HER MAJESTY THE QUEEN (Respondent) v. WILLIAM GLADSTONE and DONALD GLADSTONE (Appellants)

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

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

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P.J. Pearlman, N.J. Prelypchan, for the supporting Intervenor, the Attorney General of British Columbia
C. Harvey, Q.C., for the supporting Intervenor, Pacific Fishermen's Alliance
J.K. Lowes, for the supporting Intervenor, Fisheries Council of British Columbia

The appellants appealed from the judgment of the summary appeal court which dismissed their appeal from convictions on charges of unlawfully attempting to sell herring spawn on kelp contrary to *Pacific Herring Fishery Regulations*.

Alerted by an informant, fishery officers kept surveillance of the transportation of a shipment of 4200 pounds of herring spawn on kelp. When the appellants picked up the shipment they were placed under surveillance. The appellants were observed talking to a Japanese fish product buyer. Before their arrest a container of herring spawn was removed from the trunk of the car. Subsequently, the truck with its containers of herring spawn on kelp was seized. One of the appellants held an Indian Food Fish Licence which authorized the harvesting of not more than 500 pounds of herring spawn on kelp for food purposes. Neither of the accused held a Category J licence permitting him to sell herring spawn on kelp.

Held: Appeal dismissed.

***per* Hutcheon J.A.**

1. There was evidence that the Heiltsuk Indians were involved in extensive trade of large quantities of spawn with other native groups along the coast. Based on this evidence the summary appeal court judge was wrong in his conclusion that an amount of 4800 pounds of herring spawn on kelp was inconsistent with the Aboriginal right.

2. The trial judge was correct in finding that the regulations constituted a prima facie interference with the Aboriginal right to trade. The trial judge was also correct in finding that the licensing regime was justified within the broad concept of management and conservation and that there had been consultation with a representative named to speak on the band's behalf. The herring allocation was made following consultation with the Category J licence holders including the representative of the Heiltsuk Band Council. The Crown met the burden of proof of justification. Evidence was that the priority was always assured to the Indian people for food purposes.

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

1. The appellants were not exercising an Aboriginal right when they attempted to sell the product to fish product buyer. That activity was different in nature and quality than the Aboriginal right identified by the evidence. The regulation in question controls commercial activity, which is not integral to Aboriginal culture, therefore it can not be said to infringe an Aboriginal right. Alternatively, if there was a prima facie infringement of an Aboriginal right, then the Crown met the burden of proof of justification.

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

1. There were concurrent findings of facts in the case that trading of herring spawn on kelp was an Aboriginal custom, tradition or practice forming an integral part of the culture of the Heiltsuk people before first contact with the incomers and between contact in about 1793 and the assertion of British sovereignty in 1846.

2. The prohibition on the sale of fish by Indians over a period of about a hundred years under Regulations made pursuant to the *Fisheries Act* operated to regulate the sale of fish by way of prohibition and did not operate to extinguish the Aboriginal rights of the Indians to trade in fish. The extinguishment of Aboriginal rights in relation to fish cannot be brought about by fish regulations made in the form of subordinate legislation.

3. The Heiltsuk people have existing Aboriginal rights to harvest herring spawn on kelp not only for their own consumption, but also for purposes of trade in quantities measured in tons, subject only for the need for conservation of the resource.

4. There was a prima facie infringement of the Aboriginal right: the appellants were deprived of the herring spawn on kelp in their possession which they must be assumed to have obtained through the exercise of the Aboriginal rights. And they were prevented from exercising their Aboriginal rights to trade the 4200 pounds of herring spawn.

5. The trading of 4200 pounds of herring spawn by attempting to sell it to a Japanese buyer with access to Japanese customers in Canada and perhaps also in Japan, represents in modem form by modem means of the original Aboriginal right reflected in the pre-sovereignty customs, traditions and practices of the Heiltsuk people. The complete prohibition on the exercise of the Aboriginal right except in accordance with the allocation made by the Department of Fisheries was not shown to be justified by the needs of conservation.

6. The Crown did not meet the burden of justification in this case. There was not as little infringement as possible. There was no compensation for the confiscation of the herring roe on kelp. There was no evidence that there had been adequate consultation with the Heiltsuk Band that would discharge the burden of justification.

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HUTCHEON J.A.:

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PART I

INTRODUCTION

[para. 1] Donald Gladstone and William Gladstone, the appellants on this summary conviction appeal [[1991] B.C.W.L.D. 2104], were convicted on October 3, 1990, of offering to sell (Count 3) and attempting to sell herring spawn (Count 4) on kelp. They appealed and their appeal on Count 3 was allowed on August 7, 1991, but their appeal on Count 4 was dismissed.

[para. 2] Because the wording of Count 4 plays a part in one or more of the issues on this appeal I quote the charge:

> Count 4: On or about the 28th day of April, 1988, A.D., at or near Vancouver in the Province of British Columbia, did unlawfully attempt to sell Herring Spawn on Kelp other than Herring Spawn on Kelp taken or collected under the authority of a Category J. Licence, contrary to s.20(3) of the *Pacific Herring Fishery Regulation* and did thereby commit an offence contrary to s.61(1) of the *Fishery Act*. [sic]

[para. 3] The Crown gave particulars that the attempt was to sell to one Katsu Hirose or Seabom Enterprises Ltd. As this is an appeal from a summary appeal court, our jurisdiction is confined by s.839(1) of the *Criminal Code* to a "question of law alone". The appellant has put forward a number of issues which I propose to consider under three headings:

i) Lack of evidence of essential elements;

ii) Warrantless search;

iii) Aboriginal rights.

PART II

BACKGROUND

[para. 4] Donald and William Gladstone are members of the Heiltsuk Indian Band of Bella Coola. The evidence led by the Crown established that they arranged to ship to Vancouver approximately 4,200 pounds of herring spawn on kelp. The herring spawn was in white plastic containers held in five crates which were said by them to contain personal belongings. The fisheries officers were alerted by an informant and they kept under surveillance the transportation of the crates from the freight carrier in Vancouver to a warehouse in Richmond. There, under circumstances that I will explain later, the fisheries officers determined that the crates contained herring spawn on kelp.

