fort Victoria and then transshipped to Hawaii. Salmon was sold to the canneries and formed a major — a major part of the wage-earning ability of the Native People. Throughout this period salmon has always been traded, or has always been exchanged between Native groups and given out at ceremonies and served at feasts to visiting groups, and also provided to members of the community who have moved away. That is family, friends. The salmon has been traded with those people as well, and provided as a family obligation.

8. The Somass River fishery took increased focus after contact with Europeans as a food resource and as a means to obtain a livelihood. The Somass River fishery is the one traditional economic pursuit that the Sheshaht have continued from precontact times to the present.

9. Patricia Berenger, anthropologist, gave expert evidence that the Sheshaht traditionally relied on Somass River salmon for winter food requirements, feasts and ceremonies. She also noted:

> Cured salmon and sea foods were also used for purposes of trade and barter, to enable the chiefs to secure valuable relations of exchange with neighbouring tribes.

10. Patricia Berenger described how the Sheshaht utilization of the Somass salmon fishery was essentially unchanged from the traditional pattern until the time when the Sheshaht sold fresh and cured fish to the isolated white settlers at Alberni.

She noted that in the latter instance the Sheshaht spent the money they earned on commercial trade items and some staple food goods.

15 The Indian Food Fish licence pertinent to these proceedings provides, inter alia:

The above named, being an Indian, is hereby permitted under authority of this licence, to fish for salmon that may be taken in quantities sufficient for the sole purpose of obtaining food for that Indian and his family under the terms and conditions contained herein.

16 The Food Fish licence goes on to indicate the manner of fishing, the fishing times, the target species, and other minor matters pertinent to the obligations of the holder of the licence when fishing.

Part IV British Columbia Fishery (General) Regulations

17 The pertinent regulations read:

4...

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

27...

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

1. Are ss. 4(5) and 27(5) of the British Columbia Fishery (General) Regulations ultra vires the Parliament of Canada?

18 Counsel for the appellant N.T.C. Smokehouse asserts that after fish have been caught by a native fisher, those fish become private property and their disposition is no longer governed by federal regulations. The disposition of private property, it is argued, is a matter of property and civil rights which can only be regulated by the province and, accordingly, the *British Columbia Fishery (General) Regulations* are ultra vires Parliament insofar as they relate to the sale or purchase of fish.

19 The appellant says that the regulations do not deal with conservation, protection or management of the fishery resource and, accordingly, do not come within the ambit of s. 91(12) of the *Constitution Act, 1867*: see *R. v. Robertson* (1882), 6 S.C.R. 52 at 120-21.

20 Counsel submitted the disposition or marketing of private property is a matter of "property and civil rights" which is within the jurisdiction of the province (s. 92(13), *Constitution Act, 1867*). Accordingly, only the province can regulate the trade in a commodity such as fish after they have been legally caught. A number of cases were cited in support of the proposition that federal jurisdiction does not extend to marketing laws "in relation to the business of fishing" and to the disposition of the "products of the business". For example, in *British Columbia Packers Ltd. v. Canada (Labour Relations Board)* (1975), 64 D.L.R. (3d) 522 at 529 (affirmed on other grounds [1978] 2 S.C.R. 97 [[1978] 1 W.W.R. 621]), Jackett C.J. of the Federal Court of Appeal stated:

In so far as prior decisions are concerned, s. 91(12) has not been found to go beyond what may be described conveniently, but not precisely, as police regulation of "fisheries" regarded as property rights, the activity of removing fish from the water or the places where that activity is carried on. Clearly, so regarded, s. 91(12) is not broad enough to authorize a law in relation to the sale of fish after it has been caught: compare *Re Fisheries Act, 1914*; *A.-G. Can. v. A.-G. B.C.*, [1930] 1

D.L.R. 194 ...

See also *R. v. Robertson* (1882), 6 S.C.R. 52 at 120-21; *R. v. Somerville Cannery Co.*, [1927] 4 D.L.R. 494 at 496-97, 503 [[1927] 3 W.W.R. 215] (B.C.S.C); *Canada (Attorney General) v. Ontario (Attorney General)* ("*Re Provincial Fisheries*"), [1898] A.C. 700 at 712-13, 716 (P.C.); *Canada (Attorney General) v. Alberta (Attorney General)*, [1916] 1 A.C. 588 at 597 [10 W.W.R. 405] (P.C.) (regulation of a trade is ultra vires Parliament); and see *R. v. Fowler*, [1980] 2 S.C.R. 213 at 226 [[1980] 5 W.W.R. 511].

21 On the other hand, the Crown submits that Parliament's jurisdiction over sea coast and inland fisheries endows Parliament with jurisdiction to regulate fishing. It is argued regulations prohibiting the sale of fish, other than those caught under a commercial licence, are intra vires as necessarily incidental or functionally related to the protection and preservation of the fishery as a public resource.

22 In *Canada (Attorney General) v. British Columbia (Attorney General)* (1929), [1930] 1 D.L.R. 194 [[1929] 3 W.W.R. 449] (P.C.), Lord Tomlin, at pp. 196-97, succinctly set forth the pertinent principles which apply in resolving conflicts between the jurisdiction of the Parliament of Canada and provincial jurisdiction. They are:

> (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority even though it trenches upon matters assigned to the provincial legislature by s. 92 (see *Tennant v. Union Bk.*, [1894] A.C. 31).
>
> (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation unless these matters have attained such dimensions as to affect the body politic of the Dominion (see *A.-G. Ont. v. A.-G. Dom.*, [1896] A.C. 348).
>
> (3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91 (see *A.-G. Ont. v. A.-G. Can.* (the Assignments & Preferences Case), [1894] A.C. 189, and *A.-G. Ont. v. A.-G. Dom.*, [1896] A.C. 348).
>
> (4) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail (see *G.T.R. v. A.-G. Can.*, [1907] A.C. 65).

23 It is the third principle expressed above upon which the Crown relies in its submission that the regulations in question are "necessarily incidental" or "functionally related" to the exclusive jurisdiction of Parliament to make laws respecting all matters that come within "sea coast and inland fisheries" (s. 91(12) of the *Constitution Act, 1867*).

24 Laskin C.J.C., dissenting in his opinion that the provincial legislation at issue did *not* infringe federal jurisdiction, observed in *R. v. Interprovincial Co-operative Ltd.*, [1976] 1 S.C.R. 477 at 495 [[1975] 5 W.W.R. 382], that the federal power in relation to fisheries is concerned with:

> ... the protection and preservation of fisheries as a public resource, concern to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.

25 In *R. v. Crane; R. v. Favel; R. v. Twin* (1985), 23 C.C.C. (3d) 33 at 39 [[1986] 1 W.W.R. 522] (Alta. C.A.), the court held that the Alberta regulation which proscribed the sale of fish caught other than under a commercial type of licence is intra vires Parliament, being properly enacted pursuant to Parliament's power over the "sea coast and inland fisheries". Irving J.A., at p.

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39, stated:

> The issue in the appeals therefore resolves itself to ascertaining whether s. 56 of the regulation is "aimed at the protection and preservation" of the Alberta fishery. In my view, s. 56 is an appropriate component of the fishery management scheme established by the regulations, and has a rational and fundamental connection to the protection of the Alberta fishery, or at the least, is incidental thereto. Section 56 is an important enforcement provision to protect the fishery from domestic licensees catching fish for commercial purposes.

See also *R. v. Saul* (1984), 13 C.C.C. (3d) 358 [55 B.C.L.R. 359] (B.C.S.C.); *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641 at 672.

26 *Regulations*, ss. 4(5) and 27(5), prohibit the purchase and sale of fish which are not caught on a commercial licence — i.e. fish which are caught pursuant to a Food Fish licence or a Sports Fishing licence. Clearly, *Regulations*, ss. 4(5) and 27(5), are not directed to regulating the commercial trade in fish. If this were the case they would have been directed to fish caught on a commercial licence. Their obvious purpose is to prevent the sale of fish which, pursuant to the overall policy relating to the control and management of the fishing resource, were never intended to reach the commercial market but were expressly intended to satisfy the food fish needs of the licensee.

27 The Food Fish licence restricts the licensee to fishing for salmon for the sole purpose of obtaining food for the licensed Band's consumption or the licensed individual's family consumption, as the case may be. The licence, in conjunction with the regulations, effectively prohibits the sale of fish caught pursuant to such licence. The regulations are, in my view, necessarily incidental to achieving the objective of managing and preserving the resource.

28 Melvin Co. Ct. J. (as he then was) recognized the distinction between fish caught on a Fish Food licence and those caught on a commercial licence when he said [pp. 6-7]:

> As the protection of the resource falls within the jurisdiction of Parliament, the question then is whether or not the regulations so passed have as their object the control of the likelihood of damage to the resource. *In that context one may consider the effectiveness and practicability of enforcement.* In *Saul* the court had no facts showing actual harm to the resource but nevertheless concluded that the nexus existed, that is, the selling of fish for money. In the case at bar the evidence is clear that there was a sale of a considerable quantity of fish to the appellant and there was subsequent disposition by the appellant of fish so caught. The suggestion that regulations controlling the disposition of fish after they are sold are not necessary by virtue of the fact *that limits may be imposed as to the number of fish caught* (such as sports fishery), in my view, *does not provide a realistic means of protecting the resource.* Of necessity, Parliament has recognized three categories of fishing: (a) commercial; (b) sports; (c) Indian food fish licence. It attempts to control all three under its power over fisheries with the object of conservation. *Merely imposing catch limits on those caught pursuant to the Indian food fish licence without considering the manner in which those fish so caught might be disposed of by those who catch, in my view, fails to take into consideration the realities of the fisheries. If there is no control over disposition of fish caught then anyone who lawfully catches may sell whether they are a sports fisherman or fishing under Indian food fish or commercial licences. Under those circumstances, it is difficult to see how the fisheries department would be able to control the number of fish taken at any particular time.* (Emphasis added)

And further Judge Melvin stated [pp. 10-11]:

> Consequently, although one may conclude that, once caught, fish are a product of the fishery as described in *R. v. Vidulich*, in my opinion, the regulations are justified as necessarily incidental to the federal power to legislate in respect of fisheries. It is not sufficient to merely licence in one of the three classifications, to call for quotas or limits or to provide for openings and closings of the fishing season in order to adequately maintain and conserve the fishery. *In addition, it is necessary to control the disposition of fish caught. To allow for fish to be caught under an Indian food fish licence or a sports fisherman's licence to be sold immediately lifts the operation from that which it was originally intended to one of commercial*

> *activity with the consequent impact on fisheries management and preservation as referred to by Mr. Justice Locke in R. v. Saul.* By controlling the number of commercial licences issued and the total catch and the timing in the length of the season with reference to commercial fishery, the federal government also is legislating in the area of management and control of the fishery whose continued existence is necessary for the benefit of all Canadian residents. *The legislation in question does attempt to link the activity to actual and potential harm to fisheries by virtue of the control over the management and disposition of the fish. If fish is to be caught and sold commercially those who wish to carry out that activity are required to be licenced accordingly. This involves the buyer being satisfied that the vendor may lawfully sell the catch.*
>
> Accordingly, I am satisfied that on this ground the appellant's argument must fail. (Emphasis added)

29 I agree with the observations and conclusions expressed by Judge Melvin. While it is very difficult to ascertain whether fish being sold have been caught in excess of a food fish allocation, one can readily establish a breach of the regulations when a sale takes place where the vendor does not have a commercial licence. Furthermore, in my view, the regulations prohibiting the sale of food fish provide a disincentive to those fishing under a Food Fish licence to take more fish than they can use for sustenance purposes as authorized by the licence. If one takes the profit out of a black market exchange and penalizes those who engage in it there will be less inclination for one to catch fish to supply that market.

30 As observed by Cory J., for the majority, in R. v. Horseman, [1990] 1 S.C.R. 901 at 937 [[1990] 4 W.W.R. 97]:

> ... Obviously if it were permissible to traffic in hides of grizzly bears that were killed in self-defence, then the numbers of bears slain in self-defence could be expected to increase dramatically. Unfortunate as it may be in this case, the prohibition against trafficking in bear hides without a licence cannot admit of any exceptions.

31 In a similar vein, if one were permitted to traffic in fish caught under an Indian Food Fish licence, one would expect the amount of fish caught under such a restrictive licence to increase dramatically. Indeed, there would be no reason for Indian fishers to apply for or fish under a commercial licence. They could use the fish caught under an allocation that was intended to meet sustenance and ceremonial needs to satisfy the demands of the commercial market.

32 Counsel for the appellant also asserted that the *Fishery Regulations* do not link the prohibition against the sale of fish caught under a Fish Food licence to any potential harm to the fisheries. Counsel submitted that where there is an absence of any evidence that the commercial sale was harmful to the fishery, the regulation could not be considered "necessarily incidental" or "functionally related" to the legislative power respecting inland fisheries.

33 My colleague Justice Hutcheon has considered this submission in depth in his reasons for judgment (paras. 76-85), and I adopt his reasons and conclusions on the issue.

34 My colleague Justice Lambert points out that no conservation purpose could ever be served by requiring the Indians to eat the salmon they catch. Of course, no one suggests that any Indian family should be required to eat any quantity of their fish allotment or the fish they catch. The regulations simply permit the Indians, as a community, to catch the fish they require for food and prevent the sale of any surplus.

35 In my view, the regulations provide an objective way of effectively enforcing the prohibition against the disposition of the food fish harvest by unauthorized sale, and they thereby discourage the diversion to the commercial market of food fish caught pursuant to a Food Fish licence.

36 Accordingly, I consider the regulations are primarily concerned with the protection and preservation of the fisheries as a public resource. They inhibit "undue and injurious exploitation" of the resource and hence are not ultra vires the Parliament of Canada.

2. Does the aboriginal right of the Sheshaht and Opetchesaht Bands to fish for food encompass the commercial sale of

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fish?

37 One must first consider the nature and scope of the aboriginal right to fish and whether it includes the right to sell fish in the commercial market. If it does not, then the regulations prohibiting the sale of food fish can not be considered an infringement or interference with an aboriginal right and, subject to the application of the Indian Fish by-law, are valid, enforceable regulations. Accordingly, no enquiry into the issues of infringement and justification would be necessary.

(a) Provincial Court Reasons

38 Provincial Court Judge McLeod in his oral reasons for judgment stated:

> There is no doubt that the Sheshaht Band has the aboriginal right to catch fish returning in the area that they do fish. There is some evidence of barter exchange between the different Bands and Mr. Inglis is unable to find any record of selling of fish to the settlers. In 1882, the population of the Band totalled 176. Its needs were easily accomplished in obtaining sufficient food. There is evidence that other foods were supplied.

39 And, further:

> ... I am satisfied that the Sheshaht Band has an aboriginal right to fish in the area; however, the evidence does not show to me that the Sheshahts in *the period of their residence were sellers and barterers of fish*, and, contrary, it appears that the Sheshaht over the past 200 years, what sales were made were few and far between. *No doubt there were potlatches and meetings and exchanges of gifts of salmon but these do not constitute an aboriginal right to sell the allotted fish* contrary to the Regulations. (Emphasis added)

40 The finding of the trial judge, as to the limited nature and extent of the aboriginal trading and exchange of salmon, is well supported by the evidence.

