R. V. SAM, SAM, FRED AND WATTS

British Columbia Provincial Court, Greer J., July 19, 1985

R. Wallensteen, for the Crown
G. Badovinac, as agent for the accused

The accused were charged with fishing for salmon by means of a drag seine without the authority of a permit in violation of s.4(1) of the British Columbia Fishery (General) Regulations, thereby committing an offence contrary to s.61(1) of the Fisheries Act, R.S.C. 1970, c.F-14.

The defence was based on three grounds: 1) the area where the accused were fishing forms part of the Tsahaheh Reserve of which they are members; 2) the fishing was legal as being authorized by a by-law passed by the band pursuant to the Indian Act, R.S.C. 1970, c.I-6; and 3) that the accused had an honest belief that they were entitled to fish in the area in question, on the day in question.

Held: Accused acquitted.

1. It is conclusive from the official survey of the federal government delineating the external boundaries of the Tsahaheh Reserve, that the external boundaries of the reserve do not appear to include any portion of the Somass River where the fishing took place.

2. The principle of "ad medium filum aquae" (title goes to the centre of the stream) is limited to non-tidal rivers and streams. The Somass River is a tidal river.

3. The accuseds' second argument that the by-law passed by the band authorized the fishing failed because the by-law cannot apply outside the limits of the reserve.

4. The offence with which the accused were charged is one of strict liability.

5. The accused and other members of the band were of the firm belief that the area where they were fishing in the Somass River was within the boundaries of the reserve. They had been told by their parents and elders that the area where they were fishing was a traditional fishing ground of their forefathers. They were also of the view that this was an area which was set aside for them and which should form part of the reserve. The mistake made by the accused was one of fact and thus provided a defence to the strict liability offence with which they were charged.

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GREER P.C.J. (orally):

THE CLERK: Charlie Sam, Leslie Sam, Richard Watts, Gerald Fred.
MR. BADOVINAC: Your Honour, I've been asked to appear as agent for Mr. (I believe it was) Rosenberg, who is counsel for the accused in this matter.
MR. WALLENSTEEN: I appear on behalf of the Crown on this matter.
THE COURT: After you -- I realize you spoke to me about the permission f or them to appear by agent , but it seemed to me that -- are all of the accused out fishing or something, is that why they couldn't be here today?
MR. BADOVINAC: I don't know. I was just instructed this morning. I assume they are. I don't know them.
THE COURT: After I'm --
THE CLERK: I can call them outside.
THE COURT: Well, I think we've already discussed the fact that they could appear by agent. I just thought that they might have thought it important to be here to find out what the decision was , but I don' t think I ' 11 raise any issue about the matter now. I've got my decision and I'm prepared to make it.

The accused are charged in an Information sworn by a fisheries officer that quote:

> On or about the 29th of August, 1984, they did fish for salmon by means of a drag seine in the Canadian Fisheries waters of the Somass River , at or near Paper Mill Dam Park, at or near Port Alberni, British Columbia, without the authority of a permit in violation of Section 4

> subsection 1 of the British Columbia Fishery (General) Regulations thereby committing an offence contrary to Section 61 subsection 1 of the Fisheries Act.

At the trial of this matter in Port Alberni on the 9th of April, 1985, the accused, through their counsel, made the following admissions:

> It is admitted that the four accused, Charlie Sam, Leslie Sam, Richard Watts and Gerald Fred, did on or about the 29th of August, A.D. 1984, fish salmon by means of a drag seine at or near Paper Mill Dam Park on the Somass River at or near Port Alberni, British Columbia. It is also admitted that , at the time , they did not have the authority of a licence or permit other than the authority of the Band by-law passed pursuant to the Indian Act.

