REGINA (Appellant) v. JERRY BENJAMIN NIKAL (Respondent)

[Indexed as: **R. v. Nikal**]

British Columbia Court of Appeal, Taggart, Lambert, Hutcheon, Macfarlane and Wallace JJ.A., June 25, 1993

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C. Harvey, Q.C., for the supporting Intervenor, the Pacific Fishermen's Alliance
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The accused, a Gitksan-Wet'suwet'en Indian, was charged with fishing without a licence contrary to s.4(1) of the *British Columbia Fishery (General) Regulations* made pursuant to s.43 of the *Fisheries Act*, R.S.C. 1985, c.F-14. His defence was that he was governed not by the *Fisheries Act* and its regulations but by the Gitksan-Wet'suwet'en Indian Fishing By-law made by the Moricetown Band whose village was adjacent to the Bulkley River where he was fishing when charged. The by-law was passed under the authority of s.81(1)(o) of the *Indian Act*, R.S.C. 1985, c.I-5.

The trial judge acquitted the accused on the grounds that the by-law took priority over the *Fisheries Act* and its regulations and constituted a complete defence. The trial judge held that by-laws pertaining to fish or fishing "on the reserve" were valid not only where the waters and fishing stations were part of the reserve but also where they were adjacent to, touching, against or at the reserve ([1989] 4 C.N.L.R. 143). An appeal by the Crown to the British Columbia Supreme Court was dismissed on other grounds ([1991] 1 C.N.L.R. 162). The court held that the by-law did not apply outside the surveyed boundaries of the reserve, and the words "on the reserve" could not be interpreted as embracing activity in waters touching, against, or at the reserve. However, the court held that the requirement to obtain a fishing licence constituted a prima facie infringement of the Aboriginal right to fish protected by s.35(1) of the *Constitution Act, 1982*. The Crown appealed on a question of law: did the appeal judge err in holding that the requirement to obtain a Indian Food Fish Licence infringed the accused's Aboriginal right to fish. The accused sought leave to cross appeal on the question whether the band by-law constituted a complete defence to the charge against him.

Held: Appeal allowed. Cross appeal by accused dismissed.

***per* Macfarlane J.A. (Taggart J.A., concurring)**

1. The requirement that an Indian hold a licence does not constitute a prima facie infringement of an Aboriginal right. It is part of a centralized scheme to manage the fishery and to ensure conservation and proper allocation of the resource. Licensing is reasonable and does not cause undue hardship. The licence is free and available to all band members. It does not deny a right to fish.

2. Although s.81(1)(o) of the *Indian Act* allows the band council to make by-laws for the preservation, protection and management of fish on reserve, the by-law in question did not constitute a defence to the charge. The words "on the reserve" do not include the waters of the Bulkley River. It was not the intention of the province to grant or convey the river bed by the conveyance of lands for the use and benefit of Indians. The creation of the Moricetown

Reserve did not involve a grant or conveyance of title or ownership to the Gitksan-Wet'suwet'en people. It affirmed their right to use and occupation of the land and in particular a right of access to their traditional fishery. There was no intention of applying the presumption ad medium filum aquae to Indian reserves for the purpose of giving an extended meaning to the words "on the reserve" in the *Indian Act*.

***per* Wallace J.A. (concurring):**

1. The jurisdiction to manage and regulate the fisheries lies solely with the federal government pursuant to s.91(12) of the *Constitution Act, 1867*. The assertion of an all-encompassing control over the fishery both within and outside the reserve, is not a right of self-regulation of band members, but is a claim to a right of self-government which infringes on the federal legislative jurisdiction. No Aboriginal right of self-government remained unextinguished after the distribution of powers between the province and the federal government pursuant to the Terms of Union, 1871. The jurisdiction over inland fisheries is exclusive to Parliament.

2. The words "on the reserve" in s.81(1)(o) of the *Indian Act* do not have an extraterritorial effect. A review of the use of that phrase in the *Indian Act* and an examination of the French text, together with the fact that the Wet'suwet'en Indian fishing by-law defines "waters of the bands" to be those "located upon or within the boundaries of the reserves", supports a construction of the phrase "on the reserve" as meaning in, or within, or inside the boundaries of the reserve.

3. The Bulkley River is a navigable river. The presumption ad medium filum aquae does not apply to navigable waters. Alternatively, if the Bulkley River is not a navigable river as it flows through the Moricetown Canyon, it was never the intention of the Crown that the presumption ad medium filum aquae should apply to the Bulkley River where it flows through the reserve. Accordingly, the fishery at the Moricetown Canyon is not on the Moricetown Reserve within the meaning of s.81(1)(o) of the *Indian Act* and the Moricetown Band By-law.

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

1. The words "on the reserve" in s.81(1)(o) of the *Indian Act* have the effect of limiting the scope of the band's by-law to the management of fish within the boundaries of the reserve.

2. The Wet'suwet'en people have an Aboriginal title to the exclusive possession, use and enjoyment of the reserve land and to the fishery in the Bulkley River where it passes through the reserve. They have an Aboriginal right of self-government and self-regulation under which they can control their own use and management of the fishery through their own institutions.

3. There was evidence that the accused was fishing in the exercise of his Aboriginal rights and the Aboriginal rights of the Wet'suwet'en people, and in accordance with customs, traditions and practices of the Wet'suwet'en people in relation to the Moricetown Canyon fishery. Those Aboriginal rights have not been extinguished.

4. The requirement that the accused hold an Indian Food Fish Licence is a prima facie interference with, and infringement of, his Aboriginal right to exercise his Aboriginal fishing rights in accordance with Wet'suwet'en customs, traditions and practices.

5. In 1986 the operation of the licensing system did not recognize the Aboriginal right of fishing for other than food purposes and it permitted no sales of fish even to provide funds to purchase other food. Because of the diametrically opposed views then held by the federal government and the Wet'suwet'en people about the nature of the Aboriginal right, there was no effective consultation with respect to the fishery and little or no attempt to consult or compromise between the parties. The licensing scheme was not justified by the needs of conservation or otherwise.

***per* Hutcheon J.A. (dissenting)**

1. A licence requirement, by itself, is within the power imposed on Parliament to manage and conserve the natural resource of the fisheries and does not infringe the Aboriginal right.

2. The phrase "on the reserve" refers to land within the boundaries of the reserve.

3. Although the evidence showed that the Bulkley River was navigable both above and below the Moricetown Canyon, the location used by the band for fishing, it was not navigable at that point. The ad medium filum aquae rule was applicable to the Bulkley River at Moricetown and was not rebutted. Accordingly, the river is "on the reserve" for the purpose of the by-law.

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MACFARLANE J.A. (Taggart J.A., concurring):

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PART I

INTRODUCTION

[para. 1] The accused, a member of the Gitksan-Wet'suwet'en people, was charged with fishing without a licence contrary to s.4(1) of the *British Columbia Fishery (General) Regulations* made pursuant to s.34 [now s.43] of the *Fisheries Act,* R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14] (the Regulations). His defence was that he was governed by the Gitksan-Wet'suwet'en Indian

Fishing By-law made by the Moricetown Band whose village was adjacent to the river where he was fishing when charged.

[para. 2] His Honour Judge Smyth of the Provincial Court of British Columbia (the "trial judge") acquitted the accused. His reasons for judgment are reported at [1989] 4 C.N.L.R.

143. He held that the by-law took priority over the *Fisheries Act*, and its regulations, and constituted a complete defence to the charge. In doing so he interpreted the meaning of the words "on the reserve" as used in s.81(o) of the *Indian Act*, and held at p.147:

> By-laws pertaining to fish or fishing "on the reserve" are valid not only where the waters and fishing stations concerned are part of the reserve but also where they are touching, against or at the reserve; in short, adjacent to it.

[para. 3] The Crown appealed to the Supreme Court of British Columbia. Mr. Justice Millward (the "summary appeal judge") dismissed the appeal, but on different grounds. His reasons for judgment are reported at (1990), [1991] 1 C.N.L.R. 162, [1991] 2 W.W.R. 359, 51 B.C.L.R. (2D) 247.

[para. 4] He held that the by-law did not apply outside the surveyed boundaries of the reserve, and that the geographic limitation imposed by the words "on the reserve" could not be interpreted as embracing activity in waters touching, against, or at the reserve, but not within it. (pp. 165-66).

[para. 5] He held that the requirement that Mr. Nikal obtain a fishing licence, which imposed conditions, constituted a prima facie infringement of the Aboriginal right to fish protected by s.35(1) of the *Constitution Act, 1982* (pp. 167 - 68).

[para. 6] He concluded, at p. 174:

> For the above reasons, I find that the Indian food fish licence imposed upon the respondent, and all the Wet'suwet'en people who fish in the Moricetown canyon, infringes upon their aboriginal rights as protected in s.35 of the *Constitution Act, 1982*. This infringement is not justified and, therefore, by s.52 of the *Constitution Act, 1982* is of no force or effect. The respondent, Mr. Nikal, stands acquitted of the charge.

[para. 7] The Crown seeks leave to appeal on this question of law:

> Did the learned Appeal Judge err in holding that the requirement that the Respondent hold an Indian Food Fish Licence infringed his aboriginal right to fish in the Moricetown Canyon in July of 1986?

[para: 8] Mr. Nikal seeks leave to cross appeal on the question whether the Band by-law constitutes a complete defence to the charge against him.

PART II

THE FACTS

[para. 9] The facts were stated succinctly by Judge Smyth at pp. 143-45:

> On July 20 and 23, 1986 officers of the Department of Fisheries and Oceans watched the defendant gaff salmon in the waters of the Bulkley River at Moricetown, British Columbia. Had he possessed the free permit to which as an Indian person he was entitled then what he was doing would have been lawful, but he had none and he is now charged with two counts of fishing without the authority of a licence or a permit, contrary to the *Fisheries Act*, R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14] and regulations.
>
> The village of Moricetown is adjacent to the Bulkley River at the place where the defendant was fishing and is included within the boundaries of Moricetown Reserve No. 1. The lands comprised in the reserve were conveyed by the provincial government to the Crown in Right of Canada in 1938, in trust for the use and benefit of the Indians. But the evidence is clear that this has been an important fishing place since long before the arrival of the white man, and the reason is not hard to discern. The canyon forms a natural obstacle to the upstream passage of the fish and so they must congregate and gather their strength before making the effort to surmount its turbulent waters. I have no doubt that the

history of the Indian people at Moricetown is in large measure the history of this fishery. I am equally confident that this reserve owes its existence to the recognition by both the federal and provincial governments of the importance of the place as a source of food for the Indians who lived there in 1938, to their ancestors and to those who have come after them.

The defence to these charges is that at the material times the defendant was governed not by the *Fisheries Act* and its regulations but by the Gitksan-Wet'suwet'en Indian Fishing By-Law which was made by the Moricetown Band on February 18, 1986 and registered by the Privy Council office on June 2, 1986 under number SOR/86-612. In its turn the by-law was made pursuant to s.81(1)(o) of the *Indian Act*, R.S.C. 1970, c.I-6 (now R.S.C. 1985, c.I - 5] which states:

> 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.

