R. V. VIDULICH, BACHMEIER AND BRECKNER

British Columbia County Court, Boyd. J., January 26, 1988

D. R. Kier, Q.C. for the respondent
G.S. Levey and J.W. Hogan, for the appellants
D.M. Rosenberg, for the Intervenor, the Sheshaht Indian Band

The appellants, none of whom are Indian, appeal their convictions for illegal possession of salmon contrary to s.4(4) of the British Columbia Fishery (General) Regulations and for illegal possession of salmon caught under an Indian food fishing licence contrary to s.27(4) of the same regulations. The appellant Vidulich appeals his conviction for illegal sale of salmon contrary to s.4(5) of the British Columbia Fishery (General) Regulations. Vidulich bought the salmon from Watts, a member of the Sheshaht Indian Band, who held an Indian food fishery licence. The remaining appellants are his employees.

The Sheshaht Indian Band passed a by-law regulating on-reserve fishing on 18 March 1982. The by-law was registered by the Privy Council under the Statutory Instruments Act on 7 May 1982 and went into force 29 April 1982. The by-law permits the sale of fish caught on-reserve provided that the Band Conservation Officer is informed of the quantity sold.

The appellants claim that the British Columbia Fishery (General) Regulations is ultra vires of the Parliament of Canada in that they purport to control property in fish.

Held: Convictions set aside. New trial ordered.

1. The federal regulatory power over fishing is restricted to matters relating to the manner of fishing. Unless regulations relating to the "product of the fishery" can be justified as necessarily incidental to the federal power to legislate concerning fisheries, the regulations must fall.

2. It has not been established that the restriction in the federal regulations on the sale of salon is necessarily incidental to the federal power.

3. The aboriginal right is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians and should not be confined to subsistence needs. The Sheshaht Band fisheries by-law might fit within the aboriginal right.

4. The Sheshaht band by-law provides for conservation measures and allows the sale of fish where the Band Conservation Officer has been informed. The band by-law appears to be part of the general regulation of the fishery. If the band by-law applies then it might afford a complete defence to the charges.

5. The evidence does not show whether the fish were caught in waters subject to the band by-law. It is also uncertain if the sale of the fish was reported to the Band Conservation Officer. There is also no evidence concerning the overall regulatory scheme and the interrelationship of the sports fishery, the commercial fishery and the Indian food fishery, either on or off the reserve. Nor is there any evidence regarding any possible harm caused by the sale of fish by Indians.

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BOYD J.: This summary conviction appeal raises three issues:

(1) Whether Regulations 4(4), 4(5) and 27(4) of the B.C. Fishery (General) Regulations are ultra vires of the Parliament of Canada;

(2) Whether the Sheshaht Band By-Law #14 has paramountcy over Regulations 4(4) and (5) and 27(4) of the B.C. Fishery (General) Regulations; and

(3) Whether Regulations 27(4) of the B.C. Fishery (General) Regulations contravenes s.15(1) of the Charter of Rights and Freedoms and s.2 of the Canadian Bill of Rights.

I will outline below the relevant facts and legislation. For reasons which will become apparent, I have only considered the first ground of appeal.

I. Facts

Watt, a status Indian, and member of the Sheshaht Indian Band, caught approximately 15,000 lbs. of Chinook and Sockeye Salmon pursuant to an Indian Food Fishery Licence. Watt in turn sold the fish and roe to the appellant Vidulich who handled and loaded the fish with the assistance of his two employees, Breckner and Bachmeier (the co-appellants) and they then transported the fish to a plant for processing. None of the appellants are of native Indian descent or ancestry.

The learned trial judge rejected the defence that there was no sales transaction and that the appellants were simply acting as agents for Watts in transporting the fish to the Lower Mainland for processing and storage. He found that Vidulich had purchased the fish and had sold the roe to a processing plant and that Breckner and Bachmeier had assisted him in his efforts.