(b) Summary Appeal Court Reasons

41 Appeal Court Judge Melvin reviewed the evidence of trading. He concluded [p. 16]:

> Consequently, there was evidence, albeit of a limited nature, before the learned Provincial Court Judge that the Band traded in fish.
>
> The evidence in the case at bar, when one considers the magnitude of the sale to the appellant, in my opinion, it tends to lift the disposition to commercial proportions, rather than the disposition of fish for societal needs as touched on in *R. v. Sparrow*.

42 Judge Melvin found the regulations were necessary for the proper management and conservation of the resource and were valid and enforceable. In the circumstances, he did not find it necessary to determine whether the aboriginal right to fish constituted an aboriginal right to engage in the commercial sale of the fish.

(c) Nature and Scope of Aboriginal Rights

43 In *Delgamuukw v. British Columbia* (the reasons for judgment are filed at this time [[1993] 5 W.W.R. 97]), I set out in some detail the nature and scope of aboriginal rights as recognized by the common law. It may be convenient to refer again to pertinent passages from that decision:

44 At para. 389:

> As previously noted, aboriginal peoples are accorded by the adjusted common law additional or special aboriginal rights over and above the rights enjoyed by all citizens of Canada. What then makes these rights "aboriginal" and distinguishes them from the other rights which the aboriginal people enjoy along with other residents of British Columbia?

45 Further, at para. 392:

> It is the traditional practices and ways of the aboriginal people associated with this occupation which attract common law protection. In *Sparrow* at p. 1099, Dickson C.J. and La Forest J. said the protection of aboriginal rights extended to those practices which were "an integral part of their distinctive culture". This feature of aboriginal rights imports an historical dimension, which requires that the practices receiving protection be part and parcel of the pre-sovereignty aboriginal society.

46 Further, at para. 393:

> Thus, aboriginal rights are intimately connected to pre-sovereignty aboriginal practices. They are site and activity specific and their existence turns on the particular facts of each case: *R. v. Kruger*, [1978] 1 S.C.R. 104 at 109 [[1977] 4 W.W.R. 300]. For example, while the netting of fish in a certain location in a certain way might well constitute the exercise of an aboriginal right, the same activity under different circumstances might not be so characterized. The precise character of an aboriginal right turns on the nature of the activity, the site at which the activity takes place, and the activity's connection to the particular aboriginal community's traditional way of life.

47 These passages reflect the principles of the common law which determine the criteria which activities must satisfy in order to constitute aboriginal rights. Whether, in all the circumstances, a particular activity meets the criteria is a question of fact.

48 Section 839(1) of the *Criminal Code* provides that an appeal to this Court from the summary conviction appeal court may "be taken on any ground that involves a question of law alone". Findings of fact and questions of mixed fact and law are not reviewable by the court. The nature and scope of the aboriginal rights of the Sheshaht and Opetchesaht peoples in this case were determined as a question of fact on the basis of the traditional practices integral to the aboriginal society of the claimants' ancestors. Accordingly, the trial judge's ruling that the commercial sale of fish cannot be characterized as an aboriginal fishing right of the Sheshaht and Opetchesaht Indian Bands should not be disturbed.

49 In view of my conclusions about the scope of the aboriginal fishing rights of these claimants, it is not necessary to decide the question of whether any fishing regulations, particulary those prohibiting the sale of Indian food fish, extinguished any commercial aspect of aboriginal fishing rights in British Columbia. Nevertheless, I should respectfully say I do not agree with my colleague Justice Lambert that this question was decided in *Sparrow*. In that case, the Supreme Court of Canada confronted the argument that fishing regulations had extinguished aboriginal rights wherever, and to the extent that, they were inconsistent with the exercise of aboriginal rights. The Court rejected that argument at p. 1097:

> It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish ...
>
> At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulation does not mean that the right is thereby extinguished.

Of course, it does not follow from this that a legislative provision, made by executive act and embodied in an instrument known as "regulations", must always be taken as "regulating" and never extinguishing rights. The test for extinguishment adopted by the Court in *Sparrow* at p. 1099 was that, "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right." The Court did not deny that regulations could evince the requisite clear and plain intention to extinguish rights; indeed,

the Court specifically referred to the regulations in saying that the legislation did not indicate a clear and plain intention of the Sovereign to extinguish the aboriginal right to fish. In this case, in keeping with established and prudent judicial practice, I would decline to decide the question of whether regulations prohibiting an activity altogether are capable of extinguishing aboriginal rights. This complex question should only be answered in future cases.

3. Does the Somass River form part of the Tsah-ah-eh Reserve No. 1 so as to make the Sheshaht Fish By-law SOR-82-471 applicable to the commercial purchase and sale of fish by the appellant and thereby provide a complete defence to the charges?

50 Section 81(1)(*o*) [formerly s. 81(*o*)] of the *Indian Act* authorizes the Council of the Band to make by-laws for the preservation, protection and management of fur-bearing animals, fish and other game "on the Reserve". As previously noted the Sheshaht Band Fish By-law provides, in part:

> **Openings and Closures**
>
> 3. The Band Council shall designate openings and closures for the *on reserve* Fishery.
>
> **General Closure**
>
> 6. No person shall fish *on reserve* except as permitted by this By-law.
>
> **General Prohibition**
>
> 7. No person shall use any gear to catch fish *on reserve* except a type approved by the Band Fisheries Conservation Officer or by permission of the Band Council.
>
> **Sale of Fish**
>
> 14. Any fish caught under this By-law may be sold to any person, provided that the person selling the fish reports the numbers of fish sold to the Band Fisheries Conservation Office.

51 The question to be determined is whether the Somass River is "on the reserve" as that term is used in s. 81(1)(*o*) of the *Indian Act* and the Sheshaht Fish By-law. Since s. 14 of the by-law authorizes the sale of fish caught under the by-law, if the by-law applies to the fishery, it has the force and effect of a federal regulation and affords a complete defence to the charge.

52 The appellant N.T.C. Smokehouse submits that the fishery comes within the reserve since it is an "interest" in the reserve land in a sense analogous to an incorporeal hereditament such as a profit à prendre. On this issue, I would adopt the reasons of my colleague Justice Hutcheon in his reasons for judgment (paras. 106-13) and his conclusion that "Parliament did not intend to give to the phrase 'on the reserve' in s. 81(1)(*o*) an expanded meaning so as to include the area adjacent to but not within the boundaries of the reserve".

53 Alternatively, counsel submits that the whole reason for locating the reserve adjacent to the Somass River was to enable the Band to gain its livelihood from the fishery and that the term "on the reserve" should be construed "purposively" to include the adjacent waters of the Somass River.

54 Counsel further argued for the application of the principle that treaties and statutes relating to Indians should be liberally construed and ambiguous expressions interpreted in favour of Indian interests and that, accordingly, the phrase "on the reserve" should be given a liberal construction so as to encompass the fishery.

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55 Crown counsel's position is that s. 81(1)(*o*) of the *Indian Act* does not authorize Band by-laws to regulate activities beyond the borders of the reserves. Counsel also pointed out that a broad construction of the phrase "on the reserve" in the by-law and the *Indian Act* would result in the Indian Bands having not only a prior right to harvest the fishery, but also an exclusive access to the fish in the river since they would be authorized to determine who is permitted to fish "on the reserve". He asserted there is nothing in the *Indian Act* or the by-law to support such a far-reaching result.

56 In *R. v. Lewis* (paras. 16-28) [post, p. 224] I considered and rejected the "purposive" or "liberal" interpretation of the phrase "on the reserve" in s. 81(1)(*o*) of the *Indian Act* and the Indian by-law. Those reasons are equally applicable to the instant case and I need not reiterate them here.

57 Turning to the territorial boundaries of the reserve, Provincial Court Judge McLeod commented on this issue in the following passage:

> The Sheshaht are located on the right bank of the Somass River about three miles from its mouth. The Somass is a tidal river affected by the ebb and flow of tides, and the portion of the river where the fishing took place is in the tidal portion of the Somass River ...
>
> The surveys of the Reserve were completed, *the plan shows the boundary lines of the Sheshaht Reserve and do not include the Somass River. I am satisfied that the limits of the Reserve were as proposed.*
>
> The defence further argues that even though the plan shows the boundary line of the property to be the edge of the river bank, this is not conclusive of the issue.
>
> Defence states that the ad medium filum rule applies to non-navigable rivers, regardless whether or not it's tidal. The defence admits the area of fishing on the Somass River is tidal. It is true that the Somass River is in certain sections non-navigable. The evidence of Mr. Girodat, a Fishery Officer, describes the number of users of the river, and, in the area of the Native fishery, that the use of the river is by smaller craft; but from the evidence the river is navigable and appears to be used consistently by a number of users. I am in agreement with Judge Greer in *R. v. Sam* that the principles decided in the *Rotter* case apply only to non-tidal waters. (Emphasis added)

58 Appeal Court Judge Melvin Co. Ct. J. dealt with this issue in the following passages [pp. 18-20]:

> Shortly stated, if the river where admittedly the fish were caught does not form part of their reserve, this by-law is of no force and effect and does not afford the appellant a defence. If, on the other hand, the river does form part of the reserve in question, then by the by-law would be applicable and should under all circumstances afford this appellant a defence to the charges laid.
>
> ... When one considers the totality of the evidence in that respect, and in particular the exhibits filed, and the surveying principles employed, in my view, *the evidence leads to no other conclusion that the river was not to be included in the reserve itself* but that the Indians were to have and continue their traditional right to use the river as a source of food by virtue of the fishing activity carried out thereon. A number of submissions were advanced as to whether or not the *ad medium filum rule* applies with reference to this river. In my view, it does not for the very simple reason that the river is both tidal and navigable. See *Rotter v. Canadian Exploration Ltd.*, [1961] S.C.R. 15 [33 W.W.R. 337], and *Coleman v. Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608 (Ont. H.C.). (Emphasis added)

59 Accordingly, we have concurrent findings of fact, or at the least findings of mixed fact and law, that the Somass River was not included in the reserve itself. This conclusion is supported by considerable evidence. In the circumstances, this Court does not have the jurisdiction to interfere with that finding.

60 With respect to the submission that the presumption ad medium filum aquae should extend the reserve boundaries to

include the fishery, the lower courts concluded the Somass River, at the location of the fisheries, was both tidal and navigable. In accord with my reasons in *R. v. Lewis* (paras. 29-40), I am of the opinion that the presumption does not apply to the Somass River.

61 For the reasons stated I am of the opinion the Somass Indian Band By-law does not apply to the fishery located in the Somass River and hence does not provide a defence to the charge of breaching the *British Columbia Fishing (General) Regulations*, ss. 4(5) and 27(5).

62 I would dismiss the appeal.

***Hutcheon J.A.* (concurring):**

63

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64

Part I Introduction

65 The appellant, N.T.C. Smokehouse Ltd., was granted leave to appeal from the decision of the Honourable Judge Melvin of the County Court of Vancouver Island dated January 15, 1990 [[1990] B.C.W.L.D. 704] upholding the conviction of the Appellant to charges under the federal *Fisheries Act*. N.T.C. Smokehouse had been convicted on August 19, 1988 before His Honour Judge McLeod on Counts 2 and 4 of an information alleging violations of ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations*.

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The Charges

66 Count 2 alleged that between the 7th and 23rd day of September 1986, N.T.C. Smokehouse unlawfully bought approximately 119,298 pounds of Chinook salmon at or near the City of Port Alberni. Count 4 alleged the unlawful sale of approximately 105,901 pounds of Chinook salmon between the 8th and 24th day of September 1986.

The Facts

67 The fish had been caught under the authority of Indian food fish licences issued by the Department of Fisheries and Oceans from time to time during September 1986 for the Sheshaht Band and for the Opetchesaht Band. The particulars of the catching, buying and selling were set out in the Agreed Statement of Facts dated the 5th day of May 1988:

> 9. N.T.C. Smokehouse Ltd. between September 7 and 23, 1986 purchased approximately 119,435 pounds of Chinook salmon, which fish were caught and sold during the period of September 7 to 23, 1986 by approximately 80 native Indians representing approximately 65 members of the Sheshaht Band and 15 members of the Opetchesaht Band, from the tidal waters of the Somass River at the "Paper Mill Dam" site.
>
> 10. N.T.C. Smokehouse Ltd. between September 8, 1986 and October 24, 1986 sold approximately 105,302 pounds of the Chinook salmon which it had purchased as set out in paragraph 9.
>
> 11. The average price of the Chinook salmon purchased by N.T.C. Smokehouse Ltd. was $1.15 per pound and the re-sale price of the said fish was approximately $1.58 per pound. It is agreed that the fish subsequently were disposed of by N.T.C. Smokehouse Ltd. to Jay Margetis Fish Ltd., Kingfisher Enterprises, Pacific Salmon Industries Ltd. and Maranatha Seafoods Ltd.
>
> 12. The cost of processing the salmon included $.15 per pound for cleaning and freezing a fish as well as a 4% loss for slime and water removal. After processing and shipping costs, the margin of profit was approximately $.08 per pound.

The Federal Regulations

68 The position of the Crown throughout has been that, although the fish were lawfully caught under the authority of an Indian food fish licence, the purchase and sale by N.T.C. Smokehouse contravened Regs. 4(5) and 27(5) respectively:

> 4...
>
> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.
>
> 27...
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

The Sheshaht Fishery By-law

69 The Sheshaht Indians have lived on the land adjacent to the Somass River as an organized society since long before the coming of white settlers. Pursuant to s. 81(1)(*o*) of the *Indian Act*, the Sheshaht Band Council passed a fish by-law in March 1982 which subsequently was registered under the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, on May 7, 1982 as By-law No. SOR-82-471. The by-law was not disallowed by the Minister of Indian Affairs under s. 82 of the *Indian Act* and the by-law

therefore was in effect subsequent to April 29, 1982, to the present time. The by-law authorized the sale of fish.

Issues

1. Legislative Competence

70 Because the charges relate to the purchase and sale of fish, N.T.C. Smokehouse's position is that the fish, once caught, became private property and the subject of property and civil rights which can only be regulated by the Province. The judge on appeal held that the federal regulations were within the legislative competence of the Parliament of Canada under s. 91 of the *Constitution Act, 1867*.

2. Nature of the Aboriginal Right to Fish

71 The judge on appeal also held against the proposition that the aboriginal right to fish extended to the sale of fish.

3. The Band By-Law

72 The judge on appeal also held that the Sheshaht Band Fishery By-law which purported to authorize the sale of fish was not a defence to the charges.

Part II Legislative Competence

73 The appellant, N.T.C. Smokehouse Ltd., was convicted of two offences under ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* made under the *Fisheries Act*:

> 4...
>
> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.
>
> 27...
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

74 At the outset of the trial, N.T.C. Smokehouse challenged the validity of the two regulations on the ground that the regulation of the resale of legally caught, processed fish was a matter of provincial jurisdiction: a matter of property and civil rights under s. 92(13) of the *Constitution Act, 1867*, rather than fisheries under s. 91(12). The trial judge ruled the regulations were within the legislative competence of the Parliament of Canada and that ruling was affirmed on the first appeal.

