Frozen Fish Rights:

A socio-legal analysis of *R. v. Gladstone, R. v. Van der Peet & R. v. N.T.C. Smokehouse* (at the Supreme Court of Canada, 1995 - 96).

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ABSTRACT

First Nations seek social, political and economic change within Canadian society. Litigation continues to be one strategy for First Nations seeking such change. Using the law as a part of a resistance strategy has paradoxical and contradictory consequences because court judgements are rendered within a social and political context. In Aboriginal fishing rights litigation judges' opinions continue to be shaped by four inter-related ideologies. The first is state sovereignty. The second is liberal legalism and its dependence on positivist interpretive methods. The third are social-evolutionary concepts imposed on Aboriginal societies. The fourth is the commercial fisheries status quo (which has evolved from over one hundred years of federal Indian and Fisheries administration). How judges form interpretations represents how law can be both a site of socio-political struggle as well as constitutive of the political struggle itself. This complex relationship between law, power and resistance is theorized through the concepts of hegemony, counter-hegemony and incorporative hegemony. This thesis offers a case study of law, power and resistance through the court rulings in *R. v. Gladstone, R. v. Van der Peet* and *R. v. N.T.C. Smokehouse*. These cases represent current efforts by three coastal Aboriginal groups from British Columbia (Stó:lσ, Heiltsuk and Nuh chah nulth: Sheshaht and Opetchesaht Indian bands) to have Canada's highest court recognize and affirm their Aboriginal rights to catch and sell fish or fish products. They were heard on appeal before the Supreme Court of Canada on November 27, 28 and 29, 1995 and their final rulings were released on August 21, 1996.

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This thesis is dedicated to the memory of my father, Ronald J. Evans. He taught me how to view history as a living testament to the continuity of events. This was how he understood his future. The completion of this work was also made possible with the loving support of my wife, Kristina Patterson, and the patient guidance of my academic supervisors, Dara Culhane and Dany Lacombe. I would also like to thank Dorothy Van der Peet, Chuck Jimmy, Ken Malloway, Charles Penner, Ernie Crey, Donald Gladstone, Louise Mandell, John Pritchard, John Bartlett, Brian Robertson, Myriam Brulot and Allan Donovan for taking the time in aid of this research.

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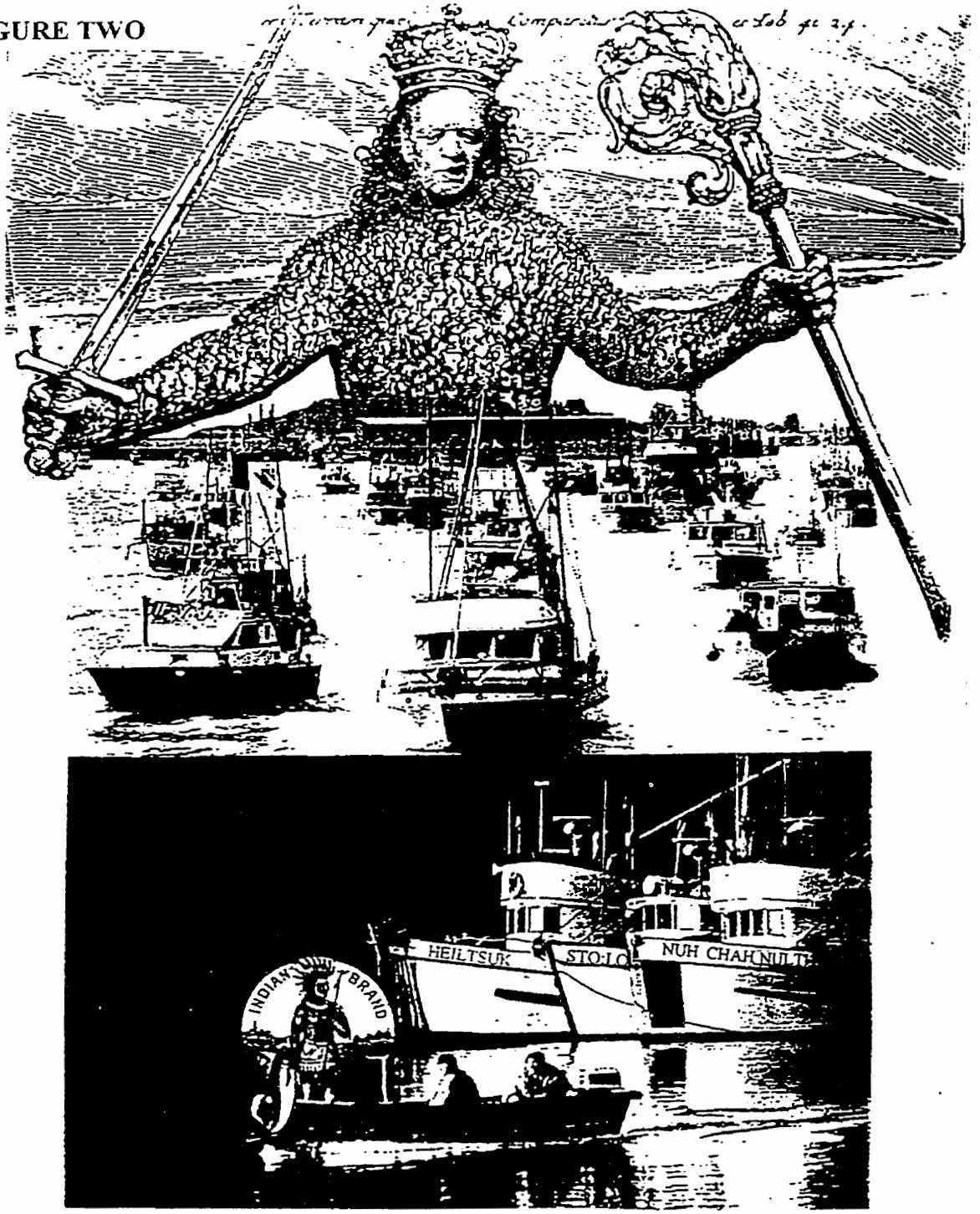
FIGURE ONE

This montage represents several interrelated ideas including; 1) Thomas Hobbes' idea of the hovering royal sovereign - who hovers over the land with the might of the sword and the scepter of law and who embodies all of the people as ultimate proprietor of lands, 2) the arrival and application of this concept of sovereignty to the Americas as a result of European "discovery" and, 3) the social evolutionary crystallization of "authentic" Aboriginal culture in Western thought as a result of the assertion of European sovereignty in the Americas.

FIGURE TWO



This montage represents the European idea of royal sovereignty now represented as the federal state (represented by Jean Crétien, current Prime Minister of Canada) which has ultimate jurisdiction over the sea coast and inland fisheries. In the bottom picture are three commercial fishing boats which represent the Aboriginal groups involved in the litigation under study. In the foreground is a small boat which represents contemporary Aboriginal commercial fishers and the "authentic, non-commercial" Indian fisher in the front of the boat.

FIGURE THREE: R. v. Gladstone, Van der Peet, and N.T.C. Smokehouse through the Canadian Court System.

R. v. Sparrow
May 31, 1990 - Supreme Court of Canada,
Unanimous decision delivered by Chief Justice Dickson and Justice La Forest

R. v. Van der Peet		*R. v. N.T.C. Smokehouse*		*R. v. Gladstone*
October 29, 1990 B.C. Provincial Court Trial Judge Scarlett		August 19, 1988 B.C. Provincial Court Trial Judge McLeod		October 3, 1988 B.C. Provincial Court Trial Judge Lemiski
↓		↓		↓
R. v. Van der Peet August 14, 1991 B.C. Supreme Court Judge Selbie		*R. v. N.T.C. Smokehouse* February 15, 1990 Vancouver Island County Court Judge Melvin		*R. v. Gladstone* August 7, 1991 B.C. Supreme Court Judge Anderson
↓		↓		↓
R. v. Van der Peet June 25, 1993 B.C. Court of Appeal Majority decision - Justice Macfarlane Concurring - Justices Taggart &Wallace Dissenting - Justices Lambert & Hutcheon	↔	*R. v. N.T.C. Smokehouse* June 25, 1993 B.C. Court of Appeal Majority decision - Justice Wallace Concurring - Justices Macfarlane, Taggart & Hutcheon Dissenting - Lambert	↔	*R. v. Gladstone* June 25, 1993 B.C. Court of Appeal Majority decision - Justice Hutcheon Concurring - Justices Macfarlane, Taggart & Wallace Dissenting - Lambert
↓		↓		↓
R. v. Van der Peet August 21, 1996 Supreme Court of Canada Majority decision - Chief Justice Lamer Concurring - Justices La Forest, Sopinka, Gonthier, Cory, Iacobucci & Major Dissenting - Justices L'Heureux-Dubé & McLachlin	↔	*R. v. N.T.C. Smokehouse* August 21, 1996 Supreme Court of Canada Majority decision - Chief Justice Lamer Concurring - Justices La Forest, Sopinka, Gonthier, Cory, Iacobucci & Major Dissenting - Justices L'Heureux-Dubé & McLachlin	↔	*R. v. Gladstone* August 21, 1996 Supreme Court of Canada Majority decision - Chief Justice Lamer Concurring - Justices La Forest, Sopinka, Gonthier, Cory, Iacobucci & Major Dissenting - Justices L'Heureux-Dubé, McLachlin & La Forest

Delgamuukw v. B.C.
December, 11, 1997 - Supreme Court of Canada
Majority decision - Chief Justice Lamer, Concurring - Cory, Major & McLachlin
Separate supporting opinion - Justices La Forest & L'Heureux-Dubé

CHAPTER ONE: Introduction

This chapter introduces the three court cases which form the subject of this thesis. Section One opens with a sketch of the dominant legal context. Section Two outlines the issues in dispute and the positions argued by the litigants in *R. v. Van der Peet, R. v. Gladstone,* and *R. v. N.T.C. Smokehouse*. Section Three generally describes the political and economic stakes in this type of Aboriginal rights litigation. I follow that discussion with a summary of the Supreme Court of Canada's rulings in these three cases. Section Four addresses my theoretical orientation. Section Five tackles my methodology for analyzing the successive court judgements from in trial to the Supreme Court of Canada level. Section Six summarizes all of these issues.

Section One: The Constitutional context

A shift in the Canadian legal landscape emerged with the 1982 patriation of the Constitution. Before 1982, First Nations legal resistance strategies were subject to Canadian common law. After 1982, as a result of First Nations' political lobbying and public demonstrations, the Canadian Constitution's section 35 recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. The Constitution also provided that the individual rights now protected under *The Canadian Charter of Individual Rights and Freedoms*[1] could not negatively impact section 35 protected Aboriginal rights.

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[1] *The Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being schedule B of the *Canada Act* (U.K.), 1982, c. 11. Basic *Charter* rights, such as the freedom of speech or religion speak to our individual freedom of human conscience and our human dignity in a free and democratic society. These political rights recognize the split between the individual and community, and seek to prevent communal suppression of individual difference through the grant of entitlements that impose antimajoritarian limits on the democratic process. See Rosenfeld 1992: 168.

Exactly how individual rights and this new breed of constitutional communal rights would be reconciled was not defined. Similarly, section 35 affirmed Aboriginal rights but did not substantively define what Aboriginal rights were. No provisions on land and resource ownership or governing jurisdictions were included.

For these reasons, section 35 became euphemistically known as the "empty box." The failure of political negotiations to define the substance of section 35 led to a multitude of Aboriginal rights court cases. *Gladstone, Van der Peet* and *N.T.C. Smokehouse* were three such cases.[2] First Nations chose to use court actions to assist in defining the content of section 35. They hoped that specific court recognition of constitutional Aboriginal rights would then potentially expand Aboriginal control over and protect access to resources as well as prompt more substantive Aboriginal/government negotiations, with respect to these issues, on a more equitable footing than in the past.

Section Two: The cases of *R. v. Van der Peet, R. v. Gladstone* and *R. v. N.T.C. Smokehouse*

In 1989, *R. v. Van der Peet* began as a court action. The litigants were Dorothy Van der Peet as defendant and the federal government (also known as the Crown and represented in legal proceedings as Regina - latin for Queen) as plaintiff. Dorothy Van der Peet is a member of the Stó:lσ Nation. The Stó:lσ Nation's traditional territory extends over much of

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[2] Other major cases include; *R. v. Nikal*, S.C.C. (1996), *R. v. Pamajewon*, S.C.C. (1996), *Native Women's Assn. of Canada v. R.*, S.C.C. (1994), *R. v. Sparrow*, S.C.C. (1990), *Roberts v. Canada*, F.C.C. (1995), *Sawbridge Band v. Canada*, F.C.C. (1995), *R. v. Sampson*, S.C.C. (1995), *R. v. Jack*, S.C.C. (1995), *R. v. Jim*, S.C.C. (1996), *Casimel v. Insurance Corp. of British Columbia*, S.C.C. (1993), *Delgamuukw v. British Columbia*, S.C.C. (1997), *R. v. Alphonse*, S.C.C. (1993), *R. v. Dick*, S.C.C. (1993), *R. v. Williams*, B.C.C.A. (1995), *Haida Nation v. British Columbia (Minister of Forests)*, S.C.C. (1995), *R. v. Pike*, B.C.S.C. (1994), *Yale Indian Band v. Lower Fraser Fishing Authority*, B.C.S.C. (1993), *R. v. Hopkins*, B.C.S.C. (1993), *Thomas v. Norris*, B.C.S.C. (1992), *R. v. Archie*, B.C.S.C. (1991), *R. v. Bones*, B.C.P.C. (1990), *R. v. Adams*, S.C.C. (1996), and *R. v. Coté*, S.C.C. (1996).

the lower Fraser River basin (see Appendix One).

In 1987, Van der Peet's common law partner, Charles Jimmie, caught sockeye salmon under a valid Indian food fish licence in the Fraser River near Yale, B.C.. Van der Peet then attempted to sell ten of the salmon to a non-Aboriginal neighbour. She was caught and charged by federal Fisheries officers for attempting to sell Indian food fish: an illegal act under the *B.C. Fishery (General) Regulations* of the federal *Fisheries Act*. Indian food fish regulations stipulate that members of an Indian band can catch salmon for consumption but not for commercial sales.

The Stó:lσ Nation chose to dispute the charges against Van der Peet. Their lawyers argued that Dorothy Van der Peet had an Aboriginal right to trade, barter and sell her Indian food fish. They specifically argued that the Stó:lσ people had been catching, bartering and trading fish in their traditional territory since before the British asserted sovereignty in 1846. When money was introduced into the region, the Stó:lσ then sold fish for money. Therefore, the exchange of fish for money represented an evolved cultural practice that remained an essential part of Stó:lσ Aboriginal society and was now an Aboriginal right protected under section 35 of the Canadian Constitution. The federal Crown's counter-arguments were firstly, that the barter, trade or sale of salmon was not an authentic practice of Stó:lσ Aboriginal culture but had commenced as a result of European influence, and secondly that, after the assertion of British sovereignty, the Stó:lσ's right to fish had been restricted from commercial sales by the introduction of Indian food fish regulations in 1878, 1888, and 1917.

In 1990, *R. v. Gladstone* began as a court action with the prosecution of Donald and William Gladstone. The Gladstones are members of the Heiltsuk Nation whose traditional

territory is on the mainland coast of B.C. northeast of Vancouver Island (see Appendix Two). In 1988, the Gladstones harvested herring roe on kelp in Heiltsuk traditional territory. They then attempted to sell the roe on kelp in Richmond, B.C.. They were charged by federal Fisheries officers with violating the *Pacific Herring Fishery Regulations*. Under the Pacific herring regulations, a commercial Category (J) licence is required for the sale of herring roe on kelp. While William Gladstone possessed a valid Indian food fish licence, which allowed the harvesting of roe on kelp for food purposes, neither Gladstone possessed a (J) licence to legally sell the roe.

The Heiltsuk Nation chose to dispute the charges against the Gladstones. Their lawyers argued that the Gladstones had an Aboriginal right to harvest and sell herring roe on kelp because it was an evolved Heiltsuk custom that was now protected as an Aboriginal right under section 35 of the Constitution. The federal Crown's lawyers opposed this claim by arguing that there was a lack of continuity between the traditional Heiltsuk practice of harvesting and trading herring roe on kelp and the practice of selling roe for money. Therefore, they argued that the current commercial practice did not warrant Aboriginal rights protection under the Constitution. They also argued that in any event, commercial Aboriginal fishing rights had been terminated by Fisheries regulations in 1878, 1888, 1917 and 1955.

R. v. N.T.C. Smokehouse began as a court action in 1988. The defendant was the fish processing company of Nuh chah nulth Tribal Council Smokehouse Limited (hereafter N.T.C. Smokehouse). N.T.C. Smokehouse is a fish processing company located on the Tsahaheh Indian reserve near Port Alberni, B.C.. N.T.C. Smokehouse's management board and employees are comprised of Nuh chah nulth people. The First Nations involved in this case

were the members of the Sheshaht and Opetchesaht Indian bands. Members of these bands belong to the Sheshaht and Opetchesaht First Nations, who form part of the Nuh chah nulth tribe. Sheshaht and Opetchesaht traditional territories encompass the area around Port Alberni, B.C. and within Nuh chah nulth tribal territory which stretches along the west coast of Vancouver Island between the Brooks peninsula in the north and the Alberni canal to the south (see Appendix Three).

In 1986, members of the Sheshaht and Opetchesaht Indian bands caught chinook salmon under valid Indian food fish licences. They then sold the surplus catch from their food fish quotas to N.T.C. Smokehouse. N.T.C. Smokehouse, in turn, sold the fish to non-Aboriginal fish processors. N.T.C. Smokehouse was charged with unlawfully buying and selling Indian food fish, contrary to the Indian food fish regulations.

The Nuh chah nulth tribal council chose to fight the charges. They argued that the Sheshaht and Opetchesaht peoples have an unlimited Aboriginal right, protected by section 35, to commercially sell their Indian food fish because selling salmon is an evolved custom of Sheshaht and Opetchesaht culture. Therefore, N.T.C. Smokehouse did not do anything illegal. The federal Crown argued that any commercial Aboriginal fishing right had been terminated by Fisheries regulations in 1878, 1888 and 1917.

Section Three: The stakes, the Supreme Court's rulings and ramifications

While judges address the specifics of each case in their rulings, their judgements also consider and carry more social, political, economic and symbolic repercussions. In the Aboriginal rights cases under study, the First Nations' claimed an Aboriginal right to catch, barter and sell fish or fish products and the protection of that right under section 35 of the

Constitution. Judicial affirmation of these claims would challenge the current status quo in the Pacific commercial fisheries, where no one identified ethnic, or social group, in Canada has an exclusive right to catch and sell fish.

Judicial affirmation of a commercial Aboriginal right in any of these cases would send out the signal that First Nations may have other commercial proprietary rights protected under section 35. For the Canadian and provincial governments, such a signal could then lead to a proliferation of Aboriginal rights litigation and future judicially affirmed Aboriginal rights that could seriously impact public management of resources as well as the public purse through court costs, settlement costs and lost resource revenues. In this way, legal recognition of commercial Aboriginal rights would affirm First Nations' ownership and jurisdiction in a manner that would jeopardize the resource economies and state management structures which have evolved in Canada since Confederation.

For First Nations, judicial recognition of commercial Aboriginal rights offers the potential to politically and economically aid their evolution towards self-reliant and self-governing First Nations communities. However, judicial negation of these claims could result in attempts by federal and provincial governments to restrict First Nations' access to fishing or could indirectly lead to constraints on First Nations' access to other resources. In this way, the First Nations involved in *Gladstone, Van der Peet* and *N.T.C. Smokehouse* potentially jeopardized all non-treaty First Nations' control and access to resources by relying on Canadian judges to define the content of their Aboriginal rights. These are some of the specific and general stakes for both First Nations and governments involved in litigating Aboriginal rights claims.

In *Gladstone,* the Supreme Court of Canada (hereafter SCC) ruled in favour of the Gladstone brothers' Aboriginal right to harvest and sell herring roe on kelp. In *Van der Peet* and *N.T.C. Smokehouse*, the SCC majority denied the Stó:lō, the Sheshaht and Opetchesaht peoples an Aboriginal right to harvest and sell sockeye and chinook salmon respectively. Together, these legal rulings created a political and economic compromise which allowed for one Aboriginal right to be recognized, a right that will impact a very minor commercial fishery already dominated by Aboriginal users, while denying any recognition of an Aboriginal right which could impact the major commercial Pacific fisheries of sockeye and chinook salmon.

The recognition of the Gladstones' right maintained the appearance of judicial fairness: Canadian courts could find in favour of a commercial Aboriginal right. Thereby, the court system represented itself as a legitimate forum for resolving Aboriginal rights issues. However, *Van der Peet* and *N.T.C. Smokehouse* clearly demonstrated that judicial fairness was seriously impaired by judicial support for the Canadian state, state management of the commercial salmon fisheries and colonial misunderstandings about Aboriginal societies. The irony that the fair and impartial legal rulings of the SCC could lead to this paradoxical compromise made me question whether litigation was conducive to and productive for the recognition of section 35's Aboriginal rights? This thesis attempts to address that question.

In the past, litigation has proven to be one major arena (other arenas include political lobbies, road blockades, etc.) for First Nations resistance to their marginalization within Canadian society (Slattery 1987: 727 - 733). Canadian courts have conditionally recognized Aboriginal rights claims in ways which have added political leverage to First Nations' lobbies for negotiating social, political and economic change. However, the conditions and definitions

that Canadian judges attach to Aboriginal rights and the socio-political conditions under which these rights operate illustrate that what is at stake is no simple win or lose model. Through my description of the relations and ideologies that inform the court judgements, I will argue that it is impossible to decide unequivocally on the efficacy of using the Canadian legal system in First Nations resistance strategies.

Section Four: Theoretical framework

At the basic level, these court cases are about power. First Nations have been disenfranchised from the control and entitlement to resources in Canada over the last two hundred years. Dominant Canadian institutions and social agencies have incrementally marginalized First Nations to the lowest socio-economic rung in Canadian society.[3] First Nations occupy the space of "other," (as have women, gays, and people of colour) in relation to western liberal-democratic societies and their legal systems. It has been a similar position of these groups only in the sense that they have been forced to the margins or subordinated by the dominant groups predicated on constructions and enforcements of "difference." The legal arguments advanced by the First Nations in *Gladstone, Van der Peet* and *N.T.C. Smokehouse* are part of strategies which attempt to use the power of Canadian law to help reverse the colonial process of creating and enforcing "Indian difference." Thereby, a theoretical analysis of the social and ideological process of making the "other" becomes an essential part of resistance strategies for marginalized social groups (Butler 1992: 3 - 21 and Hirsch and Black

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[3] See A. J. Siggner 1986. The Socio-demographic conditions of registered Indians. In *Arduous journey: Canadian Indians and decolonization*, ed. J. Pointing. Toronto: McClelland and Stewart. Also see 1987 *Native population profile report*. Ottawa: Correctional Services Canada - Management Information Services. Also see Michael Jackson 1989. Locking up natives in Canada. In *U.B.C. Law Review* 23(215). And lastly see L. Krotz, 1990. *Indian country: Inside another Canada.* Toronto: McClelland and Stewart.

1994: 6 - 13).[4]

This thesis will add to the body of criticism from feminists, critical legal scholars, historians, sociologists, and anthropologists who focus on the institution of law as a social site which, on the one hand, legitimizes the power of state coercion while on the other, offers a potential site for social change. Their critiques of the law seek to uncover the political and ideological undercurrents that inform lawmakers in the hope that once exposed, these hidden forces can be changed, transformed, or eradicated. In order to understand the paradox of law as domination and law as a tool for resistance, law must be understood as embedded within and not segregated from social relations (Fiske 1995: 183). I argue that the power of court judgements rests on their ideological legitimacy within this wider social network. Likewise, the ideological elements which influence judges in their interpretations on Aboriginal rights are drawn from this network of political, economic and social relations and not from canonical book law alone.

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[4] For feminist theorists who analyse the multiple local contexts of systematic domination see Susan Bordo 1988. Anorexia nervosa: Psychopathology as the crystallization of culture. In *Feminism and Foucault: Reflections on resistance*, eds. Irene Diamond and Lee Quinby. Boston: North-eastern University Press. Jane Flax 1990. Postmodernism and gender relations in feminist theory. In *Postmodernism/Feminism*, eds. Fraser and Nicholson. London: Routledge. Nancy Harstock 1983. *Money, sex, and power: Toward a feminist historical materialism*. New York: New York. Longman 1990. Foucault on power: A theory for women? In *Feminism/Postmodernism*, ed. Linda Nicholson. New York: Routledge. Elizabeth Janeway 1980. *Powers of the weak*. New York: Routledge. Lois McNay 1992. *Foucault and Feminism: Power, gender, and the self*. Boston: North-eastern University Press. Jana Sawicki 1991. *Disciplining Foucault: Feminism, power, and the body*. New York: Routledge. Carol Smart, 1989. *Feminism and the power of law*. New York: Routledge. For feminist scholars on Canadian legal contexts see K. Lahey 1985. Until women themselves have told all they have to tell. In *Osgoode Hall Law Journal* 23(519). Gwen Brodsky and Shelagh Day 1989. *Canadian Charter equality rights for women: One step forward or two steps back?* Ottawa: Canadian Advisory Council on the Status of Women. Susan Boyd and Elizabeth Sheehy 1986. Feminist perspectives on law: Canadian theory and practice. In *Canadian Journal of Women and the Law* 2(1). For critical race and feminist scholars see bell hooks 1989. *Talking back: Thinking feminist, thinking black*. Boston: South End Press. Marlee Kline 1989. Race, racism and feminist legal theory. In *Harvard Women's Law Journal* 11(115). Audre Lorde 1984. The master's tools will never dismantle the master's house. In *Sister outsider*. New York: The Crossing Press. Patricia Williams 1991. *The alchemy of race and rights: Diary of a law professor*. Cambridge: Harvard University Press.

This section now addresses the theoretical approach which will help to characterize the paradoxical relationship between First Nations' resistance and Canadian law. My approach begins with Antonio Gramsci. Although a Marxist, Gramsci approached the study of social control through his own concept of hegemony. For Gramsci, hegemony represented the sedimentation of any ideology which had ceased to be conscious or operates on a naturalistic or "common sense" level. The focus for Gramsci was to determine how dominant groups socially legitimate their ideologies through subordinate groups. Gramsci argued that dominant groups naturalized their ideologies through a network of apparatus which included institutions such as the courts, schools, churches, museums, publishers, and the media. In this network, the legal system served an educative function for society at large in the manufacture of the dominant moral order as well as a coercive force of the state in concert with the ruling classes (Gramsci 1971: 12 - 13, 53 - 56).

Gramsci also held that hegemonic domination was always active and always in a state of flux. Social forces continually compete to disseminate ideologies. Yet, dominant social groups also dominate access and control over major social and state institutions and are thereby able to reinforce their ideologies. In this way, dominant groups have an advantage in encoding their ways of thinking into the very social fabric of a larger block of society. Gramsci's concept of hegemony also helps to identify how judges are able to recodify legal categories as natural social realities because judicial consciousness, like everything else in society, is subject to hegemony. Judges believe they are able to provide a value-free, impartial, disinterested and unbiased court room but how they judge actual cases depends on how they have been socialized. As legal scholar Peter Hogg has stated:

> The judiciary's background is not broadly representative of the population: they are recruited exclusively from the small class of successful middle-aged lawyers. They do not necessarily have much knowledge of or expertise in public affairs, and after appointment they are expected to remain aloof from most public issues (Hogg 1979: 733).

As school children, future Canadian judges are socialized to general Canadian colonial and national myths. At law school, their legal training limits their interpretive methods to those of the dominant legal tradition (Mertz 1994: 89). As judges, their application of the law is filtered through these myths and traditions. These filters can severely impair their ability to address and understand the indigenous sources at the heart of Aboriginal rights because all aspects of Canadian myth and law began in a colonial context which ignored, misunderstood and/or was hostile to indigenous societies.

Yet again, hegemony is never complete. If it were, no social change nor discussion on hegemony would be possible. Judges' personal experiences and understandings of current social values outside of the court room can temper their rulings significantly. As a result of this subjectivity, court judgements can be very unpredictable. I argue that the variability of judicial interpretation represents a tension in the consciousness of judges between the role of law courts as the upholder of the dominant order (Baxi 1994: 251 - 252) and its function to be the rights protector and watchdog of the state (Hunt 1993: 236).

I argue that the legal system and coercive state power are central to my analysis of First Nations' marginalization and resistance. To operationalize this I have chosen to apply a modification of Gramsci's concept of hegemony proposed by legal scholar Alan Hunt. Hunt outlined an adaptation of hegemony to account for the role of the state and the dominant legal system in resistance strategies (ibid: 229 - 230). According to Hunt, the ability to form a

dominating hegemony requires an appeal to and an incorporation of some of the aspirations, interests and ideologies of subordinate groups. Thus, incorporative hegemony is a compromising process which seeks to include subordinate interests in order to secure a wider bloc of legitimacy and acceptance. Part of this complex process is achieved by the ability to articulate values and norms that have trans-social group appeal. Incorporative hegemony is a strategy used by those who possess major social power. Counter-hegemony represents the strategies of those marginalized from power who deploy and reconfigure the constitutive elements of a prevailing hegemony with the ultimate aim of inclusion within it. Thus, counter-hegemony is not an oppositional strategy. Counter-hegemonic strategies do not seek to completely usurp and replace the dominant hegemony.

Abstract legal discourses on rights have become a site of both incorporative and counter-hegemony. Rights codes typically affirm general protections from discrimination, unwarranted state intrusion, labour exploitation, etc.. Individuals and social groups within liberal-democracies will support or undermine a dominant system dependant upon the extent of the protections and entitlements extended to them. Faced with the breakdown of the dominant order or the potential loss of social control, dominant social groups will modify these codes to further include marginal groups to both maintain and potentially expand their social support base.