Accordingly, the following convictions were entered:

1. Vidulich, Breckner and Bachmeier were found guilty of having in their possession Chinook and Sockeye salmon and salmon roe) not lawfully caught under the authority of a commercial fishing licence, contrary to s.4(4) of the B.C. Fishery (General) Regulations;

2. Vidulich, Breckner and Bachmeier were found guilty of having in their possession, Chinook and Sockeye salmon, caught under the authority of an Indian Food Fishery Licence, contrary to s.27(4) of the B.C. Fishery (General) Regulations; and

3. Vidulich was found guilty of selling salmon roe caught during the closed time for commercial fishing for salmon contrary to s.4(5) of the B.C. Fishery (General) Regulations.

Having reviewed the transcript of the trial proceedings in detail, I do not find that the learned trial judge's findings of fact are unreasonable or unsupported by the evidence. Accordingly, I am unable to set aside any of the findings of fact which formed the foundation for these convictions. However, this leaves open the various issues outlined earlier. It should be noted that those issues, which are now raised on appeal, were not before the learned trial judge and were not the subject of any legal argument or any submissions at trial.

II. Relevant Legislation

1. The British North America Act 1867 and the present Constitution Act, 1867, s.91 provides:

> 91. . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:-
>
> 12. See Coast and Inland Fisheries.

2. The Fisheries Act, R.S.C.-197O, c.F-14, s.34, provides:

> 34. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
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> (a) for the proper management and control of the sea coast and inland fisheries;
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> (b) respecting the conservation and protection of fish;
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> (c) respecting the catching, loading, landing, handling, transportation, possession and disposal of fish;
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> (d) vessels, respecting the operation of fishing
>
> (e) respecting the use of fishing gear and equipment;
>
> (f) respecting the issue, suspension and cancellation of licences and leases;
>
> (g) respecting the terms and conditions under which a lease or licence may be issued.

3. Pursuant to s.34, the Government of Canada has passed a number of regulations including the British Columbia Fishery (General) Regulations which are the regulations in question under

which the appellants were charged and convicted. I will set out below those regulations and several others which I believe are germane to this appeal:

PART I:

General Provisions Respecting Fishing in Tidal and Non-Tidal Waters

4.(1) Unless otherwise provided in the Act or in any regulations made thereunder in respect of the fisheries to which these Regulations apply or in the Wildlife Act (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder;

4.(2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

…

4.(4) No person shall without lawful excuse have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

4.(5) No person shall buy, sell, barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

5. (1) No person shall abandon fish or any portions thereof that are suitable for human consumption.

5.(2) No person who catches a fish, the retention of which is prohibited by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply, shall fail to forthwith return that fish to the water in a manner that causes the least possible harm to the fish.

6.(1) Subject to the Act and any Regulations made thereunder in respect of the fisheries to which these Regulations apply, no person shall

(a) molest, injure or kill any fish by any means including the use of explosives, firearms or chemicals;

(b) trap or pen fish in their spawning grounds or in any river or stream leading thereto;

(c) drive or at tempt to drive salmon downstream or outside any fishing limits at the mouth of any stream;

(d) use torches or artificial lights to attract any species of fish other than squid;

(e) catch or attempt to catch fish by snagging or with snares; or

(f) fish for or remove fish from any fish holding facility, fish hatchery or fish collection structure operated by the Department or by the Fish and Wildlife Branch of the Ministry of Environment for British Columbia.

…

Indian Food Fishing

27.(1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the purpose of obtaining food for that Indian and his family or for the band.

27.(4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food licence.

4. Section 81(1)(o) of the Indian Act, R.S.C. 1970, c.I-6, provides:

81. The council of a band may make by-laws not inconsistent with this act or with any

regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

…

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

5. Pursuant to s.81 of the Indian Act, the Sheshaht Band Council unanimously passed the SHESHAHT BAND FISH BY-LAW at the regular band meeting held on March 18, 1982. The materials before me indicate that the By-law was registered by the Privy Council under the Statutory Instruments Act, May 7, 1982, Registration No. SOR/82-471 and that the By-law went into force on April 29, 1982. The relevant portions of the By-law provide as follows:

Position Established

1: The position of Band Fisheries Conservation Officer is hereby established. This shall be a paid position. The salary for this position shall be established by the Band Council, and shall be paid from Band funds....