The by-law consists of a preamble and 59 sections touching on topics including fishing methods and prohibitions, the conservation and protection of fish, habitat protection and so
forth. It creates offences punishable on summary conviction by fine or imprisonment. Its provisions of immediate concern are found in ss.2(k), 2(r), 3 and 4(a):

2. The following definitions apply in this By-Law:

(k)"Gitksan-Wet'suwet'en Persons" means the persons of Gitksan-Wet'suwet'en ancestry who are eligible for membership in the Tribal Council; ...

(r)"Waters of the Bands" means all water, waterways, rivers or streams which are located upon, or within boundaries of the reserves set aside for the use and benefit of the Moricetown Band.

3. This By-Law applies in respect and over all waters of the Band.

4.(a) Gitksan-Wet'suwet'en persons are permitted to engage in fishing in waters of the Bands at any time and by any means except by the use of explosive materials, rockets, combustibles, projectiles, shell or other like substances, subject to variations or restrictions as may be made pursuant to this By-Law.

The prosecution conceded in written argument that "where the By-Law has geographic application it takes priority over the *Fisheries Act* of Canada and its regulations." Neither is there any shortage of evidence, nor was it argued otherwise that the defendant is a Gitksan-Wet'suwet'en person whose fishing methods conformed to the by-law. The by-law, it should be said, is of the force and effect of a federal regulation (*R*. v. *Jimmy* (1987), 15 B.C.L.R. (2d) 146, [1987] 3 C.N.L.R. 77, per Hinkson J.A. at p. 80 C.N.L.R.).

The evidence was presented and the case argued almost entirely on the basis that its outcome depends on determining whether the bed of the Bulkley River where the river flows through the reserve is in fact part of the reserve. I see this, with respect, as a narrow reading of the pertinent enactments that is not constrained by the ordinary sense of the words used.

I should add that the Bulkley River is bounded on each side by the Moricetown Reserve No. 1.

PART III

LEGISLATION

[para. 10] Section 7 of the *Fisheries Act* empowers the Minister to issue or authorize the issuance of fishing licences. Section 34 of the Act authorizes the making of regulations. Section 61 makes it an offence to contravene the regulations.

[para. 11] Section 4(1) of the regulations provides that no person shall fish except under the authority of a licence or permit.

[para. 12] Section 27(1) of the regulations provides:

> 27(1) In this section, "Indian food fish licence" means a licence issued pursuant to subsection (1.1).
>
> (1.1)The Minister may issue an Indian food fish licence to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.
>
> (1.2)Every Indian food fish licence shall set out
>
> (a) the time during which and the area in which fishing is permitted, and
> (b) the species of fish and the quantities thereof that may be taken and may provide for
> (c) the type, quantity and size of gear that may be used, and (d) the method of marking of fish.
>
> (1.3) No person fishing under the authority of an Indian food fish licence shall contravene the terms of that licence.

[para. 13] The summary appeal judge described the licensing scheme at p. 168:

> The DFO [Department of Fisheries and Oceans] issue native fishers Indian food fish licences throughout British Columbia. The requirements of the Indian food fish licences vary throughout the province in an attempt to adapt the licences to the particular bands they affect. The licences were provided free of charge and did not restrict the number of fish that could be caught. This scheme contemplated that the Wet'suwet'en could select the mode of fishing they wish to use, however, some methods are deemed too efficient and, therefore, forbidden. In this case, the respondent preferred to fish by gaff which was an accepted method. Further, the Moricetown Band could specify the location in which they want their members to fish.

[para. 14] If Mr. Nikal had obtained an Indian Food Fish Licence it would have permitted him to catch salmon solely to be used as food for himself and his family, at the place and by the means he was fishing, during the period July 20 until September 1, 1986.

PART IV

ISSUES

[para. 15] Whether Mr. Nikal is entitled to be acquitted because the licensing regime imposed by s.4(1) of the *British Columbia Fishery (General) Regulations* is inconsistent with s.35(1) of the *Constitution Act, 1982.*

Whether upon a proper interpretation of s.81(*o*) [now s.81(1)(o)] of the *Indian Act* the words "on the reserve" can mean within the boundaries of the reserve and in adjacent waters?

Whether the Bulkley River is "on the reserve" by reason of the application of the presumption ad medium filum aquae?

PART V

WHETHER MR. NIKAL IS ENTITLED TO BE ACQUITTED BECAUSE THE LICENSING REGIME IMPOSED BY S.4(1) OF THE BRITISH COLUMBIA FISHERY (GENERAL) REGULATIONS IS INCONSISTENT WITH S.35(1) OF THE CONSTITUTION ACT, 1982

[para. 16] The first issue raises these questions:

(i) What are the characteristics or incidents of the right at stake?

(ii) Does the requirement that an Indian hold a fishing licence by itself constitute a prima facie infringement of the Aboriginal right?

(iii) Is it a defence to a charge of fishing without a licence that, if a licence had been obtained, the conditions attached to the licence would have constituted a prima facie infringement of an Aboriginal right?

(iv) Has the respondent established that the conditions of the licence constitute a prima facie infringement of an Aboriginal right?

(i) *What are the characteristics or incidents of the right at stake?*

[para. 17] It is common ground that Mr. Nikal was exercising an unextinguished Aboriginal fishing right on July 20 and July 23, 1986.

[para. 18] In the judgment under appeal Mr. Justice Millward held, at pp. 167-68, that the Aboriginal right to fish includes:

(1) the right to choose the time of year when fishing will take place;

(2) the right to determine who will be the recipients of the fish for ultimate consumption;

(3) the right to select the purpose for which the fish will be used, i.e. food, ceremonial, or religious purposes;

(4) the right to determine the method or manner of fishing, and

(5) the right to follow the directions of the traditional leaders of the Band in conducting the fishery including the right not to be required to choose between a representative of the Department of Fisheries and the traditional leaders of the Wet'suwet'en people.

[para. 19] The right asserted by Mr. Nikal is the right of the Indian community at Moricetown to self-regulation of the fishery. The right upon which Mr. Nikal relies was described in his factum:

> 104. Self-regulation of the fishery is part of the s.35(1) right. This does not deny the Crown's overriding authority to manage the fishery. It simply requires the government to justify any interference with the right of self-regulation.
>
> 99. It is submitted that in order for the right to fish to have any substance it must include the right to carry on the fishery as it has traditionally been carried on with the people making the necessary decisions under the direction of their hereditary leaders as to when, where, how, what and for whom they would fish.

[para. 20] The Alliance of Tribal Councils (Intervenor) describes it this way:

> 11. These Intervenors submit that the First Nations continue to have this jurisdiction to regulate the exercise of their collective rights in the fishery, by means of their own customs, laws and beliefs. That jurisdictional component is an aspect of the right itself. It has never been extinguished. It has force and effect, and stands to be respected, in all circumstances when not in conflict with constitutionally valid laws made pursuant to Parliament's authority.

(ii) *Does the requirement that an Indian hold a fishing licence by itself constitute a prima facie infringement of the Aboriginal right?*

[para. 21] The criteria to apply in deciding that question is set forth in *R*. v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1112, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241 [p. 182 C.N.L.R.]:

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

> the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food.

[para. 22] In short, it is not every interference that must be subject to the justification analysis.

[para. 23] It is asserted on behalf of Mr. Nikal that it is an undue hardship, and a denial of the preference of an Indian person to insist that he must have a licence, rather than being allowed to exercise his rights according to the discretion of his leaders.

[para. 24] Although the licensing scheme, with which we are dealing in this appeal, was discussed by Dickson C.J.C. and La Forest in *Sparrow* at pp. 1088-90 [S.C.R.; pp. 167-69 C.N.L.R.], and although it was argued on behalf of Mr. Sparrow that "the holders of aboriginal rights may exercise those rights according to their own discretion" (p. 1100 [S.C.R.; p. 175 C.N.L.R.], citing *R*. v. *Simon*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366), and "that the right to regulate is part of the right to use the resource in the band's discretion" (p. 1102 [S.C.R.; p. 176 C.N.L.R.]), it was not suggested that licensing by itself constituted a prima facie infringement of s.35(1) of the *Constitution Act, 1982*.

[para. 25] At the heart of the submission on behalf of Mr. Nikal is the proposition that any government action affecting the right of self-regulation must be justified. If that is correct then the first question is not whether a prima facie infringement has been established by the holder of the right, but whether the Crown can justify its action. That is not the course set by *Sparrow*.

[para. 26] In asserting that the requirement of a licence is not an unreasonable limitation upon Aboriginal rights the Crown relies on *R*. v. *Agawa*, [1988] 3 C.N.L.R. 73, 53 D.L.R. (4th) 101, 43 C.C.C. (3d) 266 (Ont. C.A.). The accused was charged with fishing with a gill net without a licence. The accused was the member of a band which had decided not to apply for a band licence (although it had done so for 33 years) in order to test its Aboriginal rights. In that respect, the case was similar to this one in which the band took the position that it had a right of self-regulation, and would not recognize the licensing power of the Crown.

[para. 27] What was said by Blair J.A. in *Agawa* bears on the argument now made in this case, that licensing by itself is a prima facie infringement of the Aboriginal right of self-regulation. He said, at pp. 121-22 [D.L.R.; p. 90 C.N.L.R.]:

> Conservation, in my view, is manifestly the purpose of the licensing provisions in the regulations ...
>
> These concurrent findings were not disputed by counsel for the respondent who stated, as noted above, that the purpose of the challenge to the *Ontario Fishery Regulations* was to test Indian rights under s.35(1) of the *Constitution Act, 1982*. Since s.12(1) of the regulations, which requires a licence for gill-net fishing and applies to all residents of Ontario, serves a valid conservation purpose, it constitutes a reasonable limitation on the Batchawana Band's treaty right to fish and, therefore, does not infringe s.35(1) of the *Constitution Act, 1982*. From this, it follows that the appeal must succeed.

[para. 28] The Crown also referred to *R*. v. *Denny,* [1990] 2 C.N.L.R. 115, 55 C.C.C. (3d) 322 (N.S.C.A.), a case which was decided on the basis that regulations were of no force and effect because they failed to recognize the Indian right to take fish for food, where a surplus existed (p. 341). But Clarke C.J.N.S. expressed this general view at pp. 341-42 [C.C.C.; p. 133 C.N.L.R.]:

> These constitutionally guaranteed rights are not violated by the legislative exercise of reasonable regulation. The salmon fishery is entitled to be protected so that it may continue to thrive and prosper for the benefit of all who fish the waters salmon inhabit. This includes the right to license and to prohibit unsavoury practices in the manner by which fish are caught. It includes, as well, the right to require native Indians to be licensed to fish for food in waters adjacent to reserve lands. Any regulatory scheme must be consistent with the guaranteed constitutional rights of persons such as these appellants. Reasonable regulation for the purposes suggested in this paragraph will not be inconsistent with those rights but rather will achieve valid objectives that are in the interests of the native people and the preservation and enhancement of the fishery.