First Nations' articulations of Aboriginal rights are counter-hegemonic because they seek expansion of the established legal rights framework. As legal anthropologist Elizabeth Mertz has argued:

> A very different type of narrative control is implicated here, for the social groups are clearly not "telling their own stories." Rather, they are seeking

> to hear their story acknowledged in authoritative legal texts; they gain control not by writing the texts themselves, but by exerting some sort of influence over the narrative produced by others (Mertz 1988: 375).

First Nations who seek inclusion of communal Aboriginal rights within the dominant individual rights framework always run the risk that inclusion will result in the assimilation of Aboriginal rights in a way far removed from the intentions of Aboriginal groups. Court rulings are particularly adept at this translation process (Turpell 1992: 45). There is also the danger that the incorporation of Aboriginal rights within the dominant legal order will lead to negative social responses. Particular social groups who stand to lose control and/or entitlements may respond negatively and lobby collectively. State officials and judges may then respond to these lobbies through reactionary restrictions on Aboriginal rights, which in turn, will limit the success of future counter-hegemonic strategies (Hunt 1993: 230).

Section Five: Methodology

Although this thesis is dedicated to a textual analysis of all of the court rulings, my analysis is indirectly informed by the following; my discussions with commercial Aboriginal fishers of the coastal community of Alert Bay, B.C. while conducting a socio-economic case study for the Royal Commission on Aboriginal Peoples, my discussions with several of the litigants, their lawyers and respective political organizations, my professional work as a contract researcher for the federal Department of Indian Affairs and Northern Development, and as a research consultant involved with numerous Aboriginal claims and legal cases. I also benefited from a thorough review of the Canadian Public Affairs Channel's (CPAC) video coverage of the Supreme Court of Canada's hearings of these cases.

My specific methodology for charting the counter-hegemonic strategies of the First Nations' defendants and the incorporative hegemonic responses of the judges in *Gladstone*, *Van der Peet* and *N.T.C. Smokehouse* begins by tracing the historical and political context for First Nations use of the Canadian legal system. I will describe the ideological foundations which underpin the Canadian legal system. This leads into a discussion of how an anthropological perspective on this type of litigation is useful in understanding the ethnocentric nature of judicial perspectives on Aboriginal peoples. I also explain why anthropologists have been drawn into Aboriginal rights litigation. In that discussion I outline the role of anthropologists as expert witnesses and how judges engage their expert opinions. I then describe how I will perform my textual analysis of the court judgements.

First Nations[5] are indigenous nations who each collectively share a common culture and history. First Nations' use of rights language began in response to the imposition of

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[5] The phrase First Nations is politically charged. I will use the phrase "First Nations" and "Aboriginal peoples" interchangeably throughout this thesis. I believe First Nations and/or tribal group is considered the better phrase by which First Nations or Aboriginal peoples chose to represent themselves. Indeed, the term "Indian" may also be the term of choice. However, the word Indian is a colonial construct that has been naturalized to such a point that Aboriginal peoples now use it to describe themselves as much as non-Aboriginal people do. The importance of the use of language to my analysis requires that I not use the term "Indian" except to describe its legal source and colonial legacy. Since section 35 of the Constitution, the phrases; Aboriginal peoples, Aboriginal rights and Aboriginal title are the legal phrases in current use and so I will use "Aboriginal peoples" and "First Nations" when discussing the legal context and "Indians" will be used when I discuss the colonial and legislative context of the *Indian Act*, the *Fisheries Act* and their social effects. When the context demands I will describe the specific group under discussion.

Paul Tennant surmises that "British Columbian Indians themselves refer to their groups as "tribes," "peoples," "nations," or "tribal groups," but none of this is completely satisfactory as a generic word. "Tribe" is the most ambiguous, for it is also applied by Indians to kin-groups and to local communities, while "people" (as in "my people") can mean anything from a kin-group to all British Columbia Indians. "Nation," commonly used in the last century by colonial officials, missionaries, and other white observers, does remain suitable, but ambiguity arises from the common use of "first nation," which normally refers only to the local community and not the entire culture group." Tennant explains that "first nation" meant Indian "band" not "tribal group" and that it was not prevalent in B.C. until after the constitutional conferences between 1983 and 1988. First Nation was a grass root of the "band" community. In the provincial context it could be "band" or "tribal group" but its designation was of the local community and not of provincial organizations. See Tennant 1990: 4, 410 - 411.

colonial legal orders which have derogated or denied indigenous legal conceptions, social relations and access to resources (Asch and Zlotkin 1997: 214 - 218). British imperial projects sought to establish English authority as the paramount and legitimate sovereign (Baxi 1994: 252). Indigenous social systems were considered secondary at best or lacking the requisite markers of a civilized society. Law and courts were instrumental in rationalizing and maintaining that foundation (Guha 1988: 139 - 141). Similarly, these institutions were instrumental in programmatic attempts to first segregate, and then assimilate, the Aboriginal peoples to the colonial system.

The mythology of modern law is intimately tied to the historical evolution of European monarchies into Western liberal-democratic states. The current precepts of modern liberal law are built upon the belief that democracies uphold ideals and are the highest form of civilized society. This orientation obscures the historical realities which enabled European colonial states to evolve into their current democratic forms (Fitzpatrick 1992: 1- 10). Canada's historical evolution into a parliamentary liberal-democracy was predicated on the removal of First Nations' control over land and sea resources.[6]

At present, the Canadian state is a political collectivity recognized by other states and by international law to possess sovereignty and territorial integrity. As a state, Canada demands a monopoly on the granting or defining of rights in domestic law. The Canadian legal system rationalizes and supports state sovereignty at all costs. Knowing this, First Nations' argue to include their own conceptions of rights, responsibilities and entitlements as a modification of the traditional legal framework of rights, proprietorship and jurisdiction that

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[6] For a thorough study of European colonial and imperial legal discourses on Indian rights in North America see Williams 1990.

flow from Canada's 1867 *Confederation Act*.

The Canadian legal system's ideological principles stem from the Anglo-American tradition of liberal legalism. The basic precepts of classic liberalism[7] are conceptualized in a relationship between individual rights and the collective will of the majority (manifest through elected and representative political institutions). In this scheme, an individual's rights should not be limited except where they negatively impact the rights of others. Legal systems, and courts in particular, claim to police the boundaries and ensure that all rights are justly protected.

This systemic myth is built upon four interrelated principles. The first is the presumption that law is separate from other political interests and social influence. The second is that the existence of law in the form of rules defines the proper sphere of their own application. The third is that rules are arrived at by objective and exhaustive analytical measures. The fourth presumption is that such rules serve to determine the framework for predictable results and future determinations (Hunt 1993: 141 - 142).

Judicial interpretation relies upon positivist empiricism. This natural science ideology is applied to social phenomena such that legal agents interpret and then codify through scientific and deductive rational methods of enquiry. These approaches attempt to remove the appearance of subjective judicial interpretation by erecting in its stead the illusion of objectivity in law. The judicial interpreter is perceived to be simply communicating the truth

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[7] Basic liberal principles are equality, individual rights and neutrality. The ideal structure is that society is a collectivity of many individuals and social groups. The state and the judiciary are considered neutral, intervening only when called on to protect individuals and facilitate market freedoms. The Canadian tenets of liberalism go back to John Locke's conceptions of possessive individualism, labour and property. For further reference see Will Kymlicka 1989. *Liberalism, community and culture*. Oxford: Clarendon Press. M. Michael 1984. *Liberalism and its critics*. Oxford: Basil Blackwell Press. D. Maclean and C. Mills, eds. 1983. *Liberalism reconsidered*. Ottawa: Rowman and Allanhead.

instead of understood as an intimate and subjective part of what is constituted as truth (Asch 1997: 44). These interpretations appear legitimate because professional scientism and rationalism are already naturalized as the "objective" methods for creating truth claims for understanding the world around us (Foucault 1972: 23). Thus, judges are allocated the power to selectively and unproblematically translate social phenomena into discrete objects and commodities by which to structure and regulate social life (Poulantza 1978: 82 - 83). By describing how judicial interpretations are not impartial, judicial truth claims can then be shown to be constructed upon a complex field of discourse and power relations.

Aboriginal rights claims challenge Canadian law's ideological basis because they seek inclusion into the dominant ideological framework through an addition of alternative conceptions of law and society which are antithetical to colonial assimilation projects. In this way, judicial responses to Aboriginal rights claims also need to be considered for their Eurocentric and colonial interpretations. One major facet of that Eurocentricism continues to be social evolutionism.

In social evolutionary thinking, European societies are reasoned to be at the pinnacle of social development while Aboriginal societies represent earlier stages on one singular evolutionary time line. Thus terms like primitive and savagery became early societal stage markers (Kuper 1988: 17 - 75). Social evolutionary thinking became a cohesive system of western thought first organized by 19th century lawyers turned ethnologists[8]; Henry Maine,

[8] See Maine 1861 and Morgan 1877. Also see E.B. Tylor 1865. *Researches into the early history of mankind and the development of civilization* and 1871 *Primitive culture*. London: John Murray. For more comprehensive coverage of this history see George Stocking 1987 and Adam Kuper 1988.

and Lewis Henry Morgan, as well as E.B. Tylor. It fell into disrepute within the discipline of anthropology after the turn of the century. In the 1950s and 60s, the social evolutionary model was resurrected by American anthropologist Julian Steward in Theory of Culture Change (1955), and Elman Service in Primitive Social Organization (1962).

These academic discourses legitimized the nomenclature and justified the popular dissemination of social evolutionary theories as universal truths and scientific facts. In these ways, Aboriginal peoples became, less humans and more symbols, entrenched within western thinking (as savages - noble or hostile, and/or primitives - hapless or childlike), to validate or negate theories on European civilization and/or to rationalize colonial projects (Stocking 1987: 186 - 233).

Anthropologist Johannes Fabian further points out how the conceptual translation of Aboriginal peoples into objects of anthropological inquiry mapped specific temporal relationships onto them. These temporal relationships then create simultaneous layers of meaning as follows:

> Linguistically, temporalization refers to the various means a language has to express time relations. Semiotically, it designates the construction of sign relations with temporal referents. Ideologically, temporalization has the effect of putting an object of discourse into a cosmological frame such that the temporal relation becomes the central and topical (e.g. over and against spatial relations) (Fabian 1983: 74).

The temporalization of Aboriginality, inherent in social evolutionary ideologies, creates a definitional Catch-22 in legal thinking. Aboriginal culture is considered to be in a prehistoric past, and any sign of European modernity on the part of Aboriginal peoples (i.e. economic rationality or Christianity) will be a sign of Euro-assimilation. Assimilation then conveys that the Aboriginal is not authentically Aboriginal and is therefore unable to make Aboriginal rights

claims.

Inversely, the demonstration of First Nations' cultural persistence, as argued to judges, notes the survival and continuity of Aboriginal cultures, but that continuity is premised on Aboriginal understandings stemming from outside of liberal legal ideology. Aboriginal beliefs and oral traditions then tend to be understood as irrational, subjective feelings as opposed to rational, legal facts. The persuasiveness of this bias in institutional and individual thinking prevents Aboriginal testimony on Aboriginal rights from being taken seriously[9] (Culhane 1994: 355).

In Aboriginal rights litigation, anthropologists have been hired by governments and First Nations to translate the "facts" about Aboriginal cultures to the judges. However, the myth of objective professionalism obscures that anthropologists are also subject to Eurocentric biases. Therefore, judges may confuse anthropological opinions with direct translations of cultural truth without acknowledging that anthropological testimony can be just as alien to Aboriginal perspectives as imposed colonial legal concepts.

Since the 1973 Aboriginal title case of *Calder v. A.G. of British Columbia*, anthropologists have continued to provide the courts with professional expert opinions on the nature of Aboriginal societies. The testimony from these witnesses has provided persuasive evidence for both litigants and judges alike. However, judges and lawyers do not evaluate anthropological knowledge by its own disciplinary rules: they selectively draw from it legal arguments and simplistic, cultural conclusions (Asch 1997: 64; Culhane 1994: 210;

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[9] Judicial consideration of Aboriginal testimony may be changing. On December 11, 1997, the Supreme Court of Canada released its ruling in the case of *Delgamuukw v. B.C.*. The SCC majority ruled that trial judge McEachern had erred in his judgement by not considering the oral traditions of the Aboriginal plaintiffs (Gitksan and Wet'suwet'en peoples) as significant evidence. *Delgamuukw v. B.C.*, S.C.C.: 97 - 108 (1997).

Riddington 1992: 211). Thereby, Eurocentric social evolutionary models continue to play a major role in legal definitions, whereas testimony from Aboriginal witnesses is given very limited recognition.

As an anthropologist, my perspective is to show how anthropological knowledge is translated within legal culture. Anthropological knowledge can aid First Nations' legal counter-hegemony but it can also collude with judicial positivist interpretations to create unilateral socio-legal definitions. These latter codifications may then become part of the dominant hegemony that Crown lawyers, government agencies, and/or anthropologists deploy as legal facts against future First Nations' counter-hegemonic legal strategies.

Therefore, I shall attempt to analyze the court judgements according to the key naturalized modes of thought and social relations that influenced their judgements. As a major institution in the manufacture of hegemony and the legitimacy of the state, judicial interpretation is first limited by the system's support for state sovereignty. That limit is further conditioned and justified through liberal legalism and positivist methodology. These modes of thought can collude with anthropological evidence to support colonial and social evolutionary assumptions about Aboriginal societies. The social effects of over one hundred years of the *Indian Act* through federal Indian administration as well as one hundred years of federal fisheries administration through the *Fisheries Act*, likewise inform and bolster particular judicial interpretations. How judicial interpretations reproduce or refute the aforementioned modes of thought and social relations represents the judges' incorporative or restrictive hegemonic strategies in response to the counter-hegemonic claims of *Gladstone*, *Van der Peet* and *N.T.C. Smokehouse*.

Section Six: Summary

In summary, I argue that the legal system is a dominant social institution with the power to appropriate history and culture to redefine social relations and entitlements in support of dominant social groups (Mertz 1988: 662). Yet that same system has the ability to empower marginalized social groups. To understand this paradox, I argue that the law is a necessary part of the dominant order which offers that court is a "fair and impartial" site for those seeking to contest the dominant hegemony. My understanding of these conflicting roles of law depends on a dynamic understanding of Antonio Gramsci's concept of hegemony. I rely on Alan Hunt's concepts of incorporative and counter-hegemony to better describe the dynamic relationships between the litigants and the judges in the Aboriginal rights litigation under study.

My methodology draws on these concepts of hegemony to trace the four dominant ideological and social filters that impact the judicial perspectives in the legal cases of *Gladstone, Van der Peet* and *N.T.C. Smokehouse*. My thesis describes how the judges relied on or refuted these filters and to show how their interpretations fit into Hunt's interrelationships of hegemony. To begin this analysis, the next chapter describes the evolution of the legal and political context which continues to shape Aboriginal rights litigation: the Constitution (1982) and *R. v. Sparrow* (1990). Before I describe *Sparrow*, I will step back historically and describe how the *Indian* and *Fisheries Act*s set in motion the socio-legal relationships between coastal First Nations in B.C., the Pacific commercial fisheries and state fisheries management.

CHAPTER TWO: *Sparrow* and the Constitution

In this chapter, Section One briefly examines how First Nations' counter-hegemonic struggles led to constitutional protections for Aboriginal rights. I then examine how the political resistance to negotiating substantive agreements on Aboriginal rights led First Nations to the courts. The case of *R. v. Sparrow*, at the Supreme Court of Canada in 1990, became the legal blueprint for section 35 protected Aboriginal rights. The same legal doctrines, case precedents and socio-economic forces that informed *Sparrow* also inform *Gladstone, Van der Peet* and *N.T.C. Smokehouse.*

Section Two outlines *R. v. Sparrow*. Section Three describes the socio-legal history that created and structured the current struggles between coastal First Nations, the Pacific commercial fisheries and federal fisheries management. Sections Four through Seven will address *Sparrow* in relation to; state sovereignty, liberal legalism and positivist methodology, social evolutionary models of Aboriginal societies, and federal Indian and Fisheries administration. Section Eight will summarize the main legal statements of this complex court decision. Section Nine discusses the socio-political responses to *Sparrow.*

Section One: The *Constitution Act*, 1982

Before 1982, Aboriginal rights were considered within the domain of common law.[10] The entrenchment of Aboriginal rights within the 1982 Canadian Constitution added considerable legal protections to these rights because they now formed part of the highest law

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[10] Common law, as distinguished from statute law created by legislatures, comprises a body of principles and rules of action, relating to government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or judgements and decrees of the courts recognizing, affirming and enforcing such usages and customs; and in a sense, particularly the ancient unwritten law of England. Black's Law Dictionary 1990. St. Paul, Minnesota: West Publishing Co..

of the land. In its original draft, the Constitution did not mention Aboriginal rights. Vigorous lobbying efforts by the Assembly of First Nations, the Native Council of Canada, as well as a multitude of provincial level political organizations, brought about the entrenchment of Aboriginal rights within the Constitution.[11]

The final constitutional document contains four references to Aboriginal peoples and rights. Section 35(1) reads, "The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." In section 35(2), the Aboriginal peoples of Canada are defined as including "Indians, Inuit and the Métis." Section 25 ensures that Aboriginal rights are not adversely affected by the *Canadian Charter of Rights and Freedoms, Schedule B, Part I, Constitution Act,* 1982, (hereafter referred to as the *Charter*). And section 37 calls for federal and provincial governments to meet within one year to consider "constitutional matters directly effecting Aboriginal peoples." I will now address each of these four clauses and the questions they will raise in legal interpretations.

Section 35(1)'s wording creates dubious legal meanings. The phrase "existing Aboriginal rights" conveys that some Aboriginal rights exist while others have ceased to without defining how or why. Secondly, the phrasing "recognized and affirmed" implies that the Constitution is recognizing not creating these legal rights. However, section 35(2) legally defines who the Aboriginal peoples of Canada are. Although the drafters of the Constitution appear to only recognize pre-existing Aboriginal rights, they still impose a definition as to who is entitled to such rights. The slippery slope between a legal recognition of Aboriginal rights

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[11] For coverage of these lobbying efforts see Sanders 1983. The Indian Lobby. In *And no one cheered*, eds. R. Simeon and K. Banting . Toronto: Methuen Press. Also see Asch 1984.

and an imposed legal definition of the Aboriginal content to those rights is one of the most significant judicial interpretations on section 35 protected rights.

Section 35(2) is the legal codification of who the Constitution considers to be Aboriginal. In a shift from the past, the Métis are now included. The Métis are the offspring of couplings between First Nations peoples and European settlers. Their inclusion under section 35(2) implies that the legal definition of Aboriginal peoples and rights is not restricted to Aboriginal societies before the assertion of British sovereignty nor before European contact. The validity of this implication will become a contentious issue for judges determining which Aboriginal cultural practices deserve constitutional protection.

With the inclusion of section 25, (the protection of Aboriginal rights from *Charter* intrusion) communal Aboriginal rights became a new species of fundamental rights alongside *Charter* rights. The conceptual relationship is no longer one between individuals and the larger society. The relationship becomes one between the larger society, the individual, and Aboriginal communities. How judges accord significance to this new liberal legal relationship will significantly impact their final rulings.[12]

Pursuant to section 37, a First Ministers conference on constitutional matters effecting Aboriginal people was held in March of 1983. It was the first time that First Nation leaders fully participated in the constitutional debate[13] (Macklem and Asch 1991: 204). Another First

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[12] For examples of the tensions between communal Aboriginal rights, the Canadian legal system and the individual rights of Aboriginal women see Fiske 1995.

[13] For analysis of the constitutional conferences see R.E. Gaffney, G.P. Gould and A.J. Semple, eds. 1984. *Broken promises: The Aboriginal Constitutional conferences.* New Brunswick Assoc. of Métis and Non-Status Indians. For a visual documentary see National Film Board 1987. *Dance around the table* (part 1 and 2, 107 minutes). For consideration of Aboriginal women's resistance to the talks see the case of *Native Women's Assoc. of Canada v. R.* 3 S.C.R. 627 (1994).

Ministers meeting was called in 1987. Both conferences failed to deliver any substantive agreements. Subsequent constitutional accords, Meech (1987) and Charlottetown (1992), brought agreement but no ratification. Meech was rejected by First Nations. Charlottetown was rejected by the Canadian people through a national referendum.[14]

With the failure of constitutional conferences and accords, any substantive definition of Aboriginal rights moved into the judicial sphere. First Nations targeted the Canadian judiciary by using section 35 as a legal defence against a multitude of criminal and civil charges (cases were cited in the Introduction, footnote 2). The first case to significantly engage the "empty box" of section 35 was to be that of *R. v. Sparrow.*

Section Two: *Sparrow*'s issues and arguments

In 1984, Reginald Sparrow, a member of the Musqueam First Nation, went salmon fishing in Canoe Passage on the north arm of the Fraser River near Vancouver, B.C.. Sparrow was fishing in Musqueam traditional territory (see Appendix Four). While Sparrow possessed a valid Indian food fish license, he choose to use a fish net longer than permitted under that license. He was caught and charged by federal Fisheries officers for fishing with a net size prohibited under the Indian food fishery regulations. The Musqueam disputed the charges.

The Musqueam's lawyers argued that Sparrow had been fishing in Musqueam traditional territory and that Sparrow had an Aboriginal fishing right to do so because fishing remains a vital part of Musqueam culture. They further argued that the Indian food fish regulations of the *Fisheries Act* did not apply to section 35 Aboriginal rights because the

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[14] For further discussion of the constitutional/political climate see Roger Gibbons 1994: *Conflict and unity.* Scarborough: Nelson Press. Also see M. Lusztig 1994. Constitutional paralysis: Why Canada's Constitutional initiatives are doomed to fail. In *Canadian Journal of Political Science* 27 (december).

Fisheries Act is federal legislation and federal law is subordinate to constitutional law. The Crown argued that federal Fisheries legislation had restricted Sparrow's Aboriginal fishing rights to the Indian food fish provisions under the *Fisheries Act* long before the 1982 constitutionalization of Aboriginal rights. The Crown further argued that the *Fisheries Act* delegated federal control over all aspects of the fisheries and therefore, Sparrow's Indian food fishery net restrictions were a legal part of the state's jurisdiction to control and conserve salmon populations.

Section Three: The *Indian* and *Fisheries Acts*

In this section I outline the history of the federal *Indian Act* and *Fisheries Act* which socially constituted the legal categories of "Indian" and "Indian food fishery." These categories set in motion the social, political and economic relationships between First Nations and the B.C. coastal fisheries as they are today. I then describe the specific historical evolution of federal Fisheries management and its bias towards coastal commercial fishing interests at the expense of the Indian food fisheries and Aboriginal groups.

In 1871, B.C. delegates travelled to Ottawa and negotiated to join the Canadian confederation. British Columbia became a province of Canada. The new province was now subject to the terms of the *British North America Act* (later renamed the 1867 *Constitution Act*). Under section 91(24) of that Act, the federal parliament was given paramount authority over "Indians and Lands Reserved for Indians." First Nations were not consulted about this process nor were negotiations held between them and government representatives concerning First Nations' rights. From 1854 until Confederation, there were no negotiations with the Aboriginal peoples of the British colonies of Vancouver Island and British Columbia or

agreements with respect to First Nations rights and resources (Tennant 1990: 26 - 31).

In 1876, the first consolidated *Indian Act* set out specific federal definitions and guidelines for Indian identity and governance (ibid: 43 - 67). It has been revised and amended continually since 1876. Today, Indian and Northern Affairs Canada (INAC, formerly DIAND: Department of Indian Affairs and Northern Development), administers the *Indian Act* under a federal ministry headed by an Indian Affairs minister.

Under section 9(12) of the 1876 *Constitution Act*, Canada was given exclusive legislative authority over "sea coast and inland fisheries." Canada administers and regulates the fisheries under the *Fisheries Act*. To foster the growth of industrial fisheries, B.C. was left unregulated for a decade. The *Fisheries Act* was then extended to B.C. on July 1, 1877. Fishing licences followed in 1888 (Newell 1993: 46 - 65). Again, First Nations of B.C. were not consulted nor informed of this process. Today, the *Fisheries Act* is administered by the Department of Fisheries and Oceans (hereafter DFO) and headed by the DFO minister. DFO officers working in B.C. operate within a management and enforcement structure of three districts - North Coast, South Coast and the Fraser River.

The pioneer B.C. commercial fishing industry developed between 1871 and 1888. Coastal Aboriginal labour in salmon fishing and canning was crucial to the industry's development. From the start Indians were to be labourers and service providers not competitors (Knight 1996: 179 - 190 and Newell 1993: 48 - 50). In 1888, the B.C. fishing regulations were amended to define and include limited protections of an Indian food fishery.

Historian Diane Newell argues that the creation of the Indian food fish regulations were coupled with the allocation of additional Indian reserve fishing sites in B.C.. Newell

states that this coupling was the federal government's attempt to appease Indian demands to protect Aboriginal access to fish resources from industrial fisheries' encroachment and overfishing (Newell 1993: 62). Although the aim of this federal response appears conciliatory, the Indian food fish provisions set in motion a series of insidious social effects. As Newell explains:

> The Indian food-fishery regulation raised two separate but profound issues for Pacific Coast Indian societies. First, it separated Indian harvesting and personal consumption of fish from economic, social or cultural purposes... Second, it separated production of resources from management of them, officially transferring all management of this crucial food and commercial resource from Indians to the state. The takeover was unilateral: there were no negotiations (Newell 1993: 62).

By 1917, as a result of increased immigration, the salmon canning industry was no longer dependent on Aboriginal labour. This opened the door for further restrictions to the Indian food fish regulations. New regulations required Indian food fishers to obtain a federal permit that specified the same type of restrictions (such as gear type, fishing area, closed times and seasons) as was required of the commercial fleet. It was already a federal offence for Indians to sell their freshwater fish. Now, it became an explicit offence for anyone found selling or buying <u>any</u> fish caught under an Indian food fish permit (ibid: 96).

The 1917 Indian food fish restrictions were contemporaneous with declines in salmon stocks. At that time, B.C. commercial fishers began the familiar cry of "too many boats chasing too few fish." Among these protests was the accusation that the Indian food fisheries were environmentally damaging and their overcatch a major reason for declining salmon stocks (ibid). This claim has been continually made to the present day whenever the coastal fisheries are considered to be in crisis.

The Sanford Evans Fisheries Royal Commission was constituted in 1917 to respond to troubles in the Pacific fisheries (ibid: 76). In response to overharvesting, the Commission recommended limiting the number of boats in the fisheries to conserve the fish stocks, a solution known as "fleet rationalization." It would take another sixty years before federal authorities would implement this idea.

Ten years after the Evans Commission, a Joint Senate and House Committee convened in 1927 to hear B.C. Indian grievances. The Allied Tribes of B.C. (the dominant political organization of the period for First Nations within B.C.) went to Ottawa to protest federal and provincial denial of Aboriginal title, the lack of treaties, the small size of Indian reserves and the abrogation of Aboriginal fishing rights.[15] Andrew Paull (one of the spokesman for the Allied Tribes) requested that, like Indian land reserves, fishing areas could be set aside for the exclusive commercial use of B.C. Aboriginal groups. Then Director of federal Fisheries, William Found, was opposed to any such Indian privilege. Yet, Found also admitted that for decades the Fisheries department had leased out vast coastal areas to the salmon canneries with no reciprocal rights for Indian fishers (ibid: 114).

Found represented the prevailing attitude within federal Fisheries. In his view, the Indian food fishery existed as a favour to the Indian Affairs department and Indian employment within the salmon canning industry more than compensated for restrictions on Aboriginal fishing rights (ibid: 120). Director Found's opinions convey that federal Fisheries management facilitated and protected the commercial fish processing sector. Whereas, the

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[15] For more comprehensive discussion of the Allied Tribes and the Joint House Committee in 1927 consult Tennant 1990: 96 - 113, Titley 1986: 135 - 161, and Newell 1993: 113 - 120.

Indian food fishery was considered nothing more than a welfare-like concession.[16]

For the next fifty years, the commercial fisheries would go through numerous boom - bust cycles while the salmon stocks continued to decline. In response, Sanford Evans' concept of fleet rationalization was eventually dusted off the shelf and put into practice. In 1968 - 69, then DFO minister Jack Davis, implemented Evans' concept. Known as the "Davis Plan," Davis' initiative attempted to address overfishing in a way which maintained profitability for full-time, mobile fishers and large-scale, centrally located processors who operated year round. The end result was a smaller fleet made up of more expensive boats, where most of the boats were owned by dominant fish processing companies. As Newell explains:

> the Davis Plan sanctioned and encouraged more use of costly harvesting and processing technology to maximize yield from a declining catch. A drastically smaller, more expensive, privately owned, coast-wide fishing fleet took more of the harvest... (Newell: 1993: 208).

Under the *Indian Act*, title to Indian Reserves is held by the federal Crown for the communal use and benefit of an Indian band. Status Indians under the *Indian Act* do not have the option to purchase fee simple property on the reserves. Thereby, Indians have been handicapped from securing a major form of collateral required by major Canadian lending institutions for approving long term loans. In the wake of the Davis Plan, many Aboriginal fishers were unable to secure loans to upgrade their smaller boats to larger, more competitive ones. As fish processors merged and consolidated their business holdings many Aboriginal and non-Aboriginal small boat operators were forced out of the industry (ibid: 142 - 153).

