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2011 CarswellBC 1161, 2011 BCCA 235

R. v. Quipp

Regina, Respondent and Frederick William Quipp Jr., Appellant

Regina, Respondent and Leanne Renae Quipp, Appellant

Regina, Respondent and Frederick William Quipp Sr., Appellant

Regina, Respondent and Frederick William Quipp Sr., Appellant and Musqueam Indian Band, Intervenor

British Columbia Court of Appeal

Bennett J.A., Finch C.J.B.C., Frankel J.A., Hall J.A., Neilson J.A.

Heard: March 1, 2011
Judgment: May 13, 2011
Docket: Vancouver CA036448, CA036449, CA036450, CA036451

Proceedings: Affirmed, 2008 BCSC 1096, 2008 CarswellBC 1712, [2008] B.C.W.L.D. 7133, [2008] B.C.W.L.D. 7135, [2008] B.C.W.L.D. 7163, [2008] B.C.W.L.D. 7134, [2008] B.C.W.L.D. 7136, 79 W.C.B. (2d) 850, [2008] B.C.J. No. 1544, [2008] 4 C.N.L.R. 102 (B.C. S.C.); Affirmed, 2008 BCSC 1098, 2008 CarswellBC 1714, [2008] 4 C.N.L.R. 158, 177 C.R.R. (2d) 119, [2008] B.C.W.L.D. 6967 (B.C. S.C.)

Counsel: C.J. Nowlin, for Appellants

C.J. Tobias, Q.C., O.L. Bick, for Respondent

M. Morellato, Q.C., C. Reeves, for Intervenor, Musqueam Indian Band

Subject: Public; Constitutional; Civil Practice and Procedure; Criminal

Aboriginal law.

Criminal law.

***Hall J.A.*:**

1 These are appeals from orders of D. Smith J. (as she then was) pronounced 14 August 2008. They concern

events that occurred in 1999. The appellants were charged with unauthorized fishing on the Fraser River. They had been fishing at times when closures had been imposed by the Department of Fisheries and Oceans ("DFO"). In trials held respectively before Judge MacDonald and Judge Gill of the Provincial Court, convictions were registered against the appellants. The cases thereafter went on summary conviction appeal to D. Smith J. who sustained the convictions.

2 In these cases, most of the factual circumstances are undisputed. At the trials, the appellants acknowledged that they were fishing at the material times otherwise than under the authority of a licence and the Crown acknowledged that it had infringed the appellants' Aboriginal right to fish for food, social, and ceremonial purposes. The issue that divides the parties is the question of justification based on conservation considerations.

3 Frederick William Quipp, Sr. is a member of the Union Bar First Nation and is married to a member of the Cheam First Nation, Leanne Renae Quipp. Frederick William Quipp, Jr. is a member of the Cheam First Nation. The traditional fishing territory of the Cheam First Nation is between the Mission Bridge and Sawmill Creek on the Fraser River. The alleged offences are all alleged to have occurred within this territory.

Background

Regulation of the Pacific Salmon Fishery

4 DFO manages the Pacific salmon fishery under the authority of the *Fisheries Act*, R.S.C. 1985, c. F-14, and the regulations thereto. In setting the terms of access to the various seasonal salmon fisheries, DFO relies on both pre-season forecasts and in-season information. Initially DFO forecasts run sizes based on a number of factors such as expected weather conditions, the condition of the spawning grounds, and historical return data. (Fraser River sockeye tend to run in four year cycles, permitting DFO to forecast the size of a given year's runs based on the number of fish that spawned four years previous.) DFO relies on pre-season forecasts to establish an annual fishing plan, which dictates the terms of access to a fishery. As the fish progress through their migration, the Pacific Salmon Commission, a bilateral body established under the Pacific Salmon Treaty between Canada and the United States, collects data regarding actual run and stock abundance, which it supplies to DFO. DFO may then alter the terms of access to respond to the updated conditions.

