LOUIS CLAXTON, CHIEF of TSAWOUT INDIAN BAND, on behalf of himself and all other members of TSAWOUT INDIAN BAND (Plaintiffs (Respondents)) V. SAANICHTON MARINA LTD. and THE QUEEN in right of BRITISH COLUMBIA (Defendants (Appellants))

[Indexed as: **Claxton V. Saanichton Marina Ltd**.]

British Columbia Court of Appeal, Hinkson, Lambert and Locke JJ.A., March 30, 1989

E.R.A. Edwards, Q.C., and G.P Wallace, for the appellant Crown
P.J. Pearlman, for the appellant Saanichton Marina Ltd.
M.L. Mandell and S.A. Guenther, for the respondent

In 1983 the province of British Columbia issued a licence of occupation to Saanichton Marina Ltd. for the purpose of constructing and operating a marina and breakwater in Saanichton Bay on the coast of Vancouver Island. The Tsawout Band, successors to the Saanich Indians, brought an action to stop the project on the grounds that it would be harmful to its right to fish which was recognized and guaranteed by the Saanich Treaty of 1852. The treaty was in the form of a deed by which the Hudson's Bay Company purported to purchase the aboriginal land rights of the Saanich Indians, but reserving to them the right to carry on their fisheries as formerly. The whole of the Bay was part of their traditional fishing grounds. At trial ([1987] 4 C.N.L.R. 48) a permanent injunction halting the project was granted against both the company and the Crown. The company and the Crown appealed.

Held: Appeal dismissed. Permanent injunction against the Crown dissolved.

1. The 1852 agreement is a treaty within the meaning of s.88 of the *Indian Act,* R.S.C. 1970, c.I-6. In negotiating this agreement with the Saanich people Governor Douglas was carrying out official imperial policy.

2 The word "fishery/fisheries" may be used to denote not only the right to catch fish but also the place where the right can be exercised.

3. The right to carry on the fishery guaranteed by the treaty is unqualified. While the right does not amount to a proprietary interest in the sea bed nor a contractual right to a fishing ground, it does protect the Indians against infringement of their right to carry on the fishery as formerly. This includes the right to travel to and from the fishery.

4. In interpreting treaties certain general rules should be applied. Those rules are that treaties should be given fair, large and liberal construction in favour of Indian people, should not be construed technically but in the sense understood by the Indian people and any ambiguity should be interpreted against the drafters. As well, as the honour of Crown is involved no sharp dealing should be sanctioned, and evidence of conduct as to how the parties understood the treaty should be used to give the treaty content.

5. Construction of a marina will derogate from the right of Indians to carry on their fisheries as formerly in the area protected by treaty: it will impede their right of access to an important area of the bay; the stationary crab fishery will be destroyed in the area to be dredged; the development will have a harmful impact on the right of fishing granted by the treaty.

6. Under the *Crown Proceedings Act,* R.S.B.C. 1979, c.86, s.11 (2) an injunction can not be issued against the Crown. The remedy allowed is a declaration of rights.

* * * * * *

HINKSON J.: Saanichton Marina Ltd., pursuant to a license of occupation granted by Her Majesty the Queen in Right of the Province of British Columbia, proposes to build a marina adjacent to property it owns on Saanichton Bay on Vancouver Island. The Tsawout Indian Band oppose the construction of the marina because they say the marina, as proposed, will interfere with their right of fishery in Saanichton Bay, granted by treaty in 1852.

The Background and Terms of the Treaty

On February 11, 1852, Governor James Douglas concluded a treaty with representatives of the

Saanich Tribe. The Tsawout Band is a successor to the Saanich Tribe and members of the band are descendants of the signatories to the treaty. At that time Douglas was engaged in a program of acquiring Indian lands on Vancouver Island for the purpose of settlement and colonization. Between April 29, 1850, and February 8, 1851, Douglas had concluded treaties with twelve Indian tribes on Vancouver Island.

The treaty with the Saanich Tribe was in the following terms:

> Know all men that we Chiefs and people of the Sanitch Tribe, who have signed our names and made out "marks" to the Deed on the 11th day of February, 1852, do covenant to surrender entirely and forever, to James Douglas the agent of the Hudsons Bay Company, in Vancouver's Island, that is to say for the Governor, Deputy Governor and Committee of the same, the whole of the land situate and lying as follows: vizt commencing at Cowitchin Head and following the coast of the Canal de Arro northwest nearly to Sanitch Point or Qua-na-sung from thence following the course of the Sanitch Arm to the point where it terminates and from thence by a straight line across country to said Cowitchin Head the point of commencement; so as to include all the country and lands, with the exceptions hereafter named, within those boundaries –
>
> The conditions of our understanding of this sale is this that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us, and the land shall be properly surveyed hereafter; it is understood however that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. We have received, as payment...