As First Nations fishers became marginalized from the commercial fisheries, more

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[16] This point of view was legally reinforced by a 1914 decision by the Judicial Committee of the British Privy Council. A subsequent Judicial Committee decision in 1929 again affirmed this position. See Newell 1993: 237.

pressure was placed on the Indian food fisheries to supply food to community members. As well, an illegal market in the sale of Indian food fish developed to provide much needed cash to First Nations fishers increasingly dependent on welfare. In the presence of a highly efficient commercial fleet, dwindling fish stocks continued to be fished to the maximum yield. In response to these pressures, DFO increasingly stepped up its enforcement and restriction of the Indian food fisheries.

To maintain fish populations and accommodate all groups in the fisheries, DFO sets an annual conservation ceiling. This is known as the "total allowable catch." With stock declines, the total allowable catch shrinks and increases the tensions between user groups to maintain their share of a given fish catch. These tensions are the direct result of the English legal tradition that became Canada's dominant fisheries paradigm: fish are considered "common property." Everyone has a right, given compliance with DFO regulations and licensing, to catch and sell fish. To fish salmon commercially, Aboriginal people, like every other Canadian, must get individual commercial licences. DFO managers treat Aboriginal commercial fishers as any other commercial fisher. Indian food fishers, like sports fishers, are considered a separate but minor user group. Any increase in one user group's catch limits must bring about a decrease in other user groups' catches. An Aboriginal fishing right recognized by the courts is taken to translate into an increased catch limit for Aboriginal groups at the expense of commercial or sport fishers. Hell hath no fury like B.C. fishers and processors scorned.

Section Four: *Sparrow* and the state

On May 31, 1990, the SCC released their ruling in *R. v. Sparrow*. The ruling came a month before the opening of the Pacific commercial salmon fisheries, and amidst the annual salvos between fisher groups and governments. Then Chief Justice, Brian Dickson, wrote for the majority of judges. Dickson ruled that Sparrow, as a member of the Musqueam Nation, had an Aboriginal right to fish for food, social and ceremonial purposes now protected under section 35 of the Constitution. Further, Dickson ruled that the Musqueam's Aboriginal fishing right was protected as the fishing priority - second only to DFO's jurisdiction to manage the fish resources for conservation purposes.

In this section I describe the SCC majority's key interpretive moves in relation to the Canadian state and sovereignty. As argued in my Introduction, all Canadian jurisprudence is tempered by the political reality of international relations where states protect their sovereignty and territorial integrity at all costs. To this end, Canadian state officials support a salt water theory of decolonization where the only colonized groups acknowledged as possessing full sovereign powers are those already separated from their colonial power centres (i.e. across salt water) (Bryant 1992: 270 - 273).

Simply stated, Britain staked a claim in North America with an assertion of British sovereignty. As Britain's Canadian colonies evolved into an independent confederation, all people and resources within its claimed boundaries became subject to exclusive Canadian jurisdiction and control. Judges do not support an Aboriginal right of sovereignty that challenges Canadian sovereignty. As Asch and Macklem explain:

> Whatever the meaning given to s. 35(1), Canadian sovereignty was "never in doubt," its assertion likely had the effect of subsuming pre-existing Aboriginal

> sovereignty to the overarching authority of the Canadian state. Thus unlike other Aboriginal rights, the Court appears to accept the proposition that the right of sovereignty, however acceptable under an inherent theory of Aboriginal right, is to be excluded *a priori* from the scope of s. 35(1)... Since the Canadian state decided not to respect Aboriginal sovereignty, such sovereignty cannot achieve the status of right (Asch and Macklem 1991: 507).

Canadian judges do not consider Aboriginal sovereignty claims because the Canadian state does not recognize Aboriginal sovereignty as a competing legal interest on par with Canadian sovereignty. Thereby, Canadian judges perform a key hegemonic function by reproducing as a given, the right of Canadian sovereignty, which in turn, protects the legal, political and economic relations that flow from Canadian Confederation. Thus, the Canadian judiciary is fundamentally limited from unbiased legal interpretations on Aboriginal rights because judges unanimously support Canadian sovereign claims over Aboriginal ones: the issue is not open.

Dickson rationalized Canadian sovereign support in *Sparrow* when he affirmed what is known as the doctrine of Discovery (Berger 1992: 83). The doctrine derives from American Supreme Court Chief Justice John Marshall's judgements in *Fletcher v. Peck* (1810), *Johnson v. McIntosh* (1823) and *Cherokee Nation v. Georgia* (1831) (known as the Marshall trilogy).[17] Marshall ruled that while Aboriginal peoples possessed natural rights[18] before the coming of

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[17] For more comprehensive coverage of the Marshall trilogy see Berger 1992: 66 - 84, Culhane 1993: 115 - 188, and Williams 1990: 228 - 232.

[18] The Law of Nature derives from Aristotle. Robert Williams surmised that "Nature" denoted the secular conception of a rationally ordered universe, manifested, but never fully attained, in the actual world. Nature in the stoic sense referred to the constitution of humans themselves as rational, social beings. The law of nature was the total sum of those principles founded on human nature that could be used to determine the proper conduct in an individual's rational life and social existence. See Williams 1990: 42 - 43. Adam Kuper surmises that the Romans adopted the Greek sense of natural law when faced with the problem of administering foreigners and their customs. Adopting the Greek assumption that certain principles were universal, the Romans developed rules based upon abstract principles of justice. There was the implicit assumption that somewhere, once, these principles had ruled. Justice might therefore be identified with some former natural condition. This latter conception was resurrected in European Renaissance legal thinking. See Kuper 1988: 22. The utilitarian Jeremy Bentham regarded Sir William Blackstone's conception of natural rights as "rhetorical nonsense...nonsense on stilts."

the Europeans, the principle of European discovery (not conquest, occupation nor annexation) gave the European's ultimate sovereignty over the indigenous inhabitants and the land. Marshall also reasoned that discovery did not extinguish Aboriginal title or sovereignty, rather, the Aboriginal peoples became dependent, domestic nations under the ascendant European power. While Marshall's theory recognized that Aboriginal peoples had a right of occupancy arising from actual possession, his belief in European supremacy led him to legally conclude that sovereignty flowed from European discovery alone. Marshall also ruled that English imperial legal policy (as represented in the *Royal Proclamation of 1763*[19]) demanded a high moral and legal standard of conduct from British colonial officials in dealing with Aboriginal peoples. Also based on this policy, only Crown (and now federal) representatives were empowered to consult and negotiate the legal removal of any residual Aboriginal sovereignty and natural rights (Bell and Asch 1997: 46).

Marshall's doctrine first appears in Canadian jurisprudence in the case of *St. Catherine's Milling* and *Lumber Co. v. The Queen* [1888].[20] In that case, the Aboriginal right of title was held to be a personal use and occupancy right dependent upon the goodwill of the European sovereign. *St. Catherine's Milling* ruling also implied that Aboriginal rights were contingent upon Crown recognition (Asch and Macklem 1991: 502). This conception of

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[19] The *Royal Proclamation of 1763* is considered the *Magna Carta* of Aboriginal rights in North America. The Proclamation's meaning is the subject of diverse academic and legal interpretations. For more comprehensive discussion see Borrows 1997. Wampum at Niagara: The Royal Proclamation, Canadian legal history and self-government. In Asch 1997: 155 - 172. Also see Mertz 1988: 671 - 682, and Williams 1990: 228.

[20] *St. Catherine's Milling and Lumber Company v. The Queen* was heard before the Judicial Committee of the British Privy Council on appeal from the Supreme Court of Canada and their decision was rendered in 1888. In 1949, decisions from the Supreme Court of Canada could no longer be appealed to the Judicial Committee and the Supreme Court became the highest court in Canada. In *St. Catherine's*, the federal government argued that they had purchased title to Ojibway Aboriginal lands through Treaty 3. The province of Ontario argued that prior to the treaty the lands were provincial Crown lands. See Kulchyski 1994: 21 - 23.

Aboriginal rights would remain inherent in Canadian common law until the 1973 *Calder* case.

The SCC's *Calder* decision relied upon Marshall to say that Aboriginal natural rights arise from Aboriginal occupation and possession and after the assertion of English sovereignty, existing Aboriginal rights became part of the Canadian common law. Once natural rights became common law rights, constitutional law doctrine was argued to apply and common law rights could then be altered by competent legislation (Bell and Asch 1997: 47). *Sparrow* would affirm Marshall's doctrine of Discovery and *Calder*'s doctrine of constitutional law.

Section Five: *Sparrow* and the alteration of the liberal legal model

In this section I discuss how the SCC majority interpreted the constitutionalization of Aboriginal rights. I hope to show how they apply these interpretations as a new liberal legal template. As legal scholar Andrea Bowker explains:

> If the Constitution entrenches a subject matter - Aboriginal rights - that must be protected from government incursion, and at the same time gives power over Aboriginal people and the subject matters in respect of which they exercise Aboriginal rights to the federal and provincial governments under ss. 91 and 92, neither the governmental power nor the protection of Aboriginal rights can be absolute. It is this conflict of power that underlies the Supreme Court's introduction of limitations... (Bowker 1995: 9 - 10).

Dickson stated that the Constitution is a foundational document that aspired to lay the blueprint for current and future societal relations. The inclusion of section 35 was interpreted as a general recognition of the long struggle by Aboriginal peoples, in politics and the courts, for constitutional recognition and political restitution (in Kulchyski 1994: 227).[21]

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[21] *R. v. Sparrow* is reported in 1 *Supreme Court Review* 1075 (1990). My citations of Dickson's majority ruling on *Sparrow* are found in Kulchyski, ed. 1994: 212 - 237.

Therefore, Dickson reasoned that judicial interpretation must be performed in a purposive way which acknowledged this struggle. Part of that purposive analysis was stated to require that legal interpretation be sensitive to the Aboriginal perspective and should any legal doubt exist as to the content of Aboriginal rights, interpretation should defer to the Aboriginal perspective because Aboriginal people are the right-holders. However, Dickson's purposive analysis for Aboriginal rights did not account for the tacit judicial purpose of supporting state sovereignty over and above the Aboriginal perspective, which biased judicial interpretation at the first stage of the SCC majority's legal analysis.

As I argued in Section One, Aboriginal rights were placed alongside Charter rights at the foundation of the Constitution. The SCC majority chose to use that propinquity to create an interpretive bridge between Aboriginal and *Charter* rights. In Dickson's interpretation the Aboriginal right is viewed as a general and fundamental right such that its evolving expression could take a multitude of forms (like the *Charter* right of freedom of speech or religion). Yet, I argue that the Aboriginal right is interpreted as analogous to, rather than contiguous with a *Charter* right. Dickson's interpretive bridge is also a double edged sword that appeared to validate the Musqueam's contemporary right claim as it transposed the claim in an incorporative hegemonic way. As legal scholar Marie Ellen Turpell explains:

> The rights regime dominates the culturally different interpretive communities by using its own conceptual framework to apply the provisions of the *Charter* to "others" even though these provisions may be interpreted in a "special" way... It performs a levitation trick by transforming differences into rights within the supreme law of Canada (Turpell 1992: 43).

Through Dickson's reasoning the state and the courts become a necessary part of section 35 protected Aboriginal rights premised on the liberal legal ideas that; no right was absolute, that

the state had a major role to play in regulating rights, that competent state legislation can extinguish common law Aboriginal rights, and that courts had a major role to play in determining the validity of state legislation on such rights. I argue with Bowker and Turpell, that while this conceptual transposition affirms and protects an evolving expression of an Aboriginal right, it also overlays *Charter*-like state limitations onto that right.

Dickson further reasoned for the injection of the state's powers into the legal interpretation of section 35 through his affirmation of fiduciary principles.[22] Dickson ruled that:

> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts Aboriginal rights. Yet we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and import some restraint on the exercise of sovereign power (in Kulchyski 1994: 233).

Fiduciary obligation is a legal relationship derived from private law and translated into the Crown - Aboriginal relationship due to British imperial legal policy (discussed in relation to the Marshall trilogy and the *Royal Proclamation of 1763*). The analogy is that a trust-like relationship exists between the parties because First Nations were dependent on Crown officials for understanding the nature of treaties and other transactions affecting their "residual natural rights." The Crown's obligation was to ensure that Aboriginal peoples' rights and best interests were honoured.

In *Sparrow*, the conflict between the government's public duty to uphold the interests of all parties in the fisheries had to be reconciled with the fiduciary duty of the Crown towards

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[22] For comprehensive coverage of fiduciary obligations see Slattery 1985. First Nations and the Constitution: A question of trust. In *Canadian Bar Review* 71(261). Also see Walker 1992 and Supreme Court Justice La Forest's judgement in *Lac Mineral v. International Corona Resources* 61 D.L.R. 14 29 (1989).

Aboriginal peoples. What Dickson created was a hybrid adjustment into what Andrea Bowker calls a public fiduciary standard:

> In this way, the Court takes the possibility of justification under fiduciary principles, and the *Charter* justification analysis with which it is familiar and creatively synthesizes them to protect both Aboriginal rights and the public interest (Bowker 1995: 14).

The public fiduciary standard is the SCC majority's incorporative response to the new liberal legal relationship between the larger society, the individual and the Aboriginal community. In *Sparrow*, this standard is deployed to reconcile state management of the fisheries, individual commercial and sports fisher interests, and the Musqueam's fishing right.

From this public-fiduciary premise, Dickson then ruled that federal legislative power continued but was to be held in check by fiduciary principles. He also commented that the "public interest" was too vague and broad to provide any meaningful guidance to justify state interference with a section 35 protected right. Instead, Dickson asked three *Charter* questions in relation to state infringement with Sparrow's Aboriginal fishing right:

1) Is the limitation unreasonable?
2) Does the regulation impose undue hardship?
3) Does the regulation deny to the rightholder their preferred means of exercising the right? (in Kulchyski 1994: 231).

Under this *Charter* framework, if a judge ruled that a state infringement of an Aboriginal right had occurred, then the Crown was legally required to justify the reasonableness of its intervention. Part of this justification test required that the Crown (as fiduciary) show meaningful consultation with First Nations <u>before</u> implementation of any law or program that would impact an Aboriginal right. This template became the SCC majority's new incorporative liberal legal framework for all section 35 Aboriginal rights claims.

Section Six: *Sparrow*'s model of Musqueam Aboriginal society

Dickson had stressed that Aboriginal rights were to be interpreted flexibly to permit their evolution over time, and to be recognized in their contemporary form, excavated out from under the layers of regulations that had been attached to them (ibid: 220). He further stated that Aboriginal rights were not to be interpreted as being frozen to the Aboriginal cultural practices at the time of contact with Europeans, the assertion of British sovereignty or the regulated state of the Aboriginal right before the 1982 *Constitution Act* (Slattery 1987: 782).

The SCC majority affirmed the definition of Aboriginal rights as being *sui generis.*[23] The term means that Aboriginal rights arise in and of themselves and are not reducible to British common law nor Aboriginal law. In other words, *sui generis* legally represented the body of common law decisions on Aboriginal rights which formed:

> ...an autonomous body of law that bridges the gulf between native systems of tenure and the European property systems applying in the settler communities. It overarches and embraces these systems, without forming part of them (Slattery 1987: 745).

The concept of *sui generis* also created a *Charter*-like sense of mutual dependency and limitation. This definition accommodated the rights of the Métis as part of the definition of Aboriginal peoples laid out in the Constitution's section 25(2). The concept functions as part of the SCC majority's overall incorporative legal strategy for section 35 Aboriginal rights within the Constitution as a whole and not just Sparrow's specific legal claim.

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[23] The concept of *sui generis* was first used by Dickson writing for the Supreme Court majority in the *Guerin* case (1984). That case ostensibly dealt with the Musqueam Indian band and the lease of their Indian reserve lands. Yet, Dickson's ruling also expanded the concept of Crown's fiduciary obligation in relation to Aboriginal peoples as being legally accountable. Dickson also held that Aboriginal title was an independent legal right that can only be extinguished by Aboriginal consent or by valid legislation. For further discussion see Slattery 1987: 728 - 732.

Premised on this interpretation, Dickson turned his specific interpretive gaze towards the source of Sparrow's Aboriginal right to fish. Dickson stated that the Musqueam right to fish is originally held as "an integral part of their distinctive culture" (in Kulchyski 1994: 231). Dickson noted that anthropologist Dr. Wayne Suttles (expert witness for the Musqueam defence) helped establish the evidence for the Musqueam's integral connection to their salmon fisheries (ibid: 221).

Following from the Marshall trilogy, the SCC majority affirmed the source of the Aboriginal fishing right as arising from the Musqueam's prior occupation and possession of territory before the assertion of British sovereignty in 1846 (ibid: 226 - 228). After 1846, the Aboriginal right was recognized by Canadian common law. Again, in keeping with the *sui generis* idea of mutual dependence, Dickson stated that Aboriginal rights were not to be considered of a lesser authority than colonial or state law: legislation which merely regulated an Aboriginal right did not extinguish it.

Dickson specified that Canadian law could extinguish Aboriginal rights in their common law form if the legislation was clear and plain. Extinguishment required that before implementation, the Crown had to consider the impacts on Aboriginal rights and that the legal enactment must clearly stipulate the specific intent to extinguish them (Foster 1992: 133 - 150). Dickson ruled that if an Aboriginal right survived unextinguished until 1982, it would receive section 35(1) protection.

I believe that Dickson's interpretation of an Aboriginal right's survival was contingent upon two components: the continued importance of the right to the Aboriginal people (i.e. in the case of fishing to the Musqueam) and the survival of the Aboriginal right from the

assertion of British sovereignty to 1982). Dickson decided that Reginald Sparrow's Aboriginal right was an unextinguished one which continues as a right to fish for food as well as social and ceremonial purposes (ibid: 225). Yet, the SCC majority strategically did not address complex questions about Aboriginal culture which underlay the first component of Dickson's interpretation of an Aboriginal right's existence: As Andrea Bowker queried:

> When is something 'integral'? What makes Aboriginal culture 'distinctive'? When is an asserted right an 'evolved' form of a 'traditional' Aboriginal right, that may be protected by s. 35, and when is an asserted right a 'new' right that is not? What is Aboriginal culture? (Bowker 1995: 18).

Dickson defined the form and significance of fishing to the Musqueam by relying on the defence's anthropological testimony (specifically from anthropologist Dr. Wayne Suttles) instead of directly addressing the complex questions of identity and Aboriginal culture.

Section Seven: The influence of federal administration on the *Sparrow* decision

Dickson stated that section 35 protected Aboriginal rights were to be considered on an equal footing with colonial or federal law. Therefore, Dickson ruled that the federal power to legislate "with respect to Indians" pursuant to the section 91(24) *Confederation Act*, 1867, (i.e. the *Indian Act*) continued and was to be read in tandem with section 35 (ibid: 229). By implication, the federal *Fisheries Act* would also be read in tandem.

This idea of tandem reading is strategic and misleading because Sparrow's constitutional Aboriginal fishing right became legally subsumed under the federal Fisheries management scheme structured according to the *Fisheries Act.* To perform this subtle subordination, Dickson first borrowed from his dissenting opinion in the common law case of *Jack v. The Queen* (1979). In *Jack,* Dickson ruled that a common law Indian fishing right in

B.C. fell within the following fishing priorities; (i) conservation, (ii) Indian fishing,[24] (iii) Non - Indian commercial fishing, and (iv) Non - Indian sports fishing. In *Sparrow*, Dickson created a constitutional taxonomy of fishing priorities based on his opinion in *Jack*. Dickson's constitutional list became (i) conservation, (ii) Aboriginal fishing for food, social and ceremonial purposes, (iii) commercial fishing, and sports fishing (in Kulchyski 1994: 235). Dickson transplanted his common law legal interpretation into his constitutional reading of section 35. In effect, the SCC majority took the Indian (food) fishing provisions and marginally expanded them into a section 35 protected Aboriginal right to fish for food, social and ceremonial purposes.

Further proof of this intent was illustrated by the SCC majority's neglect of a commercial component to Sparrow's Aboriginal fishing priority. Dickson ruled that the lower courts had not been presented with the issue of an Aboriginal right to fish for commercial or livelihood purposes, and therefore, the SCC could only consider the issue of the validity of a net length restriction affecting Sparrow's Indian food fish licence (ibid: 225). Yet Sparrow's legal team did present the commercial issue at the Supreme Court level. The Court's deferral of the commercial issue tacitly validates the current status quo of the Pacific commercial fisheries by tactically maintaining the legal border of a non-commercial Indian fishing right as a section 35 protected Aboriginal fishing right (Bowker 1995: 8).

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[24] Yet, from section (ii) it can be seen that Indian fishing is not broken down into any subcategories such as fishing for food, social, ceremonial or commercial purposes. Dickson's dissenting opinion in *Jack* reasoned that B.C. fisheries policy privileged some Aboriginal commercial fishing prior to B.C.'s entry into confederation and by B.C.'s Terms of Union 1871, imported those privileges into confederation. He did not mention this in *Sparrow*.

Section Eight: Summary of the *Sparrow* decision

These are *Sparrow*'s most significant legal findings; 1) Dickson reassigned a social and ceremonial component to the Indian food fishery and made this new description a constitutionally protected Aboriginal right, 2) this non-commercial Aboriginal fishing right was held to be superior to other fishing interests, except that, 3) DFO remained in control of fish conservation, 4) all state officials were bound to a strict code of conduct (premised on fiduciary and *Charter* principles) and, 5) the onus was on the Crown to legally justify their extinguishment or infringement of an Aboriginal right.

The SCC validated the Musqueam's counter-hegemonic claim that Reginald Sparrow was indeed practising within his Aboriginal rights when he fished with a net longer than allowed for in the Indian food fish regulations. The SCC constitutionally protected this Aboriginal fishing right as the first in line for annual fish catch quotas. Dickson also empowered all First Nations' Aboriginal rights by committing government officials to a high standard of conduct, flowing from their fiduciary obligations to First Nations. Yet, these validations were also incorporated into an affirmation of the Crown's arguments that the federal *Fisheries Act* still held supreme jurisdiction and the Aboriginal right to fish was legally interpreted in a way which marginalized its impact on the commercial fisheries.

I believe that *Sparrow* validated the Musqueam's counter-hegemonic claim in an incorporative way such that First Nations regarded the legal decision as a victory. However, the incorporation of *Sparrow* into the Pacific fisheries status quo was not so readily received. The commercial and sports fishing sectors read *Sparrow* as an unfair, undemocratic sell out to Indians (because it threatened their long entrenched economic interests) (Newell 1993: 175).

Section Nine: Socio-political fallout from *Sparrow*

The reception of *Sparrow* was indeed varied and controversial. First Nations, veteran Aboriginal rights lawyers, and legal scholars read *Sparrow* as a victory and predicted that the ability to sell Indian food fish would be restored in the future (ibid: 176). In support of that view (and in response to their inability to control illegal Indian food fish sales), DFO launched what became known as the Aboriginal Fishing Strategy (hereafter the AFS). In effect, DFO's initiatives supported *Sparrow*'s incorporative hegemonic strategy. As Dianne Newell explains:

> On June 29, 1992, with the salmon-fishing season under way, federal Fisheries minister John Crosbie announced yet another in an endless stream of programs, the Aboriginal Fisheries Strategy, including a pilot project to assign Indian groups responsibility for managing fisheries and to commercialize the Indian food-licence fishery in British Columbia (ibid).

Under the AFS, the Musqueam, Tsawwassen and Stó:lō peoples signed one year trial agreements, which included pilot sales of Indian food fish. Together these agreements made up what became known as the Lower Fraser Fishing Authority (Allain and Frechette 1993: 26).

Conversely, industry (fish packer and processing) companies funded initiatives to organize commercial fishers into resistance groups and also began to directly intervene in Aboriginal rights litigation. With names like the B.C. Fisheries Survival Coalition, and the Fishermen's Direct Action Committee, these groups teamed up with the Pacific Fisherman's Defence Fund, the United Fishermen and Allied Worker's Union and the B.C. Reform Party

in strong opposition[25] to the AFS. To them, DFO remained public enemy number one, while Indians trailed a close second. A subsequent federal report stated that:

> All parties agree that the 1992 Fraser River salmon fishing season was extremely chaotic; it has even been called an environmental disaster. That season marked the introduction of a new federal government initiative, the Aboriginal Fisheries Strategy (AFS). This was enough for some observers to jump to the conclusion that there was a link between that year's problems and the introduction of the federal program. Whether or not that conclusion is valid, the debate over the 1992 Fraser River salmon fishing season clearly reached hitherto unequalled levels of emotion and frustration; nor is the issue yet resolved (ibid: 1).

The extremely low 1992 salmon escapements to the Fraser River system coupled with the introduction of the AFS brought forth the old canard that Indians and special Indian rights were the cause of the Pacific commercial fisheries woes.

The accusation of racism, voiced to rally opposition against special fishing rights, is a good example of prevailing hegemony. These accusations are aimed at Canadians socialized to liberal-democratic ideas where no "ethnic," indeed no social group, has a special collective right to anything. Yet, as I described in my history of the *Indian* and *Fisheries Acts*, the implementation of the common property - public right to fish in Canada was made possible by the colonial and unilateral imposition (not a democratic nor a consultation process) on First Nations of the socio-legal categories of "Indians" and "Indian food fishers." Commercial and sports fisher reactions illustrate that despite the Supreme Court of Canada's incorporative

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[25] The B.C. Reform Party's platform blue book is based on the equality of all citizens. Their myopic yet egalitarian perspective holds that Aboriginal rights are special status, racist and unacceptable. In 1996, Delta M.P. John Cummins launched his own resistance strategy in demanding that equality, not race, should rule the fisheries. His strategy was to fish during commercial closures when Indian food fisheries were open. He gathered some publicity and could be found in the popular press in July, 2, 1996. Reform dips. In *Times-Colonist*. Victoria. June 13, 1996. Fish net gets ticket. In *The Globe and Mail*. Toronto. October, 28, 1996. Fishing trip lands MP in lockup. In *Vancouver Sun*. Vancouver. And, October 29, 1996. Fishery protesting MP spends second night in jail. In *Vancouver Sun*. Vancouver.

response to the Musqueam's counter-hegemonic legal claim, their rulings sparked reactionary protests couched in the dominant discourse of traditional liberalism. These reactions clearly show what Gramsci described as the dynamic process of social groups competing to entrench or refute ideologies.

My contention is that the strength of the reactionary protests against *Sparrow* and the AFS influenced *Gladstone*, *Van der Peet* and *N.T.C. Smokehouse* in ways which undermined *Sparrow's* incorporative interpretations. I argue that the judges were significantly deterred from affirming the commercial claims in all of the cases under study because of their potential impacts on the economics of the commercial fisheries, where the majority of B.C. commercial fishers had already voiced their hostility against *Sparrow* and the AFS. As journalist Terry Glavin describes:

> Nothing has sent more shudders through the industrial fisheries edifice than the prospect of an emerging Indian challenge to the industry's 90 per cent share of the coastwide total allowable catch of salmon... a 1993 government survey of industry participants' views about the state of the industry concluded that the prospect of increased tribal allocations was regarded as the single greatest threat to the B.C. commercial fishery (Glavin 1996: 92).

CHAPTER THREE: *R. v. Van der Peet* from the trial to the B.C. Court of Appeal

R. v. Van der Peet worked its way through the courts amidst the Pacific fisheries controversies described in the last chapter. Van der Peet's general legal goal was to have the courts answer what *Sparrow* had deferred: is there a commercial component to an Aboriginal fishing right? Section One begins with a description of the charges and issues leading to the *Van der Peet* case. Section Two traces the history and management of the Fraser River salmon fisheries out of which Van der Peet's claim arose. Section Three analyzes *Van der Peet*'s B.C. Provincial Court trial and ruling. I specifically examine how and why the trial judge interpreted Van der Peet's Aboriginal fishing and trading practices as non-commercial in relation to the ideologies and social relations outlined in the Introduction. Section Four examines *Van der Peet* on appeal to the B.C. Supreme Court. Section Five analyzes *Van der Peet* on appeal to the B.C. Court of Appeal including a discussion of Mr. Justice Lambert's dissenting opinion at that court level. Section Six summarizes my analysis of these judgements to conclude that all of the court rulings negate Van der Peet's counter-hegemonic claim and offer no incorporative legal strategies.

Section One: *Van der Peet*'s issues and arguments

In September of 1987, two members of the Sqwáli Indian band and Stó:lσ[26] Nation, Charles Jimmie and his brother Steven Jimmie, went sockeye salmon fishing on the Fraser River under the authority of valid Indian food fish licenses. After a day of fishing, they

[26] The word Stó:lσ (pronounced Stalo and written following international phonetic script) is Halq'eméylem. Stó:lσ means river, the Fraser River. Thus the Stó:lσ people translates as people of the Fraser River. See Carlson 1997: 140. Dr. Wayne Suttles states that the Halq'eméylem language can be further broken down into Downriver and Upriver dialects. See Suttles 1990: 453.

brought their catch back to Charles Jimmie's home on the Jimmie (Sqwáli) Indian reserve. The Jimmie Reserve is one of five Indian reserves in close proximity to the town of Chilliwack, B.C.. Charles Jimmie lives there with his common-law partner, Dorothy Marie Van der Peet, who is a member of the Tzeachten Indian band as well as the Stó:lσ Nation.[27]

Van der Peet then sold ten of the salmon to Mrs. Lugsdin, a non-Aboriginal neighbour. Van der Peet was immediately caught by Fisheries officers (from DFO's Fraser River district office located in Chilliwack). The DFO officers then charged Van der Peet with two criminal violations of the *British Columbia Fishery (General) Regulations* made pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14. The first charge was selling fish in contravention of section 27(5) which provides that:

> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

The second related charge was the contravention of section 4(5) of the said regulations which provides that selling salmon requires the authority of a commercial fishing licence.

