HER MAJESTY THE QUEEN, and, NORMAN JACKSON, EDWARD GEORGE, RUDY BRESSETTE, KERWIN SHAWNOO, MARK BRESSETTE, ROBERT L. JACKSON, ROBERT R. JACKSON, MICHAEL G. JACKSON, ALLEN BRESSETTE and CARL GEORGE

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

Ontario Court of Justice, Provincial Division, Eddy Prov. Div. J., February 19, 1992

P. Gonsalves, for the Crown
N. Peel, for the accused
W.B. Henderson, for the accused

The accused members of the Kettle Point Indian Band were charged with fishing with a gill net without a licence, contrary to s. 12(1) of the *Ontario Fishery Regulations* and failing to return fish caught without a licence to the waters, contrary to s.10 of the Regulations, thereby committing offences contrary to s.61(1) of the *Fisheries Act,* R.S.C. 1970, c.F-14 (now s.79(1) of *Fisheries Act,* R.S.C. 1985, c.F-14). While fishing in waters outside the 1979 limit imposed by the Ontario Ministry of Natural Resources, some of the accused were approached by armed law enforcement officers in boats and 1,200 pounds of fish together with gill nets and fish trays were seized. It was conceded by the Crown that at the time of the boarding of the boats by the officers, the accused aboard the boats were detained and that no right to counsel had been accorded to them at the time of the detention. It was further conceded by the Crown that no search warrant had been obtained prior to the boarding.

The accused relied on their Aboriginal and treaty rights to fish, as recognized by the Royal Proclamation of 1763, the Treaty of 1827 and s.35 of the *Constitution Act, 1982.* They also alleged breaches of ss.8 and 10(b) of the *Canadian Charter of Rights and Freedoms.*

Held: Accused acquitted on all charges.

1. There was no formal recognition, acknowledgement or consent by or on behalf of the members of the Kettle Point Indian Band to the 1979 fishing limits imposed by the Ministry. The boundaries imposed were arbitrary; there was no evidence that they had any relationship to fish populations or topography as to fishing grounds or allocation or identification of existing resources or priorities. Furthermore, there was no evidence that such boundaries were established pursuant to the *Fisheries Act* or other federal legislation. However, they indicated in the minds of ministry officials the existence, however vaguely expressed, of "a native sustenance fishery."

2. An Indian fishery utilizing gill nets for their own consumption and limited commercial purposes has been in existence in the area in question both before and after the Royal Proclamation of 1763. Kettle Point Band members have a right to fish that was preserved by the Royal Proclamation of 1763 and inherent in the Treaty of 1827.

3. The evidence, including the number of parties engaged in fishing, the number of boats and the quantity of fish taken, did not support a conclusion that the accused were engaged in commercial fishing. No evidence was adduced as to the size of the reserve community, the

number of band members regularly engaged in fishing, and the consumption of fish as a matter of sustenance.

4. The accused have an existing Aboriginal and/or treaty right to fish in the waters in question using gill nets, which is protected by s.35 of the *Constitution Act, 1982.* The Crown has failed to discharge its burden of proving extinguishment of the accused's Aboriginal and/or treaty rights to fish.

5. As to the extent of such fishing rights, *Sparrow* allows band members in future cases to show by historical data or otherwise that their Aboriginal or treaty right to fish extends to fishing for food, ceremonial or commercial purposes.

6. Section 35 provides the accused with the right of allocation of any surplus of the fisheries resource that may exist after the needs of conservation have been taken into account. The Crown has failed to justify its purported regulation of the Kettle Point fishery. The *Ontario Fishery Regulations* have not changed since 1982 consequent upon the enactment of s.35 of the *Constitution Act, 1982,* nor since 1990 consequent upon *Sparrow.* The mere preservation of fish stocks for the general welfare of the public is insufficient justification. There are no provisions in the Regulations respecting justification or allocation on a priority basis as to Indian rights.

7. The relationship between the government and Aboriginal peoples should be trust-like rather than adversarial. However in this matter the Crown has taken an adversarial approach, relying on a predawn raid by officers with drawn guns and prosecution in the courts. The honour of the Crown in so proceeding was not much in evidence.

8. Based on s.35, the accused 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 their constitutional rights, s.52 of the *Constitution Act, 1982,* renders them of no force and effect.

9. The accused's rights to be secure against unreasonable search and seizure under s.8 of the Charter have been breached. There was no justification of the officers' failure to obtain a search warrant. There was no evidence to support the reliability of the initial complaint by the local anglers association. There was no evidence of any search for existing licences or to determine if the fish were in fact taken outside the boundary area as a matter of historical practice. This was not a sudden or urgent matter requiring immediate action. The involvement of several officers including some from the O.P.P. and United States forces showed that the morning raid was planned. There was ample time to attend for a search war-rant if it could have been justified. As the accused had a reasonable expectation of a right of privacy in these circumstances, a warrant should have been sought. The Crown was not entitled to rely on s.49 of the *Fisheries Act,* R.S.C. 1985, c.17-14 (formerly s.35 of *Fisheries Act,* R.S.C. 1970, c.F-14) as there was not an urgent need to respond without the obtaining of a search warrant.

10. The Crown conceded that the accused were detained without being afforded their right to counsel. They were questioned as to fishing licences that they may or may not have had. When the officers ascertained that there were no licences or no responses were received, the boats were boarded, and fish, nets, trays and other gear were seized.

11. Section 1 of the Charter could not be relied upon to justify the searches in the manner in which they took place.

12. The accused's rights under ss.8 and 10(b) having been breached, the admission of evidence both of the statements of the accused and the property seized would bring the administration of justice into disrepute if that evidence were to be admitted.

*** * * * * ***

EDDY PROV. DIV. J. (orally): It is alleged that the accused on or about the 27th day of September 1987, on the waters of Lake Huron fronting the Township of Bosanguet in the County of Lambton, unlawfully did take fish by means of a gill net without the authority of a licence, contrary to s.12(1) of the *Ontario Fishery Regulations* as amended and thereby committed an offence contrary to s.61(1) of the *Fisheries Act,* R.S.C. 1970, c.F-14 as amended [now s.79(1) of *Fisheries Act,* R.S.C. 1985, c.F-14].

