REGINA V. JERRY BENJAMIN NIKAL

[Indexed as: **R. V. Nikal**]

British Columbia Provincial Court, Smyth J., May 29, 1989

R. Gamble, for the Crown
P. Grant, for the accused

The accused, a member of the Gitksan-Wet'suwet'en people, was charged with fishing without a licence contrary to s.4(1) of the *British Columbia Fishery (General) Regulations* made pursuant to s.34 the *Fisheries Act,* R.S.C. 1970, c.F-14. His defence was that he was governed by the Gitksan-Wet'suwet'en Indian Fishing By-law made by the Moricetown Band whose village was adjacent to the river where he was fishing when charged. It was argued that the band by-law did not apply because the river was merely adjacent to the reserve and not a part of it.

Held: Accused acquitted.

1. Section 81(1)(o) of the *Indian Act,* R.S.C. 1970, c.I-6 authorizes by-laws pertaining to fishing on reserves which, if not disallowed by the Minister of Indian Affairs, have the force and effect of federal regulations.

2. By-laws pertaining to fish or fishing "on the reserve" are valid not only where the waters and fishing stations are part of the reserve but also where they are adjacent to, touching, against or at the reserve.

3. The Gitksan-Wet'suwet'en Indian Fishing By-law prevails over the *Fisheries Act.* It was valid and effective at the material time to govern fishing in the waters of the Bulkley River at Moricetown Canyon because that river is at least touching, against or at the reserve.

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SMYTH P.C.J. (orally): On July 20 and 23, 1986 officers of the Department of Fisheries and Oceans watched the defendant gaff salmon in the waters of the Bulkley River at Moricetown, British Columbia. Had he possessed the free permit to which as an Indian person he was entitled then what he was doing would have been lawful, but he had none and he is now charged with two counts of fishing without the authority of a licence or a permit, contrary to the *Fisheries Act,* R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14] and regulations.

The village of Moricetown is adjacent to the Buildey River at the place where the defendant was fishing and is included within the boundaries of Moricetown Reserve No.1. The lands comprised in the reserve were conveyed by the provincial government to the Crown in Right of Canada in 1938, in trust for the use and benefit of the Indians. But the evidence is clear that this has been an important fishing place since long before the arrival of the white man, and the reason is not hard to discern. The canyon forms a natural obstacle to the upstream passage of the fish and so they must congregate and gather their strength before making the effort to surmount its turbulent waters. I have no doubt that the history of the Indian people at Moricetown is in large measure the history of this fishery. I am equally confident that this reserve owes its existence to the recognition by both the federal and provincial governments of the importance of the place as a source of food for the Indians who lived there in 1938, to their ancestors and to those who have come alter them.

The defence to these charges is that at the material times the defendant was governed not by the *Fisheries Act* and its regulations but by the Gitksan-Wet'suwet'en Indian Fishing By-Law which was made by the Moricetown Band on February 18, 1986 and registered by the Privy Council office on June 2, 1986 under number SOR/86-612. In its turn the by-law was made pursuant to s.81(1)(o) of the *Indian Act,* R.S.C. 1970, c.I-6 [now R.S.C. 1985, c.I-5) which states:

> 81.(1) 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.

The by-law consists of a preamble and 59 sections touching on topics including fishing methods

and prohibitions, the conservation and protection of fish, habitat protection and so forth. It creates offences punishable on summary conviction by fine or imprisonment. Its provisions of immediate concern are found in ss.2(k), 2(r), 3 and 4(a):

> 2. The following definitions apply in this By-Law:
>
> (k) "Gitksan-Wet'suwet'en Persons" means the persons of Gitksan-Wet'suwet'en ancestry who are eligible for membership in the Tribal Council; ...
>
> (r) "Waters of the Bands" means all water, waterways, rivers or streams which are located upon, or within boundaries of the reserves set aside for the use and benefit of the Moricetown Band.
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> 3. This By-Law applies in respect and over all waters of the Band.
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> 4.(a) Gitksan-Wet'suwet'en persons are permitted to engage in fishing in waters of the Bands at any time and by any means except by the use of explosive materials, rockets, combustibles, projectiles, shell or other like substances, subject to variations or restrictions as may be made pursuant to this By-Law.

