R. v. VIOLET AND BEAR

Unreported at date of publication

British Columbia Provincial Court, MacDonald P.C.J., February 28, 1984

R. Jacobs, for the Crown
L. Mandell, for the accused

The accused were charged with unlawfully transporting salmon within the province of British Columbia without a licence, contrary to s.7(1) of the British Columbia Fishery (General) Regulations, and unlawfully bringing salmon caught above a commercial fishing boundary to a place below the boundary, contrary to s.26(1) of the regulations . The evidence indicated that the fish were caught on an Indian reserve by V's brother-in-law, M, the holder of an Indian food fish licence, and that he gave the fish to the two accused. M testified that he thought it was legal to give food fish to a sister-in-law. Both accused testified they did not intend to sell the fish but they were to be used food. The defence challenged the legality and constitutionality of the relevant sections of the regulations on the grounds that they are not necessarily incidental to the federal authority with respect to sea coast and inland fisheries, under s.91(12) of the Constitution Act, 1867.

Held: (MacDonald P.C.J.)

1. The regulations in question were made pursuant to s.34(c) of the Fisheries Act, R.S.C. 1970, c.F-14, which purports to give the federal government authority to make regulations concerning the transporting of fish. 0n their face, the challenged regulations appear to fall within the scope of the legislation.

2. But the challenged regulations appear to purport to control property and civil rights, which is within provincial authority pursuant to s.92(13) of the Constitution Act, 1867.

3. Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries, but is concerned with the protection and preservation of fisheries as a public resource. As there is some concurrent jurisdiction over fisheries, the federal legislation is valid only if it is necessarily incidental to the federal authority to protect and preserve the fisheries.

4. The challenged regulations make no attempt to link the prohibited conduct to actual or potential harm to fisheries. The Crown has the onus of proving that the regulations are necessarily incidental to the protection and preservation of the fisheries resource. There was no evidence called to indicate that a breach of these sections would jeopardize the resource.

5. Section 26(1) purports to make it an offence for a person to catch game fish above a provincial boundary and carry them across the boundary to any place below the boundary, such as his residence. That section also would make it illegal for an Indian to catch fish legally on a reserve above the commercial fishing boundary pursuant to the Indian food fish licence and transport them to his own residence below the boundary in order to use them for food. This kind of prohibition is not related to the preservation and protection of the fishery resource and is ultra vires the federal government.

6. Section 7(1) purports to make it an offence to transport salmon anywhere within the province without the authority of a licence issued by a fishery officer. Although it does not apply to game fish caught under a licence or to processed or packaged fish, it would apply to an Indian who caught food fish at the river bank, put them in his car and transported them to his residence. The presence or absence of a licence would not make any difference to the ability of fishery officers to determine whether or not there was abuse of the fishery, and is not necessarily incidental to federal authority. Thus it is also ultra vires.

7. Charges dismissed.

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MACDONALD P.C.J. (orally): I should say at the outset that because it was difficult to find a date for this matter, and we agreed on a fairly short adjournment for the purpose of delivering this judgment, that I have not had an opportunity to write out or have a written prepared judgment, and therefore I am going to make my best effort to deliver it from the notes I have made at the time as well as notes I have made since, and my interpretation of the cases, etc. It may not be as perfect as if I had had time to prepare the judgment and write it out .

Inany event, the accuseds, Maxime Beatrice Violet and Robert Phillip Bear, stand charged on a six count information with really what amounts to two separate offences. The first is under section 7(1) of the British Columbia Fishery (General) Regulations, and the second being a breach of section 26(1) of the same regulations.

Section 7(1) deals with unlawfully transporting salmon within the Province of British Columbia without the authority of a licence issued by a fishery officer. Section 26(1) is concerned with unlawfully bringing salmon caught above a commercial fishing boundary to a place below the boundary. All of the offences allegedly took place on the 31st of July, 1983.

The evidence of the fishery officer indicated that he received information of a shipment of fish coming down from the interior. As a result he spotted a vehicle occupied by the two accused persons that appeared to be loaded down. He stopped the vehicle, asked the accused persons to open the trunk, and in the trunk he found two coolers of salmon, cleaned, without heads. There was also a plastic bag containing salmon heads. The caudal peduncle, I won't try to spell that, and twelve pieces of salmon in another cooler, five frozen sides of salmon, and I believe another nine pieces. None of the salmon were totally intact. The fish in the cooler were fresh, they were not frozen. There were gill net marks on the bodies of the fish. The dorsal fin was intact. The significance of that is that if these fish were Indian food fish the dorsal fin was to be removed and that was not done. The evidence was that in the opinion of the fishery officer the fish were likely caught in a gill net. They were likely only about twenty-four hours old, and definitely were salmon. The accused persons were asked where they got the salmon. They were warned they need not say anything. Maxime Violet answered that she got the salmon from her sister and brother-in-law in Lytton, from, I believe, a Mr. Thomas and Josephine Bear, and Robert Bear responded that, yes, that is where they got them. Maxime Violet said they were taking the fish home to Vancouver to can and freeze the fish. They were asked if they had any licence for the fish for transportation, presumably of the fish, and they said no, they did not. They were asked if they had a sports fishing licence. They replied no, they did not. When asked if they had an Indian food fishing licence they replied no, they did not.