[para. 29] Both decisions were made prior to the judgment of the Supreme Court of Canada in *Sparrow* but I adopt that language as an expression of the view that licensing by itself is not unreasonable. I would add that, in most circumstances, it ought not to constitute an undue hardship.

[para. 30] The summary appeal judge in this case said that a licensing scheme which ensures the proper management and conservation of a fishery reserve is not unreasonable. But he concluded that the licensing scheme to which Mr. Nikal was subject was "not rationally connected to that goal". (p. 173, in discussing valid objective.)

[para. 31] I understand that his reason for finding a prima facie infringement was that the conditions of the licence, if Mr. Nikal had obtained one, would have impacted on the Aboriginal right to an unreasonable extent and would have created hardship. In particular, he said, at pp. 167-68:

> ... I conceive it is important to note also that the aboriginal right includes the right, not the privilege but the right, to follow the directions of the traditional leaders of the band in conducting the fishery, the place of fishery and the method of fishery, and the right not to be required to choose between an employee or representative of the Department of Fisheries and the traditional leaders of the Wet'suwet'en people.
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> In putting that question, it seems to me it leads me to conclude the requirement is unreasonable and prima facie constitutes an undue hardship and that the first requirement under the ruling in *Sparrow*, therefore, that the onus set out in that procedure has been met and a prima facie infringement is shown.

[para. 32] If that means to say that a right of self-regulation is an absolute right, and that any government action affecting it is a prima facie infringement of s.35(1) then I disagree. It is contrary to *Sparrow*. I should add that contrary to the view of the summary appeal judge, Aboriginal fishers are required to comply with federal regulations even though such regulations at times may be at variance with the directions of traditional leaders.

[para. 33] I conclude that the requirement that an Indian hold a licence does not constitute a prima facie infringement of an Aboriginal right. Licensing is a natural part of a centralized scheme to manage fisheries in order to ensure conservation and to achieve a proper allocation of the resource. It is a simple means of determining where and by whom fishing is done and it may provide data necessary to properly manage the resource. Licensing is reasonable and does not cause undue hardship. The licence is free, and available to all band members. It does not deny a right to fish; it is a small part of the regulation of fishing.

(iii) *Is it a defence to a charge of fishing without a licence that, if a licence had been obtained, the conditions attached to the licence would have constituted a prima facie infringement of an Aboriginal right?*

[para. 34] The Crown submits that if one is charged with fishing without a licence it is no defence to say that, if the person had obtained a licence, the conditions attached to the licence would have constituted a prima facie infringement of s.35(1).

[para. 35] In the context of an Aboriginal rights case I do not think that the licence and its conditions can be separated. If it can be shown that a licence was not obtained because the conditions would be unreasonable, would constitute an undue hardship, or deprive an Indian of the preferred means of exercising his or her Aboriginal right, then the requirement that one hold a licence subject to such conditions could constitute a prima facie infringement of an Aboriginal right. In such a case the licensing requirements would be unconstitutional, and a charge based on that requirement would fail.

(iv) *Has the respondent established that the conditions of the licence constitute a prima facie infringement of an Aboriginal right?*

[para. 36] The summary appeal judge approached the question of prima facie infringement on the basis that the court must look at the licensing regime as a whole, including the conditions involved. He said that it was the impact on the people as a whole, not just the impact on the individual which should be considered. That approach is consistent with the proposition that fishing rights are communal rights, although individual members of the community may exercise the rights, and be protected under s.35(1) of the *Constitutional Act, 1982.*

[para. 37] I have already referred to a passage from the reasons of the summary appeal judge (p. 168) in which he said that licensing conditions varied from area to area, and were intended to reflect local circumstances and the wishes of the people they affected. In some years, previous to 1986, a band licence was issued to the Moricetown Band, and individuals fished pursuant to the conditions of that licence. There is no evidence that the conditions were not satisfactory to the band leaders. In 1986 it became necessary to issue individual licences because the band had taken the position that its by-law should apply. It also feared that if it accepted a band licence that might be construed as an abandonment of its Aboriginal right to self-regulation. Such a position had been advanced by the Crown in other litigation.

[para. 38] Thus it was not the position of the band that individual members should decline to take licences because the conditions of the licence were unreasonable, caused undue hardship, or interfered with the preferred means of fishing. In fact, the conditions were framed to suit the band, and its individual members. If Mr. Nikal had applied for a licence he could have done all the things that he was doing on July 20 and July 23, 1986. His preference was to use a gaff. That was acceptable to the band and to the DFO. By contrast, Patrick William Mitchell, a band member, obtained a licence to use a set net. It was understood that the fisher had the right to select those persons in the extended Indian family who would use and consume the fish. There were limitations but, in my opinion, in the particular circumstances of this case, they ought not to have been characterized as unreasonable, as causing undue hardship, or depriving the community of the preferred means of exercising their right.

[para. 39] The conditions of the licence did not lie at the heart of this case. The real complaint was that licensing, in any form, deprived the community of its autonomy, either by depriving it of its Aboriginal right or a statutory right, under s.81(o) of the *Indian Act*, to self-regulation. The summary appeal judge emphasized that factor in finding that it was unreasonable and an undue hardship to require a band member to choose between the DFO and the directions of the traditional leaders of the Indian community. I do not think that was a relevant consideration on the question whether a prima facie infringement has been established.

[para. 40] In my opinion, given the circumstances of this case, the respondent failed to establish a prima facie infringement of an Aboriginal fishing right.

PART VI

WHETHER UPON A PROPER INTERPRETATION OF S.81(0) [NOW S.81(1)(0)] OF THE *INDIAN ACT* THE WORDS "ON THE RESERVE" CAN MEAN WITHIN THE BOUNDARIES OF THE RESERVE AND IN ADJACENT WATERS?

[para. 41] Mr. Nikal submits the by-law passed pursuant to s.81(o) provides a complete defence to the charge.

[para. 42] The band fishing by-law was registered by the Privy Council on June 2, 1986, under number SOR/86-612. It was made pursuant to s.81(o) of the *Indian Act,* R.S.C. 1970, c.I-6. Such a by-law has the full force and effect of a federal regulation unless it is disallowed by the Minister within a period fixed by s.82(2) of the *Indian Act*. This by-law was not disallowed.

[para. 43] It is common ground that if it applies the by-law takes priority over the *Fisheries Act* and its regulations, and affords a complete defence to Mr. Nikal.

[para. 44] The question for the court is whether, by enacting s.81(o), Parliament has empowered band councils to enact by-laws which operate in the river at the reserve, where the bed of the river is not within the boundaries of the reserve.

[para. 45] Counsel for the parties repeat their submissions in *R*. v. *Lewis* [reported *supra*]. The reasons in *Lewis* are being handed down concurrently with these reasons. For the reasons given by Mr. Justice Wallace in *Lewis*, with which I agree, the by-law cannot afford a defence to Mr. Nikal.

PART VII

WHETHER THE BULKLEY RIVER IS "ON THE RESERVE" WITHIN THE MEANING OF THE INDIAN ACT BY REASON OF THE APPLICATION OF THE PRESUMPTION AD MEDIUM FILUM AQUAE

[para. 46] Prior to the enactment of the *Land Act Amendment Act*, S.B.C. 1961, c.32, the ad medium filum aquae presumption applied in British Columbia with respect to non-tidal waters which were not navigable in fact: *Rotter* v. *Canadian Exploration Ltd*. (1960), [1961] S.C.R. 15, 33 W.W.R. 337.

[para. 47] The presumption may be rebutted if an intention to exclude it is either expressly or impliedly indicated by legislation authorizing a grant, or by the conveyance of the land. Such a contrary intention may be inferred from the subject matter or the surrounding circumstances: *Fares* v. *R*., [1932] S.C.R. 78.

[para. 48] The pertinent facts may be summarized in this way:

(a) The waters in Moricetown Canyon are non-tidal waters.

(b) No finding was made as to whether the Bulkley River was navigable. But the evidence showed that the terrain was such that the canyon itself was not navigable. I will assume for the purposes of this judgment that the waters in question are not navigable.

(c) The surveyor established the boundary of the reserve by reference to the ordinary high water mark of the Bulkley River.

(d) The provincial system of land surveying, which developed in colonial times, and which received statutory recognition by the *Land Act Amendment Act* of 1879 recognized natural water boundaries. The instructions to surveyors required the surveyor to "meander" or traverse the banks of large rivers. In establishing the boundaries of the Moricetown Reserve the surveyor followed those instructions.

(e) The Official Plan of the Reserve shows Moricetown I.R. No. 1 as being comprised of 1,333 acres. This plan is accurate, within one acre, if the bed of the river and the part of a lake adjacent to the north west corner of the reserve, both of which are marked in blue on the Official Plan, are excluded. If the lands beneath these bodies of water were included, the area of the reserve would be approximately 100 acres greater.

(f) Provincial *Land Acts* from 1875 onwards generally provided for uniform land surveying practices which included the "meandering" or traversing of the banks of large rivers, lakes and seacoasts so as to obtain the exact acreage of each fractional section of land bounding such features. Lands below the ordinary high water mark were "unsurveyed" and remained in the ownership of Crown.

(g) The Moricetown Reserve was allotted in 1892, but the reserve process was fraught with difficulties. The Indians claimed rights to the foreshore in both tidal and non-tidal waters.

Canada and British Columbia took the position that the Indians' foreshore rights in respect of the reserves were the same as those of other riparians. Ultimately, by the Scott-Cathcart Agreement March 22, 1929, which provided the form of conveyance from the province to the Dominion of Indian reserves outside the railway belt, the Dominion and provincial governments rejected any Indian claim to the foreshores.

PART VIII

ASSUMING THE PRESUMPTION APPLIES, IS IT REBUTTED BY THE CIRCUMSTANCES OF THIS CASE?

[para. 49] The first question to be answered is what circumstances may be taken into account when determining whether the presumption ad medium filum aquae is rebutted?

[para. 50] In *Rotter* it was held that the fact the surveyed boundary was at the top of the river bank (high water mark) was not a circumstance which would rebut the presumption. The reason was that standard surveying practices dictated that placement. It was not intended to exclude ownership by the riparian owner of the river bed. At p. 26 Locke J. said:

> The rights of the grantee would not be held to be limited in any respect by the fact that the lands were described in reference to such a plan showing the boundary as the bank of the river containing the stream and not in midstream.

[para. 51] *Rotter* was a case where there were no circumstances to rebut the presumption. It was not a case where a specific claim to foreshore rights and ownership of the river bed had been made and rejected beforehand. If it had been then I think the decision would have been different.

[para. 52] In *Fares*, Duff J. said, at p. 83:

> The *prima facie* rule, which declares a presumption or embodies a principle of construction, may be overborne by circumstances establishing satisfactorily a contrary intention.
>
> The presumptive construction is not excluded by the fact that the lands are described by reference to a plan by colour and by quantity, or by metes and bounds, so long as the land is shewn to be bounded by the body of water or by the highway as the case may be.