75 The Crown's position throughout has been that the regulations prohibiting the sale of fish other than those caught under a commercial licence were supportable as "necessarily incidental" or "functionally related" to the power to protect and preserve the fishery as a public resource.

76 The position of N.T.C. Smokehouse throughout has been that the regulations deal with the disposition of property as opposed to the regulation of fishing; they do not deal with conservation, protection or management of the fishery resource.

77 The "necessarily incidental" or ancillary doctrine was enumerated by Lord Tomlin as the third of his four propositions

with respect to the resolution of jurisdictional disputes between Parliament and the Legislatures of the Provinces: *Canada (Attorney General) v. British Columbia (Attorney General)*, [1930] A.C. 111 [[1929] 3 W.W.R. 449] (P.C.). The Crown relies on the application of that doctrine in *R. v. Crane; R. v. Favel; R. v. Twin* (1985), 23 C.C.C. (3d) 33 [[1986] 1 W.W.R. 522] (Alta. C.A.), and *R. v. Saul* (1984), 13 C.C.C. (3d) 358 [55 B.C.L.R. 359] (B.C.S.C.).

78 Both of those decisions upheld regulations prohibiting the sale of fish caught other than under a commercial type of licence. In *Saul* the regulation (s. 37) was the predecessor of s. 4(5), with which we are concerned.

79 In that case Mr. Justice Locke said at p. 367:

> My common sense and knowledge tell me it is even now difficult enough to enforce the sports and Indian fishery regulations: quotas, times, types of net, boundary lines, areas, etc. If everyone is now to have the added attraction of making money attached to catching fish, I can see so many clandestine attempts to circumvent the law that it could never be administratively controlled and really (as was suggested) by reducing the quotas if by chance the new incentive results in "overfishing" seems to be just adding another small crime — such as, "It shall be an offence to sell an illegally caught fish".
>
> One effective way, even if thought Draconian, is to remove the incentive: witness the widely heralded decline in the market for certain types of seal fur by the absolute ban on sale in the European Common Market. This promises a self-policing curb on seal stock.
>
> Present commercial fishing licences and seasons are designed to compromise within the present regulatory framework. If the present regulation is upheld it can still operate under these circumstances, as it has in the past.
>
> Notwithstanding the wide words, I think s. 37 is a permissible invasion of property and civil rights within the province and is not *ultra vires*.

80 The above passage was quoted with approval at p. 41 of the decision of the Alberta Court of Appeal in *Twin*.

81 The criticism of this passage made by Mr. Rosenberg, counsel for N.T.C. Smokehouse, was expressed in this way:

> 37. Where legislation seeks to control activity on the basis that it might have certain effects on fish, it does not deal specifically with "fisheries". Where the legislation makes no attempt to link the activity to actual or potential harm to fisheries and where there is no evidence to indicate that the activity does in fact cause harm to fisheries, then the prohibition is not necessarily incidental to the federal power to legislate in respect of fisheries.

82 The answer to this criticism is that the legislative link to actual and potential harm was expressed in the preamble to one of the early regulations: P.C. 2539 of 11 September 1917:

> At the Government House at Ottawa
> Present:
> His Excellency
> The Governor General in Council
>
> Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;
>
> And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes

only, and to this end subsection 2 of section 8 of the Special Fishery Regulations for British Columbia provides as follows: —

> 2. Indians may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for themselves and their families, but for no other purpose; but no Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.

And whereas notwithstanding this concession, great difficulty is being experienced in preventing the Indians from catching salmon in such waters for commercial purposes and recently, an Indian was convicted before a local magistrate for a violation of the above quoted regulation, the evidence being that he had been found fishing and subsequently selling fish. The case was appealed and the decision of the magistrate reversed, it being held that there was no proof that the fish caught by the Indian were those sold by him;

And whereas it is further represented that it is practically impossible for the Fishery Officers to keep fish that may be caught by the Indians in non-tidal waters, ostensibly for their own food purposes, under observation from the time they are caught until they are finally disposed of in one way or another;

And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;

And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;

Therefore His Excellency the Governor General in Council, under the authority of section 45 of the *Fisheries Act*, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows:

Subsection 2 of section 8 of the Special Fishery Regulations for the Province of British Columbia, adopted by Order in Council of the 9th February, 1915, is hereby rescinded, and the following is hereby enacted and substituted in lieu thereof: —

"2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose. The Chief Inspector of Fisheries shall have the power in any such permit (a) to limit or fix the area of the waters in which such fish may be caught; (b) to limit or fix the means by which, or the manner in which such fish may be caught, and (c) to limit or fix the time in which such permission shall be operative. An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time limit expressed in the said permit, and any fish caught pursuant to any such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations.

(a) Proof of a sale or of a disposition by any other means by an Indian of any fish shall be *prima facie* evidence that such fish was caught by the said Indian, and that it was caught for a purpose other than to be used as food for himself or his family, and shall throw on the Indian the onus of proving that such fish was not caught under or pursuant to the provisions of any such permit.

(b) No Indian shall spear, trap or pen fish on their spawning grounds, or in any place leased or set apart for the natural or artificial propagation of fish, or in any other place otherwise specially reserved.

(c) Any person buying any fish or portion of any fish caught under such permit shall be guilty of an offence against these

regulations.

83 Under the *Interpretation Act*, R.S.C. 1906, c. 1, s. 14, the "preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act."

84 By an amendment to the *Interpretation Act* in 1919, every provision of the *Interpretation Act* was made to apply to every order and regulation "heretofore or hereafter passed by the Governor in Council" (S.C. 1919 (2nd Sess.), c. 20).

85 Thus the preamble to the 1917 regulation was intended to assist in explaining the purport and object of the regulation. Mr. Rosenberg submitted, however, that the object of the regulation was the protection of the commercial fishing industry and not the protection of the fishery.

86 A much more persuasive view of the regulation is that what was conceived to be an abuse of the permission to fish for food, catching for commercial purposes, should be prevented to allow the additional salmon to go to their spawning beds unmolested. That object speaks of the protection and preservation of all of the salmon while recognition is continued of the food purposes of the Indian people.

87 On that view of the regulation, no large step is required to conclude that the 1917 regulation was necessarily incidental to the regulation of the fisheries.

88 The history of the regulations before and after 1917 was set out by Chief Justice Dickson and Mr. Justice La Forest in 4 W.W.R. 410, 46 B.C.L.R. (2d) 1]:

> The history of the regulation of fisheries in British Columbia is set out in *Jack v. The Queen*, [1980] 1 S.C.R. 294, especially at pp. 308 *et seq.*, and we need only summarize it here. Before the province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal *Fisheries Act* was only proclaimed in force in the province in 1876, and the first *Salmon Fishery Regulations for British Columbia* were adopted in 1878 and were minimal.
>
> The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in *Jack v. The Queen, supra*, at p. 310:
>
> > The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.
>
> The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food; see P.C. 2539 of Sept. 11, 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous sixty years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a Band food fishing licence, while retaining comprehensive specification of conditions for the exercise of licences.

89 The practice of preceding a statute by a preamble is seldom used in the present day. However, ss. 4(5) and 27(5) are on the same subject as P.C. 2539 in their application to the Sheshaht Band. I know of no reason in principle that would prevent the

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use of the preamble to the 1917 regulation "to assist in explaining the purport and object" of ss. 4(5) and 27(5).

90 In my view, ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* are justified as necessarily incidental to the federal power to legislate in respect of fisheries.

Part III The Aboriginal Right To Fish

91 Subsequent to the decisions in the present case, the Supreme Court of Canada held that the aboriginal right to fish had not been extinguished and was in existence when the *Constitution Act, 1982* came into effect: *R. v. Sparrow*, supra. The Court explicitly (p. 1101) confined its reasons "to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes".

92 In this case the fish were legally caught under Indian food fish licences. The question is whether the aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act* allowed the sale of surplus fish in the commercial market.

93 The appeal court judge assumed for the purpose of the appeal that there was an aboriginal right to sell, trade and barter fish. He went on to consider whether the regulations which affected the right were justified. He concluded that they were justified as being "necessary for the proper management or conservation of the resource or in the public interest". In reaching this conclusion he relied on the decision of this Court in *R. v. Sparrow*, [1987] 2 W.W.R. 577 [9 B.C.L.R. (2d) 300].

94 That conclusion, however, is questioned because of the comments of the Supreme Court of Canada in *R. v. Sparrow*, at p. 1113:

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

95 In this case, the trial judge made findings of fact that are binding on us. He said this at p. 280 of the transcript:

> I am satisfied that the Sheshaht Band has an aboriginal right to fish in the area; however, the evidence does not show to me that the Sheshahts in the period of their residence were sellers and barterers of fish, and, contrary, it appears that the Sheshaht over the past 200 years, what sales were made were few and far between. No doubt there were potlatches and meetings and exchanges of gifts of salmon, but these do not constitute an aboriginal right to sell the allotted fish contrary to the Regulations.

96 The appellants have attempted to set aside the findings of the trial judge by relying upon what appears to be admissions made by the Crown in its factum. I quote the reply factum of the appellant:

> 47. The particular facts of this case which are admitted and should be considered in determining the scope of the right are set out in the Appellant's factum. It should be noted that the following relevant facts have been admitted by the Respondent Crown in paragraph 1 of its Factum:

97 Paragraph 1 of the Crown's factum reads:

> 1. For the purposes of this Appeal, the Respondent accepts the facts stated in paragraphs 1-4, 6-13, 15, 16, 18, 20 and 21 of the Appellant's Statement of Facts.

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98 A fair reading of the factum of the Crown and of the factum of the Attorney General of British Columbia is that, in the area in question, the aboriginal right to fish included an element of barter and of trade but that it did not extend to large-scale sale of fish. The commercial fishery was a creation of modern man, unrelated to the aboriginal fishing right.

99 In my view, the finding of the trial judge that the aboriginal right to fish did not extend to the right to sell fish is a finding of fact based on the evidence before the trial judge. As a result, this Court is without jurisdiction to examine this ground of appeal.

Part IV The Band By-Law

100 I quote this description by the appeal court judge of the Band By-law [pp. 17-18]:

> Pursuant to s. 81(*o*) of the *Indian Act* the Council of a Band may make by-laws for the preservation, protection and management of fur-bearing animals, fish and other game *on the reserve*. On March 19, 1982 the Sheshaht Band Council, pursuant to that section, enacted a fish by-law which was subsequently registered under the *Statutory Instruments Act* on May 7, 1982. As the by-law was not disallowed by the Minister of Indian Affairs pursuant to s. 82 of the *Indian Act* the by-law was in effect at the relevant period of time in the case at bar. This by-law, considered in *R. v. Vidulich*, purports to deal with fishing on the reserve in the following manner:
>
> 1. The creation of the position of a Band Fisheries Conservation Officer. His duties include the capacity of the waters on each of the Band's reserves to sustain production of fish, the closing of an area for fishing in the interest of conservation, the prohibition of gear he considers inappropriate, and the collection of statistics on all fish caught or sold under this by-law.
>
> 2. The Band Council shall designate openings and closures for the *on reserve fishery*.
>
> 3. Providing that no persons shall fish on a reserve except as permitted by the by-law.
>
> 4. The providing of information requested by any fisheries officer appointed pursuant to the *Fisheries Act* on demand.
>
> 5. Any fish caught under this by-law may be sold to any person provided that the person selling the fish reports the number of fish sold to the Band Fisheries Conservation Officer.
>
> The procedures outlined by the Band by-law were followed in the case at bar. Consequently, there was a reporting of the number of fish sold, to the Band Fisheries Conservation Office, which in turn was made available to the fisheries officers appointed pursuant to the *Fisheries Act*. Prima facie this by-law, as it is in force pursuant to the provisions of the *Indian Act* and the *Statutory Instruments Act*, would provide a complete defence in the case at bar. The issue that arises in this instance is whether or not this by-law which has the status of a statutory instrument and the force and effect of a federal regulation is applicable. From its language it is applicable only to activities carried out "on a reserve".

101 The trial judge found that the by-law was inconsistent with the regulation and was ultra vires. The appeal court judge concluded that the Somass River did not form part of the reserve and therefore the by-law was of no force or effect.

102 There is no dispute that, in enacting the Fish By-law at the meeting on March 18, 1982, the Sheshaht Band Council intended to control fishing on the Somass River. The Somass River is the only body of water to which the Fish By-law could apply. The question is whether the Council achieved that objective in law and in fact.

103 The burden of this question was undertaken by the Sheshaht Band, as an intervenor. Firstly, it was argued that by the original allotment of the reserve, the bed of the Somass River was located within the boundaries of the reserve. Alternatively, it

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was argued that the "fishery" was allotted as a sui generis interest in the nature of a profit à prendre and attached to the land reserve.

1. The Original Allotment

104 The first point depends upon the interpretation to be given to the description of the reserve contained in the Minutes of the Decision of the Reserve Commission of June 30, 1882.

> No. 1 "Tsah-ah-eh" a Reserve of eleven hundred and fifty (1150) Acres situated on the right bank of the Somass River, Alberni, about three (3) miles from its mouth.
>
> Commencing at the Southwestern Corner post of Lot (three) 3. Alberni District, and running West eighty (80) chains, thence South one hundred (100) chains, thence East to the Somass river, and thence up the right bank of the said river, to the place of commencement.

105 That description was based upon the survey carried out by Mr. Ashdown Green in June 1882. What is meant by "thence up the right bank"? The submission in the factum of the Sheshaht Band is that the "right bank" refers to the eastern bank across the river from the reserve with the result that the river is within the boundaries of the reserve. I quote two paragraphs of the factum:

> 11. It is submitted that the only intelligible meaning to be given to the words "up the right bank" is that O'Reilly meant to say "up the Eastern bank, which is on the right hand side", since that is the only way one can return to the "point of commencement". In other words, "right bank" is to be given a common sense meaning.
>
> 12. Further, it is submitted that the technical meaning of "right bank" — the right hand bank when facing downstream — is not applicable in the tidal portion of a river, where the water flows in both directions, and therefore, there is no "down-stream".

106 This interpretation does not appear to have been argued in the courts below.

107 I think that it would be highly unusual for Commissioner O'Reilly to use the phrase "up the right bank" to refer to the eastern bank when he had, in the previous part of the description, used the phrase "situated on the right bank" to refer, without any question, to the western bank where the 1150 acres were situated.

108 Further, the evidence is against any such interpretation. Mr. D.A. Duffy, an expert in land surveying including historical methodology of land surveying, testified about the term "right bank":

> Q. Just before you leave that particular exhibit, you referred to right and left bank. Perhaps you could just describe what that means to you in the accepted terminology of surveyors. What do you mean? Because if I look from the bottom up, obviously that would be my left-hand side of the river.
>
> A. Yes, it's a convention, Your Honour, that you stand looking down the river, and the right bank is on your right hand and the left bank is on your left hand. And that is a common convention in surveying. So one always knows which bank is which.