The words of the treaty upon which the present appeal turns are the following: "we are at liberty... to carry on our fisheries as formerly."

The Saanich Indians

As stated earlier, the appellant band is a successor to the Saanich Tribe and members of the band are descendants of the signatories to the treaty.

The Saanich people are identified with settlements on the east and west coasts of Saanich Arm and on neighboring islands in the straits to the east in the earliest written records noting Indians of this region. They lived in permanent winter villages at sheltered bays and also had temporary camps where they harvested fish, bemes, root crops and other resources at appropriate seasons. The winter village locations were also permanent quarters for settled populations. Unlike the Plains Indians who were nomadic hunters, the Saanich Indians lived a relatively sedentary life along the coast of the Saanich Peninsula.

Saanich villages were situated in three principal locations on Saanich Arm in the mid-nineteenth century - at Brentwood Bay and Union Bay (Patricia Bay) on Saanich Inlet and at Saanichton Bay on the east coast of Saanich Arm. According to native account, forbears of the present Tsawout people have lived at Saanichton Bay for as long as anyone knows. This bay was the location of one of, if not the most important permanent villages, providing sheltered, calm waters where winter fishing and hunting could be carried on when weather conditions made fishing in more open waters hazardous. Saanichton Bay provided a wide variety of fish, shellfish, sea mammals, and waterfowl important in the economy and diet of the Saanich people.

As did their predecessors, the Tsawout Band rely on the ocean water resources, particularly on the waters and resources of Saanichton Bay. For as long as anyone can remember, the Tsawout Indians have carried on an important stationary crab fishery in the location of the proposed marina basin. Although some crabbing is done by boat, the most convenient and often used method of harvesting crabs is to wade at low tide into that location, and use the traditional raking method. Clams and other shellfish have, in the past, been and remain an important part of the diet of the Tsawout. They are gathered at various places around the bay including in and around the proposed marina site.

Salmon have been historically relied upon by the Tsawout both from the larger traditional territory and from the confines of Saanichton Bay and continue to be important. Spring salmon are fished only in and around the bay where they come to feed. Coho, herring and smelt have been relied upon in the past and are looked to as a food source at the present time. Bottom fish such as cod, flounder, skate and halibut are taken from the bay as food. Several species of trout and in

particular cut-throat trout are also harvested from the bay for food.

Was the 1852 Agreement "A Treaty"?

At trial, the Crown sought to contend that the treaty in question was not binding on the Crown upon the basis that James Douglas, in concluding agreements with the Indians, was implementing Hudson Bay Company policy and not imperial government policy. Upon the basis of the reasoning in *R.* v. *White and Bob* (1964), 52 W.W.R. 193, 50 D.L.R. (2(1) 613 affirmed (1966), 52 D.L.R. (2(1) 481 (S.C.C.) that position is untenable. Davey J.A. expressed his view at p.197 as follows:

In the Charter granting Vancouver Island to the Hudson's Bay Company, it was charged with the settlement and colonization of that island. That was clearly part of the Imperial policy to head off American settlement of and claims to the territory. In that sense the Hudson's Bay Company was an instrument of Imperial policy. It was also the long-standing policy of the Imperial government and of the Hudson's Bay Company that the crown or the company should buy from the Indians their land for settlement by white colonists. In pursuance of that policy many agreements, some very formal, others informal, were made with various bands and tribes of Indians for the purchase of their lands. These agreements frequently conferred upon the grantors hunting rights over the unoccupied lands so sold. Considering the relationship between the crown and the Hudson's Bay Company in the colonization of this country, and the Imperial and corporate policies reflected in those agreements, I cannot regard Ex. 8 as a mere agreement for the sale of land made between a private vendor and a private purchaser.

In *R.* v. *Bartleman* (1984), 55 B.C.L.R. 78, [1984] 3 C.N.L.R. 114, Lambert JA. in considering the same treaty as in the case at bar concluded that the agreement that was made between the Saanich people, on the one hand, and James Douglas on behalf of the Hudson's Bay Company, on the other hand, was a treaty for the purposes of s.88 of the *Indian Act.* He referred to the earlier decision of this court in *R.* v. *White and Bob* in reaching that conclusion.

