Aboriginal Fishing Rights, *Sparrow*, the Law and Social Transformation

[a case study of the Supreme Court of Canada decision in *R. v. Sparrow*]

by

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Abstract

Aboriginal rights, and aboriginal fishing rights in particular, are topics which elicit a variety of responses ranging from the positive to hostile. In British Columbia, fish is big business and it is the fourth largest industry in the province. The stakes are high and the positions of the various user groups and stakeholders are clearly demarcated. The fight over fish has pitted aboriginal groups against other aboriginal groups as well as against the federal government and its department of fisheries and oceans - however, the fight becomes vicious, underhanded, and mean spirited when the aboriginal groups are matched against the commercial industry.

In an attempt to even the odds the aboriginal peoples have turned to the courts for recognition and protection of what they view as inherent rights - that is a right to fish arising out of the very nature of being an aboriginal person. Up until the Supreme Court of Canada decision in *R. v. Sparrow* aboriginal rights had been virtually ignored by both the courts and the state. However *Sparrow* changed all that and significantly altered the fight over fish. And that fight has become a virtual no-holds barred battle.

The *Sparrow* decision remains to this day one of the most important Supreme Court decisions pertaining to aboriginal rights. This thesis is a case study of *Sparrow* - it will examine the decision from a perspective of whether subordinate or disadvantaged groups are able to use the law to advance their causes of social progress and equality.

The thesis examines the status and nature of aboriginal fishing rights before and after the *Sparrow* decision. The thesis will examine whether the principles of the decision have been upheld or followed by the courts and the government of Canada. Data will consist of interviews with representatives of the key players in the fishing industry, namely, the Musqueam Indian Band, the Department of Fisheries and Oceans, and the commercial industry.

In brief, the findings of my research do not bode well for the aboriginal peoples - the principles of the *Sparrow* decision have not been followed by the government of Canada and aboriginal fishing rights remain subject to arbitrary control. The thesis will examine why and how this happened.

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for my mother and father

Chapter One

Introduction

Introduction

The fight over fish is nothing new as it dates back to the beginning of the arrival of white settlers in Canada. Even then the battle lines were clearly drawn - it was the interests of the white commercial industry versus the interests of the aboriginal peoples. An article in the Vancouver Province, dated the 19th of November, 1904 sets the tone:

INDIANS WIPING OUT SOCKEYE

> *A report in detail concerning the manner in which Indians at the headwaters of the Skeena and other northern rivers are striking at the very root of the life of the salmon-fishing industry in British Columbia, one of the greatest sources of the people's wealth, has been received . . . no less than 2,000,000 salmon . . . were killed in the Indian traps this year. That number of fish, if canned, would make about 142,857 cases . . . (in Newell, 1993: 91).*

The fight over fish, of which (sockeye) salmon is commercially the most valuable, has all the makings of a classic showdown. The cast of players include the aboriginal peoples of Canada, the commercial fishing industry, and the government of Canada, and also jockeying for positions are numerous interest groups, labour unions, and provincial governments. The subject of fishing, particularly aboriginal fishing rights, is a highly emotional and controversial issue - the very existence of coastal communities, the wealth of powerful corporations, the hopes of an impoverished minority, and the employment prospects of thousands of workers, rest mightily upon the denizens of the deep. The fish, clearly oblivious of their import, are an imperiled species and may soon, in the very near future, cease to exist - fished to extinction by a variety of user groups who share at best an acrimonious relationship fuelled by greed, ignorance, and

racism.

The access to fish is jealously guarded and fought over on various fronts. The fight is underhanded, vicious, and mean-spirited and in recent times, particularly since the Supreme Court of Canada decision in *R. v. Sparrow,* the courts have entered the fray. The following thesis is a case study of the *Sparrow* decision which, to date, remains the most important and controversial decision on aboriginal fishing rights, and was the first decision to apply the provisions of section 35(1), in the aboriginal rights section, of the *Constitution Act, 1982.*

The Law and Social Transformation

On September 1982, with much fanfare and great expectations, the *Canadian Charter of Rights and Freedoms,* (hereinafter the *Charter*), was legislatively proclaimed. The proclamation was preceded by intense debate not only regarding the repatriation of the Canadian constitution, but more importantly, on the inclusion of a charter of rights and freedoms. On the latter issue, over twelve hundred groups and individuals made representations to the Special Joint Committee on the Canadian Constitution (Mahoney, 1992: 228). Three years later when section 15, or the equality clause, of the *Charter,* became effective, scenes of minority group celebrations flashed across the nation's television screens. These groups were celebrating an anticipation of a renewal and strengthening of rights and freedoms, which were now guaranteed by the *Charter.* The celebrations were based on the hope, and perception, that the *Charter* would provide empowerment, not only to combat discrimination and challenge the status quo, but to achieve a

real measure of equality that had so far eluded the have-nots and the powerless of Canadian society.

The proclamation of the *Charter* brought to the forefront a still continuing debate on the transformative capacity of law. Much has been debated about the capacity of the law to transform existing relations of domination and subordination. According to Sargeant (1991: 1):

> *". . . the role of the law as an arena for social and political change has increasingly climbed to the top of the intellectual calendar for many sociologists of law and legal theorists alike."*

As evidenced by numerous challenges before the courts (see Mandel, 1989; Fine, 1992), the hope that the law, or at least the law as it is interpreted and applied by the courts, will ameliorate one's lot in life and remove barriers to equality, has been embraced by various groups as diverse as the women's movement to environmental coalitions to aboriginal peoples.

According to law professor, Judy Fudge (1990: 47), the perception or belief, that litigating constitutionally entrenched legal rights encourages social transformation appears to be based almost entirely on theoretical considerations, rather than substantive evidence - i.e. most arguments, on the transformative capacity of the law, assume that winning court cases automatically translates into rights. However, social transformation is not that simple. An example illustrates - even though laws regulating access to abortion services (in *R. v. Morgentaler* [1988] 1 S.C.R. 30) were declared unconstitutional several years ago, access to abortion services remains problematic for the subordinate and powerless groups in society

because some provincial governments have refused to fund abortion services or abortion clinics. While the wealthy of Canadian society are able to obtain such services at private clinics or doctors, the underprivileged have limited choices, and are often dependent upon government funded clinics for medical services. Even though women's groups celebrated the "abortion victory" as a formal recognition of women's rights, little attention was paid to the remaining, and newly erected, structural barriers. Recently the government of Newfoundland agreed to fund abortion services - some five years after the historic Supreme Court decision in Morgentaler, and after consistently losing court challenges over its refusal to do so.

Research Question:

The question that my thesis will address will focus on the use of law for social progress. What are the limits to and the possibilities of using law in the struggle for social transformation? Does a legal recognition of rights lead to social progress? If it does, is it an effective strategy? To better understand the larger question of law and social transformation, the thesis will examine one aspect of the debate - specifically, how have the aboriginal peoples of Canada used the courts to further their fight for access to a valuable resource, fish? To answer the question, the thesis will examine a landmark and historic Supreme Court of Canada decision on aboriginal rights in the case of *R. v. Sparrow*. The thesis will examine the effectiveness of using law for social transformation by analyzing legal rights before and after *Sparrow,* with particular focus on the legal rights regarding access to fish. Fish is of vital and fundamental importance to aboriginal peoples and plays a significant role in religious and ceremonial activities; fish is also viewed as

an economic saviour, a means by which many aboriginal bands and tribes hope to create sustainable economic activity. The thesis will detail the fight over fish and will provide an in-depth examination of the events leading to the *Sparrow* decision, the decision itself, and the events after the decision. Finally the thesis will examine the impact that *Sparrow* has had, if any, on aboriginal fishing rights and aboriginal access to fish.

What is social transformation and why legal rights?

The measurement of social transformation is not easily reducible to the point where improvements for the disadvantaged can be attributed to a single cause. The factors that lead to social transformation occur over time and are varied and complex. However for ease of analysis, I will adapt Snider's (in Bricky and Comack, 1986: 169) definition of "reform" to what I mean by social transformation:

> *". . . [a] change leading to the improvement in the life chances of the disadvantaged versus the advantaged."*

It is recognized that legal victories do not necessarily translate into removals of barriers, structural or otherwise. However such victories do provide a measure of success when institutions that appear to serve the ruling classes recognize, and concede, the "rightness" of arguments presented by subordinate groups. Such decisions have significant impact on how governments (or the ruling classes) deal or continue their relationship with subordinate groups. According to McCormick (1993: 523):

"The rewards of victory are not necessarily limited to success in the immediate case, but can also involve favourable interpretations of statutes or legal principles, or favourable variations in rules for the applications of those principles, that will govern the resolution of similar controversies in the future."

For example, the Native Affairs minister of Ontario (citing *Sparrow)* stated that:

". .. recent court decisions are not only upholding Indian (fishing) rights, but are sending a clear message that governments should begin negotiating with natives . . . " (in Platiel, 1993: A7).

According to Fudge (1992: 153):

". . . rights litigation (has) the potential to mobilize social movements, influence the general terms of political debate, change a particular law or doctrine and introduce a variety of perspectives and experiences into the courts which have historically been excluded."

To critics who would dismiss such a premise, the question that begs to be asked is what other feasible options are there? One cannot ignore the political, legal, economic and practical reality of the nature of modern nation states, and the inherent virtues and vices that form part of the package. Notwithstanding academic theorizing and short of an outright revolution, reality necessitates that one work within the parameters, defined by the state, to change society. The apparent paradox that one play by society's rules to change that society is reconciled by the very nature of law. According to E. P. Thompson (1975: 263):

". . . the essential precondition for the effectiveness of law . . . is that it shall display an independence from gross manipulation and shall seem to be just. It cannot be seen to do so without upholding its own logic and criteria of equity; indeed on occasion, by actually being just."

Why Aboriginal Peoples of Canada?

The focus on aboriginal peoples of Canada is no accident. By almost any measure, social, economic or political, aboriginal peoples are the most powerless and subordinate group in Canadian society. Prior to the *Constitution Act, 1982*, aboriginal peoples had no legal rights unless specifically provided for in legislation, and even then, aboriginal rights were virtually ignored by the Canadian courts - one court simply declared that aboriginal rights were too vague to recognize (Elliott, 1991: 25; Sanders, 1990: 125). The aboriginal peoples are the "David", and the Canadian state, the "Goliath" and more often than not, they have fought their battles in various courthouses across Canada. And in recent years, particularly in the wake of the *Constitution Act, 1982* and *Sparrow,* the aboriginal peoples have began to turn to the courts more and more.

Aboriginal peoples are 14% of the population of Saskatchewan, yet they represent 64% of the prison population. Nationally the figures are 2% and 10% respectively (Makin, 1987: A2). In a society of unequals, aboriginal peoples are the least equal. A cursory glance at some social indices paints a dismal picture: the life span of an aboriginal person is ten years less than the national average. For status Indians, those registered under the *Indian Act*, the situation is even worse. Life expectancy, for this group, is twenty years below the national average. In 1974 the infant mortality rate for status Indians was 3.9 (per one thousand), for the Inuit, it was 6.4, compared to the national average of 1.5. A status Indian infant is three times as likely to die a violent or accidental death than other Canadian children; between 35% to 75% of aboriginal

peoples are chronically unemployed; violent death and suicide is a staggering three times the national average - the suicide rate of Canadian aboriginal youth is the highest in the western world. Many aboriginal peoples, particularly status Indians, live on remote reserves in third-world like conditions. Most of the reserves lack even the most basic of necessities such as indoor plumbing and heating, electricity, and access to educational and medical services (Wright, 1992; Valentine, 1980: 81-90; Havemann, 1989:56; Globe and Mail, 1990, Apr 04: A6). Recently the Report of the Aboriginal Justice Inquiry of Manitoba concluded, *"Canada's treatment of its first citizens has been an international disgrace"* (Roberts and York, 1991 Aug 30: A1).

It is recognized that aboriginal peoples of Canada are not homogenous, and that there exists a diversity in cultures, circumstances and history. However for the purposes of analysis, the term aboriginal peoples refers to all persons who are legally recognized as aboriginal - such as Metis, Status, Inuit, and Treaty Indians. This distinction is important because whatever legal rights are "won" accrue only to those who are so legally entitled. Notwithstanding the legal and non-legal differences, aboriginal peoples of Canada share a similar fate, a fate that has rendered a once proud people economically and politically powerless, and has placed them at the very bottom of the Canadian social and power structure.

Definition of Law:

The seeming omnipotence of law shrouds the concept in mystique. What is law? For

some it is a codification of what is right for society, an expression of morality and ideology, of norms and regulations, based on a societal-wide consensus. For others, law is an outcome of ongoing or particular conflicts between the powerful and powerless, with the result that law represents the interests and ideology of the powerful. For still others, existing on the margins and periphery of an unequal society, the concept of law is meaningless and alien until one is subjected to its controlling influence.

There appears to be little agreement on a definition of law because conceptualization depends on one's perspective. For the purpose of my thesis, the definition by Max Weber is particularly apt:

> *"an order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a staff of people holding themselves especially ready for that purpose" (1978: 34).*

The preceding definition recognizes the pervasiveness and influence of law in society, which demands conformity and prescribes sanctions for violations. Furthermore the definition includes the institutions or agents of law such as the police, courts, and correctional institutions, which are used to enforce conformity and punish violations.

Of particular importance to the research at hand is the function of the courts. The courts, as a central and crucial institution of the Law, are often portrayed and viewed as the protector of rights or final arbiter of justice where persons who have been wronged may turn for justice.

Whether the courts do in fact provide justice or protect the rights of minorities remains a topic of considerable debate, and is of crucial importance to the study at hand. In order to understand the role of the courts, the concept of ideology is central to any discussion of law.

According to Milovanovic (1988: 13), perhaps the most important function served by law is ideology. Marx and Engels argued that social knowledge (philosophies, ideals, and law) is inextricably linked to the material conditions of those who produce such knowledge. In other words, ideology reflects class interests because it is produced by and for class interests, and is ordinarily crucial in maintaining and perpetuating the political status quo. The concept of ideology is central to my argument - it is ideology that leads us to believe all members of society are equal before and under the law. Such ideology obscures the social reality that Canadian society is rife with inequality and contradictions, and not all who appear before the law are equal.

Review of the Literature

There is a considerable body of literature examining the conflictual nature of the relationship between dominant classes and subordinate classes. E.P. Thompson's (1975) analysis of the *Black Act,* in eighteenth century England, and Douglas Hay's (1975) Albion's Fatal Tree are classic examples. Unfortunately, few scholars have examined whether law can be used to advance the causes of subordinate groups in any substantive way. While there is an emerging body of literature focusing on the transformative capacity of law, most are highly theoretical in nature and are lacking in concrete supportive evidence. However, the work of Mandel, and

Brickey and Comack, merit attention for presenting substantive and contrary arguments regarding the transformative capacity of law.

Law professor Michael Mandel's book The Charter of Rights and Freedoms and the Legalization of Politics in Canada is an incisive analysis of the *Charter,* judicial decision-making and of liberal discourse in general. Mandel's marxist critique is scathing and unrelenting, and leaves no doubt as to his position that law, and the *Charter* in particular, cannot be used for social transformation. According to Mandel (1989: 4),

> *". . . where the Charter has had an effect, that effect has been to strengthen the already great inequalities in Canada. It has weighed in on the side of power and, in both crude and subtle ways, has undermined popular movements as the women's movement . . . the aboriginal peoples movement. Filtering democratic opposition through the legal system has not only failed to reduce . . . inequalities, but has actually strengthened them."*

Mandel's argument that the *Charter* diverts and weakens opposition to the status quo is evidenced by the subordinate group's reliance on the *Charter* to fight against inequality. In spite of *Charter* case law which has overwhelmingly maintained the status quo, subordinate classes continue to be seduced by the ideology of the *Charter* and its promise of guaranteed equality.

Mandel's argument is well-worth noting - that the protection and guarantee of rights enshrined in the *Charter,* is often illusory and inconsistent, and serves to undermine other potentially effective means of seeking redress. A question that follows is how does Mandel account for some of the victories by subordinate groups. Surely if one is able to succeed in the

courts, then the law has the potential to become a tool for social reform. Mandel is adamant that law cannot be used for social reform, and that occasional victories are merely to uphold the legitimacy of law.

On the other side of the argument Brickey and Comack (1986), argue that:

> *". . . the rhetoric and rules of law must be more than sham. Law must provide some protection . . . it must live up to its own claims of equity and fairness . . . the function of law can differ, depending upon the relative strength of social forces that struggle around and within the legal order (p. 321)."*

Brickey and Comack conclude that it is possible to use law for progressive social changes because in order for law to maintain the ideology of fairness, it must be seen to do so in reality. Brickey and Comack point to examples of rights that are now constitutionally guaranteed, such as the right to form unions and the right to strike, rights which were gained by subordinate classes after extensive struggles against the ruling classes.

Data and Analysis:

Is rights litigation an effective way to redress social inequality, and have the courts fulfilled the hopes of the disadvantaged? Disadvantaged groups have increasingly turned to the courts in their struggles for social equality. Don Ryan, spokesperson for the Gitksan and Wet'sutwet'en peoples, stated that aboriginal peoples are prepared to wage court battles for

eternity in order to get a "fair shake" from the government (in Simpson, 1993, A9).

In order to address the research question, the paper will analyze the *Sparrow* decision - undoubtedly, the most important Supreme Court of Canada decision to date on aboriginal rights. The data and analysis will consist of an in-depth and critical analysis of the *Sparrow* decision, and interviews with officials from the Department of Fisheries and Oceans, and the members of the Musqueam Indian Band who challenged the state and took the *Sparrow* case to the Supreme Court.

In order to understand the significance of *Sparrow,* the paper will examine the legal rights to fish before and after the *Sparrow* decision. It is crucial to understand how completely the Canadian courts have denied legal rights to aboriginal peoples. Going back to the words of Chancellor Boyd (in the 1886 St. Catherines Milling case) Indians were *"heathens and barbarians"* with no *"fixed abodes,"* - a position taken by the Supreme Court of Canada, which almost without exception, ruled against aboriginal rights, particularly aboriginal claims to traditional lands and hence the right to the extraction of resources from those lands.

However in recent years the Supreme Court of Canada has done an apparent about face, from viewing aboriginal rights with indifference and reluctance to recognizing the aspirations of aboriginal peoples across Canada. Preceding the decision in *Sparrow,* the Supreme Court of Canada delivered several decisions, which on the face of it, are indicative of a changing attitude. In several major cases (*Calder, Guerin, Simon, and Sioui*), the Supreme Court ruled in favour

of aboriginal litigants and against the Crown (representative of the State). While important in their own right, none of the preceding cases matches the significance of *Sparrow*. George Erasmus, the then chief of the Assembly of First Nations, called the *Sparrow* decision *". . . an extremely major victory . . . we won big"* (in Binnie, 1990: 217).

My thesis will examine what exactly was "won." While the issues and rights enunciated in *Sparrow* are applicable to all aboriginal peoples across Canada, my study will focus on the situation in British Columbia, and specifically on the two major players in the dispute - the Department of Fisheries and Oceans, the federal agency responsible for management of fish in Canada, and the Musqueam Indian Band. The thesis will examine the issues from the perspective of both litigants, with particular emphasis on what exactly was "won" by the Musqueam Indian Band, and what those "winnings" mean for aboriginal peoples[1] in general and what the decision signifies about law and social transformation in particular.

Another important source of data are recent court decisions dealing with aboriginal rights. The thesis will examine court challenges which have attempted to take the *Sparrow* rights even further. For example, even though the Supreme Court ruled that aboriginal peoples had the first priority to harvest fish before any other users, the court did not decide whether that fish could be commercially sold. Recent Court of Appeal decisions from the Ontario courts appear to be in favour of aboriginal commercial fishery, while the appellate courts in B.C. have ruled that an

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[1] This analysis is limited to, aboriginal bands located in the Lower Fraser River region and on Vancouver Island, and who were signatories to the Aboriginal Fisheries Strategy ("AFS"). Information on other bands from the Department of Fisheries and Oceans was not made available to this researcher.

aboriginal right to commercial fishery does not exist.

Outline of Chapters

The thesis will consist of five chapters, including this introduction. Chapter one (Introduction) consists of a brief overview of the main (theoretical) premises underlying the study at hand and explains why the topic is being addressed. The issues involved over fish are complex and controversial and there is a battle brewing between the competing user groups. The situation in the fishing industry today presents a textbook example upon which to test the hypothesis that the law can improve the lot of a disadvantaged minority, and it is the central reason for the focus on aboriginal peoples, the most disadvantaged group in Canada. The chapter also includes a brief review of the literature on rights litigation and presents a summary of the opposing views.

Chapter two will examine aboriginal fishing rights prior to the *Sparrow* decision. In order to understand the significance of *Sparrow,* it is important to understand the situation prior to the decision. Before the coming of white settlers, the aboriginal peoples in B.C. enjoyed unhindered access to all the natural resources and in the lives of the coastal tribes fish played a significant and fundamental role - fish was not only used for food, but served as a commodity for trade with other tribes and was an important cultural and religious symbol. However with the coming of the white settlers, aboriginal peoples were legislatively restricted to a regime of fishing only for food. The chapter will examine how and why this occurred.

Chapter three is central to the thesis and will involve an in-depth analysis of *Sparrow*. The decision is important for many reasons, but it is most important for its examination of aboriginal fishing rights, and for the interpretation of the aboriginal rights provisions, or section 35(1), of the *Constitution Act, 1982* or the Constitution of Canada. The chapter will examine the events leading up to Sparrow, the decision itself, and the implications of the Supreme Court's interpretation of section 35(1). A cursory review of the decision reveals several contradictions. The Supreme Court appears cognizant of the economic implications and the various intervenors and seems to be attempting a balancing act so as to maintain the status quo while not dismissing aboriginal claims. However in doing so, it is apparent that the Court is reluctant to challenge the ruling class ideology which it ordinarily perpetuates. While acknowledging the injustices suffered by aboriginal peoples, the Court refrained from rendering a conclusive decision in *Sparrow*. Instead the Court ordered that the trial court review the case in accordance with the principles outlined in their ruling. Thus, the aboriginal peoples celebrate a "victory" while the intervenors rest assured that their economic interests remain intact. The Law is able to proclaim that it has dealt fairly with the issues because all litigants appear to be at least temporarily satisfied.

Chapter four will look at legal rights in relation to fish as a result of *Sparrow,* in order to assess whether any significant changes have occurred. Data in this chapter will consist of a review of federal fisheries policies, analysis of the interview data, review of aboriginal access to fish, and review of court decisions that attempt to build on *Sparrow*. In striving for a balanced presentation, the chapter will also examine the role of other major players in the fight over fish - the government of Canada, and the commercial fishing industry; the chapter will examine the

government response to the decision and the reaction by the commercial sector.

The concluding chapter will review recent developments and discuss the nature of aboriginal fishing rights as it stands today. The chapter will conclude with a discussion of the effectiveness of rights litigation as a strategy in the struggle for social progress and transformation.

Conclusion

To get an accurate picture of what is happening in the fishing waters of British Columbia, one must first wade through the lies, misinformation, heated rhetoric, and political posturing that is being practised by all of those involved in the fishing industry, particularly, it seems, by the commercial sector. The truth is there for anyone who seeks it but still the untruths persist - an example from a recent editorial in the Vancouver Province illustrates:

> *Since the native fisheries was expanded following court decisions enforced by Ottawa, the salmon available to commercial fishermen have dwindled alarmingly (cited in Glavin, 1993: 11).*

Chapter Two

Aboriginal Fishing Rights Before *Sparrow*

Introduction

Not far from the Canadian border, the Makah Indian Band, of Washington State recently applied for a license to hunt five grey whales for food and ceremonial purposes. The reaction was swift, yet predictably uninformed. The *Sea Shepherd Society,* a self-styled environmental group, vowed to challenge the hunt (as did other organizations) if the license was approved. The overreaction reached into Canada, specifically British Columbia, which is fighting its own battle over fishing rights with the aboriginal peoples. That the issue was not about fishing, but about hunting a protected species in a foreign jurisdiction, did not stop a local Vancouver newspaper from speculating on what may happen in Canada if aboriginal peoples made a similar application. No doubt, the newspaper was motivated by the continuing battles over fishing between the aboriginal peoples and the commercial fishing industry.[1] The newspaper conducted an informal poll; a total of 238 callers responded of which 85% were firmly opposed to any notion of any aboriginal hunting for whales (Vancouver Province, 1995, May 24: A2). That this was an issue of the Makah Band attempting to revive and exercise a traditional activity was irrelevant. One apparently incensed caller declared that the proposed hunting was fine by him as long as *"they did it in canoes they paddle."* All this fuss and alarm over a situation that had not even occurred in Canada.

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[1] It should be noted that the commercial fishing industry does not constitute a homogenous group. In the context of this thesis, the commercial sector is so identified in order to differentiate it from the aboriginal "rights" fishery. The commercial industry consists of various players (i.e. multinational corporations, individual fishers, aboriginal commercial fishers, plant workers); the relationships are complex and is characterized by cooperation, acrimony, conflict, and competition amongst and between the various users of the resource. Sport fishers are included as part of the commercial industry.