5 Allocating access to the Pacific salmon fisheries can be a complicated and sometimes contentious exercise. Fishers are commonly divided into three sectors: commercial, recreational and Aboriginal. The commercial and recreational sectors take the bulk of their catch at sea whereas the Aboriginal sector takes the bulk of its catch in-river. DFO manages access to the fishery to meet stock-specific escapement targets. (A stock is a genetically distinct population of salmon that spawn in a particular location. Escapement refers to the number of fish that are anticipated to reach the spawning grounds.)

6 Subject to meeting escapement targets, DFO policy accords priority access to Aboriginal persons fishing for food, social, and ceremonial purposes (the "FSC fishery") pursuant to communal licences issued under the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332. In setting escapement targets and regulating access, DFO consults with Aboriginal groups, including the 93 bands that fish on the Fraser River and its tributaries. DFO and Aboriginal groups do not always agree on escapement targets and the terms of access to fisheries.

The 1999 Fraser River Sockeye Fishery

7 On the basis of pre-season estimates, DFO expected 8.2 million sockeye salmon to return to the Fraser River in 1999 in four runs: the Early Stuart, the Early Summer, the Summer, and the Late Summer. The 1999 annual fishing plan allocated 800,000 sockeye to the Fraser River First Nations for the FSC fishery based on their food and cultural needs. In fact, far fewer than 8.2 million sockeye returned to the Fraser in 1999. As the diminished run sizes became apparent, DFO closed or constrained all the Fraser River sockeye fisheries. As a result, the commercial fishery harvested only 54,000 Fraser-bound sockeye, the recreational fisheries 17,000, and the Fraser River FSC fishery 252,000 (marine First Nations took an additional 95,000 sockeye for FSC purposes). These appeals concern events involving the 1999 Early Stuart and Summer runs.

The 1999 Early Stuart Run

8 The Early Stuart Run consists of a single stock that spawns in the Stuart Lake area of British Columbia. It is the first sockeye run of the year and is very significant to Aboriginal groups, particularly those residing near the spawning grounds. The Early Stuart tends to be a relatively weak stock. DFO has not permitted commercial exploitation of Early Stuart sockeye since 1985.

9 In 1999, DFO's initial forecast predicted a return of 318,000 Early Stuart sockeye. DFO set the escapement target for the Early Stuart Run at 150,000, leaving 168,000 fish available for harvest. Under the Pacific Salmon Treaty, United States fishers were allocated 16,000 fish from the 1999 Early Stuart Run. DFO planned to harvest 10,000 fish as part of a test fishery and allocated most of the remaining 142,000 Early Stuart sockeye to Aboriginal fishers with some access to recreational fishers. DFO set a "floor" escapement level of 66,000 fish, beyond which no fishing would be permitted.

10 Based on the pre-season forecast, in late June of 1999, DFO permitted recreational and Aboriginal FSC retention of Early Stuart sockeye. On 6 July 1999, the Pacific Salmon Commission issued a revised estimate for the Early Stuart Run of 150,000 fish. In response, DFO revised its escapement target downward to 128,000. Of the available catch of 22,000, DFO allocated 4,000 to the test fishery and 18,000 to the FSC fishery, which would be limited to food fishing for groups in the Stuart Lake area, for whom the Early Stuart Run is particularly important, and to dry rack and ceremonial fishing, which have particular cultural significance for many Fraser River First Nations. DFO closed the recreational fishery to retention of Early Stuart sockeye, effective July 9. Due largely to high water levels in the Fraser, which caused increased mortality, only 25,000 Early Stuart sockeye reached the spawning grounds in 1999, a number well below the escapement floor.

11 The Cheam, who fish in the lower Fraser and did not hold a ceremonial or dry rack FSC licence in 1999, ignored the closure of their FSC fishery and fished for Early Stuart sockeye between July 9 and July 25, retaining an estimated 1,400 fish. During this period a number of Cheam fishers, including the appellants, were charged with fishing without a licence.