Powers and Duties of Band Fisheries Conservation Officer

2. (a) The Band Fisheries Conservation Officer shall determine, according to the best information available to him, the capacity of the waters on each of Band's reserves to sustain production of fish.

(b) The Band Fisheries Conservation Officer may close any area for fishing for any period of time he considers appropriate in the interest of conservation.

(c) The Band Fisheries conservation Officer shall prohibit any gear type he considers inappropriate for any location.

(d) The Band Fisheries Conservation Officer shall enforce this By-law.

(e) The Band Fisheries Conservation Officer shall collect statistics on all fish caught or sold under this By-law.

Openings and Closures

3. The Band Council shall designate openings and closures for the on reserve Fishery.

General Closure

6. No person shall fish on reserve except as permitted by this By-law.

Cooperation with Federal Fisheries

12. The Band Fisheries Conservation Officer shall provide any information requested by any fisheries officer appointed pursuant to the Fisheries Act on demand.

Joint Management

13. The Band Fisheries Conservation Officer, the Fisheries Conservation Assistants, and such other persons as the Band Council may appoint, together with as many persons as the Minister of Fisheries & Oceans shall appoint (not to exceed the number appointed by the Band Council), constitute a joint management committee, with power to make recommendations to the Band Council concerning the fishery.

Sale of Fish

14. Any fish caught under this By-law may be sold to any person, provided that the person selling the fish reports the number of fish sold to the Band Fisheries Conservation Office.

III. Are Sections 4(4), 4(5) and 27(4) of the British Columbia Fishery (General) Regulations Intra Vires of the Parliament of Canada?

The thrust of this appeal is that once fish are lawfully caught, whether by a native Indian or a non-Indian, the fish become the property of the fisherman. Accordingly, the appellants submit that any legislation governing the right to own that property or prescribing the terms and conditions for the sale of that property within the province, falls squarely within the province's "property and civil rights" jurisdiction and is therefore ultra vires of the Parliament o Canada. The Crown submits that the legislation is intra vires, having been properly enacted under Parliament's power to legislate pursuant to s.91(12) of the Constitution Act, 1867 in respect of "Sea Coast and Inland Fisheries

Over many years, the Courts have addressed the scope of s.91(12) and have consistently held that the federal regulations promulgated pursuant to this legislation are limited to matters relating to the manner of fishing.

This proposition was succinctly articulated by Ritchie C.J. in the Supreme Court of Canada in The Queen v. Robertson (1881), 6 S.C.R. 52 at pp. 120-121 as follows:

> I am of the opinion that the legislation in regard to "Inland and Sea Fisheries" contemplated by the British North America Act was not in reference to "property and civil rights", that is to say, not as to the ownership of the beds of the rivers, of the fisheries, or the rights of the individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as a source of national or provincial wealth as to the public at large, who are interested in the fisheries; in other words, law in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, and which the property in the fish or the right to take fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water.

He stated further at pp.123-124:

> ... this property, the Imperial Act... has… declared shall after confederation continue to be the property of the provinces; and I cannot discover any intention to take from provincial legislatures all legislative power over property and civil rights in the fisheries... and so give to the parliament of Canada the right to deprive the province or individuals of their right of property therein, and to transfer the same or the enjoyment thereof to others, as the license in question affects to do.
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> To all general laws passed by the Dominion of Canada regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries.