[para. 5] Later that day William Gladstone arrived with a U-haul truck to pick up the crates. He drove into Vancouver and parked in a lot at Seymour and Nelson Streets.

[para, 6] William and Donald Gladstone then drove in a Javelin automobile to the premises of Seaborn Enterprises Limited, a retail fish store at 1310 West 73rd Avenue in Vancouver. They had with them one white container of herring spawn which they took into the store. William Gladstone spoke to Mr. Katsu Hirose, the owner, and asked, according to Hirose, if he was "interested in herring on kelp" to which he replied he "never touched herring on kelp from Native Indians". They left and returned to the parking lot where they were arrested.

[para. 7] Subsequently, the herring spawn on kelp was sold by the fisheries officials for $143,944.

(i) *Lack of evidence of essential elements*

[para. 8] This heading breaks down, in turn, into four points:

> (a)Failure to prove beyond a reasonable doubt when the shipment of the herring spawn on kelp was harvested;
>
> (b)Failure to prove beyond a reasonable doubt that the herring spawn on kelp was not gathered under the authority of a Category J Licence;
>
> (c)Improper use of William Gladstone's statement regarding his Indian Food Fish Licence as evidence against Donald Gladstone;
>
> (d) Failure to prove beyond a reasonable doubt that the accused attempted to sell to Mr. Hirose the shipment of the herring spawn on kelp.

[para. 9] I agree with the Crown that neither (a) nor (b) raises a "question of law alone" as required by s.839(1) of the *Criminal Code* to provide jurisdiction to this Court.

[para. 10] *William Gladstone's Statement*: The Crown accepts that the statement of William Gladstone after his arrest that his Indian Food Fish Licence was his only permit, is not admissible against Donald Gladstone. However, in my view, the inadmissibility of the statement is of no help

to Donald Gladstone. The decision would have been the same. William and Donald Gladstone acted together in the transportation of the herring spawn and in the trip to visit the retail fish store with a container of herring spawn.

[para. 11] I would therefore apply the provisions of s.686(1)(b)(iii) of the *Criminal Code*.

[para. 12] *Attempt to Sell*: Although the evidence given by Hirose of his conversation with William Gladstone is minimal, I am of the view that the circumstances detailed by the Crown in paragraph 112 amply support the conclusion of the trial judge and of the appeal judge of an attempt to sell:

> 112(a) a large shipment of herring spawn on kelp was surreptitiously shipped to the Lower Mainland from Bella Bella under the guise of "personal belongings";
>
> (b) when the crates arrived they were locked in a rental truck and left in a parking lot in downtown Vancouver;
>
> (c)the following day the Appellants removed one pail of herring spawn on kelp from the truck and drove to a fish store in south Vancouver;
>
> (d)the Appellants asked the store owner if he was interested in herring spawn on kelp ...

[para. 13] The line to be drawn between mere preparation and attempt is a matter of "common sense" to use the words of Mr. Justice Le Dain in *R. v. Deutsch*, [1986], 2 S.C.R. 2 at 23. The line was crossed at the very latest when William Gladstone asked Mr. Hirose if he was "interested in herring on kelp". In the result, I would not give effect to any of the arguments directed to lack of evidence of essential elements.

ii) *Warrantless Search*

[para. 14] At the parking lot, before the arrest of Donald Gladstone and William Gladstone, the fisheries officers searched the Javelin vehicle. Mr. Michael Jones gave this evidence:

> A I asked Mr. Donald Gladstone to open the trunk and his reply was to me, "You've got the keys, you open it." I then tried to - I then held the keys up and I said, "I can't open up the trunk without your permission." And Mr. Gladstone said, "You've got my permission, you go ahead, you open it."
>
> Q All right. He said, "You go ahead and open it"?
>
> A That's correct, Your Honour. I opened the trunk and extracted the one bucket of herring spawn on kelp and at that time officers Ian Mann - or correction, Ian Brown and Officer Redekopp arrived at the scene and arrested the two accused.

Following that, the truck with its containers of herring spawn on kelp was seized.

[para. 15] The trial judge held that the seizure without warrant of the single container was not done with the informed consent of Donald Gladstone whose rights under s.8 of the *Charter of Rights* were consequently breached. In my opinion, he refused to exclude the evidence under s.24(2) of the Charter because, as I read his reasons, of the jurisdiction in the fisheries officers under s.71 of the *Fisheries Act* to seize the Javelin vehicle as well as the truck. The appeal judge stated that he was in substantial agreement:

> 71.(1) A fishery officer may seize any fishing vessel, vehicle, fishing gear, implement, appliance, material, container, goods, equipment or fish where the fishery officer believes, on reasonable grounds, that
>
> > (a)the fishing vessel, vehicle, fishing gear, implement, appliance, material, container, goods or equipment has been used in connection with the commission of an offence against this Act or the regulations;
> >
> > (b)the fish or any part thereof have been caught, taken, killed, transported, bought, sold or had in possession contrary to any provision of this Act or the regulations ... R.S.C. 1985, c.F-14

[para. 16] I do not propose to dwell on this ground of appeal. When the containers were in the warehouse in Richmond, the fisheries officers satisfied themselves that the crates contained herring spawn on kelp. What they did in opening the trunk of the Javelin was to obtain one of the containers they knew was full of herring spawn on kelp. That could scarcely be described as a search because of their knowledge of its presence in the trunk of the vehicle. Indeed, as the trial judge noted, they were entitled at law under s.71 to seize the vehicle itself.

[para. 17] In any event, as an incident of lawful arrest, the fisheries officers were entitled to search the vehicle before or after the formal arrest, in order to preserve relevant evidence: *R*. v. *Debot*, [1989] 2 S.C.R. 1140 at 1146; *R*. v. *Speid* (1991), 8 C.R.R.(2d) 383 (Ont. C.A.), leave to appeal refused [1992] 1 S.C.R. xi; and *Cloutier* v*. Langlois*, [1990] 1 S.C.R. 158 at 182.