In light of *Sparrow*, the Stó:lσ Nation tribal organization chose to dispute Van der Peet's charges in an attempt to further challenge the Indian food fish regulations and to gain legal affirmation of DFO's Aboriginal Fisheries Strategy (AFS). They chose to make *Van der Peet* the test case because of the modest circumstances surrounding the charges: one woman selling only ten fish to a neighbour. Cognizant of the incessant rumours of large scale "Indian"

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[27] *Indian Act* bands whose members also belong to the Stó:lσ Nation include; the Katzie, Kwantlen, Matsqui, Lakahahmen, Skway, Skwah, Squiala, Kwaw-kwaw-a-pilt, Aitchelitz, Soowahlie, Tzeachten, Yakwakwioose, Skowlitz, Skowkale, Cheam, Popkum, Seabird Island, Peters, Ohamil, Skawahlook, Chawathil, and Union Bar. Other *Indian Act* bands which may include Stó:lσ ancestry are the following: Yale, Chehalis, Coquitlam, Musqueam, and Burrard (Tsleil Waututh). Many of these bands are also the member bands currently under the "Stó:lσ Nation" political umbrella such as; Aitchelitz, Chawathil, Cheam, Kwantlen, KwawKwaw Apilt, Lakahahmen, Matsqui, Popkum, Scowlitz, Seabird Island, Ohamil, Skawahlook, Skowkale, Soowalie, Squiala, Sumas, Tzeachten, and Yakweakwiooseawahlook. See Carlson 1997: 160.

fish poaching in the Fraser River fisheries, the Stó:lσ Nation considered that the judges might take a more sympathetic view of Van der Peet's particular circumstances.[28]

In 1989, *Van der Peet* became a criminal trial at the Provincial Court of British Columbia in Surrey, B.C..[29] The case was heard by Provincial Court Judge E.D. Scarlett between May and December of that year. At trial, both sides agreed that the ancestors of the Stó:lσ Nation were part of an organized society whose members had an Aboriginal right to fish in the Fraser River at the location where the fish, subject to the charges, had been caught. After the trial, but before judgement was rendered, the SCC released its rulings in *R. v. Sparrow*. Scarlett allowed both sides in *Van der Peet* to re-argue their cases through written submissions informed by *Sparrow*. Both sides then agreed that Van der Peet had an Aboriginal right to fish for food, social and ceremonial purposes.

The Stó:lσ Nation's lawyers[30] argued that Van der Peet was entitled to sell Indian food fish caught within Stó:lσ traditional territory because trading, bartering and selling of salmon was an evolved Aboriginal fishing practice of the Stó:lσ people. They also argued that with the assertion of British sovereignty in 1846, their Aboriginal practices became part of their Aboriginal fishing rights recognized by the British common law. Further, they argued

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[28] Stó:lσ Grand Chief Clarence Penner's address to the November 23, 1996 University of British Columbia's Conference entitled: *Fishey judgements.* The conference was organized by the Aboriginal Rights Coalition to allow the Stó:lσ, Heiltsuk and the Nuh chah nulth to comment on the SCC's rulings in *Gladstone, Van der Peet and N.T.C. Smokehouse.*

[29] The trial transcripts reviewed for this thesis reside with the Stó:lσ Nation in Chilliwack, B.C..

[30] Legal counsel for the defence were Louise Mandell, Leslie Pinder and Brenda Gaertner from the Vancouver law firm, Mandell Pinder, and Tim Hara and Stephen Point, from the Stó:lσ Nation. Legal counsel for the federal government of Canada were D.R. Kier and T.M. Sperling.

that between 1846 and 1982 their common law Aboriginal fishing rights had survived and were now protected under section 35(1) of the Constitution [*R. v. Van der Peet*, 3 Canadian Native Law Reporter (hereafter C.N.L.R.) 155 (1991)].

The federal Crown's legal arguments depended on two components. The first was that the barter, trade or sale of salmon was not an "authentic" cultural practice of the Stó:lσ people. The second argument was that even if a Stó:lσ commercial Aboriginal right to fish did survive to the common law it had been subsequently restricted to only food fishing by the B.C. general fisheries regulations. Following *Sparrow*, the Crown revised this argument such that Van der Peet's Indian food fishing right included the right to fish for social and ceremonial purposes.

During the seven months of court proceedings trial judge Scarlett heard testimony for the Crown from DFO officers (Flood McKee, Guy Kirkpatrick and Frederick Fraser) of the Chilliwack office, and two anthropologists: one recognized as an expert in the field of anthropology and ethnohistory (Mr. John Dewhirst) and the other in anthropology and archaeology (Dr. Arnold Stryd). For the defence, Scarlett heard testimony from three Stó:lσ elders (Tilly Guitterez, Francis Phillips and Edna Douglas), an archivist/historian (Mr. Jamie Morton), and an expert recognized in the field of social/cultural anthropology (Dr. Richard Daly).

Section Two: History of the Fraser River fisheries

As described in the last chapter, Aboriginal fishing rights litigation has come in tandem with declines in salmon stocks. The situation was/is particularly acute for the Fraser River. The Fraser River is the most productive watershed in the world for five species of salmon

(Glavin 1996: 103). For millennia, the Fraser has been the major highway and fish supplier to a multitude of First Nations from the B.C. interior to Vancouver Island. Today, ninety-one Indian bands comprising over twenty-four thousand people possess close to three thousand Indian food fish licences. The Stó:lσ people, recognized through 28 Indian bands, hold approximately thirty percent of these licences.

From the beginning of the industrial salmon fishery, the Fraser River district was the most significant location for commercial salmon fishing and canning. The burgeoning business took a dramatic downturn between 1911 and 1915 due to overharvesting of the Fraser salmon stocks (estimated at 32 million fish in 1913) and a catastrophic blockage of the Fraser River during railway construction. Rail crews were responsible for blasting massive amounts of rock into the river: the Hell's Gate slide of 1914 is the most infamous (Carlson 1997:155). Together these forces almost completely dammed and destroyed the Fraser River's salmon productivity. Aboriginal peoples, the Stó:lσ in particular, were instrumental in dipnetting fish from below the slides and then rushing them to the river above while crews worked to clear the river of rock obstacles. This lasted for several years and demonstrated the Stó:lσ people's connection and commitment to the Fraser River's salmon fisheries. The stocks would take decades to recover but they would never again reach pre-1913 levels (Glavin 1996: 108 and Newell 1993: 66).

As discussed in the last chapter, declining fish stocks and overharvesting led to the 1968-69 Davis Plan and DFO's initiative to further restrict Indian food fishing. The latter became most acute on the Fraser River where over one half of the Indian food fish salmon were caught. Sections of the Fraser were closed to Indian food fishing in the name of conservation while the commercial salmon fisheries at the Fraser River estuary continued. This

demonstrated that DFO management continued to favour the commercial fishers at the expense of Indian food fishers (Newell 1993: 66 - 67). By the 1980s, the Fraser watershed had become notorious for intense DFO surveillance of Indian food fishers.[31] Throughout the 1980s and into the 90s, local Stó:lō protests lobbied for recognition and legislation which defined their constitutional Aboriginal rights to fish the Fraser, and their desire for Stó:lō representation on key political bodies which oversee the management of the Fraser fisheries.

To further complicate the Fraser River fishing picture is the Pacific fisheries relationship between Canada and the United States. In the 1940s, management of the Fraser salmon stocks took a international turn. Treaty arrangements (the International Pacific Salmon Commission) were put into place between the U.S. and Canada with respect to commercial fishing of Fraser River salmon. Due to the destruction of Columbia River stocks (the result of hydro-electric dams built on the American side) the U.S. put up millions of dollars for Fraser River fish enhancement projects. The Canadian government compensated by giving U.S. fishers (Washington state predominately) entitlement to half of the Fraser River's commercial salmon catch. Today there are international agreements between the two countries on respective catch limits for salmon bound for the Fraser River in B.C. as well as rivers in Washington state.

These agreements are sought by each country because their commercial fleets perform what are called interception fisheries: the salmon are intercepted (caught) in the ocean (Juan de Fuca, Georgia and Johnstone Straits) before they return through the Fraser to their natal spawning rivers and streams. Both fleets also perform interception fisheries in their respective national waters for salmon bound for rivers in the U.S. (Glavin 1996: 43). Interception

[31] For reference to Aboriginal fisher protests in the 1970s and 80s see Newell 1993: 168 - 174.

fisheries make salmon stock population assessments exceedingly difficult. Different salmon stocks swimming to different spawning areas may school together before they enter the Fraser River. Fishers fishing for particular salmon stocks under a particular fish season consistently net mixed salmon stocks. The fish which are caught by accident and out of season are called the by-catch. Because the by-catch is comprised of out of season salmon, fishers tend to down play the size of their by-catch if they report it at all (ibid: 87).

The by-catch problem is exacerbated by the ability of the commercial fleets to harvest large volumes of salmon in a very short time which then makes it difficult for DFO scientists to predict how many fish of a specific salmon population will return to their spawning streams. Assessment fluctuations make it extremely difficult for DFO to set conservation parameters and allocation limits. The net result is crisis management - DFO scientists keep re-assessing the stocks while fishers continue to fish. If the numbers of fish that continue to their spawning areas fall too low DFO quickly closes the particular fishing area. The rapid opening and closing of fishing areas puts tremendous pressure on fishers to maximize their catches during each and every fish opening.

To complicate this picture even further are the repercussions from the 1974 American case of *United States v. State of Washington* (known as the Boldt decision after the presiding judge). Judge Boldt ruled that the American treaties with the Indian tribes of Western Washington entitled the tribes to a fifty percent share of Washington's commercial fisheries. Due to the Pacific Salmon Treaty between the U.S. and Canada and the interception method of fishing, the tribes of Western Washington are entitled to a major share of Fraser bound salmon stocks.[32]

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[32] For an analysis of the *Boldt* decision see Barsh 1991: 84 - 102.

After the *Boldt* decision, and now after *Sparrow*, annual management of the Fraser fisheries requires that Canadian and American representatives on the Pacific Salmon Commission, and then DFO, satisfy specific fish allocations for all of the Western Washington treaty tribes, the gillnet/seine/reefnet fishers within the Washington state fleet, the ninety Indian bands and Canadian gillnetters on the Fraser River as well as the commercial Canadian fishers in the Strait of Juan de Fuca, Johnstone Strait and Georgia Strait seiner, troller and gillnet fleets. As journalist Terry Glavin has aptly stated:

> The system of management has become so complex, and the fishing fleets of both countries have become so powerful, that managing the Fraser River salmon runs is almost like trying to put a person on the moon every year (ibid: 44).

The system's complexity is matched only by its high stakes politics. American and Canadian negotiations over fish allocations always spark a volatile blame game. B.C. politicians blame Canadian negotiators for selling out their fish to the Americans. Canadian officials blame B.C. officials for undermining Canadian negotiations. Canadian fishers blame the Americans and the Indians for overfishing while American fishers blame the Canadians for erroneous salmon stock data.

The last major Pacific Salmon Treaty between the U.S. and Canada, forged in 1985, has since crumbled. International agreements, when reached at all, are cobbled together each year. Thus every year before the salmon fishing seasons begin, political, jurisdictional, racial and polemical accusations gather momentum and explode (ibid: 75 - 89). These lobbies provide great media sound bites rather than contribute to long-term management solutions.

Section Three: B.C. Provincial Court Judge Scarlett's 1990 ruling

Dorothy Van der Peet's legal claim was chosen as one Stó:lō response to contest their

continued marginalization from the management, control and access to the Fraser River fisheries. The efficacy of the courts as part of this particular counter-hegemonic strategy begins with the analysis of Scarlett's judicial interpretations of the Stó:lσ's legal claim. Scarlett first characterized the issues in *Van der Peet* as follows:

> one, does Dorothy Van der Peet as a member of the Stó:lσ Native peoples have a right to sell Indian food fish arising out of an aboriginal right to sell, barter or trade salmon? Two, if such a right exists has it been extinguished by law or regulation? Three, if existing and not extinguished how is it to be viewed pursuant to the guidelines set out by our Supreme Court of Canada in the recent decision of *R. v. Sparrow*? [*R. v. Van der Peet* 3 C.N.L.R. 156 (1991)].

On October 29, 1990, Scarlett announced his judgement orally, ruling:

> Accused guilty
>
> 1. The Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. Any trade in salmon which took place in aboriginal times was minimal, opportunistic and incidental. The court concluded that since the Sto:lo were a band culture as opposed to tribal, no regularized trade in salmon existed in aboriginal times.
>
> 2. Since the court held that the Sto:lo Aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish, there was no need to discuss the issues of extinguishment or how an aboriginal right was to be viewed pursuant to the guidelines outlined in *Sparrow* (ibid: 155).

Section Three: i) Scarlett's interpretations in relation to state sovereignty

To maintain judicial support for the Canadian state, Scarlett, like the judges in *Sparrow* and all Canadian judges, did not support nor legally consider Aboriginal sovereignty as an Aboriginal right which could impact legal interpretations on the scope of an Aboriginal fishing right within Canada. Canadian judges do not consider legal arguments that dispute the legality by which Canada achieved sovereignty over Aboriginal peoples despite the rhetoric of

law's objectivity and impartiality or its supposed separateness from politics. All of the judges in the cases under study implicitly support that Aboriginal rights continue unless inconsistent with British *cum* Canadian sovereignty (Bell and Asch 1996: 52). I no longer raise this general presumption unless a particular judicial interpretation warrants specific discussion.

Section Three: ii) Scarlett's regard for liberal legalism and social evolutionism

Scarlett's interpretations in *Van der Peet* selectively conserved the current legal definition from *Sparrow* that an Aboriginal right to fish was for food, as well as social and ceremonial purposes. From that point of departure, the remainder of Scarlett's ruling turned significantly on his liberal legal and state biases and his definition of Stó:lσ Aboriginal society. I discuss Scarlett's selection of testimony and argue that Scarlett marginalized the defence's testimony due to his Eurocentric biases. I then show how Scarlett drew his key definitions about Aboriginal rights and Stó:lσ culture from one Crown witness in particular - John Dewhirst. Dewhirst's evidence gave Scarlett the tools he needed to define the Stó:lσ people in a social evolutionary way which created an *a priori* negation of Van der Peet's legal claim.

In *Van der Peet*, testimony was heard from three Stó:lσ elders (Court Transcript of Evidence (hereafter Court Transcript) for Tilly Guitterez, 31/05/1989, Court Transcript for Francis Phillips, 30/06/1989, Court Transcript for Edna Douglas, 28/06/1989). Tilly Guitterez was the one defence witness who specifically described her education in Stó:lσ oral history and her current role as a teacher of those traditions. She recounted stories full of anthropomorphic creation myths and transformer acts that intimately linked the Stó:lσ people to territory, fishing sites, salmon rituals and exchange networks. (Court Transcript for Tilly Guitterez, 31/05/1989). Scarlett's comments on this testimony were:

> While extensive evidence was provided by the defence in the form of oral history, it became apparent that such evidence where it was beyond a personal life experience of the witness, must be assessed very carefully. It purported at times to portray a culture which in large part has vanished with little historical record. Symbols, myths and folk tales were related and interpreted by the Native witnesses. While such evidence is always interesting and often fascinating, it embodied hearsay often unrelated or at variance to such historical record as available. The life experience of such witnesses was of the time of a culture in change, originally in conflict with and ultimately dominated by European settlers. [*R. v. Van der Peet* 3 C.N.L.R. 160 (1991)]

Scarlett did not recognize the continued social, legal and historical significance of oral traditions to the Stó:lσ people. Oral traditions are evolving bodies of stories which operate as an Aboriginal people's spoken "constitution," for lack of a better word (Carlson 1997: 161 - 184). Translated into English, Stó:lσ oral traditions lose their natal language (Halq'eméylem) context. In court, fragments of Aboriginal oral traditions and life histories are translated from their specific cultural context and lumped together alongside other non-Aboriginal legal evidence to be scrutinized by judges who interpret them through legal positivism while privileging Eurocentric scientific-logical knowledge (Hunt 1993: 305).

Anthropologist Julie Cruikshank addressed this problem in Aboriginal rights litigation through her analysis of oral tradition testimony in the case of *Delgamuukw v. B.C.*.[33] In that case, trial judge Allan McEachern, similarly disregarded Aboriginal oral tradition testimony. [34]

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[33] See Cruikshank 1992: 25 - 42.

[34] In *Delgamuukw* at trial, the Gitksan and Wet'su'weten peoples from north-eastern B.C. were asking the courts to legally recognize their Aboriginal right of title included ownership and jurisdiction over their traditional tribal territories. The case was heard before B.C. Supreme Court Justice Alan McEachern between 1987 and 1990. Volumes of Aboriginal oral tradition testimony was presented and then disregarded by McEachern.

According to Cruikshank:

> the court's decision to present and evaluate oral tradition as positivistic, literal evidence for "history" is both ethnocentric and reductionist, undermining the complex nature of such testimony because it fails to address it on its own terms (Cruikshank 1992: 26).

And:

> The lessons to be drawn from comparing oral and written accounts are not about the cultural relativity of texts, but about power and domination" (ibid: 39).

Scarlett preferred "historical records" and professional "scientific" testimony. Commenting on all of the Aboriginal testimony Scarlett warned that:

> caution had to be exercised in weighing the evidence of Natives which relied upon childhood experience and recollection and expert opinion derived from subjective observation and analysis of such recollection [*R. v. Van der Peet* 3 C.N.L.R. 157 (1991)].

Because the court system is biased towards "objective" scientific-logical knowledge, lawyers hire established professionals to help formalize and empower evidence in ways which judges will understand and find significant. In Aboriginal rights litigation, anthropologists and other social science academics are hired as expert witnesses to provide authoritative opinions about Aboriginal cultures. I believe their expert opinion testimony is judicially interpreted on two levels; 1) the strength of their argumentation which must mimic formal legal argument in semantic structure, style, tone of voice, and posture. As sociologist Pierre Bourdieu has surmised "Mastery is gained above all in practice or pedagogical techniques which aim to imitate as much as possible the conditions of professional practice" (Bourdieu 1987: 822). And, 2) the success of the expert's anthropological arguments will depend upon their correlation to the judge's ideological presumptions about Aboriginal peoples and cultures.

Scarlett's ruling gave particular attention to "portions relied upon by expert witnesses in establishing the foundations for their opinions" [*R. v. Van der Peet* 3 C.N.L.R. 160 (1991)]. However, it was the Crown's expert witness testimony which Scarlett ruled to be significant. Scarlett stated:

> This court accepts the evidence of Dr. Stryd and John Dewhirst in preference to Dr. Daly and therefore accepts the evidence that the Sto:lo were a band culture as opposed to tribal (ibid: 160)

Both Arnold Stryd and John Dewhirst were hired by the Crown to specifically rebut testimony from the defence's expert witness in anthropology, Richard Daly. Scarlett's ruling was particularly dependent on the testimony of John Dewhirst. Dewhirst's expert opinion derived solely from his review of the anthropological and ethnographic accounts on the Stó:lσ people in the *Van der Peet* case proceedings. Scarlett used Dewhirst's opinion that the Stó:lσ were a "band" culture with no elaborate institutions or market exchange network as the foundational truth statement in his understanding of the Stó:lσ people and their rights (ibid: 161).

Dewhirst's anthropological opinion contained a common social evolutionary bias. His opinion also confirmed Johannes Fabian's statements about the temporalization of Aboriginal peoples as objects of anthropological inquiry. The term "Aboriginal" signifies specific time relations which ideologically place Aboriginal societies into a less socially evolved past behind European societies. Dewhirst conveyed this when he was asked by Crown counsel what the term "Aboriginal" meant. Dewhirst replied:

> I understand aboriginal to -- to refer to the period of -- of time before the arrival or -- or about the time of arrival of Europeans at a time when the -- particular Native culture in question was still largely unmodified or altered and that they were following their cultural practices that they had practiced before the arrival of Europeans (Court Transcript for John Dewhirst, 29/06/1989: 201).

As well, Dewhirst was asked by the Crown what "prehistoric" meant. He replied:

> Pre-historic would also be prior to the arrival of Europeans in an area going back for an indefinite period in time, as long as there is evidence of human occupation (ibid).

Crown counsel consistently used the phrase "aboriginal times" when examining John Dewhirst (ibid: 176 - 309). Dewhirst did not contest its use because his opinion of Aboriginal culture as prehistoric concurred with the phrase. Dewhirst's equation of the term "Aboriginal" with "prehistory" was then reflected in Scarlett's use of the phrase "Aboriginal times" in opposition to "recent times" within his final judgement [*R. v. Van der Peet* 3 C.N.L.R. 160 (1991)].

Dewhirst also conveyed related social evolutionary ideas when under cross examination by defence counsel. When he was asked if there were general Stó:lσ laws Dewhirst retorted:

> Well, I wouldn't say that -- that there is such a thing as -- as a Sto:lo law that -- that is somehow part of a higher jurisdiction throughout the Sto:lo culture area...I would disagree with you, with the notion that there's some kind of, you know, sort of Sto:lo government or something. (Court Transcript for John Dewhirst, 29/06/1989: 273)

The response indicated that Dewhirst's understanding of "law and government" stemmed from the European model of centralized state government and law. Instead of Dewhirst considering that this model was relative to a particular way of thinking (i.e. Eurocentric) he assumed the definitions to be ahistorical and universal. In his view the Stó:lσ people were interpreted as a "band," as opposed to a tribal culture, with no type of central "law and government." In other words, the Stó:lσ people represented an earlier prehistoric phase in the development of human civilization where they lived by customs (not law) and local kinship (not civil government).

What Scarlett did not take note of was that the defence lawyers had successfully

disputed Dewhirst's anthropological opinion. They argued that much of the anthropological literature Dewhirst had relied upon had come from anthropologist Dr. Wayne Suttles (ibid: 305 - 308). Suttles had been of the opinion that the Stó:lō groups were tribal. When defence counsel put this to Dewhirst he replied that "tribe" had a variety of meanings and that he was using it for "the purpose of comparing levels of social organization" (ibid: 308). Scarlett chose to ignore that Dewhirst had affirmed the theoretical relativity of the term[35] and by extension, the relativity of the term "band" as well.

In my Introduction I briefly described the history of social evolutionary thinking in the western academic discipline of ethnology and anthropology. Dewhirst's definition of "band" springs from the 1950s resurrection of social evolutionary anthropology by Julian Steward and Elman Service. However, by the late 1960s anthropologists criticized both Service and Steward for scanty real world evidence that supported their band society concepts. Anthropologist Robin Riddington commented on this in his review of two anthropology conferences held to discuss band societies.[36] Riddington stated that Steward's and Service's models:

> were limited by the scarcity and unreliability of information from many areas, and that neither Steward's composite band nor Service's virilocal band adequately reflected the social realities found by the ethnographers (Riddington 1971: 830).

Further, Service himself revised his typology through subsequent books and articles[37] to the

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[35] For more comprehensive coverage of the tribe concept see Kennedy 1993.

[36] The first conference entitled *Man the hunter* (1965) was held in Chicago and sponsored by the Wenner Gren Foundation and the second entitled *Band organization* (1965) was held in Ottawa and sponsored by the National Museum of Canada.

[37] See Service 1975. *Origins of the state and civilization: Process of cultural evolution*. New York: Norton and Co.. And see Service 1978. Classical and modern theories of the origins of government. In *Origins of the state: The anthropology of political evolution*, eds. Cohen and Service. New York: Norton and Co..

point where he out and out rejected the general use of the "band" and "tribe" signifiers (Kennedy 1993: 111 - 114).

Another persuasive influence on Scarlett may have been that in Canadian common law jurisprudence, the band - tribe distinction had already been transformed into an acceptable legal test nine years earlier in the 1980 case of *The Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*. In that case, Federal Court Justice Mahoney likewise ruled that an Aboriginal group, the Inuit of the community of Baker Lake in the North-West Territories, to be a band culture. Mahoney ruled:

> The fact is that aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish to survive. (*Baker Lake* 227 (1980) in Asch 1984: 53 - 54).

Once Scarlett had ruled that the Stó:lσ were a band culture he then selectively addressed the rest of the trial evidence to support his conclusion.

The defence had argued that the Stó:lσ practice of bartering and trading for fish had evolved into selling fish. The Hudson's Bay Company (hereafter HBC) archival documents (Fort Langley journals) were used as evidence that between 1827 and 1846 (before the assertion of British sovereignty) the Stó:lσ traded salmon extensively with the HBC Fort Langley on the Fraser River. Then in the 1850s, when money was introduced into the region, the Stó:lσ began trading salmon for cash.

To negate this critical piece of the defence's argument, Scarlett partially relied on Dewhirst's testimony. In Dewhirst's opinion there were two types of fish traded in the HBC Fort Langley/Stó:lσ salmon trade. Dewhirst argued that the Stó:lσ had traded nominal amounts of dried salmon to the HBC fort staff, which the staff used for daily consumption

whereas the Stó:lσ traded large amounts of fresh salmon which the HBC traders then barrelled and sold to external markets. Dewhirst concluded that the Stó:lσ people only created a surplus in salmon in any "regularized systematic kind of exchange" to fuel the trade in fresh fish which was driven by HBC export markets and not Stó:lσ Aboriginal trade patterns (Court Transcript for John Dewhirst, 30/06/1989: 261). Scarlett ruled that:

> It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic [*R. v. Van der Peet* 3 C.N.L.R. 156 (1991)].

Ironically, Stó:lσ witness Francis Phillips testimony drew attention to this external distinction between an Aboriginal fish trade from a European market trade when he queried:

> ...I'm a little confused. What is the difference between trading with an Indian and trading with a non-Indian. It got me a little mixed up. That's a toughie for me?(Court Transcript for Francis Phillips, 20/06/1989: 37).

While Scarlett had earlier stated that most of the Stó:lσ witness testimony spoke of "recent times after the settlement in the Fraser Valley" (ibid: 157) he now felt free to select Stó:lσ "oral evidence" in support of his own historical conclusions. Scarlett stated that:

> This court was not satisfied upon the evidence that Aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes (ibid: 160).

What Scarlett neglected to note was that all Stó:lσ people had been legally barred from selling Indian food fish salmon for over a century. As defence witness Tilly Guitterez intimated:

> ...the only disgrace part of it is the law that disgraces me from being a... I don't know, disobeying the law of Fisheries in buying fish (Court Transcript for Tilly Guitterez, 31/05/89: 27).

In the court context, the Stó:lσ witnesses were very reluctant to admit to these "criminal" acts or to implicate other Stó:lσ people as "criminals." Thus, Stó:lσ oral evidence only made

"occasional or incidental" references to illegal salmon sales.

Scarlett attempted to construct a chain which linked his interpretations of Stó:lσ culture and fishing from the past to the present. He used three distinct links; 1) the pre-historic sense of the Stó:lσ being a band culture without a commercial fishery, 2) the size of the 1827 - 1846 Stó:lσ/HBC fish trade being a result of European markets and not an extension of pre-European contact Stó:lσ practices, and 3) his selective reading of the Stó:lσ witnesses testimony to rule that all fish trade and sales were incidental and opportunistic. Yet Scarlett had stated that in "Aboriginal times" the Stó:lσ did trade fish occasionally and incidentally. This evidence could have provided legal grounds for a Stó:lσ Aboriginal right to trade, barter and perhaps sell fish at an occasional and/or incidental limit.

Paradoxically, if Scarlett was to legally affirm a commercial Aboriginal right he required evidence of pre-European Stó:lσ fish trading practices which contained European elements of trade and commerce (i.e., regularized market trade). Scarlett privileged the colonial idea that before European contact Aboriginal culture was like a discreet material object with unchanging boundaries. In Scarlett's view, once the Stó:lσ people began large-scale trading in fish with HBC traders their Aboriginal culture was thereafter less Aboriginal because it had adopted European customs. But as legal scholar Andrea Bowker queried, "why is it that the arrival of hungry White settlers on the British Columbia coast cannot be characterized as the biggest opportunity for trade the Sto:Lo had ever encountered?"(Bowker 1995: 22).

In summary I contend that Scarlett drew his conclusions in concurrence with the Crown's arguments. Scarlett defined authentic Aboriginal practices as those which occurred pre-European contact and required that European elements of trade and commerce be present

within pre-European contact Aboriginal society. However, Scarlett stated that Stó:lσ oral testimony was not up to his standard of "historical record" evidence although he would later use it to support his own particular historical conclusion. Scarlett made it virtually impossible for the Stó:lσ litigants to prove that an Aboriginal fishing practice was commercial like before European contact or could evolve into one after contact.

Section Three: iii) Scarlett's response to state fisheries administration

At trial the Crown sought Stó:lσ admissions that Stó:lσ people had sold Indian food fish. These admissions were difficult to obtain for the reasons I mentioned earlier but occasional references were made. As Francis Phillips commented:

> Oh, there's people up every -- if I had -- if I wanted, I could be a rich man and never have to worry. I wouldn't have to sneak around anymore. I'd be gone while the gettin's good. (Court Transcript for Francis Phillips, 20/06/1989: 49).

By having the Stó:lσ witnesses admit to selling fish the Crown could then emphasize that many Stó:lσ people had committed illegal acts. Scarlett's ruling responded to this Crown strategy because his ruling also implied that the Stó:lσ were asserting a civil right to be law-breakers rather than an Aboriginal right to observe the dictates of their own culture (Bowker 1995: 24). The success of the Crown's strategy was contingent upon Scarlett being socialized to and supportive of the colonial and state prerogatives which unilaterally imposed the categories of "Indian" and "Indian food fishery" onto First Nations. As legal scholar Steven Winter comments:

> ...although narrative may be employed on behalf of the existing order, this use of narrative as authority is persuasive precisely because it evokes meaning that is already institutionalized (Winter 1989: 2228).