Consider if you will the position of the federal government of Canada in a recent aboriginal hunting rights case. In a 1985 Supreme Court of Canada case, *R. v. Simon,* the Crown argued that the right to hunt, as embodied in a treaty, was limited to hunting by methods in existence in 1752. While one may dismiss the above anonymous caller as a misinformed "crankcase," what is one to make of the position of the federal government? Although *Simon* dealt with hunting rights, the similarities of the government's position on aboriginal fishing rights is noteworthy - the issue really boils down to which group gains from resource extraction or exploitation. To the Court's credit, the judges dismissed the Crown's argument and confirmed the acquittal of the defendant (in *Simon).*

The battle for aboriginal fishing rights is intertwined with the battle for the assertion and recognition of aboriginal rights. The two issues are not mutually exclusive and represents a complex part of the much larger struggle for self-government. At stake here is the survival of an ancient culture, traditions, and a claim on an economically viable and a potentially self-sufficient way of life. The struggle for the recognition of aboriginal rights is a struggle for a recognition as a people with a distinct and diverse culture. More importantly, it is a struggle for the control over the resources of their lands. The issue of aboriginal rights is complicated, contentious, and is as much political as it is legal. However, politically the issue has been, and continues to be, a proverbial "hot potato" passed on by successive and different levels of governments that are reluctant to deal with it fairly and openly. The failure at the political level ultimately leaves the question for the courts to decide.

Aboriginal Rights

In order to understand the concept of aboriginal fishing rights, it is instructive to first consider what is meant by aboriginal rights. Even then the concept remains somewhat elusive. Until recently little, if any, legal or political attention was given to the subject of aboriginal rights, and until the 1960s, aboriginal rights did not even merit academic commentary (Financial Post, 1990, Sept 07; in *R. v. Sparrow, 1990 at p. 405).*

In one of the first court cases dealing with aboriginal rights, Chancellor Boyd, in the 1886 case of *St. Catherines Milling and Lumber Company vs The Queen,* referred to Indians as *"heathens and barbarians"* with no *"fixed abodes."* Even though the case involved profound implications for aboriginal rights, the aboriginal peoples had no legal representation, and according to Kulchyski (1994: 22) were most likely unaware of the prosecution of the case. Aboriginal peoples, in any event, were of secondary importance - the real battle was between the federal and provincial governments to determine which government would derive financial benefits from lease of aboriginal lands to the St. Catherines Milling and Lumber Company. Upon appeal to the Judicial Committee of the Privy Council, which until 1949 was the final court of appeal from the Supreme Court of Canada, Lord Watson dismissed aboriginal rights as not deserving of consideration. He stated (in Kulchyski, 1994: 21):

> *"There was a great deal of learned discussion at the Bar with respect to the precise quality of aboriginal rights, but the lordships do not consider it necessary to express any opinion upon the point."*

Prior to the *Constitution Act, 1982,* and the Sparrow decision, the highest court in the land had done little to address the question. The Supreme Court of Canada, almost without exception, ruled against aboriginal rights - as the court recently pointed out, for most of this century the right(s) of the Indians to their aboriginal lands has been virtually ignored (in *Sparrow, 1990).*

In the absence of guidance by the Supreme Court of Canada, the various provincial courts, in their attempts to deal with the persistent issue of aboriginal rights, confused the matter further by inconsistent and contradictory rulings. In a case involving consequences of the highest magnitude for the aboriginal peoples, the Quebec Court of Appeal, in *Kanatewat et al. v. The James Bay Development Corporation and A.G. (Quebec),* declared that aboriginal rights were too vague to recognize (in Elliott, 1991: 25).

The public reluctance to legally recognize, or even acknowledge, the existence of aboriginal rights mirrored the position of the provincial governments and government of Canada, which did not recognize aboriginal claims as having any legal status (Financial Post, 1990, Sept 07). In a 1969 discussion paper, the federal government proposed that all aboriginal (land) claims be rejected and recommended that both the treaties, and Indian special status, be phased out in order to completely assimilate aboriginal peoples into the Canadian mainstream. During the same period the government of Quebec embarked on the massive James Bay hydroelectric project, and the federal government proposed the MacKenzie Valley natural gas pipeline project; both public projects were massive in undertaking and cut across traditional aboriginal lands. Typical of the attitude of the state, the aboriginal peoples were not even consulted and nor were

they a factor in the decision to initiate the projects. The discussion paper proposals, and the public projects, mobilized Indian opposition and had the effect of reviving the struggle for the recognition of aboriginal rights (in Sanders, 1990: 714).

The confusion surrounding aboriginal rights becomes even more complicated when one considers the situation in British Columbia (B.C.). While the rest of Canada is more or less covered by treaties or other agreements or legal instruments, the terms of which have been generally ignored by the courts and successive governments, only 14 treaties covering mostly Vancouver Island were signed in B.C. Most aboriginal peoples in B.C. never formally surrendered their lands through treaties, and their claims to traditional lands are premised on those unsurrendered aboriginal rights (Pearse, 1982: 180).

In the early 1970s, the government of Canada agreed to discuss land claims in B.C. on the condition that the various tribes form one negotiating team (Sanders, 1990: 714). Having placed aboriginal peoples on reserves in remote and isolated regions of B.C., the government was now asking that they form a united team, a patently disingenuous move by the state in view of the diversity of the various tribes and differing interests and concerns, not to mention the wide geographical dispersement of a dispossessed peoples. Not surprisingly the attempt to form one unified negotiating team failed, and to this day, the impasse continues.

Following the failure of the never started land claims negotiations, the Nisag'a Tribal Council of B.C., led by Frank Calder, initiated court action seeking a declaration that they held

aboriginal title to their traditional lands (Sanders, 1990: 714).

In the now famous case of *Calder v. the Attorney-General of B.C.,* the Chief Justice of B.C., CJC Davey, dismissed the Nisag'a's claims. He wrote (in Asch and MacKlem, 1991: 501):

> *"[The Nisag'a] were at the time of settlement a very primitive people with few of the institutions of civilized society. I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation."*

In other words, it was the Court's view that whatever rights had been held by aboriginal peoples were no longer valid simply because the land had been settled and occupied by whites.

The decision was appealed to the Supreme Court of Canada in 1973. Even though the Supreme Court frowned upon the tone of the lower court ruling, it nevertheless dismissed the appeal. However the Nisag'a Tribal Council celebrated a "victory." The majority of the court agreed that aboriginal title existed in law but could not decide whether the title claimed by the Nisag'a had been extinguished. Here for the first time was a recognition by the highest court in the land that aboriginal title had legal status.

Even though the Calder case has been cited for its legal significance, it is difficult to accord it much substantive merit. It is all fine and well to accord aboriginal title legal status, but what does that really mean? If aboriginal peoples had title to their traditional lands, could they then sell the land; could they develop it; and if aboriginal title existed, where did it exist; could

it be applied in a tangible manner to an actual piece of real estate? The court opted out by not dealing with the issue of extinguishment and whether the Nisag'a had title. By sleight of hand and rhetorical appeasement, the court was able to satisfy all parties, especially the provincial government which would most likely have had to pay out millions of dollars in compensation. The victory, however slight, for the Nisag'a, was an end to a long battle and a dubious victory - for official recognition that they had never surrendered their aboriginal rights to their traditional lands.

However even this "victory" was considered by many, including aboriginal leaders, to be a 'fluke,' since according to some, the decision served as a catalyst for the cancellation of the MacKenzie Pipeline, a negotiated settlement of the Quebec Hydro project, and a reversal of the government proposals outlined in the 1969 discussion paper (in Sanders, 1989: 716). The *Calder* decision also led to the initiation of land-claims negotiation between the federal government and the Nisag'a. However those negotiations have failed to produce anything of substance. In a period of over 20 years, the negotiations have failed to resolve anything. To this very day (12 September 1995), the negotiations continue with no resolution in sight.[2]

Notwithstanding the recognition by the Supreme Court of Canada of the existence of aboriginal title, the waters surrounding the issue of aboriginal rights remained murky.

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[2] As of date of writing the negotiations have been completed and a tentative agreement has been signed; however the deal still needs to be ratified by all parties - the federal government, the provincial government, and the Nisga'a.

In 1978 the Liberal government of Pierre Trudeau announced that it would seek to repatriate the Canadian constitution from its colonial "ruler," the United Kingdom. The announcement started a series of intense debates, lobbying, and protests, including court challenges seeking to halt the repatriation. That the new constitution was to include a charter of rights and freedoms, the *Canadian Charter of Rights and Freedoms ("Charter")* generated even more debate - on this issue alone, over twelve hundred groups made representations to special parliamentary committees (Mahoney, 1992: 228). The aboriginal organizations, mainly the National Indian Brotherhood (NIB),[3] were initially opposed to the enterprise and lobbied extensively against it (Mandel, 1994: 249; Sanders, 1991: 718).

In the first draft of the new constitution aboriginal peoples were barely mentioned, and no significant protection of aboriginal rights was included in other drafts. It appeared that aboriginal concerns were not to be addressed at all while the federal government negotiated new constitutional arrangements with the provincial governments (in *R. v. Agawa,*1988: 78; Mandel, 1994, 249-50). However the aboriginal organizations did not sit idly by -

> *"The major native organizations were not about to let this happen. They saw the constitutional turmoil [negotiations] as an opportunity to advance their claims to land and self government. They launched a massive public relations attack on the whole Charter enterprise . . . the National Indian Brotherhood . . . (lobbied) British MPs against passage of the federal resolution . . . the Union of British Columbia Indian Chiefs chartered a train ("the Constitution Express") to take Indians from across the country to Ottawa and then on to the United Nations" (Sheppard and Valpy, 1982:167, in Mandel, 1994: 249).*

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[3] The NIB is now the Assembly of First Nations.

According to Mandel (1994), for some reason the aboriginal organizations had second thoughts, and agreed to participate in the process. Following a culmination of intensive, sometimes divisive, lobbying by aboriginal organizations, several amendments were included in the new constitution, or the *Constitution Act, 1982,* specifically addressing aboriginal issues. The most important amendment, and the focus of this paper, is section 35(1) which states:

> *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

It is important to note that the aboriginal organizations also lobbied extensively to ensure that s. 35(1) was placed outside the *Charter,* therefore beyond the legislative reach of s. 1 (which allows infringement of constitutionally guaranteed rights if justifiable) and s. 33 (overriding clause) of the *Charter.*

Having recognized aboriginal rights in s. 35 (1), the drafters of the constitution, however, left undefined what such rights meant. Instead, the drafters mandated a series of constitutional conferences to address the question. These televised, and widely trumpeted conferences, costing in the tens of millions of dollars, failed to resolve the matter. More importantly the failure of the conferences demonstrated the immense divide between aboriginal leaders and the provincial and federal government, and ended in increased acrimony. Aboriginal rights remained undefined. The vagueness of section 35(1) lead one commentator to refer to it as an "empty shell" (see Barkin, 1990: 307).

Law professor, Brian Slattery, a leading constitutional expert, had this to say about section 35(1):

> *". . . the sections regarding aboriginal rights leads us from darkness to darkness, in that they substitute impenetrable obscurity for what was formerly shadowy gloom . . . " (1983: 232).*

And in a particularly prophetic statement he added:

> *" . . . they pose an unusually difficult task for a court, required, on the basis of only the most general of indicators, to resolve disputes of daunting historical and theoretical dimensions" (1983: 232).*

The question then is whether the Canadian courts are equipped to deal with it. The courts, which in the past had ignored aboriginal rights, or viewed the subject with considerable indifference and downright racist commentary, are by virtue of section 35 (1) asked to protect rights which they had declined to protect in the past. Now the courts were not only entrusted with defining what those rights are, but also with the task of protecting them.

According to Slattery aboriginal rights refers to:

> *"a range of rights held by native peoples, not by virtue of Crown grant, agreement, legislation, but by reason of the fact that aboriginal peoples were once independent, self-governing entities, in possession of most of the lands making up Canada" (1983: 243).*

The point by Slattery, while morally principled, has not been embraced by the Courts - and surely one cannot expect otherwise. For decades the Canadian courts have conveniently

overlooked the undeniable historical fact that aboriginal settlement and possession of the lands, now known as Canada, preceded white settlement by a conservative estimate of at least 15,000 years (in Elliott, 1991: 25). But what is fair and just has nothing to do with intricacies of legal arguments and legal reasoning, the source of which emanates from the English common law. It is worth noting that the English common law principles were primarily for the protection of the property of the monied classes in pre-industrial England (Hay, 1975). The transplanted legal system was never intended to deal with aboriginal issues in the first place. The limitations of the courts in looking beyond the parameters of their "creator" was unapologetically acknowledged in an American case, the principles of which holds true for Canada. Justice Marshall, in the 1823 case of *Johnson v McIntosh,* stated (in Bartlett, 1990: 456):

> *"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."*

According to Louise Mandell (1995: 4) the judges cannot truly answer the question "what is aboriginal rights?" bound as they are to act within the parameters of the Canadian legal system and the western concept of justice, which so far has resisted the very notion of aboriginal rights.

To understand or clarify the issue, it is essential to consider the aboriginal perspective, as expressed very eloquently by the Union of New Brunswick Indians (in Binnie, 1990: 223):

"Aboriginal rights do include our hunting, fishing, trapping, and gathering as it relates to plant and animal life. Aboriginal rights include our right to exist as Indians, to govern ourselves, and to determine our livelihood, political, cultural, economic, social, and legal units. We have these rights and much more because we have never been conquered . . ."

The Fishing Industry in British Columbia

The battle over fishing rights promises no easy victories, only bloody ones, for the stakes are high. That fishing is of vital national importance is underscored by the diplomatic row between Canada, Spain, and the European Community, and between Canada and the state of Alaska over salmon stocks. The fight to harvest fish stocks reached the point of armed confrontation when Canadian authorities boarded a Spanish trawler fishing off the coast of Newfoundland. The United Nations intervened, and Canada stood accused of bullying and gunboat diplomacy. That Canada was apparently on thin ground as far as international law was concerned was deemed irrelevant; furthermore, the fact that Canada had overfished the stocks to near extinction was not considered - why accept the responsibility when someone else can be blamed (see for example Simpson, 1995, April 25: A18; 1995, March 21: A18)?

The fishing industry in Canada is a multi-billion dollar business with an estimated worth close to $3 billion. In B.C., the commercial fishery sector is the fourth largest primary industry with an estimated worth in excess of $1 billion. Fisheries forms a vital part of the provincial economy, employing over 30,000 persons. It is the one industry in which aboriginal peoples find ready employment - as processors, cleaners, and handlers, for the large corporations (Price

Waterhouse, 1989; Ministry of Agriculture & Fisheries; The 1993 Seafood Industry Year in Review, B.C.). It is also the one industry in which aboriginal persons are economically active, holding about 20% of the commercial salmon licenses (DFO/AFS Handbook, 1995: 15).

In Canada the major users and exploiters of the resource is the commercial industry dominated by multinational corporations. The Fisheries Council of B.C., a lobby group, represents the interests of the corporations which control fish-processing in B.C.; these corporations also own and/or control the technologically advanced seine fleets which catch most of the fish. The seiners catch fish by dropping giant purse nets which encircle large areas indiscriminately catching, and killing, everything in its path. The nets, by regulation, are limited to a length of 550 metres with an allowable depth length of 80 or more metres. The seine fleets not only catch the most fish, they also kill and discard tons of other fish and species that are entangled in the nets. These nets can be hauled up, their loads emptied, and reset, within thirty minutes. Much smaller in size and catching capacity are the gillnet and troll fleets used by individual commercial fishers. The trollers catch fish by dropping thickets of hook-lines in deep water. In 1995 the troll fleet consisted of 1,500 boats which caught 2.8 million pieces of salmon. The gillnetters catch fish by dropping mesh nets which entangle fish, and in 1995, they caught 5 million pieces of salmon using 2,300 boats. Most, if not all, of the fish caught by the trollers and gillnetters are then sold to the Fisheries Council of B.C. companies. The seine fleet, using 540 boats, caught 10.2 million pieces of salmon in 1995 (Howard, 1996 July 20: D3; Alden, 1996 July 26: A19; Glavin, 1996 June 13: 13; Greenpeace in Anderson, 1996 June 14; Ellis, 1996 July 30, personal communication). Another major user of the fish is the sports and recreation

industry, which plays an important role in tourism, and has an estimated worth of approximately $1 billion (Cernetig, 1995: 130). Vying for a foothold, and a greater say in the management of fish and commercial participation, are aboriginal communities across Canada (DFO/AFS Handbook, 1995; Newell, 1993; Glavin, 1993).

Understandably the various interest groups and users have a lot at stake, and the rights to harvest and exploit fish stocks are jealously guarded and fought over. The fight for access has pitted users against each other and the federal government, which has the constitutional authority to manage fisheries in Canada. The federal government Department of Fisheries and Oceans ("DFO") is responsible for the management of fisheries - this includes allocation of quotas to the various users, conservation of stocks, licensing of commercial fisheries, and the management of various species of which salmon is the most prized.

On the average, the commercial fishery is allocated the major share - at 94% (of the salmon stock); the sports fishery is allocated 3%, and aboriginal food fishery the remaining 3% (DFO/Aboriginal Fisheries Strategy Deskbook, 1995: 15). It is important to note that aboriginal food fishery is a purely arbitrary distinction and a legal creation - a distinction not made by aboriginal peoples, but by the government of Canada. In fact the entire notion of food fishery was created by government policy in order to accord commercial fishery priority and to ensure that aboriginal communities were able to feed themselves lest they become a charge on the public purse. Aboriginal participation in the commercial sector is on the basis of purchase of licenses just the same as others in the commercial industry (in *Jack v. The Queen, 1980 at p. 308-10).*

When Professor Peter Pearse, the head of the Commission on Pacific Fisheries Policy (the "Commission"), submitted his report in 1982, he declared that the West Coast fisheries were at a crisis point. A result of misguided government policy, overfishing by all users both domestically and internationally, and a case of *"too many boats chasing too few fish."* Dr. Pearse wrote (1982: vii):

> *". . . the economic circumstances of the commercial fisheries are exceptionally bleak . . . there is a growing concern about the precarious condition of many of our fish stocks and increasing anxiety among Indians about their traditional fishing rights. . ."*

A glance through recent newspaper headlines (see for example The Globe and Mail, National Edition, 1995, August 17: A2; The Vancouver Sun, 1995, August 16: A1). indicates that not much has changed in 1995. Overfishing and depleted stocks have increased tension amongst the users - and one group in particular, a relatively powerless group holding only 3% of the salmon quota, has been particularly targeted by the commercial interests - the aboriginal fishers. The rationale for doing so may be to shirk responsibility for years of overfishing, greed, poor management, and bungling DFO officials. It is much easier and convenient to blame a group that has already been effectively blamed in the past and stereotyped as plunderers. Perhaps the apt word to describe the calculated attacks on aboriginal fishery is racism, pure and simple.[4]

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[4] It should be noted that the relationship amongst and between the various user groups are complex. While acrimony and conflict has been the rule, there are exceptions driven by grass-roots community campaigns, such as the West Coast Sustainability Association and the Coastal Communities Network (in Glavin, 1996 June 13:13), where genuine cooperation and harmonious working relationship exists between aboriginal fishers, sport fishers, white commercial fishers, and the multinational corporations (Menzies, 1996, personal communication).

Aboriginal Fishing Rights

The battle over fishing rights is really a battle over a valuable commodity and resource. It is between the powerful commercial industry and the aboriginal fishing communities who refuse to have their rights ignored, and are asserting those rights with a persistence never seen before in Canada. Cunliffe Barnett, a provincial court judge in B.C., succinctly places the battle in perspective when he states (1995: 1):

> *"My introduction to native fishing issues came during the summer of 1974 when I had to sentence the occasional native person for the illegal sale of food fish, an activity which I was told threatened the social order and the corporate well-being of B.C. Packers . . ."*

The aboriginal peoples of Canada had no legal rights unless those rights were specifically granted by statute or legislation (Sanders, 1990). In order to understand the historic and legal significance of the *Sparrow* decision, it is crucial to understand that the Canadian courts, and the legal system, did not recognize any aboriginal rights to fish. Aboriginal peoples could only fish at the behest of the government of Canada, and in accordance with the terms set out in permits issued by the DFO. And as stated above, aboriginal peoples were only permitted to fish for food - sale of food fish was legally prohibited. Even when fishing rights were expressively provided for in treaties, the courts either ignored those rights or held that provincial or federal laws regulating or restricting fishing to be paramount - this inspite of the terms of many treaties which made the rights and benefits contained therein to be beyond the reach of legislative action (Pearse, 1982: 179). Commissioner Pearse wrote (at p. 180):

"I find these court decisions unsettling. It is hard to avoid the conclusion that they permit the government to unilaterally curtail the Indians' contractual rights embodied in treaties."

It is instructive to review two recent pre-constitution *(Constitution Act, 1982)* cases, which bear remarkable similarities to the fact situation in *Sparrow.* In *R. v. Adolph,* members of the Fountain Indian Band were convicted of fishing at a time prohibited by regulation. The accused were fishing in traditional fishing waters on their reserve lands. The accused appealed their conviction to the British Columbia Court of Appeal (BCCA) on the basis that the exclusive aboriginal right to fish, granted to the band, created a constitutional[5] limitation on federal legislative powers in relation to aboriginal fisheries. The accused argued that this fact alone would preclude the application of regulations (to their fishing rights) in absence of a conservation need. The BCCA dismissed the appeal and upheld the conviction. The court refused to recognize any aboriginal right to fish, and further refused to grant legal standing to the DFO policy that aboriginal peoples had first priority for food fish, because government policy is not enforceable in a court of law. In this case, the government was not required to demonstrate that the closure of fishing was necessary for conservation because no aboriginal right had been established or recognized.

In another pre-constitution Supreme Court of Canada decision, in *R. v. Derriksan,* the court declared that the aboriginal right to fish was governed by the *Fisheries Act* and regulations, and upheld the conviction of the accused notwithstanding the fact that he was fishing for food

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[5] *Constitution Act, 1867, ss. 91(12), (24).*

in traditional waters. In brief, prior to *Sparrow,* there was no legally recognized aboriginal right to fish. The *Fisheries Act* and regulations were paramount over the alleged needs or rights of any aboriginal fishery.

The Department of Fisheries and Oceans however, as a matter of policy, accorded first priority to aboriginal food fishery subject only to the needs of conservation (DFO Discussion Paper, 1989). While this may sound good on paper, reality was anything but. The major point of contention which lead to *Sparrow* was, and still is, a fundamental difference on how fishing is viewed.

Aboriginal people regard fishing as a right - a part of their history, culture, religion, and tradition practised from time immemorial. Aboriginal peoples resent the fact that government permission is required to exercise an inherent right - a right which is not recognized and has only the status of a mere policy which specifies when, where, and how much fish to catch, and what to do with the fish once caught (Pearse, 1982: 178). In submissions before the Commission, the Union of B.C. Indian Chiefs summarized their position (in Pearse, 1982: 177):

> *"We have also been legislated against, arrested or threatened with arrest for practising our harvest of resources . . . [S]ince regulations, restrictions and policies have come into existence harassment has become a real problem . . . [H]arassment on Indian fishing increases as more policies are developed . . .*

The second point of contention is the practical difficulty in exercising the accorded first priority. The DFO food fishery policy allows aboriginal peoples to fish for food in the rivers in

their traditional lands. However the migrating salmon have to swim a formidable gauntlet of barriers before arriving at the rivers enroute to their spawning grounds. Out in the ocean are the technologically superior modern fishing fleets, with fish finding devices. Further there are natural predators and the sport fisheries - according to a finding by the Commission on fisheries:

> *"Inevitably, the commercial and sport fisheries sometimes take too many fish to provide sufficient stocks for both needed escapement and the Indian fishery, and by the time this is known the only way to maintain the stocks is to constrain Indian fishing" (Pearse, 1982: 177).*

The third point of contention is the delineation of the allocated fish as "food fishery." Aboriginal peoples view access to fisheries as an inherent aboriginal right - which means to do with the fish as they wish. Fish has never been viewed as merely food by aboriginal peoples. Fish was a major commodity of trade amongst the various tribes, and plays an integral role in aboriginal culture, tradition, and religious ceremonies. Restriction and limitation of access to fish, and prohibition of sale, is seen as unwarranted control. To ensure a further degree of control, government policy required the removal of the snout and dorsal fin - a practice that was offensive to aboriginal peoples, but useful for law enforcement for identifying "aboriginal food fish" in the event of (illegal) sale - persons caught buying, selling, or having in possession aboriginal food fish could be criminally charged and prosecuted (Pearse, 1982: 177).

In the early 1900s, even as the regulatory control on aboriginal food fishery grew stricter and stricter, there was resentment among the authorities over what they apparently viewed as "special treatment" because aboriginal peoples had a food fishing provision which was "costing"

an estimated $3 million annually. By the end of the First World War, senior officials at the DFO contemplated ending food fishery altogether (Newell, 1993: 67).

Aboriginal Commercial Fishery

How did it come about that an activity once engaged in without hindrance, an activity which formed the economic backbone of many coastal tribes, was now beyond the reach of the very peoples whose ancestors had practised the craft long before the coming of the European settlers?

As the commercial industry developed in B.C., the aboriginal peoples participated fully and actively. They were instrumental in making the venture an international success which proved very lucrative for the dozens of canneries which sprung up along the coast. Entire tribes and family members were involved in the industry - as operators of boats; as fishermen; as cleaners and processors. In fact, the knowledge, expertise, labour, and skills of the aboriginal peoples were prized by the cannery operators. The aboriginal peoples knew all the best locations to fish; they had developed the best and most efficient technology of catching fish; and most importantly, fished in a manner consistent with conservation needs to ensure a continuing supply (Glavin, 1995; Newell, 1993).