This position was substantially affirmed by the Privy Council in Attorney-General for the Dominion of Canada v. Attorney-General for the Province of Ontario, [1898] A.C. 700 (P.C.). The Privy Council acknowledged that the Dominion's power to legislate in relation to fisheries did necessarily, to some extent, enable Parliament to affect proprietary rights - for example, legislation prescribing openings and closures and the types of gear to be used. However, Lord Herschell stated at p.34:

> But whilst in their Lordships' opinion all restriction or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of

> succession in respect of it, would be properly treated as falling under the heading "Property and Civil Rights" within s.92, and not as in the class "Fisheries" within the meaning of s.91. . . .Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in s.92.

In Attorney-General for British Columbia v. Attorney-General for Canada, [1914] A.C. 153 (P.C.), the Privy Council again stated that s.91 conferred an exclusive right upon the Dominion "to make restrictions or limitations by which public rights of fishing are controlled...." (p.172).

In Rex v. Somerville Cannery Co. Ltd. (1927), 4 D.L.R. 494, Macdonald J. held s.7A of the Fisheries Act ultra vires, which legislation prohibited the operation of a fish cannery without first obtaining an annual licence from the Minister. The company argued, as do the appellants here, that once fish are legally caught, they become the property of the fisherman. It argued that the federal legislation in question was not aimed at regulation of the "fishery" but rather was aimed at fish, being a "product" of the fishery, adopting the analysis of the Supreme Court of Canada in The King v. Eastern Term. Elev. Co. (1925), 3 D.L.R. 1. There the Supreme Court held that the Canada Grain Act, 1912, (Can.), which addressed the regulation of elevators as warehouses for grain and the business of operating the elevators, was legislation aimed not at agriculture generally, but rather at the product of agriculture which is an article of trade and subject to provincial jurisdiction.

This judgment was affirmed on appeal to the Supreme Court of Canada in Re Fisheries Act, 1914, [1928] 190 (S.C.C.). The Court considered various definitions of "fishery", namely, ". . .the right of catching fish in the sea, or in a particular stream of water; ... the locality where such right is exercised." (Paterson on Fishery Laws (1863) p.1) and "the business, occupation or industry of catching fish, or of taking other products of the sea or rivers from the water." (Murray's New English Dictionary, p.257), and held that neither the business of canning fish, nor the operation of a fish canning factory, was, by either of these definitions, within the meaning of "fisheries" as used in s.91.

On appeal by special leave, the issue was once again addressed by the Privy Council in Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111 (P.C.). There the Federal Crown argued that the word "fisheries", as used in s.91, was sufficiently broad to include the operations carried out upon fish, once they are caught, for the purpose of converting them into some form of marketable commodity. Lord Tomlin rejected that argument at p.121 as follows:

> ... In their Lordship's judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries".

The Privy Council further rejected the federal Crown' s attempt to argue that the licencing of fish canning and curing factories was necessarily incidental to effective legislation under the subject "sea coast and inland fisheries".

This issue of the scope of s.91 was once again raised in Re British Columbia Packers Ltd. et al and British Columbia Council United Fishermen & Allied Workers' Union (1974), 50 D.L.R. (3d) 602 (Fed.Ct. Trial Div.). In this case various processors applied for a writ of prohibition to restrain the Canada Labour Relations Board from proceeding with the union's application for certification as the official bargaining agent for the crews of fishing vessels. The application processors argued that in the circumstances of the case whatever labour legislation was necessary fell properly within the jurisdiction reserved to the provinces under s.92(13).

The Court adopted the "product" analogy raised (In The King v. Eastern Terminal Elevator Co. (supra) and stated at p.615:

> The subject-matter of the legislation in the present case is labour relations and the product affected is fish. This product is sold and traded within the Province, and the legislation would control the relationship existing between the parties for the sale of fish in the Province. Parliament cannot enact legislation affecting labour relations between fishermen and fish processors in a Province merely under the guise of its powers to regulate trade and commerce, nor does the mere fact that the legislation might possibly enure to the benefit of Canada as a whole displace the jurisdiction of provincial Legislatures in this field afforded them by the property and civil rights provisions under s.92.