I conclude that 1852 agreement was a treaty.

The Effect of the Treaty

(A) The Claims of the Parties

The Crown contended that it holds a proprietary right to the sea bed of Saanichton Bay and that the claim of the Indians sought to establish a competing proprietary right over the sea bed of Saanichton Bay. Objection was taken to any claim of a proprietary right for the following reasons:

i) Such a claim is not supported by the ordinary grammatical meaning of the words of the agreement;

ii) Such a claim would be inconsistent with the purpose of the agreement;

iii) The Indians could not have understood the treaty to establish a proprietary right; and

iv) Similarly worded treaties have not been held to create any proprietary right to "fishing grounds".

The Crown contended that all the Indians received by the terms of the treaty was a right held in common with other members of the public, to fish in Saanichton Bay.

Counsel for the Tsawout Band replied that they do not seek to establish a proprietary interest in the sea bed of the bay. Rather, they claim the right to continue their fishing activities in this particular location, as provided in the treaty.

(B) Interpretation of Indian Treaties - General Principles

In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:

a. The treaty should be given a fair, large and liberal construction in favour of the Indians;

b. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;

c. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;

d. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;

e. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

The expression of these principles is to be found in *Nowegijick v. R.,* [1983]1 S.C.R. 29, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041; *Simon* v. *The Queen,* [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390, [1986]1 C.N.L.R. 153; *R.* v. *Bartleman, supra; Taylor* v. *The Queen* (1981), 34 O.R. (2d) 360 at 367, 62 C.C.C. (2d) 227, [1981] 3 C.N.L.R. 114 (Ont. C.A.).

(C) *The Meaning of Fishery/Fisheries*

In *Fowler* v. *The Queen,* [1980] 2 5.CR. 213, [1980] 5 W.W.R. 511, 53 C.C.C. (2d) 97, 113 D.L.R. (3d) 513, 32 N.R. 230 the Supreme Court of Canada had occasion to make reference to the meaning of the word "fishery". Martland J. delivering the judgment of the court said at p.223:

> The meaning of the word "fishery" was considered by Newcombe J. in this Court in *Reference* as *to the Constitutional* Validity of Certain Sections of the Fisheries Act, 1914, [1928] S.C.R. 457 at p.472:
>
> > In Patterson on the Fishery Laws (1863) p.1, the definition of a fishery is given as follows:
> >
> > "A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised."
> >
> > In Dr. Murray's New English Dictionary, the leading definition is:
> >
> > "The business, occupation or industry of catching fish or taking other products of the sea or rivers from the water."
>
> The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing* v. *United Fishermen & Allied Workers Union* (1972), 24 D.L.R. (3d) 585, at pp.591 and 592. Chief Justice Davey at p.592 added the words:
>
> > The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

On the basis of these authorities it is clear that the word "fishery" may be used to denote not only the right to catch fish but also the place where the right can be exercised. The Indians do not claim in this case any proprietary interest in the sea bed of the bay or a right, contractual or otherwise, to a fishing ground in the bay. The *sui generis* right they claim is to carry on the fishery as formerly in the bay.

<u>The Nature of Indian Treaty Rights - Case Law</u>

The courts in Canada have been struggling with the effect to be given to rights granted by Indian treaties insofar as they apply to land and other interests claimed by the Indians by virtue of their treaty rights. In *St. Catherine's Milling and Lumber Co.* v. *Reg.* (1988), 14 App. Cas. 46, 58 L.J.P.C. 54 affirming 13 S.C.R. 577, Lord Watson said at pp.54 and 58 (App. Cas.):

> . . . the tenure of the Indians was a personal and usufructuary right, dependent of the goodwill of the Sovereign . . . the Crown has all along had a present proprietary estate on the land, upon which the Indian tide was a mere burden.

