DAVID DENNY, LAWRENCE JOHN PAUL AND THOMAS FRANK SYLLIBOY (Appellants) V. HER MAJESTY THE QUEEN (Respondent)

[Indexed as: R. V. Denny]

Nova Scotia Supreme Court, Appeal Division, Clarke C.J.N.S., Hart, Jones, Macdonald, and Matthews JJ.A., March 5, 1990

B. H. Wildsmith, for the appellants
J.D. Bissell, Q.C. and M.A. Pare, for the respondent

The appellants appeal their convictions for fishing contrary to the provisions of the *Fisheries Act,* R.S.C. 1970, c.F-14 and the Regulations made pursuant thereto.

The appellant, Denny was convicted on the charges that he did "catch and retain salmon by means of a net" contrary to s. 20(1.1) of the *Nova Scotia Fishery Regulations* and s.77 of the *Atlantic Fishery Regulations,* and for the illegal possession of salmon, contrary to s.19 of the *Fisheries Act,* R.S.C. 1970, c.F-14. At the time he was arrested, Denny was fishing in Indian Brook for himself and for the appellant Paul. Denny was using the boat of the appellant Paul. In addition, one of the three nets that Denny was using belonged to Paul. Paul was convicted of the unlawful possession of cod, contrary to s.14 of the *Atlantic Fishery Regulations.* The cod had been caught in the net of Paul by Denny.

The appellant Sylliboy, who was fishing in the Afton River, was convicted on charges of fishing with a snare, contrary to s.6(4) of the *Nova Scotia Fishery Regulations,* and the illegal possession of a snare, contrary to s. 6(5)(a) of the same regulations. All three were fishing off-reserve for food.

The appellants argued that they have a constitutionally protected aboriginal and treaty right to fish for food. They further argued that those rights take precedence over all other usages of fish, including the commercial and sports fisheries, once the needs of conservation have been met. Denny and Paul led evidence, uncontested by the Crown, that a surplus of salmon existed in Indian Brook after provision had been made for conservation.

The respondent Crown argued that, at April 17, 1982, the appellants had no existing aboriginal or treaty rights worthy of protection.

Held: Appeal allowed. Convictions quashed. Acquittals entered.

1. Aboriginal rights originate in the pre-contact self-governing status of the aboriginal peoples. They persist until extinguished by surrender or valid legislation.

2. The appellants have an aboriginal right to fish in the waters in question, which has not been extinguished by treaty or by legislation.

3. The *Nova Scotia Fisheries Regulations* passed under the *Fisheries Act* is evidence of the federal government's intention to recognize and preserve an Indian food fishery, which fishery attracts the protection of s.35 of the *Constitution Act, 1982.*

4. The social and cultural importance of fishing to native communities is recognized and will be given priority after conservation.

5. As regards the charges against Denny, the excess after the needs of conservation have been met has been proved.

6. As regards the charges against Paul and Sylliboy, since no evidence was led to the contrary, it is reasonable to assume that a resource surplus existed in each case.

7 To the extent that the regulations preclude the appellants from exercising their constitutional rights, they are of no force and effect.

8. No comment was made on a possible treaty right to fish.

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CLARKE C.J.N.S.: These appeals involve the aboriginal and treaty rights of Nova Scotia Micmac Indians to fish for food. The appellants are three Nova Scotia Micmac Indians who were convicted

of offences contrary to the *Fisheries Act,* R.S.C. 1970, c.F-14 (now R.S.C. 1985, c.F-14) and regulations made pursuant to the Act.

The trials of the appellants David B. Denny (Denny) and Lawrence John Paul (Paul) were held in Provincial Court before His Honour, Judge Charles O'Connell. The trial of the appellant Thomas Frank Sylliboy (Sylliboy) was also heard in Provincial Court by His Honour, Judge R.A. MacDonald.

All three cases proceeded on agreed statements of fact and were supplemented with historical documents and oral evidence concerning the needs of resource conservation and the allocation of the resource surplus to those needs. Documentary evidence including exhibits of an historical nature, were also tendered.

The Trials of Denny and Paul

On October 8, 1987, the appellant Denny, caught and retained a salmon by means of a net without possessing a license authorizing him to do so. This offence occurred in the waters of the Bras d'Or Lake near Eskasoni, in the County of Cape Breton, Nova Scotia. Denny was charged with the following offences:

> (a) That on or about the 8th day of October, 1987, he did unlawfully catch and retain salmon by means of a net without being authorized by license or permit to do so, contrary to s.20(1.1) of the *Nova Scotia Fishery Regulations* and s.61 (1) of the *Fisheries Act.*
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> (b) *And, further,* that in waters of the Bras d'Or Lake, near Eskasoni, County of Cape Breton, Nova Scotia, on or about the 8th day of October, 1987, did unlawfully have in his possession salmon at a place where at that time fishing for such fish was prohibited by law, contrary to s.19 of the *Fisheries Act.*

Section 20(1.1) of the *Nova Scotia Fishery Regulations,* C.R.C. 1978**,** c.848, as amended, S.O.R./81-428; 81-604 provides:

> 20.(1.1) No person shall fish for, catch or kill salmon with a net of any kind or retain any salmon so caught except under a salmon license.