Although Scarlett's previous definitions had already barred the existence of a commercial Aboriginal right to fish, he still felt obliged to comment on the illegal sales of salmon caught under Indian food fish licenses when he stated:

> It was made apparent from the outset of this trial that despite the nominal amount of fish involved in this case, the illegal catch and sale of Indian food fish is of immense size and consequence [*R. v. Van der Peet* 3 C.N.L.R. 160 (1991)].

Scarlett implied that the Stó:lσ breached the exercise of their Aboriginal rights by selling Indian food fish which in turn indirectly reinforced the legitimate role of the state, through DFO, to enforce the Stó:lσ people's compliance with the federal regulations. By first identifying the Stó:lσ as primitives without complex European-styled institutions it necessarily followed for Scarlett that Stó:lσ Indian food fishers who sold salmon remained criminals who abused their state delegated privileges.

Section Four: *Van der Peet* at the B.C. Supreme Court in 1991

Dorothy Van der Peet's legal team appealed Scarlett's ruling. The appeal was again based on the defendant's original argument. On appeal, two parties were granted intervener status: The Pacific Fishermen's Alliance and The Fisheries Council of B.C.. The Fisheries Council of B.C. is the central association for the Pacific coast's major fishing companies. The Pacific Fishermen's Alliance was the forerunner to the Pacific Fishermen's Defence Alliance and is a commercial fishing industry funded organization. These organizations represent commercial salmon fishing interests that oppose the expansion of Aboriginal interests into the commercial fisheries (Newell 1993: 176). The higher courts would also allow First Nations

and tribal organizations the right to argue in support of Van der Peet's claim.[38]

Section Four: i) B.C.S.C. Judge Selbie's view of state powers and his Liberal legal view of Aboriginal rights

On August, 14, 1991, judge Selbie released his ruling as follows:

> Appeal allowed on question of whether the aboriginal right to fish includes the right to sell or barter. The Sto:lo people's aboriginal right to fish includes the right to barter or sell. The issues of extinguishment and, if necessary, infringement and justification were returned to trial for determination [*R. v. Van der Peet* 3 C.N.L.R. 161 (1991)].

Selbie reinterpreted *Sparrow* to support a particular perspective on state sovereignty. Selbie ruled that Canadian parliamentary powers were supreme and that constitutional and legal arrangements put into place since the assertion of British sovereignty could implicitly extinguish existing Aboriginal rights without legislation explicitly spelling it out. Selbie selected one fragment from the SCC's decision in *Sparrow* to accomplish his reinterpretation as follows:

> It is significant, in my judgement, that the Court made this pronouncement regarding the test for extinguishment in the context of a discussion of *Calder*, which was concerned with the colonial period, and also the Court did not include express statutory language as part of its test. *I therefore conclude that express statutory language is not a requirement for extinguishment* (ibid:167).

Selbie decided upon this reinterpretation because he wished to diverge from *Sparrow*'s general legal guideline that pre-1982 Canadian legislation had to be clear and plain in order to extinguish Aboriginal rights. Selbie then argued against *Sparrow*'s affirmation of the strict

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[38] The rights to intervene in Aboriginal rights cases derives from the Supreme Court's post *Constitution Act*, (1982) view that the increasing role of the Canadian judiciary in Canadian society on constitutional matters necessitated that interested parties, not directly involved in constitutional litigation, but whose interests could be impacted by the outcome, be given a hearing. Granting interveners legal hearings clearly indicates the seriousness by which the court system considers the social responses to constitutional disputes as well as how courts have role in choosing which legal arguments and social issues will be admitted in court.

fiduciary code of conduct required of Crown agents in their dealings with Aboriginal peoples from the *Royal Proclamation of 1763* onwards. Selbie stated that such a code could not have been met "so long after these historical events to regard intention at a time of uncertain law" (ibid). What Selbie neglected to mention was that between 1750 and 1921, federal Crown officials acknowledged an Aboriginal right of title through sixteen treaties with Aboriginal peoples from Nova Scotia to the North-West Territories. Selbie also chose to ignore the legal significance of the fact that B.C. colonial officials made fourteen treaties with First Nations on Vancouver Island and then elected to halt the process in 1854 (Tennant 1990: 17 - 68).

In response to the trial evidence, Selbie reprimanded Scarlett for using erroneous contemporary tests for "marketing" when considering the nature of the Aboriginal right. Selbie also stated that the expert witness testimony, albeit comprised of shrewd opinion, nevertheless lacked hard evidence. He in essence implied that all of the trial's social scientific evidence was "soft." By negating this type of expert witness evidence from any "objective" ideological authority, Selbie unhinged Scarlett's ruling from any anchor in anthropological "fact" (ibid: 165). Instead of selecting a professional anthropological opinion for defining Aboriginal society Selbie relied on American Justice Marshall's natural law perspective (discussed in the last chapter in relation to *Sparrow*). In his view, the Aboriginal right evolved from antiquity and became increasingly restrained by religion, custom and social change. After 1846, the Aboriginal right was considered part of Canadian common law and thereafter subject to Canadian regulation.

Selbie did not support the view that Van der Peet's commercial fishing right continued to exist under the protection of section 35. Selbie's marginal treatment of the Crown's fiduciary duty, tied with his reinterpretation of *Sparrow*'s extinguishment guidelines as

confined to the colonial period in B.C. before 1871, paved the way for him to assert that B.C. salmon regulations since Confederation had the authority and did extinguish the commercial component to Van der Peet's commercial Aboriginal fishing right. Despite opposing interpretive choices both Selbie and Scarlett came to the same contemporary conclusion: Van der Peet's commercial Aboriginal fishing right does not exist today.

Section Five: The B.C. Court of Appeal's 1993 ruling

Van der Peet[39] appealed Selbie's decision to the B.C. Court of Appeal. The BCCA considered *Van der Peet* at the same time as *Delgamuukw, Gladstone, and N.T.C. Smokehouse*. On June 25, 1993, the BCCA released their rulings on *Gladstone, Van der Peet and N.T.C. Smokehouse* recorded in 4 C.N.L.R. 75 - 97, 221 - 270 and 158 - 220 (1993), respectively. In *Van der Peet*, the appeal was dismissed and the conviction against her was restored. BCCA Judge Macfarlane wrote the majority ruling with Judges Taggart and Wallace concurring. BCCA Judge Lambert and Hutcheon wrote separate dissenting opinions.

Section Five: i) The B.C.C.A. majority's ruling

In *Delgamuukw*, Macfarlane had stressed the danger that old, inappropriate legal concepts could be unconsciously applied in Aboriginal cases in a way that would fail to uphold the purposes of section 35 (ibid: 222). Macfarlane made this point to ostensibly affirm Dickson's statement in *Sparrow* that Canadian courts must be sensitive to the Aboriginal perspective when ruling on the content of their rights by reference "to that which is integral to

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[39] Van der Peet's defense team (L. Mandell, L. Pinder, and Brenda Gaertner) continued the appeal process on the same legal arguments. At the BCCA level, they were joined by the interveners - the Alliance of Tribal Councils and the Cape Mudge Indian band. The Crown's legal team got a major substitution with Mr. Kier and Mr. Sperling being replaced by I.G. Whitehall, S.D. Frankel, M.M. Koenigsberg, and J.A. Donnici. The Crown's intervener list was joined by the Canadian National Railway Co..

their distinctive culture" (ibid). In contradiction to this directive, Macfarlane in *Van der Peet* reaffirmed Scarlett's social evolutionary definition of Aboriginal culture (ibid: 228). He, like Scarlett, referred to the period before contact as "aboriginal times." Macfarlane ignored the Aboriginal testimony and ruled that an Aboriginal practice which arose because of European influence (as the BCCA majority defined it) would not qualify as an Aboriginal right.

Macfarlane used *Sparrow*'s phrase of "integral to their distinctive culture" as the definitive legal test for determining the significance of an Aboriginal practice to the Aboriginal society. However, again like Scarlett, Macfarlane confused *Sparrow*'s use of the term "distinctive" culture with "distinct" culture because he defined Stó:lσ Aboriginal culture to be whatever was left over following a comparison with non-Aboriginal culture (Bowker 1995: 26-27). The end legal result was that the BCCA majority decision affirmed and reinstated Scarlett's interpretation and conclusion: Dorothy Marie Van der Peet's Aboriginal right to catch and sell fish was created as a result of trade with Europeans and was not authentically Stó:lσ. Therefore, the Stó:lσ did not have an Aboriginal right to sell Indian food fish.

Section Five: ii) B.C.C.A. Justice Lambert's dissenting opinion

I argue that Lambert's opinion offered the only incorporative strategy in *Van der Peet* in accordance with *Sparrow*'s directives. Lambert argued that the Stó:lσ had the Aboriginal right to sell fish, which continued below the state's jurisdiction to conserve and manage the fisheries (ibid: 264). To reach this conclusion Lambert adopted a methodology he thought would accord more with the Aboriginal perspective. In the process he criticized the dominant perspectives judges used to identify Aboriginal rights. He outlined these perspectives as follows; 1) viewing of a particular activity according to a purpose of regulation or 2) viewing

how the custom worked in the culture in question. Lambert stated that both views accorded more with the view from the settling nation where the first considered the Indian food fisheries as a part of the Aboriginal right, an interpretation ostensibly rejected in *Sparrow*, and the second was said to also privilege an outside power of definition. Lambert illustrated that he was aware of the fact that legal rulings on Aboriginal rights were shaped by judges' colonial and external interpretations. Lambert's alternative was what he called "the social theory" (ibid: 253).

Lambert's social theory attempted to place the Aboriginal custom in relation to how the Aboriginal group conceived of it. Lambert stated that this approach was in accordance with American jurisprudence on Indian rights (ibid: 263). Lambert then argued that Van der Peet's Aboriginal right to sell fish should be in keeping with the original Aboriginal right to fish which was to obtain a "moderate livelihood" from the resource (ibid). Ironically, Lambert did not criticize his own external imposition that an Aboriginal right to sell fish was to a moderate livelihood limit. The Stó:lσ witnesses at trial did not claim such a limit as part of their customs or social identity. Despite Lambert's criticism of other judicial perspectives, the implementation of his social theory was still an external judicial imposition.

In order to create his legal limits on the Aboriginal right, Lambert looked to "... circa the 1800 era" (ibid: 262 - 263) as the proper time period to define the florescence of Stó:lσ fish trading and bartering. Lambert's focus inferred that after the 1846 assertion of British sovereignty, Aboriginal cultural practices were subsumed and frozen to their state of use when the Canadian common law recognized them as common law rights. And again, Lambert assumed that the authentic state of Aboriginal fishing practices before the common law was to sustain a moderate livelihood only. I argue that the Stó:lσ, like all Pacific coastal Aboriginal

groups, lived in social systems which valued prestige, wealth, rank and not economic moderation as Lambert concluded (Carlson 1997: 45 - 46).

I argue that Lambert's limit was a deliberate attempt to calculate a fishing limit that could be used today as a legal guide in negotiations between DFO and First Nations for future commercial fish quotas. Lambert's strategy attempted to balance his validation of the Stó:lσ's legal claim in a way which would limit his validation's impact on the Pacific commercial salmon fisheries status quo. Due to this strategy, Lambert was accused of being political rather than judicial by BCCA Judge Wallace who argued that:

> the notion of what constitutes a "moderate livelihood" is inherently subjective. Even if it could be ascertained how, and more importantly, by whom, such a fluid standard could be determined, the extent of which the sale of salmon was realizing more than a "moderate livelihood" would be impossible to police. Indeed commercial sale with a view to achieving an excessive lifestyle is difficult to discern from commercial sale from more modest objectives...
>
> ... With deference, I would suggest the appropriate "social control" required to protect and further the aspirations of Aboriginal society should be provided by negotiated treaties or other agreements rather than by extending the nature and scope of Aboriginal rights recognized by the common law at the time of sovereignty (ibid: 243 - 244).

Section Six: Summary

In conclusion, the charges brought against Van der Peet provided the Stó:lσ Nation with a counter-hegemonic legal opportunity to help empower their position within the management and control of the Fraser River salmon fisheries. Hoping for a fair trial but aware that the court could also be supportive of the dominant hegemony of the commercial fisheries against the commercialization of the Indian food fisheries, the Stó:lσ Nation chose the Van der Peet's case because they thought her modest circumstances might facilitate a more sympathetic judicial response.

How the judges in *Van der Peet* attempted to grapple with conceptions of Aboriginal culture and commerce, *Sparrow*'s general incorporative legal strategy, the current state of the fisheries status quo and the AFS controversies, brought about significant divergences in their judicial interpretations. B.C. Supreme Court Judge Selbie reprimanded trial judge Scarlett for major interpretive errors and then attempted to reinterpret *Sparrow*'s jurisprudence to his own particular extinguishment view. The BCCA majority reaffirmed Scarlett's interpretations while Mr. Justice Lambert dissented with an alternative incorporative strategy. I argued that Lambert's dissenting opinion provided an extension of *Sparrow*'s incorporative legal limits. Lambert was the only judge to validate a commercial Aboriginal fishing right as existing today. Yet like *Sparrow*, he ensured ultimate state controls and limits to the legal recognition of the Aboriginal fishing right in order to soften the blow to the Pacific salmon fisheries status quo.

CHAPTER FOUR: *Van der Peet* & the Supreme Court of Canada, 1995 - 96

Section One of this chapter begins with a summary of current socio-political forces in B.C. which influence Aboriginal rights litigation. I argue that the three main socio-political forces are; 1) the latest DFO fleet rationalization scheme, 2) the nascent B.C. treaty process, and, 3) the Agreement in Principal (hereafter AiP) between the Nisga'a, the province of B.C. and the federal government. In Section Two, I discuss the SCC's legal ruling in relation to the ideologies and social relations outlined in the Introduction. Section Three analyzes the SCC's two dissenting opinions. Section Four summarizes my analysis.

Section One: Current socio-political influences

On March 29, 1996, then DFO minister, Fred Mifflin, announced the latest in federal rationalization plans to address dwindling fish stocks. It has been dubbed "The Mifflin Plan," and its drive was to rezone the entire coast into new regulatory areas and further reduce the commercial fishing fleet. The specific 3 year goal was to shrink the fleet by half. In order to facilitate the changes the Mifflin Plan set in motion amendments to the *Fisheries Act*, new partnering arrangements and the creation of "independent" tribunals to rule on commercial fishing licence privileges. In effect, DFO shifted some of its management responsibilities from judicial and legislative authorities into the hands of private commercial fisheries interests (Glavin 1996: 81 - 82).[40] Similar to the Davis Plan, the Mifflin Plan would privilege well capitalized commercial fishers with strong ties to the major fish processing and packing

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[40] For more coverage of the Mifflin Plan see Fisheries and Oceans, Canada, March 29 1996, *Background paper B-PR-96-07E*, and also Fisheries and Oceans 1996 new release *Minister announces plan to revitalize salmon fishery NR-PR-96-15E.*

companies and push smaller independent commercial fishers out of the industry.

During the days of the Davis Plan, First Nations had mobilized local resistance to DFO initiatives without the constitutional recognition of their Aboriginal rights. By the time *Van der Peet* reached the SCC, First Nations of coastal B.C. had *Sparrow* and the continuing existence of the AFS as legal and political indicators that an Aboriginal fishing right was potentially a commercial one. Since the 1993 BCCA decision in *Van der Peet*, I believe two other socio-political forces evolved which indirectly supported Van der Peet's legal claim. These forces were the B.C. Treaty process and the Nisga'a AiP.

In 1990, B.C.'s ruling Social Credit party established a task force and a ministry of Aboriginal Affairs to respond to First Nations' blockades, lobbies and claims. At that time, leaders of the B.C.'s New Democratic Party (hereafter NDP) promised that if they were elected they would recognize Aboriginal rights and negotiate treaty resolutions with Aboriginal groups. The NDP achieved power in 1991. In 1993, they formed the B.C. Treaty Commission, and conditionally recognized Aboriginal rights. The Commission moved towards facilitating negotiations between First Nations, and the B.C. and Canadian governments with the intent of resolving Aboriginal land and rights claims to ownership and jurisdiction of traditional Aboriginal territories and resources (Newell 1993: 22). To date, over fifty First Nations in B.C. are now in the process but, as yet, there has not been one ratified treaty. The only B.C. treaty which is close to ratification is the Nisga'a Treaty, which evolved out of a much older federal government initiative.

Following the 1973 *Calder* decision, the Nisga'a were the first Aboriginal group to enter the federal government's new comprehensive claims program (administered through the federal department of Indian Affairs). The program was created in 1976 to address and

resolve outstanding First Nations' claims to the Aboriginal right of title (Tennant 1990: 172). Fifteen years later, in 1991, B.C. provincial representatives joined federal officials and the Nisga'a at the negotiating table. It was the first time since 1854 that B.C. officials acknowledged an unextinguished Aboriginal right of title and sought to resolve it through treaty-making. In 1996, the Nisga'a signed an AiP and paved the way for the final negotiation of the first contemporary treaty within B.C.[41]

The AiP's fishing provisions affirmed the Aboriginal right to fish for food, ceremonial and societal purposes. The provisions also created additional commercial fishing allocations to be set at historic Nisga'a catch levels and fishing locations (AiP: appendix H). These provisions limited the Nisga'a right to harvest and sell salmon to the ultimate jurisdiction of the *Fisheries Act* where the federal Minister of DFO would continue to set; 1) the allowable catch levels, 2) the salmon escapements pursuant to conservation and, 3) could limit the Nisga'a salmon harvest entitlements in accordance with the previous conditions (AiP, Fisheries General provisions: 1 - 8, p. 34). As well, $11.5 million was promised to purchase commercial fishing boats and licenses for the Nisga'a within the coast wide commercial fishing fleet (ibid: 47).

While the AiP's fisheries provisions were to be cast in a "Harvesting Agreement" outside of the final Nisga'a treaty (ibid: 35), these provisions still represented that federal and provincial governments were in support of a limited commercial Aboriginal fishery (defined and structured in striking similarity to BCCA Judge Lambert's 1993 "moderate livelihood" legal opinion in *Van der Peet*). I believe the Nisga'a AiP's fisheries provisions indirectly

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[41] On July 15, 1998, the Federal Treaty Negotiations Office in Vancouver announced that the final terms of the Nisga'a's final treaty were completed.

added further support to the counter-hegemonic claim of the Stó:lσ in *Van der Peet* because state representatives had supported a limited commercial Aboriginal fishery for an Aboriginal group in B.C., who like the Stó:lσ people, had never ceded their Aboriginal right of title, had traded with HBC traders (as early as 1831 - at Fort Simpson on the Nass River) and who had been subject to the same unilateral impositions of the *Indian Act* and the *Fisheries Act*. Despite *Sparrow*, the AFS, the B.C. treaty process and the Nisga'a AiP, I argue that the SCC majority ruling in *Van der Peet* legally thwarted the potential for a proliferation of First Nations' claims to a commercial Aboriginal salmon fishing right thereby indirectly appeasing dominant commercial fishing interests whose opposition to commercial Aboriginal fishing claims had only intensified following the implementation of the Mifflin Plan. The SCC majority conserved Sparrow's legal definition of a non-commercial Aboriginal fishing right and deferred to political negotiations for any expansion of Aboriginal salmon fishing entitlements.

Section Two: *Van der Peet* goes to Ottawa (at the Supreme Court of Canada, 1995)

On November 27, 28 and 29 of 1995,[42] the SCC heard the appeals of *R. v. Van der Peet, R. v. Gladstone and R. v. N.T.C. Smokehouse.*[43] At the Supreme Court level, Van der Peet's legal counsel modified their original legal argument. The Stó:lσ adopted BCCA Lambert's dissenting opinion into their legal claim by arguing that Van der Peet's Aboriginal

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[42] The Canadian Public Affairs Channel (CPAC) videotaped the SCC proceedings and broadcast them in late November of 1996. I reviewed these tapes as part of my research.

[43] New interveners in support of the Crown in all three cases were the Attorney General of Quebec, the B.C. Fisheries Survival Coalition, and the B.C. Wildlife Federation. Interveners in support of Van der Peet, Gladstone and N.T.C. Smokehouse were the First Nations Summit, Delgamuukw, H. Pamajewon, Roger Jones, Arnold Gardner, and Jack Pitchenese.

right to barter, trade and sell fish was to support a moderate livelihood. I believe this adoption was prompted by the Stó:lσ's acknowledgement that Lambert's view offered the only authoritative legal validation of any part of Van der Peet's claim. This particular modification of Van der Peet's legal argument was an excellent illustration of the ability of court rulings to influence the direction of counter-hegemonic legal strategies.

Crown counsel maintained their original legal arguments and further argued that the SCC should defer to Scarlett's ruling. The Crown's latter argument was based on the legal principle of *stare decisis. Stare decisis* directs appellate courts to consider only points of law and not to reconsider the trial judge's findings of fact. Only if a trial judge is found to have performed clear and palpable errors are appellate judges to then reconsider the trial judge's facts (Bell and Asch 1996: 39 - 40).

On August 21, 1996, the SCC released its judgements [137 Dominion Law Review (hereafter D.L.R.) (4th) 289 - 528 (1996)]. The release date fell after the implementation of the Mifflin Plan, after the bulk of the 1996 commercial salmon fisheries, and after the ratification of the Nisga'a AiP. Supreme Court Chief Justice Antonio Lamer wrote the majority opinion which was concurred by Justices La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major. Justices L'Heureux-Dubé and McLachlin wrote dissenting opinions. Lamer ruled that the barter, trade and sale of fish was not a significant, integral or defining feature of Stó:lσ society. While the exchange of salmon itself was considered a significant and defining feature of Stó:lσ society, the exchange of fish, as part of the interaction of kin and family, was not significant enough to ground a claim for an Aboriginal right to exchange fish for money or other goods (ibid: 327). Since Van der Peet's claim had failed to be considered as an Aboriginal right, the *Sparrow* tests for state extinguishment, infringement and

justification were deemed unnecessary. The Van der Peet's appeal was dismissed and Scarlett's conviction against her was restored.

Section Two: i) The SCC majority's reproduction of state sovereignty

Lamer reasoned that section 35's purpose was to reconcile Aboriginal rights with the sovereignty of the Crown and Canadian society. Lamer paraphrased from legal scholar Mark Walters to state that the intent of reconciliation[44] was as follows:

> It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal people with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each. (ibid: 309)

While Lamer ostensibly argued for the legal consideration of both common law and Aboriginal perspectives, he affirmed Canada's legal founding narrative through Marshall's doctrine of Discovery over and above consideration of any Aboriginal perspective on Aboriginal rights. Lamer's support for Marshall was the same as what underlay the *Sparrow* decision as well as all the lower court judgements in *Van der Peet*: upon the assertion of British sovereignty Aboriginal customary rights (consistent with the European concept of sovereignty) fell under the legal jurisdiction of British *cum* Canadian common law. Thus, Lamer's balance of "equal" consideration was implicitly tipped in favour of Canadian sovereignty *a priori*.

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[44] Lamer next cited Mark Walters 1992. British imperial Constitutional law and Aboriginal rights: A comment on *Delgamuukw v. British Columbia.* In 17 *Queen's L.J.* 17(350): 412 - 413, and then Brian Slattery 1992: 121 - 122. These citations were used to support the Court's view that Aboriginal rights were intersocietal law stemming from long standing practices linking the Aboriginal and non-Aboriginal communities. Walters qualified his understanding of this meeting of legal cultures by stating that "a morally and politically defensible conception of Aboriginal rights will incorporate both legal perspectives."

Section Two: ii) The S.C.C. majority's liberal legal perspective

Lamer stated that the job of the present SCC was to define the test for identifying Aboriginal rights to be protected by section 35 (ibid: 294). In aid of that process, Lamer attempted to affirm *Sparrow*'s "purposive analysis" by stating that a constitutional provision must be understood in light of the interests it was meant to protect. Lamer then stated that the "purposive analysis" principle had been articulated in *Sparrow* in relation to the rights protected under the *Canadian Charter of Rights and Freedoms* and was stated to apply equally to the interpretation of section 35(1) (Ibid: 300). However, Lamer then ruled that Aboriginal rights could not be defined on the same liberal enlightenment, philosophical precepts as general *Charter* rights because Aboriginal rights were "granted" to a "special" segment of Canadian society (ibid). Therefore, Lamer separated Aboriginal rights out from *Charter* rights and subjected Aboriginal rights to "specialized" constitutional treatment. Lamer's terms of "specialness" and "granted" subtly conveyed *St. Catherine's Milling*'s legal view that Aboriginal rights were granted to Aboriginal peoples by the European sovereign power rather than recognized by Canadian courts as pre-existing legal rights. Similarly, Lamer reasoned that:

> the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal groups in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined (ibid)

Therefore Métis Aboriginal rights were separated for distinct constitutional treatment from other section 35 protected Aboriginal rights. Lamer did not specifically justify why Métis distinctness warranted distinct constitutional treatment instead he deferred that issue to when the SCC was presented with a Métis section 35 claim. Lamer's separation strategy was in

antithesis to *Sparrow* where Métis Aboriginal rights, like all other Aboriginal rights, were to be legally viewed like evolving *Charter* rights. I argue that Lamer created the idea of Aboriginal "specialness" and Métis "distinctness" to inaugurate the SCC majority's decent into a social evolutionary view of Aboriginal culture.

The retreat to the social evolutionary view of Stó:lσ Aboriginal culture was well underway when Lamer affirmed *stare decisis* and deferred to trial judge Scarlett's findings of fact. Lamer cited a barrage of case precedents[45] to bolster the appearance that he was legally bound to *stare decisis*. Lamer then attempted to configure his own "'objective" view of Van der Peet's Aboriginal right which reflected and validated Scarlett's interpretations to infer the conclusion that there was no legal reason not to support *stare decisis*.[46]

Section Two: iii) The S.C.C. majority's social evolutionary perspective and and use of positivist methodology

Lamer said that the intent of section 35 was to protect existing Aboriginal rights. He then began to chart out his judicial view on what an existing Aboriginal right was by citing the

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[45] Lamer cited from Judge Ritchie in *Stein v. The Ship "Kathy K"*, 2 S.C.R. 802 (1976), as well as the cases of *Beaudoin-Daigneault v. Richard*, 1 S.C.R. 8 (1991), *Laurentide Motels Ltd. v. Beauport (City)*, 1 S.C.R. 705 794 (1989), *Hodgkinson v. Simms* 3 S.C.R. 377 426 (1994), and lastly Judge La Forest in *Schwartz v. Canada* 1 S.C.R. 254 (1996) to reinforce that trial courts are accorded the resources to best determine the facts and therefore do define the correct facts.

[46] On last reply before the SCC on 29/11/1995, Mr. Rosenberg, defence counsel for NTC Smokehouse, took issue with the legal principle of *stare decisis*. He argued that while the facts may remain undisturbed, legal tests and interpretation of those facts can change. Further, he argued that the BCCA had already re-interpreted the legal findings on the facts in all three case of *Van der Peet, Gladstone* and *N.T.C. Smokehouse*. Secondly, he wished to make the point that there should be a distinction made between facts that pertain to the charges giving rise to the case and the facts that pertain to the constitutional questions. Facts can be determined in relation to the charge context quite easily, whereas the historical, oral historical nature of Aboriginal rights litigation and unresolved constitutional interpretation merits legal notice by the appeal judges. See CPAC video transcripts for *Van Der Peet, Gladstone,* and *N.T.C. Smokehouse* 29/11/95.

Australian High Court in the 1992 *Mabo* decision.[47] *Mabo* ruled that the "traditional laws and customs" of Aboriginal peoples were at the root of an Aboriginal right (Ibid: 308). Lamer relied on the 1995 Oxford Dictionary definition of "tradition" which stated that tradition meant "handed down from ancestors to posterity." Lamer assumed that legal interpretation should be focused solely on the "ancestral" part of Aboriginal culture as the source and content of Aboriginal rights. Therefore, the content of Aboriginal rights was reasoned to be legally found in the past before contact with Europeans (Ibid: 310 - 311).

What Lamer's ideological presumption neglected was the verb tense of "tradition" - which represents the continual and dynamic process of handing down from one generation to the next, *ad infinitum*. The active tense focus of tradition places significance on contemporary Aboriginal cultures whose members continually redefine and negotiate the content of what they consider to be "tradition" to themselves as a people. Whereas, Lamer's social evolutionary view assumed that traditional Aboriginal culture remained unchanged and static until contact with Europeans changed it from being Aboriginal. Thereby Lamer's understanding of contemporary Aboriginal cultural practices were compared and contrasted with a static conceptual object called "traditional" Aboriginal culture. Similar to Scarlett's and BCAA Judge Macfarlane's confusion of "distinctive" Aboriginal culture with distinct culture, Lamer reasoned that:

> the influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of

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[47] In *Mabo v. Queensland* [No. 2] 175 C.L.R. 1 (1992) the Australian High Court equated native title as a burden to the radical title of the Crown, as vested in the colonial government of Australia. They further stated that it was a fallacy to equate sovereignty and beneficial ownership of land whereby the acquisition of European sovereignty is said to have extinguished native title. However, the source of native title was said to be not just the occupation of a territory prior to contact with European nations, but **rather the traditional laws and customs** acknowledged and observed by the indigenous inhabitants. *Mabo* is significant for Canadian Aboriginal rights litigation because it shares a similar British colonial and imperial legal history.

> that influence. (ibid: 320)

Legal scholar Andrea Bowker described this interpretive focus as a:

> ... focus on "integral parts," rather than the "distinctive" culture. Focusing on discrete parts of a culture, and separating these from the culture in which they are rooted, may enable a court to more easily translate the interests of s. 35(1) into rights-talk (Bowker 1995: 27).

In identifying the particular Aboriginal right of an Aboriginal group, Lamer stated that:

> Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions (ibid).

