R. V. ADOLPH AND ADOLPH

British Columbia Provincial Court, Thomas J., September 11, 1987

S. Blechingberg, for the provincial Crown
K. Cairns, for the federal Crown
A. Guenther, for the accused

The accused, status Indians and members of the Fountain Band, were charged with: unlawfully fishing without a licence or permit contrary to s.4(1) of the British Columbia Fishery (General) Regulations; unlawfully fishing by means of a net in an area closed to net fishing contrary to s.4(6) of the Regulations; and, with possession of sockeye salmon without lawful excuse contrary to s.4(4) of the Regulations. No permits or licences were applied for by the accused nor had any licence been issued to the band by the Department of Fisheries.

The accused argued that the band had always fished at certain places and in particular, had fished at the spot where the alleged offence occurred. The accused also described the need of the Indians to fish for food and spiritual values.

It was observed that in 1986 the band was unable to meet their reasonable food requirements in terms of salmon due to the fact that many Indians worked and could only reasonably fish during weekends which was the time the river was closed for Indian food fishing, and band members were afraid to fish and to consume fish because of the deleterious substances found in the salmon.

Held: Guilty of fishing with a net without a licence or permit.

1. The accused were entitled to the protection of their aboriginal right to fish for food and for ceremonial purposes. However, the accused did not establish a connection between their lack of a licence and the shortage of salmon for their food and societal needs. A requirement of a licence or permit under these circumstances did not infringe their aboriginal right and therefore the accused were guilty of Count 1 as charged.

2. With respect to Counts 2 and 3, the charges arose out of the same factual situation - fishing with a gill net without a licence or permit. To find the accused guilty of Counts 2 and 3 would result in multiple convictions for the same criminal act.

THOMAS J.: On August 8th, 1986, Mr. Timothy Cody, a fisheries guardian employed with the Department of Fisheries and Oceans, was doing a patrol by driving up the east side of the Fraser River across from Lilloet where he observed a person down by the Fraser River setting a gill net in the river. He observed him for about five minutes and saw him catch a fish. The observation took place with the assistance of binoculars. He further saw the person taking the fish out of the net, putting it up on the bank and resetting the net. Mr. Cody approached both persons and had a conversation. The fish caught was a sockeye salmon and the incident occurred upstream of the land described in Item 1 of Schedule 7 in the B.C. Fishery General Regulations.

The defendant, Mr. Ernest Adolph, produced a licence from the Indian band and was told by the fisheries officer that it was not the proper licence that was issued by the Department. The defendant further stated that he thought the licence he had was the only one he needed and was told that that was not the case and that moreover it was a closed day. The other accused, Mr. Gordon Adolph, did not produce a licence at all. It was further uncontested that the Department of Fisheries had not issued any licence to the Fountain Indian Band.

The officer further testified that he usually only requires a status card and then, if the applicant is from the Fountain Band, he will issue a permit. In this instance no permits were applied for.

Earlier in 1986 the Pacific Salmon Commission, which was established by treaty between the United States of America and Canada pursuant to the Pacific Salmon Treaty signed in 1985, made a pre-season estimate of 14 million fish coming into the Fraser System. The Commission obtains from the Government of Canada a net escapement goal which, in this instance, was 4.1 million fish leaving an estimated 9.9 million fish available for catch. Pursuant to the Pacific Salmon Treaty, 400,000 fish are excluded from the calculation of the total allowable catch and, in this instance, another 100,000 were added from the Canadian share of the catch. The balance is divided in accordance with the treaty between the United States and the Government of Canada.

It became clear on or about July 29, 1986 that the run exceeded the pre-season estimates for the summer run by a considerable margin, but the benefit of that increase went largely to the

commercial fisheries by way of extending their catch and their season but the Indian Food Fishery was held to its pre-season quota. Some changes were made with respect to the hours and times of fishing but these changes were not in effect on August 8th, 1986.