Section 61(1) of the *Fisheries Act,* R.S.C. 1970, c.F-14, as amended by S.C. 1976-77, c.35, s.18 states:

> 61.(1) Except as otherwise provided in this Act, every person who contravenes any provision of this Act or the regulations is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both.

[Section 61(1) is now s.79(1) of the *Fisheries Act,* R.S.C. 1985, c.F-14.]

Section 19 provides:

> 19. No one, without lawful excuse, the proof whereof lies on him, shall fish for, buy, sell or have in his possession any fish, or portion of any fish, at a place where at that time fishing for such fish is prohibited by law.

At the time of the offence, Denny not only had been fishing for himself but also for the benefit of the appellant Paul. Paul was charged that:

> On or about the 8th day of October, 1987, did unlawfully fish for a species of fish, to wit: cod, not being the holder of license to so fish, contrary to s.14(1) of the *Atlantic Fishery Regulations* and s.61(1) of the *Fisheries Act.*

Section 14(1) of the *Atlantic Fishery Regulations* provides:

> 14.(1) Subject to subsection (4) and section *15,* no person shall fish for any species of fish set out in Schedule 1 unless
>
> (a) he holds a fisherman's registration card; and

(b) he is authorized, pursuant to subsection (2), to fish for that species.

The trial of the appellant Denny proceeded on the following statement of facts:

> At approximately 7:25 a.m. on the 8th day of October, 1987, Mr. David B. Denny, the Defendant, arrived alone in a small truck at a location on the shoreline on the Eskasoni Indian Reserve in the County of Cape Breton, Province of Nova Scotia. Mr. Denny is a full-blooded Micmac Indian registered under the provisions of the Indian Act of Canada and a member of the Eskasoni Indian band. Mr. Denny launched a small boat with outboard motor and proceeded out in a westerly direction into the waters of the Bras d'Or Lake, adjacent to the Eskasoni Reserve. He proceeded to an area of the water near the estuary of a brook running through the Reserve and into the Lake. The brook in question is Indian Brook which is within the boundaries of the Reserve for about one and a half miles of its length measured from the estuary. Salmon ascend Indian Brook in the month of October.
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> At this time Mr. Denny hauled three gill nets, which had been set 40 to 400 feet distant from and at right angles to the shore. He returned to the shore at approximately 8:05 a.m. where he was met by Fishery Officer R.S. MacDonald and R.C.M.P. Officer Travis Budge. At this time three gill nets were located in the boat occupied by Mr. Denny, together with one salmon and several other species of fish including flounder, mackerel and cod.
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> The three gillnets were seized and tagged by the Fishery Officer, in accordance with the list attached hereto. Photographs were taken of the seized items, together with the truck and the boat being operated by Mr. Denny, and also a photograph of the salmon which was found in the possession of Mr. Denny.
>
> Mr. Denny gave a statement to the Fishery Officer in the form attached in which he indicated that the boat was owned by a Mr. Lawrence Paul, that he had fished the nets that morning and the previous morning, that the salmon in the boat was claimed by him and that he owned the nets. Mr. Denny was cooperative throughout.
>
> Mr. Denny had not been issued a license or permit to catch and retain salmon by means of a net pursuant to the *Fisheries Act* or any Regulations made thereunder.
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> Close times for salmon fishing are set forth in Section 77 and Schedule XXII of the Atlantic Fishery Regulations. The waters of the Bras d'Or Lake adjacent to the Eskasoni Indian Reserve are tidal waters within salmon fishing area #19. Pursuant to Variation Order No.1987-040 dated March 30, 1987, the close time for salmon fishing by means of any gear except angling gear, in salmon fishing area #19 was varied to be January 1 to December 31. Notice of such variation was given by publication of the Order in the Halifax-Chronicle Herald newspaper on April 4, 1987 being a newspaper circulated in the area affected by the variation. Mr. Denny was personally served with a true copy of this Variation Order and with a Notice of the Crown's intention to produce into evidence a certified copy of this Order, a copy of which is attached.
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> At the time and place where Mr. Denny was found in possession of the salmon it was permissible to fish for salmon by means of angling, subject to the licensing, tagging and other requirements of the Nova Scotia Fishery Regulations and the Atlantic Fishery Regulations.
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> Attached are photographs showing Mr. Denny hauling the boat ashore, the three gill nets as they were located in the boat, and the salmon caught by Mr. Denny.
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> Mr. Denny caught and retained the salmon for his personal consumption or that of his family, with no intent to sell the salmon for profit in the commercial sense.
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> Mr. Denny is thirty years of age, and is married with three children ages 3, 9 and 12. He has a grade 8 education, is unemployed and lives on welfare (except for occasional work on the Reserve as a labourer). He has since his marriage regularly hunted and fished for food for his family.

> Agreed to for the purpose of this charge only and subject to further evidence being called by the parties. The parties will file with the Court by agreement the 1987 Atlantic Salmon Management Plan and a topographical map of the area produced by the Department of Energy, Mines and Resources, titled Grand Narrows, 11F/15, edition three.