However, much to the chagrin of the white cannery operators, and the government, the aboriginal peoples continued to assert their independence, and routinely defied government

directives to obtain fishing licenses, asserting that it was their right to fish. This made them "unreliable" and constituted a threat to an industry concerned with competition and ensuring a dependable labour supply (Newell, 1993: 46-98). In the long run, the aboriginal fishers became victims not only of racism, but of their own success. As the market for fish grew, the demands placed on the stocks increased - to ensure sufficient supply for the commercial sector, the government simply reduced or further reduced aboriginal fisheries (Copes, 1995: 2). In an incisive treatise, Professor Newell documents the deliberate manner in which the aboriginal peoples were brought under control by the industry and government, and eventually squeezed-out and marginalized. The very peoples who had made the industry a success never stood a chance; the one industry in which aboriginal peoples had found success, and ready access to the new white economy, deliberately shut them out (Newell, 1993).

In summary, the explanation for the marginalization of the aboriginal commercial fishery is really quite simple. As the economic value of fish increased, so did the interest of the white settlers. Increasing commercial value of the fish resulted in a corresponding increase in the regulation and control of aboriginal fishery. Aboriginal fishers, who where once encouraged to sell fish to the white settlers so as not to become an economic burden on the government, were later prohibited from selling fish (Newell, 1993; Pearse, 1982: 177; DFO Discussion Paper, 1989).

Evolution of Regulatory Policy

The history of colonialism and imperialism is the history of the European powers and not of the vanquished. Indeed history, or at least recorded history, was and remains the prerogative of those who produced it. Unwritten, unacknowledged, and little regarded has been the history of the vanquished. And in British Columbia, the history of the vanquished speaks of fishing in terms of reverence.

> *"The fishing has been of such importance that it is at the very roots of our cultures; our lives have revolved around the yearly arrival of the rivers bounty. And so we cannot speak of the fishery without talking of our cultures because in many ways they are one in the same" (Gitskan-Carrier Tribal Council in Pearse, 1982: 177).*

The refusal and failure of the Canadian courts to recognize aboriginal fishing rights has been merely a reflection of other, almost countless, injustices meted out to the aboriginal peoples by the Canadian state. One writer, referring to a series of cases dealing with aboriginal issues, lamented the *". . . sad history of national dishonour"* (Palmer, in Pearse, 1982: 180). With their own internal logic and penchant for obfuscation, the legal decision-makers ignored the undisputed historical fact that fish formed an integral part of aboriginal life along the coast and inland waters of B.C. Fish was not only a valuable source of food, it was also revered in song and dance, and formed the economic and cultural lifeline of many tribes. Fish was a major commodity of trade amongst the various tribes, and later with the settlers and Hudsons' Bay Company forts with the coming of the Europeans. According to anthropological evidence, the pattern of aboriginal

settlement was, and continues to be, in large part determined by accessibility to fish (Dr. Barbara Lane, in *Jack v. The Queen, 1980, at p. 310).* Fishing in general, and salmon in particular, forms the very foundation of many aboriginal cultures. The importance of fishing to aboriginal peoples is underscored in various historical documents. Faced with the inevitability of increasing white settlement, the tribes which negotiated treaties with the colonial administrators in B.C. insisted on unhindered access to fish. The Governor of Vancouver Island, James Douglas, negotiated fourteen treaties which included the following assurance (in DFO Discussion Paper, 1989: 4):

> *"(that aboriginal peoples were) . . . at liberty to hunt over unoccupied lands and carry on (their) fisheries as formerly."*

When B.C. joined confederation in 1871 to become part of the then Dominion of Canada, there was no commercial fishery of any value. In fact, in that era, the colonial administration encouraged aboriginal fishery in order to supply the food needs of the white settlers whose time could then be devoted to agriculture. In addition, native peoples were encouraged to fish to avoid becoming a charge on the public purse (at p. 309 in *Jack v. The Queen).*

Historically in Canada, whenever there was competition between the white settlers and aboriginal peoples, the government would wade in and tip the increasingly uneven playing field even more in favour of the whites. This is true not only of agricultural policies in the Prairies (see Carter, 1990), but also of fishing. The current situation regarding aboriginal fisheries is the outcome of over a century of policy development (Pearse, 1982: 175). It is instructive to note that competition between white settlers and aboriginal peoples for agricultural lands led to the

creation of Indian reserves. Even the process of dispossession or 'reservationization' recognized the importance of fishing not only to the aboriginal peoples, but also for the white settlers. Therefore the boundaries of the reserves generally coincided with traditional fishing areas. This served a twofold purpose - aboriginal peoples could continue their tradition of fishing, which in turn was also used for trade with the white community providing food for the settlers (Lane, 1980 in *Jack v. The Queen at p. 307).*

Before 1877 there were no regulations of any type concerning fisheries in B.C. According to Rueben Ware (1978, in Pearse, 1982: 176):

> *"In this era there was no distinction between 'food fishing' and commercial fishing. There was no regulation, no proclamations, no OICs (Order in Council), no laws of any kind which specifically restricted or regulated Indian fishing in B.C."*

In response to the development of commercial fishing and canning industries, the Parliament of Canada enacted the *Dominion Fisheries Act* in 1877 - this act did not affect aboriginal fisheries, but provided legislative delegatory powers to the provinces from which to issue regulations. Ten years later, and again in response to the continuing development of commercial fishing, the province of B.C. issued regulations effectively limiting aboriginal fishing for food and restricting sale or trade (Pearse, 1982: 176; *Jack v. The Queen at p. 308-10).* The British Columbia Fisheries Regulation, issued November 26, 1888 stated:

> *Indians shall, at all times, have liberty to fish for . . . food for themselves,* ***but not for sale, barter or traffic*** *by any means other than with drift nets, or spearing*

(emphasis added).

This regulation marked the beginning of the end of a traditional way of life for the aboriginal peoples - here for the first time was an explicit law restricting and defining fishing for food only, which were to be caught using certain types of equipment. The legislation specifically made it illegal for aboriginal fishers to sell their fish permitting them to fish for food only.

Six years later, in 1894, more regulations were introduced imposing even further controls over aboriginal life - for the first time, aboriginal peoples were required to obtain permits, from the authorities, in order to fish for food; in 1910 additional regulations were issued allowing the authorities to specify the area and time of fishing, as well as the type of equipment to be used; in 1917 it became an offence to sell and or buy fish caught under the provisions of fish permits (in *Jack v. The Queen, p. 310;* Pearse, 1982).

The development of the commercial fishing industry, the concomitant conflict between whites and aboriginal peoples, and the corresponding evolution of increasingly restrictive regulation of aboriginal fisheries is summed-up by the Supreme Court of Canada in the *Jack* case (1980: 310):

> *". . . the Regulation of 1888 came into effect at a period of growth in the fishing industry and on the threshold of great expansion in the British Columbia fishery . . . (this) gave rise to (conflicts) between the Indians . . . and the sport (and) commercial fishermen . . . the (Regulations) became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets,*

then the restriction of fishing to food purposes, then the requirement of permission . . . (and) ultimately, in 1917, the power to regulate even food fishing . . ."

The preceding describes the legal and substantive situation, with minor variations to allow for changes in DFO policy, as it existed before the *Sparrow* decision.

Conclusion

There is no doubt that increasing regulatory control of aboriginal fishing was, and is, a form of control over aboriginal life. The effective denial and control of access to what aboriginal peoples consider their inherent right, has resulted in resentment and acrimony not only amongst aboriginal peoples, but also with the different levels of government and other users of the resource.

The aboriginal struggle for complete participation in, and access to, fisheries is not about seeking special privileges as the commercial industry argues (i.e. B.C. Fisheries Survival Coalition and The Fisheries Council of B.C.). It is simply an attempt to recover and exercise, freely and without hindrance, a fundamental and vital part of aboriginal culture and a way of life which decades of government control has effectively marginalized and decimated, but failed to conquer. It is an attempt to recover a centuries old economic activity which will allow aboriginal access to mainstream Canada. In submissions before the Commission on Fisheries, the members of Nuu-chah-nulth Tribal Council stated:

"Participation in the fishing industry allowed us to remain living by the sea with our own people. And it was the kind of work that was more compatible with our way of life than other kinds of work in the white man's economy. It was . . . the lesser of two evils. It did not require us to give up our communities and our culture . . . " (in Pearse, 1982: 151).

In spite of the regulations, policies, criminal prosecution, threats and animosity, aboriginal peoples have defiantly refused to surrender their inherent rights. And it was that belief in the inherent right to their traditional way of life that lead Mr. Ronald Sparrow, Jr., in open and deliberate defiance of the law, to cast his nets in the waters of Canoe Passage in the Fraser River to exercise his aboriginal right to fish, where his ancestors, from time immemorial, had done so.

Chapter Three

The *Sparrow* Decision

Introduction

In the annals of constitutional law and aboriginal rights, no Supreme Court of Canada case has generated as much interest as did the *Sparrow* decision when it was pronounced in 1990. To this day, the implications continue to reverberate throughout the fishing industry. Some have described the decision as phenomenal and some have called it "historic." There are some who claim that the decision created an aboriginal commercial fishery, while others claim that it did nothing of the sort. Some critics have stated that Sparrow decided nothing and have severely criticized the federal government for its "overreaction" and "acquiesence to the native agenda." Some aboriginal leaders celebrated the claim that "we won big" and some have wryly noted the continuance of the status quo (Elliott, 1991; Binnie, 1990; Duncan, 1995; Smith, 1995). In a particularly vehement attack on *Sparrow,* N.D. Mullins, a lawyer, wrote a letter to the editor of "The National," the official publication of the Canadian Bar Association; he dismissed the aboriginal position as *"the absurd and unacceptable claims, demands, threats, and lies of Indians in Canada"* and concluded:

> *"(The) Indians lost the Calder case in every court in Canada (and) Sparrow decided nothing except that there should be a retrial to see whether the Indians could prove that they had aboriginal fishing rights prior to 1982 . . ." (in Barnett, 1995: 1).*

Why the ambivalence? The answer is complicated because *Sparrow* is all that it is said to be and more. At first glance, *Sparrow* is about one person's defiance of the *Fisheries Act* and his assertion that fishing is an aboriginal right. To a peoples accustomed to losing battles in the

court, it was a significant legal victory. Clearly, the legal implications of the decision were profound and far-reaching. *Sparrow* is about many things - it is about defiance; it is about equality; it is about access to a valuable natural resource; it is about participation in a multi-billion dollar industry; it is about the revival and survival of centuries-old tradition; it is about legal theft and denial; it is about David against Goliath; it is about racism, equality, justice, fairness, and more. Perhaps more importantly, for the aboriginal peoples it is about the possibility of a viable economic base upon which to achieve the ultimate prize of self-government.

Background to the Decision

The events leading to *Sparrow* had been preceded by increasing acrimony and hostility between the DFO and the Musqueam Indian Band.

Under the system of regulatory control in existence since 1917, (as outlined in chapter one), the food fish catch of the Musqueam Indian Band had become marginal or non-existent. The Band's food fish requirements were fulfilled by its members who held commercial fishing licenses (*Sparrow, 1990: 397).* It was apparent that the DFO policy of according first priority to aboriginal food fishery, subject only to conservation requirements, existed only on paper and was not implemented in fact. According to a former "native beat" reporter for the *Vancouver Sun*, Terry Glavin, the DFO's primary concern, as it has been from day one, was in ensuring that the needs of the powerful commercial fishery were met first (Glavin, 1995, interview notes).

In 1978 an experimental system was introduced which allowed the Musqueam to fish for a greater number of days than other users, with a larger size net at a length of 75 fathoms. Under this scheme the number of Band members fishing increased from 19 to 64, and the number of boats increased from 15 to 38. In 1978 the recorded catch of the Musqueam numbered 4,998 pieces; in 1982 the recorded catch increased to 51,850 pieces (*Sparrow, 1990: 397; Sparrow, 1987: 311).* According to Bill Duncan, senior program officer, DFO (1995, interview notes), the department became alarmed not only at the size of the catch, but at what also became apparent - that the fish was headed for the blackmarket. The DFO's fears were borne out when it conducted a "sting" operation. In September 1982, undercover DFO agents purchased over 5,500 pieces of fish from members of the Musqueam Indian Band - the dorsal fin and snouts of the fish had been removed indicating that the Band members were selling fish caught under the provisions of the food fish license. Shortly thereafter, an early morning police-style raid was conducted on the Musqueam reserve; vehicles belonging to members of the Band were seized and charges were laid. However all the charges against the members of the Band were dismissed and the vehicles were ordered returned on the grounds that the seizure had been unlawful.

It is not clear whether the next step by the DFO occurred as a result of the botched raid, or had been planned beforehand, but nevertheless the DFO ordered that the net length be reduced from 75 to 25 fathoms. Prior to the decree, the DFO had held discussions with the Musqueam Indian Band but failed to reach a consensus on the size of the nets. The Band registered its protest and the DFO ordered the reduction in the size of the net. The DFO maintained that the net reduction was necessary to reduce the size of the catch as it felt that the amount of the catch

(with the 75 fathom net) was unreasonable in relation to legitimate food requirements of the Band and detrimental to conservation management. The Musqueam, on the other hand, maintained that the net reduction had nothing to do with conservation and everything to do with "vindictiveness" on part of the DFO officials due to the failure, and subsequent embarrassment, over the dismissal of charges arising out of the "sting" operation *(Sparrow, 1987: 310-13).* During the same period, the commercial sector continued to fish without restriction, further raising the ire of the Musqueam, and providing credence to their view that the net restriction was undue interference and not connected to conservation concerns (Becker, 1995).

In 1983, using the 25 fathom net, the recorded catch of the Musqueam Indian Band declined to 11,224 pieces. In 1984, in an atmosphere of increasing acrimony, the Band and the DFO again entered discussions regarding the conditions of the food fishing license for the upcoming season. These negotiations were characterized by Chief Becker as an exercise in futility because the DFO was not interested in the Musqueam point of view. The Band maintained that no restrictions be imposed, but suggested that if any were imposed, a 50 fathom net size would be acceptable. The DFO disagreed and again ordered the net length not to exceed 25 fathoms *(Sparrow, 1987: 310-13).*

In a strategy meeting, the Musqueam Indian Band Council resolved to continue its defiance of the DFO. It was the avowed intent of the Band to defy the DFO in every which way, including selling the fish they caught. The Musqueam did not consider their actions illegal; according to them, it was an exercise of an aboriginal right. During these events, the Musqueam

Indian Band was quite aware of the recent promulgation of the *Constitution Act, 1982* and according to Chief Joe Becker, were looking for an opportunity to test the implications of the protection accorded to aboriginal rights by s. 35(1). The position of the DFO in restricting the size of the net, and its continual regulation and harassment of aboriginal fishers, provided that opportunity (Becker, 1995, interview notes).

In the late spring of 1984, some two years after the proclamation of the *Constitution Act, 1982,* several members of the Musqueam Indian Band were caught fishing in the Fraser River with illegal nets - one of those charged was Ronald Edward Sparrow Jr. In a strategy meeting, the Band Council and legal counsel reviewed the cases of all those who had been charged, and decided that the case against Mr. Sparrow, although not considered the best case, provided the best circumstances upon which to launch a constitutional challenge. The Band had been systemically preparing for this day. All the details had been carefully planned right down to the Band's choice of legal counsel. The counsel would have to be someone who believed in aboriginal rights and shared the Band's position. Marvin Storrow, who had been named to the honourary position of Queen's counsel by his peers, was counsel of choice.

Mr. Sparrow was charged under the *Fisheries Act* of fishing with a net longer than permitted by the terms of the Band's food fishing license. Mr. Sparrow did not deny the facts of the allegations. In his defence, he stated he was exercising an existing aboriginal right protected by section 35(1) of the *Constitution Act, 1982.* This was a clear, deliberate, and unequivocal challenge to the authority of the DFO. Here, as many other aboriginal peoples had

done in the past without success, was an aboriginal person asserting that the government of Canada had no right, jurisdiction, or authority to interfere with, regulate, legislate, or control in any way whatsoever, an aboriginal right.

At trial, Mr. Sparrow was convicted; the provincial court judge determined that an aboriginal right to fish had not been established, and held s. 35(1) to be inapplicable. Mr. Sparrow appealed his conviction to the county court which dismissed his appeal and upheld the conviction. Mr. Sparrow's further appeal to the British Columbia Court of Appeal ("BCCA") was allowed. The court overturned the conviction and ordered a new trial.

While the BCCA decided the case in Mr. Sparrow's favour and ordered a new trial, the decision was inconclusive and left many issues unresolved. For example, the court found that Mr. Sparrow was, at the time of the alleged offence, exercising an existing aboriginal right which had not been extinguished. However the court also held that the restriction on the length of the net was not inconsistent with s. 35(1). In other words, Mr. Sparrow could not claim s. 35(1) protection. A new trial ordered on this basis would have resulted in a conviction since Mr. Sparrow had been charged with fishing with an illegal net, a fact which he did not deny.

On the other side, and perhaps the most important aspect of the BCCA decision was the finding that aboriginal food fishery was entitled to constitutional protection, and that protection, with the exception of conservation measures, gave aboriginal fisheries first priority over the interests of other users, including commercial fisheries.

This was indeed an almost revolutionary statement - for a Canadian court to declare that the economic interests of a major industry was less deserving of consideration than those of aboriginal peoples was almost unheard of. According to Michael Hunter (1995, interview notes), president of the British Columbia Fisheries Council, the fishing industry was taken by surprise - the decision was unexpected, and created a stir on the waterfront. That the decision brought to the forefront decades of simmering hostilities and racist sentiment from the mainly white commercial fishery was no surprise. Michael Hunter, a relatively recent arrival from the distant shores of England, declared aboriginal fishing rights to be *"un-Canadian"* and *"obnoxious and invalid"* (in Glavin, 1993, June 25: 8). Clearly, the industry felt threatened.

In view of the interests at stake, it was not surprising that the BCCA decision was appealed. For different reasons, both Mr. Sparrow and the Crown (representing the federal government) appealed and cross-appealed to the Supreme Court of Canada ("SCC"). The National Indian Brotherhood intervened in support of Mr. Sparrow. And for the Crown, the intervenors amounted to a virtual massing of the troops - the B.C. Wildlife Federation, the Fisheries Council of B.C., United Fishermen and Allied Workers Union, and the provincial governments of Ontario, Quebec, B.C., Saskatchewan, Alberta, and Newfoundland were granted intervenor status in support of the Crown.

The court case had all the makings of a classic showdown. It was David against Goliath, and many of the spectators sided with Goliath, including a number of First Nations. According to Becker (1995) there was little support for the Musqueam court challenge amongst other

aboriginal bands. The bands expressed concern and fear, which was not without reason, that the court challenge would not succeed and would result in a setback and increased curtailment of whatever rights, albeit undefined, that continued to exist.

The Appeal Arguments

Ronald Sparrow appealed on the grounds that the BCCA had erred in the following findings (in *Sparrow, 1990* at p. 392):

(1) *"in holding that s. 35(1) . . . protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights (for conservation purposes or in the public interest)."*

(2) *"in failing to find that the net length restriction . . . was inconsistent with s. 35(1) ."*

The Crown cross-appealed on several grounds arguing that the BCAA had erred in making the following findings of fact and law (in *Sparrow, 1990* at p. 392):

(1) *that the aboriginal right had not been extinguished;*

(2) *in finding that Mr. Sparrow possessed an aboriginal rights to fish for food;*

(3) *that the aboriginal right to fish for food also included the right to take fish for ceremonial and societal needs;*

(4) *that the Band now enjoyed a constitutionally protected priority over the rights of other users.*

The irony in the position of the Crown, in cross-appealing the BCCA decision, was quite remarkable, and in sharp contrast with the comments of various courts in Canada. The courts have ruled, or stated, that the relationship between the Crown and the aboriginal peoples is trust-like, not adversarial; that the Crown has a fiduciary responsibility to the aboriginal peoples, and that no sharp-dealing should be sanctioned because the honour of the Crown is at stake (in *Sparrow, 1990).* However profound, or well-meaning the words of the Courts may have been, they obviously were not heeded, particularly when the stakes were as high as they were in *Sparrow.*

The Crown, backed by the full support of the commercial industry and several provincial governments, opposed every issue that was fundamental to the exercise of the aboriginal right as decided by the BCCA. It is telling that one of the cases the Crown relied upon to support its position was none other than the *St. Catherines Milling* decision, without doubt one of the most blatant pieces of racist judicial reasoning. The Crown argued that the BCCA was wrong in recognizing the existence of an aboriginal right to fish and maintained that there was no aboriginal right to fish for food. In covering all bases, the Crown asserted that even if an aboriginal right had existed, it had been extinguished in view of the history of regulatory control of aboriginal fishery. That the regulatory impositions were at the behest of commercial interests was irrelevant, and not acknowledged by the Crown. The Crown also objected to the finding by the BCCA that aboriginal peoples had a right not only to fish for food, but also for ceremonial and societal needs. It was apparent that the Crown appeared most affronted, and almost aghast, at the BCCA's finding that the aboriginal access to fish, which before had been meted out as

privileges by the state, was now regarded as an aboriginal right, and accorded constitutional protection and priority. The Crown argued that aboriginal fishery deserved no such priority, and maintained that s. 35(1) did not invalidate regulation based on overriding public interest, such as the needs of other users.

Without a doubt, however, the greatest fear, as demonstrated by the numerous intervenors representing the fishing industry and the provincial governments, was that the aboriginal right extended to commercial fishing.

The Supreme Court of Canada Decision

When the SCC decided the *Sparrow* case, little did they know the consternation it would cause. The SCC dismissed both the appeal and cross-appeal; it upheld Mr. Sparrow's acquittal and ordered that a new trial be held in accordance with the analysis (of s. 35(1)) set out in the decision.

At its most basic level the SCC agreed with the BCCA - but what the court had to say about s. 35(1) sent shock waves across the nation. It had taken the highest court eight long years, but here finally was its first detailed look at s. 35(1). What the politicians had failed to define and resolve was given some teeth by the court. Whether the bite proved effective will be examined later. The SCC examined s. 35(1) at length and set out an analytic framework or "test" according to which s. 35(1) must be interpreted by all courts where the protection of aboriginal

rights are an issue. George Erasmus, the then chief of the Assembly of First Nations, declared the *Sparrow* decision ". . . *an extremely major victory . . . we won big*" (in Binne, 1990: 217).

When s. 35(1) was included in the *Constitution Act, 1982,* many commentators viewed the section as an "empty box" - to be filled with explicit provisions by later negotiations (in Cassidy, 1990: 4). That these negotiations, in the form of mandated constitutional conferences, resolved nothing and were a dismal failure came as no surprise to those on the left of the political spectrum (see Mandel, 1994: 353-69). It still came as no surprise when the federal government, throughout the BCCA hearing and before the SCC, argued that s. 35(1) was merely of a preambluar nature. In other words, a section that the aboriginal organizations had lobbied long and hard for, was dismissed by the government as simply a mere statement of no legal effect.

Both the BCCA and the SCC disagreed emphatically with the government's position; the SCC cited the BCCA when the judges stated:

> *". . . to so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way . . . (at p. 407) . . . s. 35(1) is a solemn commitment that must be given meaningful content (p. 408).*

That the solemn commitment was vehemently argued against by federal lawyers with full support of the provinces and other commercial interests indicates clearly that aboriginal rights promised

in the Constitution were never really intended to take on a substantive role. How else to explain the failure of the constitutional conferences? How else to explain the failure of over a century of land-claims negotiations? How else to explain that resource extraction plays second fiddle to none, least of all to aboriginal peoples? How else to explain the political reluctance and unwillingness to even address aboriginal issues? How else to explain the last minute inclusion of an aboriginal rights clause in the constitution?

In this respect, the SCC must be accorded full marks. The judges (at p. 406 of *Sparrow, 1990)* noted that s. 35(1) became a reality after *". . . a long and difficult struggle in both the political forum and the courts,"* and it is not to be taken lightly. The court held that the constitutionalization of aboriginal rights demanded that the issue be viewed seriously. The SCC stated:

> *"The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a* ***generous, liberal interpretation of the words in the constitution is demanded*** *. . . (at p. 407 - emphasis added).*

What did the SCC decide?

The Supreme Court of Canada reviewed the history and litany of injustices meted out to the aboriginal peoples and acknowledged that:

> *"We cannot recount with much pride the treatment accorded to the native peoples of this country" (in Sparrow, 1990: 404).*

In essence the SCC dismissed all of the substantive arguments of the Crown. However the Court could afford to do so, and appear generous in its approach because the actual effect of the decision was a limitation of the recognized aboriginal right.

Legal Significance

There is no doubt that the SCC decision in *Sparrow* is one of great legal significance. It has been the strongest signal yet from the highest court in the land that aboriginal rights must be taken seriously, and that the issues raised demand answers. The SCC made it clear that such answers are best resolved by negotiations, and that a high standard of conduct is expected of the government.

The SCC ruled that Mr. Ronald Sparrow was, at the time of the alleged offence, exercising an existing aboriginal right to fish for food, a right that had not been extinguished notwithstanding nearly one century of increasingly strict regulatory control. The SCC also stated that government regulation and policy was incapable of delineating, defining, or limiting that right. The SCC ruled that where it is argued that an aboriginal right has been extinguished, the extinguishment must have been clearly and plainly intended. The SCC also upheld the BCCA's expansive interpretation of food fishery to include fishing for societal and ceremonial needs.