A further charge involving the same parties and with respect to the same incident charges that they did fail to immediately return yellow pickerel to the waters taken as alleged aforesaid, contrary to s.10 of the *Ontario Fishery Regulations* and did thereby commit an offence contrary to s.61(1) of the *Fisheries Act* [now s.79(1) of *Fisheries Act,* R.S.C. 1985, c.F-14].

At the commencement of these proceedings it was agreed the Crown would proceed with the first count on the information and that resolution of the second count would be related to a decision of the court on the first count with counsel reserving the matter of calling additional evidence or otherwise in support of the second count. It is acknowledged that all of the accused are residents of the Kettle Point Indian Reserve and as such are direct descendants of members of that reserve who had heretofore entered into treaty rights at the time of the establishment of the reserve and are entitled accordingly to claim the benefit of the same.

On the evening of September 26th, 1987, Conservation Officer Vervoort stationed himself at Cedar Point on the south shore of Lake Huron, being a point to the south and west of Kettle Point Indian Reserve and perhaps some five miles from the south boundary of the reserve. He noted boats appearing to come from the Kettle Point Reserve area and they appeared to be engaged in activities which I infer made him suspicious that they were involved in illegal fishing activities at a point which was north and west of Cedar Point, after which they made those observations the boats appeared to return to the reserve area. He identified one boat that he had prior knowledge of as being operated regularly by the accused, Robert R. Jackson. The interest of the officer was particularly related to complaints received by the Ministry from the Bluewater Anglers Association as to suspicion that fish were being illegally taken by members of the Kettle Point Indian Reserve.

The following morning a total of nine law enforcements officers and three patrol boats assembled at the Cedar Cove Marina, Cedar Point. The officers comprised in one boat, two conservation officers and an Ontario Provincial Police constable. In a second boat, an Ontario conservation officer, Department of Natural Resources officer and an O.P.P. constable. In the third boat was an Ontario conservation officer, O.P.P. officer and a Michigan Department of Natural Resources officer or officers. These various officers appeared to be garbed in some cases in coveralls but not uniformly dressed, but each appeared to have some shoulder patch, at least, identifying their various sources. There is some evidence that the officers were concerned for their safety and for

that reason they were armed both with side arms and a shotgun or shotguns. That morning each of the boats ashore was assigned a boat out on Lake Huron after some consultations. Thereafter they set out in pursuit of their respective boats.

They were successful in contacting four of the boats that had been observed out on the water and the accused were found to be variously on these boats.

Subject to a determination on an application to exclude the evidence based upon breach of the accused's rights under s.8 and s.10(b) of the *Canadian Charter of Rights and Freedoms* which will be dealt with subsequently, the court would note that some 1,200 pounds of fish were seized together with a quantity of gill nets and fish trays. To be more specific,

> ... from the boat of Robert Jackson were seized nine wooden net trays and three packers containing 2,540 metres of gill net and 880 pounds of pickerel plus 20 pounds of bass plus two Chinook salmon and several course fish ... from the boat operated by Mr. Allen Bressette was taken seven packers containing 900 metres of gill net plus 182 pounds of yellow pickerel plus eight pounds of bass and several course fish. From the boat in which were Mr. Kerwin Shawnoo and Mr. Rudy Bressette were taken four packers and one net tray containing 1,1000 metres of gill net plus 36 pounds of yellow pickerel plus five bass and several course fish.

A fourth boat was not stopped, it was named Duchess and was subsequently found about a half hour later docking at the Kettle Point Indian Reserve aboard which was found Norman Jackson and Edward George, two of the accused before the court.

There is little evidence before the court that any of the accused parties held a commercial fishing licence which would permit the use of a gill net for the harvesting of fish. None of the evidence adduced would, in my judgment, support a conclusion that the accused were engaged in commercial fishing operations.

While the facts surrounding the apprehension of the accused and the seizure of the fish and nets, as I say, will be elaborated subsequently, it is conceded by the Crown that at the time of the boarding of the boats by the various officers, the accused aboard the boats, were detained and that no right to counsel had been accorded to them at the time of detention. It is further conceded by the Crown that to the extent that search and seizure was involved in the operation, no warrant had been obtained prior to or in anticipation of the apprehension search and seizure activities. As I have stated, there is evidence that guns were present and in some cases drawn in accordance at the boarding and apprehension activities. The assistance of the Michigan officers together with their boat was enlisted by the provincial officers on the afternoon of the 26th of September.

There was some discussion prior to the assembly of enforcement officers of the potential for hazard and threat which were not related to any specific individuals nor the accused and indeed no weapons were found on any of the boats of the accused parties.

The Issues

The accused raised two main issues as a result of the evidence adduced by the Crown.

1. That they have existing Aboriginal as well as treaty rights to fish in the waters of lower Lake Huron as their forebearers had done in centuries past. These rights were recognized by the Royal Proclamation of 1763 and further covered by the Treaty of July 10th, 1827 in which the Kettle Point and Stoney Point Indian Reserves were excepted out from other lands surrendered to the Crown in southwestern Ontario and further as recognized by a number of decided court cases, in particular *R. v. George* a decision that went ultimately to the Supreme Court of Canada [[1966] S.C.R. 267, 55 D.L.R. (2d) 386, 47 C.R. 382, [1966] 3 C.C.C. 137] and their rights as further confirmed by s.35 of the *Constitution Act, 1982.*

2. A breach of their rights under ss.8 and 10(b) of the Charter of Rights and Freedoms to the effect that they were subject to unlawful search and seizure and that they were detained and not afforded their right to counsel. Also it is further submitted with respect to the Crown's evidence that the Crown has failed to show that the fish seized at the time of intervention were taken by the use of gill nets from waters covered under the provisions of the regulations of the *Fisheries Act.*