Lamer's ruling assumed that it was possible for judges to interpret and segregate which specific non-European influenced cultural practices were integral and core parts of an Aboriginal society. Lamer's interpretations are significantly similar to anthropologist Julian Steward's social evolutionary model of "core cultures" (Kuper 1988: 239). Lamer's choice of the word "piggybacking," used to describe the relationship of incidental cultural practices to core cultural practices, implied that such interpretation was child's play - fun and easy to do. Lamer's conceptual model of Aboriginal culture illustrated the continuing power of Eurocentric positivist methodology and the judicial neglect of Aboriginal testimony with regard to the content of their Aboriginal culture.[48] As Mary Ellen Turpell commented:

> The perception of cultural differences as an imperative that may loosen or shift the paradigm of knowledge, rather than a cognitive gap to be filled, is one that has not yet been taken seriously in legal analysis (Turpell 1992: 44).

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[48] 19th century English ethnologist E.B. Tylor popularized that society and culture could be compared to a biological organism. See Bohannan and Glazer 1988. E.B. Tylor. In *High Points in Anthropology*. New York: Alfred Knopf: 64.

Section Three: S.C.C. Justices' L'Heureux-Dubé and McLachlin - dissenting opinions

Both Justice L'Heureux-Dubé and Justice McLachlin dissented from Lamer's ruling. Their dissension illustrated the serious lack of consensus and direction of the Supreme Court as one legal voice. Both McLachlin and L'Heureux-Dubé sought to affirm and build on *Sparrow*'s incorporative legal strategy by validating the Aboriginal fishing right claim premised on Charter-like interpretation and by subsuming their validation to Canada's fish conservation jurisdiction. I also argue that their legal strategies were similar to BCCA Justice Lambert's incorporative strategy. L'Heureux-Dubé's recognized Van der Peet's Aboriginal right as one to sell, trade and barter fish for livelihood, support and sustenance purposes [(137 D.L.R. (4th) 327 - 366 (1996)]. Whereas, Justice McLachlin set a global traditional livelihood limit of basic amenities and sustenance to Van der Peet's commercial Aboriginal right to fish.

Both dissenters assumed Lambert's tacit social evolutionary idea that the legal limits to a current Aboriginal fishing right could be determined by looking to the past. While all three judges appeared to look to the same past, their legal conclusions were somewhat different. Where Lambert presumed that Aboriginal societies (circa 1800 a.d.) harvested salmon resources to provide a moderate livelihood, L'Heureux-Dubé and Justice McLachlin found that Aboriginal societies only fished to provide basic survival and amenities (ibid: 367 - 398). Similar to BCCA Judge Lambert, both dissenters appeared unaware that coastal Aboriginal groups did not conform to the stereotype of small scale, hunters and gatherers whose whole cultural life was consumed with nothing but providing subsistence. I argue that the dissenters relied on their own versions of this stereotype to insert their respective legal salmon harvesting limits onto the contemporary exercise of a commercial Aboriginal fishing right.

Section Four: Summary

The Supreme Court of Canada majority in *R. v. Van der Peet* segregated Aboriginal rights from *Sparrow*'s Charter-like interpretations and the Métis from general section 35 Aboriginal rights interpretations. The SCC majority's rhetoric of reconciliation between Aboriginal rights, Canadian sovereignty and Canadian society was filtered through the Canadian judiciary's bias for Canadian sovereignty and common law as well as predicated on presumptions about authentic Aboriginal culture interpreted through positivist methodology. L'Heureux-Dubé and McLachlin affirmed BCCA Judge Lambert's interpretations and continued to argue against interpretive choices which relied on colonial understandings of Aboriginal societies. Yet, L'Heureux-Dubé and McLachlin also externally validated, defined and then limited Van der Peet's claim in ways which still used a social evolutionary understanding of Aboriginal culture.

The SCC majority offered no incorporation or validation of Van der Peet's counter-hegemonic claim despite the fact that the AFS and the Nisga'a treaty's Agreement in Principal had affirmed commercial fishing allocations to specific non-treaty First Nations within B.C.. Indeed, the SCC majority's ruling in *Van der Peet* showed the unpredictable and paradoxical role of court rulings in dominant hegemony. Where it appeared that the *Sparrow* decision seemed to take an unprecedented incorporative approach to section 35 protected Aboriginal rights, the SCC's decision in *Van der Peet* now contradicted and negated that approach in favour of a conservative return to a legal regime where Aboriginal rights were viewed colonially - as "special" common law rights dependant upon the goodwill of Canadian judges.

CHAPTER FIVE: *R. v. N.T.C. Smokehouse & R. v. Gladstone*

This chapter analyzes the court rulings in *R. v. N.T.C. Smokehouse* and *R. v. Gladstone*. I do not describe *N.T.C. Smokehouse* in the same depth as *Van der Peet*. The same social relations and ideologies which influenced the judges in *Van der Peet* also biased the rulings in *N.T.C. Smokehouse*. Section One analyzes *N.T.C. Smokehouse* from the trial to the Supreme Court level through subsections; i) Provincial Court Judge McLeod's 1988 ruling, ii) County Court Judge Melvin's 1990 ruling, iii) the B.C. Court of Appeal's 1993 ruling and, iv) the Supreme Court of Canada's 1996 ruling.

In *Gladstone*, the majority of judges affirmed the contemporary existence of a commercial Aboriginal fishing right. How the judges interpreted and limited their affirmation of that Aboriginal right indicated the judiciary's deference to state management of the fisheries, as well as their consideration of non-Aboriginal commercial fishing interests. Therefore, Section Two will analyze *Gladstone* in depth from the trial to the Supreme Court level through subsections; i) Provincial Court Judge Lemiski's 1990 ruling, ii) B.C. Supreme Court Judge Anderson's 1991 ruling, iii) the B.C. Court of Appeal's 1993 ruling and, iv) the Supreme Court of Canada's 1996 ruling. Section Three summarizes my analysis of both cases.

Section One: i) *N.T.C. Smokehouse* - B.C. Provincial Court Judge McLeod's 1988 ruling

The case of *N.T.C. Smokehouse* involved the Sheshaht and Opetchesaht Indian bands (member bands of the Nuh chah nulth Tribal Council) who live on Indian reserves in close proximity to Port Alberni, on the west coast of Vancouver Island. In September of 1986, under the authority of their Indian food fish licenses, band members caught chinook salmon

bound for the Somass River. They sold the surplus of their Indian food fish quotas to the on-Tsahaheh Indian reserve business of N.T.C. Smokehouse Ltd. (hereafter N.T.C. Smokehouse).[49] N.T.C. Smokehouse then sold the fish to non-Aboriginal fish processing companies (4 C.N.L.R. 1993: 210 - 211). N.T.C. Smokehouse was charged with buying and then selling the Sheshaht and Opetchesaht Indian bands' excess Indian food fish in violation of sections 4(5) and 27(5) of the *British Columbia (General) Fishery Regulations.*

The Nuh chah nulth tribal council chose to fight the charges. N.T.C. Smokehouse became the defendant and the federal government became the plaintiff. Both sides agreed at trial that before European contact, the Sheshaht and Opetchesaht peoples had lived in organized societies resident in the area where the fish subject to the charges had been caught. Both sides also agreed that the Somass River salmon fishery was an integral part of Sheshaht and Opetchesaht Aboriginal culture. One of N.T.C. Smokehouse's main legal arguments[50] was that the Sheshaht and Opetchesaht peoples have an Aboriginal right to commercially sell their Indian food fish because the catching and selling of salmon is an evolved Aboriginal practice of Sheshaht and Opetchesaht culture. N.T.C. Smokehouse also argued that the Aboriginal right to catch and sell fish was "unlimited" by definition and was now protected under section 35 of the Constitution. Since N.T.C. Smokehouse argued that the exercise of the Aboriginal right was unlimited, they stipulated that any infringement of that right had to be proven following *Sparrow*'s *Charter* limitations tests. The federal Crown's lawyers opposed

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[49] N.T.C Smokehouse Ltd. is a company duly incorporated pursuant to the laws of British Columbia and authorized to carry on business as a food processor. N.T.C. stands for Nuh chah nulth Tribal Council. All Nuh chah nulth peoples, through their respective *Indian Act* bands, have representative directors on the management board of N.T.C Smokehouse Ltd..

[50] To read the other arguments see *R. v. N.T.C. Smokehouse* 4 C.N.LR. 62 - 64 (1993).

this claim by arguing that any commercial Aboriginal fishing right had been extinguished by valid federal fisheries regulations dating back to 1878.

N.T.C. Smokehouse's defence used extensive Aboriginal testimony to chronicle the Sheshaht and Opetchesaht cultures' intimate connection to fishing and the Somass River. The defence also relied upon expert witnesses in anthropology, Patricia Berenger and Richard I. Inglis to describe Sheshaht and Opetchesaht fish trading and selling practices. Defence witnesses testified that before contact with Europeans the Nuh chah nulth peoples had traded within regional exchange networks. The first European to arrive in the Sheshaht's and Opetchesaht's area was Captain Charles Barclay in 1787. Thereafter, the Sheshaht and Opetchesaht peoples commenced salmon trading with coastal HBC traders, and then with the settlers of Vancouver Island, for European goods and later money to buy goods[51] (ibid: 205).

In 1988, *N.T.C. Smokehouse* was tried by Provincial Court Judge McLeod [*R. v. N.T.C. Smokehouse* B.C. Weekly Law Digest (hereafter B.C.W.L.D.) 163 (1988)]. McLeod ruled that the Sheshaht and Opetchesaht peoples have an Aboriginal right to fish in their traditional area. However, McLeod then ruled that the trial evidence did not support that they "were sellers and barterers of fish, and contrary, it appears that over the past two hundred years, what sales were made were few and far between" [*R. v. N.T.C. Smokehouse* 4 C.N.L.R. 171 (1993)]. For these reasons, McLeod upheld the charges against N.T.C. Smokehouse.

McLeod's reasoning was significantly akin to judge Scarlett's, Macfarlane's and Lamer's in *Van der Peet.* McLeod illustrated his own social evolutionary thinking when he stated:

The commercial fishery was a creation of modern man, unrelated to the

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[51] See BCCA Judge Lambert for discussion of the trial evidence in *R. v. N.T.C. Smokehouse* 4 C.N.L.R. 190 - 196 (1993).

Aboriginal fishing right (ibid: 185).

McLeod's statement conveyed the impression that Aboriginal culture was unrelated and distinct from modernity which then inferred that Aboriginal culture belonged in the past before modernity. McLeod did not define what he meant by "modern man" but I believe his presumption was clearly that modernity was a product of European culture only. Because McLeod had inferred that Aboriginal culture was a non-modern entity, it necessarily followed that Aboriginal culture could not evolve to include a commercial Aboriginal fishing right. McLeod's social evolutionary interpretation of Aboriginal culture was very similar to Scarlett's use of "Aboriginal times" in opposition to European "recent times" in *Van der Peet.*

McLeod also linked his interpretation of the Sheshaht and Opetchesaht's pre-European contact salmon trade with the "historical" period, when he stated that salmon trade and sales in the last 200 years were "few and far between." McLeod's conclusion was strikingly similar to Scarlett's blanket interpretation of the scale of Stó:lσ fish trading and fish selling as "occasional and opportunistic." Both trial judges first defined Aboriginal culture as distinct from European culture and placed it into the past before a commercial fishery and before "modern man." Paradoxically, the judges required that the Aboriginal right claimant prove that pre-European Aboriginal fish trading practices contained European elements of "commerce" but then the judges did not seriously consider the Aboriginal testimony as valid proof.

To further justify that an Aboriginal fishing practice could not evolve into a commercial right, both judges' ruled that Aboriginal fish trading and then selling practices lacked the necessary frequency and scale to be considered central to the respective Aboriginal culture. McLeod, like Scarlett, imposed his own view of what he considered was integral to

the distinctive Aboriginal culture by relying on social evolutionary thinking and non-Aboriginal historical records. However, McLeod, like Scarlett, did not consider how the ban on selling of Indian food fish had led the to underground practice of selling Indian food fish to non-Aboriginals which would rarely be recorded by non-Aboriginal historical documents and similarly, Aboriginal court witnesses would rarely admit to it because the practice was illegal. Instead both judges simply translated the absence of non-Aboriginal evidence into evidence of Aboriginal absence.

Section One: ii) *N.T.C. Smokehouse* - B.C. County Court Judge Melvin's 1990 ruling

N.T.C. Smokehouse appealed the decision and the case was heard by Judge Melvin of the County Court of Vancouver Island. On January 9, 1990, Melvin agreed with McLeod's ruling and dismissed the appeal [*R. v. N.T.C. Smokehouse* B.C.W.L.D. 704 (1990)].

Section One: iii) *N.T.C. Smokehouse* - the B.C. Court of Appeal's 1993 ruling and dissenting opinion

Leave to appeal Judge Melvin's decision to the British Columbia Court of Appeal was granted on February 15, 1990. In 1993, BCCA Judge Wallace, writing for the BCCA majority, ruled that:

> The nature and scope of the Aboriginal rights of the Sheshaht and Opetchesaht in this case were determined as a question of fact on the basis of the traditional practices integral to the Aboriginal society of the claimants' ancestors. Accordingly, the trial judge's ruling that the commercial sale of fish can not be characterized as an Aboriginal fishing right of the Sheshaht and Opetchesaht should not be disturbed [*R. v. N.T.C. Smokehouse* 4 C.N.L.R. 172 (1993)].

Similar to SCC Chief Justice Lamer's ruling in *Van der Peet*, Wallace relied upon the legal principle of *stare decisis* to affirm the trial judge's findings of fact. Also as in *Van der Peet*, Wallace supported a characterization of the Aboriginal right founded upon the "traditional"

practices of the "ancestral" Aboriginal culture.[52] In *N.T.C. Smokehouse*, the BCCA majority affirmed trial judge McLeod's social evolutionary perspective and upheld his conviction against N.T.C. Smokehouse.

BCCA Judge Lambert dissented from this view. Following his opinion in *Van der Peet*, Lambert again used what he had called the "social theory" of interpretation (ibid: 209). Instead of focusing on the historical records or expert witness testimony, Lambert first focused on the importance of the Somass River fishery to the Sheshaht and Opetchesaht peoples by citing the defence's Aboriginal testimony (ibid: 211). Lambert then rule that the Sheshaht and Opetchesaht peoples had an Aboriginal right to commercially fish for salmon to a moderate livelihood limit. Lambert then set what he thought the moderate livelihood level would be. He determined how many fish the Sheshaht and Opetchesaht peoples would be allowed to catch, trade and sell today by reference to the amount these peoples had caught and traded in the period between 1787 (European contact) and 1846 (the assertion of British sovereignty).

In Lambert's scheme, it is the coming of the Canadian common law in 1846, which set the deadline to the "moderate livelihood limit." Lambert did not argue how or why British *cum* Canadian sovereignty and common law had the power to freeze the exercise of the Aboriginal right to a quantifiable limit. Again, Lambert cited American jurisprudence as his main source of legal justification for a moderate livelihood limit which tacitly included his support for Marshall's doctrine of Discovery. While Lambert argued that his social theory

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[52] At the BCCA level, interveners in support of *N.T.C. Smokehouse* included; the Alliance of Tribal Councils, Delgamuukw (of the Gitksan), Jerry Benjamin Nikal (of the Wet'suwet'en), Donald and William Gladstone (of the Heiltsuk), Cape Mudge Indian band, and the Carrier Sekani Tribal Council. Interveners in support of the Crown included the Attorney General of British Columbia, Pacific Fishermen's Alliance, Fisheries Council of British Columbia, and the Canadian National Railway Company.

accorded more with the Aboriginal perspective, Lambert did not argue that the Aboriginal right to catch and sell fish continues to fluctuate according to Sheshaht and Opetchesaht needs and values. In these ways, Lambert's social theory still supported an external, Eurocentric view of Aboriginal culture and Aboriginal rights. As in *Van der Peet*, I believe Lambert's judicial intent was to validate and then limit the Aboriginal fishing right such that the socio-economic implications of an Aboriginal right to commercially fish salmon would not drastically impact the Pacific commercial salmon fisheries status quo. By offering a formula for placing a quantifiable ceiling on all commercial Aboriginal fishing rights, I argue that Lambert was cognizant of the commercial salmon fishers fears of the "Aboriginal threat" to their industry as much as he was aware of N.T.C Smokehouse's legal goals. Lambert exemplified how Canadian judges' do not objectively rule on the "facts" but rather interpret "facts," contingent on their personal biases, to facilitate the best "peace, order and harmony" for the litigants as well for dominant social groups.

Section One: iv) The Supreme Court of Canada's 1996 ruling and dissenting opinions

N.T.C. Smokehouse appealed the BCCA ruling to the Supreme Court of Canada. N.T.C. Smokehouse appealed on the basis that the BCCA majority had erred in delineating the scope of the Sheshaht and Opetchesaht's Aboriginal rights by differentiating between fishing for consumption and fishing for commercial purposes. N.T.C. Smokehouse's legal team argued that this differentiation was the result of the BCCA majority's failure to view the issue from the Aboriginal perspective. N.T.C. Smokehouse also continued to argue that any limit on the Sheshaht and Opetchesaht's Aboriginal rights should be "unlimited" in definition and justified by the Crown in accordance with the *Charter* tests laid out in *Sparrow* [*R. v.*

N.T.C. Smokehouse 137 D.L.R. (4th) 529 (1996)]. Unlike Van der Peet's, N.T.C. Smokehouse' counter-hegemonic legal strategy did not incorporate BCCA Judge Lambert's moderate livelihood limit.

In *N.T.C. Smokehouse* as in *Van der Peet*, Lamer wrote the SCC's majority ruling. His ruling was endorsed by Justices La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major. Justices L'Heureux-Dubé and McLachlin dissented (ibid: 537). In support of trial judge McLeod's findings of fact, the SCC majority ruled that the evidence did not support that the Sheshaht and Opetchesaht's ancestors were sellers and barterers of fish. The SCC majority ruled that while the exchange of fish may also have taken place at potlatches and other ceremonial occasions, such transactions were "incidental to the events" (ibid: 539). Therefore, the SCC majority was not required to consider *Sparrow*'s infringement tests. The appeal was dismissed and the conviction against the N.T.C. Smokehouse was upheld (ibid).

In her dissenting opinion, L'Heureux-Dubé reprimanded Lamer for ignoring general principles and interpretive canons on Aboriginal rights laid out in *Sparrow.* L'Heureux-Dubé concluded that the best description of the Aboriginal traditions in relation to the Somass River chinook fishery had given rise to an Aboriginal right, to be exercised in accordance with the Sheshaht and Opetchesaht's rights of self-regulation - which included the right to conserve, catch, and sell sufficient salmon for "livelihood, support and sustenance purposes." This was consistent with L'Heureux-Dubé's opinion in *Van der Peet.* In her search for limitations on the exercise of the Aboriginal fishing right, L'Heureux-Dubé considered DFO's Indian food fish quota system. This brought L'Heureux-Dubé's interpretations dangerously close to incorporating DFO management into the exercise of the Aboriginal fishing right instead of viewing DFO management as an unjustified state interference with the Aboriginal right until

the Crown proved otherwise (as was directed in *Sparrow*). I argue that L'Heureux-Dubé's consideration of DFO regulations as a seemingly natural limit to the exercise of the Aboriginal fishing right illustrated the difficulty that Canadian judges continued to have in separating out over one hundred years of fisheries regulations and state fisheries management from the legal analysis of Aboriginal fishing rights (ibid: 540 - 556).

SCC Judge McLachlin argued that the SCC majority's total denial of an Aboriginal right to commercially fish was in conflict with the Crown's fiduciary duties to Aboriginal peoples. Following her *Van der Peet* approach, McLachlin characterized N.T.C. Smokehouse's appeal as one which sought to answer whether the Sheshaht and Opetchesaht peoples possess the Aboriginal right to sell fish for the purpose of obtaining "sustenance" from the Somass River fishery. However, N.T.C. Smokehouse argued that according to the Aboriginal perspective there was no distinction between fishing for sustenance and fishing commercially. Like BCCA Judge Lambert before them, both McLachlin and L'Heureux-Dubé deliberately reinterpreted N.T.C. Smokehouse's legal claim to map a "livelihood" or "sustenance" limit onto the exercise of the Aboriginal right which was no less external than the BCCA majority's distinction between consumption and commercial or the SCC majority's complete denial of a commercial Aboriginal right.

In summary I argue that Lamer's ruling in *N.T.C. Smokehouse* provided the SCC majority the liberal legal opportunity to 1) consolidate and 2) test their interpretation edifice constructed in *Van der Peet*. 1) By affirming *stare decisis*, the SCC reaffirmed the trial judge's neglect of Aboriginal testimony and supported a social evolutionary understanding of Sheshaht and Opetchesaht culture where Aboriginal fish trading practices were defined as non-commercial. In this process, the SCC validated the trial judge's and BCCA majority

ruling in *N.T.C. Smokehouse* in the same manner as they had done in *Van der Peet.* Through *stare decisis*, all of these court rulings were consolidated under the SCC majority's singular legal voice. And 2) *N.T.C. Smokehouse* allowed the SCC majority to conclude predictable legal results from their ruling in *Van der Peet.* Their legal reference point was no longer *Sparrow* per se but their reinterpretation of *Sparrow* through *Van der Peet.* The SCC majority decision in *N.T.C. Smokehouse* helped entrench the SCC majority decision in *Van der Peet* as the new legal orthodoxy. Every future Aboriginal rights case that Canadian judges would rule on would then apply *Van der Peet* as the dominant legal model.

Section Two: i) *Gladstone* - B.C. Provincial Court Judge Lemiski's 1990 ruling

R. v. Gladstone involved Donald and William Gladstone as the defendants and the federal Crown as the plaintiff. The Gladstones are members of the Heiltsuk Nation whose traditional territory is on the mainland coast of B.C. northeast of Vancouver Island. In 1988, the Gladstones harvested herring roe on kelp in Heiltsuk traditional territory. They then attempted to sell the roe on kelp in Richmond, a suburb of Vancouver, B.C.. The Gladstones were charged by DFO officers with violating the *Pacific Herring Fishery Regulations* made pursuant to the federal *Fisheries Act.* While William Gladstone possessed a valid Indian food fish license which allowed the harvesting of roe on kelp for food purposes, neither he nor his brother possessed a commercial license to sell the roe. Under the Pacific herring regulations a Category (J) license is required for the commercial sale of herring roe on kelp.

At trial both sides agreed that before European contact, the Heiltsuk Nation were an organized society living within their traditional territory. Both sides also agreed that harvesting herring roe on kelp was an integral part of Heiltsuk society and that the herring roe

subject to the charges had been harvested in traditional Heiltsuk territory. The lawyers for the Heiltsuk argued that the Gladstones had an Aboriginal right to harvest and sell herring roe on kelp from Heiltsuk territory because it was an evolved Heiltsuk cultural practice now protected under section 35 of the Constitution. The federal Crown's lawyers opposed this claim by arguing that there was a lack of continuity, as well as a qualitative distinction, between the "traditional" Heiltsuk practice of harvesting and trading herring roe on kelp and the practice of selling roe for money. In the Crown's view, the current Heiltsuk practice of selling roe did not warrant constitutional protection. The Crown also argued that in any event, all commercial Aboriginal fishing rights had been extinguished by fisheries regulations dating back to 1878.

The Gladstones' legal team[53] marshalled a plethora of anthropological and historical data to prove that the Heiltsuk people had been major traders in herring spawn prior to European contact and then sellers of spawn after European settlement. Journal accounts from significant Canadian historical figures, such as HBC trader/explorer, Alexander Mackenzie, and HBC trader *cum* Vancouver Island and British Columbia governor, James Douglas, persuaded the judges from the trial to the appeal level of the large scale nature of the Heiltsuk trade in herring roe. Defence expert witness in anthropology Dr. Barbara Lane testified that as early as 1791 a.d., the non-Aboriginal historical documents recorded that the Heiltsuk were transporting roe for trade in "flotillas of freight canoes carrying tons of spawn product"

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[53] Legal counsel were M. Storrow, Q.C. and M. Morellato. Storrow was also initial defense counsel to the Dick defense in *R. v. Dick* 2 C.N.L.R. 137 (1993). The *Dick* case argued that the Lekwiltok people (a First Nation in the Campbell River, B.C. area) had a commercial Aboriginal right to fish. The B.C. Provincial Court found against the existence of the right and the case was dropped at that court level. Storrow was also counsel for the Musqueam in *R. v. Sparrow*.

[*R. v. Gladstone* 4 C.N.L.R. 82 (1993)].[54]

In 1990, Provincial Court Judge Lemiski ruled in favour of the existence of the Heiltsuk's Aboriginal right to catch and sell herring roe on kelp. Lemiski stated that the trial evidence supported that the Heiltsuk had been large scale traders in herring roe since before European contact. Lemiski then ruled that DFO's Pacific herring regulations did interfere with the Heiltsuk's Aboriginal right. As a result of that finding, Lemiski was obliged to consider *Sparrow*'s tests on state infringement. Lemiski used a particular characterization of the Gladstones' actions to strengthen his conclusion that the infringement of the Heiltsuk's Aboriginal right by the herring regulations was legally justified. Lemiski characterized the Gladstones' actions as having the intent:

> to sell a relatively large quantity of spawn in a surreptitious manner in a location far removed from the Heiltsuk band's region not dissimilar to the manner in which criminals transport and sell narcotics (ibid: 20 - 21).

In Lemiski's narrative the Gladstones' acts were assigned the criminal signifiers of "surreptitious" and "not dissimiliar" to illicit drug dealers. Lemiski's narrative implied that William and Donald Gladstone were asserting an Aboriginal right to be law breakers rather than asserting that the DFO regulations had unlawfully restricted the Heiltsuk's exercise of their Aboriginal fishing right. Lemiski's use of the phrase "removed from the confines of the "Heiltsuk band's region," implied that the Aboriginal activity should be confined to the local region around the Heiltsuk band's Indian reserves. In these two ways, Lemiski used the naturalized socio-legal reality of the *Fisheries Act* and *Indian Act* to legally undermine the

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[54] Early written and archival historical information on the European contact periods for the First Nations of coastal B.C. rarely describe indigenous practices with such detail. Mackenize's journal is one exception as is John Jewitt's account amongst the Nuh chah nulth (Mowachaht) people of Nootka Sound, 1803 - 05, see 1987 (1815) *White Slaves of the Nootka*. Surrey: Heritage House Publishing Co. Ltd.

Heiltsuk's Aboriginal right claim. Premised on the aforementioned characterizations, Lemiski ruled that DFO's Category (J) Herring Roe on Kelp licenses were part of the *Fisheries Act*'s valid legislative objective to manage and conserve fish resources. Therefore, while DFO's Pacific herring regulations did interfere with the Heiltsuk's Aboriginal right to commercially sell herring roe, the regulations were legally justified (ibid: 94). What Lemiski neglected to mention was that Category (J) licensing was never proven at trial to be for conservation purposes. Rather, the trial evidence supported the view that (J) licensing operated as a state management and allocation tool only.[55]

Following from *Sparrow*'s public fiduciary standard, the justification of state infringement with the Heiltsuk's Aboriginal fishing right also required Lemiski to consider whether DFO officials had met their legal obligations to consult with the Heiltsuk Nation (with regard to their Aboriginal rights) prior to the implementation of the Category (J) licensing system. Lemiski concluded that at the time of the 1975 introduction of (J) licenses, the Heiltsuk Nation had been consulted when DFO officials held one meeting with all prospective (J) license holders (Indian bands as well as non-Aboriginal individuals) to discuss the new commercial Herring roe and roe on kelp fisheries and licensing. Lemiski also stated that DFO officials had consulted with the Native Brotherhood of B.C. about the implementation of (J) licensing.[56] Lemiski therefore concluded that DFO officers at that time (before the 1975-76 fishing season) had met *Sparrow*'s consultation guidelines with respect to

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[55] Other cases have concluded that DFO licensing regimes and the allowance or disallowance of the Indian Food Fisheries do not necessarily flow from conservation objectives; *R. v. Sam* 3 C.N.L.R. 162 (1989), *R. v. Watts* 3 C.N.L.R. 162 (1989), *R. v. Bones* 4 C.N.L.R. (1990), and *R. v. Sampson* 131 D.L.R. (4th) 192 (1990).

[56] The Native Brotherhood of B.C. was formed by coastal chiefs in 1931. They amalgamated with the Pacific Coast Fishermen's Association in 1941. See Knight 1997: 195 - 203. The NBBC continues to support individual Aboriginal fishers in the commercial industry by performing lobbying and loan sponsorship functions to bolster and protect Aboriginal participation .

the Heiltsuk's Aboriginal rights (ibid: 83).

I argue that Lemiski treated the fiduciary issue within *Sparrow*'s consultation requirement cavalierly. It is difficult to understand how DFO officials could have specifically consulted the Heiltsuk Nation, with respect to their Aboriginal rights, by meeting with all (J) license holders, Aboriginal and non-Aboriginal, together. Secondly, the Native Brotherhood is a political organization for Aboriginal fishers within the commercial fishing industry. It does not represent nor has it ever represented the Heiltsuk Nation in relation to the Heiltsuk's Aboriginal rights. And thirdly, Lemiski neglected to consider the fact that before *Sparrow* and the 1982 constitutional entrenchment of section 35, DFO did not regard Aboriginal rights claims (beyond Indian food fishing) as requiring separate consideration of Aboriginal commercial fishers from other commercial fishers (Bowker 1995: 45).

In conclusion, Lemiski 's interpretations relied on the socio-legal categories of "Indian food fishers" and "Indian band" to describe the Gladstone's brother's actions as criminal. He used these socio-legal categories to bolster his ruling that DFO had legally valid jurisdiction to control the Heiltsuk's Aboriginal right to commercially sell herring roe. While Lemiski ostensibly validated the existence of an Aboriginal right to commercially sell herring roe on kelp, his unsubstantiated deference to DFO' "proper management and conservation" subsumed his validation of the Aboriginal right under his state management bias. As well, Lemiski's cavalier treatment of *Sparrow*'s consultation guidelines undermined the seriousness of the fiduciary obligations required of Crown agents in their dealings with Aboriginal peoples and illustrated Lemiski's blanket support for the actions of DFO officials.