The 1999 Summer Run

12 The Summer Run, which consists of four main stocks, is typically the largest sockeye run of the season. In 1999, the initial estimate for the Summer Run was 5.3 million sockeye. DFO set the escapement target at 1.5 million, allocated 800,000 fish to the FSC fishery and the balance to the commercial and recreational sectors.

13 On the basis of its initial estimate, in late July and early August, DFO opened fisheries for all three sectors. In two openings in late July, commercial fishers took 49,000 fish. On July 31, DFO opened an in-river recreational fishery in which fishers took 14,000 fish. Between July 29 and August 8, DFO permitted two FSC

openings in which Aboriginal fishers took 137,000 fish. An additional 94,000 fish were taken in a DFO test fishery.

14 On August 6, the Pacific Salmon Commission issued a revised estimate for the Summer Run of only 1.3 or 1.4 million fish. In response, DFO closed all Summer Run fisheries. No commercial fisheries were open at the time. The recreational fishery was closed as of August 9. Apparently it took a couple of days to effect notification in the case of the recreational fishery. The FSC fishery was closed as scheduled on August 8 and no further openings were permitted except for limited dry rack and ceremonial fisheries. Despite the closure of their FSC fishery, members of the Cheam continued to fish Summer Run sockeye. On 15 August 1999, the appellant Frederick William Quipp, Sr. was charged with fishing without a licence.

15 To some extent, DFO's concerns regarding the abundance of Summer Run sockeye proved to be unfounded. An error committed by DFO fish counting staff led DFO to believe that Chilco stock would be 300,000 or 400,000 fish, lower than the pre-season estimate of 500,000. In fact, the Chilco stock was 900,000 strong. Actual escapement of Summer sockeye was between 1.7 and 1.8 million fish, above the escapement target of 1.5 million. In the absence of this error, it seems DFO would have permitted further FSC fisheries on Summer Run sockeye.

Judgments Below

Provincial Court

16 Charges against the appellants and others relating to fishing after the closure of the Cheam FSC fishery on the Early Stuart Run were tried before Judge MacDonald of the Provincial Court in October and November of 2000. On 28 December 2000, MacDonald P.C.J. entered convictions against a number of accused including the appellants, who were convicted on the charge of unlawfully fishing without the authority of a licence, contrary to s. 26(1) of the *Pacific Fishery Regulations*, 1993, SOR/93-54, pursuant to ss. 33 and 78 of the *Fisheries Act*: *R. v. Aleck*, 2000 BCPC 177, [2001] 2 C.N.L.R. 118. In relation to these offences, Mr. Quipp, Jr. was assessed a fine of $500; Ms. Quipp and Mr. Quipp, Sr. were assessed fines of $100.

17 Charges against Fredrick William Quipp, Sr. and others relating to fishing after the closure of the Cheam FSC fishery on the Summer Run were tried before Judge Gill of the Provincial Court. On 20 June 2002, Gill P.C.J. entered convictions against a number of accused including Fredrick William Quipp, Sr. who was convicted on the charge of unlawfully fishing without the authority of a licence, contrary to s. 26(1) of the *Pacific Fishery Regulations*, 1993, SOR/93-54, pursuant to ss. 33 and 78 of the *Fisheries Act*: *R. v. Peters*, Surrey 112644-T (unreported). Mr. Quipp, Sr. was assessed a fine of $600 in relation to this offence. Certain charges against a number of accused persons were dismissed by Gill P.C.J. because he found DFO had not responded in a sufficiently timely manner when the counting error was discovered.

18 At both trials the appellants admitted the elements of the offence of fishing without the authority of a licence and the Crown admitted it had infringed the appellants' constitutionally protected Aboriginal right to fish for food, social, and ceremonial purposes by its closure of the fisheries in each instance.