In *Guerin* v. *The Queen,* [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 13 D.L.R. (4th) 321, 55 N.R. 161, [1985] 1 C.N.L.R. 120, Dickson J. (as he then was) referred to the earlier decisions in which Indian treaty rights had been discussed. He said at p.381

[p.135 C.N.L.R.]:

> It is true that in contexts other than constitutional the characterization of Indian title as "a personal and usufructuary right" has sometimes been questioned. In *Calder, supra,* for example, Judson J. intimated at p.328 that this characterization was not helpful in determining the nature of Indian title. In *Attorney-General for Canada* v. *Giroux* (1916), 53 S.C.R. 172, Duff J., speaking for himself and Anglin J., distinguished *St. Catherine's Milling* on the ground that the statutory provisions in accordance with which the reserve in question in *Giroux* had been created conferred beneficial ownership on the Indian Band which occupied the reserve. In *Cardinal* v. *Attorney General of Alberta,* [1974) S.C.R. 695, [[1973] 6 W.W.R. 205, 40 D.L.R. (3d) 553] Laskin J., dissenting on another point, accepted the possibility that Indians may have a beneficial interest in a reserve. The Alberta Court of Appeal in *Western International Contractors Ltd.* v. *Sarcee Developments Ltd,* [1979] 3 W.W.R. 631, [98 D.L.R. (3d) 424, [1979] 2 C.N.L.R. 107] accepted the proposition that an Indian Band does indeed have a beneficial interest in its reserve. In the present case this was the view as well of Le Dam J. in the Federal Court of Appeal. See also the judgment of Kellock J. in *Miller* v. *The King,* [1950] S.C.R. 168, in which he seems implicitly to adopt a similar position. None of these judgments mentioned the *Star Chrome* case, however, in which the Indian interest in land specifically set aside as a reserve was held to be the same as the "personal and usufructuary right" which was discussed in *St. Catherine's Milling.*

The most recent pronouncement on this subject is the decision of the Supreme Court of Canada rendered on December 15, 1988, in *Canadian Pacific Ltd.* v. *Paul,* [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487, 89 N.R. 325, [1989]1 C.N.L.R. 47 where the court said at pp.677-678 [pp.59-61 C.N.L.R.]:

> Before turning to the jurisprudence on what must be done in order to extinguish the Indian interest in land, the exact nature of that interest must be considered. Courts have generally taken as their starting point the case of *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1988), 14 App. Cas. (P.C.), in which Indian title was described at p.54 as a "personal and usufructuary right". This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown. That this was so was recognized as early as 1921 in *Attorney-General for Quebec* v. *Attorney-General for Canada,* [1921] 1 A.C. 401 (P.C.), where Duff J., speaking for the Privy Council, said at p.408 "that the right recognized by the statute is a usufructuary right only and a personal right *in the sense that it is in its nature inalienable except by surrender to the Crown."* (Emphasis added.) This feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions. In *Guerin, supra,* this Court recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them. On the nature of Indian interest Wilson J. noted at p.349 [p.152 C.N.L.R.]:
>
> > The Bands do not have the fee in the lands; their interest is a limited one. But is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.
>
> In the same case Dickson J. elaborated on the nature of Indian title at p.382 [pp.135-36 C.N.L.R.]:
>
> > It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.
> >
> > Indians have a legal right to occupy and possess certain lands, the ultimate tide to which is in the Crown. While their interest does not, strictly speaking amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land

> is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.

The statements of Judson J. in *Calder* v. *Attorney-General of British Columbia,* [1973] S.C.R. 313, at p.328 are also helpful:

> when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".

The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis.* It is more than the right to enjoyment and occupancy although, as the Chief Justice pointed out in *Guerin,* it is difficult to describe what more in traditional property law terminology.

It will be seen that the Supreme Court of Canada has not undertaken any definition of rights conferred upon Indians by treaty. That court has recognized the rights are unique, and that they confer additional protection on the Indians. Beyond that point the court has not attempted to define the nature and extent of such rights.

The Crown contends that no decision on the meaning of Indian treaty rights has recognized a claim such as is advanced here. The Crown relied upon the decisions in *R.* v. *Bartleman, supra; R.* v. *Sikyea,* 46 W.W.R. *65,* 43 C.R. 83, [1964] 2 C.C.C. *325,* 43 D.L.R. (2d) 150 (N.W.T.C.A.) and *Horse et al.* v. *The Queen,* [1988] 1 S.C.R. 187, [1988] 2 W.W.R. 289, 47 D.L.R. (4th) *526,* 82 N.R. 206, [1988] 2 C.N.L.R. 112, 65 Sask. R. 176 (sub nom. *R.* v. *Horse; R.* v. *Standingwater).*

R. v. *Bartleman, supra,* involved the interpretation of the same treaty which is relied upon by the Indians in the present case. There the court was concerned with the hunting rights of the Indians, rather than their right to carry on the fishery as usual. The right to hunt was expressed in the treaty by the phrase"... it is also understood that we are at liberty to hunt over the unoccupied lands...".