Section Two: ii) *Gladstone* - B.C. Supreme Court Judge Anderson's 1990 ruling

The Heiltsuk Nation appealed Lemiski's decision and continued to argue that the Pacific herring regulations did constitute an unjustified infringement of their Aboriginal fishing right. The appeal was allowed and heard by B.C. Supreme Court Judge Anderson. In 1991, Anderson ruled in agreement with Lemiski that the Heiltsuk's Aboriginal right to trade and sell large quantities of herring spawn existed and continued under the protection of section 35. Despite Anderson's affirmation of the existence of the Heiltsuk's right, he concluded in true liberal legal fashion that the Aboriginal fishing right was not "absolute and unfettered." Rather, Anderson ruled that the Heiltsuk's "traditional" Aboriginal fishing rights have been preserved under Indian food fish licenses and Category (J) licenses. To further support that conclusion, Anderson, like Lemiski, did not rule that the fiduciary obligations on the Crown required more significant and specific consultation with the Aboriginal right-holder before the implementation of (J) licensing. Anderson's ruling presumed that the catch limits allocated under DFO's herring roe on kelp and Indian food fisheries, were part of the Heiltsuk's right. Anderson interpreted the regulations as a part of the Aboriginal right instead of conceptually removing the regulations first which then required the Crown prove their infringement of the Heiltsuk's right was justified.

Section Two: iii) *Gladstone* - the B.C. Court of Appeal's 1993 majority ruling and dissenting opinion

The Gladstones appealed Anderson's ruling to the B.C. Court of Appeal. They continued to argue that DFO's herring regulations were an unjustified state interference with

their Aboriginal right to harvest and sell herring roe on kelp.[57] Judge Macfarlane wrote for the BCCA majority. Again, as they had decided in *Van der Peet* and *N.T.C. Smokehouse*, the BCCA majority supported a distinct line between an Aboriginal practice and a non-Aboriginal practice based on a social evolutionary understanding of Aboriginal culture. Predicated on that distinction, Macfarlane ruled that the Heiltsuk had no Aboriginal right to harvest and sell herring roe on kelp (ibid: 85). Macfarlane did not once mention the extensive non-Aboriginal historical evidence of a Heiltsuk herring roe trade "in tons" (Bowker 1995: 32). I argue that Macfarlane ignored this evidence because in the BCCA majority's interpretation it did not matter what quantity of herring roe the Heiltsuk traded because "commercial" and "Aboriginal" remained mutually exclusive by Macfarlane's definition (ibid).

Macfarlane attempted to bolstered his social evolutionary view by affirming the Crown's argument that scanty historical evidence between 1955 - 1975 indicated a marginal exchange of herring roe. Therefore, Macfarlane concluded that the Heiltsuk had largely abandoned their herring roe trading practice and that the commercial herring spawn fishery "first developed in British Columbia in the early 1970s, in response to a demand for the product in Japan" [*R. v. Gladstone* 4 C.N.L.R. 85 (1993)]. However, *Sparrow* ruled that once an Aboriginal group possessed an Aboriginal right, recognized by the common law, it could not be lost by abandonment (Kulchyski 1994: 225).

Despite Macfarlane's conclusion against the existence of the Heiltsuk's commercial

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[57] At this court level, the Alliance of Tribal Councils intervened on behalf of the Gladstones and the Attorney General of British Columbia intervened on behalf of the Crown. As in *Van Der Peet*, both the Pacific Fishermen's Alliance and the Fisheries Council of British Columbia were on side with the Crown. The act of the Crown taking Aboriginal people to court, or a provincial A.G. office taking the Crown's side appears counter to the Crown's fiduciary duty for "honourable dealings" with Aboriginal peoples. This point was raised by the Heiltsuk's lawyer, Marvin Storrow, when he queried in his opening address to the SCC why federal and provincial governments were never on side with Aboriginal peoples in court. See CPAC video transcripts of SCC *Gladstone* proceedings 28/11/95.

right, he ventured further to comment that if one did exist, state infringement was justified and consultation requirements had been met. Again, as I have argued in response to trial judge Lemiski's treatment of the consultation issue, it is difficult to see how the Crown's fiduciary duty to Aboriginal peoples could be met by DFO treating Aboriginal and non-Aboriginal licensees in the same manner. Regardless, Macfarlane's comments clearly indicated his biased support for state management and the actions of DFO officials.

Lambert dissented from the BCCA majority's view. In response to Lemiski' ruling, Lambert raised the testimony of the defence's expert witness in marine biology, Dr. G. Vigers. Vigers had given evidence on the spawning rates of herring. Vigers stated that the herring roe on kelp harvesting method was not detrimental to the environment nor the survival rates of herring because only a tiny fraction of the herring eggs (0.1 percent) actually hatch and grow into herring (ibid: 94). In this light, Dr. Vigers stated that DFO's (J) licensing served more as an allocation function than as a conservation one. Lambert argued that Lemiski (as well as Anderson and Macfarlane) had turned this potential conservation issue into an actual conservation concern irrespective of the fact that Dr. Vigers' testimony was not challenged by the Crown's lawyers (ibid: 95).

Another key point in Lambert's dissenting opinion was his rebuttal of Macfarlane's ruling that between 1955 and 1975 the Heiltsuk had abandoned their Aboriginal herring roe trading practice. Following *Sparrow*'s guidelines, Lambert concluded that once an Aboriginal custom, tradition or practice was recognized, confirmed and protected by the common law, it became a common law Aboriginal right. Like all other common law rights, if an Aboriginal right was to come to an end then the end must be brought about by valid state legislation which must be clear and plain (ibid: 92).

Lambert affirmed the Gladstones' Aboriginal right to harvest and sell herring roe on kelp to levels in accordance with historical Heiltsuk catch levels. This meant that the Heiltsuk had an Aboriginal right to sell herring roe on kelp in quantities measured "in tons" and subject only to conservation, if ever required (ibid). Lambert's ruling was consistent with his legal strategies in *Van der Peet* and *N.T.C. Smokehouse*. Lambert focused on the post-European contact historical period (around the coming of the Canadian common law) to set a harvesting and selling limit on the Heiltsuk's Aboriginal right. In this case, the non-Aboriginal evidence persuaded Lambert that the amount of roe traded was "in tons." Whereas in *Van der Peet* and *N.T.C. Smokehouse*, Lambert concluded that all of the evidence indicated a more moderate scale of trade and sales.

Lambert upheld the Gladstone's appeal because the Crown had not met the heavy burden of justification and consultation as set out in *Sparrow*. Lambert openly disputed, the presumption that the courts should naturally defer to state fisheries jurisdiction over Aboriginal fishing rights. By doing so, he unearthed how judges in Aboriginal rights litigation defer to the state's jurisdiction instead of operating as the watchdog of the state. The majority rulings in *Gladstone* also clearly showed that as a result of the naturalization of the public's right to fish and state management of resources, judges in Aboriginal fishing rights litigation have difficulty in, or are adverse to, stripping the layers of non-Aboriginal regulation away in order to view the Aboriginal right in its original form.

Section Two: iv) *Gladstone* - the Supreme Court of Canada's 1996 ruling and dissenting opinions

In *Gladstone*, Lamer wrote for the majority with Justices Sopinka, Gonthier, Cory, Iacobucci and Major concurring. Justices La Forest, L'Heureux-Dubé, and McLachlin gave

dissenting opinions. Based on the legal tests outlined in *Van der Peet,* Lamer ruled that prior to European contact, the harvest and exchange in herring roe for money or other goods was a central, significant and defining feature of Heiltsuk culture. Lamer stated that the trade was best characterized as commercial because of the volume of the roe trade between the Heiltsuk and their Aboriginal neighbours. Lamer cited the journal of HBC explorer Alexander Mackenzie as one major evidentiary source for ruling that the Heiltsuk Aboriginal right was best characterized as a commercial one. Therefore, the SCC majority ruled that the Heiltsuk had an Aboriginal right to barter, trade and sell herring roe on kelp to commercial markets [*R. v. Gladstone* 137 D.L.R. (4th) 649 (1996)]. Again, the testimony from Aboriginal witnesses played an insignificant role in the SCC majority's ruling.

Following the SCC majority's "integral to the distinctive society" test in *Van der Peet*, the trade in herring roe was interpreted as an integral feature of who the Heiltsuk were and are. Like Lemiski, the SCC majority implied that the scale of the herring roe trade signified the central importance of the trade to the Heiltsuk. This in turn, implied that when the herring roe trade practices were removed from Heiltsuk society, Heiltsuk culture would lose one of their core features and could therefore potentially become less distinctively Heiltsuk! Again, this logical fallacy is the result of the judges' positivist interpretation of Aboriginal culture as a discrete object. While positivist legal interpretations translated cultural phenomena into legal objects that made it easier for the judges to interpret, their translations did not address social identity and cultural practices as determined by the Heiltsuk right-holders.

In current anthropological knowledge, "culture" is no longer a concept that is adequately represented by a biological organism metaphor. It also no longer specifically signifies temporal and ideological meaning within a social evolutionary meta-narrative. Social

groups who negotiate their identity in contexts of domination and exchange construct their identity in ways that cannot be likened to a biological organism. A community, unlike a body, can lose a central "organ" and not die. All critical elements of identity are in specific conditions replaceable. Recognized viable Aboriginal cultures still exist when any one or even most of these elements are missing, replaced or largely transformed (Clifford 1988: 370).

Rather than engage complex social identity issues, the SCC majority constructed a legal/cultural model premised on non-Aboriginal historical records and positivist interpretation of Heiltsuk Aboriginal culture. Similarly, the historical figures of Alexander Mackenzie and James Douglas also objectified the indigenous cultures they came into contact with and described these events through third person narratives. Their journals interpreted Aboriginal cultures in ways similar to how anthropologists and judges externally interpret Aboriginal cultures. This European style of writing and observation has long been institutionalized as representing social scientific and historical fact. Therefore, it was not a large step for judges to convert non-Aboriginal historical observations into legal and cultural "truth" without any reference to the Heiltsuk Aboriginal testimony.[58]

Lamer then moved to consider the issues of state extinguishment, infringement and justification. The Crown had argued that section 39 of the *Fisheries Act* and section 21(a) of the 1955 B.C. Fishery regulations had extinguished the Heiltsuk right to collect herring eggs for any purpose except food. The Crown also argued that a 1917 federal Order-in-Council (No. 2539) had explicitly extinguished all Aboriginal rights to fish for any other purpose except food. In support of *Sparrow*'s view, the SCC majority held that the fisheries regulations cited by the Crown were aimed at dealing with the immediate problems of

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[58] See Culhane 1994: 266 - 290 and Riddington 1992: 206 - 220 for more in-depth analysis of this problem.

ensuring fish escapement populations and not the legal removal of Aboriginal rights. In Lamer's view, the Heiltsuk's common law Aboriginal right to commercially sell herring roe had not been extinguished (ibid: 663 - 665). Therefore, the Aboriginal right continued and was now protected under section 35 of the Constitution.

The Heiltsuk's defence had been focused on the constitutional challenge of one regulation: section 20(3) of the *Pacific Herring Fishery Regulations*. However, Lamer reasoned that the scope of the Heiltsuk's challenge was much broader than the one regulation and encompassed the Crown's entire management of the herring spawn on kelp fishery.[59] The SCC majority then ruled that DFO's Category (J) license and allocation system constituted an unjustified state infringement of the Heiltsuk's Aboriginal right. Lamer stated that before European contact, the Aboriginal right was limited only by difficulties in transportation, preservation and resource availability, whereas now, the Heiltsuk could only harvest and sell herring roe on kelp to a limit imposed by a government fisheries policy which did not flow from a compelling legislative objective such as conservation.

I argue that Lamer's ruling of an unjustified infringement was a very significant interpretive move. In *Sparrow*, Dickson kept the SCC's judicial focus specifically on the Indian food fish regulation dealing with the fishing net size and thereby avoided legal consideration of a commercial component to the Musqueam's Aboriginal fishing right. Lamer could have used a similar legal tactic to remain focused on the specific regulation challenged by the Heiltsuk's defence. Instead, Lamer chose to link that specific dispute to DFO's entire management of the herring roe fisheries. I argue that Lamer chose this move in order to

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[59] In *Sparrow* the regulatory infringement of the Musqueam right to fish was focused on a net length provision and was challenged by Reginald Sparrow's counsel independently of the broader fisheries management scheme.

validate the Heiltsuk's legal claim. As I stated in the last section, the defence's witness, Dr. Gary Vigers, had argued that commercial herring roe (J) licenses were for allocation not conservation purposes. Lamer paraphrased Dr. Vigers' testimony to state that:

> in real situations, the fisheries management is full of uncertainty -- from the inability to identify governing forces at each stage of recruitment to subjective (but unintentional) sampling bias of fisheries officer's observations...Each level of measurement has intrinsic errors which may be amplified at the next level of evaluation (ibid: 670 - 671).[60]

Unlike Judges Lemiski and Anderson, Lamer did not immediately defer to DFO management. Instead, Lamer pointed out some of the problems of determining fish harvesting limits within that management system. The end result was that the SCC majority affirmed that the Heiltsuk's Aboriginal right to fish commercially was not legally limited by any outside state jurisdiction.

Lamer then stated that legal analysis now became complicated because the Aboriginal right would be an exclusive one where the fishing priority schemes *à la Sparrow* and *Jack* did

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[60] The issue of uncertainty in fisheries management was coupled to political bias in the June 1997 issue of *Canadian Journal of Fisheries and Aquatic Sciences*. An article by Canadian fisheries/marine biologists Jeff Hutchings, Carl Walters and Richard Haedrich. The article was entitled Is scientific inquiry incompatible with government information control?"

The essay's authors argue that fisheries scientific research has been systematically misunderstood and distorted by something they term the DFO "*system* of government-administered science"(emphasis in the original). They point their fingers at the "bureaucratic/political process within DFO that translates scientific assessments into policy positions. The problem as they see it, has not been seated within fisheries science *per se* but rather rooted in the policy and management side of the DFO system. Essentially they insist that bureaucrats have suppressed "scientific uncertainty" while employing scientific results as legitimation for annual Total Allowable Catches and other management policies. See Anthony Davis and Daniel MacInnes 28/07/1997. Why didn't fisheries scientists blow the whistle? *Globe and Mail*. Toronto.

The article also warranted comment from Simon Fraser University's Institute of Fisheries Analysis which stated: "The emergence of this conflict between DFO and the scientific community comes as no surprise to us. Our own experience on the coast has been to witness the dismantling of the once strong research capability of DFO and a concurrent erosion in the department's stock assessments, and enforcement and management capability." Bob Brown, Rick Routledge and Patricia Gallaugher 17/07/1997. When science and politics collide. *Simon Fraser News*. Burnaby, B.C..

not apply.[61] Therefore, the SCC majority deferred any ruling on the issues of state justification and infringement and sent *Gladstone* back to the trial level. However, before concluding his judgement, Lamer suggested potential directives in reconciling the Heiltsuk's now legally validated and unlimited Aboriginal right with the herring roe fisheries (ibid: 686).

Lamer stated that since the *Magna Carta,* no new exclusive fishery in tidal waters could be created by Royal grant, and that no public right of fishing in such waters could be taken away without competent legislation. He went on to reason that the intent of section 35's entrenchment could not have intended the extinguishment of the public's common law rights to fish and therefore did not. Lamer clearly showed his deference to state management because he was unwilling to empower the constitutional Aboriginal right over a federal jurisdiction and long standing English legal tradition. Also, despite his comments on some of the problems with DFO allocation management, Lamer still offered this statement:

> this Court must grant a certain level of deference to the government's approach to fisheries management (ibid: 685).

Then Lamer opined that:

> Although by no means making a definitive statement on the issue, I would suggest that with regards to the distribution of the fisheries resource, after conservation goals have been met, objectives such as the pursuit of economic fairness, and the recognition of the historical reliance upon and participation in the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard (ibid: 682)

And also that:

> limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation(ibid: 683).

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[61] Parallel to McLachlin's holding in *Van der Peet,* and following the Article 13 in B.C.'s Terms of Union "policy as liberal as heretofore" argument held in *Jack,* Lamer extrapolated that there had been recognition of a limited Aboriginal commercial fishing priority when B.C. joined confederation.

Lamer asserted that the "broader community as a whole" was a compelling interest which could limit the Heiltsuk's Aboriginal right. However, in *Sparrow*, Dickson had ruled that the "public interest" was too broad and vague to justify a limitation on section 35 Aboriginal rights. Similarly, Lamer deferred to the state's management system to ensure that economic fairness and the non-Aboriginal sector be considered in the reconciliation between the Heiltsuk's fishing right and the commercial herring roe fisheries status quo. Thus, the exposure of an unlimited Aboriginal right protected by section 35 was short lived. In the absence of legal reasons, Lamer clearly conveyed his state, liberal legal and non-Aboriginal biases, when he introduced "economic fairness," the "public interest" and the "non-Aboriginal sector" as valid extra-legal considerations for limiting the exercise of the Heiltsuk's right.

While SCC judge La Forest was in agreement with Lamer on the general analytical framework, he was not of the opinion that the Gladstones' activities constituted a contemporary exercise of their Aboriginal rights. First, La Forest argued that the Gladstones' attempt to sell herring roe on kelp to a foreign buyer was "totally out of character and context" to either any existing Heiltsuk "band" exercise of Aboriginal rights to sell fish or any licensed sales. His characterization of Heiltsuk culture accorded with social evolutionary models used by the SCC in *Van der Peet* and *N.T.C. Smokehouse*.

La Forest followed the BCCA's majority view with his statement that the Heiltsuk commercial attempts to sell herring roe were "light years away from the ancient practice of sharing resources with fellow bands in furtherance of spiritual ideals." The use of the phrase "light years," "sharing resources" and "spiritual ideals" again signified a social evolutionary model to create its meaning that authentic Aboriginal culture existed only in a non-European past (Mertz 1988: 665). La Forest's social evolutionary model was also premised on the myth

that Pacific coast First Nations were simple and spiritual egalitarians who lived to hunt, fish, gather, in harmony with nature and their neighbours.[62]

The second significance of La Forest's dissenting opinion was his view on extinguishment. He refuted Lamer's interpretation by arguing that the fisheries regulations did extinguish any commercial Aboriginal fishing rights in B.C.. La Forest reasoned that a "clear and plain intention" or an acknowledgement of the existence of the Aboriginal right was not required for Canadian legislation to extinguish Aboriginal rights before 1982 because that would preclude the Crown from ever having met that standard. Although he stated that legal consideration of the fiduciary concept was needed, his argument supported judge Selbie's view in *Van der Peet* that Canadian legislation could implicitly extinguish common law Aboriginal rights.

As in *Van der Peet* and *N.T.C. Smokehouse*, L'Heureux-Dubé and McLachlin dissented from the SCC majority's ruling. While L'Heureux-Dubé concurred with Lamer's affirmation of the Aboriginal right, she distinguished her analytical approach from that of the SCC majority. L'Heureux-Dubé opposed Lamer's individual cultural trait interpretive approach to Aboriginal cultural practices, but she still concluded that the trade in herring spawn on kelp was extensive and organized in a market-type economy central to Heiltsuk's culture and social organization. Therefore the Gladstones' commercial claim did constitute an Aboriginal right deserving protection under section 35. On the issue of state justification of infringement, L'Heureux-Dubé agreed with Lamer that the case be returned to trial. Yet L'Heureux-Dubé, unlike Lamer, did not comment on any potential extra-legal s [*R. v. Gladstone* 137 D.L.R. (4th) 701 - 709 (1996)].

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[62] See Adam Kuper 1988: 1 - 15 and Noel Dyck 1991: 34 - 37.

McLachlin characterized the Heiltsuk's legal claim as an Aboriginal right to sell herring spawn on kelp to a sustenance limit. In McLachlin's view, the Aboriginal right to trade was to be confined to what was necessary to provide basic housing, transportation, clothing and amenities as the modern equivalent of Heiltsuk's "traditional" reliance on the resource. McLachlin ignored that the non-Aboriginal historical evidence conveyed that the Heiltsuk had "traditionally" traded herring roe "in tons." Instead, McLachlin equated "traditional" with a basic sustenance level reliant upon a social evolutionary understanding of Aboriginal cultures as small-scale hunters and gatherers. While McLachlin reprimanded the SCC majority's comments on potential limitations to the Heiltsuk right as being political and extra legal, her opinion was no less political and strategic because she tactically placed legal limits to the exercise of all Aboriginal right to commercially fish by imposing social evolutionary stereotypes onto all of the Aboriginal cultures in the cases under study.

Section Three: Summary

The legal strategies of the Sheshaht and Opetchesaht in *N.T.C. Smokehouse* were somewhat different than those in *Van der Peet*. N.T.C. Smokehouse's legal team argued for an unlimited commercial Aboriginal fishing right alongside a bundle of other legal arguments. This counter-hegemonic legal strategy also supported *Sparrow*'s *Charter* tests for determining the validity of state infringement of an Aboriginal right. Despite strategic differences in the First Nations' legal strategies, the court rulings in both cases were strikingly similar.

Trial judge McLeod used a social evolutionary model to interpret Aboriginal culture as based in a pre-European past that was, by definition, unable to possess or acquire a commercial cultural practices. As *N.T.C. Smokehouse* worked its way through the appeal

courts, the court rulings would reaffirm this social evolutionary model. At the Supreme Court of Canada, Lamer would use *N.T.C. Smokehouse* to affirm the SCC majority's general interpretive approach constructed in *Van der Peet.* Lamer also legally consolidated all of the lower court rulings in the two cases under the banner of *stare decisis*. The SCC majority's interpretive response to *N.T.C. Smokehouse*, like *Van der Peet,* did not validate or incorporate the legal claims of the Aboriginal litigants rather, the SCC majority negated any legal possibility that the Sheshaht and Opetchesaht's legal claim could impact upon the commercial chinook salmon fisheries.

In *Gladstone*, the legal ruling pattern would be dramatically different and the legal system's support for state jurisdictions and social balancing of dominant interests would become more apparent. Trial judge Lemiski ruled that the Gladstones' did have a contemporary Aboriginal right to harvest and sell herring roe on kelp. Then the trial judge relied on the socio-legal realities of the *Indian* and *Fisheries Act*s to call the Gladstones' actions criminal, and then to defer to the presumption that DFO had the valid legal power to impose licensing system onto the Heiltsuk's Aboriginal right to commercially harvest and sell herring roe.

The first appeal judge, Anderson, would again legally justify DFO licensing interference with the exercise of the Heiltsuk's Aboriginal right. Anderson assumed that DFO management was part of the right, a legal perspective that was dismissed in *Sparrow*. In antithesis, the BCCA majority ruling would return the legal interpretations of the Heiltsuk's Aboriginal society into a social evolutionary model similar to the model in *Van der Peet,* where authentic Aboriginal society could not by definition possess or adopt a commercial cultural practice.

At the Supreme Court of Canada, Lamer affirmed Lemiski's findings of facts as he had affirmed the trial judges' facts in the other two cases. I believe the conservative and colonial nature of the lower court decisions merits serious comment at the SCC level because the lower court decisions appeared to influence many of the SCC majority's judicial choices. The level of court can and does influence the extent of judicial activism on Aboriginal rights. Lower courts have a tendency to approach change with caution, leaving fundamental questioning to appellate levels. Confronted with vast amounts of litigation, lower courts opt for the philosophy of judicial constraint for reasons of efficiency and timeliness. At the intermediate appellate level, courts are more willing to consider change, but stability often prevails if change brought about by a decision could have significant social, political, or economic impact, is difficult to enforce, or has the potential to proliferate litigation (Bell and Asch 1997: 43).

The trial judge's decision can hold tremendous significance for future appeal judges who wish to conserve the "objective" appearance of law and do not wish to disrupt the socio-economic status quo that legal affirmation of an Aboriginal right may bring. This was especially true for Aboriginal fishing right cases under study. To defer to the trial judge, all an appellate judge needed to do was evoke the legal principle of *stare decisis* and then defend their decision by citing supporting case law. Again, the force of judges' use of positivist methodology obscured the fact that the trial judges' "facts" were contingent upon subjective interpretations and not simple observation. The trial judges in all the cases under study ruled conservatively and deferred serious legal issues to appellate courts who in turn deferred back to the trial judges' facts. Only in *Gladstone* would the SCC majority diverge from their unanimous support for *stare decisis.*

In *Gladstone*, Lamer affirmed that the trial evidence from the non-Aboriginal historical documents supported a large scale Heiltsuk trade in herring roe in the pre-European contact period and into the contact period. From that historical interpretation, the SCC majority defined the Heiltsuk trade in herring roe as an integral part of Heiltsuk society. The SCC majority then interpreted that the Aboriginal right had survived unextinguished and was now protected under section 35. The SCC majority characterized the current Aboriginal right as unlimited one to harvest and sell herring roe on kelp to commercial markets.

I believe Lamer's four significant interpretive choices were; 1) to allow the Heiltsuk barter and trade in herring roe to evolve into a commercial Aboriginal practice, 2) to allow that commercial Aboriginal right to survive extinguishment and gain section 35 protection, 3) to link the Heiltsuk's specific claim against section 27(5) of the Herring regulations to the entire DFO management system and, 4) to not defer to DFO management on the herring roe on kelp fishery premised on a conservation assumption. In the absence of legal limitations, Lamer offered extra legal suggestions which clearly indicated his non-Aboriginal and state biases.

I argue that Lamer's legal strategy led to SCC Judge La Forest's break with the SCC majority in this case. In La Forest's dissenting opinion, he argued in favour of the power of the Crown to generally extinguish common law Aboriginal rights before their 1982 constitutionalization. His dissenting opinion also supported a social evolutionary understanding of Heiltsuk culture which implicitly negated a commercial Aboriginal right as being part of Aboriginal culture. By his dissension, La Forest drew attention to Lamer's divergence from both *Van der Peet* and *N.T.C. Smokehouse*'s social evolutionary models, where Aboriginal societies were frozen to a non-European past and unable to adopt European

cultural practices. SCC Judge McLachlin also made some strong comments in her dissenting opinion. She reprimanded Lamer for his extra-legal and political considerations in relation to external limitations on the Aboriginal right. La Forest's and McLachlin's dissension support my argument that the judges in *Gladstone, Van der Peet* and *N.T.C Smokehouse* clearly did not agree on the same "objective and impartial" legal interpretations or conclusions.

I argue that by validating the Gladstones' commercial Aboriginal right, the SCC majority could convey the impression that an Aboriginal legal claim could be validated through the SCC majority's legal tests on section 35 protected Aboriginal rights, despite the fact that the SCC had negated Van der Peet's and N.T.C. Smokehouse's legal claims. In this way, the court system could maintain its liberal legal function to appear as an "impartial and objective" forum for resolving disputes. However, the burden of legal proof that the Gladstones' had met was quite unique. I have shown throughout this thesis that the majority of the judges have marginalized Aboriginal testimony in favour of expert witness testimony and historical/archival accounts of Aboriginal societies. The Heiltsuk were fortunate to have detailed non-Aboriginal historical evidence which persuaded the trial judge to confirm the Aboriginal claim. However, very few other First Nations would be able to meet this burden of non-Aboriginal historical proof required by the SCC.

Due to the SCC majority's decision to validate the Heiltsuk's claim, the second tier of Lamer's strategy was directed at the implications of their validation on the commercial herring fisheries. I argue that the SCC majority was aware that the herring roe on kelp industry was a 20 year old minor commercial fishery already dominated by coastal Indian bands where the Heiltsuk Indian band already possessed one Category (J) license to sell herring roe on kelp. As historian Diane Newell pointed out:

> ...most herring roe on kelp licenses (J) have always been in the hands of Indians...The government stopped issuing new (J) licenses in the late 1970s, by which time only 28 were available and renewed each year: with 18 to Indians (5 to bands and 13 to individuals), for an unprecedented 64.2 per cent of the total, and 10 to non-Indians (Newell 1993: 200).

To further minimize the socio-economic impact of their validation, the SCC majority recommended such principles as "economic fairness," "the public interest" and the "non-Aboriginal sector," as potential restraints on the Heiltsuk's Aboriginal right. While Lamer's comments appeared to offer balanced liberal principles, these directives represented the SCC majority's desire to maintain dominant social interests within the Aboriginal rights socio-legal equation despite the fact that the SCC majority had affirmed an unlimited constitutional Aboriginal right.

CHAPTER SIX: Was *Sparrow* the High Water Mark? Summary of the legal cases and social consequences.

> Life is lived forward but it is understood backward (Sören Kierkegaard in Geertz 1995: 166).

The general intent of this research was to demonstrate how the Canadian legal system reproduces and socializes a dominant moral, political and economic order as well as offers a conditional opportunity for marginalized social groups to contest that order. I argued that the legal cases of *Gladstone, Van der Peet* and *N.T.C. Smokehouse* represented First Nations' use of the Canadian court system as one tier in their strategies to contest a Canadian colonial order which has abrogated Aboriginal entitlements and access to resources through the unilateral socio-legal enactments of segregation and then assimilation. As a result of these colonial and national histories, judicial interpretations of Aboriginal rights are influenced by Eurocentric ideologies and social relations which severely handicap a fair and impartial hearing of Aboriginal legal claims. Yet Canadian judges form subjective interpretations influenced by and in response to a wide array of current social values as well as historical forces. Thus, legal judgements can and have conditionally validated Aboriginal rights claims as the Supreme Court of Canada's rulings in *Calder*, *Sparrow*, and *Gladstone* attest.