Essential to a determination of the constitutional issue is a consideration of the meaning and effect of s.35 of the *Constitution Act, 1982* which reads as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1), "treaty rights" include rights that now exist by way of land claims agreements or maybe so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Briefly stated, the Crown relies upon *R. v. Agawa,* [1988] 3 C.N.L.R. 73, 53 D.L.R. (4th) 101, O.R. (2d) 505, 28 O.A.C. 201 (C.A.) for the general submission of the Crown that s.35 of the *Constitution Act, 1982* in referring in s-s.(1) to existing Aboriginal and treaty rights must be interpreted to mean those rights which have been regulated to the present time by means of the various Acts and regulations including the *Fisheries Act* and further that there is a preeminent right in the Crown to enact this legislation which would include the existing regulations under the *Fisheries Act* and binding upon Aboriginal and treaty rights.

The position of the accused is that *R. v. Agawa is* no longer the binding law in Ontario but rather *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 is binding which in interpreting s.35 of the *Constitution Act, 1982* requires the Crown to justify an infringement by such legislation as the regulations under the *Fisheries Act* and that it is incumbent upon officers of the Crown to consult with members of the Indian band whose rights are effected, to make an allocation of the existing resources on a priority basis to satisfy first, the Indian rights and to justify the process in a reasonable manner.

Determining the "Existing Aboriginal and Treaty Rights of the Defendants"

This issue has been considered by the decisions of the court and broadly in *R. v. George.* Calvin William George was charged that on September 5th, 1962 at Kettle Point Indian Reserve unlawfully did hunt a migratory bird at a time not during the open season contrary to the regulations and provisions of the *Migratory Birds Convention Act,* R.S.C. 1952, c. 179. The case was heard originally in the local court by His Honour Judge Dunlap, the sitting magistrate and then on appeal by the Ontario High Court and first reported in *R. v. George* (1963), 41 D.L.R. (2d) 31 (Ont. H.C.). It was subsequently appealed to the Ontario Court of Appeal and reported in *R. v. George* (1964), 45 D.L.R. (2d) 709 and then ultimately to the Supreme Court of Canada *R. v. George,* [1966] S.C.R. 267, 55 D.L.R. (2d) 386, 47 C.R. 382, [1966] 3 C.C.C. 137. That case centres upon the treaty rights of the accused to hunt for food at any time on the reserve. It is useful for its discussion and elaboration of the historical basis of such rights.

While the decision of the learned magistrate was upheld on appeal by McRuer C.J.H.C. at the Ontario High Court and further upheld by the Ontario Court of Appeal, and that to the fact that the accused had a right as an Indian on that reserve to hunt in the manner in which it was alleged he was doing so, it must be noted that the Supreme Court of Canada finally determined that the provisions of the *Migratory Birds Convention Act* as federal legislation was paramount, notwithstanding the provisions of s.87 of the *Indian Act* and in effect overturned the lower court decisions.

It is my judgment, however, that Justice McRuer's decision must now be read in light of the most recent decision of the Supreme Court in *R. v. Sparrow* herein, because of its expansive consideration and treatment of the historical basis of the rights at issue herein. I quote from McRuer C.J.H.C. at page 32 of the D.L.R. reports.

> The rights of the accused as an Indian on a reservation have their roots very deep in Canadian history. Article 40 of the Articles of Capitulation signed by General Amherst as Commander in Chief of his Britannic Majesty's troops, and forces in North America and the Marquis de Vaudreuil "Governor and Lieutenant-General for the King in Canada" provides:
>
> > The Savages of Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried armes, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries. The actual Vicars General, and the Bishop, when the Episcopal see shall be filled, shall have leave to send to them new Missionaries when they shall judge it necessary. - "Granted except the last article, which has been already refused."
>
> Following the Treaty of Paris in 1763 the Royal Proclamation of October 7, 1763, R.S.C. 1952, vol. 6, App. 111, p. 3, gave to the Indians certain definite rights that have ever since been judicially recognized. The proclamation reads in part as follows [p. 6]:
>
> > And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians and with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been

> ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.

The proclamation forbids any Governor or Commander in Chief to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments or upon any lands which "not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them." The proclamation further provides that

> ... all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

Private purchase of lands from the Indians was strictly prohibited. It was further provided [p. 7]:

> ... We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie ...

McRuer J. continues:

> For the purposes of this case the area reserved for the Indians included all that part of Ontario lying west of a line drawn from Lake Nipissing to the westerly head of Lake St. Francis on the St. Lawrence River (see map appended to Part 1, Shortt and Doughty, Documents Relating to the Constitutional History of Canada, 1759-1791).

He continues:

> By a treaty made in 1827 between the "Chiefs and Principal Men of that part of the Chippewa Nation of Indians inhabiting and claiming the territory or tract of Land" described in the treaty, and King George the Fourth (see *Indian Treaties & Surrenders,* vol. 1, p.71), an area of 2,200,000 acres of land in what is now part of Western Ontario was surrendered to the Crown in consideration of an annuity of £1,100 to be distributed as set out in the agreement. From this agreement certain parcels of land were reserved, totalling 17,951 acres, which include what is now known as the Kettle Point Indian Reserve. The treaty or agreement, as it may be called, recites in part (pp. 71-4):
>
> > Whereas, His Majesty being desirous of appropriating to the purposes of cultivation and settlement a tract of land hereinafter particularly described, lying within the limits of the Western District and District of London, in the Province of Upper Canada and heretofore possessed and inhabited by a part of the Chippewa Nation of Indians, it was proposed to the Chiefs and Principal Men of the said Indians at a Council assembled for the purpose at Amherstburg, in the said Western District, on the twenty-sixth day of April, in the year of Our Lord one thousand eight hundred and twenty-five, that they should surrender the said tract of land and the possession and the right of possession heretofore enjoyed by them in the same to His Majesty, His

> heirs and successors, for such recompense to be made by His Majesty to the said Nation of Indians as should at the said Council be agreed upon.
> . . .
>
> And whereas, the tract of land intended and agreed to be surrendered as aforesaid has been since accurately surveyed, so that the same, as well as certain small reservations expressed to be made by the said Indians from and out of the said tracts for the use of themselves and their posterity, can now be certainly defined.

