

BRITISH COLUMBIA PACKERS LIMITED (Plaintiff (Respondent)) RONALD v. VICTOR SPARROW (Defendant (Appellant))

[Indexed as: **British Columbia Packers Ltd. V. Sparrow**]

British Columbia Court of Appeal, Macdonald, Locke and Toy JJ.A., February 24, 1989

L.F. Harvey, for the appellant
G.L. Bisaro, for the respondent

The roe herring fishery is regulated under the *Fisheries Act*, R.S.C. 1970, c.F- 14 and regulations made thereunder. In 1972 the appellant Indian first acquired an Indian Class H Roe Herring Seine Licence. In 1974 a moratorium was placed on the issuance of non-Indian H licences. In 1979 the patties made an agreement in writing for the sale by the appellant to the respondent of a ship together with the appellant's H licence. The industry practice was to create a trust arrangement by which the beneficial interest in the licence was transferred while the licence remained in the name of the original owner. The dispute arose in 1986 when the appellant refused to sign the necessary documents to obtain renewal of his licence for the 1987 season.

Held: Appeal dismissed.

1. The contract was not illegal due to breach of express statutory conditions.
2. The object of the agreement was the transfer of all beneficial interest in the herring licence to the respondent with the appellant remaining a bare trustee holding the legal tide. Neither the statute nor the regulations prohibit the transfer of beneficial interest in a herring licence. The statutory restrictions apply only to dealing with the legal title.

Editor's Note: Application for leave to appeal to the Supreme Court of Canada was dismissed with costs July 13, 1989.

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MACDONALD J.A.: On 14th September 1979 the patties made an agreement in writing for the sale by the appellant Sparrow to the respondent British Columbia Packers Limited of a vessel the "Native Spirit" together with Sparrow's category H roe herring seine licence. The issue of the appeal is the legality of the agreement in so far as it relates to the herring licence. Mr. Justice Macdonell, trying the action on an agreed statement of facts [22 B.C.L.R. (2d) 302), found the provision legal and granted the respondent remedies it sought for the enforcement of the agreement.

For background of the dispute I take the following from the reasons of the judge [pp.303-304]:

The defendant in this proceeding is a status Indian who has been engaged in commercial fishing since approximately 1942. In approximately 1972 he acquired for the first time what is known as a class H roe herring seine licence. The early 1970's were the times in which a market for roe herring developed in Japan, creating an interest in this class of licence. Each licence is categorized in two ways: first, according to boat, either gill net or seine, and secondly, according to whether they are issued to an Indian or non-Indian. Such licences are personal, meaning that they are issued to a named individual as opposed to a named vessel, although the applicant for a licence names the vessel which he intends to use for his fishing enterprise. Originally the Department of Fisheries and Oceans issued class H licences to all eligible applicants. However, rapid expansion of the roe herring fleet in the early 70s led to moratorium on the issuance of non-Indian H licences in 1974. Current holders of licences at that time could continue to apply yearly to renew their licence subject to various stipulations as to the licence's uses for the past year. However, those that had not fished for roe herring in the past, specifically in the past year, were unable to obtain a licence.

Indian licences continued to be issued until 1977, at which time a similar moratorium was imposed. The consequence of these moratoriums and of the high potential earnings in this particular fishery was to create a great demand for H licences.

I go now to the statutory provisions and regulations upon which the appellant relies.

The *Fisheries Act*, R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14], in s.7 authorizes the minister to issue fishing licences. By s.34 [now s.43] the Governor in Council may make regulations:

- (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.

By s.61 [now s.79] contravention of the Act or the regulations is a summary conviction offence.

At the date of the agreement between the parties the applicable regulations were the *Pacific Fishery Registration and Licensing Regulations*, C.R.C. 1978, c.824, as amended. Section 9(5) provides:

- (5) No fishing licence shall be transferred unless approval for the transfer has been received from the Regional Director.

Section 25 reads:

25.(1) No person shall use a commercial fishing vessel in fishing for roe herring unless the vessel displays, in addition to the registration plates and tabs required by section 4, current year roe herring licence tabs that are issued for the vessel.