The trial of Paul proceeded on a somewhat similar statement of facts. As noted earlier, Denny had been fishing on behalf of himself and the appellant Paul. On October 9, 1987, as a result of the seizure of the three gill nets found in the possession of Denny, Paul visited the Department of Fisheries office and gave a statement to Fishery Officers Muise and MacDonald in which he stated that one of the three gill nets found in the possession of Denny the previous day belonged to him. Paul indicated that he had no involvement in the events of October 8, 1987 leading up to the seizure of the nets. Paul was not the holder of a license to fish for codfish by means of a gill net being the type referred to in s.14 of the *Atlantic Fishery Regulations.* The fish caught in the net owned by Paul were to be used for food for himself and his family and not for the purpose of commercial gain. Paul is a fullblooded Micmac Indian, registered under the provisions of the *Indian Act* of Canada.

The following are additional facts relevant to the trials of Denny and Paul.

1. The alleged offences were committed off reserve lands.

2. Fishing for salmon by means of a net was prohibited at the material date and place pursuant to a Salmon Time Variation Order, issued pursuant to s.4 of the *Atlantic Fishery Regulations, 1985,* made under the *Fisheries Act* (Canada).

3. Fishing for salmon by means of angling gear between June 15 and October 15 was permitted at the material date and place, while commercial fishing was absolutely prohibited.

4. The appellants Denny and Paul did not apply for a license or permit to fish for salmon or cod with a net. Had they done so, the respondent Crown says at p.8 of its factum, "they would not have been issued one."

5. The appellants were entitled to obtain a license to fish for salmon by means of angling gear and to fish for cod without a license provided such fishing was done by means of a hand-line or by angling.

In decisions filed August 29, 1988, the trial judge found the appellants Denny and Paul guilty as charged and entered convictions. Sentencing proceeded on September 8. Paul was sentenced to a fine of $100.00 or 5 days in jail in the event of default, while Denny was ordered to pay fines of $400.00 on the s.20(1. 1) violation, $300.00 on the s.19 offence and in default, 10 days in jail on each count. The salmon and three gill nets previously seized were ordered to be forfeited. The appellants appeal from these convictions and seek leave and if granted, appeal from the sentences imposed.

The Appellant Sylliboy

The trial of the appellant Sylliboy also proceeded on an agreed statement of facts. Sylliboy is a registered Micmac Indian and a member of the Afton Indian Band in Antigonish County, Nova Scotia. On November 18, 1987, he was standing on the banks of the Afton River where it intersects the Trans-Canada Highway. Sylliboy was observed by approaching Fisheries Officers to be holding a long pole with a snare at the end of it. He was searching for salmon within a stream along the Afton River. He did not see any and did not put the snare in the water. The Afton Indian Reserve includes two parcels of land and the Afton River flows through both parcels. While Sylliboy had no fish, he intended to use any fish caught as food for himself and his family. The appellant was approached by the two Fisheries Officers who seized the snare. On or about December 14th, 1987, the appellant and another individual were duly charged that they

> (a) did engage in fishing in non-tidal waters by means of snaring, contrary to s.6(4) of the *Nova Scotia Fishery Regulations* [sic], C.R.C. 1978, c.848, as amended, made pursuant to s.34 [now s.43] of the *Fisheries Act,* R.S.C., c.F-14, as amended, and did thereby commit an offence under s.61(1) [now s.79] of the said *Fisheries Act,* as amended.
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> (b) and also at the same place and on the same date they did have in their

possession a snare within 15 metres [sic] of non-tidal waters contrary to s.6(5)(a) of the *Nova Scotia Fishery Regulations,* C.R.C. 1978, c.848**,** as amended, made pursuant to s..34 [now s.43] of the F*isheries Act,* R.S.C., c.F-14, as amended, and did thereby commit an offence under s.61(1) [now s.79] of the said *Fisheries Act,* as amended.

As in the cases of the appellants Denny and Paul, the alleged offence took place in a fishing area off reserve lands. As well, there was a general prohibition of fishing for salmon in effect during the time of the offence. At the material date the *Nova Scotia Fishery Regulations* and indeed all Fishery Regulations from to coast made under the *Fisheries Act* prohibited fishing in non-tidal waters by means of a snare.

After a trial at Antigonish, Nova Scotia on April 26, 1988, Sylliboy was convicted of both charges and fined $10.00 and $20.00 costs, on each count. Sylliboy appeals from these convictions and seeks leave to appeal 'granted, appeals from the sentences.

Issues on Appeal

The issues, common to these three appeals, are:

1. Do the appellants have an existing aboriginal or treaty right to fish for food in the waters in question?

2. If the appellants have such a right to fish, does s.35(1) of the *Constitution Act, 1982* give the appellant a right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account?

3. If the appellants have such a right, than by reason of s.35(1) of the *Constitution Act, 1982,* do the appellants have an immunity from prosecution under the *Fisheries Act* and Regulations with respect to the charges in question?

In the Denny appeal, two additional issues are raised:

4. Does s.19 of the *Fisheries Act* require all fishing for salmon be "prohibited by law" at the time and place that the appellant Denny was in possession of a salmon?

5. Can the appellant Denny be convicted of both catching and retaining a salmon by means of a net without a license and of being in possession at the same time and place of the same salmon?