The Court affirmed the judgment of the Supreme Court of Canada in The Queen v. Robertson (supra) in these terms at pp.617-618.

> The case, in my view, lays down a fairly strict limitation to the jurisdiction of the Parliament of Canada under this head. It limits the competence of Parliament in this field to the regulation, protection and preservation of fisheries and excludes from its jurisdiction the rights of individuals in the fisheries themselves. It would seem to follow a fortiorari that where the true nature of the subject-matter is the right of individuals to contract as to the proceeds of the catch, it must be excluded as being too remote to be necessarily incidental to or effectively required for the general policing or supervisory powers afforded the federal authority by s.91(12) over fisheries.

Following an extensive analysis of the judgments reviewed Addy J. concluded at p.619: above,

> From an analysis of these cases it seems clear that fish is property which falls within the property and civil rights jurisdiction of the Provinces and that any contract or arrangement between citizens for the disposal of the proceeds of the sale of that property is not, in any way, essential to, does not fundamentally relate to nor is it necessarily incidental to the policing or control of the fisheries. Fish like grain in The King v. Eastern Terminal Elevator Co., supra, are the product of the grounds on which they are harvested and the fact that Canada may control the fishing grounds does not necessarily give it continuing control after harvesting over the product itself which is the article of trade or over the marketing of the product within any Province.

The Court held s.108 of the Canada Labour Code ultra vires, concluding with this statement at p.627:

> It might be otherwise...if parliament had legislative jurisdiction over the business, trade or undertaking of fishing. It does not, in my view, possess any such jurisdiction. Its jurisdiction is limited to the policing of fisheries themselves and does not, as stated previously, even enjoy property rights over these fisheries. The fact that it could by its regulatory powers in some instances completely prevent any fishing whatsoever from taking place does not clothe it with the jurisdiction over fishing as a business.

This judgment was upheld by the Federal Court of Appeal in United Fishermen and Allied Workers v. B.C. Packers Ltd. (1975), 64 D.L.R.(3d) 522. There Jackett C.J. concluded at p.529:

> In so far as prior decisions are concerned, s.91(12) has not been found to go beyond what may be described conveniently, but not precisely, as police regulation of "fisheries" regarded as property rights, the activity of removing fish from the water or the places where that activity is carried on. Clearly, so regarded, s.91(12) is not broad enough to authorize a law in relation to the sale of fish after it has been caught....

and at p.530:

> … I have concluded that s.91(12) authorizes Parliament to make laws in relation to "fisheries" but does not extend beyond that to the making of laws in relation to things reasonably incidental to carrying on a fishing business, such as labour relations and disposition of the products of the business, when such things do not in themselves fall within the concept of "fisheries".

In my view, this long line of judicial decisions concerning the breadth and scope of s.91(12) leads me to the inescapable conclusion that once caught, the fish which are the subject of the impugned regulations, are indeed the "product of the fishery" and are in no way connected with the fishery itself. The regulations prohibit the possession and sale of fish not caught under the authority of a current fishing licence or fish caught under the authority of an Indian Food Fishery Licence) and do not deal with "fisheries". Accordingly, the constitutional attack succeeds unless the regulations can be reasonably justified as necessarily incidental to the federal power to legislate in respect of fisheries.

In determining this final issue, the Crown relies heavily upon the judgment of Locke J. (as he then was) in R. v. Saul (1984), 13 C.C.C. (3d) 358, [1985] 2 C.N.L.R. 156 (B.C.S.C.), holding that s.37 of the British Columbia Fishery (General) Regulations, C.R.C. 1978, c.840 (the predecessor of the present s.4(5)) was intra vires. There Locke J. also concluded that since the impugned regulation did not prima facie deal directly with "fisheries", the prime issue to be

addressed was whether or not the regulation provided for a matter necessarily incidental to the subject of sea coast and inland fisheries.