The accuseds' defence rests principally upon three grounds as I understood them: one, the area where the accused were fishing forms part of the Tsahaheh Reserve of which they are all members; two, that being the case, the fishing was legal as being authorized by a by-law passed by their band pursuant to the Indian Act, R.S.C. 1970, c.I-6; three, that the accused had an honest belief that they were entitled to fish in the area in question, on the day in question. That this was a mistake of fact and they are entitled to be acquitted on the basis of the Sault Ste. Marie principle and the case of R. v. Baker, an unreported decision of the Honourable Judge Sheppard. County Court of British Columbia, pronounced on the 3rd of June, 1983 [reported [1983] 4 C.N.L.R. 73].

The reserve in question is the Tsahaheh Reserve and is located within the Alberni Land District near Port Alberni on the right bank of the Somass River about three miles from its mouth. The Somass River is a tidal river, that is to say, it is affected by the ebb and flow of tides and the portion of the river where the fishing took place is in the tidal portion of the Somass River.

The Crown takes the position that the Indian reserve in question while lying immediately adjacent to the Somass River does not include in its boundaries any portion of the river. The Crown filed as an exhibit in this case, a certified true copy of a plan on deposit in the Land Titles Office in Victoria which purports to delineate the Tsaheheh Indian Reserve comprising at that time ten hundred and thirty-six acres adjacent to the Somass River. This particular plan was surveyed and drawn in 1883. The boundaries of the reserve are outlined in dark blue and the west bank of the Somass River is the easterly boundary of the reserve. It is also included on the survey that two hundred and forty-eight acres of the reserve was cut off and that the final size of the reserve was seven hundred and eighty-eight acres.

The Crown pointed out that no where on the plan is there an endorsement or reference to suggest that the Somass River adjacent to the easterly edge of the reserve is to be part of the reserve land and the Crown submits that there should be some type of endorsement on the plan showing the inclusion of the relevant portion of the Somass River as part of the reserve if this was to be the intention of the Indian Reserve Commission creating this reserve. They say that if the reserve included the relevant portion of the Somass River then the actual acreage would be larger than has been designated.

The Crown filed, as exhibit 2 in these proceedings, a certified true copy of a plan on deposit in the Land Titles Office in Victoria under number 1696 O.S. which is entitled the "Plan of Summary of the Retracement and Restoration of the External Boundaries of the Tsahaheh Reserve No. 1". This survey was carried out in 1953 and delineates the entire external boundaries of this Indian reserve where the Tsahaheh Band is located. The total area of this reserve is seven hundred and ninety-nine acres. The Crown says that this particular survey is very significant in that it is entitled "The Retracement and Restoration of External Boundaries of the Tsahaheh Indian Reserve No. 1". In the legend on the right side of the plan, the Crown points out that there is a specific symbol used by the surveyor showing the land dealt with in the plan. The symbol being two solid blue lines running parallel to one another and that when one examines the boundaries of the reserve, and specifically the boundaries of the eastern edge of the reserve adjacent to the Somass River, the boundary follows the edge of the river or the river bank.

The Crown says that this plan is an official survey of the Government of Canada on behalf of the Tsahaheh Reserve for the purpose of delineating the external boundaries of the reserve and that it is the final and legal demarcation of the limits and extent of the reserve and point out that the external boundaries do not include any portion of the Somass River within the said reserve.

The accused, in their submission, point out that in considering the limits and boundaries of the reserve and what is to be included therein or excluded therefrom, attention must be paid to the original instructions and directions which were given to the Commissioner who set up the reserves

between 1876 and 1894. They point out that in letters obtained from the Public Archives it is to be noted that the directions given state that in allocating reserve lands to each band, the Commissioner should be guided generally in the spirit of the terms of the union between the Dominion and the local governments which contemplated a "liberal policy" being pursued towards the Indians. They also go on to say that the Commissioner was instructed to have special regard to the habits, wants and pursuits of the band and he was told to interfere as little as possible with the fishing stations occupied by them and to which they might be especially attached. He was told, according to their submission, that "their fishing stations should be very clearly defined by you in your report to the department and distinctly explained to the Indians interested therein so as to avoid further future misunderstandings on this most important part."