It appeared, ostensibly, that the priorities of the Department of Fisheries and Oceans was to give first priority to the preservation of the stock; then to the Indian Food Fishery; then to commercial fisheries and finally to sports fishermen. I add the qualification 'ostensible' because it did not appear that this was applied for reasons which did not appear at trial. There was evidence that the Interior Indian Fisheries Commission, a body representing the majority of the tribal groups within the Fraser River watershed, has stated that 600,000 fish were a minimal reasonable food catch. Why a lesser sum was reserved by the Government of Canada was left unexplored.

With respect to the defence, the defendant Ernest Adolph gave evidence to the effect that both he and Gordon Adolph are members of the Fountain Band, that they are status Indians and that the Fountain Band has always fished at certain places and in particular, as long as he can recall and certainly as he has been advised by his grandfather, has fished at the same spot at which the alleged offence occurred. The various fishing spots have been given names and this fishing spot had a specific name and was always used by members of the Fountain Band. He described the relationship between the members of the Fountain Band and the salmon and the need of the Indians for the fish as food and for spiritual values. The evidence given did not differ materially from the conclusions drawn by our Court of Appeal in the case of R. v. Sparrow, 32 C.C.C. (3d) 65, [1987] 1 C.N.L.R. 145 and it is fair to infer that there is a grant similarity between the various Indian tribes along the Fraser with respect to their view of the salmon and the importance of the salmon for food, for ceremonial purposes and in their folklore and belief.

What was important is the observation that in 1986 the members of the Fountain Band were unable to meet their reasonable food requirements as far as salmon is concerned and various reasons were given for it. One of them is that many of the Indians now work and can only reasonably fish during the weekends which was precisely the time when the river was closed for Indian food fishing. Another obstacle was that band members were afraid to fish and to consume fish because of the deleterious substances found in the salmon and that this had a very inhibiting effect on the band members obtaining the appropriate amount of fish sufficient for their food and ceremonial requirements.

Are the Defendants Entitled to Aboriginal Rights?

Evidence given with respect to the status of the two defendants as being members of the Lillooet Band was given by the defendant Ernest Adolph. The gist of his evidence is described earlier in my judgment and in spite of the argument of counsel for the Attorney General of British Columbia, I am thoroughly satisfied that the two accused in question were members of the Fountain Band and that the Fountain Band had at all times fished at their specific spots in the river where they presently fish and I am thoroughly satisfied that the two defendants are entitled to the protection of their aboriginal right to fish for food and for ceremonial purposes. Not much further needs to be said on this point.

Were the Aboriginal Rights Taken Avay?

The answer to this question is determined in part by the charges as laid which are as follows:

> Count #1: On or about the 8th day of August, A.D., 1986, at or near Lilloet in the Province of British Columbia, did unlawfully fish without the authority of a Licence or permit thereby contravening Section 4(1) of the British Columbia Fishery (General) Regulations thereby committing an offence to Section 61(1) of the Canada Fisheries Act.
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> Count #2: On or about the 8th day of August, A.D., 1986, at or near Lillooet in the Province of British Columbia, did unlawfully fish by means of a net in the waters set out in item (1) of Schedule VII, thereby contravening Section 4(6) of the British Columbia Fishery (General) Regulations, thereby committing an offence under Section 61(1) of the Canada Fisheries Act.
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> Count #3: On or about the 8th day of August, A.D. 1986, at or near Lilloet in the Province of British Columbia, did without excuse, have in their possession, fish to wit Sockeye Salmon caught contrary to the Act or Regulations made thereunder, thereby contravening Section 4(4) of the British Columbia Fishery (General) Regulations, thereby committing an offence contrary to Section 61(l) of the Canada Fisheries Act.