Thereafter the treaty continues with the grant and description of the land surrendered and contains the following:

> ... saving, nevertheless, and expressly reserving to the said Nation of Indians and their posterity at all times hereafter, for their own exclusive use and enjoyment, the part or parcel of the said tract which is hereinafter particularly described, ... and which is situated at Kettle Point, on Lake Huron, that is to say (setting out in detail the area in which the Kettle Point Reserve is included)

Judge McRuer continues:

> A perusal of this treaty makes it clear that the Indians on the Kettle Point Reserve still have all the rights enjoyed by their ancestors in that area.

He elaborates upon that:

> Ever since the judgment of Lord Mansfield in *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 it has been recognized that the Proclamation of 1763 at least had all the effect of a statute of the Parliament of Great Britain.
>
> In *The King v. Lady McMaster,* [1926] Ex. C.R. 68 at p. 72, Maclean J., said: "The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed." With respect, I think there are authorities that warrant the view that the proclamation has even a greater force than a statute.

He continues:

> I think this case leaves it open to argue that since there was no reservation of a power of revocation of the rights given to the Indians in the Proclamation of 1763, those rights cannot now be taken away even by legislation. Whether this be true or not this much seems clear - that the Indians' rights to hunt for food on the lands reserved to them in the Treaty of 1827 cannot now be taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes those rights.

By the *B.N.A. Act,* s.91(24) exclusive legislative authority with respect to Indians and lands reserved for Indians became and is continuously vested in the Parliament of Canada. Section 88 of the *Indian Act* reads as follows:

> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or bylaw made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

At the Ontario Court of Appeal level in the *George* decision at p. 713, Roach J.A. stated:

> The treaty does not refer to the Proclamation in terms but historical implication impels the conclusion that what was surrendered and conveyed to the Crown by the treaty were the rights granted to them by the Proclamation to and in respect of the lands described in the treaty as being intended to be thereby conveyed. What was preserved and confirmed to them were those same rights to and in respect of the lands reserved by the treaty and without any time limitation thereon.

It is useful to note at the level of the Supreme Court, *R. v. George,* Cartwright J., in dissent summarized his finding as follows [at p. 397 D.L.R.]:

> At the risk of repetition I think it clear that the effect of s.87 is twofold. It makes Indians subject to the laws of general application in force in the Province in which they reside but at the same time it preserves inviolate to the Indians whatever rights they have under the terms of any treaty so that in a case of conflict between the provisions of the laws and the terms of the treaty the latter shall prevail.

Finally it must be noted that the majority decision given by Martland J. at p. 398 [D.L.R.] really summarizes the final disposition of *R. v. George.*

> Accordingly, in my opinion, the provisions of s.87 do not prevent the application to Indians of the provisions of the *Migratory Birds Convention Act.* I can see no valid distinction between the present case and that of *Sikyea v. The Queen,* 50 D.L.R. (2d) 80, [1965] 2 C.C.C. 129, [1964] S.C.R. 642, and, for the reasons given in that case, I think that this appeal should be allowed.

It might be noted then that the Supreme Court of Canada disagreed with the decisions of the court below and in effect held that the provisions of the *Migratory Birds Convention Act* had resulted in a conviction of Mr. George in that they were validly inactive legislation and which affected those rights.

The Nature and Extent of Fishing Rights Enjoyed by the Kettle Point Indian Reserve Band Members

While the decisions of *R. v. George* cited are useful in their expansive treatment of the treaty rights of the Kettle Point Indian Reserve Band, they are not determinative of the extent of the fishing rights as such other than to note that the right to fish is treated therein by inference as co-equal with the right to hunt as part of the historical, natural right. This distinction was touched upon by Mr. Justice Griffiths in *R. v. Tennisco,* [1981] 4 C.N.L.R. 138, 131 D.L.R. (3d) 96, 64 C.C.C. (2d) 315 (Ont. S.C.) wherein he observed that the words in the Royal Proclamation as to

Crown lands, were lands that have not been ceded to or purchased by the Crown "are reserved to them, or any of them, as their hunting grounds." It should be liberally construed so as to include the right to fish. In *R. v. Taylor and Williams,* [1981] 3 C.N.L.R. 114, 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.), it had to deal with members of the Chippewa Nation Indian Tribes charged with taking bullfrogs from unoccupied Crown lands for food for their families contrary to the provisions of the *Game and Fish Act.* MacKinnon A.C.J.O. observed [p. 123 C.N.L.R.]:

> If the Indians were to remain in the area one wonders how they were to survive if their ancient right to hunt and fish for food was not continued ...
>
> ... In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned ...
>
> Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: R. *v. White and Bob* (1964), 50 D.L.R. (2d) 613 at p. 652 ...

In *George Henry Howard v. The Queen,** an unreported decision of the Ontario Court (General Division) rendered January 3, 1991, Murphy J., observed:

> I cannot accept the Crown's submission the right to fish on Reserve land does not include the right to fish on the waters of Rice Lake which is adjacent to the lands. The Crown's argument would not give the Treaty a liberal construction and would not be resolving a doubtful expression in favour of the Indian. It would give the Treaty a very narrow interpretation and not in keeping with the spirit of the Treaty ...
>
> ... The right to fish on Reserve land to have any meaning must include the right to fish in waters adjacent to the Reserve land.