I theorized the interrelationship between Aboriginal rights litigation and their political and economic dimensions through Antonio Gramsci's concept of hegemony. I specifically chose Alan Hunt's adaptation of Gramsci's concept because Hunt's categories of incorporative and counter-hegemony were useful in understanding the interaction between court rulings and First Nations' legal strategies (Hunt 1993: 330 - 333). Through Hunt's framework, I argued that Canadian judges were supportive of Canadian hegemony, which I demonstrated as continuing to reproduce an indisputable concept of English *cum* Canadian

sovereignty which is tied to federal management of Aboriginal peoples as "Indians" and "Indian food" fisheries. I stated that in the cases under study, First Nations legal strategies were counter-hegemonic because First Nations' chose to enter the dominant legal system to gain authoritative legal recognition of their Aboriginal rights within that system, which in turn, would potentially empower and protect their participation (as Aboriginal peoples) in the Pacific coast commercial fisheries. If a judge strictly negated an Aboriginal right claim I demonstrated how their interpretations were conservative. If a judge validated an Aboriginal right claim which could lead to its integration within the commercial fisheries, I described how their judicial interpretations were incorporative to the prevailing hegemony.

The difficulty with this thesis was its cross-disciplinary approach. Usually, studies in anthropology involve participant-observation within a particular social group for the eventual production of a thesis which interprets and reflects the data from the researcher's participation. Whereas, I was not actively involved in the cases under study as a lawyer, litigant, witness or ethnographic observer. It was extremely complicated to demonstrate my arguments and interpretations of the legal arguments and judicial interpretations presented solely on my decidedly one-sided selections from the legal transcripts. My fear was that an attempt to address several issues important to both the study of anthropology and the study of law would result in an analysis which at times, to either anthropologists or legal scholars, would appear simplistic and general to one and inaccessible or inaccurate to the other.

Despite my trepidation, I believe my socio-legal study demonstrated that such intellectual cross-germination can be of tremendous utility to First Nations, lawyers, legal scholars, anthropologists who study law, and anthropologists who act as expert witnesses in Aboriginal rights litigation. Since 1982, Canadian judges have become much more involved in

major social disputes because they have been called upon to interpret and define constitutional entitlements and limitations. However, as legal arbiters on section 35 protected Aboriginal rights, Canadian judges continue a majoritiarian rule because their reception of evidence and their final decisions reflect an external hegemonic vision which misrepresents the perspectives of the Aboriginal rights-holder and thus fails to enact a *sui generis* reconciliation of Aboriginal peoples' rights with Canadian society. Perhaps that task is best left to political negotiation rather than litigation? Yet, Aboriginal groups continue to press their Aboriginal rights claims in Canadian courts.

First Nations' counter-hegemonic praxis illustrates how law is a constitutive mode of regulation invested with the power of forming, bolstering and/or removing social boundaries through reinforcing and/or refuting particular ideologies. Law serves to demarcate and secure the boundaries between distinct fields of regulation such that their relative autonomy within their specific fields is reinforced. The ideological construct of a unitary "Law" obscures the plurality of regulatory forms which coalesce and form distinctive modalities of social domination. Socio-political responses to the SCC rulings on Aboriginal fishing rights show that Canadian social groups continue to dramatically dispute any process of reconciliation of Aboriginal rights with Canadian society. This contestation conveys that the prevailing hegemony in Canada continues to represent a colonial institutional complex reluctant to co-ordinate its efforts or agree upon the terms for decolonization which respects full and equitable participation of Aboriginal peoples in that process. In this sense, First Nations' counter-hegemony must continuously adapt to the shifting terrain of authoritative promises for change. The legal promise of empowering Aboriginal rights, held out by the SCC's 1973 decision in *Calder*, has since evolved into a quagmire of shifting and contradictory

commitments from federal and provincial government officials, and a Canadian judiciary attempting to apply legal boundary maintenance to this oscillating socio-political landscape.

The history of Aboriginal groups and socio-legal realities in Canada's Pacific fisheries illustrates an intimate interplay between the executive, legislative and judicial powers of the state which influence a resource and the peoples who depend on it. In response, Aboriginal groups of the Pacific coast have adeptly learned how to tack back and forth, among and between the branches of the state including; the judiciary, government departments, agencies and programs, at both federal and provincial levels to promote Aboriginal fishing rights (Newell 1993: 217). As First Nations know too well, court decisions on their own cannot bring about reform; it depends on the support of politicians, bureaucrats, and dominant social groups to implement legal decisions.

On August 27, 1996, the back pages of the Globe and Mail reported the Supreme Court's findings in *Gladstone*, *Van der Peet*, *N.T.C. Smokehouse* (27/09/1996. The court has ruled on Aboriginal fishing rights. What happens now?" *Globe and Mail.* Toronto). On September 4, 1996, the Globe carried Jeffrey Simpson's story entitled *Aboriginal Rights are Different Things to Judges and Politicians.* Simpson concluded that the rulings were very limited and conservative. From this he projected that the fight for the recognition of Aboriginal rights would, more than ever, be fought through public opinion and in political arenas. Three days later, letters to the editor tried to spin his pessimism into creative alternatives and to draw attention to the fact that at least some evidence was accepted by the SCC and had led to the legal recognition of the Heiltsuk's right (Tony Hall, Department of Native American Studies, University of Lethbridge 07/09/96. Natives will challenge authority, and second letter by Jack Weaver, New York, New York. *Globe and Mail.* Toronto).

The B.C. Reform party pariah M.P. John Cummins used the SCC judgements to undermine the Nisga'a Agreement in Principle's commercial salmon fishing provisions. He stated that the provisions were now illegal (September, 1996 John Cummins, Member of Parliament for Delta, B.C., House of Commons report). On October 16, 1998, Cummins joined the B.C Fisheries Survival Coalition and the Pacific Coast Area C Salmon Gillnet Association as a plaintiff in a legal action which is attempting to halt the ratification of the final Nisga'a Treaty (17/10/1998 Nisga'a Land Deal Taken to Court. *Vancouver Sun.* Vancouver). Whereas law professor Hamar Foster commented that:

> ...those involved in the process, want to put as good a face on these decisions as possible so we can proceed and come to just resolution of the issues. The Court's rulings are important decisions but they're not about to derail the treaty process (Foster 1996. Supreme Court of Canada decisions rendered on *Gladstone, Van Der Peet and NTC Smokehouse. Treaty News* (december). Federal Treaty Negotiation Office, Department of Indian Affairs and Northern Development, Vancouver).

Despite the negative press and contradictory socio-political responses, at least the Gladstones had come home with a victory. After 10 years in the courts they had won Canada's highest legal recognition of their Aboriginal right to harvest, eat, barter, trade and commercially sell herring roe on kelp to external markets. But what did that mean for them and other First Nations? The case itself had been referred back to trial on the issues of state infringement, justification and consultation. Assuredly, the Supreme Court's rulings had strengthened the Heiltsuk's bargaining position on commercial fishing issues at the treaty negotiation table but what about the legal implications for Stó:lσ and Nuh chah nulth treaty negotiations and the Aboriginal Fisheries Strategy?

The SCC rulings prompted the United Fishermen and Allied Workers' Union head, Dennis Brown, to write a September 23, 1996 article in the union newspaper, *The Fisherman*,

in support of the decisions. He also wrote to then federal Fisheries Minister, Fred Mifflin, in an attempt to apply pressure for a review of the AFS. Mifflin replied that the AFS was a policy and management initiative and would not be modified at present. In the same reply, Mifflin also unequivocally supported the Nisga'a AiP calling it a "good agreement" (21/10/96. Mifflin offering little on AFS review. *The Fisherman* 5 Vancouver). However, by December Mifflin had appointed Vancouver lawyer Jim Matkin to review the AFS (06/12/ 96. Native Indian fishers' right to sell salmon faces review. *Vancouver Sun*. Vancouver). On March 31, 1998, it was announced that a joint Senate/House Committee had recommended that DFO abolish all commercial fishing agreements with First Nations. In opposition to this recommendation, the current Liberal DFO minister, David Anderson, affirmed DFO's continuing commitment to the AFS and hinted that AFS-type agreements may be incorporated into the federal *Fisheries Act* in the future (01/04/1998 CBC Radio One 92.9 f.m.).

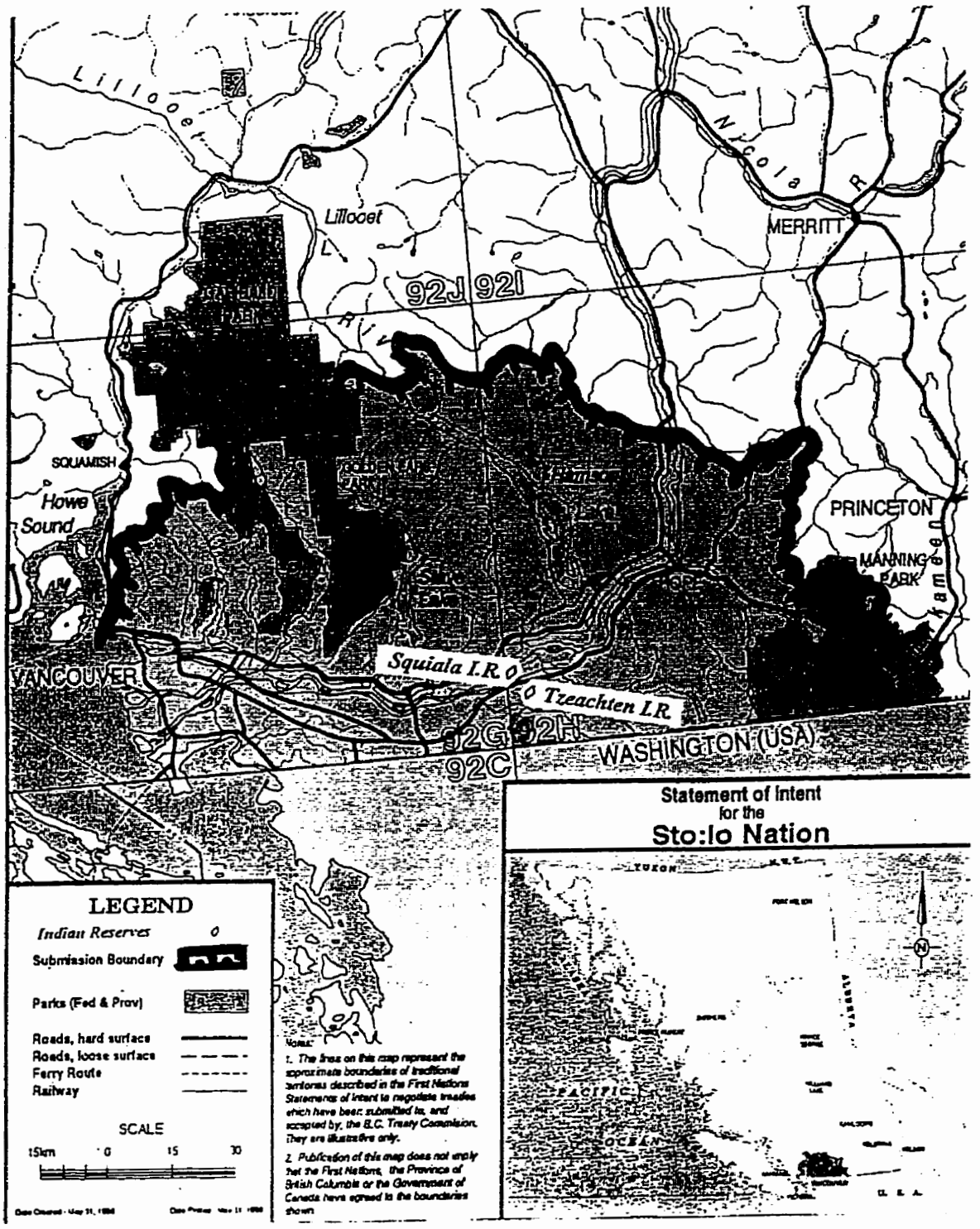
Amidst the fallout from *Gladstone*, *Van der Peet* and *N.T.C. Smokehouse*, the same SCC majority released its judgement in *Delgamuukw v. B.C* [S.C.C. 97 - 108 (Dec. 11, 1997)]. The SCC majority affirmed the legal existence of Aboriginal title! Given my analysis in this thesis, I was surprised that the SCC majority would reprimand the trial judge for disregarding Aboriginal testimony and oral tradition evidence and then support a concept of Aboriginal title which could seriously impact the socio-economic status quo in B.C.. I believe federal and provincial officials, law firms and other B.C. interest groups, were equally surprised that this conservative SCC would affirm Aboriginal title as conditional land ownership protected under section 35 of the Constitution. And yet, the *Delgamuukw* decision supports my argument that court rulings are indeed unpredictable and paradoxical because law is enmeshed and responsive to dominant ideologies as well as contemporary social, political

and economic issues for both Aboriginal and non-Aboriginal peoples. As SCC Chief Justice Lamer stated in *Delgamuukw*, "Let us face it, we are all here to stay" [*Delgamuukw v. B.C.* 3 S.C.R. 1065 (1997)].

In conclusion, *Van der Peet*, *Gladstone* and *N.T.C Smokehouse* (as well as *Sparrow* and *Delgamuukw*) have shown that for First Nations' resistance strategies, the Canadian legal system offers potentials and delivers paradoxes. First Nations' counter-hegemonic strategies continue to adopt and adapt legal arguments which empower their resistance to marginalization while judicial strategies continue to reproduce Canadian hegemony while offering up small concessions. This socio-legal pattern has been in existence in Aboriginal rights litigation for over 25 years and will not change dramatically until there is a concerted effort by dominant agents of social regulation and governance to decolonize with respect to First Nations. Thus the social/historical pattern is not a linear progression because First Nations counter-hegemony is conditioned by asymmetrical power conflicts over social values, responsibilities and entitlements directed by choices to create opportunities or to impose limits - motivated as much by past decisions as current events.

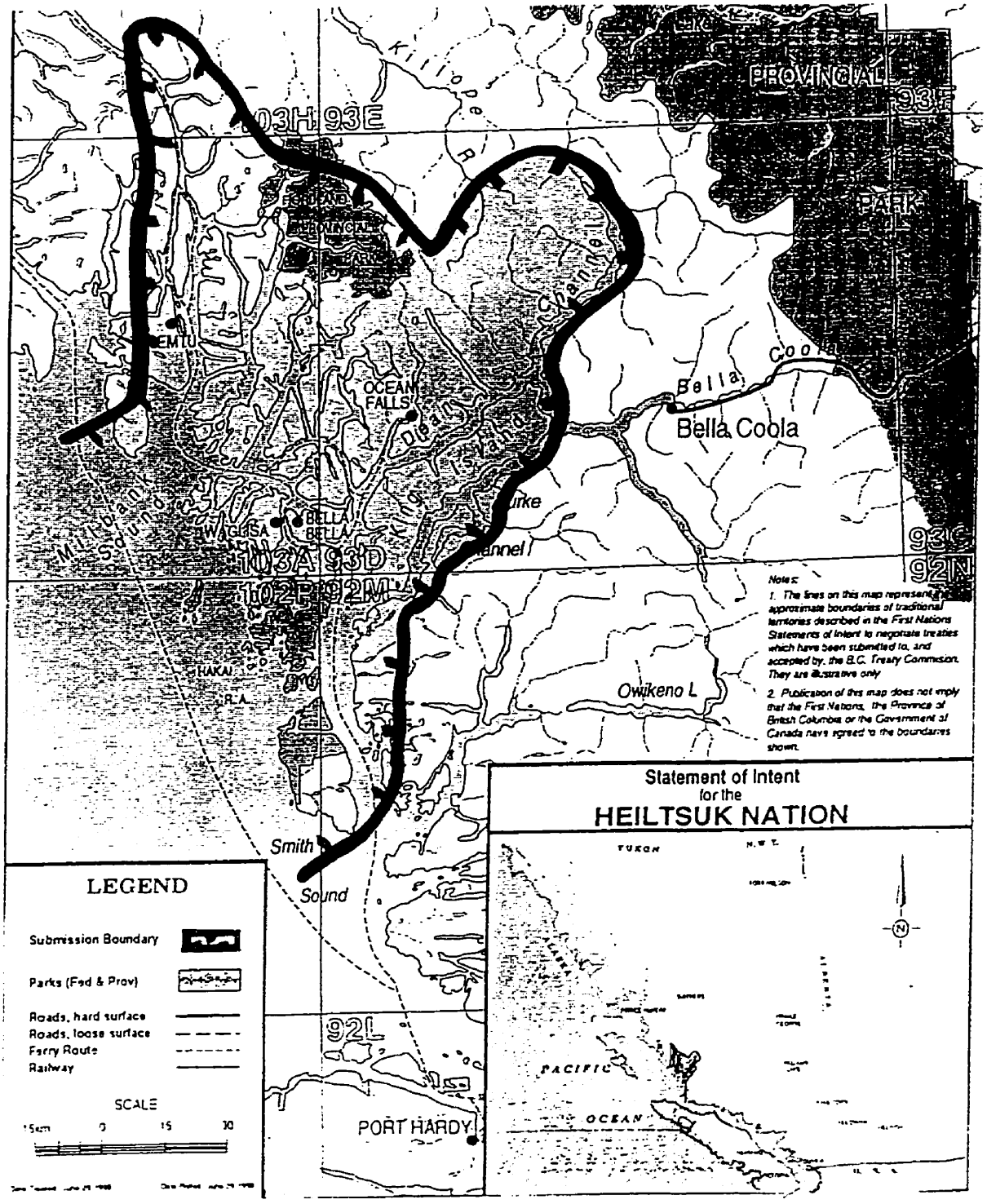
> Rights, in other words, protect us against the hubris that any current conception of Justice or right is the last word (Cornell 1992: 167).

APPENDIX ONE: Stólo traditional territory



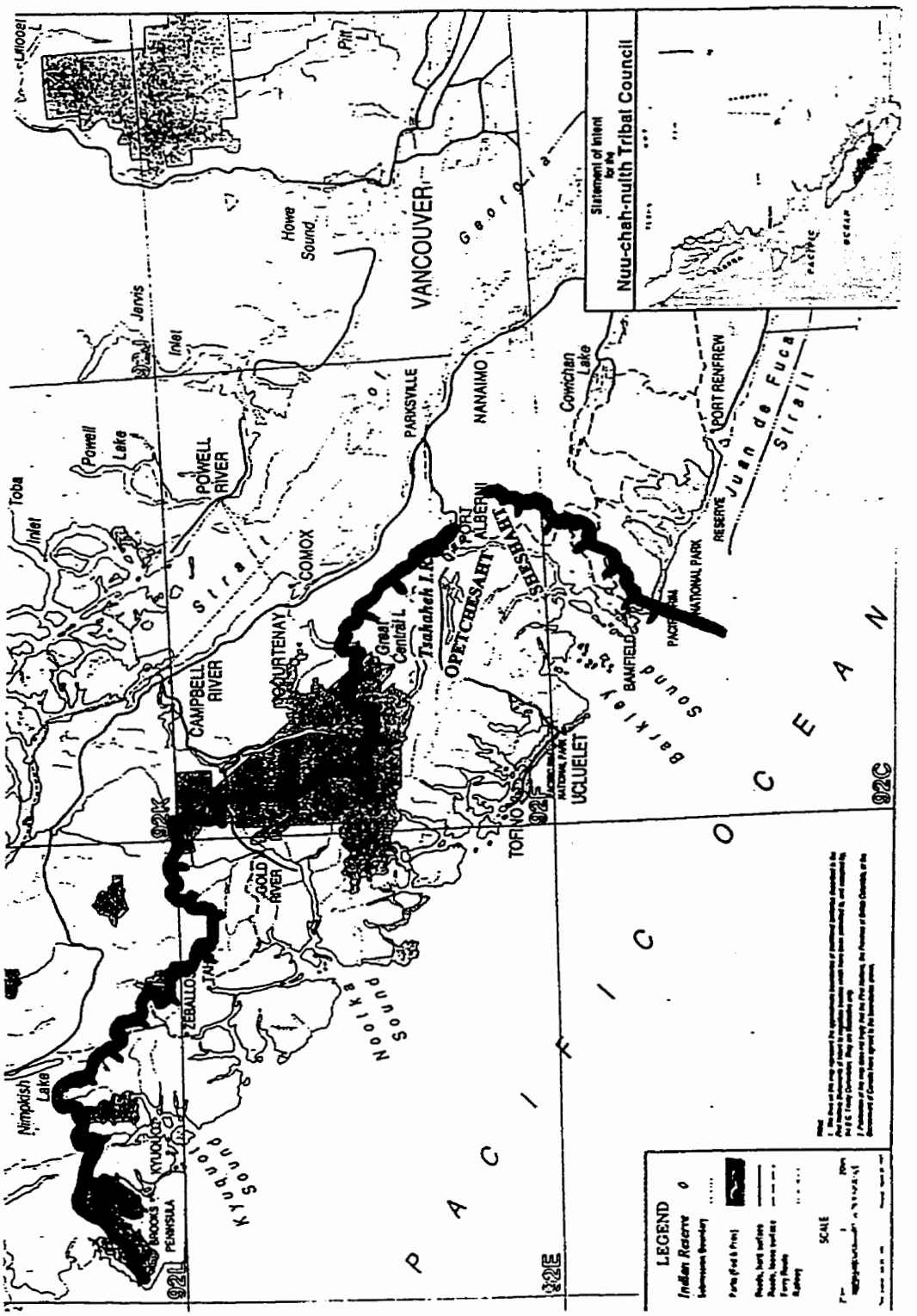
This public information was obtained from the Federal Treaty Negotiation Office, Department of Indian Affairs and Northern Development, Vancouver, B.C..

APPENDIX TWO: Heiltsuk traditional territory



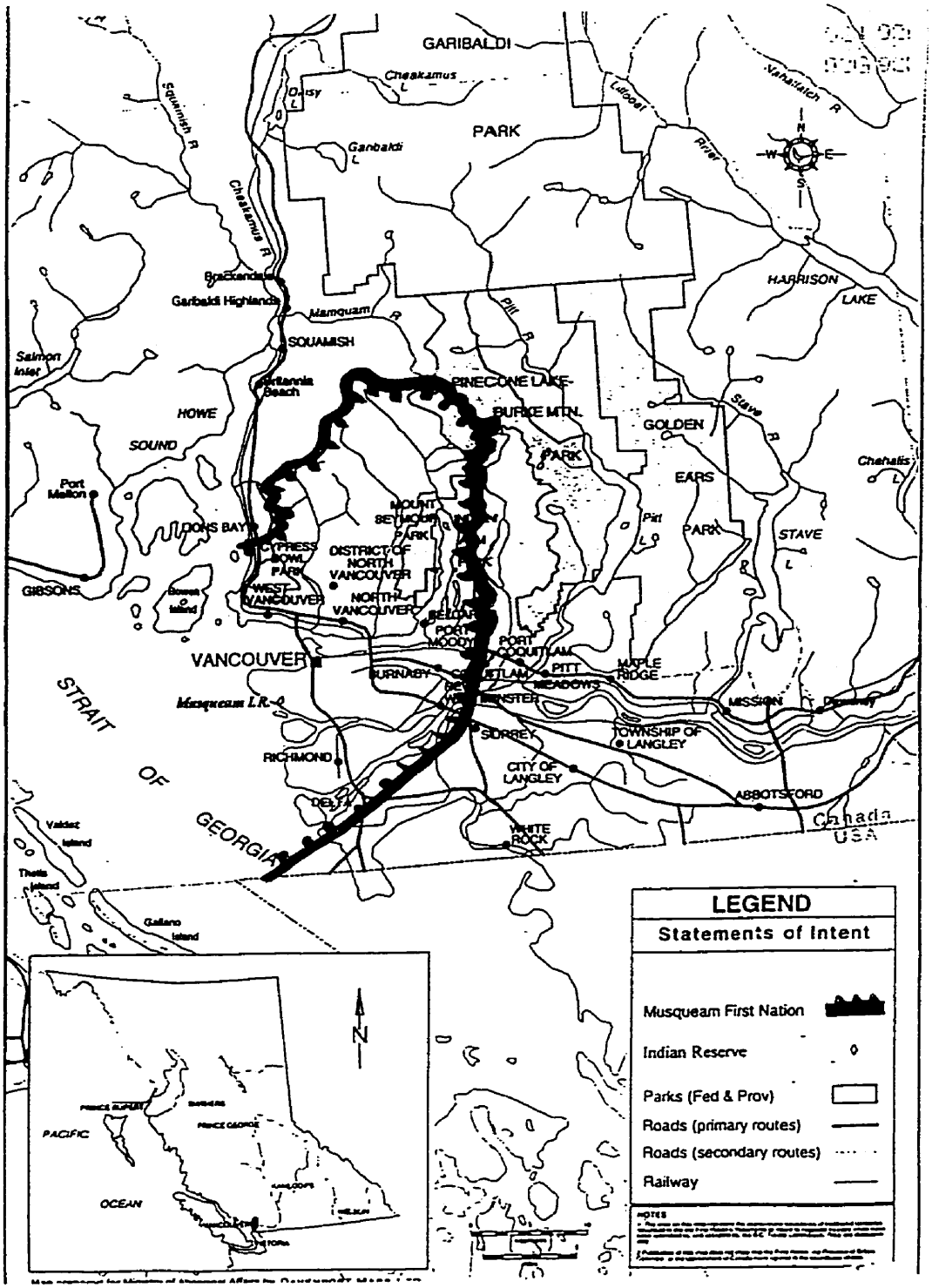
This public information was obtained from the Federal Treaty Negotiation Office, Department of Indian Affairs and Northern Development, Vancouver, B.C..

APPENDIX THREE: Nuh Chah Nulth traditional territory



This public information was obtained from the Federal Treaty Negotiation Office, Department of Indian Affairs and Northern Development, Vancouver, B.C..

APPENDIX FOUR: Musqueam traditional territory



This public information was obtained from the Federal Treaty Negotiation Office, Department of Indian Affairs and Northern Development, Vancouver, B.C..

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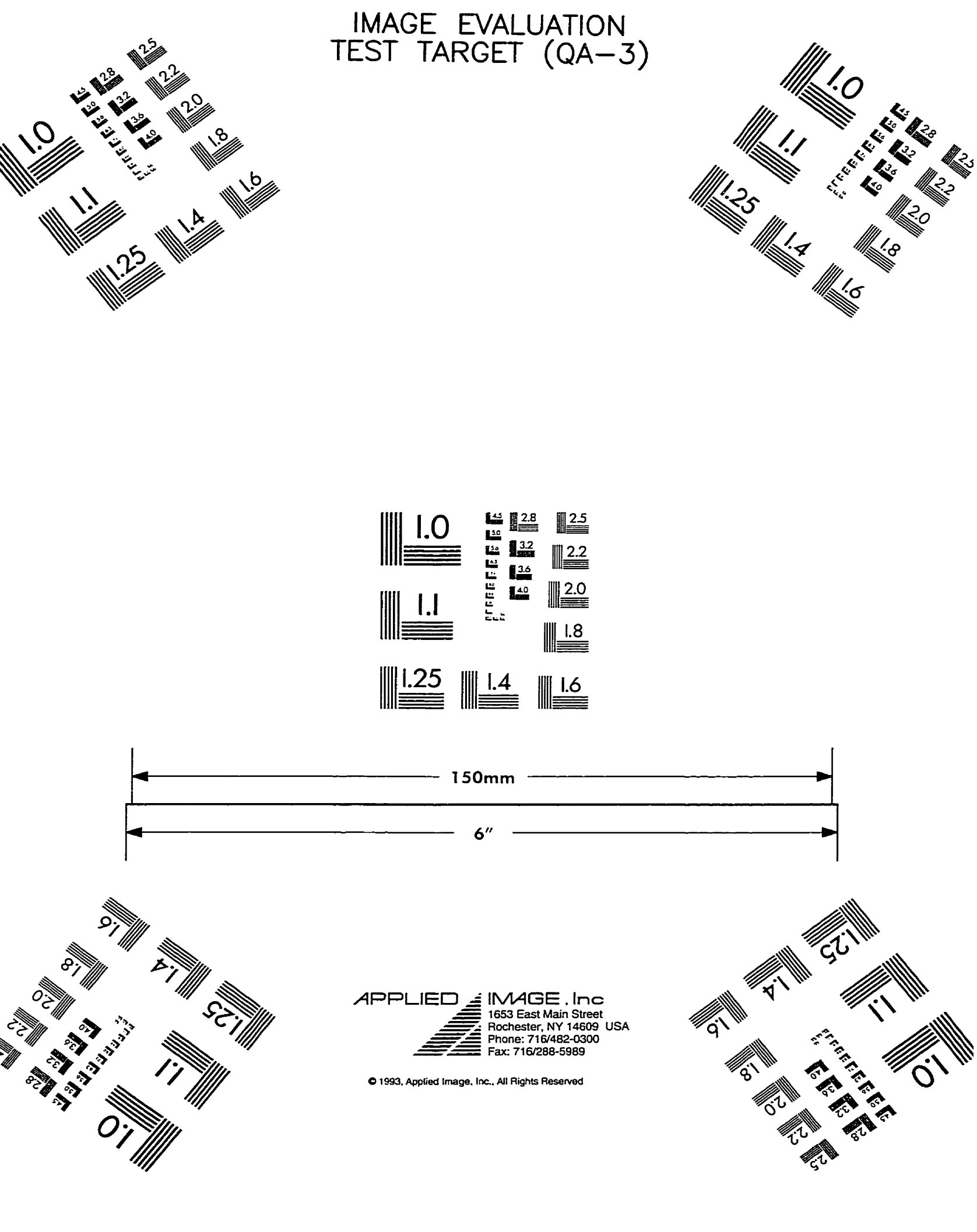
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