[para. 18] In these circumstances, I agree with the decision of the trial judge to admit the evidence.

iii) *Aboriginal Rights*

(a) *Trial Court*

[para. 19] The trial judge held that the Heiltsuk Indians, over hundreds of years, regularly harvested herring spawn on kelp as a food source; the band had engaged in inter-tribal trading and barter as witnessed by the 1793 journal of Alexander McKenzie, and the trading continued to modem times. Judge Lemiski also found the Aboriginal right to trade and barter had not been extinguished and that the regulations under the *Fisheries Act* presented a prima facie interference to the collective right of the accused. He concluded, however, that the infringement was justified in the circumstances of this case of an attempt "to sell a relatively large quantity of spawn in a surreptitious manner to a foreign buyer in a location far removed from the Heiltsuk Band's region."

(b) *Summary Appeal Court*

[para. 20] The appeal judge agreed with the trial judge's conclusions about the nature and continuation of the Aboriginal right to modem times. On the application of the tests from *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, Mr. Justice Anderson said this [pp. 20-21]:

> The real question is whether this right has been infringed.
>
> The aboriginal right, as I see it, is for the Native Indians to gather herring spawn on kelp for food, social and ceremonial purposes and as incidental thereto, to trade this one type of food for another. This is the right which the Indians have traditionally exercised during recorded history. With deference, I have been unable to conclude that the Regulations formulated under the *Fisheries Act* have interfered with this right. The Indians still have the right to gather the herring spawn on kelp for their traditional purposes. However, I have not been able to translate that right into an absolute and unfettered right to harvest herring spawn in any quantity and to sell the spawn so harvested commercially.
>
> The appellants were found in possession of about 4,800 lbs. of herring spawn on kelp, an amount which is inconsistent with the aboriginal right and which the evidence discloses was intended to be sold for commercial purposes. In my view, the possession of this amount of herring spawn for a commercial purpose cannot be considered to be in keeping with the aboriginal rights. The traditional aboriginal rights have been preserved as the individual members of Heiltsuk Band are entitled to Indian Food Fishing Licences and the Band itself is authorized under a Category J Licence to harvest herring spawn on kelp and to trade in it for commercial purposes.

I conclude, therefore, that the aboriginal right has not been interfered with by the Regulations made under the *Fisheries Act* and that the appellants have failed to establish a prima facie infringement.

In view of this conclusion, I do not consider it necessary to consider the issue of justification.

PART III

THE EVIDENCE OF TRADE

[para. 21] In her report on "Harvest of Herring Spawn and Commerce in Herring Spawn by the Heiltsuk (Bella Bella) Indians…", Dr. Barbara Lane described the early trading in these words:

> Pacific herring spawn only in certain locations. Consequently, some Native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. This partly explains the extensive trade in spawn among Native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favored.
>
> After the spawn was processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and hampers. These canoes travelled for trading purposes from one tribe to another and were under the direction of their respective chiefs. Implicit is the existence of stable and peaceful relations between separate political entities.

[para. 22] In the light of this evidence I think, with respect, that the appeal judge was clearly wrong in his conclusion that an amount of 4,800 lbs. (his figure) of herring spawn on kelp was inconsistent with the Aboriginal right. Dr. Lane writes of "flotillas of freight canoes carrying tons of spawn product".

[para. 23] In view of that evidence, I agree with the trial judge that the regulations constituted a prima facie interference with the Aboriginal right to trade.

[para. 24] I disagree, however, with the trial judge in his application of the test of justification. As I understand his reasons, Judge Lemiski concluded that the surreptitious manner of the attempt to sell - "not dissimilar to the manner in which criminals transport and sell narcotics" -was not in keeping with any existing exercise of Aboriginal rights.

[para. 25] The manner was dictated, no doubt, because of the prohibition in the regulations. The proper question is whether Reg. 20(3) was justified:

> 20. …
>
> (3) No person shall buy, sell, barter or attempt to buy, sell or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

[para. 26] In *Sparrow*, the Supreme Court of Canada put forward a list of tests for justification of legislation, not purporting to be exhaustive. For the purposes of this discussion that list includes these questions:

(a) Is there a valid legislative objective in Reg. 20(3)?

(b) Was there consultation in the allocation of resources?

(c) Has the Crown met its responsibility toward the Aboriginal people?

PART IV

OBJECTIVE AND CONSULTATION

[para. 27] I agree with the trial judge that a licensing regime is justified within the broad concept of "program management and conservation". He noted, also, there had been consultation with the Native Brotherhood of B.C., an organization that opposed any use except for "Native Indian food".

[para. 28] In response to this, the appellants submit that the Heiltsuk people were not consulted. But in the application for the 1988 Category J licence, the Heiltsuk Band Council named a representative to speak on its behalf. Consultation with that representative is sufficient to meet the requirement of consultation discussed in *R*. v. *Sparrow.*

PART V

ALLOCATION

[para. 29] The evidence disclosed that the Heiltsuk Band Council had had a Category J licence since 1975 or 1976. Mr. Lloyd Webb testified that he met with the spawn and kelp licence holders to discuss plans for those holders. The Band was one of 28 holders of which 12 were non-Indian.

[para. 30] In 1988, the amount permitted to be gathered under each Category J licence was 16,000 lbs. The appellants say there is no evidence to support the proposition that in the 1988 condition this limitation was justified.

[para. 31] By letter dated February 17, 1988, the Director of the Fisheries Branch sent to each licence holder a copy of the 1988 Herring Spawn-on-Kelp Fishery Plan. This consisted of some four pages of information, advice and instructions and included this allocation:

> 3. LICENCE DISTRIBUTION AND HERRING ALLOCATION
>
> In 1988, a total of 2,275 tons of herring is allocated to the spawn-on-kelp fishery. The distribution of licences and herring allocation for each area is represented in Table 1.
>
> TABLE 1
>
> | Area | Number of Licences | Herring Allocations (Tons) |
> |---|---|---|
> | Queen Charlotte Islands (Statistical Areas 1-2) | 11 | 775 |
> | Prince Rupert (Statistical Areas 3-5) | 8 | 800 |
> | Central Coast (Statistical Areas 6-10) | 5 | 300(200)A |
> | Strait of Georgia (Statistical Areas 11-18, 28) | 0 | 0 |
> | West Coast Vancouver Island (Statistical Areas 19-27) | 4 | 200 |
> | TOTAL | 28 | 2,275 |
>
> NOTES:- A – from minor stocks.
>
> An allocation is made for each Area by estimating the quantity of herring that will be used in the spawn-on-kelp fishery. For each closed impoundment 100 tons are allocated and for open ponds (most common in the Q.C.I. area) 35 tons are allocated.