The evidence is that there was a commercial fishing boundary at approximately the Mission Bridge, which runs north-south across the Fraser River. It would appear from the evidence that Lytton is above this commercial boundary, and the accused persons were located below the boundary at the time they were stopped. Evidence further is that above the bridge there was only two types of fishing allowed, that would be sports fishing with the proper licence, or Indian food fishing, again with the proper licence.

The evidence called on behalf of the accused persons was firstly from Mr. Horace Michelle. He indicated that the accused, Maxime Violet, is his sister-in-law, or the sister of his common-law wife, that the fish in question were caught on the July 29th to July 31st weekend by gill net on the Indian reserve nine kilometers south of Lytton, British Columbia. He indicated that he did have a food fish licence and that was produced and is marked Exhibit Eight in these proceedings. He said that he gave the fish to Maxime Violet and Mr. Bear. He was unaware of any commercial boundary prohibitions. He was asked if he aware that Indian food fish were for himself and his immediate family and he replied that he though it was okay to give the fish to a sister-in-law. The evidence of Mr. Michelle was corroborated by Josephine Thomas, the a sister of Maxime Violet. Maxime Violet also gave evidence herself, again corroborating the evidence of Mr. Michelle, and stating further that she had no intent to sell the fish. They intended to use them for food. Mr. Bear gave similar evidence.

With respect to the charges against the accuseds, the defence really is not based, shall I say, on any interpretation of the facts, or the merits of the case, but rather concentrates on the legality or constitutionality of the relevant sections of the B.C. Regulations. I will not summarize the arguments of defence or Crown, other than where necessary as I give my judgment.

The federal government only has that power to govern fisheries that is given to it by the Constitution Act, 1867, and that power is contained in section 91 subsection (12) of that Act, which gives the federal government authority over seacoast and inland fisheries legislation. Dealing with

that topic is the federal Fisheries Act, and in particular we are dealing with regulations under that Act. Those regulations are authorized by section 34 of the federal Fisheries Act, R.S.C. 1970, c.F-14, which states, in part:

> 34. The Governor in Council way make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulation.
> (a) for the proper management and control of the sea coast and Inland fisheries;
> (b) respecting the conservation and protection of fish;
> (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish.

I will stop at that point. The section carries on for several more subsections, but the first question is whether or not section 34 purports to authorize regulations such as those referred to in the charge before me. It is clear in my mind, under subsection (c) of section 34 that the federal government purports to say that they have authority to make regulations concerning the transporting of fish, and basically that is what the regulations relate to in the charges before me. So, on the face of it, it would appear that the regulations, 7 subsection (1) and 26 subsection (1) do fall within the scope of the apparent legislation, that is the federal Fisheries Act. and are thereby properly authorized. However, that is only part of the problem. Defence goes on to argue that the authority of the federal government to legislate in the sphere of fisheries derives from section 91 of the Constitution Act, 1867, and in particular argues that those sections are ultra vires the federal government because the regulations are not necessarily incidental to federal government authority with respect to fisheries.

Prima facie, if one looks at the regulations, subsection (1) of section 7, and subsection (1) of section 26 of the British Columbia Fishery (General) Regulations, it would appear that they purport to control what could be otherwise described as property and civil rights, which is within the authority of the provincial government.

In the case of Interprovincial Co-operatives Limited and Dryden Chemicals Limited v. The Queen In Right of the Province of Manitoba [1975] 5 W.W.R. 382, Chief Justice Laskin speaking for the Supreme Court of Canada stated [at p. 413 (Laskin C.J. (dissenting))]:

> Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization.

The net effect of all of that is that there is a certain amount of concurrent jurisdiction with respect to the subject matters of these proceedings, namely fisheries, and the federal government's legislation is only valid if it can be said to he necessarily incidental to the federal government's authority to protect and preserve the fishery.

The reason that the federal government does not have exclusive authority is that this particular offence, or offences, did not take place at the site of the fishery as defined within the legislation, but rather took place at a different location and therefore in order for the regulations to be valid they must be necessarily incidental to the general power I the federal government, as I have already indicated.