Perhaps the most important legal victory for Mr. Sparrow, and the Musqueam Indian Band, was the SCC affirmation of the BCCA ruling that aboriginal fishing rights was a

constitutionally protected right which is to be accorded top priority over the needs of other users, subject only to conservation. The ruling by the SCC does not mean that aboriginal fishery cannot be regulated - in this respect the power and jurisdiction of Parliament is supreme. However the SCC clearly circumscribed that power by holding that the state must justify any regulation which may affect the aboriginal right. If the justification is for valid reasons, such as conservation, then the brunt of any conservation measures must be borne by the other user groups such as the commercial and sports fishery sector. The Court also held that any regulation, which has the effect of interfering with an aboriginal right, must only occur if it does not cause undue hardship to the person exercising that right. Finally, the Court ruled that the government must consult with the aboriginal peoples on any regulation which may affect their fishing rights.

Legally, and theoretically, there can be no denying that the decision dealt a severe blow to the government, and the DFO in particular. In essence, the SCC told the government that they could no longer bully the aboriginal fishers. In other words, the complete and arbitrary control exercised by the government over aboriginal fishery was declared invalid.[1]

However the "story" does not end here. Reality has its own peculiarities and holds that no matter now positive the ruling or directives of a court may be, it requires action and conduct on part of the "loser" to demonstrate in a tangible manner that the directives of the court are carried out. As we shall see later, the spirit of the SCC ruling has not been carried out. In subtle and insidious ways, the DFO has maintained control over aboriginal fishery, and continues to

[1] The government (DFO) still has the constitutional authority to manage fisheries, including the regulation of aboriginal fishery.

ignore, in practice, the Court's decision that aboriginal fishery is to be accorded top priority; however, first we turn to a consideration of what the SCC did not decide.

What the SCC did not decide

While the legal issues adjudicated upon in *Sparrow* are significant, what is more significant, and conspicuous by it obvious exclusion, is what the Supreme Court did not decide. The SCC did not rule on whether aboriginal peoples, or the Musqueam Indian Band in particular, had a right to sell the fish they caught.

As far as legal technicalities, common law, rules, and procedures are concerned, the SCC was legally correct in not ruling on the commercial aspects of the aboriginal fishery. The court challenge was never presented on a commercial basis - i.e. that aboriginal fishery included a right to sell the fish. The question before the Court was whether the net length restriction was constitutional in view of s. 35(1). The Musqueam Indian Band which took the *Sparrow* case to the Supreme Court was wary of presenting a commercial rights argument to the courts - it would have seemed that the Musqueam were trying to grab too big of a piece of the pie. *Sparrow* was a cautious step forward to test the waters of s. 35(1) - it should be remembered that Mr. Sparrow's case was not the best case the Band could have hoped for, but according to legal advice it was the only case which presented the logical basis upon which to test the strength of the constitutional protection of s. 35(1).

Notwithstanding legal technicalities, and common law principles, there was absolutely nothing preventing the SCC from ruling on the issue. In other words, the SCC could have ruled that the Musqueam Indian Band had a right to sell their fish. The Court could have said that the rules imposed upon the aboriginal fishery, and the arbitrariness of those rules, were inconsistent with s. 35(1). The Court, after all, did agree with the BCCA in extending the privilege of food fishing to constitutional status and protection. The Court further extended that right to include the taking of fish for "societal and ceremonial needs." The Court was under no obligation to extend the concept of "food fishing" to encompass other uses that were and are integral to the Musqueam Band because it was an issue not raised in the appeal to the BCCA. One cannot help but surmise that the Court could afford to be generous in expanding food fishery, because the effect was actually to limit aboriginal fishing to parameters conducive to control. By not including the commercial aspect, the Court implicity made it clear that the aboriginal right to fish did not include the right to sell fish.

The judges sitting on the bench of the Supreme Court are not naive in any sense of the word. They knew the existence of uncontradicted historical and anthropological data that fully supported the fact that the Musqueam had existed as a society long before the coming of European settlers; that the Musqueam traded and bartered in fish with other coastal and inland tribes, and later, with the Europeans upon their arrival. There was no doubt that fish formed an integral part of the economy of not only the Musqueam, but of other coastal tribes in B.C. And yet, the Court declined to address the issue, taking refuge behind legal rules.

Why should the Court have said "yes" to an aboriginal fishery that included the sale of fish? First and foremost, it would have been a truly just and fair settlement. After all, the Court did admonish the justice system and Canadian society for being unable to recount with much pride the treatment accorded to aboriginal peoples. The merit for recognizing a commercial component to aboriginal fishery is found in explicit statements by the Court throughout its decision. By extending food fishery to include the taking of fish for societal needs, the Court had a clear opening upon which to conclude that societal needs could mean a right to do with the fish what the Musqueam had done with the fish before being legally prohibited from doing so - mainly trade and barter. If the Court accords a legal right to include "societal needs," should not those needs be defined by those to whom it is accorded? Societal needs was not defined by either the BCCA or the SCC - arguably those needs could mean commercial activity which would benefit the society as a whole by addressing some of its most pressing social problems such as poverty, unemployment, and dependence on social assistance. The definition of societal needs is only limited by one's imagination, and it is apparent that the SCC suffered from a remarkable lack of imagination on that day.

There is still further support for the economic use of fish by the Musqueam in the decision. For example, the Court states:

> *". . . the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time . . . (and) suggests that those rights are affirmed in a contemporary form rather than in their primeval simplicity and vigour" (Sparrow, 1990: 397).*

This statement provides clear support for reviving the ancient practice of barter and trade into its modern day equivalent of open market sale. It also includes a recognition that aboriginal fishers should be allowed to exercise that right by use of modern equipment, and not, to quote the anonymous caller (p. 1 of Chapter 1) *"in boats they paddle,"* or to the position of the Crown in *Simon* which argued that the exercise of rights should be in the form that prevailed in the 1700s.

With regard to aboriginal fishery, the BCCA *(Sparrow, 1987: 331)* stated:

> *"The breadth of the right should be interpreted liberally in favour of the Indians. So 'food purpose' should not be confined to subsistence. In particular, this is so because the Musqueam tradition involves . . . a broader use of fish than mere day-to-day consumption."*

The SCC, in an earlier aboriginal rights case, *Nowegijick v. The Queen,* had stated that treaties and statutes should be liberally construed and doubtful expressions resolved in favour of aboriginal peoples. The SCC applied the same principle of liberal rhetoric to s. 35(1), and concluded that the constitutional nature of s. 35(1) makes it clear that a *"generous and liberal interpretation is demanded."*

Well then - if a generous application is demanded, to quote the Court, why not a recognition of the commercial nature of aboriginal fishery? And if one really thinks about it, there is no requirement for generosity when the issue is about the restoration of rights once enjoyed by the aboriginal peoples before the coming of white settlers, i.e., being just and fair is

not generous, it is simply the right thing to do. However the principles enunciated, and the bold nature of the statements by the Supreme Court, amount to naught given the technical avoidance of the issue. The undeniable fact is that it would have taken a remarkable degree of courage on part of the Court to allow aboriginal fisheries an unhindered access to the resource. By unhindered, I mean a true recognition of the aboriginal right - a right to do with the fish as per one's discretion. However such a bold and courageous move on part of the Court would have turned the industry upside down. And the SCC was not blind to the magnitude of the economic implications - the judges stated:

> *"The presence of numerous intervenors representing the commercial fish interests . . . indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishing . . . we recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises, and tensions increase" (Sparrow, 1990: 403).*

On this account the SCC was not quite correct - there is no *possibility* of conflict between aboriginal fisheries and commercial fishery - there *is* conflict. In fact there is a great deal of conflict and animosity, which is the subject of Chapter Four. Before moving on, it is important to discuss the "justification" scheme imported into s. 35(1) by the Supreme Court.

Limitation of Aboriginal Rights under s. 35(1)

It should be noted that before the promulgation of the *Constitution Act, 1982,* aboriginal organizations lobbied extensively to ensure that s. 35(1) was placed beyond the reach of s. 1 and

s. 33 of the Charter. Section 1 allows for the infringement of constitutionally guaranteed rights if it can be justified according to a test delineated in the SCC decision, *R. v. Oakes,* and section 33 allows legislative action to override the Charter guarantees. The very thing that aboriginal organizations feared, and with very good reason, occurred in *Sparrow.* In a subtle and almost insidious manner, the Court imported into its analysis of s. 35(1) a justification test, to allow for the limitation or control of aboriginal rights where none had been envisioned or intended by parliament.

Where did this limitation come from? According to Tom Berger (1989: 606), the Supreme Court *"invented it out of thin air."* Several commentators (Freedman, 1994; Mandel, 1994; Elliott, 1991; Binnie, 1990) have argued that the limitation placed upon s. 35(1) may have the effect of curtailing other aboriginal rights. The Court, in essence, ruled that aboriginal rights could be curtailed according to a justificatory scheme. The issue of particular concern here is that the decision was delivered by a fairly liberal and sympathetic Court led by the renowned Chief Justice Dickson. What are successive courts to make of this, particularly in view of the fact that the members currently on the bench at the SCC are known for their conservative values? In *Sparrow,* the SCC has provided successive courts an opening or scheme for controlling aboriginal rights since the power of argument and legal obfuscation can be easily manipulated to support a variety of positions no matter how untenable or implausible some may be. Chief Joe Becker is blunt and he readily acknowledges that the present make-up of the SCC does not bode well for future challenges under s. 35(1); he further acknowledges that had *Sparrow* been presented to the SCC today, the result would have been even less favourable.

While reaching out to the aboriginal peoples of Canada, the SCC with remarkable incredulity, does not appear cognizant of the paradoxical nature of its own statements. As noted earlier, the Court concluded that the relationship between the state and aboriginal peoples entails a fiduciary responsibility, and that the relationship is trust-like, not adversarial; yet the relationship has always been, and continues to be, adversarial. The Court acknowledges this point:

> *"Our history has shown . . . 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 interests" (Sparrow, 1990: 409).*

If this is so, then why not alleviate those concerns by not limiting s. 35(1) rights? Perhaps because the judiciary is a construction of the state and is unable to dissociate from the ideological underpinnings of its creator.

Conclusion

At first glance, *Sparrow* appears to have been an unqualified victory for the aboriginal peoples. However upon sober reflection, the decision is anything but. There is no denying that the decision is of considerable legal significance - but that has not translated into any significant or substantial benefit to the aboriginal peoples. Perhaps there is a moral victory, the value of which cannot be measured at this time.

The fact remains that *Sparrow* is a major disappointment. In view of the liberal language and the liberal make-up of the SCC, the expectation or hope for a just and fair interpretation of s. 35(1) was betrayed. By importing a limitation scheme where none was intended, the SCC has diminished the capacity of s. 35(1) to fulfil its promise to the aboriginal peoples of Canada.

Chapter Four

After the *Sparrow* Decision

Introduction

The heady days following the *Sparrow* decision involved a great deal of cheerleading, and there was much speculation on what the decision could mean for the welfare of the aboriginal peoples of Canada. The decision was hailed as an example of how the law can be used to achieve legal and social justice. Within months of the decision, the political science department at the University of Victoria organized a conference to discuss the implications of *Sparrow*. Legal experts, scholars, politicians, aboriginal leaders, supporters, and opponents convened to discuss and analyze the decision. Some posited the view that s. 35(1) was not an *"empty box,"* but a *"full box,"* and that the SCC had accorded to the aboriginal peoples everything they wanted, and that the Constitution included a full and extensive recognition of aboriginal and treaty rights. On the other side, critics of the decision argued that, notwithstanding its apparent constitutional import, *Sparrow* had decided nothing. But there were more supporters than critics, and they got carried away by the rhetoric of the court's decision resulting in some wildly speculative predictions. Some even argued that the decision meant aboriginal peoples now had the authority to make laws regulating the use and exchange of fish. There was even talk that *Sparrow* had paved the way to resolving the demands of many First Nations organizations for self-government (see conference papers, The *Sparrow* Decision, University of Victoria, 1990).

Legal and theoretical arguments, and speculation aside, what needs to be addressed, and to this day has not been, is really quite straightforward, and is the subject of this chapter. Specifically, what has the *Sparrow* decision meant to the aboriginal peoples of Canada? What

has the decision meant to the Musqueam Indian Band who took the case to the Supreme Court? Has the economic situation of the Band improved? Has social transformation occurred? Has it meant access to a valuable natural resource where none had existed before? Has there been a change leading to the improvement (in life chances) in accessibility to fish? Are aboriginal fishers now able to exercise their rights without hindrance and/or interference? Has the spirit and intent of the decision been respected or enforced?

To answer the preceding questions, the following pages will examine the nature of aboriginal fishing rights after the decision. To provide a contextual perspective, it is imperative to also consider the position of the other major players in the fishing industry - the Department of Fisheries and Oceans ("DFO"), and the commercial fishing industry. In 1992 the government of Canada, citing its obligations under the *Sparrow* decision, implemented a multi-million dollar program known as the Aboriginal Fisheries Strategy ("AFS") promoted by the government as a means to enhance aboriginal participation in the fishing industry. On the other side, the *Sparrow* decision, and the AFS, has served as a rallying cry for the commercial sector which has waged an all out war against the aboriginal fishery. The chapter will conclude with a review of recent court challenges which have attempted to build upon the "victory" in *Sparrow.*

Fishing Rights after *Sparrow.*

As outlined in chapter two, aboriginal fisheries has a long, rich, and varied history. From its position of reverence to its use as an economic commodity, fish has been, and continues to

be, of vital and fundamental importance to the aboriginal way of life in fishing communities along the coast and inland waters of B.C., and elsewhere in Canada. However with the coming of the European settlers in the early 1800s, there has been constant and sometimes violent conflict between whites and aboriginal peoples over fish. Eventually, and with deliberation, aboriginal peoples were legislated out of the lucrative commercial market, and marginalized to an increasingly restrictive regime of fishing for food only. Since 1888 aboriginal fishers no longer had any legal right to fish unless so accorded by the government - and the government did not accord any rights with the exception of allowing fishing for food under policy provisions. The aboriginal peoples continued to maintain that they had an inherent right to fish, a right which had never been given up, and continued to defy the state through court challenges, "fish-ins," and other forms of protests. In turn they were harassed, intimidated, prosecuted, convicted of criminal offenses, fined and/or jailed. And still the aboriginal peoples persisted in claiming an inherent right to fish, a right which had no basis in Canadian law, and was not recognized by the government of Canada (Newell, 1993; Pearse, 1992).

In 1984 yet another court challenge was initiated. The Musqueam Indian Band took a calculated risk and decided to test the promise contained in s. 35(1) in the new Canadian constitution. The *Sparrow* decision was, and remains to this day, the most significant legal victory in the fight for the recognition of an aboriginal right to fish. The court challenge took several years and cost in excess of hundreds of thousands of dollars before the SCC decided that aboriginal peoples had a constitutionally protected right to fish.

Before the decision, aboriginal peoples had no legal right to fish for food, or for any other reason. After the decision, they gained a legal right to fish not only for food, but also for societal needs and ceremonial purposes. The decision was significant for two main reasons. It was the first time that a Canadian court had recognized such a right, and secondly, it was a huge moral victory for a peoples accustomed to losing court battles.

However any measure of significance, legal or otherwise, is relative and must be tempered with reality. In practical terms and in the scheme of things, the decision has so far proven insignificant and represents a smoke-screen of the highest order achieved by obfuscation through legal rhetoric. Furthermore, even the "victory," however slight, has been rendered ineffective and meaningless due to the combined, but not necessarily collusive, efforts by the DFO and the commercial interests.

Before and After

Before the SCC decision, the aboriginal food fishery was allocated 3% of the total allowable catch of salmon. The lion's share was held by the commercial fishery at 94%, and the remaining 3% was held by the sports fishery. In order to allow the aboriginal fishing communities to meet their food requirements, the DFO accorded first priority to aboriginal fishery subject only to conservation needs. However, as already indicated, the aboriginal fishers never did enjoy first priority in practice. Frequently, and with regularity, the commercial fishery would catch more than its allocated share leaving the aboriginal fishery to bear the brunt of any

conservation measures. The DFO was aware of this problem, and was advised by the Pearse Commission to address the matter, but did not do so. In fact the DFO did not even make the attempt, because they were up to something quite sinister. During the early 1980s, it became common practice for the DFO to depend upon the "shadow" effect to deprive aboriginal fishers of access to the resource. The "shadow" effect is created by the migrating salmon and the corresponding harvest - the salmon move up stream in cycles; if one particular cycle is fished out, it usually takes up to four days for another cycle to move up the river to make up for the harvested fish. The delay in the arrival of the next cycle of salmon creates "holes" in the river where there are no migrating salmon. The DFO would allow the commercial fisheries to harvest huge amounts of fish before the salmon entered the river system, and then the DFO would open up the fishing to aboriginal fishers knowing full well that there was no fish to be caught; the aboriginal fishery would be shut down again when the next cycle of salmon would start approaching the river system . In other words, the DFO would allow the aboriginal fishers to fish only on days when there were "holes" in the river system, and feign ignorance when native groups would complain that there were no fish to be caught. This trickery only stopped when the aboriginal fishers became aware of what the DFO was doing and made it clear that they would not tolerate continued abuses.[1]

For anyone hoping for clarity in the decidedly muddy waters of fishing rights, the SCC decision was a disappointment. The situation after the decision remains unchanged with one minor exception - aboriginal fishing rights pertaining to food, societal needs, and ceremonial

[1] This information was provided by DFO officials on condition of anonymity.

purposes are now legally recognized. Nothing else has changed. The subject of fishing rights remains confusing and ill-defined, and the battle over fish continues unabated in the political arena, in the fishing waters, and in court houses across Canada. The conflict between the mostly white commercial fishery and aboriginal fishery continues and has, in some respects, intensified. The commercial sector is still allocated 94% of the salmon catch and the aboriginal share remains at 3%. Most importantly, it is still illegal for an aboriginal person to sell fish caught under the provisions of food fishery.

However a "before and after" analysis provides only a glimpse of what is happening in the fishing industry in B.C. (and elsewhere in Canada where aboriginal fishers compete for fish stocks with other users). The rules of the game may have been changed by the courts, but that does not mean that those making the decisions are playing by those rules.

The Government Response to *Sparrow*

When the SCC ruled that Mr. Ronald Sparrow, at the time of the alleged offence, was exercising an existing aboriginal right to fish, there was an almost collective cry of victory in aboriginal communities across Canada. It was this hard-won recognition that led George Erasmus, the former chief of the AFN, to declare *Sparrow* a major victory. Upon sober reflection it is apparent that Mr. Erasmus reacted hastily. The actual effect of the decision has been, in fact, a limiting of the aboriginal right to parameters that allow for continued state control. The SCC was quite precise - the aboriginal right to fish only applies to food, social, and

ceremonial purposes, and nothing more.

However if one is accorded a legal right, even in a manner that actually limits it, that right has to have some meaning or effect. The ideology of law dictates that a legal recognition of a right means the legal protection of that right. It means that a right is to be exercised by the holder, without interference, and is required to be provided with protection when or while exercising that right. A right is rendered meaningless if one is unable to exercise that right. It is similarly meaningless if one is denied that right or prevented from exercising that right.

In according legal recognition to aboriginal food fishery, the SCC also ordered that aboriginal food fishery be accorded top priority subject only to the needs of conservation. The SCC stated:

> *". . . the significance of giving the aboriginal right to fish food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of fishing rights. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by . . . sports fishing and commercial fishing (Sparrow, 1990: 414).*

The SCC, as if anticipating future government conduct, was particularly emphatic on the preceding matter, and clearly intended the decision to act as a strong check on legislative power. The Court stated that any regulation affecting aboriginal food fishing must be justifiable and meet the test set out above. The court also added that there can be no underlying unconstitutional

objective such as shifting more of the resource to a user group that rank below the priority accorded to aboriginal food fishery.

However, according to the Grand Chief of the Sto:lo nation, Clarence Pennier (1995, Sept 10: A34), and other anonymous sources in the DFO, that is exactly what happened in the 1995 fishing season. Even with the weight of the SCC decision, the precise direction of the judges, and constitutional protection, aboriginal fishing rights remain subject to almost whimsical and arbitrary control by the DFO, and have yet to be accorded top priority. Aboriginal fishing rights, which are constitutionally protected, continue to be ignored by the government of Canada.

Not only does aboriginal fishery not receive top priority but fish, which had been originally allocated to them as food fishery, was taken away and shifted to another user group; i.e., the fish that the Bands along the coast of B.C. were not permitted to catch was simply given to the commercial fishing interests. The action by the DFO, with full support at the ministerial level, was and is illegal, unconstitutional, and in complete and blatant violation of the *Sparrow* ruling.

Once again, as in countless times in history, the aboriginal fishers stood by powerless to change the situation. Some complained - the Chemainus Tribal Council wrote to the federal minister in charge of fisheries and urged compliance with the *Sparrow* ruling and the AFS agreement; the Council never received a reply.

One of the fundamental, and perhaps contradictory, problems with winning legal rights is that those who are accorded those rights must often fight to protect or exercise those rights. And often, that struggle entails taking the matter to the courts; however most aboriginal bands lack the resources necessary to fight court cases, and contrary to popular belief (see, for example, B.C. Fisheries Survival Coalition Presentation to the Parliamentary Standing Committee on Forestry and Fisheries, March 1994: 13), are not funded by the state to do so. There are other complicating factors - that of gathering evidence; of travelling great distances; of the time required to leave the fishing grounds to attend court miles away. In addition, most have no desire to attend court and only do so as a last resort, and the absurdity of the matter is not lost on the aboriginal fishers. If one court ruling is not obeyed, what assurance is there that subsequent court rulings will be respected? Clearly, there is something fundamentally and morally wrong when a government department deliberately violates its constitutional obligations and its supposed "trust-like" relationship, for the sake of political expediency and profits for the multi-nationals and the white fishers.

The effect of such government actions can be devastating. A closure of aboriginal fishery means more than just denial of food. It is a denial of a way of life, and the effects have profound implications. The situation worsens the further up-river one gets to the remote, isolated, and virtually inaccessible villages. What may seem like a simple action (i.e. closure of fisheries) is anything but a small matter to the remote aboriginal communities. Fishing entails considerable planning, and the fisher must travel through inhospitable terrain for days, or arrange for transportation, in order to time his arrival at the traditional fishing grounds to coincide with DFO

opening dates. Upon arrival the fisher is informed by helicopter or boat patrol that s/he cannot fish. With no fish food provisions to supply his family or other band members, the aboriginal person is left to find other sources of food. According to some observers (Ellis, 1996; Glavin, 1996 - interview notes), and anonymous DFO officials, the remote aboriginal bands are starving because they have not been allowed to catch food fish. Furthermore the closure amounts to a denial of an activity which is fundamental in aboriginal culture. The matter does not receive much publicity; the bands are distant and isolated, and they generally want nothing to do with government officials.

The preceding also holds true for the 1992, 1993, and 1994 season. It is not a coincidence that the statistics correspond to the years in which the AFS was in operation. The AFS was supposed to accord to the aboriginal fishing communities more control over fishing; it was supposed to increase aboriginal participation and involvement in the management of fish - none of this has happened. In fact the opposite has happened, and it has happened in a deliberate and insidious manner. In all the preceding years, since 1992, most of the aboriginal bands who depend on fish for food, have not been able to, or permitted, to catch their pre-season allocation of salmon. Most up-river or interior bands have caught less than 50% to 30 % of the agreed level (Glavin, 1995; The David Suzuki Foundation Annual Report, 1995; Ellis, 1995). The real picture is demonstrated by comparisons between the "food" fish allocations and the actual catch of the various bands. For example, the 1995 allocation for the Pacheenaht, of Vancouver Island, was 4,500 pieces of salmon. The actual catch was zero; for the Sliammon the allocation was 10,000; the actual catch was zero; for the Klahoose it was 4,000; actual catch was

zero. The statistics, with minor variations, are relatively the same for other bands in B.C. The tables below show the statistics for Vancouver Island Bands (table i), and the Fraser River Bands (table ii). Without exception, not one single aboriginal band caught their allocated amount. The allocations were arrived at following negotiations by the DFO and the individual bands - the DFO had signed agreements with the bands that they would be able to catch their respective allocated share.

table [i]

Aboriginal Food Fishery (B.C.) 1995[2]
Allocation and Actual Catch of Sockeye Salmon

Band/Tribe/Group	Allocation	actual catch
T'Sou-ke	300	- 0 -
Boundary Bay	1 300	- 0 -
Esquilmalt	1 000	- 0 -
Songhees	2 100	60
STF	10 000	1 247
Tseycum	2 000	- 0 -
Pacheenaht	4 500	- 0 -
Halalt	3 500	- 0 -
MITC	12 000	2 731
Nanaimo	17 000	1 700
Nanoose	4 500	1 850
Sechelt	15 000	5 797
Qualicum	1 000	- 0 -
Klahoose	4 000	- 0 -
Malahat	1 200	- 0 -
Ditidaht	3 000	- 0 -
Cowichan Tribes	20 000	2 000
Sliammon	10 000	- 0 -
Chemainus	14 000	1 800

[2] data provided by Terry Glavin, David Ellis, Clarence Pennier, and the DFO

table [ii]

Sockeye Allocations/Catch for Fraser River First Nations[3]

Band/Tribe/Group	allocation	actual catch
Musqueam; Tsawassen; Burrard	140 000	134 713
Sto:lo; Katzie; Yale	450 000	422 356
NWSFA; NNTC[4]	110 000	92 349
Stl'atl'lmx Nation	63 000	33 522
Shuswap Nation Fisheries	21 700	1 096
Whispering Pines/High Bar	12 000	68
CTC; ALB; TNG[5]	100 000	26 094
Carrier-Sekani	55 000	11 309
Carrier-Chilcotin	5 000	16
Lheit-Lit'en Nation	10 000	2 080

[3] Source: Management Biology Unit/DFO (1995); provided by Glavin, updated by Ellis (1995)

[4] Nicola Watershed Stewardship & Fisheries Authority; Niaka'pamux Nation Tribal Council

[5] Cariboo Tribal Council; Alkali Lake Band; Tsilhqot'in Nation Government

The total allocation for the Vancouver Island Bands (in table [i]) was 123,400 pieces of sockeye salmon; the actual combined catch was just under 19,000 pieces. While the figures for the Fraser River Bands are relatively better, they indicate similar discrepancies. The Bands did not catch their allocation because they were told not to by the DFO. The DFO persuaded the Bands that an overriding need for conservation existed, and the Bands cooperated. According to a spokesperson for the Musqueam Band, the Band agreed to stop their fishing because they had agreed with the DFO that a conservation need existed (personal communication, 1995). However there was no such conservation need because the DFO, under intense pressure from the commercial lobby, lied to the aboriginal fishers and simply reallocated the aboriginal food fish to the commercial fishery in direct and blatant violation of the constitution of Canada. The decision to violate aboriginal fishing rights, and the terms of the AFS agreement, apparently occurred with the full knowledge of the federal minister of fisheries, Brian Tobin. According to an anonymous DFO official, Mr. Tobin had been informed by field staff that there was sufficient salmon to meet both the needs of all the aboriginal bands and to meet conservation requirements. Nevertheless the aboriginal fisheries were shut down. For this the commercial industry's public relations machinery must be accorded credit, and the government condemned for acquiesence to their interests.