[para. 32] A fair inference from the evidence is that the allocation was made following consultation with the Category J licence holders including the representative of the Heiltsuk Band Council. In my opinion, the Crown met the burden of proof of justification at this stage and it was for the defence to show in what way the allocation was improper.

[para. 33] It was submitted by the defence that the allocation failed to recognize the priority to be given to Aboriginal rights. However, the evidence is that priority is always assured to the Indian people for food purposes. Webb testified that the amounts required for Native Indian food of herring and spawn was not included in the calculation of the stock available for the yearly catch. That stock, since 1983, is equal to twenty per cent of the exploitive rate. The Indian people take their requirements for food purposes out of the eighty per cent that is not available to anyone else.

[para. 34] I note, too, that of the 28 holders of Category J licences, 12 were non-Indian. In other words, approximately 60 per cent of the catch level of 2,275 tons was allocated to the Indian people.

[para. 35] In these circumstances I am quite unable to say that the allocation was improper and, in my opinion, the Crown has met its responsibility toward the Aboriginal people.

[para. 36] In the result, I would dismiss the appeals of Donald Gladstone and of William Gladstone.

[para. 37] I agree with the Crown that the proper course for this Court to follow on the issue of the forfeiture of $143,944, the proceeds of the sale of the herring spawn (on) kelp, is to extend the time of the Notices of Appeal against Forfeiture and to set those appeals (CA013850 and CA013852) down for hearing. This panel is not seized of the issue.

[para. 38] **MACFARLANE J.A. (concurring) (Taggart and Wallace JJ.A., concurring):** William Gladstone and Donald Gladstone appeal from the decision of the late Mr. Justice J.J. Anderson ("the summary appeal judge") pronounced August 7, 1991, upholding the appellants' convictions on a charge of unlawfully attempting to sell herring spawn on kelp, other than herring spawn on kelp taken or collected under the authority of a Category "J" Licence, contrary to s.20(3) of the *Pacific Herring Fishery Regulations*, made pursuant to the *Fisheries Act*, R.S.C. 1985, c.F-14.

[para. 39] William and Donald Gladstone had arranged for a shipment of herring spawn on kelp of approximately 4,200 pounds, having a wholesale value of approximately $140,000, to be covertly transported from Bella Bella to Vancouver, where they attempted to sell the whole shipment to a Japanese fish product buyer.

[para. 40] I have had the advantage of reading, and am in agreement with, the reasons of Mr. Justice Hutcheon, except with respect to the nature and scope of the Aboriginal right asserted by the appellants. In short, I do not think that the Aboriginal right extends to the sale of herring spawn on kelp on a commercial basis.

Aboriginal Rights

[para. 41] The Appellants are both members of the Bella Bella Band or Heiltsuk Nation.

[para. 42] The trial judge found on the historical and anthropological evidence before him that the Heiltsuk Indians had regularly harvested herring spawn on kelp as a food source, and that the band had engaged in inter-tribal trading and barter of herring spawn on kelp. However, he was not satisfied that the inter-tribal trade in herring spawn was very extensive or very significant in the affairs of the Heiltsuk Band.

[para. 43] The summary appeal judge agreed with that characterization. He also agreed there was some continuation of that type of trading activity to modem times.

[para. 44] There was evidence that the commercial herring spawn on kelp fishery first developed in British Columbia in the early 1970s in response to a demand for the product in Japan.

[para. 45] The summary appeal judge also expressed the view that the provision of 4,200 lbs of herring spawn on kelp (which has a wholesale value of approximately $140,000) for a commercial purpose cannot be considered to be in keeping with the asserted Aboriginal right.

[para.46] The summary appeal judge said [pp. 20-21]:

> The aboriginal right, as I see it, is for the Native Indians to gather herring spawn on kelp for food, social and ceremonial purposes and as incidental thereto, to trade this one type of food for another. This is the right which the Indians have traditionally exercised during recorded history. With deference, I have been unable to conclude that the Regulations formulated under the *Fisheries Act* have interfered with this right. The Indians still have the right to gather the herring spawn on kelp for their traditional purposes. However, I have not been able to translate that right into an absolute and unfettered right to harvest herring spawn in any quantity and to sell the spawn so harvested commercially.

[para. 47] The question raised on this appeal is not different in character from that which was discussed in the reasons I have given in *R*. v. *Vanderpeet* (which are being handed down at the same time as these reasons [reported *infra*]).

[para. 48] In *Vanderpeet* the question arose whether the Indian people in that case had an Aboriginal right to sell or barter fish. I said:

> The question may be put another way: Was there a commercial aspect to the aboriginal right to fish which was an integral part of the distinctive culture of the Sto:lo people?
>
> I put the question that way because this case is not about the casual disposal of surplus food fish. In essence, it is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis. The result would be to give Indian fishers a preference or priority over other Canadians who seek a livelihood from commercial fishing.

[para. 49] It is clear that the trial judge and the summary appeal judge did not view the activity in question as being an integral part of the distinctive culture of the Heiltsuk people. I agree that the activity is different in nature and quality than the Aboriginal right identified by the evidence.

[para. 50] The case is not one that turns on quantity, although both judges below took account of the quantity involved. There was evidence of considerable quantities being transported to other Indians in Aboriginal times. But the quality and character of the activity in Aboriginal times was quite different from that disclosed by the evidence in this case. The Aboriginal activity was rooted in a culture which gave significance to sharing a resource, to which one nation had ready access, while other Indian peoples did not.

[para.51] Both judges below said that the activity in question in this case was not of the same character as the activity which attracts protection as an Aboriginal right.