He held that the impugned regulation was necessarily incidental to the effective operation of the regulatory scheme established by Parliament, stating at pp.366-76:

> ...That fish would become extinct if all were free to catch and sell seems self-evident: witness the elaborate regulations of myriad kinds.
>
> Surely the regulation of fish means passing regulations that are possible to enforce. In my view, the emphasized passages of the authorities I have cited consider in each case the likelihood of damage and the effectiveness and practicability of enforcement. The accused's argument contemplates regulation at the geographic site of the fishery and at the time the fishing is open. To carry out reasonable enforcement of such kind over every site in British Columbia seems to me to be an impossible administrative task.
>
> I say so because I believe the court is entitled to use common sense when it conforms with the objectives of the legislation. The court has no facts showing actual harm to the resource - just as in the Fowler case - but I nevertheless believe that the nexus is much closer: it is the selling of fish for money. Under the learned judge's decision, anyone who catches a fish is free to peddle it to anyone, driven by that great motivating force, money. Judicial notice is one way of putting it (see Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), p.358, "Human Behaviour", and the dissertation in Schiff's Evidence in the Litigation Process (1978), particularly pp.653-67. I conclude there is a real apprehension of harm.
>
> My common sense and knowledge tell me it is even now difficult enough to enforce the sports and Indian fishery regulations: quotas, times, types of net, boundary lines, areas, etc. If everyone is now to have the added attraction of making money attached to catching fish, I can see so many clandestine attempts to circumvent the law that it could never be administratively controlled and really (as was suggested) by reducing the quotas if by chance the new incentive results in "overfishing" seems to be just adding another small crime - such as, "It shall be an offence to sell an illegally caught fish."
>
> One effective way, even if thought Draconian, is to remove the incentive: witness the widely heralded decline in the market for certain types of seal fur by the absolute ban on sale in the European Common Market. This promises a self-policing curb on seal stock.
>
> Present commercial fishing licences and seasons are designed to compromise within the present regulatory framework. If the present regulation is upheld it can still operate under these circumstances, as it has in the past.
>
> Notwithstanding the wide words, I think s.37 is a permissible invasion of property and civil rights within the province and is not ultra vires.

Locke J.'s reasoning was adopted by the Alberta Court of Appeal in R. v. Twin (1985), 23 C.C.C. (3d) 33, in which the court considered whether s.56 of the Alberta Fishery Regulations (the Albertan equivalent of our Regulation 4(5)) was intra vires Parliament. The Alberta Court of Appeal noted the trial judge's reliance on the judgment of Addy J. of the Federal Court Trial Division in B.C. Packers (supra) but pointed out that although the Supreme Court of Canada affirmed the result on appeal ((1977), 82 D.L.R. (3d) 182, (1978) 2 S.C.R. 97, [1978] 1 W.W.R. 621), it did so on a different ground than those considered by either the Federal Court of Appeal or by Addy J. Laskin C.J.C. noted:

> In the result, the appeal is dismissed on a ground other than that taken either by the Federal Court of Appeal or by Addy J., and without reference to any issue of constitutionality.

In both Saul and Twin, the Court specifically noted the remarks of Laskin C.J.C., who in a dissenting judgment, stated in Interprovincial Co-operatives Ltd. et al. v. The Queen in Right of Manitoba (1975), 53 D.L.R. (3d) 321 at p.325, [1976] 1 S.C.R. 477, [1975], 5 W.W.R. 382 at p.413, that federal power in relation to fisheries

> ... is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization. (my underlining)

Adopting these remarks, Locke J. in Saul appears to find some foundation for the proposition that the federal power in relation to fisheries, set out in s.91, is sufficiently broad to prohibit the commercial sale of fish, since to allow such commercial sale of fish caught by the sports or Indian fisherman, would encourage overfishing, which would in turn destroy the effective operation of the regulatory scheme which is designed to preserve the fishery.