The accused also point to a letter which was written by Commissioner O'Reilly, dated October 9, 1882, to the Indian Reserve Commissioner. This letter was filed as exhibit 8 in this case and was exacted from the Public Archives of Canada. In this letter, Commissioner O'Reilly described the reserve as follows:

> No. 1 Tsahaheh is a reserve situated on the right bank of the Somass River about three miles from its mouth at the first rapids, contains eleven hundred and fifty acres, mostly excellent land, and capable of being made of great value. It is the only place in this section of country that can be converted into anything like an extensive farm. The portion fronting on the river is covered with maple, alder and cottonwood, while further back there is an unlimited supply of spruce and cedar of fine quality. Situated at the upper end of the reserve is their valued salmon fishery the entire length of which is within the reserve.

The accused also point to the fact that according to the plans filed by the Crown in this case as to the limits of the reserve land, these plans deal only with the land area of the reserve and not the river itself and that it is impossible to tell whether or not the river is included in the reserve as they are both shaded in the same colour. They also point out that the maps are made from a survey and the surveyor simply followed the bank of the Somass River, rather than attempting to survey the fishery itself.

It is the position of the accused that there can be no doubt that the fishery was included in the reserve because both the minutes of the decision that created the reserve and the letter of October the 9th, 1882 above quoted from Commissioner O'Reilly indicate that the reserve is eleven hundred and fifty acres. They also, go on to point out that in the October 9th, 1882 letter of O'Reilly, he states that the reserve is eleven hundred and fifty acres, but it goes on to say that it includes the fishery. The eleven hundred and fifty acres that is allocated on June the 3rd, 1882, is eleven hundred and fifty acres; that this same acreage is referred to on October the 9th, 1882 by Commissioner O'Reilly when describing the reserve and that this acreage includes the fishery.

I've considered all the arguments and reviewed all exhibits in this case. It is my opinion that the views of the Crown must prevail so far as the limits of the reserve as concerned.

Exhibit number 2 filed in this case appears to me to be the final official survey of the Government of Canada on behalf of the Tsahaheh Indian Reserve for the purpose of delineating the external boundaries of the Indian reserve. In my view, this is final conclusive proof of the external boundaries of the reserve and they do not appear on the plan to include any portion of the Somass River where the fishing took place.

A further argument is advanced on behalf of the accused that even though the plan shows the boundary line of the property in question to be the edge of the river bank , that this is not conclusive of the issue. That the real question to be deci4ed is what was the intention of the parties?

The citing support of their argument to the case of Canadian Exploration v. Rotter, [1961] S.C.R. 15 where it was held that the principle of "ad medium filum aquae" applied to lands immediately bordering the Salmo River, essentially meaning that title goes beyond the boundary of the river to the middle of the stream or river.

It is further submitted that as reference was made in the letters by Commissioner O'Reilly and others to the fishery being included in the reserve, that this is evidence of the requisite intention of the parties and as was done in the Rotter case, the reserve boundaries should be extended to and include the fishery at least to the middle of the Somass River.

The Crown says that the principles in the Rotter case are applicable only to non-tidal rivers whereas the Somass River is a tidal river, that is to say, where the unlawful fishing took place is an area subject to ebb and flow tides from the sea. The Crown says that the Supreme Court of Canada in the Rotter case repeatedly referred to the rights of the riparian owners of land upon non-tidal or non-navigable stream and whether the common law rule of construction ad medium filum applies. The Crown says that the comments in that case should be limited to non-tidal streams.

It cannot be said in my view in law that merely because the reserve lies upon the banks of the river that that ownership extends beyond the boundary to the middle tread of the river ad medium filum as submitted by counsel on behalf of the accused and I agree with the submissions of the Crown that the principles decided in the Rotter case apply only to non-tidal rivers.

The defence of the accused, therefore, that they were lawfully fishing on the day in question because the area was within the reserve must accordingly fail.

This also must be the fate of the second defence put forward by the defence which is that the by-law passed by the band authorized their fishing. That by-law cannot, in my view, be said to apply outside the limits of the reserve. This defence must also fail.