[para. 52] In my view, the appellants have not established that they were exercising an Aboriginal right when they attempted to sell the product in Vancouver. The regulation in question controls commercial activity, which is not integral to Aboriginal culture, and therefore cannot be said to infringe an Aboriginal right.

[para. 53] If I should be wrong in that conclusion, and there was a prima facie infringement of an Aboriginal right, I agree with Mr. Justice Hutcheon that the Crown met the burden of proof of justification. I also agree with him that none of the criminal law defences can succeed.

Summary

[para. 54] 1. The appellants were not exercising an Aboriginal right when they attempted to sell herring spawn on kelp to a Japanese fish product buyer in Vancouver. The nature and quality of that activity was different from the Aboriginal right identified by the evidence.

2. The regulation in question is not inconsistent with the exercise of the Aboriginal right.

3. Alternatively, if there was a prima facie infringement of an Aboriginal right it was justified.

4. I would not give effect to any of the other defences, and adopt the reasons of Mr. Justice Hutcheon in that respect.

[para. 55] I would dismiss the appeals.

LAMBERT J.A. (dissenting):

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PART I

THE BACKGROUND FACTS

[para. 56] William Gladstone and Donald Gladstone are brothers. They are members of the Heiltsuk people who live now on the reserve at Waglisha on the east coast of Campbell Island, near Bella Bella.

[para. 57] William Gladstone arranged for five crates which had been shipped down the coast to Vancouver to be stored at a commercial storage facility in Vancouver. Fisheries officers examined the crates and concluded that they contained the kind of pails that were specially designed and designated by the Fisheries Department for the storage of herring spawn on kelp. An employee of the storage facility opened one of the crates and found that indeed it contained a number of pails. One of the pails was opened and it contained herring spawn on kelp.

[para. 58] William Gladstone removed the crates from the storage facility in a U-Haul truck. One of the pails was then transferred by him to a car. The two brothers travelled in the car to the premises of Seaborn Enterprises Limited, a retail fish store, and both William and Donald Gladstone entered the store and talked to Mr. Katsu Hirose, the owner. Mr. Hirose said later that William and Donald Gladstone asked him if he was interested in herring spawn on kelp.

[para. 59] Shortly after that, when the car returned to where the U-Haul truck was parked, Fisheries officers examined the pail in the back of the car and found that it contained herring spawn on kelp. They asked if William or Donald Gladstone had a licence for the herring spawn on kelp and William Gladstone produced an Indian Food Fish Licence for 1988, the year in question, which authorized the harvesting of not more than 500 pounds of herring spawn on kelp for food purposes.

[para. 60] The Fisheries officers arrested both William and Donald Gladstone. They seized the crates and the 123 pails of herring spawn on kelp which they contained, and they seized the pail in the car. The total of 124 pails contained about 4,200 pounds of herring spawn on kelp. The Fisheries officers sold it for $143,944.00.

PART II

THE CHARGES

[para. 61] William Gladstone and Donald Gladstone were charged with five counts. They were tried on only two of them. The trial judge was Judge Lemiski. He convicted both men on both counts. William and Donald Gladstone appealed to the Summary Conviction Appeal Court. The appeal was heard by the late Mr. Justice Anderson. The convictions on one of the counts were set aside and the convictions on the other count were upheld. This appeal is brought by William Gladstone and by Donald Gladstone from their convictions on the single remaining count. There is no cross-appeal from the acquittals.

[para. 62] The count on which William Gladstone and Donald Gladstone were convicted reads:

> On or about the 28th day of April 1988 A.D., at or near Vancouver in the Province of British Columbia, did unlawfully attempt to sell Herring Spawn on Kelp other than Herring Spawn on Kelp taken or collected under the authority of a Category J. Licence, contrary to s.20(3) of the *Pacific Herring Fishery Regulation* and did thereby commit an offence contrary to s.61(1) of the *Fisheries Act*.

[para. 63] s.20(3) of the *Pacific Herring Fishery Regulations* reads:

20.(3) No person shall buy, sell, barter or attempt to buy, sell or barter herring spawn on kelp other than herring spawn on kelp taken or collected under the authority of a Category J licence.

PART III

THE ISSUES NOT BEING DEALT WITH

[para. 64] A number of issues have been argued throughout the trial, the appeal to the Summary Conviction Appeal Court, and on this appeal. Four separate arguments were made at each level directed to the Crown's failure to prove particulars of the charge. At each level it was also argued that the seizure of the pails was unlawful and that for that reason the charge should be dismissed. It is not necessary for me to deal with those arguments since I would allow the appeal on other grounds. I do not propose to deal with them.

[para. 65] It was also argued at trial and before the Summary Conviction Appeal Court that s.20(3) of the *Pacific Herring Fishery Regulations* was beyond the legislative competence of the Parliament of Canada as being a regulation dealing with the marketing of fish rather than with the management of the fishery. That issue was not argued on this appeal and I do not propose to deal with it in these reasons.

PART IV

THE ABORIGINAL RIGHTS ISSUE

[para. 66] Alexander Mackenzie arrived at the Pacific Ocean near the present village of Bella Coola. He was the first person to cross North America over land in northern latitudes. He and Captain Vancouver reached this area within a few weeks of each other in the summer of 1793. On 23 July of that year Alexander Mackenzie encountered Indian traders near Elcho Harbour. In his journal he made this record:

> The Indians who had caused us so much alarm, we now discovered to be inhabitants of the islands, and traders in various articles, such as cedar-bark, prepared to be wove into mats, *fish-spawn*, copper, iron, and beads, the latter of which they get on their own coast. For these they receive in exchange roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries. (my emphasis)

[para. 67] In the report of Dr. Barbara Lane, an anthropologist who has testified as an expert many times with respect to the Indians of the Northwest Coast, the Indians to whom Alexander Mackenzie was referring were from the Heiltsuk people, the ancestors of William Gladstone and Donald Gladstone.