Supreme Court of British Columbia

19 D. Smith J., sitting as a summary conviction appeal judge, heard appeals from both the Early Stuart Run convictions (*R. v. Aleck*, 2008 BCSC 1096) and the Summer Run convictions (*R. v. Douglas*, 2008 BCSC 1098).

The central issue on both appeals was whether the Crown had discharged its burden to justify the infringements of the appellants' Aboriginal rights.

20 The appeal judge addressed the application of the test from *R. v. Sparrow*, [1990] 1 S.C.R. 1075. She concluded that DFO's closure of the Cheam Early Stuart and Summer FSC fisheries was in pursuit of conservation, which was a valid legislative objective in the circumstances.

21 The appeal judge then turned to the question of whether DFO had given due priority to the appellants' Aboriginal right to fish for food, social, and ceremonial purposes. She considered that this issue had to be examined on a case-by-case basis and that the justificatory standard was one of reasonableness in light of the circumstances that existed at the time of the infringement: *Aleck* at para. 47; *Douglas* at paras. 31-32. The appeal judge cited *R. v. Douglas*, 2007 BCCA 265at para. 54 (*"Douglas 2007"*), for the proposition that the doctrine of priority does not demand that the FSC fishery be accorded priority access in time: *Douglas* at para. 40.

22 On the Early Stuart appeal, the appeal judge concluded:

> [57] The 1999 Early Stuart fishing season required conservation measures to be given the highest priority. All retention Early Stuart fisheries were closed. While the aboriginal fishery must be afforded the next highest priority after conservation measures, the best priority of allocation and access to the fish that could be given in the very difficult circumstances of that season was ongoing but limited dry rack and ceremonial fishing. The reality is that the Cheam's unauthorized fishing expanded that priority at the expense of all other fisheries.

23 On the Summer Run appeal, the appeal judge concluded:

> [41] The pre-season allotments under the DFO fishing plan gave priority to the aboriginal fisheries over the commercial and recreational fisheries. When the in-season circumstances changed, the aboriginal fisheries, along with the commercial and recreational fisheries, were required to share in the conservation measures imposed in order to maintain the fishing plan's escapement goals. The appellants' position that the aboriginal fisheries should not be subject to valid conservation measures until their pre-season allotment has been met would be contrary to the *Sparrow* test, as I understand it. Conservation takes priority over both aboriginal and nonaboriginal fishing allotments. Even in the face of mid-season exigent circumstances that required all fishing sectors to be closed, the limited aboriginal dry rack and ceremonial fisheries provided the aboriginal fishers with some priority.
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> [42] In summary, I am satisfied that after August 9, 1999, the closure of both aboriginal and non-aboriginal fisheries was justified on the basis of the DFO's honest belief in the significantly reduced numbers of retuning Summer run sockeye, including the Chilco, that would prevent it from meeting its escapement goals. In my view, these conservation measures did not ignore the aboriginal right of priority to the fish. ...

24 In both cases the appeal judge concluded that the conduct of DFO amounted to a minimal infringement of the appellants' right to fish, that DFO had met its obligation to consult with and accommodate the Cheam in the circumstances, and that the appellants were not entitled to compensation for any infringement of their Aboriginal rights. In the result, the appeal judge sustained the convictions registered against the appellants related to both the Early Stuart Run and the Summer Run.

Issue

25 The appellants sought leave to appeal from the dispositions of the appeal judge. Section 839(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that a court of appeal may hear an appeal from the decision of a summary conviction appeal court, with leave, on a question of law alone. The appellants advanced a number of proposed grounds of appeal. Neilson J.A. granted leave to appeal on the issue of whether the priority granted to the FSC fishery includes priority in time: *R. v. Quipp*, 2010 BCCA 389at para. 44.

Positions of the Parties

26 In their submissions, the appellants argued that the priority granted to the FSC fishery always includes priority in time until the FSC allocation is met. They said that, to the extent that this Court's decision in *Douglas 2007* contradicts this position, that case was wrongly decided.