This brings me to the third and, in my opinion, the more substantive defence put forward by the accused, that is to say, that the accused made a mistake of fact and should be acquitted on the basis that they had a reasonable belief that where they were fishing was, in fact, on the reserve.

There is no question but the offences with which the accused are charged, are one of strict liability and not absolute liability as defined in the case of R. v. City of Sault Ste. Marie (1978), 40 C.C.C (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295. That case defines strict liability offences in the following manner:

> Strict liability offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

The accused takes the position initially that the area where they were fishing is, in fact, on the reserve. However, they say that this is a question of fact and if they are or were mistaken, then their mistake is one of fact and not one of law and rely upon the decision of the Honourable Judge Sheppard in R. v. Baker which was rendered on June the 3rd, 1983. In that case, the accused were also of the view that where they were fishing was within the boundaries of the reserve and that the by-law which they had passed applied to it. The court, in that case, came to the conclusion that the error made by the accused was one of fact and not one of law and acquitted the accused of having a reasonable belief which, if the set of facts were true, would have allowed them a complete defence for the charge.

The Crown says, in response to this submission, that firstly that the mistake made by the accused in this case was one of law and not one of fact and, in doing so, rely upon the decision of R. v. McDougall, 31 C.C.C. (3d) 1; also Molis v. Acquine, 116 D.L.R. (3d) 291; and an unreported decision of His Honour Judge Taggart of the County Court of New Westminster dated May the 11th, 1983, R. v. Bob, [1984] 2 C.N.L.R. 107. The latter case was one in which the facts were almost identical to this case and came to the conclusion that the mistake made by the accused in that case was one of law and not one of fact. The Crown's view is that the evidence tendered by the accused in this case would lead one to conclude that on August the 29th, 1984, they chose simply to ignore the law and that there is no evidence in this case before the court that would suggest that they were mistaken as to any fact which led them to honestly but erroneously fish on the day in question that was prohibited by law. It is their view that ignorance of law is no excuse and that is what the accused set out deliberately to do in this case.

The critical question, in this case, it seems to me is whether or not the accused had an honest belief that where they were fishing on the Somass River was within the reserve?

All of the accused gave evidence in this case and all, without exception, deposed to the fact that they believed that where they were fishing was within the reserve boundaries.

They also admitted in cross examination that they had also fished this area under a food permit system with permits issued by the Department of Fisheries. There is no doubt in my mind that, despite the fact that there is an official plan of the reserve in the band office showing and delineating the extent of the reserve boundaries, the accused and other members of the band were of the firm belief that the area where they were fishing in the Somass River was within the boundaries of the reserve.

The next question, of course, falls upon the determination made by myself in this case that the reserve boundaries do not include the area where the accused were fishing. Therefore, a mistake was made by the accused. The critical question, in this case, is was this a mistake of fact or one of law: Following the Baker case which is almost on all fours with this case, the conclusion was that this mistake was one of fact, or at least one of mixed fact and law. The Bob case appears to decide the issue on an opposite basis, that is to say, that there was a mistake of law rather than one of fact.

In my view, based on my reading of these two County Court cases, I choose to follow the Honourable Judge Sheppard. I find that the mistake made by the accused in this case was not one of law but one of fact.

Most, if not all, of the accused who gave evidence deposed to the fact that they had been told by their parents and elders of the band that the area where they were fishing was a traditional fishing ground of their forefathers who had fished there for generations. They are also of the view that this was an area which was set aside for them and which should form part of the reserve. This was a belief , in my view, which was honestly held by the accused.

If this set of facts were true, it would form a complete defence to these charges as there is a by-law of their band in place authorizing this fishing. It turns out, as a result of the ruling I have made in this case, that I have found as a matter of fact that, based on the evidence I've heard, the boundaries of the reserve do not include that area of the Somass River where they were found to be fishing. In my view this is a mistake of fact and not one of law. Based on the principles of the Sault Ste. Marie case, therefore, in my view, the accused are entitled to be acquitted on the basis that they had a reasonable honest belief in a set of facts which turned out to be true and would afford a complete defence to the charge. I therefore acquit the accused of the charge.