109 Duffy was cross-examined on the contradiction arising from the fact that the point of commencement was on the left bank and that one could not return to the point of commencement by going up the right bank. Duffy gave one reasonable explanation for the point of commencement. Whatever the explanation for the commencement instruction that placed the point of commencement on the left bank, the surveyor Green included no part of the left bank either in the sketch of the reserve (Ex. 24)

or in his survey notes. He traversed the right bank and not the left bank.

110 I agree, therefore, with the courts below, that the Somass River was not included in the boundary of the reserve in the original allotment. In view of that conclusion I need not consider whether Commissioner O'Reilly had any authority to decide any right of fishery, as to which considerable doubt exists, based in the main on the correspondence between the Department of Indian Affairs and the Department of Marine and Fisheries.

2. A Profit à Prendre Attached to the Reserve

111 The question is whether "on the reserve" in s. 81(1)(*o*) of the *Indian Act* should be interpreted to include the fishery of the Somass River where ancestors of the Sheshaht band have fished for over 200 years. In other words, should "on the reserve" as used in s. 81(1)(*o*) be construed to include the river adjacent to the land that was allotted to the band for the very purpose of maintaining their traditional fishery.

112 Did Parliament in enacting s. 81(1)(*o*) (then s. 80(*o*)) intend to enable band council to claim exclusive use and enjoyment of all fishery privileges fronting on their reserves?

113 We start with these propositions:

114 (a) the Somass river is tidal;

115 (b) at common law the general public has the right to fish in tidal waters;

116 (c) Federal legislation would be required to take away the public right to fish in tidal waters; and

117 (d) no such Federal legislation exists although fishing is severely regulated.

118 When s. 80 was enacted in 1951, Senator Reid (who introduced Bill 79, *An Act respecting Indians into the Senate*), said this about the powers given to band councils by the section:

> The powers of the council are broadened to bring them more into line with those ordinarily exercised by municipal authorities, in order that the Indians may become more self-reliant and have greater power of governing themselves and the reserves upon which they reside.

119 Senator Reid quoted verbatim from the explanatory memorandum on the main provisions of Bill 79.

120 The significance of this explanation is that it removes from this discussion any suggestion that s. 80(*o*) was directed at some mischief related to fishing rights in tidal waters. From at least 1882, the Department of Minerals and Fisheries had opposed the grant of exclusive fishing rights in tidal waters fronting the reserves of Indian people.

121 The historical documents filed on behalf of the Canadian National Railway Company establish beyond question the adamant stand of the Department against such grants. The public was not to be deprived of the right to fish in tidal waters. Those documents are admissible at this stage of the appeal pursuant to the concept of judicial notice,

> ... to identify more accurately the historical context essential to the resolution of this case.

Sioui v. Quebec (Attorney General), [1990] 1 S.C.R. 1025 at 1050.

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122 With that historical background and with the explanation of the purpose of s. 81 in mind, I can only conclude that Parliament did not intend to give to the phrase "on the reserve" in s. 81(1)(*o*) an expanded meaning so as to include the river adjacent to but not within the boundaries of the reserve. Accordingly, the by-law with its right to sell has not displaced the regulations with its prohibition against sale.

123 For all of these reasons, I would dismiss the appeal.

***Lambert J.A.* (dissenting):**

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124

Part I The Issues

125 There are three issues in this appeal.

1. The Constitutional Issue

126 Are Regs. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations*, which prohibit trading in fish caught other than under a Commercial Licence, beyond the legislative competence of the Parliament of Canada?

2. The Aboriginal Rights Issue

127 Were the fish in this case, which were caught and sold by members of the Sheshaht and Opetchesaht Indian Bands in the tidal waters of the Somass River, caught and sold in the exercise of aboriginal fishing rights?

3. The Indian Act Issue

128 Does s. 14 of the Sheshaht Band Council Bylaw No. SOR-82-471, which specifically permits the sale of fish caught during fishery openings on the reserve, apply to the fishing on the Somass River?

Part II The Facts

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129 There was an Agreed Statement of Facts at the trial of this case in Provincial Court. That Agreed Statement of Facts was supplemented by documents and by the oral evidence of nine witnesses. When the appeal was heard before the Summary Conviction Appeal Court Judge an application was made to introduce further evidence. That application remains undecided. However, there was a large measure of agreement about the facts between N.T.C. Smokehouse Ltd. and the Crown. That agreement is reflected in the Statements of Fact in their factums. Further evidence, largely relating to questions about the scope of aboriginal rights and the extinguishment of aboriginal rights, was admitted on the hearing of this appeal on the application of the Attorney General of British Columbia. I do not think there remain any disputed questions of fact which affect the link between the questions of law alone to which this appeal is confined, and the outcome of the appeal, in such a way as to affect that outcome.

130 The Agreed Statement of Facts was in these terms:

> 1. N.T.C. Smokehouse Ltd. is a company duly incorporated pursuant to the laws of the Province of British Columbia and was duly authorized to carry on business as food processors during the year 1986. The processing plant of N.T.C. Smokehouse Ltd. was located near Port Alberni, British Columbia.
>
> 2. The Sheshaht and Opetchesaht Indian Bands both have reserve lands which are adjacent to the Somass River, which river runs past the said reserve lands to the Port Alberni Inlet. At issue in this trial is whether or not that portion of the river from which the fish were caught are part of the reserve and whether or not the "fishery" is part of the reserve. The determination of this issue may affect the application of the Sheshaht Band bylaw referred to in paragraph 6 of this Agreed Statement of Facts.
>
> 3. The members of the Sheshaht and Opetchesaht Bands have traditionally fished for salmon in the Somass River before the arrival of non-Indians, and more particularly in the tidal waters of the river at the "Paper Mill Dam" site.
>
> 4. The Department of Fisheries and Oceans for the year 1986, issued Indian Food Fishing licences pursuant to the regulations under the Fisheries Act for both the Sheshaht and Opetchesaht Bands. The Indian Food Fish licences permitted fishing during the month of September 1986 on the following times and days:
>
> 1. 12:00 noon September 7, 1986 to
>
> 12:00 noon September 9, 1986 to
>
> 2. 12:00 noon September 14, 1986 to
>
> 12:00 noon September 16, 1986 to
>
> 3. 12:00 noon September 21, 1986 to
>
> 8:00 a.m. September 22, 1986.
>
> The quota for Indian food fish that was allocated from the Department of Fisheries and Oceans to the Bands was 13,000 Chinook salmon. Attached to this agreement as Exhibit "A" is a copy of the Food Fish licence. Subsequent to the Indian food fishery, the Sheshaht and Opetchesaht Bands reported in May of 1987 to the Department of Fisheries and Oceans that approximately 19,800 pieces of Chinook salmon were caught. These figures are unverified by the Department of Fisheries and Oceans.
>
> 5. No other fishery was permitted on the Somass River or in the Port Alberni Inlet during the month of September 1986, including commercial fishing, except for a sports fishery which was closed on September 14, 1986 through November 30,

1986, pursuant to the *Fisheries Act* and *Regulations*.

6. The Sheshaht Band Council passed a fish bylaw on or about March 19, 1982, which subsequently was registered under the *Statutory Instruments Act* on May 7, 1982, as Bylaw No. SOR-82-471. The bylaw was not disallowed by the Minister of Indian Affairs under s. 82 of the *Indian Act*, and the bylaw therefore was in effect subsequent to April 29, 1982, to the present time.

7. The Sheshaht Band Council designated openings pursuant to the bylaw during the period September 7 to 23, 1986, for fishing on the Sheshaht Reserve. It is agreed that notices were posted at the Paper Mill Dam site in compliance with the bylaw and, for the purpose of this prosecution, it is agreed that the individuals who sold fish pursuant to the bylaw reported the number of fish sold under the bylaw to the Band Fisheries Conservation Officer.

8. For the purposes only of this prosecution, it is agreed that members of the Opetchesaht Band who caught fish and sold it to N.T.C. Smokehouse Ltd. are in the same position as members of the Sheshaht Band in regard to the purportd application of the bylaw as a defence available to N.T.C. Smokehouse Ltd.

9. N.T.C. Smokehouse Ltd. between September 7 and 23, 1986, purchased approximately 119,435 pounds of Chinook salmon, which fish were caught and sold during the period of September 7 to 23, 1986, by approximately 80 Native Indians representing approximately 65 members of the Sheshaht Band and 15 members of the Opetchesaht Band, from the tidal waters of the Somass River at the "Paper Mill Dam" site.

10. N.T.C. Smokehouse Ltd. between September 8, 1986, and October 24, 1986, sold approximately 105,302 pounds of the Chinook salmon which it had purchased as set out in paragraph 9.

11. The average price of the Chinook salmon purchased by N.T.C. Smokehouse Ltd. was $1.15 per pound and the re-sale price of the said fish was approximately $1.58 per pound. It is agreed that the fish subsequently were disposed of by N.T.C. Smokehouse Ltd. to Jay Margetis Fish Ltd., Kingfisher Enterprises, Pacific Salmon Industries Ltd. and Maranatha Sea-foods Ltd.

12. The cost of processing the salmon included $.15 per pound for cleaning and freezing a fish as well as a 4% loss for slime and water removal. After processing and shipping costs, the margin of profit was approximately $.08 per pound.

13. There are no other Indian Bands or tribes other than the Sheshaht Band and the Opetchesaht Band who occupy lands adjacent to the Somass River or upstream from the Somass River and there are no other Indians who claim aboriginal rights to fish in the Somass River.

131 The statements of fact in the N.T.C. Smokehouse Ltd. factum with which the Crown agrees and which seem relevant to the issues in this appeal are as follows:

1. The Sheshaht Indians have lived on the land adjacent to the Somass River, near Port Alberni, as an organized society since long before the coming of European settlers.

2. The taking of salmon from the Somass River was part of the Sheshaht culture and remains so to this day.

3. For the Sheshaht, the salmon fishery has always constituted a part of their distinctive culture. Salmon was consumed for subsistence. Salmon was consumed on ceremonial and social occasions. Salmon was also an article of trade which was used by the Sheshaht for livelihood purposes. Richard Inglis, curator of the Provincial Museum and renowned authority with respect to trade relations of West Coast People stated:

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

> The Somass River Fishery was and still is an integral part of the Sheshaht economy ... The Fishery was to be used not only as a food supply but also as a means to earn a livelihood.

4. Commissioner Patrick O'Reilly was appointed Indian Reserve Commissioner for the Province of British Columbia and in that capacity, he allotted Reserves including Sheshaht Reserve #1 TSAH AH EH. The letter of appointment and instructions to Commissioner O'Reilly from the Department of Indian Affairs dated August 9, 1890 stated that:

> You should in making allotments of lands for Reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.

6. The first non-Indian to make contact with the Sheshaht People was Charles Barclay in 1787. He traded metal with the Sheshaht for fresh salmon.

7. The Sheshaht traded fresh fish to the first European traders. That fish was shipped to the Hudson Bay Company in Victoria and was transshipped to the Sandwich Islands or the Hawaiian area. When asked about the Sheshaht trading, bartering, or selling salmon from the Somass River, Richard Inglis gave viva voce evidence as follows:

> Salmon was sold to the first fur traders that came into the region. It was sold to early settlers, to early store owners. It was sold to traders, starting at least in the 1840s, probably through many of the decades of the 1800s to the independent traders coming on the coast and then taking the salmon to Fort Victoria and then transshipped to Hawaii. Salmon was sold to the canneries and formed a major — a major part of the wage-earning ability of the Native People. Throughout this period salmon has always been traded, or has always been exchanged between Native groups and given out at ceremonies and served at feasts to visiting groups, and also provided to members of the community who have moved away. That is family, friends. The salmon has been traded with those people as well, and provided as a family obligation.

8. The Somass River fishery took increased focus after contact with Europeans as a food resource and as a means to obtain a livelihood. The Somass River fishery is the one traditional economic pursuit that the Sheshaht have continued from precontact times to the present.

9. Patricia Berenger, anthropologist, gave expert evidence that the Sheshaht traditionally relied on Somass River salmon for winter food requirements, feasts and ceremonies. She also noted:

> Cured salmon and sea foods were also used for purposes of trade and barter, to enable the chiefs to secure valuable relations of exchange with neighbouring tribes.

10. Patricia Berenger described how the Sheshaht utilization of the Somass salmon fishery was essentially unchanged from the traditional pattern until the time when the Sheshaht sold fresh and cured fish to the isolated white settlers at Alberni. She noted that in the latter instance the Sheshaht spent the money they earned on commercial trade items and some staple food goods.

11. Agnes Sam, born in 1911, is a member of the Sheshaht Band. She was born on the Reserve on the Somass River and has always lived there. Her Grandfather went to Victoria to claim the Somass River "because that's the only way we live". She was one of the Indians who sold salmon to the Appellant. She needed the money to buy jars to can fish with and to buy little things for her grandchildren. Her only other source of income is old age pension.

12. Charlie Watts, born in 1917, is also a member of the Sheshaht Band. He has lived on the Reserve all of his life. He is familiar with the "old history" as passed down through the oral tradition at the potlatch. The Somass River belonged to the

Sheshaht.

13. In wartime, the Sheshaht were issued special permits by the Department of Fisheries and Oceans to commercially catch and sell fish from the Somass River.

16. There was a body of written material relied upon by the experts at trial including archival documents and Royal Commission Reports. This material was placed before Melvin C.C.J. on appeal and referred to extensively in argument. That material establishes:

(a) In 1874 the Sheshaht were the richest people in British Columbia with almost limitless resources. Each Indian could gain at least $1,000.00 per annum from their sealing grounds and fisheries while at that time many were obtaining $500.00-$700.00 per annum.

(b) In 1893, Sheshaht Indians were selling fish to settlers in Alberni and were permitted to catch fish for sale.

(c) In 1914, the Sheshaht and Opetchesaht reported to the Royal Commission on Indian Affairs that they were selling fish for a living.

(d) In answer to the specific question asked by the Sheshaht Indians as to whether or not they had the right to sell fish from the Somass River Fishery, the Royal Commission on Indian Affairs published the following response in Victoria, British Columbia, on August 6, 1913:

> **Regulations Re: Fishing & Hunting**
>
> The Royal Commission on Indian Affairs having caused the question of the right of the Indians to fish during 'close season' to be investigated by its counsel, makes the following statements for the information of the Indians as the result of such investigation.
>
> Indians may, at any time, with the permission of the District Inspectors of Fisheries, but not otherwise, catch fish for the purpose of providing food for themselves and their families, but for no other purpose.
>
> This would seem to confer the right to fish during the 'close season' as well as during the fishing season with any apparatus usually employed in fishing, but during the 'close season' they can only catch fish for the purpose of providing food for themselves and families — they cannot sell any fish so caught. Of course during the fishing season, they can sell the fish which they catch during such season; but an Indian is prohibited from spearing, trapping, or penning fish on their spawning grounds or in any place otherwise specifically reserved.