27 Canada says that the doctrine of priority speaks of priority of allocation, not time. Canada says that whether the FSC fishery is entitled to priority in time will depend upon the circumstances.

28 The intervenor Musqueam Indian Band says that the law requires that the FSC fishery be accorded priority in time in some but not all circumstances. The intervenor says that whether the FSC fishery is entitled to priority in time should be conditional upon the application of the Crown's fiduciary duty to protect an Aboriginal right to fish for FSC purposes.

Analysis

29 In dealing with the issue of whether the priority accorded to the FSC fishery includes priority in time, I propose to consider the question of temporal priority by reference to the authorities, including this Court's decision in *Douglas 2007*. I propose to then consider whether the appeal judge correctly applied the applicable principles in her decisions on the Early Stuart Run and Summer Run appeals.

The Doctrine of Priority

30 A leading authority on the question of priority generally is the Supreme Court of Canada's decision in *Sparrow*. In *Sparrow*, the accused, a member of the Musqueam Band, was charged under the *Fisheries Act* with the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. In defence, he argued the net length restriction was of no force and effect because it was inconsistent with his Aboriginal right to fish protected by s. 35(1) of the *Constitution Act, 1982*.

31 The Court, *per* Dickson C.J. and La Forest J., affirmed that the accused held an Aboriginal right to fish for food, social, and ceremonial purposes but noted that Aboriginal rights recognized and affirmed by s. 35(1) are not absolute. Government may infringe an Aboriginal right if it is capable of justifying the infringement. The infringement of an Aboriginal right will only be justifiable where government acts in pursuit of a valid objective and in a manner that upholds the honour of the Crown and is consistent with "the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Aboriginal peoples" (at 1110). This relationship is fiduciary in nature: *Sparrow* at 1109; *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 56.

32 Turning to the context of fisheries regulation, the Court held that, while conservation is a valid legislative objective, s. 35(1) demands that government adhere to certain guidelines when acting in pursuit of conservation. The Court reproduced a passage from the concurring reasons of Dickson J. (as he then was) in *R. v. Jack*, [1980] 1 S.C.R. 294 at 313, in which he opined that, in allocating access to a fishery, the Crown was bound to

give priority to Indian food fishing subject to conservation measures and to "the practical difficulties occasioned by international waters and the movement of the fish themselves." The Court in *Sparrow* adopted this proposition in the following passage, which speaks to what has become known as the doctrine of priority:

> The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing. [At 1116.]

33 In the result, the Court ordered a new trial on the basis that the record did not permit the Court to determine whether there had been an infringement and, if so, whether such infringement could be justified.

34 In *R. v. Gladstone*, [1996] 2 S.C.R. 723, the Court revisited the question of priority in a different context. That case concerned convictions against two members of the Heiltsuk Band on the charge of attempting to sell herring spawn on kelp without a licence. The majority of the Court, *per* Lamer C.J., held that the prohibition on the sale of herring spawn on kelp constituted an infringement of the appellants' Aboriginal right to sell herring spawn on kelp on a commercial scale but ordered a new trial on the issue of whether that infringement could be justified.

35 The majority in *Gladstone* considered that the content of the priority articulated in *Sparrow* might not be applicable on the facts before the Court in *Gladstone*. The right recognized in *Sparrow* was internally limited: it would extend only to the amount of fish required to meet the Aboriginal group's consumption needs. In contrast, the asserted right in *Gladstone* was one without an internal limitation. The majority held that the content of the priority to be accorded to Aboriginal fishing rights that are not internally limited could be characterized as somewhat weaker than that described in *Sparrow*:

> Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. [At para. 62.]

The majority affirmed that the notion of priority articulated in *Sparrow* would be appropriate in the context of the FSC fishery: *Gladstone* at para. 58.