[para. 53] The ratio decidendi in *Fares* was summarized by Locke J. in *Rotter* at p. 28:

> The patents issued defined the area of each of the parcels of land in acres. The land had been surveyed up to the border of the lake as it was at the time when the patents were issued, but no reference was made in these instruments to the survey. The lands purchased by the company were sold under the provisions of the *Dominion Lands Act*, R.S.C. 1886, c.54, which permitted the sale of such lands only as had been surveyed at such prices as might be fixed by the Governor in Council and at a price not less than $1 per acre.
>
> Duff, J. (as he then was), considered that the letters patent could not be construed as conveying more than the acreage referred to in them, since to do so would be to convey unsurveyed lands without consideration, contrary to the terms of s.29 of the Act. He held that what he referred to as the presumptive rule and also the presumptive construction of grants of riparian lands entitling the owners to non-navigable waters *ad medium filum* was rebutted by this fact and by the further fact that, at the time title to the lands was acquired by the claimants, the lands had long since ceased to be riparian lands.

[para. 54] *Fares* was a case where the statute authorized a grant of a specified acreage (and no more) at a certain price. To hold that additional acreage in the form of the lake bed was included in the grant was completely inconsistent with the legislative intention.

[para. 55] The circumstances in this case are not like those in *Rotter* or in *Fares*. In my opinion it was not the intention of the Province to grant or convey the river bed by the conveyance in British Columbia Order in Council 1036. Ownership of the river bed is not critical to preserving and protecting the Aboriginal right to fish. Access to the Aboriginal fishery is the critical factor, which fishery has been preserved and is now protected by s.35(1) of the *Constitution Act, 1982*, as applied in *Sparrow*.

[para. 56] Such an intention is inconsistent with the firm rejection by the province and by Canada of the Indian's claim to foreshore rights.

[para. 57] Prior to the execution of the Scott-Cathcart Agreement, which led to the conveyance by the province to Canada in 1938 of lands for the use and benefit of Indians, the Crown took the position that ownership of the foreshore or river bed should be held by the province. Ownership by the Crown of the foreshore and river bed was not inconsistent with continued access by the Indians to their traditional fishery, and was consistent with the right of other citizens to uninterrupted access to those waters. The Indians took issue with that position, and their claim to ownership of the foreshore and river bed was specifically rejected.

[para. 58] Such an intention is inconsistent with the proposition which I stated in *Delgamuukw* v. *British Columbia* [[1993] 5 W.W.R. 97] that the underlying title to land in the province, indeed the ownership of land, is vested in the Crown, subject to the burden of an Indian right of use and occupation. The creation of the Moricetown Reserve did not involve a grant or conveyance of title or ownership to the Gitksan Wet'suwet'en people. It affirmed their right to use and occupation of the land, and, in particular a right of access to their traditional fishery. The English property law

rule in question applies to the interpretation of grants and conveyances of lands. It has no application to circumstances which do not involve a grant, but which recognize or affirm existing rights.

[para. 59] Although the policy of the province, as described in cl. 5 of the Scott-Cathcart Agreement was to give the Indians the same riparian rights as other upland owners I do not think it was intended to apply the presumption ad medium filum aquae to Indian reserves for the purpose of giving an extended meaning to the words "on the reserve" in the *Indian Act*. I think the Crown is right in submitting that the rights in common are rights of access. All riparian owners or occupiers stand in the same position with respect to fishing in a non-tidal, non-navigable river. Under the present law (*Land Act*, R.S.B.C. 1979, c.214, ss. 52, 53) the presumption no longer applies to anyone, except in the limited circumstances set out in the Act. Whether that applies to a conveyance by the province to Canada of lands for the use and benefit of Indians I do not decide.

[para. 60] My conclusion is that the Bulkley River is not "on the reserve", within the meaning of the *Indian Act* by reason of the application of the presumption ad medium filum aquae.

PART IX

CONCLUSIONS

[para. 61] I would grant leave and allow the appeal by the Crown. I find that Mr. Nikal was not entitled to be acquitted because the licensing regime imposed by s.4(1) of the *British Columbia Fishery (General) Regulations* is inconsistent with s.35(1) of the *Constitution Act, 1982*.

[para. 62] I would grant leave but dismiss the cross appeal of the respondent. I find:

(a) The words "on the reserve" in s. 81(o) of the *Indian Act* do not include the waters of the Bulkley River.

(b) The Bulkley River is not "on the reserve" within the meaning of the *Indian Act* by reason of the application of the presumption ad medium filum aquae.

WALLACE J.A. (concurring):

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PART I

INTRODUCTION

[para. 63] On July 20th and 23rd, 1986, Mr. Nikal, a Wet'suwet'en Indian and member of the Moricetown Indian Band was fishing in the Moricetown Canyon in the Bulkley River, where the Wet'suwet'en Indians have fished since time immemorial. He caught a salmon on each occasion. He was charged with fishing without a licence, contrary to s.4(1) of the *British Columbia Fishery (General) Regulations*. Mr. Nikal's defence was that he was fishing under the authority of a Gitksan-Wet'suwet'en Indian Fishing By-law passed under the authority of s.81(1)(o) of the *Indian Act*, R.S.C. 1985, c.I-5.

[para. 64] The licence required by s.4(1) of the Regulations was provided to members of the Indian band free of charge and did not restrict the number of fish that could be caught. Licence holders could select the mode of fishing they wished to use although some methods, deemed too efficient, were forbidden. Mr. Nikal was fishing by gaff which was an accepted method of fishing salmon.

PART II

LEGISLATION

[para. 65] Section 81(1)(o) of the *Indian Act* provides, in part:

> 81.(1) The council of a band may make by-laws…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*. (Emphasis added)

[para. 66] The Moricetown Band on 18th February, 1986, passed a by-law entitled the Gitksan-Wet'suwet'en Indian Fishing By-law SOR/-86-612. It provides, in part:

> 2. The following definitions apply in this by-law:
>
> > (r) "Waters of the bands" means all waters, waterways or streams which are *located upon or within boundaries of the reserves* set aside for the use and benefit of the Moricetown Band.
>
> 3. This by-law applies in respect and over all waters of the Band.
>
> 4.(a) Gitksan and Wet'suwet'en persons are permitted to engage in fishing in waters of the Band at any time and by any means ... (Emphasis added)

[para. 67] If the by-law applies to the Moricetown Canyon it has the force and effect of a federal regulation and provides a complete defence to the charges against Mr. Nikal: *R*. v. *Jimmy*, [1987], 15 B.C.L.R. (2d) 145, [1987] 5 W.W.R. 755 (C.A.).

[para. 68] The *British Columbia Fishery (General) Regulations* provide, in part:

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

PART III

TRIAL COURT REASONS

[para. 69] The Provincial Court trial judge, whose reasons are reported in [1989] 4 C.N.L.R. 143 at 146, referred to the *Concise Oxford Dictionary* (7th ed.) definition of the word "on" which states:

> so as to be supported by or attached to or covering or enclosing.
>
> so as to be close to, in the direction of, touching, arrived at, against, just at (house is on the shore road; on Fifth Avenue; on the right; North; far side; both sides of).

[para. 70] The trial judge then considered the pertinent terms of the by-law and he concluded [pp. 147-48]:

> 3. By-laws pertaining to fish or fishing "on the reserve" are valid not only where the waters and fishing stations concerned are part of the reserve but also where they are touching, against or at the reserve; in short, adjacent to it.
>
> 4. The Gitksan-Wet'suwet'en Indian Fishing by-law was valid and effective at the material time to cover fishing in the waters of the Bulkley River at Moricetown Canyon because that river is at least touching, against or at the reserve.
>
> It follows from this that while there is no doubt that the defendant was fishing on July 20th and 23rd and no doubt that he was doing so contrary to the *Fishing Act* and its Regulations, he was acting in conformity with the by-law and the by-law prevails irrespective of whether the bed of the Bulkley river is part of the lands reserved in trust for the Indians at Moricetown.

Accordingly, he acquitted Mr. Nikal.

PART IV

SUMMARY APPEAL COURT REASONS

[para.71] The summary appeal court judge concluded "on the reserve", as used in s.81(1)(o) of the *Indian Act*, could not be read to include land outside of the reserve boundaries. He found that the trial judge was in error in reaching such a conclusion.

[para. 72] The summary appeal court judge, however, concluded that the licence requirement, per se, and the conditions it imposed, constituted a prima facie infringement of Mr. Nikal's Aboriginal right to fish. He then considered the issue of justification and concluded the infringement imposed by the requirement of a licence was not justified. He applied s.52 of the *Constitution Act, 1982* and ruled that Regulation, s.4(1) was invalid and of no effect. On this basis he upheld the trial judge's acquittal of Mr. Nikal.

PART V

ISSUES TO BE RESOLVED

I. Was Mr. Nikal's Aboriginal right to fish infringed by the *British Columbia Fishery (General) Regulations*, s.4(1) and, if so, is such an infringement justified?

II. Is the fishing site at the Moricetown Canyon within the meaning of "on the reserve" as that term is used in s.81(1)(*o*) of the *Indian Act* and the Moricetown Band Fishing By-law?

OPINION

I. *Was Mr. Nikal's Aboriginal right to fish infringed by the licence requirement provided in s.4(1) of the Fishery Regulations and, if so, is such an infringement justified?*

[para. 73] One must first determine whether the Aboriginal right to fish encompasses an Aboriginal right of the band "elders" to manage and regulate the fishery in the Bulkley River.

[para. 74] As I appreciate the submission of Mr. Nikal's counsel, it is that the Aboriginal right to fish for sustenance purposes, both on and off the reserve, includes the right of the elders of the band to direct the band members as to how and when they may fish and the right and obligation of band

members to follow the elder's direction subject, however, to the right of the federal Crown to regulate the fishery for conservation and proper management purposes.

[para. 75] Counsel submitted that the Wet'suwet'en people fish for, and under the direction of, the elder who owns and manages the fishing site. Furthermore, the elders had stated in the Feast Hall that fishers do not need and should not accept Department of Fishery licences in any circumstances because the elders considered the Department had no authority over Indian fishing. They had stated that those who ignored the direction of the elders would be shunned by the community and prohibited from fishing at the more productive sites. This position was contrary to previous and long-standing Band policy of fishing under the authority of Department of Fishery licences.

[para. 76] The elders' direction to the members of the band to not accept Department of Fishery fishing licences was not based on any objection to the terms of the licence or its conditions. Rather, the direction was given by the elders in furtherance of a power struggle between the band and the federal government as to which entity should have the authority to regulate the fishery in the Bulkley River.

[para. 77] Mr. Nikal's counsel characterized the authority of the elders to regulate and manage the fishery in the Bulkley River including the determination of who will fish; where, when and how they will fish; the species of fish they will catch; and the purpose and people for whom they will fish to be an Aboriginal right of "self-regulation" protected by s.35(1) of the *Constitution Act, 1982*. Further, counsel asserts this Aboriginal right requires the federal Crown to justify any interference with that right of "self-regulation".