132 Other facts were stated in the factums but they were not agreed to and I do not propose to refer to them.

Part III The Proceedings

133 N.T.C. Smokehouse Ltd. was charged with four counts:

Count #1:

N.T.C. SMOKEHOUSE LTD., between the 7th day of September, A.D. 1986 and the 23rd day of September, A.D. 1986, at or near the City of Port Alberni, County of Nanaimo, Province of British Columbia, DID UNLAWFULLY buy fish to wit: Approximately 119,435 pounds of Chinook Salmon, that had not been caught under the Authority of a Commercial Fishing Licence being fish caught from the waters of the Somass River and its Tributaries or Alberni Inlet during the closed

time for Commercial Fishing for Salmon, Contrary to Section 4.(5) of the British Columbia Fishery (General) Regulations and did thereby commit an offence contrary to Section 61.(1) of the Fisheries Act.

Count #2:

N.T.C. SMOKEHOUSE LTD., between the 7th day of September, A.D. 1986 and the 23rd day of September, A.D. 1986 at or near the City of Port Alberni, County of Nanaimo, Province of British Columbia, DID UNLAWFULLY buy fish, to wit: Approximately 119,435 pounds of Chinook Salmon, caught under the Authority of an Indian Food Fish Licence, Contrary to Section 27.(5) of the British Columbia Fishery (General) Regulations and did thereby commit an offence contrary to Section 61.(1) of the Fisheries Act.

Count #3:

N.T.C. SMOKEHOUSE LTD., between the 8th day of September, A.D. 1986 and the 24th day of October, A.D. 1986, at or near the City of Port Alberni, County of Nanaimo, Province of British Columbia, DID UNLAWFULLY sell fish, to wit: Approximately 105,302 pounds of Chinook Salmon, that had not been caught under the Authority of a Commercial Fishing Licence being fish caught from the waters of the Somass River and its Tributaries or Alberni Inlet during the closed time for Commercial Fishing for Salmon, contrary to Section 4.(5) of the British Columbia Fishery (General) Regulations and did thereby commit an offence contrary to Section 61.(1) of the Fisheries Act.

Count #4:

N.T.C. SMOKEHOUSE LTD., between the 8th day of September A.D. 1986 and the 24th day of October, A.D. 1986 at or near the City of Port Alberni, County of Nanaimo, Province of British Columbia, DID UNLAWFULLY sell fish, to wit: Approximately 105,302 pounds of Chinook Salmon, caught under the Authority of an Indian Food Fish Licence contrary to Section 27.(5) of the British Columbia Fishery (General) Regulations and did thereby commit an offence contrary to Section 61.(1) of the Fisheries Act.

134 The trial was held before Judge McLeod in the Provincial Court of British Columbia. All three issues which remain issues in this appeal were argued. Judge McLeod convicted N.T.C. Smokehouse Ltd. on Counts 2 and 4 and dismissed Counts 1 and 3 on an application of the *Kienapple* principle.

135 The same three issues were argued before Judge Melvin in the Summary Conviction Appeal Court. Judge Melvin dismissed the appeal [[1990] B.C.W.L.D. 704].

136 This appeal is from Judge Melvin's decision.

Part IV The Constitutional Issue

137 The first issue is whether the subsection under which N.T.C. Smokehouse Ltd. was convicted, namely s. 27(5) of the *British Columbia Fishery (General) Regulations*, and the subsection under which it would have been convicted but for the application of the *Kienapple* principle, namely s. 4(5) of the *British Columbia Fishery (General) Regulations*, are within the legislative competence of the Parliament of Canada. The two subsections read in this way:

4 ...

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

27 ...

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

138 The two subsections are presumably made under paras. (*a*) or (*b*) of s. 43 of the *Fisheries Act*:

43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(*a*) for the proper management and control of the sea-coast and inland fisheries;

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

139 Counsel for N.T.C. Smokehouse Ltd. argued that the power to make regulations under those paragraphs is limited by the scope of head 91(12) of the *Constitution Act, 1867*:

12. Sea Coast and Inland Fisheries

140 The constitutional scope of head 91(12) was considered by the Judicial Committee of the Privy Council in *Canada (Attorney General) v. British Columbia (Attorney General)*, [1930] 1 D.L.R. 194 [[1929] 3 W.W.R. 449]. Lord Tomlin, for the Judicial Committee, at pp. 196-97, set out four paragraphs which, in their generality, remain sound today:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated: —

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority even though it trenches upon matters assigned to the provincial legislature by s. 92 (see *Tennant v. Union Bk.*, [1894] A.C. 31).

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation unless these matters have attained such dimensions as to affect the body politic of the Dominion (see *A.-G. Ont. v. A.-G. Dom.*, [1896] A.C. 348).

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91 (see *A.-G. Ont. v. A.-G. Can.* (the Assignments & Preferences Case), [1894] A.C. 189, and *A.-G. Ont. v. A.-G. Dom.*, [1896] A.C. 348).

(4) There can be a domain in which provincial and Dominion legislation may overlap in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail (see *G.T.R. v. A.-G. Can.*, [1907] A.C. 65).

141 The sections of the 1914 *Fisheries Act* which were challenged in that case prohibited the operation of a salmon cannery, a fish cannery, or a salmon curing establishment, for commercial purposes, except under a licence from the Minister.

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142 It is noteworthy that the *Fisheries Act* in force in September 1986, when the offences are alleged to have occurred in this case, contains a definition of "fishery" which is in all material respects the same as the definition in the 1914 Act which was quoted by Lord Tomlin. The definition in the Act in force in 1986 reads:

> "fishery" includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith.

That definition clearly does not extend to fish canning or to fish marketing.

143 Lord Tomlin said this, at p. 198:

> The appellant seeks to support the validity of these sections first upon the ground that their subject matter is one within the subjects of express enumeration in s. 91, and secondly upon the ground that they consist of provisions necessarily incidental to effective legislation upon an enumerated subject.

144 The Judicial Committee decided that it would be an unnatural construction of the word "fisheries" in head 91(12) of the *Constitution Act, 1867* to include within the compass of that word the operations carried out upon the fish, after they were caught, for the purpose of converting them into some form of marketable commodity. The Judicial Committee also decided that it was not clear that any licensing system for fish canning or fish curing establishments was necessarily incidental to effective fisheries legislation. Lord Tomlin, at p. 199, said this:

> ... and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters.

145 The next case is *British Columbia Packers Ltd. v. Canada (Labour Relations Board)* (1975), 64 D.L.R. (3d) 522, a decision of the Federal Court of Appeal sitting in a division comprised of Chief Justice Jackett and Deputy Justices Sheppard and Smith. The question was whether fishermen and crew of fishing boats were employed in connection with the operation of a work, undertaking, or business within the legislative authority of the Parliament of Canada. Chief Justice Jackett delivered the principal judgment. He concluded it in this way, at p. 530:

> With some hesitation, therefore, because I am only too aware that there are *dicta* in the decisions, and there are portions of the definition of "federal work, undertaking or business" in the *Canada Labour Code*, that do not seem to accord with my reasoning, I have concluded that s. 91(12) authorizes Parliament to make laws in relation to "fisheries" but does not extend beyond that to the making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and *disposition of the products of the business*, when such things do not *in themselves* fall within the concept of "fisheries". (my emphasis)

146 Mr. Justice Sheppard agreed that head 91(12) did not extend to regulating the business of fishing and fish processing.

147 Mr. Justice Smith said this, at pp. 530-31:

> I have had the advantage of reading the reasons for judgment of my lord the Chief Justice and agree with him that this appeal should be dismissed. I fully agree that in the light of prior decisions s. 91, head 12 of the *British North America Act, 1867*, "Sea Coast and Inland Fisheries", is not broad enough to authorize Parliament to enact legislation in relation to the business of fishing, in so far as that business is concerned with labour relations *or with the sale of fish after they have been caught*. (my emphasis)

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148 That brings me to two closely related decisions of the Supreme Court of Canada, namely, *R. v. Fowler*, [1980] 2 S.C.R. 213 [[1980] 5 W.W.R. 511], and *R. v. Northwest Falling Contractors Ltd.*, [1980] 2 S.C.R. 292 [[1981] 1 W.W.R. 681]. Those two cases dealt, respectively, with s. 33(2) and s. 33(3) of the *Fisheries Act*, which read like this:

> (2) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.
>
> (3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

149 In *Northwest Falling Contractors* it was decided that s. 33(2) demonstrably linked proscribed conduct with actual or potential harm to the fisheries, presumably through the use of the word "deleterious". In *Fowler* it was decided that s. 33(3) made no attempt to do so. Mr. Justice Martland gave the judgment of the Supreme Court of Canada in both cases. In *Fowler* he said that there was no evidence before the Court to indicate that the full range of activities caught by s. 33(3) did in fact cause harm to the fisheries.

150 In the present case, the two prohibitions, namely the prohibition in s. 4(5) and the prohibition in s. 27(5) designate, as fish that cannot be the subject of sale or purchase, fish caught by a person not holding in one case, or holding in the other case, a particular kind of licence. Those fish or any part of them are thereafter taken out of the market entirely. In this case, the sales to N.T.C. Smokehouse Ltd. by the Indian fishers who caught the fish are prohibited; so are the purchases by N.T.C. Smokehouse Ltd.; so are the sales by N.T.C. Smokehouse Ltd. to Jay Margetis Fish Ltd., Kingfisher Enterprises, Pacific Salmon Industries Ltd. and Maranatha Seafoods Ltd., the four fish processing or packing companies which purchased the fish from N.T.C. Smokehouse Ltd.; so are the sales by those four fish processors to a wholesaler or to a supermarket chain; so are their sales to a restaurant or to an individual consumer for home or family consumption. (However, I suspect that the only people who are ever prosecuted are the Indian fishers themselves and the people who purchase from them.)

151 I am prepared to conclude, though the evidence is scanty, that the prohibition against the sale of fish by the person who caught them without a commercial licence, and the prohibition on the purchase of fish from the person who caught them without a commercial licence, and even the prohibition of any subsequent sale by that person, are necessarily incidental to and functionally related to the Federal legislative scheme for management and conservation of the fishery, enacted under head 91(12) of the *Constitution Act, 1867*. But in my opinion it is not necessarily incidental to fishery conservation or management to impose on fish wholesalers or retailers, restaurant operators or household managers, the burden of a strict or absolute liability offence unless they first try to determine the licence status of the original fisher who caught the fish they are marketing, eating or proposing to eat.

152 In *Canada (Attorney General) v. British Columbia (Attorney General)*, *R. v. Fowler* and *R. v. Northwest Falling Contractors Ltd.*, the Court referred to the evidence to see whether it had established the con stitutional fact of the linkage between the legislative scheme and head 91(12) of the *Constitution Act, 1867* which would have demonstrated that the legislative provision was necessarily incidental to the conservation of fish or the management of the fishery. In those cases that evidence was lacking. It is not very strong in this case. And, indeed, there is some evidence tending to support the view that there is no linkage between the legislative prohibition and the legislative purpose and that, consequently, the legislative provisions in question are not necessarily incidental to the management of the fishery. William Green, a fisheries biologist, and former employee of the Department of Fisheries & Oceans, gave evidence at trial that, from a conservation and management point of view, Regs. 4(5) and 27(5) were anachronistic, ineffective, inefficient, redundant and without any valid conservation objective. He said that the best method of keeping conservation goals was to set and adjust quotas.

153 In *R. v. Saul* (1984), 13 C.C.C. (3d) 358 [55 B.C.L.R. 359] (B.C.S.C.), Mr. Justice Locke upheld the constitutional validity of an equivalent section to the present s. 4(5) of the *British Columbia Fishery (General) Regulations*. He said that he

relied on common sense and knowledge, which he considered was derived from facts established by judicial notice, to conclude that without such a regulation there would be many clandestine attempts to circumvent the law by fishing outside the periods set for fishery openings. The reasons of Mr. Justice Locke were reluctantly followed by Judge Boyd in *R. v. Vidulich* (1987), 22 B.C.L.R. (2d) 238 (Co. Ct.), and were adopted and extensively quoted by the Alberta Court of Appeal in *R. v. Crane; R. v. Favel; R. v. Twin* (1985), 23 C.C.C. (3d) 33 [[1986] 1 W.W.R. 522]. In none of those cases was the regulation in question considered in the frame of reference that the regulation applied beyond the sales of the fish by the person who caught them and into the whole processing, packing, wholesaling and retailing operations and on to the ultimate purchase by the consumer.

154 Reference was made during the course of argument to the preamble to the 1917 Indian Food Fish Regulation, P.C. 2539, of 11 September, 1917, which linked the conservation of food to the catching of fish for commercial purposes by Indians in non-tidal waters. I accept that the control of commercial fishing by Indians and, of course, by all others, in the rivers where spawning salmon run is necessarily incidental to conservation and management of the salmon fishery. But it is noteworthy that the 1917 regulation went no further than to address the mischief of Indians catching fish and selling them without any regulation. It did not seek to extend its scope into the processing, packing, wholesaling or retailing of fish or to the ultimate purchase by the consumer. In my opinion the scope of regs. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* is so broad that it applies beyond what is necessarily incidental to a fishery scheme for the conservation and management of the resource and seeks to control sales and purchases by processors, packers, wholesalers and retailers in a way that has not been shown by evidence to be necessary for the successful carrying out of the scheme of management and conservation that has been decided upon, namely the prevention of Indians catching fish in rivers where they have traditionally caught them and then selling them.

155 I have read the testimony of Mr. Dennis Girodat, a Fisheries officer who was called on behalf of the Crown. I do not think it can be said that his evidence established a linkage between the conservation of the salmon resource and a prohibition of the sale of fish caught by Indian people. On the other hand, he was not asked about that.

156 I am not prepared in this case to conclude that there is not any necessary linkage between the conservation of the salmon resource and the sale by native Indians of fish caught by them, or the purchase or sale of fish by persons who purchased the fish from native Indians. Until confronted by compelling evidence to the contrary, I would propose to take judicial notice of that linkage between the prohibition of such sales and purchases and the conservation of the resource.

157 On the other hand, in the absence of evidence of any necessary linkage, I am not prepared to accept from my own judicial notice that there is a necessary linkage between conservation of the resource and the prohibition of the purchase and sale of fish by persons who do not purchase the fish from native Indian fishers or from fishers who do not hold commercial licences. So purchases and sales by processors, packers, wholesalers, retailers, restaurants, and the ultimate consumers have not been shown, in my opinion, to be within the constitutional powers of Parliament to make laws in relation to Seacoast and Inland Fisheries.

158 I think this is a case where constitutional severance of the broad prohibition in these two sections and similar sections should occur. If purchases and sales are made by persons who are not the original prohibited fisher, nor the person who purchased or sold fish that they bought from the original prohibited fisher, then those purchases and sales would not be subject to the prohibition. The remainder of the legislative scheme, including the prohibition of sales by the original fisher and the person who purchased from the original prohibited fisher could stand without the necessity of extending the prohibitions right down the chain of purchases and sales.