The prosecution conceded in written argument that "where the By-Law has geographic application it takes priority over the *Fisheries Act* of Canada and its regulations." Neither is there any shortage of evidence, nor was it argued otherwise that the defendant is a Gitksan Wet'suwet'en person whose fishing methods conformed to the by-law. The by-law, it should be said, is of the force and effect of a federal regulation *(R.* v. *Jimmy* (1987), 15 B.C.L.R. (2(1)146, [1987] 3 C.N.L.R. 77, per Hinkson J.A. at p.80 C.N.L.R.).

The evidence was presented and the case argued almost entirely on the basis that its outcome depends on determining whether the bed of the Bulkley River where the river flows through the reserve is in fact part of the reserve. I see this, with respect, as a narrow reading of the pertinent enactments that is not constrained by the ordinary sense of the words used.

Section 81(1)(o) of the *Indian Act,* which I will now repeat for convenience of reference:

> 81.(1) 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.

This enactment must be read in light of R. v. *Jimmy (supra)* in which the validity of a by-law passed by the Cowichan Indian Band was challenged on grounds including that s.81(1)(o) delegates only the power to make by-laws in relation to fish that have been landed and not concerning the act of fishing. The Court of Appeal held that the meaning of the words was not to be so closely confined. Hinkson J.A. said this (at pp.81 and 82 C.N.L.R.):

> I am not persuaded that fishing upon Indian reserves cannot be dealt with under the provisions of the *Indian Act.* In *Jack* v. *The* ..... the Supreme Court of Canada considered Article 13 of the Terms of Union between British Columbia and Canada. Dickson J. (as he then was) who dissented in the result, discussed the relationship between Article 13 and s.91(24) of the *Constitution Act, 1867.* After reviewing the evidence of preconfederation policy on Indian fishing Dickson J. explained how the Indian fishery is inextricably bound up with the very subject matter of s.91(24). He said at page 257:
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> > It is apparent from the foregoing that Indian fishing was an essential element of both "the charge of the Indians" and "the trusteeship and management of the lands reserved for their use and benefit." It is extremely difficult to separate out the fishery from either Indians or the lands to be reserved for Indians. In the latter case, lands were to be reserved to Indians for the purpose of permitting them to continue their river fishery at the customary stations. In the former case, the Indians were to be encouraged to exploit the fishery, both for their own benefit and that of the incoming white settlers, as a means of avoiding the Indians becoming a charge upon the colonial finances.
> >
> > However one wishes to view the pre-Confederation "policy," it undoubtedly included some elements of an Indian fishing policy.

> In my respectful opinion that analysis supports the conclusion that Parliament acting within its powers under s.91(12), and also under 91(24) of the *Constitution Act, 1867,* has power to regulate fishing by the three statutory schemes I have mentioned. I conclude, therefore, that the by-law is not invalid on the ground that it deals with fishing on this Indian Reserve.

The three statutory schemes to which Hinkson J.A. referred include regulation pursuant to s.34 [now s.43] of the *Fisheries Act,* pursuant to s.73 of the *Indian Act* and pursuant to s.8 1 of the *Indian Act.* I conclude that a by-law dealing with fishing on a reserve is a valid use of the s.81(1)(o) legislative power. In what way is the power shaped by the expression "on the reserve"?

Of the word "on" *The Concise Oxford Dictionary* (7th ed.) says in part:

> so as to be supported by or attached to or covering or enclosing.
>
> so as to be close to, in the direction of, touching, arrived at, against, just at (house is on the shore, road; on Fifth Avenue, on the right, North, far side, both sides of).