[para. 78] Accordingly, counsel submitted that the regulations requiring every fisher to have a licence is, in and of itself, an unjustifiable infringement of the Wet'suwet'en peoples' Aboriginal right to fish.

[para. 79] In my view the jurisdiction to manage and regulate the fisheries lies solely with the federal government pursuant to s.91(12) of the *Constitution Act, 1867*. The assertion of an all-encompassing control over the fishery, whether within or outside the reserve, is not properly characterized as a right of self-regulation of band members; rather, it is a claim to a right of self-government which infringes on the federal legislative jurisdiction. As I concluded in *Delgamuukw* (para. 470-85), no Aboriginal right of self-government remained unextinguished after the exhaustive distribution of powers between the province and the government of Canada pursuant to the *Terms of Union, 1871*. The jurisdiction over inland fisheries conferred by s.91(12) is *exclusive* to Parliament.

[para. 80] Any authority of the band elders to regulate or otherwise manage the fisheries can only be the result of the delegation of such authority by Parliament to the Wet'suwet'en Band. Section 81(1)(o) of the *Indian Act*, which I consider later in these reasons, is one example of such delegation. I observe that, except for s.81(1)(o), no other legislative authority has been delegated to the band, its elders, or members with respect to the Bulkley River fishery. How the elders regulate the conduct of the members of their bands, on and off the reserve, and their authority to do so, may be a matter of concern to those members who accede to such self-regulation. That is not the issue in this litigation. In my view, the elders do not have the Aboriginal right to excuse their members from complying with federal laws and regulations respecting inland fisheries. The force and effect of the federal laws and regulations must turn on their validity, or lack thereof, as determined by the courts.

[para. 81] I have had the privilege of reviewing the reasons of my colleague Justice Macfarlane. I adopt his reasons and the conclusion he has expressed, at paragraphs 21 to 33, that the licensing requirement imposed by s.4(1) of the *British Columbia Fisheries (General) Regulations* does not constitute a prima facie infringement of Mr. Nikal's Aboriginal fishing right.

[para. 82] I also agree with his conclusion, expressed at para. 35, that the licence and its conditions can not be separated and that the regulatory requirement of a licence to fish, depending on the conditions attached to the licence, could in some circumstances constitute a prima facie infringement of the fishers' Aboriginal fishing rights. For the reasons stated by Justice Macfarlane (para. 37-40) I concur that, in the instant case, Mr. Nikal has not demonstrated that the conditions of the licence constituted a prima facie infringement of Mr. Nikal's Aboriginal fishing right. Accordingly, there is no necessity to address the issue of justification.

II. *Is the fishing site on the Bulkley River within the meaning of "on the reserve" as that term is used in s.81(1)(o) of the Indian Act and the Moricetown Band Fishing By-law?*

[para. 83] The answer to this question involves these considerations:

(a) Does a purposive construction of s.35(1) of the *Constitution Act, 1982* result in the inclusion of the Bulkley River fishery within the meaning of "reserve"?

(b) Does a purposive construction of s.81(1)(*o*) of the *Indian Act* and the Moricetown Band's fishery by-law result in the inclusion of the Bulkley River fishery within the meaning of "reserve"?

(c) Does the presumption ad medium filum aquae apply to the Bulkley River so as to include the fishery within the reserve?

(a) *Section 35(1) of the Constitution Act, 1982*

[para. 84] Counsel for Mr. Nikal has submitted that s.35(1) must be interpreted in a "broad purposive" manner favourable to the Aboriginal people and their perspective of what comes within their reserve. It is further submitted that it is in this framework that the ambit of the band's fishing by-law authority must be determined. The suggestion is that an appropriate interpretation of s.35(1) would support a broader territorial scope of the by-law authority to include the regulation and management of the fishery located in the Bulkley River.

[para. 85] A similar argument was addressed to the court in *R*. v. *Vanderpeet* [reported *infra*]. In my reasons in that case (para. 73-78), I express the view that the purpose of s.35(1) is to protect existing Aboriginal rights from unjustified infringement or extinguishment by legislation and regulation. I concluded s.35 was not passed to change the scope and nature of Aboriginal rights existing in 1982 nor, in my view, is its purpose to enlarge or extend the scope and effect of the band's fishing by-law beyond the territorial boundaries of the reserve. Accordingly, I reject counsel's submission on this issue.

(b) *Section 81(1)(o) of the Indian Act*

[para. 86] In the *Lewis* case (para. 17-27), I rejected the construction of the phrase "on the reserve" to include waters *outside* the reserve but immediately adjacent to it. I was persuaded to do so by a review of the *Indian Act* and the use of the phrase "on the reserve" in that Act with respect to a wide range of activities which, on any reasonable construction, would normally be confined to the territorial limits of the reserve. The regulatory powers extend to such matters as: consenting to the granting of timber reserves (s.57); the regulation of the harvest of fur bearing animals (s.81(1)(o)); the prohibition of manufacture and sale of intoxicants (s.85.1); trespassing (s.80(i)(p)); and, by-laws regulating a variety of activities (s.81(a), (p), (p.1), (p.2)). I considered in that case that the phrase "on the reserve" used in the Squamish Indian Band By-law No. 10 and s.81(1)(o) of the *Indian Act* should receive the same construction as that phrase receives where used throughout the *Indian Act* and the bylaw.

[para. 87] Moreover, an examination of the French text supports a construction of the phrase "on the reserve" as meaning in, or within, or inside the boundaries of the reserve. The by-law power in s.81(1)(o) is stated in French to apply “*dans la reserve*". The preposition “*dans*" is clear and unambiguous.

[para. 88] These considerations, together with the fact that the Wet'suwet'en Indian fishing by-law defines "waters of the bands" to be those which are "located upon or within the boundaries of the reserves", lead me to conclude that Parliament never intended that such a fishing by-law, passed by band council pursuant to s.81(1)(o) of the *Indian Act*, should have an extra-territorial effect.

(c) *The ad medium filum aquae presumption*

[para. 89] The summary appeal court judge did not consider the application of the presumption ad medium filum aquae to the waters of the Bulkley River, adjacent to the Moricetown Indian Reserve.

[para. 90] If the presumption applies to these waters then the river bed would be considered part of the reserve and the Gitksan-Wet'suwet'en Indian Fishing By-law would be applicable to the site where Mr. Nikal caught his fish.

[para. 91] A person, who purchases land where the grant, by reference to a plan, shows one of its boundaries to be the bank of a *non-tidal, non-navigable* river is entitled, against the grantor, to claim riparian ownership ad medium filum aquae, in the absence of evidence from the circumstances or description to show a contrary intention: see Rotter v. *Canadian Exploration Ltd*. (1960), [1961] S.C.R. 15, 26 D.L.R. (2d) 133, 33 W.W.R. 337.

[para. 92] Two interesting questions arise when considering the application of the presumption ad medium filum aquae to rivers adjacent to Indian reserves. They are, firstly, whether the presumption applies only in relation to "ownership" of land abutting a body of water and can not be asserted by one having only an occupancy interest, and, secondly, whether the presumption is applicable at all to the unique circumstance of a conveyance from the provincial Crown to the federal Crown to hold the reserve "in trust for the use and benefit of the Indians of the Province of British Columbia" (B.C. Order-in-Council 1036). Counsel, however, did not address either of those issues and, in the light of the conclusion I have reached in this case, they may well be dealt with on another occasion when the court will have the benefit of submissions by counsel.

[para. 93] The application of the presumption turns on two further considerations:

(i) Is the Bulkley River a navigable river?

(ii) Assuming the Bulkley River is not navigable, has the presumption ad medium filum aquae been rebutted?

(i) Is the Bulkley River a navigable river?

[para. 94] The fishing site is located at the foot of turbulent rapids where the river passes through the Moricetown Canyon. The question arises whether this impediment to navigation turns an otherwise navigable river into one that is properly characterized at law as "non-navigable".

[para. 95] The question was considered by Anglin J. (as he then was) in *Keewatin Power Co*. v. *Town of Kenora* (1906), 13 O.L.R. 237 (H.C). The case concerned the Winnipeg River which begins at the Lake of the Woods and flows to Lake Winnipeg. During the course of the river, various falls and rapids are encountered necessitating numerous portages between stretches of good water. The volume of water was such that, if natural obstacles were overcome by canals or other means, navigation from Lake Winnipeg to Fort Frances would be quite feasible.

[para. 96] Anglin J. at p.243, observed:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

[para. 97] And further [pp. 243-44]:

> The rule laid down by the district Judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great, while they last, as to prevent the use of the best instrumentalities for carrying on commerce, *but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be sothe river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars*. (Emphasis added)

[para. 98] And at p.263:

> But it is argued that in any event the *ad medium* rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability *entirely* ceases the stream must be deemed a public highway, though above that point it is private property: *The Queen* v. *Robertson*, 6 S.C.R. 52. (Emphasis added)

> The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown, *juris publici*, and in the riparian owners, *juris privati*, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the east branch of the Winnipeg river is presently impossible, the engineers say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable *in posse*? I think it is.
>
> There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed *ad medium filum*: *Re State Reservation at Niagara Falls*, (1884), 16 Abbott's N.C. (N.Y.) 159, 187; 37 Hun 507, 547-8.

[para. 99] The *Keewatin* decision was varied by the Ontario Court of Appeal ((1908), 16 D.L.R. 184) on the basis that English law on the subject was applicable to Ontario without modification. The Court of Appeal did not comment on the navigability of a river, where such navigation is impeded by falls and rapids.

[para. 100] In *Coleman* v. *Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608 (Ont. H.C.), Henry J, at pp. 613-15, set out a number of principles relating to the navigability of rivers in Canada, one of which was that:

> Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points.

[para. 101] The question of whether the Bulkley River was navigable was not raised at trial or before the summary appeal court. The evidence at trial discloses that a railway line runs along the southerly side of the Bulkley River and a highway runs along the northerly side.

[para. 102] In 1911, when the railroad construction was taking place, a Mr. Wiggs O'Neill of Smithers, British Columbia, operated a large power boat launch above the Moricetown Canyon - capable of carrying 32 passengers - to carry freight on the Bulkley River and to service the railway and road building construction crews. Since that time, because of the availability of other means of transportation, there has been little reason to use the river for the commercial transportation of goods.

[para. 103] In the last decade or two there has, however, been an increased commercial interest in using the river for recreational purposes. Fishing and river guides, utilizing jet boats, drift boats, inflatable rafts and other craft travel the Bulkley River for many miles on either side of the Moricetown Canyon.

[para. 104] Although a few intrepid souls have kayaked through the canyon itself at low water, it has been regarded for most purposes as non-navigable. The canyon, however, is easily portaged. The Bulkley River, in the main, is less difficult to run than is the upper Fraser River. The interest in travelling down the river to preferred fishing locations combined with the relatively recent interest in canoeing and kayaking, has given rise to a viable commercial tourist industry.