As a Judge of the County Court, I consider myself bound by the judgment of Locke J. in Saul, unless it can be demonstrated that (a) subsequent decisions have affected the validity of the judgment; (b) some binding authority in case law or some relevant statute was not considered; or (c) the judgment was unconsidered. (In re Hansard Spruce Milts Ltd. (1954), 13 W.W.R. (N.S.) 285 (B.C.S.C.).

Applying this test, I have grave doubts concerning the applicability of Locke J.'s judgment in Saul to the issues before me on this appeal. In the case at bar, I have some additional evidence before me, which, in my view, seriously tests the assumption underlying the judgment in Saul - that is that commercially caught fish alone may be sold for money. This evidence comprises the general provisions of the Sheshaht Band Fish By-law (supra) and more particularly s.14 of the By-law which allows an Indian to sell any fish caught on the reserve to any person, provided that the person selling the fish reports the number of fish sold to the Band Fisheries Conservation Officer. The By-law appears to contemplate a scheme whereby fish is caught by the Indian, not simply for the restricted purpose of obtaining food for himself or his family or for the Band, but for the purpose of selling that fish and earning cash to purchase other consumer goods for himself or his family or for the Band.

This broader concept of the Indian Food Fishery was raised in Sparrow v. R. (1986), 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145, where, in considering the operation of the Musqueam Indian Band's Indian Food Fishery and the exercise of the Band's aboriginal right to take salmon for "food purposes", the British Columbia Court of Appeal noted at p.331 [p.178 C.N.L.R.]:

> What can be said with certainty in this case is that there is a right in the Musqueam to take salmon from Canoe Passage and Ladner Reach, the waters referred to in the licence. It is necessary to distinguish between a right and the method by which the right may be exercised. The aboriginal right is not to take food by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption. (my underlining)

In the case at bar, in light of the provisions of the By-law, it would appear that the extent of the Band's commercial sales are reported to the Band's Fisheries Conservation Officer and in turn to a federal fisheries officer and that and other information is considered in determining the regulation of the harvest and the appropriate number of licences to be issued to the three fishing groups. The joint conservation management scheme established by the By-law may well be an integral part of the overall regulatory scheme which, contrary to Locke J. 's assumption in Saul, does allow for the commercial sale of fish yielded by the Indian Food Fishery.

For these reasons, I seriously question Locke J.'s finding that s.4(5) of the B.C. Fishery (General) Regulations, prohibiting the purchase, sale or barter of other than commercially caught fish, is necessarily incidental to the effective operation of the overall regulatory scheme. Adopting this same reasoning, I also question whether s.4(4) and s.27(4) of the B.C. Fishery (General) Regulations can be said to be necessarily incidental to the effective operation of the regulatory scheme.

There is no evidence before me concerning the specific source of the fish and roe which were caught by Watt except that the fish were caught pursuant to an Indian Food Fishery Licence on the Sommas River and its tributaries. However, it is not clear whether the fish were caught on that portion of the river and its tributaries bounded by the Indian Sheshaht Reserve, such that the provisions of the Sheshaht Band Fish By-law do apply. If the By-law does apply, the question still arises whether Watt's sales were reported to the Band's Conservation Officer. None of that evidence is before the Court. Nor is there any evidence concerning the overall regulatory scheme and the interrelationship of the sports fishery, the commercial fishery and the Indian food fishery both on or off the reserve. Nor is there any evidence concerning the extent to which the commercial sale of fish caught off the reserve may harm the fishery resource.

If the fish were caught on the reserve and the By-law applies, then Watt's sale to Vidulich may well

be lawful and there may be a complete defence to all of the charges. If the fish were not caught on the reserve, then, in the absence of any evidence specifically linking the prohibitions to any likely harm to the fisheries (since some commercial sale of Indian food fishery fish is at least allowed for in the overall scheme), the impugned regulations may well be ultra vires.

As was the case in Sparrow (supra), the facts relevant to the defence have not been canvassed and determined. Accordingly, the appropriate order is to set aside the convictions and direct a new trial.