The right which has been hard fought for and won, and accorded legal protection, is not much of a right if it cannot be exercised when an explicit prohibition exists. Furthermore that right is violated when that right is arbitrarily taken away and accorded to another party. The SCC had ruled that the government cannot do this, but the government did; the Court ruled the

government must consult with aboriginal bands - the government did not. The Court ruled that aboriginal fishing rights must be accorded top priority and the needs of other users are secondary - the government did not listen. The aboriginal fishers cry foul but are ignored. Instead they are criminally charged when they persist in exercising their constitutional rights as if *Sparrow* never happened (see Platiel, 1995 Oct 17: A5; Glavin, 1995). In 1995 a total of 110 charges were laid against aboriginal fishers, the highest in recent memory (anonymous source, 1995; Glavin, 1996; Ellis, 1996). The local media, which had long eliminated its "native beat" reporter, does not bother with the real story and focuses instead on aboriginal overfishing and poaching. More often than not, the media portray the white commercial fisher in a sympathetic light painting a picture of a person in danger of losing his/her livelihood because of Indian fishing. The Indian is always the "bad guy" as the media focuses on the number of Indians criminally charged for violations under the *Fisheries Act.* An example illustrates - a front-page headline, in the Vancouver Sun, proclaims "Indians 'mishandled' fishing funds" (1995, 23 November). However a further reading of the fine print reveals the true nature of at least part of the 'mishandled' funds. The Kwakiutl band had redirected a portion of the AFS funds to pay the legal bills of a band member charged for fishing violations.

The evidence strongly indicates that the DFO has not only shirked its obligations under *Sparrow,* but has deliberately circumvented them. According to a senior fisheries manager[6] at the Pacific Region office of the DFO, the department, under cover provided by the AFS program, has set out to deliberately override the spirit and intent of *Sparrow,* and has done so by

[6] This was confidential information provided on the assurance of anonymity.

misleading and blatantly lying to the aboriginal bands and to the Canadian public.

The Aboriginal Fisheries Strategy ("AFS")

The Aboriginal Fisheries Strategy may have been a well-intentioned, sincere effort to respond to *Sparrow* and to address the inequities inherent in the manner which the DFO had managed fisheries (Copes, 1996, interview notes). But what the AFS has become is anything but. The evidence is quite convincing that the AFS has served the interests of the DFO. And the interests of the DFO has always been, and continues to be, the well-being and profitability of the commercial fishing industry.

The AFS had its inception in 1992 - it is a multi-million dollar program designed to operate over a seven-year period. In a brochure titled *West Coast Fisheries: Changing Times,*[7] and newspaper advertisements, the DFO promoted the AFS as its response to *Sparrow.* The stated purpose of the program was to enhance aboriginal participation in all aspects of fisheries; the DFO stated that AFS would ensure that the constitutional rights of aboriginal peoples to fish would be protected. None of this has occurred. It is telling that a stated objective of the AFS is to minimize the disruption of non-aboriginal fisheries.

First and foremost, the AFS was a belated response to *Sparrow.* The SCC forced the DFO to act, and the DFO did so with considerable reluctance. It is worth noting that the DFO

[7] Supply and Services Canada, 1993 (cat. no. Fs 23-240/1993E)

has exhibited a remarkable degree of obstinance - the DFO refused to act after the Pearse Commission of 1982; it refused to act when so recommended by its own commission of inquiry; it refused to act after the passage of s. 35(1), and it even refused to act after the *Sparrow* decision when it took almost two years for the DFO to formulate any plan of action. When the DFO finally responded to *Sparrow,* it was a brilliant sleight of hand that has effectively undermined the marginal "victory" of the *Sparrow* case.

The AFS consists of individually negotiated agreements between the DFO and the various bands - central to the agreement is the issue of allocation, or the amount of fish that the contracting band will be permitted to catch. The seasonal allocation is agreed upon by both parties after negotiations. For many of the Bands, the request for a certain number of fish reflects both a political statement and legitimate food requirements. Therefore an arbitrary decision by the DFO to suspend or cancel the terms of negotiated agreements not only denies the Band fish for food, it also represents a political slap on the face and drives home the message of the Band's lack of political power.

To begin with, the negotiative process does not occur on a level playing field. Even before arriving at the agreement the DFO takes pains to ensure that they hold all the cards. In order to do so, the DFO has engaged in intelligence gathering as if the aboriginal peoples are some cold-war enemy. In an internal memorandum dated 25/July/1995, obtained through the *Access to Information Act,* the operations manager directs a subordinate to gather information and profiles on aboriginal leaders and community groups as if seeking weaknesses to exploit.

Specifically:

> *List of aboriginal organizations, their representatives and band affiliations, a description of their constituents and influence, speciality issues, connections to other groups outside Pacific Region and other important points . . . [T]he list will include not only chiefs, chief councillors and representatives, but also aboriginal people who hold significant positions of influence or respect in their communities. The test of whether to include an individual is to determine whether an individual might have reason to be in contact with DFO, or whether DFO . . . might have reason to contact this individual . . .*

The manager also directs the subordinate to create a database and share the information with the Land-Claims section. The letter is directed to a DFO employee of aboriginal background who is also requested to use his contacts to supplement the database.

It is more than apparent that the DFO just does not get the message - the aboriginal peoples are not the enemy or some foreign power that should be spied upon. But that is exactly how the aboriginal peoples are treated by the DFO. The AFS contracts that the Bands sign often exceed 10 pages in length and contain all sorts of disclaimers and caveats; such is not the case for the commercial users. The nature and extent of the contracts reflect a clear case of paranoia and mistrust on part of the DFO. Furthermore the terms of the private contract between two parties (DFO and aboriginal bands) are made public - the distribution list includes those who are opposed to aboriginal fisheries such as the Fisheries Council of B.C., the Survival Coalition, and others.

However such is the prevailing attitude that it is not surprising that the AFS has not

benefited those whom it was supposed to. In reality the AFS is a sham and a "con-job" of the highest order. What the AFS has done is allow the DFO to maintain the control over aboriginal fisheries that the SCC had taken away. According to a senior manager in the DFO the AFS "buys" back the authority and control that was lost in *Sparrow.* In other words, the AFS maintains the status quo; it allows the DFO to continue its activities as if *Sparrow* never happened; the AFS allows the DFO to shut down aboriginal fisheries and to quote one (anonymous) DFO official:

> *"It [AFS] allows us to charge and convict Indian people."*

Under the AFS all that needs to be established for a successful prosecution is that the accused offender violated a signed agreement; if one was to follow the *Sparrow* "test" then it becomes more onerous and difficult - the Crown has to establish a host of factors which makes it difficult to convict an aboriginal person exercising his/her right to fish.

An anonymous source in the DFO has characterized the AFS as sitting between a "screw-up" and a "disaster" with no long-term strategy whatsoever; there is no indication where the AFS is headed and the program is running out of funds. The AFS has bought time for the DFO, allowing it to function as it did before the *Sparrow* decision. The same source however credits the AFS for slowing the decline in the rapidly deteriorating relationship between aboriginal fishers and the DFO.

There is no denying that there have been, and continues to be, abuses (i.e. poaching) by all users in the fishing industry. Those who have been most often accused of poaching (i.e. aboriginal fishers) are not the only abusers. However some observers of the fishing industry, including DFO officials, readily acknowledge that aboriginal bands have been most cooperative (Glavin, 1995, Ellis, 1996 - interview notes). The aboriginal bands who are signatories to the AFS have fully cooperated with the DFO and have honoured their end of the agreement. Not so for the DFO. An example illustrates. The AFS agreement signed with the Sto:lo nation contains a dispute settlement mechanism with clearly and precisely defined resolution directions. When the Sto:lo, aggrieved by the blatant violation of the agreement by the DFO, requested mediation, the DFO refused to participate and proceeded to cut in half the pre-season salmon allocation for the Sto:lo and reallocated it to the commercial fisheries. According to an official with the DFO the department refused to participate because it knew it was in the wrong - the DFO was not prepared to accept any position but its own, and the DFO feared that the ruling would go against them and cause undue embarrassment. The DFO avoided mediation by falling back on its bag of tricks, arguing that any decision of the mediation panel would encumber the Minister, and according to legal principle the Minister's prerogative cannot be encumbered.

It is difficult to disagree with some senior DFO officials who state that the AFS has nothing to do with fishing but everything to do with the larger picture of aboriginal rights and land-claims issues. This was borne out by the DFO's request that the signatories to the AFS consider the 1994-95 agreements as "partial fulfilment of the federal Crown's responsibility under the treaty." The AFS had been sold to aboriginal communities as the government's response to

Sparrow; it was sold as a program separate from any treaty negotiations. The request by the DFO caught the aboriginal communities by surprise and they protested - again, the Chemainus Tribal Council wrote to the Minister, and again no one listened.[8] The program designed by two former bureaucrats from the Department of Indian Affairs and Northern Development was meant to gauge public reception to on-going aboriginal land claims negotiations. One may wonder how accurately the reaction will reflect public opinion given that the agenda has been hijacked by the commercial users. If one were to gauge the reaction in accordance with the response by the commercial industry, then the future for further meaningful negotiations is indeed bleak.

However for a sham to be perpetuated it must have some degree of legitimacy, and for at least one band, the Musqueam Indian Band of Vancouver, B.C., the AFS has been a qualified success. But that success is completely dependent upon the goodwill of the DFO, and for as long as the program remains politically acceptable.

The Musqueam Indian Band Department of Fisheries

The Musqueam Indian Band has demonstrated in the past that they are not about to sit idly by as the government rides roughshod over their rights. The Musqueam sued the federal government in the *Guerin* case and won a $10 million settlement; the same band also challenged the DFO and won (in *Sparrow).* It is therefore not surprising that the Musqueam has benefited from the decision and the AFS. There is no question that a few aboriginal bands have benefited

[8] Correspondence from Chemainus Tribal Council to the Prime Minister's Office, dated 10/August/1994.

economically, but most of the 90 or so bands along the coast and inland waters of B.C. have not received any tangible benefits, economic or otherwise. And whatever moderate success is enjoyed by the few bands does not take away from the fact that the AFS has not worked for the majority of the native groups or bands, and that the DFO has undermined and ignored the *Sparrow* ruling.

When asked about the impact of the decision on the Musqueam Band and its fishers, Chief Joe Becker wryly noted that, immediately following the decision, aboriginal peoples were no longer being criminally charged for fishing violations. However this temporary outcome had more to do with the state of utter confusion among DFO enforcement officers than any shift in policy, or goodwill, by the DFO; mostly based on a misunderstanding and inaccurate interpretation of *Sparrow*, the senior managers at the DFO panicked, and the enforcement officers out in the field did nothing due to an almost complete lack of guidance from the policy-makers (in Glavin, 1993; Smith, 1995).

The AFS agreement between the Musqueam and the DFO has a provision for the pilot sale of salmon, or a Pilot Sales Arrangement ("PSA"). It should be noted that the agreement does not increase the allocation of salmon to the Musqueam; it only allows for the sale of a portion of the food fish caught by the Musqueam. While most of the Bands are signatories to the AFS, only four have signed PSA agreements. This agreement by the DFO did not break any new ground. It only recognized a reality and eliminated an activity that was done under cover of darkness; the Musqueam were selling a portion of their fish anyway. The Musqueam Band

has prospered; its members no longer have to fear criminal charges for selling their fish; there is a certain degree of immeasurable respectability to the selling of "food" fish as the fishers no longer have to engage in surreptitious behaviour. It has meant increased employment for the Band members; there are fewer band members receiving social assistance payments. The AFS agreement has allowed the Band to operate its own department of fisheries with the (delegated) authority to oversee and manage the Band's fish resources. Overall, Chief Becker has expressed satisfaction with the AFS agreement and expressed a hope that it would continue. However there is no such commitment by the government; the AFS ends in 1997.

When asked about how many salmon are sold by the Musqueam, Chief Becker is silent. His concern is that when the PSA ends, the DFO will reduce the Musqueam allocation to an amount equal to the difference between what the Musqueam catch and sell. Mr. Becker's hope is that the PSA will be expanded. Unfortunately for the Musqueam, and other aboriginal fishing communities, this hope, in all probability, will not translate into reality. According to William Duncan, a senior administrative officer at the DFO, the AFS and PSA will not be extended because the issue has become too controversial (personal communication, 1996). The commercial interests, of course, have worked hard to ensure that the AFS remains controversial.

The benefits which have accrued to the Musqueam are short-term, and there is no guarantee that the AFS or PSA will continue. Any economic or social benefits the Musqueam have gained under the AFS and PSA are illusory in nature because there is a lack of certainty regarding the continuity of the program. If the DFO decides to pull the plug on the program,

then the gains made by the Musqueam will vanish. In order to conclude that social transformation has occurred, the changes or improvements must be of a durable, continuing, and substantial nature. The changes must also recognize fundamental issues. The issue here is aboriginal fishing rights and neither the AFS nor PSA recognizes it; the AFS is a negotiated agreement and the PSA is at the behest of the DFO and does not arise out of a recognition of the history of aboriginal fishing. The PSA, in brief, is a short-term pragmatic approach which recognizes a limited aspect of reality and brings out into the open a former activity confined to the blackmarket. In any event, though a few bands prosper or benefit from the AFS does not mean that those benefits accrue to the general aboriginal community in Canada. Indeed, the evidence strongly indicates that aboriginal bands have actually suffered under the AFS. As cited in tables i and ii, most bands have not been permitted to catch their negotiated allocations of salmon.

Reaction by the commercial industry[9]

When the *Sparrow* case slowly progressed through the lower courts, no one paid any attention to it. It was simply another in a long line of court challenges and did not even merit any attention by the commercial industry. All that changed with the BCCA decision and the later

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[9] In order to understand how the commercial industry operates, it is important that the key players are identified at the outset. Michael Hunter is the president of the Fisheries Council of B.C. which represents the major fish-processing companies. Among its members are the companies generally referred to as the "Big Four" - B.C. Packers, J. S. McMillan, Ocean Fisheries, and the Canadian Fishing Company. Another key player is Weston Foods, a multi-national food conglomerate, a parent company of B.C. Packers and a food distributor.

Phil Eidvisk is the director of the B. C. Fisheries Survival Coalition, an industry funded and fishermen supported lobby group.

affirmation of the substance of the decision by the SCC. Since then the commercial industry has mounted an all out war against aboriginal fishery.

Shortly after the SCC decision, Michael Hunter, president of the Fisheries Council of B.C., wrote to the then minister of Fisheries, Bernard Valcourt, and urged that no action be taken. The letter is indicative of the fear felt by the commercial industry. Mr. Hunter wrote (emphasis added):

> *". . . although the Sparrow case is a landmark case . . . it should have little effect on your management policy or process and, consequently, upon the rights and interests of commercial users.* ***Nor does it mean that your enforcement efforts aimed at curbing illegal sales of food fish should in any way be diminished."***

Hunter's letter is incorrect and misleading on at least two accounts. He writes of the rights of the commercial users when there is no such thing. The only ones with any legal right to fish are the aboriginal peoples, a right which the commercial industry conveniently continues to overlook and challenge when confronted. The letter also makes clear a perception shared by many in the commercial sector that the aboriginal fisher is to be blamed for poaching activities. The B.C. Fisheries Survival Coalition argues that over 90% of fish caught under the provisions of "food fish" policy is sold on the blackmarket by the aboriginal fishers. The Coalition presents no evidence, stating instead that the matter is "common knowledge" (Survival Coalition, 1994: 12).

According to Chief Joe Becker things did not change much after the *Sparrow* decision.

The ball was in the DFO's court and the government took its time to respond. In 1992 when the DFO finally formulated a response by introducing the AFS, it incurred the wrath of the commercial industry and brought to the forefront racist sentiments which had been simmering for decades. The Fisheries Council of B.C. was outraged. The president of the Council, Michael Hunter declared, *"Everywhere we turn, control is being given to the Indians"* (in Glavin, 1993:8). In that year 1.2 million sockeye salmon went "missing" and the blame was laid squarely on the aboriginal fishers.

Not to be outdone in being affronted was the B.C. Fisheries Survival Coalition, an industry and union supported lobby group formed for the sole purpose of protesting and challenging aboriginal fishing rights. In submissions to a parliamentary committee, the Coalition, in typically hyperbolic and blatantly inaccurate fashion, argued (1994: 9):

> *"It is not possible to assess the impact of the Sparrow decision without being made aware of the aboriginal influence in the academia, government, and the media . . . (the) deliberate misinterpretation (of the decision) resulted in Sparrow having a wide-ranging impact far beyond the legitimate scope of the decision."*

The Coalition placed advertisements in newspapers and told anyone who would listen that the fishing industry was now racially segregated and that the natives had all the rights - and many in the fishing and non-fishing communities listened and gathered in well-orchestrated protests. Typical of the hysteria was an editorial in the Vancouver Province (in Glavin, 1993: 11):

> *"Since the native fisheries was expanded following court decisions enforced by Ottawa, the salmon available to commercial fishermen have dwindled alarmingly."*

Never mind that nothing of the sort happened - the aboriginal fishery was not expanded but that did not stop the media from perpetuating untruths. The theme was picked up by small community newspapers and the spectre of aboriginal fishing rights spread. The non-fishing community of Summerland protested against the AFS on the premise that if they did not do so the aboriginal peoples would use *Sparrow* to demand access to timber for a ceremonial right to totem poles. Another newspaper headlined that "Native Fishing causing Health concern" - the fine print accused the aboriginal fishermen of fouling the city because some were seen urinating in the streets (in Glavin, 1993: 11).

Michael Hunter continues to maintain that if the court hearing the *Sparrow* case had access to all the facts, mainly the commercial industry's view, the case would never have been decided in favour of the Musqueam. He may be right, judging by recent appellate court decisions (to be discussed later). So stunned was the industry by the *Sparrow* decision that they have sworn never again will they be caught off-guard. The various lobby groups, representing commercial interests, have retained lawyers whose sole function is to track court cases involving aboriginal rights, and to intervene in every such case.

It is now 1995, and the fourth year of the AFS, and nothing has changed. The commercial industry continues to be outraged and the natives are still being blamed for almost all the ills in the fishing industry. The commercial users have always maintained that *Sparrow* was misinterpreted by the government; the view held by them is that *Sparrow* dealt with the specific issue of Musqueam fishing rights and any official redress should therefore be restricted

to the grievances of the Musqueam and not applied to the general aboriginal population. Michael Hunter appeared before a parliamentary committee and declared that the AFS was a cover to launder the illegal sale of fish (in Hogben, 1994, Nov 30: A2). *"We're sick and tired of this racially segregated commercial fishery,"* declared Phil Eidsvik. *"It is wrong to give priority to the aboriginal commercial fishery,"* adds the Pacific Gillnetters Association (in Crawley, 1995 Aug 16: A1). In 1990 lawyer Chris Harvey, representing the Pacific Fishermen's Alliance, an organization condemned as racist, warned white fishermen that a *"back to the jungle, free for all"* would occur if aboriginal peoples gained control of the fisheries (in Glavin, 1993: 8). And again in 1995 Mr. Harvey was back, this time representing a group of independent fishermen in a class-action lawsuit against the DFO, accusing them of encouraging illegal fishing and illegal sales (by aboriginal communities). The lawsuit also alleged that the DFO took fish from the legitimate commercial fishery and allocated it to the (presumably illegal) aboriginal fishery; Mr. Harvey also accused the DFO of expanding the priority rights of aboriginal fishers (Vancouver Sun, 1995, June 07:3).

Once again nothing of the sort has happened - there is no evidence to support Harvey's allegations but they do make great headlines. In fact the very opposite happened, yet the advantage, as always, has gone to the commercial industry.

The Mike Hunters, Phil Eidsviks, and Chris Harveys aside, no one appears more affronted than Mel Smith. Mr. Smith, a lawyer and consultant to the Reform Party, unleashes his wrath on all things aboriginal in a provocatively titled bestseller *Our Home or Native Land.* Smith

ignores the facts and goes for the emotional jugular. He accuses the government of acquiesence to native demands and the DFO of giving away the fish to aboriginal fishers. Not true - but Smith does not let the truth get in the way of his vitriolic attack on the AFS and the DFO. Smith argues that the commercial industry was healthy until the introduction of the AFS in 1992. Smith adds that there is no evidence that aboriginal fishers were ever marginalized out of the industry; he concludes that there is no constitutional validity to the aboriginal commercial fishery (Smith, 1995; 199-225). Mr. Smith is wrong on all counts but he continues to go unchallenged in his diatribe. It is remarkable that a lawyer, and a consultant to a major political party, should be so uninformed about constitutional issues but since when does a commercial activity require constitutional validity or approval - there is no such requirement. However that does not stop Smith from expecting such a requirement of aboriginal fisheries. In fact such is the extent of inaccuracies, that Mr. Smith arguably could be charged with the criminal offence of spreading hate propaganda.

Why is it that the AFS has excited so much passion and elicited such vehement attack from the commercial industry? The AFS was never intended to benefit the aboriginal fishers even though it had been promoted as such. The real objective of the AFS was to protect the commercial fishery. The AFS has not accorded any special benefit or advantage to aboriginal fishers even though it has been so interpreted by the commercial sector. For this the DFO, and the multinational corporations, are to be blamed.

Even though the AFS was heavily promoted as the government's response to *Sparrow,*

one of its main objectives was to ensure that the commercial industry would continue earning profits. The DFO, which has long enjoyed a rather cosy relationship with the multinational fishing companies, designed the AFS so that it would cause as little disruption as possible to non-aboriginal fisheries. However the promotional material led many in the industry (i.e., fishers and union leaders) to believe that the fish was being given away. Meanwhile it is business as usual for the multinationals for whom the AFS has served as a boon. The AFS has firmly united the industry and entrenched them in opposition to aboriginal fishers, and diverted attention away from the Fisheries Council companies management practices. It is a unity that has been otherwise rare in a fragmented industry. It is even more remarkable in an industry not known for labour peace (see Millerd and Nicol, 1994: 5). According to Eidvisk, opposition to aboriginal fishery, and the AFS in particular, has united an industry normally at odds and in competition with each other. Such is the strength of the unity in opposition that Eidvisk marvels at what the issue of aboriginal fishery has engendered; Eidsvik states he is able to organize protests with *"just a few phone calls"* (interview notes, 1995).

For this the major processing companies are no doubt thankful. The fishing industry is dominated and controlled by the fish processors who had cornered the market long ago and were instrumental in initially marginalizing the aboriginal fisher. The market is dominated by the "Big Four" and the capital intensive nature of the industry keeps competition to a minimum although there are several other smaller processors (Pinkerton, 1987). The AFS has helped divert attention away from the oligopolistic nature of the fish processing market, and the firm control that the processors exert upon the industry. The Fisheries Council of B.C., which represents the major

processors, has worked hard to keep competition amongst its members to a minimum and to control the price that the processors pay to the fishers who supply them with the raw resources (Pinkerton, 1987: 72-3). According to Ellis (1996) most of the individual commercial fishers (trollers and gillnetters) are not particularly fond of the multinationals because most are financially or otherwise obligated to sell the fish they catch to them. The fishers who have a vested interest in the continued viability and survival of the industry, have been led to believe that the aboriginal fisheries, at an insignificant 3% of the total allocation, will lead to a destruction of a viable industry and create massive unemployment amongst the ranks of the white fishers.