I note this concern has not gone unacknowledged for filed before me as an exhibit with respect to the Kettle Point Indian Reserve is a letter under the hand of J.K. Young, Fish and Wildlife supervisor for and on behalf of J.D. Parker, District Manager, the Ontario Ministry in a letter dated July 16, 1979 to Chief Charles Shawkence, Chippewas of Kettle Point Band noted:

> Our interpretation of Treaty No. 29 which defines the boundaries of the Kettle Point Reserve is that the Reserve extends to the waters edge.
>
> Although we certainly support the idea of a native sustenance fishery, we cannot allow unlimited fishing by members of the Band as we feel that this leads to the commercialization of fish.
>
> In order that we can limit the magnitude of the native fishery, we are defining an area in which we will allow netting by members

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* [Editor's Note: The Court of Appeal decision dismissing the accused's appeal of a dismissal by a summary conviction appeal court of his appeal from conviction is reported at [1992] 2 C.N.L.R. 122. An application for leave to

appeal to the Supreme Court of Canada was granted October 1, 1992.] of the Kettle Point Band. The area is depicted on a sketch attached ...

That sketch in essence extends the southerly boundary of the reserve in a westerly direction, 1.5 miles or 2,400 metres into Lake Huron. The easterly boundary of the same reserve, 1.5 miles in a northerly direction into Lake Huron and appears to conjoin those two extensions for approximately the same perpendicular distance opposite the shores of the reserve. The letter continues,

> ... This does not in any way mean that Band members have exclusive fishing rights within this area and our enforcement officers may, on occasion, check anglers in the area although they will not in any way interfere with native netting operations. Conversely, netting operations outside of the designated area will not be allowed. Also fish taken will be for the personal use of band members.

There is no evidence that formal recognition or acknowledgement or consent by or on behalf of members of the Kettle Point Indian Reserve ensued that letter. There is evidence before me that members of the Ministry of Natural Resources charged with enforcing the *Ontario Fishing Regulations* and pursuant to the *Fisheries Act* intended to conduct their subsequent enforcement activities based upon this arbitrary boundary offered to the band. There is no evidence before me that the boundary has any relationship to natural fish populations or topography as to fishing grounds or allocation or identification of existing resources or priorities respecting the same. Further there is no evidence before me that such boundaries were established pursuant to any consideration of the *Fisheries Act* or federal legislation. This exercise, however, does serve to indicate in the minds of ministry officials, at least, the existence however vaguely expressed of "a native sustenance fishery."

It is urged upon the court on behalf of the accused that there is such an abundance of evidence, both by historical data, scholarly study and judicial findings that this court should accept that there has been in existence in this area, both before and after the Royal Proclamation of 1763, the existence of an Indian fishery utilizing gill nets for their own consumption and limited commercial purposes. In another area of Ontario, near Sault Ste. Marie, such recognition was generally accorded in *R. v. Agawa* [p. 75 C.N.L.R.]:

> The evidence established that Indians in the areas occupied by the Batchawana Indian Band habitually fished with gill nets for their own consumption and for commercial purposes when the treaty was executed. Dr. Charles E. Cleland, Professor of Anthropology and Curator of Anthropology at Michigan State University and an expert on Indians in the area, testified that from the time of Christ Indians were heavily dependent upon fish for their livelihood. The use of gill nets by the ancestors of the band can be traced back to 800 A.D. Professor Cleland's evidence was not disputed by the appellant and was accepted by both the trial judge and the summary conviction appeal court judge.

The treaty referred to in that decision was the Robinson Huron Treaty of 1850.

I find that the members of the Kettle Point Indian Reserve Band have a right to fish that was preserved pursuant to the Royal Proclamation of 1763 and inherent in the Treaty of 1827 applying those principles of precedent and interpretation cited in similar cases as above.

It is interesting to note Exhibit One filed in this matter is a marine chart generally of the area of southern Lake Huron. The Crown evidence alleges that fishing activities took place outside the 1.5 mile concession fishing area, referred to above, in an area which by scale would appear to be approximately 3.5 nautical miles southwest of the south boundary of Kettle Point Reserve. Perusal of the topography in the area in question would appear to indicate variations in depth of the lake bottom at that point which may well by nature of such variation operate as a natural place for fishing activity. If, in fact, such area serves as a natural fishing ground that leaves little to the imagination to perceive that area may well have served as a focal point for Native fishing activities for many generations previously. In light of my findings and conclusions and centering upon the decision of the Supreme Court of Canada in *R. v. Sparrow*, and its directives, what may well result in the future is a more precise, rationalization of the rights of the Kettle Point Indian Band Reserve to fish in the waters of Lake Huron in the vicinity of their reserve. For purposes of disposition of this matter, I find as a fact that the fishing rights referred to herein of the Kettle Point Indian Band Reserve members on a reasonable interpretation of the same would include the right to fish by the use of gill nets in an area lying southwest of the reserve and approximately 3.5 nautical miles southwest of the south boundary, generally in the area noted on Exhibit One as BG-1, BG-2.

The Crown concedes on submission that the markings are subject to an error of approximately one inch in circumference or two statute miles by diameter in a circle from that point. Based upon those concessions including the locations marked NJ-1 for the Norman Jackson boat which is found close to the south boundary of the concession area, also shown on Exhibit One, the Crown generally acknowledges that it has failed to show that the accused, Norman Jackson, Edward George, Allan Bressette and Carl George respectively, were contravening the Act in that they were found so close to the concession area, the court is entitled, and does draw the inference that any fish and other equipment found aboard their boats might well have been taken from the area shown as the concession area and thereby from the standpoint of the Crown, at least, in an area which it had unilaterally extended as an area where there was permission to net fish.

I raise these matters at this point as the Crown acknowledges that there was, in my judgment, a de facto right of the Kettle Point Indian Band Reserve members to fish in the waters adjacent to the Kettle Point Reserve pursuant to the concession area. It is the position of the Crown that the remaining defendants were found in an area where the evidence would preclude the court drawing such an inference. I propose to deal with these matters in more detail under the heading of Charter of Rights.