[para. 105] The evidence of the commercial and recreational activities carried on through the use of a variety of river craft on both sides of the canyon and the ease with which the canyon itself can be by-passed by portaging leads me to conclude the Bulkley River is not remarkably different from many Canadian rivers such as the Ottawa, the Fraser, and the Winnipeg - which serve as transportation routes despite obstructions to their uninterrupted navigability by reason of falls, rapids and sand bars. Accordingly, in my view, the evidence reveals that the Bulkley River throughout its length, from a point well below the Moricetown Canyon to well above it, is properly classified as a navigable river. The presumption ad medium filum aquae does not apply to navigable waters: see *Flewelling* v. *Johnston,* [1921] 2 W.W.R. 374 (Alta. C.A.); *Iversen* v. *Greater Winnipeg Water District* (1921), 57 D.L.R. 184, [1921] 1 W.W.R. 621 (Man. C.A.). Accordingly, the presumption does not apply to that portion of the river which flows through the Moricetown Canyon of the Bulkley River.

(ii) Assuming the Bulkley River is not navigable, has the presumption been rebutted?

[para. 106] If I am in error in concluding the Bulkley River is a navigable river as it flows through Moricetown Canyon, I would adopt the reasons and conclusions of my colleague Justice Macfarlane (para. 49-60) that it was never the intention of the Crown that the presumption ad medium filum aquae should apply to the Bulkley River where it flows through the Moricetown Indian Reserve. Accordingly, the fishery at the Moricetown Canyon is not on the Moricetown reserve within the meaning of s.81(1)(o) of the *Indian Act* and the Moricetown Band By-law.

PART IV

DISPOSITION

[para. 107] For the reasons stated, I would allow the appeal.

[para. 108] **LAMBERT J.A. (dissenting):** On 20 July, 1986 Mr. Nikal was fishing for salmon with a gaff in Moricetown Canyon on the Bulkley River at Moricetown in central British Columbia. He was photographed by officers of the Department of Fisheries and Oceans. He was fishing at the same place and in the same way on 23 July, 1986. Again he was photographed. Mr. Nikal was identified by the Fisheries Officers, who discovered that he did not have an Indian Food Fish Licence.

[para. 109] Mr. Nikal is a Wet'suwet'en Indian and lives on Moricetown Reserve No. 1, a major Wet'suwet'en reserve located on both sides of the Bulkley River at Moricetown Canyon, where the salmon rest before tackling the Canyon on their way to the spawning grounds. Moricetown Canyon is the last Indian fishing site through which the spawning salmon must pass in the Skeena-Bulkley River system.

[para. 110] Mr. Nikal was charged with two counts that he "unlawfully did fish without a licence or permit contrary to s.4(1) of the *British Columbia Fishery (General) Regulations*". One count related to 20 July and the other to 23 July, 1986.

[para. 111] The trial took place before Judge Smyth in the Provincial Court of British Columbia at Smithers. The trial lasted for several days and the evidence was carefully marshalled and presented. Judge Smyth decided that Gitksan-Wet'suwet'en Indian Fishing Bylaw SOR 86/612 which became effective in the Spring of 1986 applied to fishing in Moricetown Canyon and was a complete defence to the charges. Judge Smyth's decision is reported at [1989] 4 C.N.L.R. 143.

[para. 112] The Crown appealed to the Summary Conviction Appeal Court. The appeal was heard by Mr. Justice Millward who dismissed it, but for different reasons than those of Judge Smyth. Mr. Justice Millward did not think the Gitksan-Wet'suwet'en Indian Fishing Bylaw applied to fishing in Moricetown Canyon. But he decided that Mr. Nikal was fishing in the exercise of his Aboriginal rights and that the licencing requirement constituted an infringement of those rights: in short, it was a prima facie infringement which was not justified under the tests in *R*. v. *Sparrow*, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. 263, 111 N.R. 241, a decision of the Supreme Court of Canada which had just been handed down when Mr. Justice Millward gave his decision. Mr. Justice Millward's decision is reported at 51 B.C.L.R. (2d) 247, [1991] 1 C.N.L.R. 162, [1991] 2 W.W.R. 359.

[para. 113] The Crown has applied for leave to appeal on this single question of law:

> Did the learned Appeal Judge err in holding that the requirement that the Respondent hold an Indian Food Fish Licence infringed his aboriginal right to fish in the Moricetown Canyon in July of 1986.

Counsel for Mr. Nikal applied for leave to cross-appeal on the question of whether the Gitksan-Wet'suwet'en Fishing Bylaw provided a complete defence. I do not propose to discuss whether a cross-appeal was required in order to raise that issue. I propose to regard both issues as properly before the Court and as issues which contain questions of law on which leave to appeal has been granted.

[para. 114] I propose to turn first to the Gitksan-Wet'suwet'en Fishing Bylaw. I have considered similar bylaws in my reasons in *R*. v. *N.TC. Smokehouse Ltd*. [reported *infra*] and *R*. v. *Lewis* [reported *supra*], both of which are being handed down at the same time as the reasons in this appeal. In both cases I said that the key question was whether Parliament, when it enacted s.81(1)(o) of the *Indian Act* in 1951, intended to confer on Indian bands the power to make bylaws which control the management of major fisheries which, in turn, constitute the reason for the

placement of the reserves at the places where they were located. In both cases I said that the surveyed boundaries of the reserve did not encompass the river in which the fish ran. In both cases I said that the boundaries should not be regarded as having been extended to the middle of the current of the river by the operation of the ad medium filum aquae rebuttable presumption. And in both cases I concluded that the words "on the reserve" in s.81(1)(o) had the effect of limiting the bylaw's scope to the management of fish within the actual boundaries of the reserve.

[para. 115] In this case Moricetown Reserve No. 1 occupies both banks of the Bulkley River at Moricetown Canyon. But the evidence about the survey of the reserve and about the conveyance from the province to Canada of the land included within the reserve is compelling evidence that the boundaries of the reserve run along both banks of the river and that the river itself is not included within those boundaries. I find the evidence about the acreage of the reserve being described as 1,330 acres in the conveyance from the province to Canada particularly compelling. The acreage would be 100 acres more if the Bulkley River were included.

[para. 116] While Mr. Nikal might be thought to have stood on the reserve when he was gaffing fish in the river (though the evidence seemed to indicate that he was below high water mark) the power to make bylaws controlling the management of the fish relates not to fishing on the reserve but to fish on the reserve. In my opinion the fish caught by Mr. Nikal were not on the reserve.

[para. 117] Judge Smyth interpreted the words "on the reserve" to include fish which were in water "touching, against, just at, or within" the boundary of the reserve. For the reasons set out in my judgments in *N.T.C. Smokehouse* and in *Lewis* I think that Judge Smyth's interpretation of s.81(1)(o) is not correct. I think the correct interpretation is "within the boundaries of the reserve". There are concurrent findings of fact by Judge Smyth and Mr. Justice Millward that the Bulkley River is not within the boundaries of Moricetown Reserve No. 1. I do not think that the location of the boundaries is a question of law alone. I think that there is a body of evidence in support of that finding and I would not interfere with it.

[para. 118] It follows that I would not accede to the defence based on the Gitksan-Wet'suwet'en Fishing Bylaw.

[para. 119] That is not to say that the Wet'suwet'en people do not have an Aboriginal title to the exclusive possession, use and enjoyment of the reserve land and to the fishery in the Bulkley River where it passes through the reserve. They do. They also have an Aboriginal right of self-government and self-regulation under which they can control their own use and management of the fishery through their own institutions. I have discussed those types of rights in my reasons in *Delgamuukw* v. *British Columbia* [[1993] 5 W.W.R. 97] which are being handed down simultaneously with my reasons in this appeal. I will not repeat here what I said there, other than to say that the division of legislative powers in the *Constitution Act, 1867* relates only to plenary law-making power for the government of everyone within a sovereign state and not to the internal self-regulation of specific groups, within the group itself, and in relation to the group's own resources. There is no claim in this case and there was no claim in the *Delgamuukw* case to supplant in any way the law-making powers assigned by the *Constitution Act*, *1867* to Parliament and the Legislatures.

[para. 120] I propose now to turn to the infringement issue.

[para. 121] There was evidence that when Mr. Nikal was fishing on 20 and on 23 July, 1986 he was fishing in the exercise of his Aboriginal fishing rights and the Aboriginal fishing rights of the Wet'suwet'en people, and in accordance with the customs, traditions and practices of the Wet'suwet'en people in relation to the Moricetown Canyon fishery. For the same reasons as I have given in *N.T.C. Smokehouse*, which rely, in turn, on the reasons of Chief Justice Dickson and Mr. Justice La Forest, for the Supreme Court of Canada, in *R*. v. *Sparrow*, it is my opinion that those Aboriginal rights have not been extinguished. Mr. Nikal's right to fish in this way was recognized, affirmed and guaranteed by s.35 of the *Constitution Act, 1982*. But that right is neither absolute, at one end of the scale, nor meaningless, at the other. It is a genuine right and its exercise must be permitted to occur in its full vigour. But it can be regulated in accordance with a justifiable legislative objective reached by justifiable regulatory means. As was said in *Sparrow* at p. 1110 [S.C.R.; p. 181 C.N.L.R.]:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where

> exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has *some negative effect* on any aboriginal right protected under s.35(1). (my emphasis)

[para. 122] At pp. 1111- 19 [S.C.R.; pp. 182-87 C.N.L.R.] in *Sparrow*, Mr. Justice Dickson and Mr. Justice La Forest have set out an analysis of how to approach the question of whether there has been a prima facie interference with, or a prima facie infringement of, an Aboriginal right, and whether the Crown has discharged the burden of justifying any such interference with, or infringement of, the exercise of the Aboriginal right.

[para. 123] The first question in this case in relation to infringement is whether there has been a prima facie infringement of the Aboriginal right.

[para. 124] On that question the *Sparrow* case gives guidance. It discusses how the question of prima facie infringement should be approached in a case such as this. But it is important to remember that the analysis in the *Sparrow* case was delineated with respect to a charge of fishing with a net length of 45 fathoms when the Musqueam Band's Indian Food Fishing Licence imposed a condition that driftnets were to be limited to 25 fathoms in length. The infringement question, in its dual aspects of prima facie infringement and justification for the infringement, was entirely considered in the context of whether restricting a member of the Musqueam people from fishing with a net longer than 25 fathoms was a justifiable interference with his Aboriginal fishing rights. In that context the prima facie infringement tests propounded by the Supreme Court of Canada are all demonstrably relevant. The reason is that one has to understand the nature of the Aboriginal right in order to understand whether there has been a prima facie infringement. Perhaps there never was an Aboriginal right to fish in that place with such a net length. Maybe the larger size of the net is not an exercise of the Aboriginal right by a modern method but rather a deviation from the Aboriginal right itself. Those questions were all live questions in the *Sparrow* case. But what was not a live question was whether the requirement that the fishing be done under a licence was a requirement which in itself constituted an infringement of the Aboriginal fishing right. A band licence had been obtained in the *Sparrow* case. The licence had been obtained by the Band and it had been obtained voluntarily. No issue was raised about whether the licence requirement itself constituted an infringement. And there was no reason why the Supreme Court of Canada should have considered that issue.