Lambert J.A. concluded at p.97 [p.131 C.N.L.R.]:

> In my opinion, the restrictions placed by the treaty on the hunting rights of the Indians entitled to exercise the treaty rights are, first, that the hunting must take place within the geographical area of the traditional hunting grounds of the Saanich people, and, second, that the hunting must take place on land that is unoccupied in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier.

It will be seen that the right to hunt granted by the treaty was qualified. The right pertained to unoccupied lands. No similar qualification is contained in the treaty in dealing with the right to carry on the fishery.

In *R.* v. *Sikyea, supra,* the treaty under consideration contained a covenant in favour of the Indians in the following terms:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Again the rights conferred on the Indians by the treaty were qualified.

Finally, in *Horse et al.* v. *The Queen, supra,* the facts were that the appellants were all treaty Indians and were all hunting for food. They entered upon privately owned land to hunt without permission from the owners. One of the grounds upon which the Indians relied in order to hunt on privately owned lands turned on the provisions of Treaty No.6. The operative provision of that treaty was as follows:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have right

> to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefore, by the said Government;

Estey J. speaking for the court concluded at p.209 [p.132 C.N.L.R.]:

> In summary then the terms of the treaty are clear and unambiguous: the right to hunt preserved in Treaty No.6 did not extend to land occupied by private owners. When the passages from the negotiations sought to be introduced by the appellants are viewed in the context of the various treaties covered in the Morris text it becomes clear that while the Indians were entitled to continue their mode of life by hunting, the preservation of that right did not include the grant of access to lands privately owned and occupied by settlers. Settlement of these lands was the goal of the government along with the intention of including, where possible, the nomadic Indian population at least to the extent that some of them would turn to agriculture with government assistance as their principal source of sustenance and survival. The extraneous material which properly should be examined when ambiguity in the Treaty is encountered, in any case supports and does not contradict the unambiguous terms of the treaty.

Upon the basis of those authorities the Crown contends that as settlement and development occurred in and around Saanichton Bay, the right of the Indians to carry on the fishery was gradually restricted and might ultimately, in certain parts of the bay, be extinguished.

However, unlike the provisions of the treaties considered in these decisions, upon which the Crown relies, the right to fish, unlike the right to hunt, is not qualified or limited to unoccupied lands or qualified in any other respect. In my opinion, the treaty right with respect to the fishery should not be held to be so restricted.

Rather, I rely upon the reasoning in *Guerin* and *Paul, supra.* I conclude that the right granted to the Indians by treaty is unique in the sense that it is difficult to describe it within the framework of traditional legal terminology. While the right does not amount to a proprietary interest in the sea bed nor a contractual right to a fishing ground, it does protect the Indians against infringement of their right to carry on the fishery, as they have done for centuries, in the shelter of Saanichton Bay.

Rights Incidental to the Fishery

The right granted by the treaty is broader than the words of the treaty may on their face indicate. The right to carry on the fishery encompasses other rights which are incidental to the right granted by the treaty. In *Simon* v. *The Queen, supra,* Dickson C.J.C. said at p.401 S.C.R. [pp.166-67 C.N.L.R.]:

> The majority of the Nova Scotia Court of Appeal seem to imply that the treaty contained merely a general acknowledgement of pre-existing non-treaty aboriginal rights and not an independent source of protection of hunting rights upon which the appellant could rely. In my opinion, the treaty, by providing that the Mickmac should not be hindered from but should have free liberty of hunting and fishing as usual, constitutes a positive source of protection against infringements on hunting rights. The fact that the right to hunt already existed at the time the treaty was entered into by virtue of the Mickmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the treaty.

The Chief Justice continued at p.403 S.C.R. [p.168 C.N.L.R.]:

> It should be clarified at this point that the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting ground.

Effect of the Treaty - Conclusion

Applying the reasoning in those authorities, I conclude the effect of the treaty is to afford to the Indians an independent source of protection of their right to carry on their fisheries as formerly.

Upon the basis of the reasoning in the *Simon* case, this would include the right to travel to and from the fishery.