In the Sylliboy appeal, a further issue advanced:

6. Can the appellant be convicted on the same set of circumstances of both fishing with a snare in non-tidal waters (s.6(4), *Nova Scotia Fishery Regulations)* and of being in possession of a snare within 15 metres of non-tidal waters (s.6(5)(a), *Nova Scotia Fishery Regulations?)*

The Submissions of the Appellants and the Respondent

The appellants' position is that they should each be acquitted because, as Micmac Indians, they have a right to harvest fish for food and that right gives each, by virtue of s.35(1) of the *Constitution Act, 1982,* priority over other user groups in the allocation of any surplus fishery resources, once the needs of conservation have been met. They argue that under the regulatory scheme which now exists, this constitutional right to an allocation of the fisheries resource is denied them. The federal fisheries authorities, taking into account the needs of conservation, have determined that for both of the fisheries resources involved in the cases under appeal, namely Atlantic salmon and cod, a limited harvest can and should be permitted. This harvest, by policy and practice, has been allocated to user groups other than the appellants, namely commercial and recreational fishermen. The appellants say that the federal regulatory scheme is inconsistent with the Constitution and, as such, is of no force and effect as against the appellants, pursuant to s.52 of the *Constitution Act, 1982.*

The respondent argues that the appellants do not possess aboriginal or treaty rights which allow them to fish for food in the waters in question in contravention of the federal Fishery Regulations. It is further submitted, that, as of April 17, 1982 (the date upon which s.35(1) of the *Constitution Act,*

1982, was brought into force and effect) the appellants did not have any "existing" rights worthy of constitutional protection.

The Appellants' Claim to an Aboriginal Right to Fish for Food

The appellants contend that they enjoy an aboriginal right to fish. Support for this proposition is stated in the following manner at p.21 of their factum:

> ...This is because the Micmac in their treaties have never given up these rights, unlike most treaty Indians in Canada. From Northern Ontario through the Prairie Provinces and in northeast British Columbia, the model for Indian treaties was the extinguishment of Indian rights as part of the cession of land rights, in exchange for the promises contained in the treaties. In the Maritimes the treaties confirmed pre-existing aboriginal rights . . . that the concept of aboriginal rights is legally recognized as a legitimate, enforceable right by the courts of Canada is no longer the subject of debate. . . . Thus, the Appellants as Micmac Indians in Nova Scotia continue to enjoy aboriginal rights as well as treaty rights.

A definition of the term “aboriginal rights" is provided by Brian Slatterly in his article entitled: "The Constitutional Guarantee of Aboriginal and Treaty Rights," 8 Queen's L.J. 232 where he writes at p.243:

> The expression, "aboriginal rights" . . . refers to a range of rights held by native peoples, not by virtue of Crown grant, agreement or legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands now making up Canada.

Professor Hogg, in his text *Constitutional Law of Canada* (2d ed., 1985) states at p.563:

> . . . it seems likely that the aboriginal peoples of Canada held rights of some kind with respect to the lands that they occupied at the time of European settlement, and that those rights, unless voluntarily surrendered or taken away by statute, survived the reception of French and English law that occurred as the result of European settlement.

In *Calder v. A.G.B.C,* [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 the Supreme Court of Canada recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. The Supreme Court of Canada has confirmed the existence of such rights in subsequent decisions including *Guerin* v. *The Queen,* [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120, [1984] 6 W.W.R. 481, 13 D.L.R. (4th) 321, 55 N.R. 161 and *Simon* v. *The Queen,* [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. In *Simon,* Chief Justice Dickson, referring to the Treaty of 1752, wrote at p.402 [p.167 C.N.L.R.]:

> The fact that the right to hunt already existed at the time the treaty was entered into by virtue of the Micmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the treaty.

The aboriginal rights of Indians (to fish, for example) can be extinguished. Such abrogation could take place in either of two ways:

1. The federal government could enact legislation for such a purpose pursuant to its power to make laws in relation to "Indians, and Lands reserved for the Indians" under s.91(24) of the *Constitution Act, 1864:* see Hogg, *Constitutional Law of Canada, supra,* at p.563; *Calder* v. *A.G.B.C.,* supra; *R.* v. *Derriksan,* [1976] 2 S.C.R. v, [1977] 1 C.N.L.B. (No.1) 3, [1976] 6 W.W.R. 480, 31 C.C.C. (2d) 575, 71 D.L.R. (3d) 159, 16 N.R. 321 (S.C.C.) and *Jack* v. *The Queen,* [1980] 1 S.C.R. 294, [1979] 2 C.N.L.R. *25,* [1979] 5 W.W.R. 364, 28 N.R. 162.