[para. 68] William Tolmie in 1834 and 1835 and James Douglas in 1840, both notable Hudson Bay traders, recorded in their journals the harvesting of herring spawn and the trade in herring spawn by the Heiltsuk people with the Bella Coola, Kwakiutl and Tsimshian peoples over a significant length of the coast. These entries appear in William Tolmie's diary in 1834:

> Saturday, April 5: ... The Sound now abounds with herring, which are depositing their spawn plentifully - they eject it on branches of pine placed in convenient stations by the Indians by whom it is used as food *& collected in great quantities*. It has a slightly saline taste, not disagreeable ...
>
> Wednesday, April 16: From 15 to 20 large canoes of Wacash's people passed on their way to the Caughquil country - *the canoes were laden with boxes, hampers &c filled with dried herring spawn, which they are to barter for Oolaghens* – the covers of their boxes are fitted similarly to that of a bandbox – hampers small & twisted of cedar bark. (my emphasis)

[para. 69] This entry appears in William Tolmie's journal for 7 March, 1835:

> …8 canoes of Neecelowes Indians have arrived in the Sound and encamped about 3 miles from the Fort - *they have come for the purpose of collecting and trading herring spawn*. (my emphasis)

[para. 70] In 1840 James Douglas visited the Hudson's Bay post at Fort Simpson and reported on the seasonal movements of the Coast Tsimshian Indians. He reported that the Tsimshian made an annual trip to Heiltsuk territory to trade for herring spawn. He recorded it in these words:

> They likewise hunt and trade with the natives in the interior canals, *and procure quantities of herring spawn* from the people of Millbank Sound, and do not visit the Fort in a body until the following February ... (my emphasis)

[para. 71] Dr. Lane in her report on the distribution of herring spawn by the Heiltsuk Indians said this:

> Pacific herring spawn only in certain locations. Consequently, some Native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. *This partly explains the extensive trade in spawn among Native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favoured*.
>
> *After the spawn was processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and hampers*. These canoes travelled for trading purposes from one tribe to another and were under the direction of their respective chiefs. Implicit is the existence of stable and peaceful relations between separate political entities. (my emphasis)

[para. 72] Dr. Lane gave extensive oral evidence. In cross-examination she was asked about quantities of spawn transported and she gave these answers:

> Q Now, while we're on this point, you at page 6 refer to the extensive trade and spawn among Native groups. Tons you speak of.
>
> A Yes.
>
> Q Tons.
>
> A Correct.
>
> Q Where does that come from, tons?
>
> A Well, from a number of accounts but let me point you simply to Tolmie's account that begins with the first flotilla of canoes, fifteen or twenty large canoes he said.
>
> Q Yes?
>
> A Each of those canoes was capable of carrying over a ton and I don't know what the upper limit would be, of freight*. If you simply take his lower figure, fifteen canoes and the lowest figure of a ton of freight, you've got fifteen tons right there*. And then in the subsequent days he records other canoes of other chiefs heading to the same destination, I assume, with the same kind of cargo. (my emphasis)

[para. 73] Judge Lemiski said that he was satisfied that the Heiltsuk people harvested herring spawn on kelp as a food source and that they engaged in inter-tribal trading and barter of herring spawn on kelp. Mr. Justice Anderson said that this conclusion was a proper one.

[para. 74] In my reasons in *Delgamuukw* v*. British Columbia* [[1993] 5 W.W.R. 97] I have discussed the origin and nature of Aboriginal rights. I do not propose to repeat here what I said there. The question is whether the Aboriginal custom, tradition or practice formed an integral part of the distinctive culture of the people in question and was protected as such by the institutions of the people in an organized society. There are concurrent findings of fact in this case that trading in herring spawn on kelp was such a custom, tradition or practice of the Heiltsuk people before first contact with incomers and between contact in about 1793 and the assertion of British sovereignty, which is accepted by the parties to have occurred throughout British Columbia in 1846.

[para. 75] The main focus of the Crown argument at all stages of this case has been that there was a lack of continuity in the exercise of the right. In particular, it was said that there was little if any trade in herring spawn on kelp between 1955 and 1974. It was about 1974 that the Japanese market for all forms of herring spawn first opened up.

[para. 76] In my reasons in *Delgamuukw*, in Part IV, Division 3, which I have headed "Abandonment", I have given my reasons for concluding that a custom, tradition or practice of pre-contact Aboriginal people may be abandoned by prolonged disuse before contact, but that once the custom, tradition and practice becomes recognized, confirmed and protected by the common law, and becomes, in essence, a common law Aboriginal customary right, then like all other customary rights it can not be lost by disuse and, like all common law rights, if it is to come to an end then the end must be brought about by valid legislation. For that reason, as well as for the reasons of Judge Lemiski and Mr. Justice Anderson, I conclude that the Aboriginal rights of the Heiltsuk people to harvest herring spawn and to trade their herring spawn extensively and in considerable quantities have been established.

[para. 77] For the reasons I have given in *R* v. *Vanderpeet* [reported *infra*], it is my opinion that 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, decided that the prohibition on the sale of fish by Indians over a period of about a hundred years, under Regulations made under the *Fisheries Act*, only operated to regulate the Indian sale of fish by way of prohibition, and did not operate to extinguish the Aboriginal rights of Indians to trade in fish. In the context of the facts in *Sparrow*, that conclusion may be broader than was necessary for the decision, but it reflects a reasoned conclusion of the Supreme Court of Canada couched in general terms and I would not depart from it.

[para. 78] I would also add that in my opinion, for the reasons I set out in my judgment in *Delgamuukw* v. *British Columbia*, in Pt. IV, Division 1, Sub-division (d), headed "Clear and Plain Intention: Whose Intention," the extinguishment of Aboriginal rights can only be brought about by the clear and plain intention of the Sovereign Power, legislatively expressed in Parliament. The extinguishment of Aboriginal rights in relation to fish cannot be brought about by fish regulations made in the form of subordinate legislation, because the *Fisheries Act* itself contains no clear and plain intention to delegate the power of extinguishment to a subordinate law-making body.

[para. 79] For those reasons I have concluded that the Heiltsuk people have existing Aboriginal rights to harvest herring spawn deposited on kelp, hemlock branches, and similar substrates, at their traditional locations, not only for their own consumption, but also for the purposes of trade in quantities measured in tons, subject only to the need for conservation of the resource; and that they have an Aboriginal right to trade in herring spawn in quantities measured in tons.