159 It follows that on the evidence in this case I would uphold the constitutionality of ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* insofar as they applied to the sales to and by N.T.C. Smokehouse Ltd. and I would not accede to the defence based on the unconstitutionality of those sections.

Part V The Aboriginal Rights Issue

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160 I have discussed the origin and nature of aboriginal rights in my reasons in *Delgamuukw v. British Columbia*, which are being handed down at the same time as these reasons [[1993] 5 W.W.R. 97]. And I have discussed the nature and scope of aboriginal rights in relation to fishing, fisheries, and the sale of fish, in my reasons in *R. v. Vanderpeet*, which are also being handed down with these reasons [ante, p. 75]. I do not propose to repeat here all that I said in *Delgamuukw*, nor do I intend to repeat the summary that I included in *Vanderpeet* about the nature of aboriginal rights in relation to fishing, fisheries, and the sale of fish. But the question of the scope of aboriginal rights in relation to the salmon resource is of critical importance in this appeal and in my opinion an understanding of that question depends on the perspective which is employed in describing the scope of the aboriginal rights. We know from the reasons of Chief Justice Dickson and Mr. Justice LaForest, for the Supreme Court of Canada, in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1112, [[1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1], that it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. From that mode of approach I propose both to summarize and to amplify what I said in *Vanderpeet* about delineating and describing the scope of the aboriginal rights at stake in this appeal in relation to the salmon resources in the Somass River.

161 But before discussing the applicable principles I will try to state, as shortly as possible, the aboriginal customs, traditions and practices as they existed before contact in 1787, as they existed between contact and the assertion of British sovereignty in 1846, and as they existed after sovereignty. Those customs, traditions and practices are summarized in paras. 1-4, 6-12 and 16 of the appellant's factum, all of which were accepted by the Crown. I have set them out at the beginning of these reasons and will not repeat them here. However, I will refer to the report of Patricia Berenger, an anthropologist specializing in Northwest Coast traditional salmon fisheries, entitled "The Somass River Salmon Fishery and An Evaluation of Traditional and Modern Utilization of Somass Salmon Resources by the Sheshaht Indian Band", which describes the traditional importance of the Somass salmon runs in this way:

> **Importance of the Somass runs**
>
> The Sheshaht traditionally relied on Somass River salmon for their principal supplies of storage foods. After the catch was smoke dried it was packed and bundled for transport back to the winter villages. Supplies piled high were loaded onto cedar plank platforms supported between large dugout canoes. Sufficient quantities were needed both to meet winter food requirements and to provide dried salmon for the winter feasts and ceremonies. Cured salmon and sea foods were also used for purposes of trade and barter, to enable the chiefs to secure valuable relations of exchange with neighbouring tribes.
>
> Quantitative estimates of traditional salmon production are necessarily inexact. Models of former abundance must take into account annual variations in salmon runs, common to an anadromous resource. On the basis of the best available evidence it is logical to conclude that in years when salmon runs were abundant the Sheshaht had enough to meet their requirements.
>
> The reciprocal nature of traditional exchange systems mark them as essentially different from "market systems" in which "surplus" is sold. Typically the Sheshaht and other Nuu-chah-nulth tribes entered into systems of exchange within a regional social network, that is, with local groups related by marriage and other ties of kinship, or with tribes with whom marriage ties are sought. As articles of food and wealth are exchanged, the bonds of social and political relations are strengthened.

There was no market economy among the Nuu-chah-nulth peoples. But there was a good deal of exchange of goods through the potlatch ceremonies and through less formal exchanges. Dried salmon was one of the goods exchanged in this way.

162 Mr. Richard I. Inglis, then Acting Head of the Ethnology Unit and Acting Head of the Human History Unit at the Royal British Columbia Museum, in the course of his oral testimony, said this in relation to the Nuu-chah-nulth peoples:

> Aboriginally salmon was traded between groups. It was traded to peoples who had territories that did not have salmon rivers. It was given out as a major foodstuff in potlatches to visiting groups. Salmon in the rivers — Native people have a very different system of evaluating salmon, and I have been told a number of times about the salmon from this particular

> creek, or this particular river, or particular run, being better and better tasting than other types of salmon. And that is — this is repeated over and over again amongst other coastal groups as well. Salmon was sold to the first fur traders that came into the region. It was sold to early settlers, to early store owners. It was sold to traders, starting at least in the 1840s, probably through many of the decades of the 1800s to independent traders coming on the coast and then taking the salmon to Fort Victoria and then transhipped to Hawaii. Salmon was sold to the canneries and formed a major — a major part of the wage earning ability of the Native people. Throughout this period salmon has always been traded, or has always been exchanged between Native groups and given out at ceremonies and served at feast to visiting groups, and also provided to members of the community who have moved away. That is family, friends. The salmon has been traded with those people, as well, and provided, as a family obligation.

163 The Sheshaht and Opetchesaht peoples used salmon as the principal source of their nourishment and subsistence. Salmon was given and exchanged for other goods in the complex winter feasting and social rituals and ceremonies of the Nuu-chah-nulth nation, including the Sheshaht and Opetchesaht peoples. The first European to arrive in Barkley Sound was Captain Barclay in 1787, five years before Captain Vancouver reached British Columbia and only nine years after Captain Cook first explored the coast. Captain Barclay stayed for over a week and traded iron implements for fresh food, including salmon. From then on the Indians in Barkley Sound traded salmon for goods and later for money to buy goods at any opportunity they had to do so. They traded to the first settlers on Vancouver Island. The settlers' requirements for food were met by the Indians and generally not by the settlers doing their own fishing. The Sheshaht and Opetchesaht people traded salmon to the Hudson's Bay Company and that company shipped the dried salmon to Hawaii.

164 Also before discussing the applicable principles I will set out the conclusions of Judge McLeod on the question of aboriginal rights. He said this:

> I am satisfied that the Sheshaht Band has an aboriginal right to fish in the area; however, the evidence does not show to me that the Sheshahts in the period of their residence were sellers and barters of fish, and, contrary, it appears that the Sheshaht over the past 200 years, what sales were made were few and far between. No doubt there were potlatches and meetings and exchanges of gifts of salmon, but these do not constitute an aboriginal right to sell the allotted fish contrary to the regulations.

165 In the course of his reasons, Judge Melvin accepted, for the purposes of those reasons, that the Band had an aboriginal right to fish, and he examined the evidence but reached no conclusion on the aboriginal right to sell or trade in fish.

166 It is clear from his reasons that Judge McLeod confined his consideration of the scope of the aboriginal rights of the Sheshaht and Opetchesaht peoples in relation to fish to their customs, traditions, and practices, as those customs, traditions and practices existed before contact. The reference to "potlatches and meetings and exchanges of gifts of salmon" without any reference to the extensive trading activities in the 19th century, both before and after 1846, as shown by the evidence, de monstrates the limited scope of Judge McLeod's inquiry. In my opinion Judge McLeod erred in law in his understanding of the relevant period, the relevant practices and the relevant perspective for the determination of aboriginal rights. It follows that his conclusion on the scope of the aboriginal rights of the Sheshaht and Opetchesaht peoples is tainted by the errors in law. That conclusion is not binding on this Court and cannot stand.

167 Aboriginal rights were not frozen before contact, between contact and sovereignty, or after sovereignty. What occurred in all three periods can serve to define the scope of the right in modern times. *The essential task is to determine whether the right is rooted in the customs, traditions and practices that were nurtured by the organized society of the particular aboriginal people as an integral part of their distinctive culture before sovereignty, and in most cases before contact and, if the right is rooted in that way, to describe its scope in terms of the aboriginal perspective on the form it took at the time of sovereignty in 1846, when it first became recognized, affirmed and protected by the common law and absorbed into the body of the common law.* In the period after sovereignty, the right could evolve, and the manner of its evolution may well serve to illustrate the scope of the right in 1846.

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

168 Since Judge McLeod's conclusion that the scope of the aboriginal right in this case does not include a right to trade in salmon in commercial quantities rested entirely on a consideration of the scope of the right before contact, and ignored the evidence about substantial trading in commercial quantities between contact and sovereignty, it is based, in my opinion, on an error in law and cannot stand. Judge Melvin reached no conclusion on the scope of the aboriginal right though he too seemed to confine his consideration to the form of the right before contact.

169 I come now to a consideration of the scope of the aboriginal rights at stake in this appeal. Since I will be following the same line of reasoning as I adopted in *R. v. Vanderpeet*, I propose merely to summarize that line of reasoning in point form.

170 1. A single aboriginal custom, tradition or practice can be described in a number of different ways, depending on the perspective used to provide the focus for the description.

171 2. One way to describe an aboriginal custom is to describe the purpose of the activity. If the activity is fishing and the fish are later eaten, then the custom could be described as fishing for food purposes. I have called that the "purpose" form of description.

172 3. A second way to describe an aboriginal custom is to describe the limits placed by the aboriginal people on the exercise of the right. If the custom is to catch all the fish that the people wish to catch, subject only to the needs of conservation, then the custom could be described as fishing at will to the conservation limits of the resource. I have called that the "self-regulation" form of description.

173 4. A third way to describe an aboriginal custom is to describe the social function which the custom occupied in the lives of the people and which made it an integral part of their distinctive society. If the custom was for the entire people to move to a particular place when the fish were running and to build their entire activities around the catching and curing of fish and to foster their relationships with neighbouring people through the exchange of fish, then the custom could be described as fishing for a living, or a livelihood. I have called that the "social" form of description.

174 5. I regard the "social" form of description as being the form which best combines the giving of an aboriginal perspective to the meaning of the right at stake with the underlying rationale of why the common law absorbs and protects local customs that are regarded as an integral part of their life by the local society.

175 6. I regard the "purpose" test as adopting the perspective of the settlers and incomers and as not being sensitive to the perspective of the people whose right is at stake. I regard the "self-regulation" test as not giving sufficient significance to the underlying reasons why the common law absorbs and protects local customs when it first becomes applicable in the territory.

176 7. Once the "social" form of description is chosen in this case, it would describe the aboriginal customs, traditions and practices of the Sheshaht and Opetchesaht peoples in relation to the salmon runs in the Somass River as being customs, traditions and practices that form a central core of the lives of those peoples and which provide them with a means of living or, in short, with a livelihood.

177 8. There is no case which requires that a "purpose" description be adopted rather than a "social" description of the scope of an aboriginal right. The scope of the right in either social or purpose terms was not in issue in the *Sparrow* case. The reasons in that case were limited so as to exclude fishing for a commercial purpose, but that was done in order to exclude the necessity for considering the inter-relationship between aboriginal rights in the fishery and the rights of non-Indian commercial fishermen in the fishery, and not to establish a "purpose" description of aboriginal rights. The issue in *Sparrow* related to the use of a net longer than 25 fathoms and the question of the scope of the right in that context was referred back for a new trial.

178 9. The "social" description of the aboriginal rights of the Sheshaht and Opetchesaht people in the Chinook salmon run in the Somass River accords better than the "purpose" description with the reasoning of Mr. Justice Dickson in *R. v. Jack*, [1980] 1 S.C.R. 294 [[1979] 5 W.W.R. 364], and with the priorities there set out at p. 313, namely:

(i) conservation;

(ii) Indian fishing;

(iii) Non-Indian commercial fishing; or

(iv) Non-Indian sports fishing.

In that system of priorities Indian fishing is not divided into different categories according to the purpose for which the fish were caught or for which they were used or to be used after they were caught.

179 10. The "social" description of the aboriginal right in issue in this case provides a close parallel to the similar "social" description of the rights of the native Indian people in Washington State. See *United States v. State of Washington*, 384 F. Supp. 312 (U.S. Dist. Ct., 1974), and *Washington v. Washington State Commercial, Passenger & Fishing Vessel Assn.*, 443 U.S. 658 (1979). In those cases it was decided by the United States Supreme Court that the scope of the aboriginal fishing rights, later embodied and confirmed by treaty, encompassed an assurance that the reasonable livelihood needs of the native people would be met, and that their prior interest in the resource is such as to provide them with "a moderate living". Reference should also be made to the reasons of Chief Judge Fox of the United States District Court in *United States v. State of Michigan*, 471 F. Supp. 192 (U.S. Dist. Ct., 1979). It is, of course, of great importance to try to achieve harmony between the recognition of aboriginal rights in British Columbia and the recognition of aboriginal rights in Washington State, where the Indians are closely related to the Indians of British Columbia and where they share many of the same customs, traditions and practices.

180 11. The "social" description of the aboriginal rights in issue in this case also accords better with an understanding of how the right should be exercised in modern times. Salmon was an overwhelmingly dominant part of the diet of the Sheshaht and Opetchesaht peoples before contact, as it was also for the Hudson Bay traders. It was salmon for every meal, every day, all year, or very nearly so. The amount of salmon required for such a diet represented a very considerable quantity per person per year. A calculation of that quantity per person per year must surely represent the minimum scope of the exercise of the right, though the accurate scope, as I have said, must be represented by the scope which provides a moderate livelihood. By whatever approach the scope of the right is measured, it does not make sense in today's times, with today's standards of balanced nutrition, as exemplified in the Canada Food Guide, to require the Sheshaht and the Opetchesaht people, in order to exercise their aboriginal rights to the fullest extent, to eat the amount of salmon per person per year that their ancestors ate in, say, 1800. It fits much better with modern social concepts to permit them to trade salmon for other nourishing foodstuffs required to provide good health and to use the salmon resource to provide the money to purchase the wherewithal for a nutritious diet.

181 12. *I conclude that the best description of the aboriginal customs, traditions and practices of the Sheshaht and Opetchesaht peoples in relation to the chinook salmon run on the Somass River is that their customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation, including recognition of the need for conservation, to catch, and, if they wish, sell, themselves and through other members of the Sheshaht and Opetchesaht peoples, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800.*

182 13. For those reasons, I have concluded that Judge McLeod's conclusion that the Sheshaht and Opetchesaht peoples did not have an aboriginal right that encompassed the sale of fish in this case was flawed by an error in law in relation to the perspective from which aboriginal rights should be determined, and by an error in law in relation to the categorization and description of the aboriginal customs, traditions and practices which formed the basis of their entitlement to the right on the evidence in this case.

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

183 14. In any case, even if the correct method of categorizing the aboriginal right in relation to the utilization of fish by the Sheshaht and Opetchesaht peoples is in accordance with the "purpose" test of considering the reason why the fish were caught and the actual purpose for which they were caught, in my opinion Judge McLeod committed an error in law in confining his consideration of the customs, traditions and practices of the Sheshaht and Opetchesaht peoples to the way in which the customs, traditions and practices were carried out before contact, rather than extending his consideration to include the form of the flowering and unfolding of the right brought about by contact with traders, seamen and settlers in the period between contact in 1787 and the assertion of British sovereignty in 1846.

