R. v. WILSON

British Columbia Provincial Court, Smyth P.C.J., October 20, 1987

R. Toews, for the Crown

The defendant, chief of the Frog Clan of the Gitksan people, was charged with violating s. 4(6) of the British Columbia Fishery (General) Regulations which prohibits fishing by means of a net in specified waters. The defendant did not hold an Indian food fish licence. He contended that the requirement that he obtain such a licence violated the aboriginal right to fish assured him by s. 35 of the Constitution Act, 1982.

Held: Defendant guilty.

1. The aboriginal right to fish is concerned with insuring that there is a harvest sufficient for "reasonable food and societal needs". It is an inherently elastic concept, but it does not imply that the aboriginal fishery has a claim based on s. 35 of the Constitution Act to a share of the harvest over and above food fish requirements.

2. Section 35 offers no impediment to a resource management scheme that enhances the commercial or sport fishing catch with no corresponding increase in the aboriginal catch provided the "reasonable food and societal needs" of aboriginal fisherman are first assured.

3. There are no suggestion in the evidence that the requirement that aboriginal fishermen hod a "food fish licence" had the effect of reducing their harvest below their entitlement.

4. Section 4(6) of the Regulations does not impose an absolute prohibition. Section 4(6) must be read with s. 4(7) which exempts those who are fishing under the authority of an "Indian food fish licence". There is no absolute prohibition from fishing governing those who act in accordance with the terms of an Indian food fish licence.

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SMYTH P.C.J.: On July 10th, 1985 the defendant was fishing in the waters of the Skeena River by means of a net he had set about a mile downstream from the Skeena's confluence with the Bulkley River.

He is a native Indian and chief of the Frog Clan of the Gitksan people and contends that the law's requirement that he obtain an Indian food fish licence violates the aboriginal right to fish assured him by s. 35 of the Constitution Act, 1982. The issue is set in the context of the defendant's prosecution for a violation of s. 4(6) of the British Columbia Fishery (General) Regulations, which prohibits fishing by means of a net in specified waters that include those of the Skeena River. Section 4(6) is moderated by s. 4(7) which exempts those who are fishing under the authority of an "Indian food fish licence", which is a category of permit provided for by s. 27 of the Regulations. There is no doubt that the defendant qualified for such a permit and would have been issued one free of charge had he asked. But he has never held such a licence in over fifty years of fishing in the traditional Indian way and feels that so long as he follows the Gitksan rules he should bot be required to do so. The Crown concedes that on July 10, 1985 the defendant was exercising his aboriginal right to fish.

The leading authority is Sparrow v. R., 32 C.C.C. (3d) 65, [1987] 1 C.N.L.R. 145, in which the court of Appeal considered the power to regulate fishing by means of conditions attached to an Indian food fish licence. The appellant Sparrow was a member of the Musqueam Indian band near Vancouver who had been convicted at trial of fishing with a drift net longer than permitted by the terms of the licence issued to his band. For several years before the alleged offence nets of up to seventy-five fathoms in length had been allowed but at the end of March 1983 a restriction to nets not exceeding twenty-five fathoms was introduced. This reduction in the length of nets was intended to limit the number of fish harvested. It was objected to by the appellant as an intrusion upon rights guaranteed him in these terms by s. 35 of the Constitution Act 1982:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Court of Appeal ordered a new trial to resolve outstanding factual questions but made it clear that s. 35 does not exempt aboriginal fishing from regulation. As the Court observed:

> The "existing right" in 1982 was one which had long been subject to regulations by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.

But the Court made it equally clear that s. 35 has subjected federal regulatory power to restraints that did not exist before April 17, 1982. The questions central to this case are the nature of those restraints and whether to prohibit the defendant from fishing unless licensed exceeds them.

In Sparrow's case the Court of Appeal discussed a series of decisions pre-dating the Constitution Act, 1982 and having to do with the scope of Indian hunting rights. One of them was R. v. Wesley (1932), 2 W.W.R. 337. The Court said [pp. 171-72 C.N.L.R.]:

> In identifying the evil sought to be avoided by the constitutional provision, R. v. Wesley suggests a basis for limiting the power to regulate. In the passage quoted by Hall J., McGillivray J. said that if the Indians were otherwise subject to provincial game laws "…in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them." The same evil need not follow from regulations, such as those in question here, which are specifically directed to Indian fishing. In such a case, the principle can be served by limiting the power to regulate so that it cannot limit the number of fish to be taken to one insufficient for support and subsistence.

The evil to which the Court of Appeal referred is the suppression of the number of fish to be taken to a level inadequate to meet subsistence needs. The remedy is to modify regulatory power so that no such limitation may be imposed. This, in my view, is the measure of s. 35 in relation to aboriginal fishing rights and it is made clear in this passage from Sparrow [p.178 C.N.L.R.]:

> Those regulations which do not infringe the aboriginal food fishery, in the sense of reducing the available catch below that required for reasonable food and societal needs, will not be affected by the constitutional recognition of the right. Regulations which do bear upon the exercise of the right may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest.

By far the greater part of the evidence in this case was devoted to explicating the conservation question. I think it is enough to say that the central theses of the expert evidence led by the defence was that the techniques employed by the Department of Fisheries and Oceans have as their result to prefer the commercial fishery at the mouth of the Skeena River to the Indian food fishery upstream. This, it was said, is contrary to the Department's stated order of priorities, now constitutionally entrenched, of placing only conservation before the interest of the Indian food fishery.

I do not think that the evidence supports the conclusion that the defendant's aboriginal right to fish has not been given precedence over the commercial fishery. Recognition of the defendant's aboriginal right to fish is concerned with ensuring that he and his people enjoy a harvest sufficient for "reasonable food and societal needs". This is an inherently elastic concept and the Indian food and fish harvest it requires may well change from time to time. However, I do not understand it to imply that the aboriginal fishery has a claim based upon s. 35 of Constitution Act, 1982 to a share of the harvest over and above food and fish requirements. It follows that in my view s. 35 offers no impediment to a scheme of management of the resource that enhances the commercial or sport fishing catch with no corresponding increase in the aboriginal catch provided the "reasonable food and societal needs" of aboriginal fishermen are first assured.

While the evidence in the present case calls into question whether Department of Fishery and Oceans management practices are calculated to achieve optimal harvests over time, it does not suggest any impairment of the aboriginal right to fish as defined in Sparrow. Indeed, rather the contrary, as this passage from the evidence of Mr. Michael Morrell, the qualified biologist called by the defence, illustrates:

> There have been discussions of the pros and cons of the existing Indian allocation, frequently with commercial fishermen thinking that it's too high in particular instances and Indian representatives or others arguing that it's all right.

Finally, I would observe that even had I reached a different conclusion as to the aboriginal harvest I would nevertheless have decided that the case against the defendant has been proved since there

is no suggestion in the evidence that the requirement that aboriginal fishermen be licensed has the effect of reducing their harvest below their entitlement.

It was also urged on me that s.4(6) of the British Columbia Fishery (General) Regulations is no regulation at all but an absolute prohibition. But s. 4(6) must be read with s. 4(7)(b), together they say:

> (6) No person shall fish by means of a net in the waters set out in an item of schedule VII
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> (7) Subsection (6) does not apply to a person fishing:
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> …
>
> (b) under the authority of a licence issued pursuant to section 27.

There is in short no absolute prohibition from fishing governing those who act in accordance with the terms of an Indian food fish licence.

For these Reasons I find the defendant guilty.