[para. 80] In my reasons in *R.* v. *Vanderpeet*, which are being handed down with these reasons, I discussed the question of the characterization of Aboriginal rights and I mentioned three alternative methods of description of the identical Aboriginal customs, traditions and practices. I have called the three methods of description the "purpose" method, the "self-regulation" method, and the "social" method. For the reasons I have given in the *Vanderpeet*, case I consider that the "social" method of describing Aboriginal customs, traditions and practices, which is a method based on the relationship between the custom, tradition and practice and the lives and the social inter-relationships within the people and with neighbouring peoples, is the method most consistent with both a consideration of the Aboriginal perspective and a consideration of the common law as a social regulation mechanism. I have said also that the "purpose" classification seems to me to lose sight of the Aboriginal perspective and to look at Aboriginal rights purely as they exist now and as seen from the incomers' perspective. It is not necessary to undertake any comparison of the "social" method of description as opposed to the "purpose" method of description in this case. Under either form of analysis the Heiltsuk people have Aboriginal rights to trade in large quantities of herring spawn on kelp and those rights are now recognized, affirmed and guaranteed by s.35 of the *Constitution Act, 1982*.

[para. 81] I add that in my opinion the decision of Mr. Justice Anderson, the Summary Conviction Appeal Court Judge, that the extensive practice of the Heiltsuk people in pre-contact times of trading quantities of herring spawn on kelp, measured in tons, to neighbouring peoples, principally for other food products, does not give rise to an Aboriginal right in modern times to sell herring spawn on kelp in similar quantities in a market economy for consumption in Japan represents an example of the discredited frozen rights theory and reflects a concept of Aboriginal rights which fails to reflect any Aboriginal perspective and which adopts too narrow a level of generality of description of the Aboriginal customs, traditions and practices of the Heiltsuk people.

[para. 82] In this appeal and in the appeals in *R*. v. *Vanderpeet*, and *R*. v. *N. T. C*. *Smokehouse Ltd*. [reported *infra*], on which judgments are being handed down at the same time as judgment in this appeal, I have discussed the nature, origin and scope of Aboriginal title and Aboriginal rights

in relation to fish, fishing and fisheries. What I have said about the law in each of the three appeals applies with equal force to the other two.

PART V

THE INFRINGEMENT ISSUE

[para. 83] Under the *Sparrow* analysis of the limits of the protection given to Aboriginal rights by s.35 of the *Constitution Act, 1982*, we now know that the first step is to consider whether there has been a prima facie infringement, and, if so, the second step is to consider whether that prima facie infringement is justified. If it is justified, then the Aboriginal right is lawfully overridden and cannot provide a defence to a charge under the *Fisheries Act* or to similar charges.

[para. 84] In the *Sparrow* case itself, Mr. Sparrow was charged with fishing with a net longer than 25 fathoms, contrary to the terms of his Indian Food Fish Licence. Accordingly, there was a genuine question about the scope of the Aboriginal right being exercised by Mr. Sparrow and about whether there was a prima facie infringement. The relevant factors which must be considered in relation to prima facie infringement are discussed in the *Sparrow* case.

[para. 85] In my opinion there is no doubt about the prima facie infringement question in this appeal. William Gladstone and Donald Gladstone were entirely prevented from selling the 4,200 lbs. of herring spawn on kelp in their possession and the kelp was confiscated, sold, and the proceeds retained. They have been deprived of their property in the herring spawn which they must be assumed to have obtained through the exercise of their Heiltsuk Aboriginal rights. And they have been prevented from exercising their Aboriginal rights to trade the 4,200 lbs. of herring spawn. So there is, in my opinion, a clear prima facie infringement.

[para. 86] The next aspect of this issue is whether the prima facie infringement was justified. The only justification that has been suggested lies in the interests of conservation of the resource. No other justification has been suggested in this case and I will not speculate about whether any other form of justification might be possible.

[para. 87] Judge Lemiski decided that the Aboriginal rights of William Gladstone and Donald Gladstone were being exercised in a way that was not in keeping with the culture of the Heiltsuk people or with the proper exercise of the Aboriginal rights in question and accordingly the interference with the right was justified. Judge Lemiski also thought that there was a potential conservation concern and that, in relation to that potential conservation concern, the keeping track of the resource was necessary against the day when conservation action with respect to the spawn on kelp fishery might be required, even though there was no actual conservation concern in 1988.

[para. 88] Mr. Justice Anderson, under the heading of "Justification of the Infringement of Aboriginal Rights" said that the Aboriginal right was to trade one type of food for another and that the sale of 4,200 lbs. of herring roe was not the exercise of the Aboriginal right at all. So he concluded that there was no infringement and that it was unnecessary to consider the issue of justification.

[para. 89] In my opinion the trading of 4,200 lbs. of herring roe by attempting to sell it to a Japanese buyer with access to Japanese customers in Canada and perhaps also in Japan, represents the exercise in modern form by modern means of the original Aboriginal right reflected in the pre-Sovereignty customs, traditions and practices of the Heiltsuk people. To say that what was done in this case was not the modem exercise of the original Aboriginal right because it was done clandestinely and surreptitiously is, in my view, wrong. It could not have been done openly because the exercise of the Aboriginal right was prohibited by the regulations which were vigorously enforced against the Heiltsuk people. To say that an attempt by William Gladstone and Donald Gladstone to avoid the regulations proves that the regulations are justified is a circular argument and is, for that reasons, fallacious.