To review, Treaty No. 29 of July 10, 1827, the Chippewa Nation of Southwestern Ontario ceded some two million acres to the Crown to open the same up for settlement. At the same time a number of reserves were set out including those of the Kettle Point Indian Band and those of the Stoney Point Reserve adjacent. The Stoney Point Reserve was largely expropriated by the Crown for the purposes of forming Camp Ipperwash during the Second World War and to date has not been returned to the Stoney Point Reserve, many of whose members moved to the adjacent Kettle Point Reserve and continue to reside thereon.

In that sense then, the lands of the Kettle Point Indian Reserve form unceded lands in their original state as lands occupied from time in memorial by members of the Chippewa Nation. It takes no great feat of imagination to acknowledge and confirm the fact that such reserves fronted almost without exception, upon large bodies of water, in this case the shores of southern Lake Huron, to acknowledge that the traditional hunting and fishing rights enjoyed by the Natives at the time of the establishment of the reserves suppose an intention that they should be entitled to

continue those fishing activities in the waters duly accessible to them, including those Crown lands which would form the waterbed of southern Lake Huron.

I have cited *Howard v. The Queen* on the point as to fishing in adjacent waters, in that case those of Rice Lake. While the issue of how far such right extended into Rice Lake was not fully explored for the purposes of the facts in that case, the learned justice found that the fishing activities in the immediate vicinity of the reserve was within the adjacent waters. As already stated, I have found that each of all of the defendants herein had such Aboriginal right as may have been extended in the Royal Proclamation of 1763 or by reasons of such rights inherent in the Treaty of July 10, 1827, to fish in the area generally described in Exhibit One as lying northwest of the Kettle Point Indian Reserve, some two to three miles distant there from generally two miles north of Cedar Point. To the extent that the accused parties pursuant to s.730(2) of the *Criminal Code* are obligated to show or claim an exemption or exception, I am satisfied that the same has thereby been established.

Having regard to the quantity of fish and nets and gear seized, as I have stated, the Crown asked us to find, that in the absence of any other evidence, that what has been shown is a commercial enterprise with respect to the fishing activity. As I have stated, I am unable to do so under the circumstances. No evidence was adduced as to the size of the Kettle Point Indian Reserve community, the number of members of the band regularly engaged in fishing, the consumption of fish as a matter of sustenance. When I look at the number of parties engaged allegedly in the fishing operating, the number of boats and the quantity of fish taken, I am unable to conclude that the Crown has shown a commercial operation on that evidence.

With respect to the issues raised by the accused of their right pursuant to s.35 of the *Constitution Act,* the Crown relies upon *R. v. Agawa* as cited as the prevailing law with respect to these issues in the province of Ontario. The extent of that decision and the principles cited therein have been enlarged upon and elaborated, in my judgment, in the decision of *R. v. Sparrow.* I am convinced the *Sparrow* decision, being the most recent pronouncement of the Supreme Court of Canada on the issue centering upon s.35 of the *Constitution Act, is* binding upon me.

The Ontario Court of Appeal decision in *R. v. Agawa* makes reference to *R. v. Sparrow,* though both references are to the decision before the British Columbia Court of Appeal, [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. At page 519 [O.R.; p. 84 C.N.L.R.] of *R. v. Agawa* is found "The decision (in *Sparrow)* is now under appeal to the Supreme Court of Canada." *Agawa* was rendered on the August 3, 1988. *Sparrow* in the Supreme Court of Canada on May 31, 1990.

The essential finding of the court in *Agawa* may be found at page 525 [O.R.; pp. 90-91 C.N.L.R.], Blair J.A.:

> In *Sparrow, supra,* the British Columbia Court of Appeal held that restrictions on aboriginal fishing rights must also be reasonably justified as conservation measures.
>
> Conservation, in my view, is manifestly the purpose of the licensing provisions in the regulations. At first instance, the learned justice of the peace found that:
>
> > The purpose of the *Fisheries Act* and Regulations made thereunder, although binding upon all persons, is not to abolish the rights to fish of all persons, but to monitor and

> regulate, so that the fisheries resource will provide an adequate supply of fish now, and in the future.

On a fair reading of the reasons of the learned summary conviction appeal court judge those findings were, in my opinion, approved and affirmed by him. He stated, after referring to the judgment appealed from, that:

> It is implicit from these observations and the concerns expressed elsewhere in his Reasons for Judgment over the depletion and extinction of the fish population if the fishing by Indians and of others with gill nets for commercial purposes were not monitored and regulated to ensure an adequate supply of fish now and in the future, that it had been established as a fact in evidence that prior to the Treaty the Indians had been in the habit of fishing with gill nets both for their own consumption and for commercial purposes as well.
>
> Such finding is indeed supported by the evidence and accepted as a fact by the trial Judge and for the purposes of this appeal.

He continues:

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

To summarize then, the Court of Appeal found that conservation was the manifest purpose of the licensing provisions of the regulations. They require a licence for gill net fishing and apply to all residents of Ontario and thus constitute a reasonable limitation on the treaty right to fish and accordingly did not infringe s.35(1) of the *Constitution Act.*

However, I find that the decision of the Supreme Court in *R. v. Sparrow* brings forth a much more detailed and explicit set of requirements before the Crown can be said to have extinguished or regulated Aboriginal or treaty fishing rights that may be said to exist pursuant to s.35(1) of the *Constitution Act.* In *Sparrow* the Court was concerned with a determination firstly of Aboriginal rights of the Musqueam Indian Band respecting salmon fishery at the mouth of Fraser River in the City of Vancouver. Its exploration of this issue related to a determination of what might be regarded as "existing" rights under s.35(1) of the *Constitution Act.* At page 1099 [S.C.R.; p. 175 C.N.L.R.] of that decision:

> There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

> We would conclude then that the Crown has failed to discharge its burden of proving extinguishment.

Citing *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64 a decision of the British Columbia Court of Appeal [p. 174 C.N.L.R. of *Sparrow*]:

> But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be clear and plain".* The test of extinguishment to be adopted in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

On the issue as to the extent of such fishing right, i.e. for food, ceremonial purposes or commercial purposes, the Court observed [p. 176 C.N.L.R. of *Sparrow*]:

> Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish *for food* for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right.
>
> Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s.35(1).