The companies have not only exploited the fishers but have also manipulated them in subtle and not-so-subtle ways. For example, some of the processors pay the skippers of fishing boats bonuses to buy their loyalty (i.e. so that the skippers will only sell their fish to the company paying the bonus); the bonus is not paid to, or shared with, the crew and is not part of the union's collective agreement with the processors; furthermore, the bonus undermines union solidarity and creates a perception for the skipper that s/he is part of the management when in reality the role is essentially a line function (Pinkerton, 1987: 76). The processors also assist in financing of vessels; they provide accounting and banking services to the fishers (Koss, 1991:2).

The multinational corporations, primarily the "Big Four" - Canadian Fishing Company, B.C. Packers, J. S. McMillan, and Ocean Fisheries - had cornered the fishing market long ago.

These companies, and another major parent company, Weston Foods[10], control almost the entire production and distribution of B.C. salmon products (Pinkerton, 1987: 66-89; Glavin, 1993: 8). Furthermore, Simon Reisman, a prominent negotiator in the Canada - U.S. free trade talks, sits on the board of directors of one of the companies controlled by Weston Foods, which operates processing plants on both sides of the border (Glavin, 1993). These companies have guaranteed themselves the giant share of the salmon catch in several ways: (1) both Canadian and American fishers supply their processing plants on both sides of the border; (2) these companies or commercial fisheries are allocated 94% of the salmon stock by the DFO; (3) because these companies control or own the processing plants, most of the independent commercial fishers have little choice in deciding to whom to sell their catch; (4) the major companies also hold a giant share of the commercial fishing licenses; and (5) they own or control the seine fleets which catch the most salmon (Pinkerton, 1987; Muszynski, 1987; Glavin, 1993).

The outrage exhibited by the multinationals is difficult to fathom in view of the fact that their control over fish is not seriously threatened by anyone notwithstanding *Sparrow* and other court challenges. The corporate controlled seine boats comprise 12% of the total fishing fleet consisting of seiners, trollers, and gillnetters, yet they catch over 50% of the (sockeye) salmon. Of all the B.C. Fisheries Council companies, two corporations, B.C. Packers and the Canadian Fishing Company, own 35% of the seine boats (47 and 93 respectively), and control most of the fish-processing plants in B.C. In 1993, for example, the total sockeye salmon catch by both B.C. Packers and the Canadian Fishing Company was greater than the combined allocation of salmon

[10] parent company of B.C. Packers

to all the aboriginal communities in B.C. According to the trollers and gillnetters, there is also a constant struggle to hold on to their share of the commercial quota, and to keep all the fish from being caught by the corporate seine boats. Even then it is a losing battle. Most of the individual fishers have very limited options when it comes to selling their catch - the only buyers are the B.C. Fisheries Council companies which often purchase the fish at artificially low prices. David Ellis has characterized the relationship between the individual commercial fisher and the corporate sector as "feudal." It is these fishers that the companies have baited and used in their battle against aboriginal fishing (Howard, 1996 July 20: D3; Glavin, 1996 June 13: 15; Alden, 1996 July 26: A19; Ellis, 1996 personal communication).

The exploitation of labour and the constant search for cheaper labour is consistent with the history of fish processing in B.C. - this, of course, runs counter to the objectives of the labour unions (Muszynski, 1987: 270-90). Largely built by cheap labour, be it aboriginal, Chinese, or Japanese (before World War II), the industry has always sought cheap and available labour in the never ending pursuit of even greater profits for owners and shareholders, the majority of whom have never set foot on a fishing boat. The processors had long ago started shutting plants and eliminating jobs in B.C. In the late 1980s, they moved with the tide of the *Free Trade Agreement* ("FTA") and opened processing plants in Washington and Alaska and staffed them with lower paying, non-union labour; they also started shipping B.C. fish to the U.S. for processing - Washington state, for example, is completely dependent upon the export of unprocessed fish from B.C. All this inspite of provincial legislation which restricts export of

unprocessed fish, and other natural resources. Inexplicably the FTA allows this[11] - however the apparent exemption applies only to unprocessed fish and not to any other natural resources (Millerd and Nicol, 1994: 3).[12] Perhaps there is a connection given that the chief Canadian negotiator, in the free trade talks, has some financial interest in the well-being of Weston Foods. B.C. Packers, a subsidiary of Weston, was amongst the first to open a plant in Washington (Glavin, 1993: 11).

Herein lies the greatest threat to unionized and non-unionized labour in the B.C. commercial fishing industry. Instead of uniting to battle against the multinationals, the ordinary fishers are so consumed with opposition to the aboriginal fisheries, with a fervour never before seen, that they have missed entirely the real threat to their livelihood. The export of unprocessed fish has profound implications for workers in the industry since there has been a steady decline in the number of jobs in the processing operations. From 1974 to 1994, the number of large fish processing plants in B.C. declined by more than 50% inspite of the fact that canned salmon production increased over the same period. Meanwhile the amount of salmon processed in unionized plants in B.C. continues to fall. Interestingly enough the Canadian processors on this side of the border are in direct competition with Canadian processors based in the U.S.; the plants are being supplied by both American and Canadian fishers (Millerd and Nicol, 1994: 5). It is noteworthy that B.C. Packers in B.C. competes with B.C. Packers in the U.S. and it is not difficult to conclude who ultimately profits. It is not the ordinary commercial fisher or plant

[11] This was the case under the GATT (General Agreement on Tariffs and Trade) agreement; it was also ratified in the Free Trade Agreement.

[12] Chair, Fish Processing Strategic Task Force

worker.

When asked to comment, Eidsvik, arguably the loudest opponent, dismisses the suggestion as "conspiracy hogwash" and falls back on his tested rhetoric of "racial segregation" and "everyone should be equal in law." According to the Survival Coalition the processors are investing outside the country because of the AFS; furthermore the AFS has been labelled as the biggest single destabilizing factor in the industry (Survival Coalition, 1994: 16). The Survival Coalition, the unions, and the white fishers have not yet realized that the greatest threat to their livelihood are the multinationals, not aboriginal fishers. However, they are too busy fighting aboriginal fisheries to appreciate their own rather tenuous situation.

The big winners in the war against the AFS and aboriginal fisheries are the Fisheries Council companies who, having worked hard at limiting competition and ensuring themselves of a dependable supply, are not about to let any aboriginal fisher disrupt that. The spectre of aboriginal fishing is something the industry is clearly threatened by. But the industry has managed to turn the tables and has used the issue of aboriginal fisheries to protect themselves by portraying themselves as both victims and as the protector of the fish. The supply of fish is limited and rapidly dwindling and the last thing the companies need is more competition, and that is why they have mounted such a vehement assault on aboriginal fishing. So effective has been the campaign that any talk of aboriginal fisheries in non-aboriginal communities elicits fears of ecological and environmental diaster, of overfishing and poaching by aboriginal fishers, and of the white fishers being driven to the brink of unemployment.

There is no question that the attack is fuelled by misinformation, inaccurate information, fear-mongering, and blatant lies - the rhetoric of the attack on aboriginal fishery has far outstripped the facts. For example, Hunter was queried on why it makes any difference to the Council from whom they buy their fish. According to Hunter, fish caught in the river system is of a lesser quality then fish caught in the ocean (interview notes, 1995). While the processors may prefer ocean caught fish for its quality, the reality is that it provides an excuse not to purchase fish from aboriginal fishers.[13] The processors can most of the fish and the quality of fish is not of primary concern - quantity is (Pinkerton, 1987: 73).

The greatest fear of the multinationals can be found in the hopes, dreams, and aspirations of impoverished aboriginal communities. The communities hope to create sustainable economic activity to create badly needed jobs where unemployment often reaches 90%; in hinterland economies and urban reservations, fish is the one great hope because currently there is nothing else that the aboriginal communities can build on to battle the chronic social ills that pervade aboriginal communities all across Canada.

However these hopes also represent an intolerable competition to the multinationals. Having worked at capturing the aboriginal labour in the 1800s, to creating a relationship of subordination and dependence, to eventually marginalizing the aboriginal fisher, the commercial processors fear that aboriginal communities will start cottage industries to process their own fish, in direct competition to them. A hint of what is to come is found in the recent negotiations with

[13] The multinational corporations are also constrained by complex labour agreements which stipulate from whom the fish is to be purchased.

the Nisga'a in B.C. which has set in motion the public relations machinery of the commercial industry. Once again the Survival Coalition, the unions, and the Fisheries Council are all outraged and are threatening to sue; they have threatened to hound the politicians and have promised to work at defeating any elected politician opposed to their views. Why? After over twenty years of negotiations the Nisga'a and the federal and provincial governments are close to an agreement which includes a provision for a Nisga'a managed fishery on their lands. Under pressure from the commercial lobby, the B.C. government, facing an election, has backed away from the agreement - the settlement arrived at after over 20 years of negotiations has the support of the Nisga'a, the federal government, and even a sports fishery organization. It also has the support of several experts in the field including Peter Pearse and Peter Larkin and the David Suzuki Foundation described the agreement as *"fair, just and reasonable"*. However it is the avowed intent of the Coalition and the Council to scuttle the deal. Hunter, speaking for the Council, but speaking as though his position reflects the mood of the general populace, states: *"I don't think the public will buy that"* (in Vancouver Sun, 1996 Feb 02: B2). Hunter further declared that the agreement will "*. . . destroy the fish, the industry . . .*" (in Vancouver Province, 1996, Feb 18: A30). It is interesting to note the Council's habit of reframing issues of direct interest to them into public issues. However altruism is the last thing the commercial industry could be credited with. Their only motive is profit - according to a spokesperson for the David Suzuki Foundation one of the reasons the commercial industry is opposed to the deal is greed; the industry hopes to realize the profits from the predicted large salmon runs in the 1997, 1998, and 1999 season, and they have no intention of sharing the resource (Hume, 1996, Feb 06: B1).

There is no direct evidence that the DFO and the multinationals operate as anything but independent entities - but consider the following points: The DFO has, in the past, participated in executive exchange programs with the major fishing corporations (Ellis, 1996, interview notes); according to an anonymous source in the DFO, senior DFO officials have gone on all-expenses paid fishing expeditions with the head of the Sport Fishing Association; the DFO consults with advisory committees which are essentially an "old boy's network;" the make-up of these advisory committees, some of which are partially funded by the DFO in the form of grants, consists of prominent people in the industry, including Michael Hunter and others from the commercial industry. Of course, there is also a "token" aboriginal person. From this it is difficult not to infer that policy-making at the DFO is not entirely free from bias or that it does not favour the companies. However the DFO is not entirely to blame. The multinationals are powerful entities which employ thousands of workers; whatever action they take often has profound social and economic implications. According to Marchak (1987: 12) *"The power of large corporations necessarily affects and structurally constrains the choices government makes."*

The example of 1992 and the case of the "missing" fish illustrates this well. In an award-winning article, Terry Glavin explains what really happened in 1992. In the weeks preceding the 1992 season opening for salmon, the gillnetters and trollers and other small independent fishers sat idly by as they awaited the arrival of the migrating salmon. However they, and the aboriginal fishers, were told not to go fishing because 1.2 million salmon had somehow gone missing. The B.C. Fisheries Council announced that the aboriginal poachers had caught them all. This was blatantly false because the fish had been caught out in the ocean by

the Fisheries Council companies. The fish that the aboriginal fishers were accused of poaching had been caught by the seine fleets but that did not stop the Council from launching a vehement attack on aboriginal fisheries. Mel Smith wrote a chapter on the matter and accused the aboriginal fishers of stealing the fish. The Council went to the Supreme Court of B.C. seeking an order to stop the just signed AFS agreements between the DFO and the Lower Fraser Bands; in signed affidavits and evidence gathered by the Council's private investigators, the Court was told that the fishing industry was facing an ecological disaster and that 1.2 million salmon had been poached by aboriginal fishers. The judge hearing the case dismissed it; Dr. Pearse was hired by the DFO to investigate but found no evidence that wide scale poaching by aboriginal fishers has caused the "disappearance" of the salmon. But the allegations made the headlines and created an uproar (in Glavin, 1993: 9; Smith, 1995).

The commercial industry, particularly the B.C. Survival Coalition and the Fisheries Council, have done a masterful public relations job. The commercial users have effectively portrayed themselves as victims and explode into outrage at the slightest pretext. There is a great deal of irony in the rallying cry of the white fishers - they cry racism and inequality, while remaining blissfully ignorant at the plight of the aboriginal fishers who have rarely been treated as equal in Canadian society. Why, they ask, are Indians being given special treatment?

All this while the major fishing corporations continue to make millions of dollars while plundering the resources in pursuit of even greater wealth for their shareholders. While such an objective is inherent in a free-market capitalist system, no one takes responsibility for the

dwindling stocks. And blaming the aboriginal fisher for the ills in the industry diverts attention from the fundamental problem of overfishing and greed on part of the commercial sector. It is also racism, pure and simple.

There is no mistaking the racist overtones in the hysteria that pervades the fishing industry. It is hysteria that has been created and perpetuated by the Fisheries Council companies, the DFO, politicians, and white fishers. The public is led to believe that salmon stocks are being plundered by aboriginal fisheries; that they have their own protected commercial industry, and that they have all the advantages because of their race. The reality is often ignored - aboriginal fishers are generally an impoverished lot. There are a few who have been remarkably successful but not because of any special treatment or rights; these are the aboriginal fishers who hold licenses and operate as commercial fishers on an equal footing with white fishers. However this remains the exception rather than the rule. Aboriginal fishers are still confined to the margins of the industry and, inspite of recent court decisions, including *Sparrow,* remain subject to arbitrary control by the DFO.

A cynic may observe that such hysteria, animosity, anger, misinformation, lies, and vehemence is perhaps exactly what the B.C. Fisheries Council and the DFO want. The issue has become so convoluted and conflated that it makes it politically palatable *not* to negotiate fisheries with the bands; it makes it politically palatable *not* to uphold the SCC decision in *Sparrow.*

Future (and continuing) Court Challenges

The most crucial issue for all the players in the fishing industry boils down to one question. Does aboriginal fishing rights include the right to sell the fish for economic or livelihood purposes? The ultimate prize, that of a right to sell their fish, still eludes the aboriginal fisher. Even though the "victory" in *Sparrow* has been rendered almost negligible by the DFO and the commercial industry, the hopes that the victory engendered led to several court challenges which attempted to expand upon the rights enunciated in *Sparrow.* The focus in this section will be on cases dealing with the commercialization of rights fishery. Rights fishery pertains to fish caught as a matter of constitutional rights and is limited to "food fish" and does not include fish caught by aboriginal fishers holding commercial licenses.

The aboriginal communities have always maintained that they should be permitted to do with the fish whatever best suits their needs, including selling. The commercial industry vehemently disagrees with this position and it was their turn to celebrate when the British Columbia Court of Appeal dealt with the issue of sale. Court challenges initiated by aboriginal communities which argued for a right to sell their fish have, to date, not succeeded. In three major court decisions, the BCCA ruled against the aboriginal right to sell fish. *R. v. NTC Smokehouse, R. v. Gladstone,* and *R. v. Vanderpeet* consists of similar fact situations - in each case, an aboriginal person was charged with the offence of selling fish and in each case the defence asserted that the sale occurred under an aboriginal right. And in each case the courts rejected that argument.

Of the three fishing cases, the most important one is the *Vanderpeet* decision. While an analysis of the decision is beyond the scope of this thesis, it does merit some consideration in this context. Buoyed by the unexpected success of *Sparrow,* the Sto:lo Nation, which had not initially supported the Musqueam's court challenge, decided to test the mettle of what appeared at first glance to be very positive language from the BCCA. The Sto:lo decided to push for an aboriginal right to sell their fish. Inspite of anthropological evidence that the Sto:lo had engaged in barter and trade, the BCCA concluded that the Sto:lo had no such right. The Court's reasoning resonates with Eurocentric biases. The majority of the Court concluded that the Sto:lo had engaged in barter and trade of fish but characterized the activity as incidental and informal. The Court maintained that the commercial activity was created by the arrival of the Hudson's Bay Company's trading posts, precluding the possibility that the Sto:lo possessed the business acumen to exploit or develop new markets for their fish. Don Ryan, a spokesperson for the Gitskan Wet'suet'en remarked, *"We got hammered. This has pushed us back to the high water mark"* (in Smith, 1995: 220).

However the battle continues, all three cases are now before the Supreme Court of Canada and decisions are expected sometime in the fall of 1996.

Conclusion

In answering the questions posed at the beginning of this chapter, it is difficult not to conclude that the DFO, and the government, has violated the spirit and intent of the SCC

decision in *Sparrow*. The hope that arose out of *Sparrow* led many to speculate that it would mean aboriginal access to a valuable resource - this has not happened; there was hope that aboriginal fishers would be able to exercise their guaranteed constitutional rights without hindrance and/or interference - this has not happened. While some First Nations have benefited, most have not.

The outcomes in the wake of *Sparrow* raise doubts about whether rights litigation is an effective strategy for the disadvantaged to achieve social transformation. Scepticism reinforced by the official and public reactions to *Sparrow* is the subject of the concluding chapter.

Chapter Five

Sparrow, the Law and Social Transformation

Introduction

The 1995 fishing season was not a good season for the aboriginal fisher (see table [i] and [ii] in chapter four), nor was it a particularly productive year for the commercial fishers (Smith, 1995, Aug 17: A1; Cernetig, 1995, Aug 17: A4; Crawley, 1995, Aug 10: A1). Just before the August 1995 opening date for aboriginal-only fishing at the mouth of the Fraser river, Ernie Crey, executive director of the Sto:lo Nation Fisheries Authority, was interviewed on a local newscast and asked to comment on the threats by the B.C. Fisheries Survival Coalition to disrupt the opening (see Vancouver Sun, 1996, Aug 08: A1). Mr. Crey replied that it would be best for the Survival Coalition to reacquaint themselves with the law because the aboriginal fishers would be exercising their constitutional rights to fish (in accordance with the SCC decision in *Sparrow* and section 35(1) of the *Constitution Act).* To a query regarding appropriate government response if the Survival Coalition made good on their threats, Mr. Crey replied *"presumably they will be arrested" (CBC Regional Newscast, 1995, Aug 16; see also Crawley, 1995, Aug 09: B2).*

Opening day came and the Coalition, as they had threatened, disrupted the fishing. The televised scenes of mayhem in the waters of the Fraser River resounded with celebratory yells by the white fishers as their boats churned up the waves around the aboriginal fishing boats. The police and DFO officials stood by and no one was arrested or charged[1] with disrupting the

[1] With the exception of John Cummins, MP, Reform Party, who insisted upon being arrested and charged in order to publicly demonstrate his objection to the aboriginal-only fishing. Mr. Cummins, a former fisher, has continually spearheaded protests and publicity campaigns against aboriginal fishing rights; his tactics receive considerable media coverage. Mr. Cummis continues to maintain that aboriginal fishers are being "greedy" in their demands for fish.

aboriginal fishers attempting to exercise their constitutional rights - rights which the Supreme Court ruled were to be accorded first priority over any other user. As one Coalition member put it (in Smith, J., 1995, Aug 17: A5), *"Why should they get to fish first . . . it's not fair."* In their zealous attempts to thwart aboriginal fishing, and to gain publicity, the Coalition deliberately overlooked some obvious facts - aboriginal food fishing is constitutionally guaranteed, and the aboriginal opening was only for 12 hours on a day when the tides were running out (fish do not swim to spawning grounds when the tides are out), while the commercial fleet was scheduled for a 24 hour opening the next day (see Mearns, 1995 Aug 17). And even in that 12 hour opening, there was no way that the aboriginal fishers would be able to catch their allocation. The Sto:lo Nation threatened to sue the DFO and demanded that they be allowed to fish for a longer period, but to no avail (in Smith, J., 1995, Aug 17: A5).

In addition to legitimate democratic protests, the Coalition has also engaged in publicity stunts (i.e. wrapping the Pacific Region DFO office in Vancouver with fishing nets) and in the harassment of aboriginal fishers and the destruction of their property. For the Coalition, the battle is personal and motivated by malice and a genuine, if misguided, concern about the state of the industry. During the course of an interview, Phil Eidvisk, spokesperson for the Coalition, handed me a photograph of Ron Sparrow's residence and rhetorically asked, *"does he look like he needs more fish*[2]*."* Terry Glavin reports that harassment of aboriginal fishers by Coalition members occurs frequently - i.e. in one incident a member of the Tsawassen band, returning from fishing, was prevented from docking for almost 2 hours; when he finally was allowed to

[2] The 8" x 11" photograph depicted a large sprawling estate/luxury residence.

dock, he found that all four tires in his vehicle had been slashed (personal communication, 1996, April 29). During the August 1995 protests, Musqueam fishers lost some of their nets and came close to having their boats "swamped" as Coalition boats circled the smaller aboriginal boats (Becker, personal communication, 1996 May 02).

In his 1996 Annual Report, Max Yalden, head of the Human Rights Commission of Canada declared, once again, as he has for the past nine years, that the most pressing human rights problem facing Canada is the plight of its first peoples. The successes associated with the mainstream of Canadian society continues to elude the aboriginal peoples dispersed across Canada; an overwhelming number of aboriginal peoples live in third world conditions in one of the most affluent nations in the world.

During the nine years in question, indeed since the dawn of white settlement in Canada, the aboriginal peoples have not been passive recipients of all that successive governments have meted out. Aboriginal peoples have fought, and continue to fight for a foothold in Canadian society; for political, social, legal, and economic equality; to be heard; to be recognized; to be treated as equals in a society which has, by both subtle and blatant means, relegated them to the margins. In spite of all that has occurred, aboriginal peoples continue to survive in Canada. And that achievement in and of itself is quite remarkable in face of the many attempts to subdue, control, and subjugate them. Furthermore the natural resources of which the aboriginal peoples were once the only users and guardians continue to be expropriated and exploited without compensation. When the resources being expropriated are on lands under treaty negotiations, the

expropriation has been accelerated by companies eager to get as much wealth from the resources as possible before the lands are "won" under land claims agreements by aboriginal groups - the problem has become so severe that the B.C. Treaty Commission has filed a complaint with the provincial government (O'Neill, 1996 July 11: A1).

In attempts to protect their rights, aboriginal peoples have engaged in a variety of actions ranging from the peaceful to the violent. Aboriginal peoples have conducted blockades of roadways and railways, sit-ins at DFO offices, deliberately defied DFO orders, ignored DFO directives to obtain fishing licenses, filed lawsuits and have sought court injunctions against both government and private interests which infringe upon their rights, and have engaged in violent and armed confrontation with the state. As documented by Newell (1993), the aboriginal peoples of Canada have never given up what they view as their inherent right to fish or hunt; they have continually fought for a legal recognition of a right to do with the fish what their ancestors, from time immemorial have done, without requiring the permission of the state. In recent years an increasing number of aboriginal tribes and bands have been turning to the law to advance their causes and to protect their rights. It is these attempts which provide insight and example regarding the efficacy of the oft-claimed transformative capacity of law. However as evidenced by the preceding case study of a "landmark" Supreme Court of Canada decision dealing with aboriginal rights, it is a strategy fraught with pitfalls.

Law and Social Transformation

For the disadvantaged in liberal-democratic societies, a hypothesis, largely untested, has been that the law can be used as means of social transformation. The theoretical suppositions which have given rise to the whole debate about the efficacy of law as a tool for social transformation are remarkably lacking in substantive evidence, and are based on the premise that winning legal battles results in social progress. Many proponents cite the example and supposed successes of the women's movement and the American civil rights movement in support of arguments in favour of attempts by subordinate classes seeking to further their objectives of social, economic, and/or political equality (see Brickey and Comack, 1989; and also Fudge, 1990). However a closer and critical examination of the gains made by the preceding movements indicates a complex variety of factors at play which can hardly be reduced, or ascribed, to the law as being the causal factor; for example, the issue of abortion and the ongoing battle between the two polarized groups, pro-life and pro-choice.

The pro-choice movement has fought a long and still continuing battle for freedom of choice, arguing that the matter of abortion is solely for the person seeking it. The pro-life movement, a bastion of conservative and religious values, have argued otherwise and, until recently prevailed in law (insofar as abortions had to be approved by a hospital committee). When the SCC decided the *Morgentaler* case, there was a collective cry of victory by various women's rights organizations - a response similar to that elicited by the *Sparrow* decision. And like the *Sparrow* decision there was much debate and learned commentary regarding *Morgentaler,*

and just like *Sparrow,* the *Morgentaler* decision resonated with high sounding moralistic rhetoric (see for example the reasons stated by Justice Bertha Wilson). However, what the celebrants and many learned commentators overlooked was the fact that the SCC did not legalize abortion or accord women an unrestricted right, or any right, to abortion. The Court simply ruled that the procedure in place, requiring the approval of a hospital committee, was too onerous and therefore a violation of constitutional rights. The SCC clearly left the door open for future legislative action aimed at controlling or criminalizing abortion. There are no guarantees, and more importantly there is no protection, against future legislative action.

The same holds true for aboriginal rights. The SCC, in *Sparrow,* imported into its analysis, of section 35(1), an interpretative procedure that has had the effect of actually limiting the scope of rights originally envisioned by aboriginal organizations. The decision paves the way for future courts to limit and control aboriginal rights. More importantly, the decision also provides the state with the legal justification to control aboriginal rights - rather than appear heavy-handed, the state has the means of legitimizing regulatory control contrary to what section 35(1) guarantees.