[para. 90] So that brings me to the question of conservation itself. Judge Lemiski said this:

> The Crown argued that the objective of the relevant regulations was *proper management and conservation* of the resource. The Defence called Dr. G. Vigers who gave impressive expert opinion evidence that the herring spawn on kelp harvest is non-destructive and there are no conservation concerns based on "biological or environmental concerns." He said the

real issue was "allocation" rather than conservation. He testified that for every million herring spawn only . I % of I % of the eggs actually hatch and that other fish and birds consume vast quantities of the spawn. In terms of the narrow definition of "conservation" I accept the Defence position. But the fully-phrased justification relied on by the Crown includes "*proper management* and conservation" of the resource. In my opinion it is self-evident that management of anything demands and depends upon information. How can the government manage and conserve a resource without knowing what interference there is with that resource? (Judge Lemiski's emphasis)

[para. 91] Judge Lemiski considered that there was a *potential* conservation issue and that amounts to an *actual* conservation concern. (Judge Lemiski's emphasis)

[para. 92] I have read the evidence of Dr. Vigers. In examination in chief he was asked about his report and said this:

Q You say: "This report presents information which substantiates several conclusions with respect to the harvest of spawn on kelp. In particular, it is my opinion that there are no conservation concerns based on biological or environmental considerations." Is this your opinion?

A Yes, it is, Your Honour.

Q "The Department of Fisheries and Oceans have no identifiable or perceived conservation concerns with respect to the amount or methods of spawn on kelp harvested." That is your opinion as well?

A Yes, it is, Your Honour.

Q Next: "The issue is one of allocation rather than conservation." Is that your opinion?

A That's correct.

Q Can you explain what you mean by that a little bit?

A Well, the issue as I see it, Your Honour, is that in harvesting the spawn on kelp the proportion or the percentage of spawn that is harvested or that is allocated for harvesting each year is currently twenty-two hundred and seventy-five tons. The amount of spawn, herring spawn that occurs coast-wide is in the order of ten to the thirteenth kilograms, which is about a billion tons, or a very large number. So, in proportion the species or the spawn is not being threatened based on those numbers.

There is a number of other factors as well. When spawn on kelp is collected the herring do not spawn out. That is, they spawn in a series of events, of depositing about a hundred eggs or so per spawning event. And they do this every few minutes, or over the course of their spawning cycle, until they ultimately can spawn as many as, say, twenty thousand eggs.

So, for the spawn on kelp harvest, there are many safety factors that protect for conservation, and the allocation is really one of a regulatory matter to identify the amount of spawn harvested.

Q Then you say: "The spawn on kelp harvest is non-destructive, returning the harvested year class to the fishery."

A Yes. This is emerging as a practice, particularly in the open pond type of spawn on kelp harvest, where kelp is hung, suspended in the water, and the herring spawn on the kelp, and are essentially free to go their own way after they have completed spawning.

So it's non-destructive in the sense as, say, compared to the sac roe fishery, which harvests herring in the round and takes the entire fish, and then kills the fish to take the unspawned eggs, and with the meat going to a reduction fishery.

[para. 93] Dr. Vigers pointed out that the Department of Fisheries' records show the adult herring stock from year to year. British Columbia averages 350,000 tons, or 33 billion fish. From those fish, the 1988 allocation of herring roe and herring spawn, in total, was 40,000 tons. The roe is

gathered from herring caught in nets and killed when the roe is extracted from the roe sac of the female fish. Since all the fish are killed, the fish caught in the roe fishery reduce the total quantity of herring. But the herring which deposit the spawn on kelp live on to spawn again the following year, or at least many of them do. The spawn on kelp fishery accounts for 6% of the total harvest allowance of spawn and roe for a year. The remaining 94% comes from the roe fishery. But the fish that provide the 6% live on and the fish that provide the 94% are killed. Accordingly, in regulating the stock, there is no conservation imposed on the herring spawn on kelp fishery and no need for such conservation in the circumstances which existed in 1988. The conservation each year is entirely dealt with by regulating the 94% of the total of spawn and roe which are from fish that are netted and killed for their roe.

[para. 94] Dr. Vigers' evidence was not effectively challenged. It was described as impressive by Judge Lemiski. It was, indeed, supported by the evidence of a Fisheries officer.

[para. 95] In light of that evidence, the only regulation which might be justified in relation to controlling the exercise of the Aboriginal rights would be a regulation which requires the herring spawn on kelp that is harvested to be reported to the Fisheries Department. I see no reason why that should require a licensing system. Indeed, a licensing system with a fee was struck down by the United States Supreme Court as not being required for conservation in *Tulee* v. *State of Washington* 315 U.S. 681 (1942). But that is not the point. The point is that a complete prohibition on the exercise of the Aboriginal right except in accordance with allocations made by the Department of Fisheries and Oceans and in accordance with quotas set by the Department has not, in my opinion, been shown to have been justified by the needs of conservation. Nor can the seizure and confiscation of 4,200 lbs. of herring roe on kelp, which were being sold in the exercise of an Aboriginal right by William Gladstone and Donald Gladstone, be shown to have been justified by the needs of conservation.

[para. 96] In *Sparrow*, Chief Justice Dickson and Mr. Justice La Forest said this, at p. 1119 [S.C.R.; pp. 186-87 C.N.L.R.]:

> We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown....
>
> 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 regulating 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 of the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

[para. 97] In my opinion the Crown has not met the heavy burden of justification in this case. There has not been as little infringement as possible. There has not been any compensation for the confiscation of the herring roe on kelp. And the only consultation that has been shown to have taken place has been with the Native Indian Brotherhood and not with the members of the Heiltsuk Band. The Native Indian Brotherhood representative may not have considered the Aboriginal rights of the Heiltsuk people when he was consulted some years ago. The fact that about half of the Category J Licences issued for the herring spawn on kelp fishery have been issued to Indians does not, in itself, indicate adequate consultation, nor does it indicate that those members of the Heiltsuk Band who actually hold the Aboriginal rights have been consulted and their views considered with respect to the issuance of Category J Licences. In my opinion no inference of adequate consultation can be drawn from the fact that the Heiltsuk Band itself holds a Category J Licence with a representative nominated for the purpose of that licence, certainly not an inference that would discharge the heavy burden of justification as described in *Sparrow.*

PART VI

CONCLUSION

[para. 98] I would allow the appeals of William Gladstone and Donald Gladstone. I would do so on the basis of my answers to questions of law alone relating to the nature and scope of Aboriginal rights and relating to what constitutes prima facie infringement and what constitutes justification for prima facie infringement of Aboriginal rights. I would enter verdicts of acquittal with respect to each of the counts that remained outstanding and that were the subject of this appeal.