36 *Douglas 2007* required this Court to consider the question of priority in circumstances similar to those in the instant appeals. *Douglas 2007* involved convictions against four members of the Cheam First Nation for fishing Early Stuart sockeye during a closure in July of 2000. In its pre-season estimate for that year, DFO expected 291,000 Early Stuart sockeye to return. On the basis of in-season information, on 3 July 2000, DFO revised its estimate upwards to 300,000 fish. On 11 July 2000, DFO revised its estimate again to 350,000. On the basis of these upgrades, DFO permitted recreational fishers to retain Early Stuart sockeye between 4 July 2000 and 9 July 2000. DFO permitted the Cheam to fish Early Stuart sockeye for FSC purposes during a number of

time-limited openings between 30 June 2000 and 15 July 2000. The Cheam apparently paid insufficient heed to the times of openings and closings: four Cheam fishers were charged with fishing without a licence within these dates at times when their fishery was closed.

37 The issue in *Douglas 2007* was whether the Crown could justify its infringement of the appellants' right to fish for FSC purposes. The Court, *per* Finch C.J.B.C., held that the infringement was justified. Turning to the question of whether DFO accorded the appellants' FSC fishery the appropriate priority, Finch C.J.B.C. reproduced the following passage from *Gladstone* at para. 63:

> The content of this priority — something less than exclusivity but which nonetheless gives priority to the aboriginal right — must remain somewhat vague pending consideration of the government's actions in specific cases. Just as the doctrine of minimal impairment under s. 1 of the *Canadian Charter of Rights and Freedoms* has not been read as meaning that the courts will impose a standard "least drastic means" requirement on the government in all cases, but has rather been interpreted as requiring the courts to scrutinize government action for reasonableness on a case-by-case basis, priority under *Sparrow*'s justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights.
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> [Citations omitted; emphasis added by Finch C.J.B.C.]

38 In response to the appellants' complaint that recreational fishers had been granted priority in time to Early Stuart sockeye, Finch C.J.B.C. pointed out that recreational access had been subsequent to or contemporaneous with FSC access. Then, at para. 54, he said:

> This is not to say that the priority required by *Sparrow* means that the food, social and ceremonial fisheries must always precede or occur contemporaneously with the non-aboriginal fisheries. As part of the contextual analysis into priority, it will sometimes be necessary to consider the practical difficulties occasioned by the movement of the fish themselves: *Sparrow*, *supra*, at 1116, citing *R. v. Jack*, [1980] 1 S.C.R. 294 at 313. The Fraser River sockeye encounter numerous fisheries, including aboriginal, recreational and commercial, as they migrate from the Pacific to their spawning grounds. If a non-aboriginal fishery could never precede any of the aboriginal fisheries, the result would be an exclusive food, social and ceremonial fishery, regardless of need and abundance of stock. That cannot be the intended result of *Sparrow*, where the Court stated that the objective of the priority requirement is to guarantee that fisheries conservation and management plans "treat aboriginal peoples in a way ensuring that their rights are taken seriously" (at 1119). DFO's actions in this case were consistent with that purpose.

39 Finch C.J.B.C. concluded that the terms of access accorded to the Cheam FSC fishery were consistent with *Sparrow*. The Supreme Court of Canada refused leave to appeal: [2007] S.C.C.A. No. 352 (15 November 2007).

40 This Court has convened a division of five to consider the correctness of the proposition articulated at para. 54 of *Douglas 2007* that the priority accorded to the FSC fishery need not include priority in time. On their application for leave to appeal, the appellants argued that *Douglas 2007* confused and diluted the priority articulated in *Sparrow* by wrongly relying upon the passage from *Gladstone* reproduced above, an argument the intervenor supported in its submissions on these appeals. In granting leave to appeal, Neilson J.A. said:

> I am satisfied there is some confusion in the authorities as to the nature of the priority accorded to the aboriginal FSC fishery and whether it includes a priority in time. In my view, clarification of that issue raises a question of law of some importance. [2010 BCCA 389 at para. 38.]