With nothing but theoretical suppositions to support it, the *Morgentaler* case has often been held up as an example in support of the transformative capacity of law (see analysis by Fudge, 1990). What such arguments clearly overlook are the decades of political lobbying and other factors, (i.e. protesting, shift in paradigm, change or advancement in economic status, empowerment, etc.), that have contributed to social progress. It is problematic indeed to ascribe

to the law successes in an arena where it is distinguished by a conspicuous lack of success. On this point, Justice Gerard LaForest is succinct (in *R. v. Andrews, 1989: 38):*

> *". . . much economic and social policy making is simply beyond the institutional competence of the courts. Their role is to protect against incursions on fundamental values, not to second guess policy decisions . . ."*

While that may be true of the role of the courts, the law encompasses a broader field. However it is left up to the courts to interpret legislation, and even when such legislation has had the announced intention of ameliorating social ills, the courts have fallen short as evidenced by, for example, the Supreme Court's interpretation of section 35(1). Therein lies perhaps the most fundamental of problems - that of burdening an institution of redress with issues of immense social implications which it is not suited to consider. When viewed from this perspective it is important to recognize the shortcomings of this strategy notwithstanding its conceivable promises. Indeed, there is considerable evidence that law, as a tool for social transformation, lacks efficacy (see for example litigation under the *Canadian Charter of Rights and Freedoms* in Mandel, 1989; 1996; see also Fine, 1995; McCormick, 1993). The question then is why is there so much faith in law. The concept of ideology offers an explanation and one need look no further than the ultimate ideological weapon, the *Charter,* which declares:

> *Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.*

In his unrelenting and scathing criticism of the *Charter*, law professor Mandel (1989: 240), makes the following observation:

> *"It is no accident that the Charter list of items according to which we must be equal in law are the very things according to which we are unequal in life. . ."*

Mandels' point is well taken - legal rights do not recognize the realities of economic, political, and social relations of domination and subordination.

When it comes to issues of formal equality, the courts have not hesitated. However equality is a political term and construction and, as always, a rather slippery and relative concept. It is worth noting that everyone, including aboriginal peoples, is formally equal before and under the law because conferring of formal equality does not entail considerable expense to the state, and it does have a lofty moralistic and rhetorical ring to it. Indeed wealthy corporations have portrayed themselves as individuals and have won rights which constitutionally were never intended to serve the interests of non-person entities (see, for example, the legal victory by tobacco companies upholding their right to free speech to advertise cancer-causing products, contrary to the now unconstitutional legislation banning such activities). Issues of profound economic disparity, unemployment, poverty, and other social ills are not redressed by the granting of formal equality, and it is precisely these factors which are arguably the greatest threat to social justice and equality (Mandel, 1989).

The reasons that *Sparrow* has failed the aboriginal peoples are complex and perhaps one

should first consider the theoretical supposition itself. Curiously, the hypothesis that winning legal battles translates into social transformation has found acceptance in academic circles without a detailed examination of the evidence. There is a remarkable lack of evidence in support of this hypothesis and considerable evidence to the contrary. The debate concerning law and social transformation may make for stimulating intellectual discourse but it does nothing for those on the receiving end - the subordinate groups still struggling for a foothold in mainstream society. Indeed a recent survey concluded that trust in the legal system increases correspondingly with the level of income. For example, 46% of persons earning under $30,000 (per annum) said that they did not trust the courts; however 75% of those earning over $60,000 trusted the courts. In other words, the higher the income, the higher the trust in the court system (Bindman, 1996, July: A1). While the dominant groups have devised sophisticated means of keeping others out, it seems contradictory that these groups would then allow access to those being kept out. Furthermore this tool that dominant groups have so successfully manipulated, the law, is also a tool by which the status quo is maintained and perpetuated. An examination of fishing rights and the aboriginal peoples fight for those rights reveals the apparent folly of litigating to advance social causes; as outlined in preceding chapters, it was the government and private companies which drafted laws to take those rights away in the first place.

However the ideological hegemony of law disguises reality and leads us to believe that the law is a guarantor of justice and equality. But such beliefs overlook a crucial problem and a glaring contradiction, because the law often does not act in an even-handed fashion. How can one be equal in law while being unequal in every other material measurement; and if one is an

aboriginal person, then one is especially not equal before the law. The blindfolded symbol of Justice, having peaked out from under her blindfold, acts to further perpetuate and legitimate inequality when the person standing before her is an aboriginal person (see the Nova Scotia Justice Inquiry into the wrongful conviction of Donald Marshall, Jr., 1989; The Manitoba Justice Inquiry, 1991).

Yet the faith in law as being capable of redressing gross inequities, or of evening the odds between the subordinate and dominant classes, persists in spite of considerable evidence to the contrary (see Fine, 1995, Apr 17: A1; Mandel, 1996). The faith also extends to the Royal Commission on Aboriginal Peoples which, in spite of the ruling in *Sparrow,* erroneously contends that s 35(1) allows aboriginal communities the right to interpret and try Canadian laws (see Globe and Mail editorial, 1996 Feb 27: A20). The faith, not surprisingly, also extends to those who practice and teach law. According to law professor Mahoney (in Fine, 1995 Apr 17: A17):

> *"The courts get right into the messy reality of life to decide the very difficult questions of equality and competing rights . . . I think we are going down the road to real equality."*

Taking a more sober and reflective view is political scientist Peter Russell who states (in Fine, 1995 Apr 17:A17), *"Law professors really love those cases but that doesn't change the country very much."* Professor McCormick (1993) examined all the Supreme Court of Canada decisions since 1949, the year in which the Court became the highest court of appeal in Canada, and concluded that the state and corporations were the major victors in the majority of cases.

According to Wood (in Fudge, 1990: 50):

> *"it is precisely the recourse that subordinate groups have had to judicial and political institutions in their relations with the dominant classes, together with restrictions on the 'freedom' of the state itself, that have created a faith - though hardly unlimited - in the efficacy of legal and political forms."*

Perhaps this is why aboriginal peoples continue to turn to the courts in their struggle for equality and social progress. However the courts, with remarkable naivete, tell aboriginal peoples that the courts are not the proper forum and suggest negotiations with the government. The government, in turn, exhibits a reluctance to negotiate, and when negotiations are carried out it is often lacking in good faith. Aboriginal leaders, frustrated by the slow pace of official negotiations, threaten court action and the cycle continues. Don Ryan, spokesperson for the Gitksan and Wet'suwet'en, readily acknowledges the shortcomings of both forums stating that they have been frustrated at every turn by both the government and the courts, but nevertheless vows to continue the legal battle (in Simpson, 1993 June 18:A9). Philip Joe, of the Squamish Nation, is clearer still of his position, threatening to take his fight to the courts if negotiations fail (Noble, 1996 Apr 24:3).

The major problem with such an approach is that when one plays by the rules set out by the dominant classes, one cannot expect much more than a symbolic victory. In the final analysis that is exactly what *Sparrow* is about. It is nothing more than a symbolic victory. However, in their fight for legal rights, and for fish, aboriginal peoples are not going to be satisfied with symbolic victories. *Sparrow* was and is more than just a demand for a symbolic victory; it is

more than just a demand for formal legal rights. It is a challenge to the Canadian state, and a direct challenge to the capitalist interests, the multinationals which dominate and control the fishing industry in B.C.

However the commercial industry has not taken kindly to the challenges and has fought back and the battle has become bitter and vicious. While the two major combatants (aboriginal peoples and multinational corporations) are assumed to be on equal footing in the courts, and are in fact guaranteed equality before the law, the reality is otherwise. A fundamental problem with court battles is that it disguises the enormous imbalance in power and resources because the two parties are anything but equal. And as evidenced by the government response to *Sparrow,* the multinational corporations have won the battle for fish. The outcome is not surprising for it was never a fair fight to begin with.

Why has *Sparrow* failed to deliver?

> *"The Sparrow decision is a . . . tool that aboriginal communities can use to advance their cause" (Issac, 1991:379).*

In both legal and practical terms, *Sparrow* has not served the interests of the aboriginal peoples. It has failed aboriginal peoples in two significant ways - first is the legal decision itself, and second, has been the state's response. In reviewing the *Sparrow* decision it is puzzling that it should be called a "landmark." The question is "landmark" for whom? As outlined in chapter four, the decision has not altered to any great degree the aboriginal peoples fight for fish or the

status of fishing rights. The most fundamental of issues (concerning the right to sell) remains unresolved. The decision has not accorded any advantage to the aboriginal fisher - aboriginal fishing rights and aboriginal access to the valuable natural resource remains subject to arbitrary, almost whimsical control by the DFO even though that control is exercised in a more sophisticated manner. Furthermore the courts continue to pay lip service but offer little in the way of substantial redress and nowhere is this better illustrated than in two recent decisions by the SCC in *R. v. Nikal,* and to a lesser degree, *R. v. Lewis.* Interestingly enough, both aboriginal leaders and the commercial industry proclaimed both decisions as a victory (for obviously different reasons) (in Bell, 1996, Apr 26: A1).

Jerry Benjamin Nikal was caught fishing for salmon in the Bulkley River which flows through his reserve. Mr. Nikal was on reserve property and maintained that the requirement to obtain a fishing license was an infringement of his constitutional rights [as per s. 35(1)]. Mr. Nikal further maintained that only his Band could regulate fishing on reserve property. Mr. Nikal was acquitted at trial and also upon further appeal by the Crown. The B.C. Court of Appeal reversed the findings of the two lower courts and found Mr. Nikal guilty - the finding was upheld by the SCC upon appeal by Mr. Nikal.

The commercial industry declared the *Nikal* decision as a victory for conservation although the manner in which they have plundered, exploited, and wasted the resource hardly qualifies them as conservationists. However it is entirely in keeping with the image that the companies hope to project, given that they have accused the aboriginal fishers of widespread

poaching and decimation of salmon stocks. On the other hand, aboriginal leaders grasping at apparent straws also declared *Nikal* a victory and this based on an issue already decided by the courts in *Sparrow.* In *Nikal* the S.C.C. rejected the aboriginal argument that they controlled the rivers running through reserve property (a faulty argument to begin with given that reserve land is legally crown land - not aboriginal land), stating that the Bands had no right to regulate fishing in those waters. The SCC also ruled that aboriginal fishers must obtain licenses from the DFO in order to exercise their rights to fish. It is interesting to note the comments of Justice Millward of the Supreme Court of B.C. when he examined the licensing requirement. Millward concluded that the food fish licensing infringed Mr. Nikal's aboriginal right and rejected the DFO's position that licensing was an important control feature meant to safeguard the fish stock. Justice Millward stated that conservation measures should be directed first at other users because aboriginal fishers were to be accorded top priority; Millward also noted that the licensing scheme achieves little and that it merely provides the DFO with the number of people fishing with licenses, without addressing conservation concerns.

However, Justice Millward's findings were not accorded much merit by the BCCA which reversed the findings of the lower courts and found Mr. Nikal guilty. The Court ruled that such a finding by the lower court was *inconsistent* with *Sparrow* in which the SCC had decided that the Crown could regulate aboriginal rights. The substance of the BCCA ruling was upheld by the SCC and almost as an aside, the SCC confirmed that aboriginal peoples had a constitutional right to fish for food and ceremonial purposes. It was on this latter affirmation that aboriginal leaders expressed pleasure. In other words, despite the SCC ruling that substantially went against

them, aboriginal leaders found comfort in an issue which was already the case (following the *Sparrow* decision). Herb George, spokesperson for the Wet'suwet'en Hereditary Chiefs, commented that he was pleased with the decision but added, *"I see a big policy gap between what the court has said and what the government is doing"* (Bell, 1996 Apr 26: A1). According to Eric Johnson, fisheries coordinator, Assembly of First Nations, the Ontario government has rushed to apply the provisions of *Nikal* (i.e. licensing requirement), but have yet to apply the ruling in *Sparrow* (personal communication, 1996 May 16).

There are various possible explanations as to why *Sparrow* has not lived up to the expectations of aboriginal communities; the reasons are complex and multilayered but there are two factors worth noting. First and foremost, fish is a valuable commodity with an estimated worth in the billions of dollars, and secondly, in their fight for fish, the aboriginal fishers have come across a formidable opponent - the B.C. Fisheries Council companies, the multinational corporations, which control the commercial fishing industry. In other words, the stakes are too high. The corporations, which directly and indirectly employ thousands of people, have invested hundreds of millions of dollars and have worked hard at developing markets for fish products. Furthermore the livelihood of individual commercial fishers and fish plant workers depends on the existence of a viable commercial industry, and they have clearly demonstrated that they will not change to accommodate other user groups particularly if it requires that competing users be allowed to fish first. Compounding this reluctance to change is the federal government policy pertaining to unemployment benefits - those employed in seasonal work, as in fishing, are entitled to collect unemployment benefits during the off-season. This system has created a subculture

of dependence and some say, a rather profitable way of life where persons who are employed for part of the year are compensated for the entire year. In 1995, for example, unemployment benefits to fishers totalled $100 million (Howard, 1996, Jul 20, D3; Simpson, 1996 June 19: A24; Marchak, 1987).

The financial well-being of the multinationals, and their shareholders, depend upon a ready and available supply of fish; profitable economic activity requires certainty, predictability, consistency and dependability. It is worth remembering that it was the continued assertion of independence on part of the aboriginal fishers during the early days of the inception of the commercial fishing industry which led to company driven legislation which eventually forced aboriginal peoples into the marginal position that they find themselves in today - the companies forced out aboriginal fishers in order to control the market. So when the power and might of the multinationals are matched against that of an economically and politically marginal group, it is not difficult to predict the outcome. As documented throughout this thesis, the odds tend to be stacked against aboriginal peoples, and in the fight for fish, the odds have proven insurmountable. It is clear that the multinationals will not concede to the hopes of a powerless and historically disadvantaged minority, no matter what the courts have to say. Aiding and abetting the capitalist interests is the State, which explains the *"big gap"* that Herb George spoke of. This is evidenced by the DFO's continued violation of the ruling in *Sparrow* for the sake of the profitability of the commercial industry (as documented in chapter four). This in itself is not surprising, since the history of commercial fishing in B.C. is also the history of government control and marginalization of aboriginal fishers - as documented in chapter two and chapter four, the state

has continually weighed in on behalf of the multinational corporations. At this stage it is worth revisiting the events of August 1995.

Prior to announcing the August 1995 aboriginal-only fishing opening, which raised the ire of the commercial industry, the DFO just a week before had cancelled two previously scheduled openings for aboriginal fishers. The reason given by the DFO was that there was simply no fish to be caught and conservation of the remaining stocks was paramount. Ernie Crey expressed his disappointment but commented *"we've never been a people to argue against conservation."* The Musqueam Indian Band agreed and expressed support for conservation measures (see chapter four). It was clear that the aboriginal community had no choice but to agree for the apparent sake of conservation - the DFO had painted such a bleak picture that any insistence to continue fishing would have been a public relations disaster, and in the fight over fish the battles are also fought in the public arena. The DFO figures for the salmon count seemed so alarming that one industry spokesperson called it a *"natural disaster."* Brian Tobin, the federal minister responsible for fisheries, flew in from Ottawa to meet industry representatives in Vancouver who in turn told Tobin:

> *"We are appalled that your department is permitting aboriginal commercial fishing to continue . . . despite this conservation crisis . . ."*

Typically, the industry purposely got their facts wrong; the opening was for a food fishery not commercial - the industry is well aware of the difference. However, notwithstanding the apparent conservation crisis, the commercial industry pressured the DFO to allow fishing to continue - the commercial fishers and the multinationals were facing an economic crisis. This

left the DFO with an apparent dilemma - how to allow commercial fishing when aboriginal fishing had just been cancelled? And with the fish counts being so low, how to allow the commercial fishers to fill their nets? The dilemma was resolved when the DFO suddenly declared that there were more fish than originally thought - in other words, the DFO scientists and bureaucrats had erred in counting the fish. Hence, within a matter of just one week, in a move to appease the commercial users, the DFO revised the original count and now there was no *"natural disaster"* because there were enough fish for everyone.

In typical DFO fashion, and in a move reminiscent of the "shadow" effect, the DFO, ostensibly to fulfil its obligations under *Sparrow,* accorded the first opening to aboriginal fishers. However the opening was for only 12 hours and during the day when the tides were running out. Even this perceived capitulation by the DFO was too much for the commercial fishers and they amassed in vehement protest. Needless to say the aboriginal fishers came nowhere close to catching their allocation (see tables i & ii, chapter four). However there were enough fish to allow for both escapement (for conservation) and for aboriginal fishers because there was no conservation crisis to begin with. It may have been a *"natural disaster"* for the commercial fishers, but this should not have prevented the DFO from fulfilling its obligations to the aboriginal fishers. The SCC had emphatically stated that only if there were fish left over after conservation and aboriginal needs had been met, could the other users (i.e. commercial fishers) then have access to the resource. But that is not what happened. Following the 12 hour aboriginal-only fishing, the DFO allowed the commercial fishers, with their immense catching capacity, to fish for 24 hours starting the next day (see reports by Smith, J., 1995 Aug 17: A5;

Crawley, 1995 Aug 10: A1; Cernetig, 1995 Aug 17: A4).

The preceding situation clearly called upon the DFO to honour the explicit directives of the SCC. Based on the fish count there should not have been any commercial fishing; there was sufficient fish only to meet the needs of conservation and aboriginal fishers according to the priority order established by the SCC. However, as in previous years, notwithstanding the *Sparrow* decision, the aboriginal fishers were deliberately shortchanged.

The situation today is no different than it was six years ago when the *Sparrow* decision was announced and celebrated by aboriginal communities throughout Canada. Aboriginal fishing rights continue to be ignored and their attempts to exercise those rights continue to be thwarted and frustrated at every turn. Aboriginal fishers are denied access to the resource and they sit and watch other users, who have no constitutional right to the resource, take the lion's share. The attempts by aboriginal communities to establish a sustainable economy based on a natural resource that is constitutionally guaranteed to them are met with resistance and roadblocks of an increasingly insidious nature. The DFO has the mandated authority to manage fisheries but it has no right to subvert the ruling of the SCC, and that is exactly what the DFO has done.

Recently the British Columbia Court of Appeal had the occasion to examine the principles enunciated in *Sparrow* in three fishing rights cases of *R. v. Sampson and Elliott, R. v. Little* and *Regina v. Jack, John and John.* The SCC may have narrowly construed s. 35(1) of the *Constitution Act,* however that does not mean that the courts do not uphold their rulings, legal

principles, or take kindly to its violations although the rulings do allow for flexible interpretations (as was the case when the Supreme Court of B.C. reviewed the case). In each case, the BCCA applied *Sparrow* and in each case the Court concluded that the requirements of *Sparrow* had not been met. For example, the appellants in *Jack, John, and John* were all charged with fishing contrary to the *Fisheries Act.* The appellants were caught with five or six salmon which were released by the attending fisheries officer; the one dead salmon was confiscated and it set in motion another expensive court trial initiated by the Crown for the purpose of convicting an aboriginal fisher, and protecting the fisheries for the commercial users. The Crown which is legally supposed to act in a trust-like capacity as far as aboriginal relations are concerned argued for the conviction of the accused.

The trial judge hearing the matter acquitted the accused; in applying the *Sparrow* principles, the judge determined that the DFO had acted arbitrarily in the closure of aboriginal fishing and on the imposition of an allocation for aboriginal fishers; the judge also held that the conduct of the DFO did not reflect the supposed trust-like relationship between the government and aboriginal peoples; the judge found that there had been no consultation between the DFO and the aboriginal fishers; the judge found that the salmon allocation was divided amongst the commercial fishers and sport fishers which resulted in the heaviest burden of conservation being placed upon aboriginal fishers; the judge also found the closure of the river (in effect a closure of aboriginal fishing) to be a clear violation of Mr. Jack's constitutional rights.

The Crown, again forgetting the trust-like relationship, and supported by the B.C.

Fisheries Council and the Pacific Fishermen's Alliance (the intervenors in the case), appealed the decision of the trial judge to the Supreme Court of B.C. The Crown argued that the objective of protecting commercial and sport fishery from devastation was a valid objective which justified any infringement of the rights enunciated in *Sparrow*. The Supreme Court judge agreed; he also applied the *Sparrow* principles and found Jack, John, and John guilty for the same reasons that the accused had been acquitted at trial - the judge found that the closure of the river was valid and stated (in *R. v. Jack, John and John, 1995: 26):*

> *". . . [I]t would not be possible to protect all wild chinook salmon* ***without serious effects on the commercial fishing industry . . ." (emphasis added).***

The judge obviously read into the reasoning of *Sparrow* an issue which had been explicitly removed from consideration - i.e. the concerns of commercial fisheries are relegated to secondary consideration. However the judge cannot be entirely faulted. The malleability of legal reasoning allows for varied interpretations and the judge was clearly not blind to the situation of the commercial intervenors in the case as he overturned the decision of the trial judge.

Mr. Jack (along with Mr. John and Mr. John) appealed their convictions to the BCCA. The BCCA agreed with Mr. Jack and overturned the guilty verdict. The Court stated *(R. v. Jack, John and John, 1995: 31):*

> *"In our opinion, the DFO failed to give priority to Mr. Jack's aboriginal right when it prohibited any fishing for chinook . . . but at the same time allowed sport fishers [to fish for chinook salmon] . . ."*

In reaching their decision the BCCA quoted the trial judge with approval (at p. 39-40):

> *"[The trial judge] held that such allocations were unilaterally imposed by the DFO and that the Indians were expected to abide by any corresponding regulations and orders. He held that such conduct did not reflect the trust-like relationship with which the Crown was required to deal with aboriginal peoples. He therefore found that there had not been as little infringement as possible in order to affect the desired conservation result."*

The preponderance of facts leads to an inescapable conclusion - the DFO has failed in its constitutional obligations to the aboriginal peoples of Canada. The failure cannot be attributed to an anomalous situation, nor is it an aberration. On the contrary, the failure arises out of a planned and deliberate undermining of *Sparrow* and it has been carried out in the most sophisticated of manners, leading the aboriginal peoples, the general public, and the individual commercial fisher into believing that the DFO is doing its utmost, through for example the AFS and PSA, to fulfil its constitutional obligations, when, in fact, it has done the opposite.

The conclusion that the DFO has failed the aboriginal peoples is found not only in this analysis but also in other sources. The B.C. Court of Appeal, in *John, Jack and Jack* concluded that (in the circumstances of that particular case) the DFO had not lived up to the standard of conduct demanded by *Sparrow*. The David Suzuki Foundation, an environmentalist "think-tank," graded the DFO "F" for failure in its management of aboriginal fisheries; seasoned observers of the fishing industry (Terry Glavin, David Ellis) and even sources within the DFO have reached similar conclusions. A recently released report by a team of twelve independent consultants hired to review DFO operations concluded that the DFO had misled the public and found serious flaws in the manner in which the DFO operates (in Hume, 1996 June 21: A1). According to groups

involved in the fishing industry, the DFO deliberately underestimates the figures for fish stocks in order to mould public opinion (in Bouw, 1996, Aug 7: B1). This explains how the DFO is able to move from a situation of a "natural disaster" to a situation where fish counts improve to allow for openings. In another report commissioned by the Steelhead Society of B. C., an environmental (and sport fishery group), the consultant concludes that commercial fishers are under-reporting their catches by up to 30% because the DFO has been lax in enforcing its own policies (in Crawley, 1996 July 17: A4). And of course the aboriginal peoples themselves, who live with the broken promises of the DFO, are all too familiar with the fact that their rights are not respected. Ernie Crey and Clarence Pennier of the Sto:Lo Nation and the numerous bands who were not permitted to fish for their allocated share in 1992, 1993, 1994, and 1995 can readily attest to the utter failure of the DFO. The aboriginal bands who are starving because they have not been allowed to fish for food can attest to the undeniable fact that the ruling in *Sparrow* has been undermined.

In the face of all this, why has the DFO persisted in clinging to the old ways?

Why has the DFO failed?

Up until *Sparrow,* the management of fisheries by the DFO had continued unchanged, uninterrupted, and on a relatively even keel. The fish in Canada is managed by an army of administrators, scientists, and thousands of support staff, secure in the perception that they are managing the resources in accordance with the department's mandate; they are also secure in the

knowledge that their unionized jobs have the security of tenure. However *Sparrow* changed all that. The SCC decision required the DFO to rethink the way it did its business; the SCC directives required that the DFO change drastically the manner in which fisheries was managed.

The DFO had become accustomed to bullying aboriginal fishers; it had become accustomed to telling the aboriginal fisher when, where, and how to fish, and how much to catch. Most of all, the DFO had become quite cosy with the B.C. Fisheries Council companies and had developed its own culture and a monolithic bureaucratic organization to match. In 1981-82 the total budget of the Pacific Region of the DFO was $84 million (Pearse, 1982: 234); in 1993-94 the budget was $147.8 million (Schwindt, 1996: 113); in 1994-95 the budget for the Pacific Region was $241 million (O'Neill, 1996 June 17); a significant percentage of the budget is allocated to salaries for an army of bureaucrats[3] who have a vested interest in continuing the status quo (Marchak, 1987: 17). Based on its 1981-82 budget, Marchak concluded that the cost of managing fisheries is close or equivalent to the commercial value of the fish (1987: 17); applying more recent figures, Schwindt (1996: 114) concludes that the combined costs of government expenditure in managing the fisheries, and the investment by the private sector or commercial users, have greatly exceeded the commercial value of fish; in other words, fisheries costs more than it generates in monetary return. Carl Walters, a fisheries biologist at the University of British Columbia, is even more critical (in Alden, 1996, Jul 26: A19):

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[3] At present there are 2,300 employees in the Pacific region; 1,327 employees in the head office for a total of 10,367 (O'Neill, 1996).