2. Voluntary surrender of the rights by the Indians: *Constitutional Law of Canada, supra,* at p.563.

In *R* v. *Isaac* (1975), 13 N.S.R. (2d) 460, 9 A.P.R. 460, [1978] 1 C.N.L.B. (No. 3)14 (N.S.S.C., A.D.), this court recognized the existence of Indian aboriginal rights to hunt and fish. The decision of Chief Justice MacKeigan is also relevant for his particularly thorough historical analysis of the basis upon which the Micmac aboriginal rights exist. The court found that the "original Indian rights"

of Nova Scotian Indians to hunt and fish had not been diminished by treaty, other agreement or competent legislation. Chief Justice MacKeigan stated at p.478:

> The original Indian rights as defined by Chief Justice Marshall were not modified by any treaty or ordinance during the French regime which lasted until 1713 in Acadia, and until 1758 in Cape Breton, and must be deemed to have been accepted by the British on their entry. Such acceptance is shown by the British Royal Proclamation of October 7, 1763 (R.S.C. 1970, Appendices, pp. 123-129), which has been perhaps a little extravagantly termed the "Indian Bill of Rights."

The Chief Justice continued:

> The Proclamation was clearly not the exclusive source of Indian rights ... but rather was "declaratory of the aboriginal rights".
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> . . .
>
> I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p.127) acknowledged that in all colonies, including Nova Scotia, all land which had not been "ceded to or purchased by" the Crown was reserved to the Indians as *"their Hunting Grounds."* Any trespass upon any lands thus reserved to the Indians was forbidden.

As to the issue of whether the Indians of Nova Scotia had given up these particular rights, Chief Justice MacKeigan noted at p.479 of the decision:

> No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves, although thorough archival research might well disclose record of informal agreements, especially in the early 1800's when reserves were established by executive order.
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> Agreements with the Indians in the Maritimes were primarily treaties of peace, informal and sometimes oral. . . . They often acknowledged gifts to the Indians and sometimes specifically assured hunting and fishing rights to the Indians.

In determining that these rights continued to exist, the Chief Justice stated at p.483:

> I have been unable to find any record of any treaty, agreement or arrangement after 1780, extinguishing, modifying or confirming the Indian right to hunt and fish, or any other record of any cession or release of rights or lands by the Indians.

Having stated earlier in his decision (p.478) that a usufructuary right is a right to the use of land and includes "the right to catch and use the fish and game and other products of the streams and forests of that land," the Chief Justice wrote at p.485:

> This Part (of the decision) has established that Indians in Nova Scotia had a usufructuary right to the use of land as their hunting grounds. That right was not extinguished for reserve land before Confederation by any treaty, or by Crown grant to others or by occupation by the white man. It has not been extinguished or modified since 1867 by or under any federal Act.

The result in *Isaac* was stated succinctly in *R.* v. *Cope* (1981), [1982] 1 C.N.L.R. 23, 132 D.L.R. (3d) 36, 65 C.C.C. (2d) 1, 49 N.S.R. (2d) 555, 96 A.P.R. 555 (N.S.S.C,.A.D.) at p.37 [p.24 C.N.L.R.]:

> . . . Indians had a personal and usufructuary right to hunt, a right historically associated with their lands, and that that aboriginal right had been affirmed by various treaties . . . the lands in Nova Scotia where that aboriginal right might still be enjoyed were essentially limited to Indian reserve land. *We thus concluded that the aboriginal right to hunt, which impliedly included a right to fish, had been preserved for the Indians on reserve land* and could not be affected by provincial laws, having regard to the exclusive federal power in respect of Indians and lands reserved for the Indians. (emphasis added)

Relying upon *Isaac* and the fact situation upon which it was based, it is appropriate in the

circumstances that give rise to these appeals to find that the aboriginal rights of Nova Scotian Micmac Indians extend beyond the strict perimeter of reserve lands to the waters incidental and adjacent to the reserves. To limit an aboriginal fishing right purely to reserve lands is inconsistent with the fact that, in Nova Scotia, no treaty has been found to exist clearly showing that the Indians have released that right.

The respondent submits that, in the event this court finds the existence of an aboriginal right of the appellants to fish for food, such right has been extinguished by the enactment of the Regulations made pursuant to the *Fisheries Act.* It states at p.33 of its factum:

> Prior to April 17, 1982, it is submitted that an effective expression of the Crown's intent to extinguish an aboriginal right did not depend on whether the intent was manifested in statute or in subordinate legislation such as regulations. There is no basis in law that would preclude otherwise valid regulations from extinguishing an aboriginal right. The regulations are an exercise of the will of Parliament.

And at p.34 of the factum:

> If regulations manifest a sovereign intent "necessarily inconsistent" with the continued existence of the aboriginal right, as opposed to merely regulating its exercise, then extinguishment will result.

Section 6.1 of the *Nova Scotia Fishery Regulations,* S.O.R. 83-705, is evidence of federal legislation establishing or making possible a food fishery for Nova Scotian Indians.

Section 6.1(1) provides:

> Provisions Respecting Indians
>
> Notwithstanding any other provision of these Regulations, a license may be issued to an Indian or an Indian Band authorizing that Indian or Members of that Band to fish for food.

This regulation, effective September 15, 1983, is evidence of the federal government's intention to recognize and preserve an Indian food fishery. It adds support to the proposition that Nova Scotian Indians' aboriginal right to fish for food has not been extinguished.