184 15. The Sheshaht and the Opetchesaht peoples exchanged, traded, and gave away at feasts, very considerable quantities of salmon in the period before contact. The very first contact between the Sheshaht and the Opetchesaht peoples, on the one hand, and a European arrival, on the other, occurred in 1787 when Captain Barclay anchored in the Sound that is now named after him. The very first thing that happened is that the Sheshaht and the Opetchesaht peoples traded salmon to Captain Barclay for iron implements. In the years between 1787 and 1846 the Sheshaht and the Opetchesaht peoples traded or sold salmon to the many seamen, traders and settlers with whom they came in contact. They traded or sold salmon to the Hudson's Bay traders for preservation by them and for sale in Hawaii. And they caught and sold to the settlers the salmon required by the settlers for food. The right to engage in such trading was not conferred on them by the common law. The common law did not apply to them at all before 1846. So their rights to trade in salmon and sell salmon in the substantial quantities that were traded and sold between 1787 and 1846 were rights that had their origin in the customs, traditions and practices of the Sheshaht and the Opetchesaht peoples and were surely an integral part of their distinctive culture.

185 16. The Sheshaht and the Opetchesaht peoples did not engage in a market economy and in commerce in fish until the market economy and the market for commerce in fish arrived with the incoming seamen, traders, and settlers. As soon as the market arose, the Sheshaht and the Opetchesaht peoples took advantage of it. As Chief Judge Fox said in *United States v. Michigan* [p. 260]:

> The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right ... It may expand with the commercial market which it serves, and supply the species of fish which that market demands.

186 17. So the conclusion I have stated about the scope and content of the aboriginal rights of the Sheshaht and Opetchesaht peoples in para. 12 above would rest with equal stability and correctness on a "purpose" method of describing aboriginal rights, properly understood, as it rests on what I regard as the more correct "social" method of describing aboriginal rights.

187 18. There has been no clear and plain intention to extinguish the aboriginal rights of the Sheshaht and Opetchesaht peoples to obtain a moderate livelihood from the salmon resource of the Somass River and to catch fish for sale and to sell fish in commercial quantities. Consistent prohibition of the sale of fish by Indian peoples, subject only to a period during the Second World War, and the regulations made under the Fisheries Acts, do not result in the extinguishment of those rights, since the intention of the Sovereign Power in Parliament has never been directed to enacting the extinguishment of those rights. I consider that this point was decided in the *Sparrow* case with respect to rights to trade fish and to sell fish in commercial quantities even though that case assumed Mr. Sparrow was fishing, with a net greater than 25 fathoms in length, for food and ceremonial purposes.

188 In this appeal and in the appeals in *R. v. Vanderpeet* and *R. v. Gladstone* [ante, p. 133], on which judgments are being handed down at the same time as judgment in this appeal, I have discussed the nature, origin and scope of aboriginal title and aboriginal rights in relation to fish, fishing and fisheries. What I have said about the law in each of the three appeals applies with equal force to the other two.

189 That brings me to the infringement question. The Crown, in its factum, asked that a new trial be ordered on the questions of prima facie infringement and justification, leading to a conclusion on infringement as a whole, under the *Sparrow*

analysis, if a decision were made that the Sheshaht people and the Opetchesaht people had aboriginal rights which encompassed a right to sell fish. I do not think that it is necessary to order a new trial. I consider that on the facts of this case that analysis is straightforward and that an opportunity to present new evidence on that question could not contradict the essential facts which support my decision.

190 The fishing in this case occurred in September, 1986. The Fisheries Department opened the salmon fishery for Indian fishing on the Somass River from 12:00 noon on 7 September to 12:00 noon on 9 September, from 12:00 noon on 14 September to 12:00 noon on 16 September, and from 12:00 noon on 21 September to 8:00 a.m. on 22 September. In those periods all the salmon that were purchased by N.T.C. Smokehouse Ltd. were caught. That amount was 119,435 lbs., or about 60 tons. In addition, there must have been other salmon caught and used for food. The number of people fishing was 65 members of the Sheshaht people and 15 members of the Opetchesaht people for a total of 80 fishers. So the average amount sold by each of the fishers to N.T.C. Smokehouse Ltd. was 1,500 lbs. or 3/4 of a ton. All of the fish was caught in the permitted openings of the Indian fishery in the Somass River. The openings and closings constituted the effective means of conservation control exercised by the Department of Fisheries and Oceans.

191 It seems to me that setting openings which permit 80 fishers to catch, on the average, 3/4 of a ton of fish each, and then requiring them and their families to eat the 3/4 of a ton of salmon each, with their dependants, as opposed to permitting them to sell the fish and to use the money obtained to purchase the food requirements for a balanced diet in accordance with the Canada Food Guide, makes no sense. The evidence is that Agnes Sam sold salmon to N.T.C. Smokehouse Ltd. and used the money to buy jars to can salmon and to buy little things for her grandchildren. Surely there is no conservation purpose in preventing her from buying jars to can salmon. And surely there is no conservation purpose in requiring her to eat the salmon after it is caught. There is evidence that 13,000 Chinook salmon were allocated as a quota to the Sheshaht and Opetchesaht peoples. There is a report by the licence holders that 19,800 pieces of Chinook salmon were caught in the openings that were permitted. But there is no evidence that the catch was so predictable that it would be possible to know when 13,000 Chinook salmon were in the nets and to haul the nets at that moment. So the excess catch over food requirements has not been shown to have been anything other than fortuitous. What were the Sheshaht and Opetchesaht fishers to do with 6,800 Chinook salmon in excess of their food requirements? Throw them away?

192 Once it is accepted that the Sheshaht and Opetchesaht peoples had an aboriginal right to catch the salmon that were caught and to sell those salmon to N.T.C. Smokehouse Ltd., and that N.T.C. Smokehouse Ltd. was exercising an aboriginal right when it sold the fish to commercial fish processors, then there can be no doubt that the application of ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* to them constituted a prima facie infringement of their aboriginal rights. It is not necessary in this case to consider further the scope of the right. The contradiction between the exercise of the right and the enforcement of the sections of the regulations is unavoidable. This case is not like the *Sparrow* case where the question of the contradiction had to be explored on the evidence. In this case the contradiction is inescapable.

193 The only question that remains is whether the needs of conservation justified the application of the prohibition on sale in this case. Once it is established, as it has been, that all the fish were caught in the openings of the Indian fishery in the Somass River established by the Department of Fisheries and Oceans to permit the needs of conservation, then in my opinion the Crown cannot discharge the heavy burden imposed on it under the *Sparrow* analysis of establishing that the application of ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* to prohibit the sale of fish caught in the permitted fishery openings, was justified.

194 Accordingly, I conclude that N.T.C. Smokehouse Ltd., the alter ego of the Sheshaht and Opetchesaht peoples, was exercising an aboriginal right when it bought and sold the fish which it is charged with buying and selling, and that the exercise of the right was infringed upon by the application of ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* to the purchase and sale of the fish by N.T.C. Smokehouse Ltd.

195 It follows that on the basis of this aboriginal rights issue I would allow the appeal and enter verdicts of acquittal on all counts.

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Part VI The Indian Act Issue

196 On 19 March, 1982 the Sheshaht Band Council passed a bylaw under s. 81(1)(*o*) of the *Indian Act* dealing with fishing on the Sheshaht reserve. That bylaw was forwarded to the Minister of Indian Affairs in accordance with s. 82 of the *Indian Act* and, not having been disallowed by the Minister, it came into effect forty days later on 29 April, 1982. It was registered under the *Statutory Instruments Act* on 7 May, 1982 and is numbered SOR-82-471.

197 The authority to make the bylaw under s. 81(1)(*o*) of the *Indian Act* is in these terms:

> 81.(1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,
>
> (*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

For the purposes of this appeal I propose to accept, as I understand the Crown has accepted, that the catching and selling of fish comes within the words "preservation, protection and management".

198 The bylaw itself contains these provisions:

> **Position Established**
>
> s. 1. The position of Band Fisheries Conservation Officer is hereby established. This shall be a paid position. The salary for this position shall be established by the Band Council, and shall be paid from Band funds ...
>
> **Powers and Duties of Band Fisheries Conservation Officer**
>
> s. 2. (a) The Band Fisheries Conservation Officer shall determine, according to the best information available to him the capacity of the waters on each of Band's reserves to sustain production of fish.
>
> (b) The Band Fisheries Conservation Officer may close any area for fishing for any period of time he considers appropriate in the interest of conservation.
>
> (c) The Band Fisheries Conservation Officer shall prohibit any gear type he considers inappropriate for any location.
>
> (d) The Band Fisheries Conservation Officer shall enforce this By-law.
>
> (e) *The band Fisheries Conservation Officer shall collect statistics on all fish caught or sold under this By-law.*
>
> **Openings and Closures**
>
> s. 3. The Band Council shall designate openings and closures for the on reserve Fishery.
>
> **General Closure**
>
> s. 6. No person shall fish on reserve except as permitted by this By-law.
>
> **Cooperation with Federal Fisheries**

s. 12. The Band Fisheries Conservation Officer shall provide any information requested by any fisheries officer appointed pursuant to the Fisheries Act on demand.

Joint Management

s. 13. The Band Fisheries Conservation Officer, the Fisheries Conservation Assistants, and such other persons as the Band Council may appoint, together with as many persons as the Minister of Fisheries & Oceans shall appoint (not to exceed the number appointed by the Band Council), constitute a joint management committee, with power to make recommendations to the Band Council concerning the fishery.

Sale of Fish

s. 14. *Any fish caught under this By-law may be sold to any person, provided that the person selling the fish reports the number of fish sold to the Band Fisheries Conservation Office.* (my emphasis)

199 I think that three points are particularly noteworthy in the context of this appeal: the first is that escapement is under the sole control of the Band Fisheries Conservation Officer; the second is that no one is permitted to fish on reserve except as permitted by the bylaw; and the third is that any fish caught under the bylaw may be sold to any person.

200 It is argued on behalf of N.T.C. Smokehouse Ltd. that s. 14 of the bylaw, which permits the sale of fish caught under the bylaw, is a complete defence to the two counts on which convictions were entered and would also be a complete defence to the two counts which were dealt with under the *Kienapple* principle. The Crown has conceded, for the purposes of this appeal, that if the bylaw applied to the catching of the fish that were sold to and by N.T.C. Smokehouse Ltd. then it should be regarded as providing a defence to N.T.C. Smokehouse Ltd. on all four counts. The Crown has also conceded that the Sheshaht Band bylaw applies to the fish caught by Opetchesaht Band members as well as to the fish caught by Sheshaht Band members.

201 If the Band bylaw provides a good defence if it applies, as is conceded by the Crown, then the Band bylaw must override the *British Columbia Fishery (General) Regulations* made under the *Fisheries Act*. The paramountcy of the defence under the Band bylaw over the charge under the fishing regulation is in accordance with the decision of this Court in *R. v. Jimmy* (1987), 15 B.C.L.R. 145 [[1987] 5 W.W.R. 755], particularly at pp. 150-51. I think that decision must have rested on the fact that the Band bylaw is more specific and directed more particularly to the very fishing that is the subject of the charge.

202 So I now turn to the real question on this issue, namely: *Does the regulation-making power under s. 81(1)(o) of the Indian Act extend to the power to make a by-law governing the Indian fishery in September 1986 on the Somass River?* The answer to that question depends on the scope to be given to the words "on the reserve" in s. 81(1)(*o*). That in turn depends on the meaning of the words chosen to express the legislative intention, and on the object and scheme of the provision when it was enacted in 1951 and as the provision should be applied in 1986.

203 I propose to consider that question under four separate headings: the surveyed boundaries of the reserve; the ad medium filum aquae principle; the Scott-Cathcart Agreement; and the applicability of the words "on the reserve" to water outside the boundaries of the reserve but adjacent to it.

The Surveyed Boundaries

204 The starting point is the survey carried out by Ashdown Green in June, 1882 which was incorporated into the Minutes of the Decision of the Reserve Commission on 30 June, 1882:

No. 1 "Tsah-ah-eh" a Reserve of eleven hundred and fifty (1150) Acres situated on the right bank of the Somass River,

> Alberni, about three (3) miles from its mouth.
>
> Commencing at the southwestern corner post of Lot (three) 3. Alberni District, and running West eighty (80) chains, thence South one hundred (100) chains, thence East to the Somass river, and thence up the right bank of the said river, to the place of commencement.

205 We were privileged to hear very careful and fully researched arguments about the historical process giving rise to the delineation of the boundaries of the Tsah-ah-eh reserve. Some significant points were made in support of the position that the whole width of the Somass River for that part of its length that flows between the line or extended line of the north boundary of the reserve and the line or extended line of the south boundary of the reserve is within the reserve boundaries. Three of the most important points are: first, that the survey line returned up the right bank of the Somass River to the point of commencement, but the point of commencement was only on the right bank of the river if "right" means facing upstream; second, that an official map of the reserve shows an island on the river as a part of the reserve; and third, that since the river is tidal at the relevant part of the river, the surveyors' convention that the "right" bank always means right facing downstream would not apply because there is no downstream in tidal water.

206 However, it is my opinion that the Somass River was not within the description of the extent of the reserve set out by the Minutes of the Decision of the Reserve Commission which formally established the Reserve. I agree with that part of the reasons of Mr. Justice Hutcheon which appears in Pt. III of those reasons under the heading: "1. The Original Allotment".

207 Judge McLeod decided that the limits of the surveyed boundaries of the reserve did not include the Somass River itself. Judge Melvin reached the same conclusion. The question is one of fact. Our jurisdiction in this appeal is restricted to questions of law alone. It must be accepted that the surveyed boundaries of the reserve do not include any part of the Somass River.

The Ad Medium Filum Aquae Principle

208 The ad medium filum aquae principle is a part of the English common law. A river bed must have an owner. The owner has rights to the fishery and rights with respect to the water and, even more important, the owner has responsibilities to up-stream and downstream owners with respect to the flow of the river. In England, the Crown holds an allodial title to the land, but it does not own the bulk of the land, as it does in British Columbia. So the rule was adopted in England many years ago that a grant of land adjacent to a river was presumed to carry with it a grant of the bed of the river out to the middle line of the principal current of the river, unless the presumption was rebutted. That is the ad medium filum aquae principle. It is a principle about ownership at common law and occupation at common law and it is a principle about the interpretation of grants of land.

209 In my opinion the principle has no application to Indian reserves.

210 We know from the decision of the Supreme Court of Canada in cases such as *Guerin v. R.*, [1984] 2 S.C.R. 335 [[1984] 6 W.W.R. 481, 59 B.C.L.R. 301], and *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, that aboriginal title is sui generis, that is, it is not like any common law estate, tenure, or interest in land. It is not less and it is not more. It is to be considered to be in a class all by itself.

211 We know also from the decision in *Guerin* that the interest of the Indian occupiers of reserve land in their reserve lands is the same as their interest in any other lands to which they hold aboriginal title.

212 And we know from *Mabo v. Queensland* (1992), 107 A.L.R. 1 (Aust. H.C.), that aboriginal title consists of a right to the possession, occupation, use and enjoyment of the land and its resources. We also know that the title may be exclusive or shared-exclusive, depending on the aboriginal customs, traditions and practices on which it is based. There may be aboriginal rights over land which are more specifically focussed than the exclusive or shared-exclusive aboriginal title, and the existence of those rights may not be inconsistent with some other uses of the land. I have dealt with these questions in my reasons in *Delgamuukw* and need say no more here.