As I have stated herein, the Crown has raised before me on the evidence a consideration as to whether or not the accused parties were engaged in commercial fishing operations. It is my interpretation of this finding of the Supreme Court that it is now open for the members of the band of the Kettle Point Indian Reserve in the future, to show by historical data or otherwise that Aboriginal or treaty rights to fish extended to fishing for food, for ceremonial and/or commercial purposes.

It is interesting to note in the decision of *R. v. George,* 41 D.L.R. (2d) 31 at 36, McRuer, C.J.H.C., as early as May of 1963, he appeared to have reached a conclusion somewhat now affirmed by the Supreme Court in *Sparrow:*

> Whether this be true or not this much seems clear - that the Indians' rights to hunt for food on the lands reserved to them in the Treaty of 1827 cannot now be taken away by the Parliament of Canada short of legislation which expressly and directly extinguishes those rights.

That finding with respect to the treaty now before me in essence was undisturbed before the Ontario Court of Appeal and the Supreme Court of Canada. I find as a fact that the treaty made in 1827 between the Chiefs and Principal Men of the Chippewa Nation clearly comes within that definition of a treaty set out in *R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127, 70 D.L.R. (4th) 427, Lamer J. [at p. 1044 S.C.R.; p. 139 C.N.L.R.]:

> From these extracts it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.

and at page 1063 [S.C.R.; p. 152 C.N.L.R.]:

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon, supra,* at p. 410, and *White and Bob, supra,* at 649. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.

In *Sparrow* the Court turned its mind to a resolution of whether or not the word "existing" in s.35 of the *Constitution Act* should be interpreted as rights that existed in 1982 but subject to all the various and sundry statutes, prohibitions and regulations that heretofore had been enacted so as to, in some cases, virtually extinguish the Indian right. That was the burden of the previous superior court decisions and learned justices appeared to reach that conclusion that such rights were so circumscribed. At page 1105 [S.C.R.; p. 178 C.N.L.R.] in Sparrow the Court observes:

> It is clear, then, that s.35(1) of the Constitution Act, 1982 represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s.35(1) possible and it is important to note that the provision applies to the Indian, the Inuit and the Metis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against legislative power.

and further at page 1108 [S.C.R.; p. 180 C.N.L.R.]:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s.35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

I wish to echo the observations made in *Sparrow* at page 1108 [S.C.R.; p. 180 C.N.L.R.]:

> The relationship between the Government and aboriginals is trust-like, rather than adversarial ...

and at page 398 [D.L.R.; p. 172 C.N.L.R.]:

> ... the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right ...

In my judgment, the time has long since passed when the Crown should seek to determine its relationship by way of regulation of Indian fishing and hunting rights through the use of the courts particularly in the manner utilized in this case. Surely, the matter of receiving a complaint from the Bluewater Angler's Association, entering upon an investigation of such complaint to the extent of conscripting members of the Ontario Provincial Police, officers of the Department of Natural Resources of the State of Michigan, together with officers of the Ministry of Natural Resources, organizing a predawn raid with boats pursuing and intercepting persons engaged in fishing activities, approaching with guns drawn and boarding and seizing the nets and gear, scarcely can be construed as an activity in which the government's relationship is trust-like rather than adversarial.

Surely, the honour of the Crown in so proceeding is not much in evidence. In that sense I would echo the observation of counsel for the accused, "we are here for all the wrong reasons, we should not be doing what we are doing, the way we are doing it." At page 1103 [S.C.R.; p. 177 C.N.L.R.] of the *Sparrow* decision:

> And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in the recent case in this Court, see *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47). As MacDonald, J. stated in *Pasco v. Canadian National Railway Co.,* [1986] 1 C.N.L.R. 35 at 37, 69 B.C.L.R. 76 (B.C.S.C.): "We cannot recount with much pride the treatment accorded to the native people of this country."
>
> For many years, the rights of the Indians to their aboriginal lands - certainly as *legal* rights - were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the later 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community".

In that historical perspective, it is clear that the 1982 enactment of s.35 under the *Constitution Act* made a fundamental and profound difference on how the law will regard Aboriginal and treaty rights. The approach that must be taken is revealed in *R. v. Sparrow.* In *Agawa,* the Ontario Court of Appeal held that the general welfare of the public in having fish stocks conserved was sufficient to subordinate the treaty rights to the general good. Such a generalized approach, however, is not supported in *Sparrow.* Section 52 combined with s.35 might argue in favour that such rights are beyond any government regulation. The Court, however, does not take that position. It acknowledges that some regulation is possible [p. 181 C.N.L.R.]:

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats

> to the existence of aboriginal rights and interest. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.
>
> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s.35(1).

Before me, the Crown acknowledged that the *Ontario Fisheries Regulations* have not changed since 1982 consequent upon the enactment of s.35 of the *Constitution Act,* nor since 1990 consequent upon *R. v. Sparrow* and further acknowledges that there is no provisions in the regulations respecting justification or allocation on a priority basis as to Indian rights. Rather it relies upon the regulation by way of conservation recognized in *R. v. Agawa.* Surely the Court in *Sparrow* has indicated that regulation is possible but it must be by way of justification. Simply put, in order to justify the imposition of regulations the purpose of which is to conserve fishery, there must be justified allocation. And an order of priority is recognized by the Court:

> 1. Conservation for the purposes of maintaining the existing fish stock,
> 2. Indian fishery,
> 3. Non-Indian commercial fishing,
> 4. Sport fishing;

and in that order. The Court acknowledges that these considerations must be interpreted in light of the facts of each particular instance and offers them as an approach for allocation. It is interesting to note at page 1115 [S.C.R.; p. 184 C.N.L.R.], the Court adopts the dissent of Dickson J., in *Jack v. The Queen* at [[1980] 1 S.C.R. 294, [1979] 2 C.N.L.R. 25, [1979] 5 W.W.R. 364, 28 N.R. 162, at p. 313 S.C.R., p. 41 C.N.L.R.]:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

The Court further observes at page 1116 [S.C.R.; pp. 184-85 C.N.L.R.]:

> While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established.