In *R.* v. *Sparrow* (1986), [1987] 1 C.N.L.R. 145, [1987] 2 W.W.R. 577, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300, 32 C.C.C. (3d) 65 (B.C.C.A.) (on appeal to the Supreme Court of Canada), the Court considered Indian aboriginal and treaty rights to fish for food where the accused was charged with the offence of fishing with a drift-net longer than that permitted by the terms of an Indian Food Fishing License, contrary to 61(1) of the *Fisheries* Act, R.S.C. 1970, c.F-14. Counsel for the federal Crown put forth a similar argument to the effect that any existing aboriginal right to fish had been extinguished by validly enacted federal regulations. In disposing of this argument, the Court stated at p.265 (D.L.R.) [p.165 C.N.L.R.]:

> The only submission that the right is not an existing one was that of counsel for the federal Crown who put forward the doctrine, apparently propounded in this case for the first time, of "extinguishment by regulation." The major premise is that the aboriginal right to fish was unrestricted. The minor premise is that, over the past century or so, restrictions have been imposed by both federal and provincial fisheries legislation. So, it is said, that whatever right to fish is retained by Indians cannot be an aboriginal right because it has been restricted. No logical basis is suggested for the proposition that a right which is restricted ceases to be a right.

The Court continued at p.266 [p.166 C.N.L.R.]:

> In our view, the "extinguishment by regulation" proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognized the Indian right to fish, are strong evidence that the right does exist.

Similarly, the federal government, by s.6.1 of the *Nova Scotia Fishery Regulations,* recognizes the potential existence of an Indian food fishery, both on an individual and band basis. Following the

reasoning in *Sparrow,* the fact that these regulations were enacted is further recognition of the existence of an aboriginal right to fish for food possessed by the Micmac Indians of Nova Scotia. As stated in the decision at p.266 [p.166 C.N.L.R.]:

> If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have constantly recognized the Indian right to fish, are strong evidence that the right does exist. It is clear that there was an aboriginal right . . .

I am persuaded that the appellants have an aboriginal right to fish for food in the waters in and the Afton River. And further, based upon the decision in extinguished through treaty, other agreement or competent legislation.

The Appellants' Claim to a Treaty Right to Fish for Food in the Waters of the Bras d'Or Lake

The appellants submit that the Micmacs of Cape Breton come within the provisions of the Treaties of 1725 and 1752. They argue that these documents show that Micmacs throughout Nova Scotia enjoyed treaty-protected rights to “have free liberty of . . . fishing as usual,” to use the language of the Treaty of 1752. In response, the respondent submits that the treaties do not refer to the Micmacs of Cape Breton and as a matter of fact and law, could not have included them.

Given the conclusion that the appellants possess an aboriginal right to fish for food in the relevant waters, it is not necessary to determine whether the appellants have a right to fish protected by treaty.

Constitution Act, 1982 Section 35(1) states:

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

Section 35 is a substantive guarantee of the aboriginal and treaty rights of the aboriginal peoples of Canada. Professor Hogg provides a useful overview of this section in *Constitutional Law of Canada, supra,* at p. 564:

> Section 35 is outside the *Charter of Rights,* which occupies ss.1 to 35 of the *Constitution Act, 1982.* Section 35’s location outside the *Charter of Rights* provides certain advantages. The rights referred to in Section 35 are not qualified by Section 1 of the *Charter*, that is, the rights are not subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Nor are the rights subject to legislative override under Section 33 of the *Charter.*
>
> Nor are the rights effective only against governmental action, as stipulated by Section 32 of the *Charter.* On the other hand, Section *35's* location outside the *Charter* carries the disadvantage that the rights are not enforceable under Section 24, a provision that permits enforcement only of *Charter* rights.

Professor Hogg continues at p.565:

> The word "existing" in sub-section (1) probably has the effect of excluding aboriginal or treaty rights that have before April 17, 1982 been extinguished by voluntary surrender or competent legislation. In other words, Section 35 does not retroactively annul prior extinguishments of native rights so as to restore the rights to their original unimpaired condition. Such an interpretation would leave the word "existing" with no work to do, not to mention the unpredictable ramifications of such a radical interpretation . . . *the word "existing" in Section 35 means "unextinguished."* (emphasis added)

I accept the proposition that "existing" as used in the context of s.35(1) of the *Constitution Act, 1982* is to be equated with the term "unextinguished." That leads to the question whether s.35(1) recognizes unextinguished aboriginal and treaty rights in their original form or whether protection is only to be given to rights as they existed on April 17, 1982 subject to regulation by valid federal

statutory enactment. (See the Supreme Court of Canada decisions in *Calder, Guerin* and *Jack.)*

In *R.* v. *Sparrow, supra,* the British Columbia Court of Appeal considered s.35(1) of the *Constitution Act, 1982.* The evidence adduced at trial established that Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial and, thus, he was exercising an existing aboriginal right. After concluding that this right was not extinguished, the court went on to consider the effect of s.35(1).