213 In *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.), in *Guerin v. R.*, and in *Mabo v. Queensland*, we are warned about the fallacy of applying common law principles with respect to common law estates and tenures to aboriginal title questions. The aboriginal title must be understood from the perspective of the aboriginal people themselves and should not be compared to any common law estate, tenure, or other interest in land.

214 Applying those principles to the facts of this case, and particularly to the undisputed evidence about the customs, traditions and practices of the Sheshaht and Opetchesaht peoples in relation to the salmon runs in the Somass River, it is my opinion that the Sheshaht and the Opetchesaht peoples each have a collective shared-exclusive aboriginal title to the possession, occupation, use and enjoyment of the resource consisting of the salmon fishery in the Somass River, carrying with it the aboriginal title to the possession, occupation, use and enjoyment of the bed of the Somass River, and carrying with it the right to catch salmon for the ample subsistence of the people and to provide them with a moderate livelihood. The **aboriginal title** and rights to which I have referred constitute a **burden** on the allodial title of the Crown and a burden on the fee simple title of the Crown to the bed of the Somass River and to the fishery in the Somass River.

215 In my opinion the aboriginal titles of the Sheshaht and Opetchesaht peoples to the bed of the Somass River and to the enjoyment of the resources of the salmon fishery in the river owe nothing whatsoever to the ad medium filum aquae principle. In my opinion it constitutes the error against which we were warned in the three cases to which I have referred, and others, to apply a technical principle of the common law to trying to settle the boundaries of the reserve. The allodial title to the bed of the river is in the Crown, just as the allodial title to the reserve is in the Crown, and the allodial title to neighbouring lands within the ancestral homelands of the Sheshaht and Opetchesaht peoples is in the Crown. The fee simple title to the reserve is in the Crown. The fee simple title to the adjoining lands is either in the Crown or in someone to whom the Crown granted fee simple title, or the successors of that person. And so the fee simple title to the bed of the river is also in the Crown or a grantee. But the aboriginal title consisting of the shared-exclusive right to the possession, occupation, use and enjoyment of the bed of the river and the fishery of the river is in the Sheshaht and Opetchesaht peoples. That right of possession, occupation, use and enjoyment is a burden on the allodial title of the Crown and on the fee simple title of whoever holds the fee simple title.

216 Where then is the room remaining for the application of the ad medium filum aquae principle? It cannot apply to the Sheshaht and the Opetchesaht people as owners of the land. They are not owners of the land. The Crown owns the land. There is no need for it to apply to them as occupiers of the land. The right by which they occupy the land already gives them the right to occupy, possess, use and enjoy the whole of the Somass River in the area where their traditional fisheries are carried out.

217 When the common law came into effect throughout British Columbia on the assertion of British sovereignty in 1846, and when the English common law was cut off in 1858 and the law of British Columbia took on a life of its own, it is my opinion that the ad medium filum aquae principle was "from local circumstances inapplicable" to any determination of the ownership or occupation rights of native Indian people in their ancestral fishing streams and rivers.

The Scott-Cathcart Agreement

218 On 22 March, 1929, Duncan Scott, Deputy Superintendent General of Indian Affairs, and W. E. Ditchburn, Indian Commissioner for British Columbia, on behalf of the Federal Government, and H. Cathcart, Superintendent of Lands, and O. C. Bass, Deputy Attorney General of British Columbia, on behalf of the Province of British Columbia, signed an agreement dealing with matters discussed in the preamble, which I will set out, and including, in particular, cl. 5, which is relevant to the native Indian interest in the foreshore. I will also set out cl. 5:

> The undersigned having been designated by their respective Governments to consider the interest of the Indians of British Columbia, the Department of Indian Affairs and the Province of British Columbia arising out of the proposed transfer to the province of the lands in the Railway Belt and the Peace River Block and to recommend conditions under which the transfer may be made with due regard to the interests affected beg to report as follows:

As the tenure and mode of administration of the Indian Reserves in the Railway Belt and the Peace River Block would, we thought, be governed by the terms of the conveyance by the Province to the Dominion of the Indian Reserves outside those areas it was thought advisable to agree if possible upon a form of conveyance particularly as that question had been before the Governments for some time and remained undecided and furthermore to consider a few important matters germane to Indian affairs in the Province with the hope of making recommendations which would promote the ease and harmony of future administration ...

5. It was urged by the Dominion representatives that Indian claims to the foreshore of their reserves be recognized by the Province, but the Provincial representatives pointed out that it has been and is the invariable policy of the Province to consider the rights of the upland owners, and that this policy fully protected the rights of the Indians in the same way as other upland owners or occupiers of the land.

In this connection the following letter from the late Premier Oliver, dated the 23rd of April, 1924, was before the representatives:

Ottawa, April 23, 1924

The Honourable,

The Superintendent General of Indian Affairs,

Ottawa.

Dear Sir:

Re: Indian Reserves in British Columbia

Referring to our conversation of yesterday and having reference to the fears expressed by the Indians that where their Reserves fronted on the water, access to their lands might be interfered with by construction of wharfs, docks, booms, or other obstructions erected or placed along any foreshore being in the Province, as I expressed myself yesterday, I would favour a policy treating the Indians on exactly the same footing as I would treat the whites, and would if necessary advise the Government of the Province to give the Indian Department a written assurance to that effect. I am, however, of the opinion that no such assurance is necessary, as I think the principle of Riparian Rights would apply to any Indian reserves having water frontage to the same extent as Riparian Rights would apply to the same lands were such lands subject to the private ownership of any person other than an Indian. In other words, Riparian Rights would accrue to the Indians (through the Indian Department) to the same extent as they would apply to a white owner. I should be pleased if you would obtain the advice of your legal Department on this phase of the situation.

I am,

Yours faithfully,

John Oliver.

It was considered by the representatives of the Province that this letter expressed the policy which in the past has been followed, and will be followed by the Province in the future.

219 The Scott-Cathcart Agreement was approved by Canada through Privy Council Order 208/1930 and by British Columbia through the *Indian Affairs Settlement Act*, S.B.C. 1919, c. 32, and by Order in Council 1151/1930.

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

220 In my opinion the Scott-Cathcart Agreement set out a policy of the British Columbia government and an understanding by Premier John Oliver of that policy and of the legal position underlying it. It is possible that actions taken in reliance on that policy could have created legal rights. But that is not the question in this appeal. The question is whether the Scott-Cathcart Agreement made the ad medium filum aquae principle apply to the rights of Indian people to waters adjacent to their reserves so as to confer ownership and occupation rights in those waters on those Indian peoples. In my opinion the Scott-Cathcart Agreement was a binding agreement which created rights between the Federal and Provincial Governments. But in my opinion it did not create any rights on the part of the Indians. It is also my opinion that the Agreement related to foreshore rights, but I am not satisfied that it related to rights to the beds of rivers.

221 For those two reasons I do not consider that the Scott-Cathcart Agreement affected the legal position of the Sheshaht and the Opetchesaht peoples as I have described it in the previous segment of this part of these reasons in relation to the ad medium filum aquae principle.

Does "On the Reserve" Mean "Within or Adjacent to the Reserve"?

222 It was argued on behalf of N.T.C. Smokehouse Ltd. that the words "on the reserve" in s. 81(1)(*o*) of the *Indian Act* should be given a meaning equivalent to "within or adjacent to the reserve". It was said that such a meaning was within the accepted usage of the word "on" and that such a meaning best carried out the legislative purpose and legislative scheme which must be taken to have been to give to the Indians the right to manage their traditional fisheries.

223 There are five circumstances which persuade me that Parliament did not grant a power to make bylaws applicable beyond the boundaries of the reserve.

224 The first circumstance is that the French text of s. 81(1)(*o*) uses the words "dans la reserve". The English words "on the reserve" throughout the *Indian Act* sometimes appear in the French text as "sur la reserve" and sometimes appear as "dans la reserve". Neither of those renderings would give the words a meaning equivalent to "adjacent to the reserve", but "dans la reserve" in particular must mean, in my opinion, within the boundaries of the reserve.

225 The second circumstance is that in 1951, when s. 81(1)(*o*) was first enacted and when its meaning must be ascertained, the Indian fishery throughout Canada was confined to fishing for food. Commercial fishing by Indian people was not permitted, and the sale of fish by Indian people was prohibited by regulations made under the *Fisheries Act*. It would have been very strange in those circumstances if Parliament had permitted the management of fisheries, including commercial fisheries, adjacent to reserves to be granted to the Indian peoples who lived on the reserves when those people were themselves prohibited from catching fish for commercial purposes.

226 The third circumstance is that other Indian reserves throughout Canada abut on to the sea or on to large lakes containing important fisheries which were being actively exploited commercially in 1951. And again, those reserves may have been established in those particular locations in order to take advantage of the aboriginal custom, tradition and practice of harvesting the resources of the fishery for sustenance purposes. In those cases, where the reserves abut the sea or large lakes, there would be no clear basis for determining the extent of the power granted to Indian bands whose reserves were adjacent to the sea or to the lakes to make bylaws controlling the management of the fishery in the sea or in the lakes.

227 The fourth circumstance relates to whether it could have been contemplated by Parliament to permit Indian bands whose reserves abut on one side of a river to control the management of the fishery out to the line formed by the middle of the main current, which is the only point which could arguably (but not correctly) have been thought by Parliament to be within the lands of the reserve, and yet to permit the fishery in the remainder of the width of the river to be managed and controlled by the ordinary regulations made under the *Fisheries Act*. Such a division of management powers is so full of difficulties that it cannot have been contemplated by Parliament.

1993 CarswellBC 149, 80 B.C.L.R. (2d) 158, [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 48 W.A.C. 273, [1993] 4 C.N.L.R. 158

228 The fifth and final circumstance relates to the fact that s. 81(1)(*o*) deals with not only the preservation, protection and management of fish, but also with the preservation, protection, and management of fur-bearing animals and other game on the reserve. If the power to control the management of fish extends outside the boundaries of the reserve, then there would be no reason not to permit the control of the management of fur-bearing animals and of game beyond the boundaries of the reserve to be governed by the bylaws of the Band whose people live on the reserve. There would have to be a connection, of course, between the fur-bearing animals and the other game, on the one hand, and the reserve, on the other hand, but the fact that the animals wintered on the reserve might provide a sufficient connection to permit the regulation of those animals in the summer when they might have moved to higher ranges off the reserve. There is no basis that I can see for distinguishing fish off the reserve, on the one hand, from fur-bearing animals and game off the reserve, on the other hand. Yet I cannot believe that it was intended by Parliament that the control of the management of fur-bearing animals and other game off the reserve should be covered by the words of s. 81(1)(*o*).

229 The five circumstances that I have set out relate to the intention of Parliament as derived from the wording chosen to express that intention, as derived from the object of the Act, and as derived from the scheme of the Act. They have led me to conclude that Parliament did not grant to the Sheshaht Band and to bands similarly situated the power to make bylaws controlling the management of a fishery outside the boundaries of the reserve but adjacent to the reserve. Nor can it be said that the bylaw making power must permit bylaws to be made which extend their scope to waters adjacent to the reserve merely because the fishery in the waters constituted the reason for the establishment of a reserve at a location adjacent to the fishery.

230 I have concluded that the boundaries of the Tsah-ah-eh Reserve do not extend out beyond the bank of the Somass River to the middle line of the current of the river, and I have concluded that Parliament did not confer on the Sheshaht Band the power to make bylaws in relation to a fishery adjacent to the reserve when it enacted s. 81(1)(*o*) of the *Indian Act* in 1951. Accordingly, it is my opinion that the *Sheshaht Fishery Bylaw* of 19 March, 1982 affords no defence to any of the charges in this case.

231 That is not to say that the Sheshaht and the Opetchesaht peoples do not have power to regulate their exclusive fishery in the Somass River through their aboriginal rights of self-government and self-regulation, exercisable through their own institutions to control the manner of enjoyment of their collective aboriginal title to the fishery and the manner of the exercise of their aboriginal rights in the fishery.

Part VII Conclusions and Disposition

232 I have concluded that the catching of fish in the Somass River in September, 1986 by members of the Sheshaht and Opetchesaht Indian Bands, and the sale of much of that fish, was done in the exercise of an aboriginal right, but that it was not done under the Sheshaht Band Fish Bylaw.

233 I have also concluded that ss. 4(5) and 27(5) of the *British Columbia Fishery (General) Regulations* are constitutionally valid in their application to N.T.C. Smokehouse Ltd. in this case, though not necessarily in other applications down the marketing chain, but that their application to N.T.C. Smokehouse Ltd. in the circumstances of this case constituted an infringement of the aboriginal title and aboriginal rights of the Sheshaht and Opetchesaht peoples in the salmon fishery in the Somass River and that the infringement was not justified by the needs of conservation or in any other way.

234 I would allow the appeal and enter verdicts of acquittal on all four counts.

Appeal dismissed.

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KEYCITE

R. v. N.T.C. Smokehouse Ltd., [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 80 B.C.L.R. (2d) 158, 1993 CarswellBC 149, [1993] 4 C.N.L.R. 158, 48 W.A.C. 273 (B.C. C.A., Jun 25, 1993)

History

Direct History

1 R. v. N.T.C. Smokehouse Ltd., 1990 CarswellBC 1709, [1990] B.C.W.L.D. 704, [1990] C.L.D. 366, 9 W.C.B. (2d) 439 (B.C. Co. Ct. Jan 09, 1990)

Affirmed by

2 **R. v. N.T.C. Smokehouse Ltd.,** [1993] 5 W.W.R. 542, 29 B.C.A.C. 273, 80 B.C.L.R. (2d) 158, 1993 CarswellBC 149, [1993] 4 C.N.L.R. 158, 48 W.A.C. 273 (B.C. C.A. Jun 25, 1993) **(Judicially considered 14 times)**

Affirmed by

3 R. v. N.T.C. Smokehouse Ltd., 137 D.L.R. (4th) 528, [1996] 9 W.W.R. 114, [1996] 2 S.C.R. 672, 109 C.C.C. (3d) 129, 23 B.C.L.R. (3d) 114, 80 B.C.A.C. 269, 200 N.R. 321, 1996 CarswellBC 2307, 1996 CarswellBC 2308, 50 C.R. (4th) 181 (S.C.C. Aug 21, 1996) **(Judicially considered 40 times)**

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5 R. v. Alfred, 1993 CarswellBC 903, [1994] 3 C.N.L.R. 88, [1993] B.C.J. No. 2277 (B.C. S.C. Oct 25, 1993) **(Judicially considered 2 times)**

6 R. v. Nikal, [1993] 5 W.W.R. 629, 33 B.C.A.C. 18, 80 B.C.L.R. (2d) 245, 1993 CarswellBC 151, [1993] 4 C.N.L.R. 117, 54 W.A.C. 18, [1993] B.C.J. No. 1399 (B.C. C.A. Jun 25, 1993) **(Judicially considered 5 times)**

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