"The fishery has become a pathetic drain on public resources, almost certainly costing the public more than it returns in terms of employment and social benefits."

In any private enterprise one would expect some serious restructuring of an organization such as the DFO, e.g. loss of jobs, in line with the financial realities. However the unionized positions of DFO employees makes it difficult to eliminate jobs and hence the organization continues on its present course.

Rather than change to meet the directives of the SCC or adapt to the evolving environment in which they operate, the DFO has resisted. According to Chief Joe Becker (and an anonymous senior DFO manager) there is resistance at every level - from fisheries officers to senior managers. While Mr. Becker notes that there has been some genuine cooperation at the higher levels, the same cannot be said of the staff at lower levels, and Mr. Becker ascribes this to a concern over jobs. A senior manager at the DFO also ascribes the resistance to change to both a concern about jobs as well as systemic racism within the DFO - i.e. persons who have managed with a particular perception maintain that perception even when it is not supported by facts. It is worth noting that aboriginal fishers have long considered the DFO as public enemy number one (Newell, 1993). The DFO bureaucrats are also faced with conflicting directions - the courts tell them do one thing, but their managers tell them do something else. How else to explain the continued violation of the *Sparrow* decision?

Whatever the reason for the DFO's resistance to change or reluctance to accept the ruling

of the SCC, it is apparent that *Sparrow* has created a seige mentality amongst DFO staff. The B.C. Fisheries Survival Coalition receives and has received hundreds of tips in the form of confidential "leaked" information regarding aboriginal fisheries. Disgruntled DFO employees motivated possibly by racism or a concern over possible job loss have provided the Survival Coalition with considerable ammunition with which to battle aboriginal fisheries; a representative of the Coalition showed me a stack of internal confidential DFO information leaked to him by DFO staff. Perhaps this resistance also explains the AFS program which was ostensibly designed to address the *Sparrow* decision but has in fact addressed the needs of the DFO, and the needs of the DFO have always been concerned with the profitability of the commercial industry. As one DFO employee stated, the AFS buys back the authority supposedly lost because of *Sparrow* by allowing the DFO to continue operating as it has in the past.

Not only is there concern over job loss within the DFO, there is also concern over job loss in the commercial fishing industry. Indirectly and directly the fishing industry in B.C. employs thousands of people; many coastal communities depend on fish for their very survival. Millions of dollars of investment by both the public and private sector are tied up in fishing which makes it paramount that commercial fishing remain viable. Ironically it is this very capitalization or over-capitalization which is the cause of the many ills pervading the commercial industry. When politicians are pressed with such issues involving profound economic and social implications, they listen, and the rights of a marginalized people pale in comparison - no matter that the concerns of aboriginal peoples are equally, if not more, pressing.

As noted earlier, the DFO is not entirely to blame. The department is under constant and intense pressure to submit to the needs of the commercial fishery. In addition to its obvious economic implications, the DFO is under constant scrutiny by commercial fishers who have demonstrated an unwillingness to tolerate any incursions into what they view as their territory. Complicating matters is the undeniable fact that fishing is a heavily subsidized industry in the form of unemployment benefits, and taxpayer funded grants[4] to various lobby groups which lobby on behalf of the commercial industry - the paradoxical nature in which the DFO operates is apparent but it is also completely illogical. Recently commercial fishers in New Brunswick amassed outside the home of the provincial fisheries minister and pelted his home with eggs and other projectiles. The fishers have in the past "occupied" DFO offices, wrapped the DFO offices in fishing nets, closed the street around the DFO office by stringing nets across the street, vandalised the property of aboriginal fishers, swamped aboriginal boats, and organized what amounts to a virtual hate campaign against aboriginal fishing. They have also initiated countless lawsuits against the DFO and its senior managers, so that the fishers have become the proverbial thorn in the side of the DFO.

In addition to the aforementioned pressures, the DFO must also be responsive to systemic requirements. In essence, the DFO must help to fulfil the State's function of aiding in the accumulation process. According to Marchak (1987: 18-19), it is in the service of this function that the state must take an active role in containing conflict between the various user groups.

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[4] Many of these grants are awarded to the B.C. Fisheries Council companies, including B.C. Packers and the Canadian Fishing Company. These grants are not repayable and amount in excess of hundreds of thousands of dollars - i.e. in 1991 and 1992, these amounts totalled almost one million dollars (in Glavin, 1996, June 13: 15).

The continuing and intense conflict between aboriginal and commercial fishers necessitates state intervention. The state cannot afford interruptions to a vital economic activity; it is the state's function to maintain profitable conditions in any given industry. And faced with the immense power wielded by the multinational corporations, the state invariably resolves the conflict in favour of the powerful because the state can ill-afford to do otherwise (Marchak, 1987: 11).

Is Rights Litigation an Effective Tool?

In deciding *Sparrow,* the SCC did not offer a remedy or even begin to redress historical wrongs - the judges merely suggested a method for sharing the resource. It appears that the Court relied on rhetorical appeasement to set the tone, and in doing so, misled the litigants. The victory celebrated by aboriginal communities is illustrative of a perception of having won when the SCC actually set out a framework on how to control section 35(1) rights. In doing so the SCC actually dealt a severe blow to the aspirations of aboriginal peoples by limiting the scope of rights envisioned by s. 35(1). It should be recalled that the aboriginal peoples initially lobbied against the constitutional exercise preceding the repatriation in 1982, fearing that they had nothing to gain and much to lose. This view was of course based on previous dealings with the government where the aboriginal peoples have consistently come up short. After much soul-searching the aboriginal leaders decided to participate in the process and lobbied equally hard to ensure that the protection envisioned by s. 35(1) was placed beyond the reach of the limitation (as per section 1) and notwithstanding clause (section 33) of the *Charter.* However the SCC imported into its analysis an interpretative guideline which provides other courts the means with

which to limit s. 35(1) protection. As one commentator noted, the limiting analysis was invented out of thin air.

The preceding case study is not offered as proof for either side of the debate concerning the transformative capacity of law. Based on my findings, I cannot offer anything more than a qualified and cautious support for the strategy of litigating rights. Arguably it does lead to change - an analogy explains. Picture if you will a giant block of wood representing the status quo, and poised to strike at this block is a chisel being held by a subordinate group; the chisel can only be propelled forward by positive court rulings. Each positive decision propels the chisel forward and for the motion to continue, successive positive court decisions must follow. In other words, rights litigation translates into slowly chipping away at the status quo in order to gain entry into mainstream society. The preceding analogy, or the premise (of "chipping away"), was suggested to me by Louise Mandell, author, lawyer, and a strong advocate of aboriginal rights (personal communication, 1995). It is Ms. Mandell who has taken the *Vanderpeet* case to the SCC and now awaits the apex court's decision *(Vanderpeet* attempts to further the aims of *Sparrow* and deals with the commercial use of aboriginal "rights" fishery).

The proper question then becomes not whether the law is at all capable of transforming existing relations of subordination and domination, but whether it is an *effective* strategy for doing so in this case. There are two concerns with the above analogy - there is always the possibility that the court will decide against you (as happened in all the major fishing rights cases of *Vanderpeet, Gladstone, NTC Smokehouse, Nikal,* and contrary to popular belief, *Sparrow).*

In other words, the strategy can backfire. Secondly, and perhaps more importantly, how effective a strategy is it? Court challenges take years to resolve and costs in the millions of dollars are not unusual - for subordinate groups, resources are scarce to begin with and one cannot afford to divert or direct valuable resources towards a strategy that has produced and continues to produce negligible results. Consider once again the case of *Sparrow* - the court challenge was initiated in 1984 and was not decided until six years later, and *Sparrow,* as outlined in the preceding pages, has not produced anything that substantially improves the access to fish. The one issue that has become the focal point involves the sale of fish under the provisions of the PSA (Pilot Sales Agreement). However *Sparrow* has nothing to do with the PSA. The real story is found in the boardrooms of the DFO and the strategy meetings in various aboriginal communities. According to an observer, members of the Nuu-Chah-nulth Tribe challenged the DFO for restricting their ability to sell fish caught under food fish provisions - a spokesperson for the Nuu-Chah-nulth made it clear to the senior DFO manager that they would continue selling and the only way to stop the practice was to arrest each and every one of the Nuu-Chah-nulth.[5] Faced with the daunting prospect of massive civil disobedience and having to arrest hundreds of aboriginal fishers, and the potential political fallout, the DFO backed down - even in this regard, the DFO still emerged victorious because the PSA was only signed with four out of over 90 aboriginal bands in B.C. and more importantly, it did not increase the amount of fish that could be caught (Ellis, 1996 - personal communication). In any event, the last laugh in this matter

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[5] It should be noted that Bruce Rawson, the most senior non-elected DFO official denies the above incident; Mr. Rawson, now a private consultant in Ottawa, does acknowledge receiving threats but states that the DFO receives hundreds of threats by all parties involved in fishing; Mr. Rawson stated that the DFO responded to *Sparrow* in keeping with its constitutional obligations. When I pointed out that my research had concluded that was not the case, Mr. Rawson disagreed with my conclusions and stated that the government cannot shirk constitutional obligations (1996, June, personal communication).

must be accorded to the commercial industry - recently the DFO announced a suspension of the PSA and will only allow the continuance of PSA on the condition that there be a commercial fishery in the waters where aboriginal fishing takes place (reported by Crawley, 1996 June 14: B1).

Reliance on a litigation strategy distracts from other potentially more effective tactics. In addition to the fact that lengthy court challenges are costly and time consuming, litigating for rights can also provide an excuse for the politicians *not* to act in order to resolve issues which are essentially political questions, not legal. The politicians demur from taking action, seeking refuge in awaiting the court's decision. Meanwhile the suffering and inequity continues.

In liberal-democratic societies, however, one cannot overlook the importance of law. Winning legal battles legitimizes one's attempts to challenge the status quo. It accords to one's struggle the undeniable cachet that ones' actions are condoned by law. If not condoned, then at least supported as far as legality is concerned. Has legitimizing the struggle by aboriginal peoples accorded any benefits? Not apparently so, judging by what is happening in the fishing waters. White commercial fishers disrupt aboriginal peoples in the peaceful exercise of their constitutional rights and no one is arrested or charged. Even more alarming is the undeniable fact that the DFO has continually violated the ruling in *Sparrow*. Even this small victory has been undermined by the DFO; the department has consistently and blatantly ignored the principles of the decision and the explicit directives of the Court. The DFO has taken the narrowest possible interpretation of the decision and has turned the tables in their own favour.

There is a lesson in this, if the state considers it acceptable to violate aboriginal constitutional rights, then why would not the other users (i.e. commercial fishers) also consider it acceptable to violate aboriginal rights? As demonstrated by the actions of individual fishers and the multinationals, that is exactly what is happening in the fishing waters throughout Canada.

It is worth repeating that aboriginal peoples are only legally entitled to first priority when fishing for food, social, and ceremonial purposes. This ruling provides considerable flexibility for the state in further limiting access to the resource. The ultimate prize in the battle was a right to harvest fish commercially - this was denied by the SCC because they refused to deal with the issue even though it was clear to the most casual of observers that that is what the case was about.

In this current era of rights discourse (Mandel, 1996; 1989) everyone seems concerned about special status or rights or that one group or person are accorded more rights than others no matter how abstract or intangible those rights may be, and the issue makes for heated debates. Somehow, accordance of rights to aboriginal peoples, rights which are constitutionally guaranteed and which recognize past injustices, are being construed, or rather purposefully misconstrued as the granting of special privileges to the detriment of others. Opponents focus on it as an affront and react with outrage; politicians pick up the phrase "special status" - the news media repeats it and the issue takes on a life of its own. Newspaper columnists and radio talk-show hosts speak of apartheid; lobbyists speak of racial segregation and complain that aboriginal peoples are getting all the rights. There is not one iota of evidence to even suggest that aboriginal peoples

are being given special rights. There is considerable evidence to the contrary, but the issue of special status or rights keeps cropping up. B.C.Reports, a right-wing newsmagazine boldly declared on its front-cover (1996, April 16) that democracy has been denied in B.C. because the government of B.C. has not agreed to the demands of certain protestors to call a referendum on the Nisg'a agreement (the commercial users are outraged that the agreement contains provisions for a Nisag'a managed fishery on the Nass River which runs through the reserve).

Conclusion (recent developments)

The aboriginal peoples of Canada remain on the outside looking in, and it appears that that is where they will remain for some time to come.

When the leaders of the top seven economic nations, or the Group of Seven (G7), met in Halifax to discuss economic issues in the summer of 1995, Ovide Mercredi, First Chief of the AFN, led a group of protestors in a symbolic attempt to crash the summit, and to publicize the plight of aboriginal peoples. Mr. Mercredi and the other protestors were turned away by a cordon of security officers, but not before Mr. Mercredi condemned the Canadian government for denying aboriginal rights to hunt and fish to the international media representatives gathered to cover the summit.

About a year later, Mr. Mercredi was again denied the opportunity to participate in another crucial conference involving all the provincial governments and the federal government.

The Chief of the AFN wrote to the Prime Minister (correspondence dated 1996, April 24) urging that aboriginal leaders be allowed to participate to discuss issues of profound importance to aboriginal peoples, but to no avail.

Recently, the entire staff of commissioners of the federal agency, the Indian Specific Claims Commission, resigned en masse to protest government inaction. The Commissioners stated that they did not wish to further frustrate aboriginal aspirations by holding out hopes of settlements; the Commissioners stated that their work was being *"severely undermined"* by a lack of government response (Canadian Press, 1996, Jul 15: A7).

Meanwhile the Micmac Indians of Nova Scotia have decided that enough is enough and have established a commission to oversee hunting and fishing in Micmac territory. A spokesperson stated:

> *"We have decided to . . . regulate our own rights . . . we are getting tired of people going to court fighting over rights and access to certain resources (Canadian Press, 1996 May 21).*

The 1995 fishing season is perhaps a watershed of things to come. It was clearly one of the worst fishing seasons on record with all users suffering losses. However the group that is legally *not* supposed to bear the brunt, in fact suffered the most. Ernie Crey's comments on the 1995 season is to the point:

> *". . . this hit to our economy could only be described as staggering . . . the larders of our families will be very nearly empty . . . (in Cerntig, 1995, Aug 17: A4).*

And the larders of many aboriginal families, particularly those in remote and isolated reserves, were empty. All indications are the larders will also be empty for the 1996 season. The DFO again manipulated the allocation quota of salmon to aboriginal bands, and again without consulting the bands as required by the *Sparrow* decision. According to Ken Malloway of the Sto:Lo Nation, the DFO waited until the last possible minute to inform the aboriginal bands of the change in allocation:

> *"They've deliberately delayed letting us know so that we wouldn't have time to challenge them" (in Smith, 1996 Aug 8: 7).*

The delay in informing the aboriginal bands about the change in allocation allowed the commercial fishers to catch fish which should have been either caught by the aboriginal fishers or allowed to escape for spawning.

By all indications the situation will worsen in the years to come. The DFO has recently initiated two controversial programs for the fishing industry and both these programs do not serve the interests or needs of aboriginal fishing communities. The catch-and-release program for sport fishers allow sport-fishing to continue while aboriginal fishers are prohibited from fishing. The Haida Indians, citing a 30% to 50% mortality rate of the catch-and-release fish, recently lost a legal bid to stop the fishing. The Haida sought an injunction on the grounds that it was unconstitutional for the DFO to allow sport fishing while prohibiting them from fishing for food.

Of the two programs, the most controversial is the so-called Mifflin plan, named after the

current federal minister in charge of fisheries. The plan has been severely criticized by individual commercial fishers and their respective unions for catering to the needs of the B.C. Fisheries Council companies and increasing the "corporatization" of fishing (Howard, 1996 July 20: D3). According to Glavin, the Mifflin plan has accorded to B.C.'s biggest fishing companies everything they asked for (Glavin, 1996 June 13: 13). A report commissioned by the B.C. government concludes that the Mifflin plan will have a devastating effect on fishing communities and states (in McLintock, 1996 July 12: A2):

> *"Many of these are aboriginal communities with few alternative employment prospects . . ."*

In spite of these objections the Mifflin plan will go into effect, even though experts in the field have noted that the plan does nothing for conservation and everything to cater to the interests of the powerful corporations. To this criticism, the person responsible for the implementation of the Mifflin plan responds, *"I can't see any real downside to letting market efficiencies prevail" (in Howard, 1996 July 20: D3).*

In the province of Ontario, which has not applied the principles of *Sparrow,* the bullying of aboriginal fishers continue. Michael Valpy of the Globe and Mail ponders:

> *"I want to understand something. Why year after year, do the Chippewas of Nawash have to fight off their provincial government, thieves, arsonists . . . including local (politicians) to catch fish . . . (1996 July 09: A17).*

In August 1995 a mob of about 70 fishers harassed a Chippewa woman selling fish and threw fish entrails at her; a Nawash fish boat which had been sunk and later raised was set ablaze while

it was docked at a federal dock; during the same time, 10,000 metres of commercial nets belonging to the Chippewa was stolen and vandalized. When asked to respond, a member of the Ontario legislature surmised that it could be the Chippewa themselves who had vandalized and burned their own property *"or somebody from Russia" (in Valpy, 1996 July 09: A17).*

This is indeed a sad and deplorable state of affairs with no resolution in sight. What the aboriginal fishers want is not special treatment, special status, special rights or any other pejoratively imbued terms ascribed to their quest for a recognition of their rights. Aboriginal peoples have sought, from the courts, a restoration of rights once enjoyed by them without let or hindrance. In my conversations with Chief Joe Becker and others involved in aboriginal issues, the aboriginal demands did not seem unreasonable and were not exclusionary. What they have sought is a level playing field, not favouritism; what they seek is a respect for their constitutional rights. However what is going on in the fishing waters of B.C. have nothing to do with respect for aboriginal traditions, aboriginal history, or aboriginal rights. Furthermore it has nothing to do with conservation, in spite of the overwhelming evidence of the rapidly declining salmon stocks; it has nothing to do with fairness or justice, and it most certainly has nothing to do with *Sparrow.* It does have everything to do with racism and greed and political expediency. Racism, in the form of a united front against aboriginal fishers; in the form of the propagation of false and inflammatory information; in the form of a deliberate ignorance of the *Sparrow* decision; in the form of a deliberate denial of historical and legal rights; greed, in the form of fishing for profit and plundering of resource and in the form of a concerted effort to keep others (particularly aboriginal fishers) out of the lucrative commercial market; political

expediency, in the form of the DFO's continued capitulation to capitalist interests.

When I first embarked on this research, I expected to reach a different conclusion. At first glance all indications pointed to a very positive interpretation and application of the principles enunciated in *Sparrow* - there were indications that the government was doing all it could, in an expeditious manner, to respond to the SCC decision. Furthermore, an initial reading of the SCC decision, with its grandiloquent statements about mistreatment of aboriginal peoples, seemed almost enlightened - for the first time, the highest court in the land was admitting that the first peoples of Canada have not been treated fairly. Based on the preceding, I prematurely opined that the law can indeed assist the disadvantaged to achieve a measure of social justice or equality; that the law has the potential of evening the odds. However upon further research, and thorough critical analysis, my initial opinion gave way to disappointment and outrage.

There is something profoundly wrong and unjust happening in the fishing waters of B.C. and Canada. The only fair and proper response would be to allow unhindered and free access to the resource. The aboriginal fisher should have the unequivocal freedom of choice to do with the fish whatever best suits their needs - either sell the fish or use it for food, social, or ceremonial purposes.

However I am also wearily pragmatic and cynical and I do not foresee any favourable resolution for the aboriginal fisher. It appears that not only the federal government, but also the general public, have hardened in their attitude towards aboriginal peoples. A recent survey

commissioned by the federal government concludes that attitudes towards aboriginal issues have changed significantly, particularly when compared to a similar survey conducted only two years ago. According to the more recent survey, a majority of Canadians feel that aboriginal peoples are being unreasonable in their demands to settle land-claims; the figure for B.C. is 67%; more than 40% of Canadians feel that aboriginal peoples have themselves to blame for their problems (in Aubury, 1996 July 8: A4). In view of this, it is difficult to be optimistic.

In any event, it is not improbable to conclude that the fight over fish may amount to nought for there is a growing likelihood that commercially valuable fish, which have made the waters of B.C. home for countless years, may soon be extinct; that is, unless drastic measures are taken to conserve the remaining stocks. But the manner in which the DFO has managed the fish, and the incurable greed exhibited by all those in the commercial industry, does not provide much reason to hope for a miracle, which is what is needed for the fish to survive.

Postscript

On the 22nd of August, 1996, following the completion of this thesis, the Supreme Court of Canada decided three cases dealing with aboriginal fishing rights - *R. v. Vanderpeet, R. v. NTC Smokehouse,* and *R. v. Gladstone*[6]. In the first two cases, the SCC ruled against the aboriginal appellants and in *Gladstone,* the SCC ruled in favour of the Heiltsuk peoples and ordered a new trial.

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[6] These decisions have not yet been reported and were retrieved from the Supreme Court of Canada website via the internet.

Almost immediately following the announcements by the SCC, members of the B.C. Fisheries Survival Coalition started celebrating. In keeping with their disruptive tactics, the Coalition members convened in an area where an opening for aboriginal only fishing was taking place, and began to fish. *". . . this is only the beginning,"* stated Phil Eidvisk, director of the Coalition. Eidvisk called for an immediate halt of the Aboriginal Fisheries Strategy and demanded that the fisheries component of the Nisga'a agreement be rescinded.

There is no doubt that the SCC has dealt a severe, if not a knockout, blow to aboriginal aspirations. In the most important of the three cases, *Vanderpeet,* the SCC ruled against the Sto:Lo Nation, stating the band had not proven that the practice of bartering fish was a central or integral part of Sto:Lo society. The Court stated:

> *"The facts do not support the appellant's claim . . . the findings of fact . . . suggest that the exchange of salmon for money or goods, while certainly taking place in Sto:Lo society prior to contact, was not a significant, integral or defining feature of that society . . . the appellant has failed to demonstrate that (the barter in salmon) is an aboriginal right . . . under s. 35(1) of the Constitution Act, 1982.*

The irony in coming to this decision should be obvious - a group of 9 men and women, all white, all conservative, and all over the age of 55 deciding what is central to an aboriginal society. The same court in *Sparrow* had ruled that the aboriginal perspective must be taken into account when determining what is an aboriginal right. In view of the preceding decisions, it is difficult to state with any degree of confidence whether the Supreme Court of Canada justices are capable of appreciating such a perspective.

In deciding *Vanderpeet* the SCC did leave open the possibility that aboriginal fishers may have the right to sell their fish - providing that they can prove that right in law. However that is the crux of the problem. If the Sto:Lo and the Nuu-chah-nulth *(NTC Smokehouse),* for whom salmon is central, cannot prove that they possess that right, how can other bands do so? In my view, the SCC has set up an almost insurmountable test and it has, in effect, offered a false hope. The decision encourages litigation because bands that have fished from time immemorial do not doubt that they possess the right to do with the fish what they wish, including selling them. The Sto:Lo and the Nuu-chah-nulth spent an enormous amount of money and waited eight long years for an answer - and they lost.[7]

Even more troubling, from an aboriginal perspective, was the SCC decision in *Gladstone.* The Gladstone brothers were convicted of selling herring spawn without a proper license. The SCC ruled that William and Donald Gladstone were exercising an aboriginal right when they sold the herring spawn on kelp, but did not rule whether the licensing scheme infringed that right and ordered a new trial. However the Court also stated:

> *"Where the aboriginal right has no internal limitation . . . some limitation of those rights will be justifiable . . . (in the interests of) regional and economic fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups . . ."*

It is clear that the decision provides a means for the state to further restrict aboriginal rights and

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[7] According to Chief Steven Point, the Sto:Lo Nation spent over $250,000 in the *Vanderpeet* case (personal communication, 1996).

distribute the fish as it see fits in the interests of *"regional and economic fairness."* As documented in the preceding pages, that criteria translates into what is best for white fishers and multinational corporations.

Once again the SCC rulings are being hailed as "landmark" by the newsmedia, lawyers, and academics. However, the question remains - landmark for whom?

It is also important to keep these decisions in perspective. Even if the aboriginal appellants (in *Vanderpeet* and *NTC Smokehouse)* had won, it would not have changed a central fact. The DFO controls the allocation and management of fish, and it is worth remembering that the aboriginal share of the sockeye salmon is a mere 3%. It is cold comfort to have the right to sell fish when there is a sharp limitation on how much fish can be caught in the first place.

In sum, these new decisions are likely to bring the same old results.

Appendix I

Glossary of Organizations and Abbreviations

Glossary of Organizations and Abbreviations

AFN	Assembly of First Nations
AFS	Aboriginal Fisheries Strategy
B.C.C.A.	British Columbia Court of Appeal (the highest court in B.C.).
DFO	Department of Fisheries and Oceans
PSA	Pilot Sales Agreement
S.C.C.	Supreme Court of Canada (the highest court in Canada)

Appendix II

citation of cases

R. v. Adolph (1983), 47 B.C.L.R. 330 (B.C.C.A.)

R. v. Agawa [1988] 3 C.N.L.R. 73

R. v. Andrews (1990), 61 C.C.C. (3d) 490

Calder v. A.-G. of B.C. [1973] S.C.R. 313

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