[para. 125] The situation is different here. Mr. Nikal was charged with fishing without a licence. His Aboriginal right to fish is not dependent on holding a licence. Requiring him to hold a licence, is, in itself, an interference with his right to fish. And photographing him while he is fishing and prosecuting him for the offence, indicates the severity of the interference. When Mr. Nikal decided to go fishing in July 1986 in the exercise of his Aboriginal rights and in accordance with Wet'suwet'en practices, customs and traditions, it was an interference with his exercise of that right to require him to find his way into Smithers and fill out forms and answer questions and wait until the licence was granted, or alternatively wait until it was mailed to him, all before he could go fishing. In my opinion, requiring Mr. Nikal to hold an Indian Food Fish Licence is a prima facie interference with, and infringement of, his Aboriginal right to exercise his Aboriginal fishing rights in accordance with Wet'suwet'en customs, traditions and practices. In the words I have quoted from *Sparrow* at p. 1110 [S.C.R.; p. 181 C.N.L.R.]: the licence requirement has "some negative effect" on the Aboriginal right protected under s.35(1).

[para. 126] That brings me to the question of justification. The first aspect of this question relates to the objective of the regulatory scheme. The second aspect relates to the means by which it is put into place and the means by which it is carried out. In relation to means, Mr. Justice Dickson and Mr. Justice La Forest in *Sparrow* said this at p. 1119 [S.C.R.; p. 187 C. N. L. R.]:

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

> *We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians*. (my emphasis)

[para. 127] As we struggle towards a sensible solution in this difficult area, the final outcome, it seems to me, must incorporate a system of regulation of the fishery in order to ensure conservation and the continuance of the supply of fish both at sea and in the river. That system must be controlled, in my opinion, by one single organization with power to make decisions for the whole length of the river system, and at sea, so as to control conservation of the resource throughout the system. And that body should consult with all the users of the resource throughout the system to endeavour to secure a consensus and voluntary compliance with agreed or otherwise fairly determined conservation goals. Such a scheme may well require a form of licensing in order to ensure reporting and to enforce catch limitations and if it includes licensing for fishers in the ocean and in the lower reaches of the river it might well also require licensing for those engaging in the highest fishery on the river.

[para. 128] But in 1986 the system of regulation did not recognize the Aboriginal right of fishing for other than food purposes and it permitted no sales of fish even to provide funds to purchase other food to attain a balanced diet. The federal government was taking the position that any Aboriginal right to fish for salmon and to sell salmon for food had been extinguished. The federal government did not recognize the Wet'suwet'en rights of self-government and self-regulation of the Moricetown Canyon fishery through Wet'suwet'en institutions. In 1986 the Chiefs of Wet'suwet'en Houses did not wish to concede that the Minister of Fisheries and Oceans had power, by issuing or refusing to issue a licence, to decide whether any Wet'suwet'en people had the right to fish and, if so, which persons, and at which times, and in what way. Those concerns were heightened by the impending trial of the major land claim case brought by the Wet'suwet'en people and now known as *Delgamuukw* v. *The Attorney General of British Columbia*. That concern was realized in fact when the federal Crown argued at trial in the *Delgamuukw* case that the acceptance of statutory licences reflected an abandonment of Aboriginal rights. In 1986, because of the diametrically opposed views then held by the federal government, on the one hand, and the Wet'suwet'en people, on the other hand, about the nature of the Aboriginal rights of the Wet'suwet'en people, there was no effective consultation with respect to the Moricetown Canyon fishery and little or no attempt to consult or compromise between the representatives of the Department of Fisheries & Oceans and the representatives of the Wet'suwet'en people.

[para. 129] In that context, and considering only what occurred in 1986, I conclude that the licensing system as it was then operated was not consistent with what have now been recognized to be the true rights of the Wet'suwet'en people. Whatever view may be taken of the objective of the licensing scheme at that time, the manner of putting it into effect and carrying it out without the cooperation of the Wet'suwet'en people, and directly contrary to the wishes of the Chiefs of Houses of the Wet'suwet'en people, was not in accordance with the principles set out in *Sparrow* that in order to be justified a legislative scheme must have as little interference with or infringement upon the exercise of the Aboriginal right as possible.

[para. 130] The conclusion that the requirement of holding a licence is itself not justified in order to achieve the goal of conservation is supported by the decision of the Supreme Court of the United States in *Tulee* v. *State of Washington*, 315 U.S. 681 (1942) where Mr. Justice Black delivered the opinion of the court to that effect. It is true that in that case a fee was required for the licence, but as I read the reasons of Mr. Justice Black, the licensing system without a fee would also have been contrary to the exercise of the Aboriginal right as confirmed by the 1859 Treaty and would not have been justified by the needs of conservation.

[para. 131] I add also that the question of whether there has been as little infringement as reasonably possible seems to me to be a mixed question of law and fact; that Mr. Justice Millward, in the Summary Conviction Appeal Court in this case, did not misconceive the applicable law; and that whether he applied it to the facts to produce the correct result does not raise a question of law alone, but rather a mixed question of law and fact with which this Court may not interfere on an appeal from the Summary Conviction Appeal Court.

[para. 132] I would dismiss the Crown appeal from the acquittal of Mr. Nikal.

HUTCHEON J.A. (dissenting):

Para. No.

PART I

INTRODUCTION

[para. 133] The respondent, Jerry Benjamin Nikal, was acquitted in the provincial court of two charges of fishing without the authority of a license or permit, contrary to the *Fisheries Act* and regulations. The appeal by the Crown to the summary conviction appeal court was dismissed and the Crown has appealed to this court on this single question of law:

> Did the learned Appeal Judge err in holding that the requirement that the Respondent hold an Indian Food Fish Licence infringe his Aboriginal right to fish in the Moricetown Canyon in July of 1986.

[para. 134] That single question of law raises several issues that I will list after I quote the essential facts from the reasons of the trial judge, Judge D. I. Smyth, which are reported at [1989] 4 C.N.L.R. 143 at 143-44:

> On July 20 and 23, 1986 officers of the Department of Fisheries and Oceans watched the defendant gaff salmon in the waters of the Bulkley River at Moricetown, British Columbia. Had he possessed the free permit to which as an Indian person he was entitled then what he was doing would have been lawful, but he had none and he is now charged with two counts of fishing without the authority of a licence or a permit, contrary to the *Fisheries Act*, R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14] and regulations.
>
> The village of Moricetown is adjacent to the Bulkley River at the place where the defendant was fishing and is included within the boundaries of Moricetown Reserve No. 1. The lands comprised in the reserve were conveyed by the Provincial Government to the Crown in Right of Canada in 1938, in trust for the use and benefit of the Indians. But the evidence is clear that this has been an important fishing place since long before the arrival of the white man, and the reason is not hard to discern. The canyon forms a natural obstacle to the upstream passage of the fish and so they must congregate and gather their strength before making the effort to surmount its turbulent waters. I have no doubt that the history of the Indian people at Moricetown is in large measure the history of this fishery. I am equally confident that this reserve owes its existence to the recognition by both the federal and provincial governments of the importance of the place as a source of food for the Indians who lived there in 1938, to their ancestors and to those who have come after them.

I add this fact that the Bulkley River passes through the centre of the reserve lands.

PART II

TRIAL JUDGMENT

[para. 135] The trial judge gave effect to the defence that at the material times Nikal was governed not by the *Fisheries Act* but by the Gitksan-Wet'suwet'en Indian Fishing By-law made by the Moricetown Band on February 18, 1986.

PART III

SUMMARY CONVICTION APPEAL COURT

[para. 136] Mr. Justice Millward held that the By-law did not apply to fishing in the Bulkley River because the river was not "on the reserve". Pursuant to s.81(1)(o) of the *Indian Act*, the authority of a council of a band to make by-laws concerning fishing was confined to land (including water) inside the reserve boundaries.

> 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;

[para. 137] Mr. Justice Millward then went on firstly to hold that the licensing regime constituted a prima facie infringement of s.35 of the *Constitution Act, 1982* and secondly, that the infringement could not be justified. Thus Nikal had met the first test of infringement of s.35 laid down by the Supreme Court of Canada in *R*. v. *Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 111 N.R. 241 and the Crown had failed to meet the second test of justification. The reasons are reported at [1991] 1 C.N.L.R. 162, [1991] 2 W.W.R. 359, 51 B.C.L.R. (213) 247.

PART IV

ISSUES

[para. 138] The question of law raises the following issues:

(1) Does the license requirement in the regulation to the *Fisheries Act* constitute an infringement of the Aboriginal right to fish?

(2) If the answer to (1) is in the affirmative, is the license requirement "justified" under the test laid down in *Sparrow*?

(3) Did the trial judge err in his interpretation of "on the reserve" in s.81(1)(o) to include the Bulkley River, adjacent to the reserve?

(4) Does the presumption ad medium filum sequence apply to the Bulkley Canyon at Moricetown?

(5) If the answer to (4) is in the affirmative, has the Crown rebutted the presumption?

(1) *License Requirement*

[para. 139] Nikal was charged with two counts of fishing without a license. I note that he was not charged with any breach of a condition of a license. His first defence was that by reason of his Aboriginal right to fish he did not need a license.

[para. 140] The appeal judge held that the license requirement constituted a prima facie infringement of Nikal's Aboriginal right to fish. I quote the findings on this issue (at pp. 167-68):

> The short answer to the question of whether or not the legislation and the derivative consequences of the legislation, that is the licensing regime, whether that interferes with the aboriginal right is apparent when one considers that the aboriginal right includes the right to choose the period of time, whether early in the year when the ice is still in the river, or after the end of August, up to a date in September, when steelhead are normally taken, the right to select persons intended to be the recipients of the fish for ultimate

> consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial or religious purposes, and the method or manner of fishing and I conceive it is important to note also that the aboriginal right includes the right, not the privilege but the right, to follow the directions of the traditional leaders of the band in conducting the fishery, the place of fishery and the method of fishery, and the right not to be required to choose between an employee or representative of the Department of Fisheries and the traditional leaders of the Wet'suwet'en people

[para. 141] With respect, I do not think that the conditions of the license are in question in this case. The question is whether the requirement of a license infringed Nikal's Aboriginal right to fish.

[para. 142] The tests for infringement were laid down in *R.* v. *Sparrow* in this passage at pp. 1112-13 [S.C.R.; pp. 182-83 C.N.L.R.]:

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

[para. 143] As to the facts, by an agreement made with the band council in 1982, the Department of Fisheries and Oceans issued a band licence for the fishing season in that year. In 1984 and 1985, the band council refused to accept a band licence and the Department reverted to individual licenses. In 1986, a license was readily available to Nikal, for free, to fish at the time and place he was fishing and with the gear that he preferred.