It is apparent that there is a sense in which the words "on the reserve" may be interpreted so as to include not only fishing places and waters that are part of the lands conveyed in trust but also places and waters that are not, so that s.81(1)(o) may be construed to warrant subordinate legislation concerning fish and fishing at places and in waters that are merely touching, against or at the reserve. I think that there is no doubt that the Bulkley River, if not within the reserve, is at least touching against or at it. This seems to me to be a reading of the enactment that is entirely within Parliament's constitutional power to legislate in relation to "Indians, and Lands reserved for the Indians" (s.91(24) *Constitution Act, 1867).* It avoids the anomaly of seeing Indians for whom lands have been reserved as fishing stations adjacent to waters that are not part of their reserves treated differently as *to their fishing rights* from Indians whose reserves include the beds of fishable waters. The Indians, the lands, the fisheries are all matters of federal legislative competence. Where the facts show as decisively as in the present case that they are held together with links forged of history, culture and economy, I should not want to undertake the "extremely difficult" task of separating except under a clear legislative command to do so. Section 81(1)(o) is acknowledgement of the importance of fishing in the life of many Indian bands and is one of the ways by which the use and benefit of a reserve like the one at Moricetown may be enhanced for the band for which it was set apart *(Indian Act,* s.18).

The By-Law

The full measure of s.81(l)(o) is of only academic interest if the by-law uses just part of the Act's legislative potential. It is necessary in this regard to know what is meant by the expression "waters of the bands" by which the spatial application of the by-law is contained:

> r) "Waters of the Bands" means all water, waterways, rivers or streams which are located upon, or within boundaries of the reserves set aside for the use and benefit of the Moricetown
> Band.

With some idiomatic exceptions "upon" is interchangeable with "on" whose definition I need not repeat "Within" is defined in part as follows: "to or on or in the inside of, enclosed by."

I am inclined to think that the ordinary meaning of "within" is rather more consistent than not with the sense that it is meant in the by-law to refer to "waters, waterways, rivers or streams" that are part of the reserve and not just contiguous to it On the other hand, “upon” has been used in a disjunctive way and should be interpreted, if reasonably possible, so as not to assign it a meaning so far merged in the sense of "within" as to make it surplusage. There is such a meaning, I have referred to it earlier, and if the definition of "waters of the bands" is recast accordingly then it refers to "all water, waterways, rivers or streams which are (located) touching, against, just at or within boundaries of the reserves set aside for the use and benefit of the Moricetown Band." This is an interpretation *intra vires* s.81(1)(o), suggested by the ordinary sense of the words used and sympathetic to the objects of the by-law which are found in part in the preamble, two of whose recitals are these:

> AND WHEREAS the Tribal Council and its eight member bands wish to ensure that there will be a sufficient supply of fish for all band members:

AND WHEREAS the Tribal Council and its member bands wish to establish a management and protection scheme that will complement and enhance fisheries management practices, thereby increasing the benefits from the resources for all, and most particularly will conserve the fishing resource of the Gitksan-Wet'suwet'en people and preserve that resource for future generations of the Gitksan-Wet'suwet'en.

My conclusions can be summarized in this way:

1. *Indian Act,* s.81(1)(o) authorizes by-laws pertaining to fishing on reserves which, if not disallowed by the Minister of Indian Affairs and Northern Development, have the force and effect of federal regulations.

2. The validity of such by-laws may be found in Parliament's constitutional power to legislate not only in relation to lands reserved for Indians but also in relation to Indians themselves.

3. By-laws pertaining to fish or fishing "on the reserve" are valid not only where the waters and fishing stations concerned are part of the reserve but also where they are touching, against or at the reserve; in short, adjacent to it.

4. The Gitksan-Wet'suwet'en Indian Fishing By-Law was valid and effective at the material time to govern fishing in the waters of the Bulkley River at Moricetown Canyon because that river is at least touching, against or at the reserve.

It follows from this that while there is no doubt that the defendant was fishing on July 20 and 23 and no doubt that he was doing so contrary to the *Fisheries Act* and its regulations, he was acting in conformity with the by-law and the by-law prevails irrespective of whether the bed of the Bulkley River is part of the lands reserved in trust for the Indians at Moricetown.

I find him not guilty on each count