The two related questions raised with respect to *Douglas 2007* are thus: What is the nature of the priority accorded to the Aboriginal FSC fishery? And, does it include priority in time?

41 The passage from *Gladstone* quoted by this Court in *Douglas 2007* deals with the modified priority applicable in the context of Aboriginal fishing rights without an internal limitation, a priority different from that articulated in *Sparrow*.

42 The majority in *Gladstone* held that the content of the doctrine of priority is contextual. In the context of an Aboriginal right to fish for FSC purposes, however, *Sparrow* decided that the applicable priority is priority of allocation: if the allowable catch (after conservation) is equal to or less than FSC needs, all the available fish must go to the FSC fishery: *Sparrow* at 1116; *Gladstone* at para. 58. While the inquiry into whether an FSC fishery was accorded priority in the circumstances is contextual, the content of the applicable priority is not.

43 The Court in *Sparrow* held that the Crown must give priority of allocation to the FSC fishery subject to conservation measures and taking into account the practicalities of the fishery. One of these practicalities is that salmon migrate through the Pacific Ocean and up the Fraser River to their respective spawning grounds. While making clear that the Crown has a constitutional obligation to place the interests of Aboriginal fishers ahead of the interests of other users, the Court in *Sparrow* was careful not to dictate in detail the means by which the Crown is to give effect to the necessary priority afforded the FSC fishery. This is apparent from the Court's approval of the statement of Dickson J. in *Jack* that Indian food fishing is entitled to priority subject to conservation measures and to "the practical difficulties occasioned by international waters and the movement of the fish themselves" (at 313, reproduced in *Sparrow* at 1116), and also from the comments of the Court in *Sparrow* regarding how the Aboriginal right established in that case would affect the Crown's ability to manage the fishery:

> We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.
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> [At 1119; emphasis added.]

44 After describing the content of the doctrine of priority, the Court in *Sparrow* expressed approval of the Nova Scotia Court of Appeal's treatment of Aboriginal fishing rights in *R. v. Denny* (1990), 55 C.C.C. (3d) 322. The Court in *Sparrow* reproduced a passage from *Denny* in which that court stated that s. 35(1) provided the Aboriginal fishers in that case with "a priority of allocation and access" subject to conservation: *Denny* at 340-41, reproduced in *Sparrow* at 1117.

45 In my opinion, the reference to priority of access in *Denny* does not operate to incorporate into the doctrine of priority a requirement that the FSC fishery be accorded priority in time. The Court in *Sparrow* referred

to that passage in *Denny* not to illustrate the content of the priority but to demonstrate that a regulatory provision or regime that fails to accord appropriate protection to a s. 35(1) Aboriginal right will be of no force and effect. Moreover, the reference to *Denny* cannot have incorporated a requirement of prior temporal access into the doctrine of priority because to do so would be contrary to the Court's instruction that Parliament be afforded proper latitude in administering fisheries policy (at 1116 and 1119).

46 The key consideration underlying the doctrine of priority is that Aboriginal rights are not to be ignored but must be respected. The source of the doctrine of priority is the fiduciary relationship between the Crown and Aboriginal peoples: *Sparrow* at 1109-10; see also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 162. The Crown is bound to manage Aboriginal access to a fishery in a manner consistent with this relationship. Where it fails to do so, the Crown will be incapable of justifying the infringement of the Aboriginal right: *Sparrow* at 1110; see e.g. *R. v. Tommy*, 2008 BCSC 1095.