- (2) Where an Indian has been issued a licence to operate a vessel in fishing for roe herring, no person except an Indian shall operate that vessel.

Licence tabs would not be issued for a vessel unless the owner of the vessel had held valid roe herring licence tabs during the immediately preceding year (s.26(b)) and had used the vessel in fishing for roe herring during that year (s.29(b)). Section 28(2) of the regulations provided:

- (2) A person who sells or otherwise disposes of a vessel for which roe herring licence tabs have been issued shall remove such tabs from the vessel and forthwith advise the Regional Director of the sale or other disposition.

Section 36 of the regulations is the foundation of the appellant's case. It is as follows:

36.(1) Subject to subsection (2), licences, registration plates and licence tabs are not transferrable from person to person or from vessel to vessel except with the prior approval of the Minister.

- (2) Where a vessel for which registration plates or licence tabs have been issued pursuant to these Regulations is sold or otherwise disposed of, the plates and tabs shall continue to be valid in respect of that vessel for the period for which they would have been valid if the vessel had not been sold.

(3) Subsection (2) *does not apply to roe herring licences*, groundfish trawl licences, shrimp trawl licences or abalone licences. [emphasis added]

Section 39 is:

39. The Minister may suspend or cancel a licence issued in respect of a vessel or to a person or may refuse to issue any such licence if the operator of the vessel or the person, as the case may be, is convicted of a violation of the Act or any Regulation thereunder.

The dispute arose in 1986 when Sparrow refused to sign the necessary documents to obtain renewal of his herring licence for the 1987 season. By that time new regulations were in force. They were the *Pacific Fishery Regulations*, 1984, 50RI84-337, as amended. From those regulations the appellant invokes the following:

4.(1) Subject to subsection (4), no person shall engage in commercial fishing except under the authority of a commercial fishing licence.

6.(1) The Minister may specify in a commercial fishing licence issued under section 7 of the *Fisheries Act* the following terms and conditions: ...

- (e) any other terms and conditions.

6.(2) No person fishing under the authority of a commercial fishing licence shall contravene or fail to comply with any term or condition of that licence.

10.(1) A commercial fishing licence issued to a person shall be carried by that person while the person is engaged in the commercial fishing authorized by that licence.

13. No registration certificate, identification plate, validation tab or commercial fishing licence issued in respect of a commercial fishing vessel shall be removed or transferred to another vessel without the approval of the Minister.

21. Where an Indian has been issued, under the former regulations, a Category H [Herring] licence and a validation tab has been issued, under the former regulations, in respect of the vessel to be used by that Indian in fishing for roe herring, no person other than an Indian shall use that vessel in fishing for roe herring.

It may be noted that s.21 is in substitution for the former s.25(2) which provided that "no person except an Indian shall operate that vessel."

The judge found that [p.304]:

A. practice developed after the 1977 regulation of leasing these licences or creating a trust arrangement by which the beneficial interest in the licence was transferred while the licence remained in the name of the original owner.

The 14th September 1979 agreement contained these provisions:

B. At present time the Licence is not transferable...

6. If and so soon as the Licence shall become transferable Sparrow, or his Successor, will execute all instruments and do all things necessary or proper to transfer the Licence to Packers or its nominee.

Legal ownership requirements under the regulations were disclosed to the Department of Fisheries and Oceans in the licence form submitted by the respondent. This is what was done. Lloyd Bains, of 37.5 percent Indian heritage, purchased a 33/64th interest in the vessel and licence immediately after the agreement between the respondent and Sparrow. Then, 16 shares of legal title to the vessel were temporarily signed over to Sparrow to meet the requirements of the regulations from the first season in 1980 until partial ownership was no longer required under the regulations. With respect to the requirement of operation of the vessel by an Indian the respondent arranged for Joe Louis, a native, to be aboard the vessel as an active fisherman. Mr. Justice Macdonell dismissed the claim of illegality for these reasons [p.307]:

I conclude, from examining the contract between the parties dated 14th September 1978, that what is being sold is a beneficial interest in the defendant's roe herring licence. Both parties fully realized that there was a restriction on transfer at the time and provided that, should the licence become transferable without consent at a later time, a transfer document would be forthcoming. The agreement also envisaged the transfer to the plaintiff or its nominee. As I see it, the defendant is for all practical purposes a nominee of the plaintiff, or trustee holding the licence until it could be transferred and, in the meantime, the plaintiff has bought and paid for the benefits of the fishing licence, not unlike the trapline licence held by a nominee in the *Ernst v. Dumlich* [(1984), 55 B.C.L.R. 285, reversed 19 B.C.L.R. (2)(1)155 (C.A.)] case.