Now, the regulations themselves, in my view, make no attempt to link the prohibited conduct to actual or potential ham to fisheries. I should also add that there was no evidence called in the case to indicate to me that a breach of the two sections of the regulations would jeopardize the fishery resource. The Crown argues that the regulations, firstly, are not a blanket prohibition, and that is true with respect to section 7(1) of the regulation.. That section merely requires that a licence be issued by a fishery officer before salmon can be transported within the province. The same cannot be said for section 26 subsection (1) of the regulations, in that it is prohibitive in nature. There is no licence that, apparently, one can get to transport fish from above a commercial boundary to a spot below a boundary, and in that sense it is a prohibitive type of regulation. The Crown further argues, in any event, that the licensing requirement under section 7, and the prohibition under section 26, are required as a management tool In detecting and controlling abuse or potential abuse of the fishery. The question which I have is whether or not these

regulations are necessary to prevent the abuse that the Crown speaks of. If that is so it is not obvious from a reading of the sections.

I am referred to a number of cases on the topic and the decisions which I found most helpful were, firstly the decisions of R. v. Fowler, which is cited in [1980] 5 W.W.R. 511, and that is a decision of the Supreme Court of Canada. In addition I was referred to the case of R. v. Saul [reported supra, at p. 163] which is a Provincial Court decision in this province, a decision of my brother judge, Gordon, in Kamloops on the 9th of November, 1983. The Fowler decision referred to one other case which is helpful, and that is at page 521 of the Fowler decision wherein there is a reference to the case of A.G. Canada v. A.G. British Columbia; Reference re Fisheries Act, 1914 cited as [1930] A.C. Ill, and in that decision the Attorney-General for Canada sought to support provisions in the Fisheries Act, 1914, which required the obtaining of a federal licence in order to operate for commercial purposes a fish cannery, or in British Columbia a salmon cannery or curing establishment. It was in this case that Lord Tomlin stated his four propositions regarding conflicts between federal and provincial jurisdiction.

The federal argument was that the legislation in issue was valid under section 91(12) as being directly or incidentally in relation to sea coast and inland fisheries. It was argued that the operation of canning and curing establishments was inseparably connected with the conduct of fisheries.

The legislation was held to be ultra vires of Parliament. Lord Tomlin said at pages 121-122:

> It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters.

That case, it seems to me, is fairly analogous to this case, at least as far as the licensing provisions of section 7 subsection (1) of the regulations is concerned. As I have indicated earlier it is not obvious to me that section 7 subsection (1) is necessarily incidental to effective fisheries legislation, and I would agree with the earlier comment by Lord Tomlin that effective fisheries legislation may well require that the Minister should have power for enforcing regulations to make certain inspections, and to require appropriate statistical returns, but that did not go so far as to say that a licensing authority was either required or necessary. In the Fowler case itself the question was somewhat different and the facts are certainly distinguishable from the case before me. Although the conclusion that the particular section was ultra vires was the same as that in the A.G. Canada v. A.G. British Columbia case, that is where the similarity ends.

The other case which I referred to, the Saul decision, I also found very helpful. I am unaware from counsel, or if I was advised I missed it, but I am not aware of whether or not any appeal has been taken from this decision. In any event I assume, since Crown counsel took no objection to the case being offered by defence counsel that it does constitute at least in the Provincial Court the law of British Columbia at the moment . That case involved an interpretation of section 37 of the same British Columbia Fishery (General) Regulations, which read:

> 37. No person shall buy, sell or barter fish or portions of fish unless the fish were lawfully caught under a commercial fishing licence.

I found the case helpful in that it directed me through the maze of problems that one incurs when trying to decide whether or not something is ultra vires the federal government and to resolve potential conflict in law. His Honour, Judge Gordon, held that certainly section 37 of the regulations was authorized by the general governing section, namely section 34 of the federal Fisheries Act. However, he went on to hold that the section was ultra vires the federal government in that it was not legislation which was necessarily incidental to effective fisheries legislation. He discussed at some length the effect of these regulations and states at page 11 [p.169, supra]:

> It is important to keep the thrust of the regulation in mind when asking whether or not it is necessarily incidental to the protection and preservation of sea coast and inland fisheries, or whether it is more a matter of property and civil rights.

He then turns to a discussion for potential abuse of resource through the sale of fish by sports fishermen and Indians. He further held that it is the Crown which carries the burden of satisfying the court by evidence or by submissions that regulation 37 is necessarily incidental to the protection and preservation of the fisheries resource.