The Effect of the Proposed Marina on Fishing Rights

The grant of the license of occupation by the Crown provincial to the company interferes with the treaty right of the Indians in a number of ways. The company asserts that the marina will only occupy five percent of the surface of the bay. The Indians contend that description of the marina is misleading. The mouth of the bay is about 4400 feet wide. The breakwater of the proposed marina would extend about 1345 feet into the bay and would have a width of up to 700 feet. The bulk of 9.2 acres in the proposed marina basin would have at least the surface of the sea bed removed through dredging, such dredging to take the level of the marina basin to about six feet below low water level. The Indians contend that they are concerned about this marina development in the bay because Saanichton Bay is the last remaining undisturbed estuarine environment on the Saanich Peninsula, constituting an important and unique fish habitat. The Tsawout Indians contend that construction of the proposed marina would have the following impact:

a. Dredging and construction of the marina would destroy the very important stationary crab fishery. Further injury will result from restriction of access to the crabbing areas around the marina basin. Eel grass beds, preferred habitat for crab, are more extensive in the area of the proposed marina site than elsewhere in the bay.

b. There would be a direct impact on the taking of shellfish, through destruction of habitat and through substantial interference with access to that part of the bay to the north of Sandhill Creek.

c. Sandhill Creek has been identified as the primary nursery stream for sea-run cut throat trout on the east side of Saanich Peninsula, and Saanichton Bay provides extensive rearing habitat for other fish and food organisms. Marina construction will reduce carrying capacity for those fish and organisms, who will create a special danger to the cut throat trout and will create a situation where access to the waters of the bay for fishing will be reduced.

The company responds that the concerns of the Indians are unfounded. The company proposes to transplant the eel grass to off-set the disruption caused in the area of the marina. The company has not yet decided on a suitable location for such a transplant, they are considering an area within Saanichton Bay but also an area beyond the bay which may or, may not, prove to be suitable having regard to ocean currents.

In my opinion, construction of the marina will derogate from the right of the Indians to carry on their fisheries as formerly in the area of Saanichton Bay which is protected by the treaty. To begin with it will limit and impede their right of access to an important area of the bay. Further they will not be able to carry on the stationary crab fishery as formerly, indeed with the loss of the eel grass, that part of the fishery will be destroyed in the area to be dredged. Construction will also disrupt other parts of the fishery in that area as well. The development that has already occurred around the bay has not had such a serious effect on the fishery. This development, while of only a small area of the bay, will have a harmful impact on the right of fishery granted to the Indians by the treaty.

Conclusion

I conclude the protection afforded to the Indians by the treaty provides them with a basis for objecting to the development of the proposed marina and that their objection should be sustained.

The Effect of Section 88 of the Indian Act

Upon the basis of the decisions above referred to, it is clear that this treaty is a treaty within that term in s.88 of the *Indian Act,* R.S.C. 1970, c.I-6. That section states:

> 88. Subject to the terms of any treaty . . . all laws of general application . . . in force in any province are applicable to Indians.

There is no question that if the license of occupation derogates from the treaty right of the Indians, it is of no force and effect. The province cannot act to contravene the treaty rights of Indians, nor can it authorize others to do so. That was the conclusion of the trial judge.

The trial judge granted a permanent injunction against the company and the Crown upon the basis

that construction of the proposed marina would cause irreparable harm to the Indians. Counsel for the Crown did not refer to the provisions of the *Crown Proceeding Act,* R.S.B.C. 1979, c.86. Section 11(2) provides:

> 11. . . .
>
> (2) Where, in proceedings against the Crown, relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance; but may make an order declaratory of the rights of the parties instead of an injunction or an order for specific performance.

In view of that provision, it was not appropriate for the trial judge to grant an injunction against the Crown. I would dissolve the injunction insofar as it applies to the Crown. The company contends that the trial judge erred in reaching the conclusion that construction of the proposed marina would cause irreparable harm to the Indians. In my opinion, it was open to the trial judge, on the evidence, to make that finding. The relief sought by the respondents was a declaration. The trial judge made the declaration but went on to support it with an injunction. I am of the view that, in the circumstances, it was appropriate to grant that additional relief against the company.

In disposing of the appeal, I wish to emphasize that all that is being decided in this case is whether this marina, if constructed, will derogate from the right granted by the treaty to permit the Indians to have access to and carry on the fishery in Saanichton Bay.

Other than dissolving the injunction against the Crown, I would dismiss the appeal.