In finding that the aboriginal fishing right that was protected by s.35(1) was the substantive right which existed on April 17, 1982 rather than the right to fish as it existed in its original form many years earlier, the Court stated at p.272 [p.172 C.N.L.R.]:

> It must be borne in mind that what is recognized and affirmed by s.35(1) is the "existing" right. In 1982, the Indian right to fish existed in circumstances profoundly different from those prevailing before or in the early years of white settlement when the fishery was thought to be "inexhaustible": see Dickson, 3. in *Jack et al. v. The Queen.* . .. The constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a Parliamentary system of government and of federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia.
>
> Any definition of the existing right must take into account that it exists in the context of an industrial society with its complexities and competing interest. *The "existing right" in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.* (emphasis added)

The court added at p.276 [p.177 C.N.L.R]:

> Parliament has the constitutional authority and responsibility under head 12 of s.91 of the *Constitution Act, 1867,* to make laws in relation to sea-coast and inland fisheries. Indians share with other Canadians the need for reasonable regulations to ensure the proper management and conservation of this resource. The regulations made pursuant to the *Fisheries Act* place limits on the rights of all persons including Indians.
>
> Parliament has the constitutional authority and responsibility under head 24 of s.91 of the *Constitution Act, 1867,* to make laws in relation to Indians and lands reserved to Indians.
>
> Section 35(1) of the *Constitution Act, 1982,* does not purport to revoke the power of Parliament to act under heads 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on April 17, 1982, may not be taken away.
>
> *The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on April 17, 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected then reasonable regulations to ensure the proper management and conservation of the resource must be continued.* (emphasis added)

By applying this reasoning in *Sparrow,* which I adopt, to this appeal, it follows that the appellants' aboriginal right to fish in the waters in question is protected pursuant to s.35(1) of the *Constitution Act, 1982.* The precise nature of the right protected may be determined by an examination of the right as it existed on April 17, 1982. It is not the original right to fish possessed by the appellants' ancestors that is protected by this section in the Constitution. Rather, it is the unextinguished right which existed on April 17, 1982 - a right which could potentially be regulated through a valid federal enactment. Therefore, to use the words of the court in *Sparrow:* "It was in the beginning a regulated, albeit self-regulated right. It continued to be a regulated right and on April 17, 1982, it was a regulated right."

As a consequence, the regulations under which the three appellants were charged are a valid exercise of federal legislative power pursuant to s.92(12) of the *Constitution Act, 1867,* notwithstanding the fact that the appellants' aboriginal right to fish has been recognized and afforded protection under s.35(1) of the *Constitution Act.*

However, the federal power to regulate the protected aboriginal right under s.35(1) is limited. It is not absolute. I agree with the following statement of the court in *Sparrow* at p.277 [p.178 C.N.L.R]:

> The general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. *The essential limitation upon that power is that which is already recognized by government policy as it emerges from the evidence in this case. That is, in allocating the right to take fish, the Indian food fishery is given priority over the interest of other user groups.* What is different is that, where the Indian food fishery is in the exercise of an aboriginal right, *it is constitutionally entitled* to such a priority. Furthermore by reason of s.35(1) it is a constitutionally protected right and cannot be extinguished. (emphasis added)

The official policy of the federal government recognizes the priority of an Indian Food Fishery with respect to salmon stocks. The goal of conservation receives paramount consideration while the Indian Food Fishery is given secondary priority. Evidence of this policy appears in the *Atlantic Salmon Management Plan (1987)* which contains the following principles:

> 1. Conservation of Atlantic salmon stocks, particularly the large salmon component, remains the overriding priority in the management of this fishery.
>
> 2. The social and cultural importance of fishing to native communities, which have traditionally harvested the resource for their own consumption is recognized and will be given priority after conservation.

The existence of this policy is supported by a paper entitled *Blueprint for the Future of Atlantic Salmon (1980)* which was prepared by the Department of Fisheries and Oceans and tendered as evidence during the course of the trials. Page seven of the document states:

> Policy Statement for Atlantic Salmon
>
> In light of the problems inherent in a mixed stock fishery, the best way to manage Atlantic salmon is through discreet stock management....
>
> It is the intention of the Department of Fisheries and Oceans to manage the Atlantic Salmon resource in Atlantic Canada on a "best use" basis, in consultation with the appropriate provinces and all user groups, in order to both conserve stocks of Atlantic salmon and to optimize the economic and social benefits of this natural resource to the people of this region and the rest of Canada.
>
> The priority for allocation of stocks will be the same as is currently followed, that is (1) resource conservation, (2) native food fisheries, and (3) commercial and recreational fisheries.

On the issue of the Indians' priority to a food fishery after the needs of conservation have been considered, Judge MacDonald commented at p.9 of his decision in the *Sylliboy* case:

> There's no doubt that in fact the evidence that was brought forth by the experts that were examined by counsel, was to the effect that there is some awareness in the Federal Department of Fisheries that this priority is considered but I must say I was not impressed from the evidence as a whole that the needs of the Indian food fishery as asserted under the Treaty Rights were in fact given any priority. It is quite clear from the evidence at the trial that while perhaps a great deal of thought has been given and perhaps in some places there are some priorities... *the fact is that there is* no *real evidence of any priority given to the needs of the Indian Food Fishery.* (emphasis added)

I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account. As stated in *Sparrow* at p.277 [p.178 C.N.L.R]:

> . . . where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to such priority...
>
> Those regulations which do not infringe the aboriginal food fishery, in the sense of reducing the available catch below that required for reasonable food and societal needs, will not be affected by the constitutional recognition of the right. Regulations which do bear upon the exercise of the right may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest....