[para. 144] As to the law, I consider that in the decision in *R*. v. *Sparrow* (cited above), the Supreme Court of Canada accepted that a license requirement, by itself, is within the power imposed on Parliament to manage and conserve the natural resource of the fisheries. Whether a condition of the license, such as the length of the net, infringes s.35 is a separate and distinct question and it was on that question, alone, that the new trial was ordered in *Sparrow.* The assumption throughout the reasons for judgment was that the requirement of a license did not infringe the Aboriginal right.

[para. 145] That assumption may very well explain the refusal of leave to appeal, several months after *Sparrow* was decided, in *R*. v. *Agawa*, [1988] 23 C.N.L.R. 73, 53 D.L.R. (4th) 101, 43 C.C.C. (3d) 266 (Ont. C.A.). The Ontario Court of Appeal held in *Agawa* that the licensing requirement was a "reasonable limitation" on the Band's treaty right to fish. The treaty in question affirmed the Aboriginal right to fish.

[para. 146] In both *Sparrow* and *Agawa* the license in issue was a band license. As I have noted, a band license was offered in 1986 but was refused by the band council. In those circumstances, I am of the view that the individual license requirement resorted to by the Department did not infringe Nikal's Aboriginal right to fish. The requirement, itself, was not unreasonable and did not impose undue hardship. Nor did the requirement, itself, deny to Nikal his preferred means of exercising his Aboriginal right to fish.

[para. 147] Mr. Pape, counsel for the Alliance of Tribal Councils, submitted that:

> 11. These Intervenors submit that the First Nations continue to have this jurisdiction to regulate the exercise of their collective rights in the fishery, by means of their own customs, laws and beliefs. That jurisdictional component is an aspect of the right itself. It has never been extinguished. It has force and effect, and stands to be respected, in all

circumstances when not in conflict with constitutionally valid laws made pursuant to Parliament's authority.

31. The licensing requirement constituted a prima facie interference in this case, because it was an absolute prerequisite to the exercise of the right. As such it had a substantial "negative effect" on the right of fishing. Such a pre-condition goes to the heart of the exercise of the right. It causes a more fundamental interference than would the usual type of restriction, such as a requirement that fishing be done by a particular method, or at a particular time or place.

[para. 148] As I have noted, it is implicit in *Sparrow* that the Aboriginal right to fish is subject to the federal power to regulate by means of a license. I agree with Mr. Whitehall, counsel for the Attorney-General of Canada, that the concept of Aboriginal rights is not so broad as to enhance the notion of the power to legislate in the manner suggested in the submissions I have quoted and that there can be no question that the legislative authority in relation to fisheries rests with the Parliament of Canada. *Sparrow* is authority for the proposition that a licensing regime is within that legislative power and is not, in itself, an infringement of the Aboriginal right to fish.

(2) *Justification*

[para. 149] Because the answer I gave to (1) is in the negative, I need not answer (2).

(3) "*On the reserve*"

[para. 150] I quote again for convenience the provision that authorized the council of a band to enact by-laws relating to fish

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;

[para. 151] The trial judge concluded that Bulkley River was "on the reserve" for these reasons at 146:

In what way is the power shaped by the expression "on the reserve"?

Of the word "on" *The Concise Oxford Dictionary* (7th ed.) says in part:

so as to be supported by or attached to or covering or enclosing.

so as to be close to, in the direction of, touching, arrived at, against, just at (house is on the shore, road; on Fifth Avenue, on the right, North, far side, both sides of).

It is apparent that there is a sense in which the words "on the reserve" may be interpreted so as to include not only fishing places and waters that are part of the lands conveyed in trust but also places and waters that are not, so that s.81(1)(o) may be construed to warrant subordinate legislation concerning fish and fishing at places and in waters that are merely touching, against or at the reserve. I think that there is no doubt that the Bulkley River, if not within the reserve, is at least touching against or at it. This seems to me to be a reading of the enactment that is entirely within Parliament's constitutional power to legislate in relation to "Indians, and Lands reserved for the Indians" (s.91(24) *Constitution Act, 1867*). It avoids the anomaly of seeing Indians for whom lands have been reserved as fishing stations adjacent to waters that are not part of their reserves treated differently as to their fishing rights from Indians whose reserves include the beds of fishable waters. The Indians, the lands, the fisheries are all matters of federal legislative competence. Where the facts show as decisively as in the present case that they are held together with links forged of history, culture and economy, I should not want to undertake the "extremely difficult" task of separating them except under a clear legislative command to do so. Section 81(1)(o) is acknowledgement of the importance of fishing in the life of many Indian bands and is one of the ways by which the use and benefit of a reserve like the one at Moricetown may be enhanced for the band for which it was set apart (*Indian Act*, s.18).

[para. 152] The judge on appeal disagreed with those conclusions at 165:

> In my respectful opinion, the trial judge was in error in reaching those conclusions. The phrase "on the reserve" must be given in its ordinary meaning in context to which it was found in the *Mitchell* case in the Supreme Court of Canada [*Mitchell* v. *Peguis Indian Band*, [1990] 3 C.N.L.R. 46, 71 D.L.R. (4th) 193]. The Chief Justice explains that the principles must be understood in context of this Court's sensitivity to the historical and continuing status of the aboriginal people in Canadian society. Mr. Justice La Forest says, different considerations must apply in the case of statutes relating to Indians than apply in the case of treaties.
>
> Dealing with statutes, in particular the Indian Act, he said, in effect, it is appropriate to interpret in a broad manner, provisions that are aimed at maintaining Indian rights and to interpret narrowly, provisions aimed at limiting or abrogating those rights.
>
> With those statements in mind, "on the reserve" cannot fairly be read as including land outside of the reserve boundaries. Other considerations also apply. The clear boundary for application of by-laws in s.81 of the *Indian Act* must be set. Any proper interpretation of the words "on the reserve" should apply throughout the Act. Any other approach would lead to
> inconsistencies in the interpretation of the Act.

[para. 153] Apart from the meaning to be given to the expression "on the river", Mr. Grant, counsel for Nikal, submitted that all of the evidence of events leading up to the establishment in 1899 of the reserve on the Bulkley River at Moricetown Canyon demonstrated that the fishery was intended to be part of the reserve. He cited, among other material, the Walkem Report of 1875; the Memorandum in 1876 of Instructions to Commissioners and Commissioner O'Reilly's assurances on September 18, 1891, to the Indian people.

[para. 154] Against that material, we have the evidence at trial of Mr. Donald Duffy, the Surveyor-General for British Columbia, confirming that, in his opinion, the survey of the reserve that accompanied its establishment excluded the Bulkley River. In addition, we know that the instrument conveying the reserve from the province to the Dominion of Canada listed the acreage at 1330 acres whereas if the river area had been included an additional 100 or more acres would have been involved.

[para. 155] The trial judge appears to have accepted this evidence in preference to that of Mr. David Nielsen, a surveyor called on behalf of Nikal. I say this because the trial judge placed his conclusion, not on Nielsen's evidence that the river was within the reserve, but on his interpretation of the words "on the reserve", that extends to waters "touching, against or at the reserve".

[para. 156] With respect, I agree with the conclusion of Mr. Justice Millward that the phrase "on the reserve" used throughout the *Indian Act* refers to land within the boundaries of the reserve and that is the meaning to be given to the phrase in s. 81. No doubt, as he noted at 166, a powerful case can be made for "the proposition that the Crown's intention over the years has been to reserve and preserve to the Indian people at Moricetown a traditional fishery". That has not been accomplished by either the allotment, nor the subsequent transfer by the province to the Dominion of the Reserve by Order in Council 1036.

(4) *Ad medium filum aquae*

[para. 157] No express finding has been made in this case as to whether the Bulkley River was navigable or non-navigable at Moricetown Canyon. There was evidence at trial that the Bulkley River was navigated both above and below the Canyon by commercial fishing guides and tour operators using jet boats, drift boats and inflatables. There was also evidence that on occasion recreational canoeists and kayakers run the rapids at Moricetown Falls.

[para. 158] Mr. Grant, counsel for Nikal, submitted that "it cannot be seriously argued that the Bulkley River at Moricetown is navigable". No doubt this submission is based on the fact that the drop from the top of the rapids to the bottom of the falls is between one hundred and twenty and two hundred feet.

[para. 159] For the purposes of this appeal I think we must accept that the Moricetown Canyon is not navigable. The decision of the Supreme Court of Canada in *Rotter* v. *Canadian Exploration*

Ltd., [1961] S.C.R. 15, 33 W.W.R. 337, is authority for the proposition that the ad medium filum aquae rule is in force in British Columbia and applicable to non-tidal non-navigable rivers. On that authority, the rule is applicable to the Bulkley River at Moricetown.

(5) *Has the Crown rebutted the presumption?*

[para. 160] In *Flewelling* v. *Johnson* (1921), 59 D.L.R. 419 at 424-25, [1921] 2 W.W.R. 374, it was said that the presumption is "easily rebuttable by the term of the grant and the *surrounding circumstances* and more easily in the case of a grant from the Crown." (Emphasis added)

[para. 161] We are told that the form of conveyance followed in Order in Council 1036 by which the reserve land was conveyed by the province to the Dominion on 29 July 1938 was the form of conveyance agreed to in the Scott-Cathcart Agreement of 22 March 1929. In that agreement cl. 5 had this to say about Indian claims to the foreshore:

> It was urged by the Dominion representatives that the 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 land.

[para. 162] In the light of that agreement, I do not understand how it could be said that as between the province and the Dominion the grant rebutted the presumption. All of the submissions on the part of the Crown are directed to the point that the rights of upland owners were rights of access only. If the waters were navigable that would be a valid point but *Rotter* v. *Canadian Exploration* (cited above) decided that in British Columbia the upland owner of land adjacent to a non-tidal, non-navigable river was entitled to the benefit of the ad medium filum aquae rule.

[para. 163] Then it was submitted that the survey system of the Province developed in colonial times and recognized in 1879 by the *Land Act Amendment Act*, rebutted the presumption. Mr. Duffy testified that the surveyor, Skinner, laid out the reserve along the ordinary high water mark of the Bulkley River.

[para. 164] I have already concluded that the trial judge appeared to accept the evidence of Duffy on this point. It follows that the survey intended to exclude and did exclude land below the ordinary high water mark of the river from the parcel surveyed, set aside as reserve, and ultimately transferred to Canada for the band.

[para. 165] However, this was the very circumstance that the Supreme Court of Canada in *Canadian Exploration* held was not sufficient to rebut the presumption. In that case the boundary of the lot on the survey plan filed in the Land Registry office was along the top of the bank. The title was ordered to be amended to add "and the lands immediately adjoining the same to the west ad medium filum aquae of the Salmo River as of May 28, 1945" (at 33).

[para. 166] In my opinion, the rule applied and was not rebutted. Accordingly, by the application of the rule, the river was "on the reserve" for the purpose of the by-law.

[para. 167] It follows that I would dismiss the appeal of the Crown.