The Court then goes on to describe a mechanism whereby to providing for conservation [p.185 C.N.L.R.],

> ... then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

To reinforce this approach, the Court [at p. 185 C.N.L.R.] approves the decision of the Nova Scotia Court of Appeal in *R. v. Denny,* [1990] 2 C.N.L.R. 115, 55 C.C.C. (3d) 322, that case

> ... addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of those rights.

The *Denny* decision defines it at [1990] 2 C.N.L.R. 115, 55 C.C.C. (3d) 322, Clarke C.J.N.S. at 340 [C.C.C.; p. 133 C.N.L.R.]:

> Though it is crucial to appreciate that the rights afforded 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 food needs, where a surplus exits. 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.

Accordingly, with respect to the constitutional matters before me I find as follows:

1. The accused have an existing Aboriginal and/or treaty right to fish in the subject waters in this matter and the use of gill nets protected by treaty existing in 1982 at the time of passing of s.35 of the *Constitution Act.*

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

3. Based upon s.35 of the *Constitution Act, 1982* the accused enjoy a limited immunity from prosecution of the provisions of the *Fisheries Act* and Regulations of the province of Ontario. To that extent that the provisions under which they have been charged are inconsistent with the constitutional rights of the accused, s.52 of the *Constitution Act, 1982*, renders them of no force and effect.

Charter of Rights

While the result I have reached with respect to the constitutional arguments made are largely conclusive of the issues before me, there is an obligation on the court to respond to the issues raised by the accused with regard to the Charter of Rights and Freedoms, of a breach of their rights under ss.8 and 10(b). The Crown acknowledges the fact that they were detained and questioned without being afforded their right to counsel on the facts. I am also satisfied on the facts set forth herein that their rights to be secured against unreasonable search and seizure under s.8 has also been breached.

The Ministry's officers had received complaints of illegal gill net fishing. There is no evidence before the court other than that complaint to support the reliability of those complaints. There was no evidence adduced of any search for existing licences or to determine if the fish were in fact taken illegally outside the concession area as a matter of historical practice. This was not a sudden or urgent matter requiring immediate action. The fact that several parties and their boats were enlisted including officers of the United States and the O.P.P. showed that prior knowledge and planning for the morning raid was evident. In that sense, there was ample time to attend for a search warrant if it could have been justified on their application. Why the U.S. authorities were enlisted raises the question of whether there was some prior concern on behalf of the Crown that the fish might have been taken in U.S. waters which were some 12 miles distance to the west from the areas in question. If that was a concern, it raises the issue as to how reliable their knowledge was as to the location and nature and extent of illegal fishing. These questions remain open due to lack of evidence in that area. There was only a vague idea of possible fishing in an area outside the concession area. There were no investigations on the reserve or consultations or cooperation with the officers of the Kettle Point Police Force nor would it appear any investigations on the reserve itself to attempt in any manner to verify the truth of the complaints received. This, in my judgment, is pertinent to the reasonableness of the search. The fact of the assembly of men and equipment, the early morning briefing, the approach to the boats displaying firearms in which U.S. officers were present is all, in my judgment, a part of the earlier planning and anticipation of the activity that was to take place.

I find accordingly that there should have been a warrant sought in a situation where there was a reasonable expectation by the accused on these facts of a right of privacy. The accused were approached by speeding boats at dawn by officers whose identification was largely confined to shoulder patches. There appeared to be no significant identification on the boats themselves. They were not wearing ordinary uniforms in some cases but rather coverall type clothing.

There had been no effort as to prior identification of the boats that were on the water or their occupants and indeed there was little evident activity in the nature of attempting to establish their exact location, to wit: the taking of bearings with any certitude.

The officers' evidence suggest the activity was generally in an area which had a two mile radius beyond that which was identified on the exhibit. There was no evidence that there were other dangers present such as the presence of recreational boaters of persons using the waters for recreational purposes which would justify in the alternative the intervention at high speed in the manner of which it occurred.

Accordingly, I am [not] able to find on these facts a justification under s.1 of the search activities in the manner in which they took place. I distinguish the situation here from that of the type of detention justified by the courts due to the concern for the problem of drinking and driving and the resultant public harm that has been clearly shown in that activity. Clearly they were detained without being afforded their right to counsel and they were questioned as to the fishing licences that they may or may not have had. When that was ascertained, that there were no licences or responses received, the vessels were boarded, the fish were seized as well as nets, trays and other gear.

While there is an aspect of plain view in terms of what was evident on their boarding, there was only suspicion of where the fish had actually been obtained. For example, whether it had been obtained where they were stopped; whether it was in the nearby, adjacent concession area; or whether it was taken in the U.S. waters which were some 12 miles distant.

I find on these facts, the Crown is not entitled to rely upon the right to search provided in s.49 of the *Fisheries Act,* R.S.C. 1985, c.F-14 [formerly s.35 of *Fisheries Act,* R.S.C. 1970, c.F-14] where clearly there was, here in my judgment, not a situation which showed an urgent need to respond without the obtaining of a search warrant.

Thus, having found a breach of the accused's rights under ss.8 and s.10(b) of the Charter, in my judgment, when I consider all of these facts and attending circumstances, this is a case where the admission of evidence both of the statements of the accused and the property seized would, in my view, bring the administration of justice into disrepute if that evidence were to be admitted. I make these findings in order to be in a position if this matter is proceeded further to place before the court and to respond to the accused in respect of that application, but I reiterated as I have stated that I am content that the burden of my decision with respect to this matter is founded upon the constitutional issues.

For those reasons, the charges against the accused in the first count of the information are dismissed.