I consider the *Ernst v. Dumlich* case is remarkably similar to the case at bar. Dealing with the issue of nominee, Hinkson J.A., for the court, said at p.6 of the judgment [p.159 B.C.L.R.):

But, there is no prohibition in the Act to a nominee holding the licence, nor is there any requirement that such nominee hold the licence and its rights beneficially.

The same reasoning applies here. Cited in the *Ernst* case is *Re Stratford and C.U.P.E.* (1980), 28 O.R. (2)(1) 734, 111 D.L.R. (3d) 457, where the Divisional Court said at p.737:

In our view, the parties must clearly be prohibited by statute from entering into the agreement in question before a Court should declare such agreement illegal.

Having concluded that the contract was not illegal due to breach of express statutory provisions, I am of the view that the same considerations apply to the second branch of the defendant's argument, which is that there is illegality implicit in the performance obligations under the contract.

I now summarize the appellant's argument. The courts will not enforce an agreement to accomplish an illegal act. Nor will they enforce a contract that is expressly or impliedly prohibited by law. What do the Act and regulations prohibit? Firstly, at the time the agreement was made, the herring licence could not be transferred without the approval of the regional director and the minister: ss.9(5) and 36(1). Such approvals were neither sought nor granted. In addition the regulations make it clear that the herring licence was intended for bona fide use by an Indian only. The licence tabs would not be issued for the vessel unless the owner of the vessel had held valid herring licence tabs during the immediately preceding year. How was there breach? Well the very object of the agreement was precisely the use of the herring licence by a non-Indian by means of, in substance, a transfer of the licence. The terms of the agreement whereby Sparrow would apply each year for renewal of the herring licence could not be carried out without the licence tabs being issued for a vessel the owner of which, B.C. Packers, had not held valid licence tabs for the immediately preceding year. In substance, here, there was a transfer. The respondent became the beneficial owner of the licence, Sparrow was a bare trustee. The intent of the parties was to transfer to the respondent the entire benefit of Sparrow's licence. The judge erred by focusing on whether the agreement itself was prohibited by the regulations. He should have correctly characterized the object of the agreement and questioned whether what was to be done under it was illegal. If he had done that he would have been led to the correct conclusion. And that conclusion is that the whole object of the agreement was the doing of the very act which the statute and regulations prohibited.

The appellant continues: the judge drew support from the judgment of this court in *Ernst v. Dumlich* [55 B.C.L.R. 285, rev'd 19 B.C.L.R.(2)(1) 155 (C.A.)]. He erred in doing so. In that case the object of the impugned agreement was the transfer of a trapline registration to the plaintiffs nominee. There was no statutory prohibition against transfer of the trapline registration. As long as such transfer was carried out with approval of the appropriate government officials it was lawful. So the case is distinguishable.

I reach now my opinion upon the issue. I think the judge found for the respondent for valid reasons. He concluded [p.307) "that the contract was not illegal due to breach of express statutory provisions." That met para. 7 of the appellant's statement of defence which says:

In answer to the whole of the statement of claim, the Defendant says that the Agreement, is so far as it relates to the "H" licence, is unenforceable as being illegal and contrary to the Fisheries Act Regulations referred to above and public policy.

There is the same result if one ascertains the object of the agreement and inquires whether what was to be done thereunder was an illegal act. The object of the agreement was the transfer of all beneficial interest in the herring licence to the respondent, Sparrow, who was to remain a bare trustee holding the legal title. It would be unprofitable elaboration to do more than say that one can search the statute and regulations and find no prohibition of transfer of beneficial interest in a herring licence. The restrictions apply only to dealing with the legal title.

I would dismiss the appeal.