The sections of the Fisheries Act, R.S.C. 1970, c.F-14 and the regulations which were alleged to be breached are set out hereunder, namely:

> 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.
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> (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.
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> 3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.
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> (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.
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> (5) No person shall buy, sell, trade or 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.
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> (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
> (a) by means of a net in waters and at times authorized by these Regulations or the Pacific Commercial Salmon Fishery Regulations;
> (b) under the authority of a licence issued pursuant to section 27; or
> (c) in accordance with the British Columbia Sport Fishing Regulations.
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> (8) No person shall fish for sockeye, pink or chum salmon in non-tidal waters.
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> (9) Subsection (8) does not apply to a person fishing
> (a) under the authority of a licence issued pursuant to section 27;
> (b) in accordance with the British Columbia Sport Fishing Regulations; or
> (c) for salmon for commercial purposes in the Stikine River or the Taku River under the authority of a licence issued in accordance with subsection 22(6) of the Pacific Commercial Salmon Fishery Regulations.
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> (10) No person shall sell, offer to sell or have in his possession any fish taken in contravention of subsections (6) or (8).

During argument great stress was laid on the case of R. v. Sparrow of the Court of Appeal, now reported in 32 C.C.C. (3d) 65, [1987] 1 C.N.L.R. 145. From that case I draw the following conclusions) namely:

1. The Parliament of Canada has the general power to regulate the time, place and manner of all fishing including fishing under an aboriginal right;

2. In allocating the right to take fish, the Indian Food Fishery is given priority over the interests of other user groups;

3. As far asthe Indian food fishery is concerned, it is constitutionally entitled to such priority and as it is a constitutionally-protected right it cannot be extinguished;

4. Those regulations which do not infringe the aboriginal food fishery in a sense of reducing the available catch below that required for reasonable food and societal needs are not affected by the constitutional recognition of the aboriginal right;

5. Only if the regulations affect the aboriginal right is then the burden on the Parliament of Canada to establish that those regulations are reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest.

This summation appears to follow from R. v. Sparrow, supra, and in particular the following passage [p.178 C.N.L.R.]:

> The general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. The essential limitation upon that power is that which is already recognized by government policy as it emerges from the evidence in this case. That is, in allocating the right to take fish, the Indian food fishery is given priority over the interest of other user groups. What is different is that, where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to such priority. Furthermore, by reason of s.35(1) it is a constitutionally protected right and cannot be extinguished.
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> 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. These purposes are not limited to the Indian food fishery.

As I earlier observed, no permits or licences were applied for by the accused nor had any licence been issued to the Fountain Indian Band. It is further clear from the evidence of the fisheries guardian that if an applicant is from the Fountain Band, he will issue a permit and no evidence at all was produced explaining the absence of any licence to the Fountain Indian Band. In other words, I don't know whether the Fountain Indian Band ever applied for the licence or whether or not the Department of Fisheries had refused to issue a licence.

It is further clear that during 1986 the Fountain Band did not have sufficient salmon for their food and societal needs. It seems to me that it is incumbent on the defence to do more than that. The defendants in this particular instance will have to establish a connection between the absence of a licence or permit and the infringement of aboriginal rights. In this instance, the connection is totally lacking. Two reasons were given for the lack of fish with no attempt made to make any assessment as to their importance. The best case that can be for the defendant is that their weekend closures affected their exercise of the right to fish for food. However,- they were not charged with fishing during closed season or times but with, among others, fishing without a licence or permit.

As there has been no connection shown between their lack of a licence and the shortage of salmon for the Fountain Band, the defence cannot succeed. It is clear that the requirement of a licence or permit under these circumstances does not infringe the aboriginal rights.

Accordingly, I find the defendants guilty of Count 1 as charged.

With respect to Counts 2 and 3, these charges arise out of the same factual situation; namely fishing with a gill net without a licence or permit. It follows that to find the accused guilty of Counts 2 and 3 would result in multiple convictions for the same criminal act. This result follows from the majority judgment of R. v. Hagenlocher, 65 C.C.C. (2d) 101 which was adopted without reasons by the Supreme Court of Canada (1982), 25 C.R. 531.