To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellant and their families is simply not appropriate action on the part of the federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource." This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Expert evidence was adduced at the Denny trial indicating that a surplus of salmon existed in the waters of Indian Brook after provision was made for conservation. This evidence was not contradicted by the Crown. In particular, Peter Amiro was qualified as an expert to give opinion evidence in relation to the biology of Atlantic salmon and the scientific factors involved in Atlantic salmon conservation. Mr. Amiro made an assessment of Indian Brook in 1987. Counsel for Denny and Paul asked this expert the following question at p.115 of the transcript:

> Q. And could you advise why you took a look at Eskasoni River or Indian Brook in October of '87?
>
> A. Fred Allen was the area manager in Eastern Nova Scotia, asked of Gary Turner, who is the senior advisor, what might be the harvestable surplus of salmon for Eskasoni Brook if they were to ask for an excess. Gary referred the question to our assessment group, headed by R.E. Cutting, who asked me to see what I could do. And at that time, there were very little data available, so I used a very old technique to get an idea of what might be possible provided you managed the stock. And this addresses that if you manage the stock, that is achieve spawning escapement, and there are not other salmonids in the brook competing, i.e. rainbow trout, that the possibility of ten to seventy adult salmon per year being surplus could be, and that would reflect the change in variable marine mortality due to variance and natural fishing mortalities, and that ten to seventy includes surpluses available to all home water fisheries.

A further analysis by Mr. Amiro, conducted three days prior to his giving testimony at the trials of Denny and Paul, confirmed the existence of a surplus of salmon once conservation needs had been taken into account. It follows that the appellant Denny was entitled to receive priority in the allocation of this surplus over other user groups, based upon his aboriginal right to fish which is protected by s.35(1) of the *Constitution Act, 1982.*

Brian Slatterly in his article, "The Constitutional Guarantee of Aboriginal and Treaty Rights," *supra,* writes appropriately at *p.235:*

> The legal effect of the aboriginal rights provisions is governed by section 52. This states that the Constitution of Canada "is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." ... The effect is to put the Constitution in a position of legal paramountcy. The Act overrides "any law" . . . that is inconsistent with its terms, including both statutes and the common law.

And at p.*255:*

> Section 35 ensures that the rights named there remain fully operable. A statute that directly impedes the exercise of a constitutional right is inconsistent with that right and consequently fails.

Though it is crucial to appreciate that the rights a forded to the appellants by s.35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the

needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

In the case of Denny, the evidence at trial indicates that a surplus was, in fact, present. The impugned regulations are inconsistent with Denny's entitlement to fish for food, in the waters adjacent to the reserve, to the extent that they fail to give him priority over other persons legally permitted to fish. In that way, and to that extent, the impugned regulations are of no force and effect when applied to Denny.

The appeals of Paul and Sylliboy are slightly more problematic in that cogent evidence of a surplus of fish, after conservation, was not presented. However, since no evidence was adduced to the contrary, it is reasonable to assume that resource surplus existed in each case. The trial judge in the Sylliboy case commented on there being "a self sustained yield of salmon in the Afton River" and that "whatever fishing may have been engaged in by the native peoples at Afton, has not interfered with the quantity of fish now there."

Both Paul and Sylliboy, in accordance with their respective constitutional entitlements to a priority in the allocation of the resource, after the needs of conservation have been recognized, were entitled to fish for the purpose of satisfying their personal and their familial nutritional requirements. As with Denny, the impugned legislation fails to give them priority over other persons legally entitled to fish in the waters adjacent to the reserve. It thus precluded Paul and Sylliboy from fishing in the exercise of their constitutionally guaranteed rights and to that extent is of no force and effect.

These constitutionally guaranteed rights are not violated by the legislative exercise of reasonable regulation. The salmon fishery is entitled to be protected so that and prosper for the benefit of all who fish the waters salmon inhabit. This includes the right to license and to prohibit unsavory 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.

Conclusion

I would respond to the common issues, earlier stated, in the following manner.

1. The appellants have an existing aboriginal right to fish for food in the subject waters in these appeals. Given this finding, it is not necessary to determine whether the appellants have a right to fish protected by treaty.

2. Section 35 of the *Constitution Act, 1982,* provides the appellants with the right to an allocation of any surplus of the fisheries resource which may exist after the needs of conservation have been taken into account. This right is subject to reasonable regulation of the resource in a manner that recognizes and is consistent with the appellants' guaranteed constitutional rights.

3. Based upon the appellants' aboriginal right to fish for food and the protection afforded by s.35(1) of the *Constitution Act, 1982,* the three appellants enjoy a limited immunity from prosecution under the provisions of the *Fisheries Act* and Regulations. To the extent that the provisions under which they have been charged are inconsistent with the constitutional rights of the appellants, s.52 of the *Constitution Act* renders them of no force and effect.

In view of these responses to the issues that are common to the three appeals, it is unnecessary to consider the additional grounds raised by the appellants Denny and Sylliboy.

For the reasons given, the trial judges, in my respectful opinion, erred in law by entering convictions against the three appellants on the counts with which they were charged. Accordingly I would allow the appeals of the appellants Denny, Paul and Sylliboy, quash their convictions and enter verdicts of acquittal.