47 This Court's comment at para. 54 of *Douglas 2007* to the effect that the doctrine of priority does not demand that the FSC fishery be accorded priority in time is in my opinion consistent with the authorities. It is in accord with the nature of the resource. The priority articulated in *Sparrow* speaks to priority of allocation. It demands that the Crown *always* accord priority of allocation to the FSC fishery. As noted, where it is estimated that a limited surplus will exist in a given fishery after conservation requirements have been met, then the doctrine of priority may require that access be only permitted to Aboriginal fishers. Whether the FSC fishery is entitled to priority in time will depend on the circumstances, on the application of the Crown's obligation to manage the fishery in a manner consistent with its fiduciary relationship with Aboriginal peoples.

48 In summary, where the Crown seeks to justify the infringement of a s. 35(1) Aboriginal right, the two fundamental questions for the court are (1) was the Crown acting in pursuit of a valid legislative objective? And (2), was the Crown's conduct consistent with the fiduciary relationship between the Crown and Aboriginal peoples? Where the right in issue is a right to fish for FSC purposes and the infringing conduct is alleged to have been in pursuit of conservation, *Sparrow* demands that the FSC fishery be accorded priority of allocation. As the appeal judge correctly noted, in assessing whether the Crown has met the burden of justifying an infringement of an Aboriginal right, the standard by which the Crown's conduct will be evaluated is one of reasonableness in light of the circumstances that existed at the time of the infringement: *Douglas* at para. 31; *Aleck* at para. 47, citing *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110.

49 In arriving at her conclusion that the appellants were not entitled to priority in time, the appeal judge relied on para. 54 of *Douglas 2007* in her reasons on the Summer Run appeal at para. 40:

> It is also clear from *Douglas* at ¶54 that the aboriginal right of priority to the fish does not include a right of priority in time to access the fish. Priority in time would give the aboriginal fisheries "an exclusive food, social and ceremonial fishery, regardless of need and abundance of stock", which "cannot be the intended result of *Sparrow*".

The appellants complain that this passage is categorical. They say it precludes the possibility that the FSC fishery be accorded priority in time in some circumstances. I do not agree.

50 The appeal judge was well aware that the FSC fishery must be accorded priority in time in some circumstances. In the related appeals in *R. v. Tommy*, 2008 BCSC 1095, the appeal judge entered acquittals on two counts of fishing without a licence on the basis that, in the circumstances, the honour of the Crown demanded that the FSC fishery be accorded access prior to any recreational fishery. The charges related to the 1999

chinook salmon fishery. At the outset of the 1999 season, DFO did not expect chinook returns to be sufficient to meet Aboriginal FSC needs. DFO nevertheless permitted the recreational fishery to retain chinook. The appeal judge said:

> In the circumstances of these appeals, where there was insufficient fish to meet the First Nations' food, social and ceremonial needs, I am of the view that all of the available Chinook had to go to the First Nations, regardless of the minimal impact the recreational fisheries may have had on the stock. This was necessary in order to guarantee the appellants their constitutional right of priority to the fish in the circumstances that existed and were known to exist before the commencement of the 1999 fishing season. [At para. 83.]

51 She distinguished the circumstances in the Early Stuart and Summer Run appeals on the basis that, at the time DFO permitted recreational and commercial access to those runs, it reasonably expected sockeye returns would be sufficient to meet the Aboriginal FSC allocation. As this distinction demonstrates, the appeal judge appreciated that the FSC fishery may be entitled to priority in time in some circumstances. In my view, she correctly apprehended the doctrine of priority.

52 These appeals do not permit this Court to review all of the findings of the appeal judge. In the course of her reasons for judgment, the appeal judge arrived at a number of conclusions on issues such as whether there had been as little infringement as possible, whether consultation had been adequate, and whether the appellants were entitled to compensation. These conclusions are beyond the scope of these appeals, which are limited to the issue on which Neilson J.A. granted leave to appeal, the question of priority in time.

53 I would dismiss the appeals.

***Finch C.J.B.C.*:**

I agree:

***Frankel J.A.*:**

I agree:

***Neilson J.A.*:**

I agree:

***Bennett J.A.*:**

I agree:

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