Defence counsel in the case before a makes the same proposition, and Mr. Jacobs for the Crown did not object to that statement of the law with respect to the onus. At page 15 [p. 172, supra] of his judgment, His Honour, Judge Gordon, states:

> With respect, there is nothing before me, except the assurance of Crown counsel to suggest that in order to protect and preserve this public resource, it is necessary or even advisable to prohibit a sports fisherman from selling part of his large lawfully caught salmon. Yet this is the effect of the regulation. It prevents a person from exchanging three of the trout he caught on the weekend fishing trip for some of his neighbour's garden produce. It prevents an Indian from doing likewise that [sic] the fish he caught under a permit authorized by section 29 of the regulations. There is nothing before the court indicating the sale of lawfully caught fish as above would jeopardize the fishery resource. It is difficult to see how such sales could.
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> Crown counsel argues, however, that if transactions of this kind were legitimized, the sale or barter of lawfully caught fish would soon be wide spread resulting in an increased demand upon the fishery resource. The answer to that suggestion is that the quotas of fish to be lawfully taken and the periods for lawful Indian fishing should then be reduced.
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> By preventing the sale of lawfully caught fish, regulation 37 obviously constitutes a major intrusion upon the subject of property and civil rights.

Turning to the facts before me and seeing how they relate to the Saul decision, I look to section 26 subsection (1) of the British Columbia Fishery (General) Regulations, which is a blanket prohibition as follows:

> 26. (1) Subject to subsection (2), no person shall send, ship, bring or cause to be sent, shipped, or carried, any salmon or steelhead trout caught above a fishing boundary to any place below the boundary.

and subsection (2) reads;

> (2) Subsection (1) does not apply to salmon or steelhead trout that are cured and canned and are required by an Indian for food for himself and his family.

However, what it does do is in effect make it an offence for a person to catch game fish above a commercial boundary and transport or carry them across the commercial fish boundary to any place below the boundary. So that if someone were fishing in, for example, the Lytton area of the Fraser River and decided to carry those fish home to his residence in Vancouver he could not do so without violating section 26 of the Act. He would also be in violation of section 7(1) unless he received a licence, or actually in the case of game fish there is an exception, but in any event he would be in breach of section 26 subsection (1). That section would also make it illegal for an Indian to catch fish legally on an Indian food fish licence on a reserve above the commercial fishing boundary and transport them to his own residence below the commercial fishing boundary, even if the only purpose of that transportation was to take home so that he could then prepare and either freeze or can the fish, or eat them at that time. I cannot see how that kind of prohibition could assist the federal government in the preservation and protection of the fishery resource.

In addition section 7 subsection (1) of the regulations which requires that a licence be obtained before a person transport fish anywhere in British Columbia, it seems to me could also have some wide sweeping effects which would not at all be necessary in order to preserve fishery resource, or for that matter to protect it. Under section 7 subsection (1), although the section does not apply to game fish caught under a licence or to fish that are processed or packaged, it makes it an offence to transport salmon within the province anywhere without the authority of a licence issued

by a fishery officer. Again, in this case, if an Indian were to catch Indian food fish at the river bank, put them in his car and transport them to his residence, it does not matter whether he crossed any boundary or anything else, he would have to have a licence under that Act in order to transport those salmon. I cannot see where the presence or absence of a licence would make any difference at all to the ability of the fishery officers to determine whether or not there was any abuse going an at the source. Here, it seems to me, on the basis of the argument submitted and the thrust of the argument from the Crown, that the regulations are required in order to prevent potential or possible abuse of the fishery, presumably in this case by excessive fishing by Indians under the provisions of an Indian food fish licence. As indicated in the authorities previously referred to in my decision and in the Saul case, it seems to me that there are many other methods that would be far more effective and far more necessary in order to protect the resource than this kind of arbitrary system. Here, for some reason, the Fisheries Department is trying to monitor the transporting of fish within the province, but really not very effectively. For example, there is no check in at a weigh scale, such as there is for a commercial vehicle which is transporting goods, and therefore there is a check of what is in each vehicle. Here one could have to rely upon a tip or some informer in order to determine who was carrying what. I do not see how that kind of information could really assist the Crown in any way in monitoring what was going on. Rather it would be better to monitor either at the source where the fishery is taking place, namely the fishery as defined within the legislation, or at the potential depot for the fish if it is suspected that the fish are going for an unlawful purpose, and I am not sure that, and I must say based on the Saul decision, what that unlawful purpose would be. It would appear that it is now not an offence for an Indian to sell or barter fish in that the regulation has been ruled to be ultra vires, so I really cannot imagine what illegality the Crown is trying to protect.

In addition there is really no evidence before me or really no logical inference that I could draw, to the effect that because Indians were permitted to take fish from one part of the province to another that that in some way would cause an abuse or cause the Indians to take more fish from the water than they are otherwise legally entitled to. If they do those things, then of course there are regulations, properly in force, which govern and regulate the amount of fish that the Indians are entitled to have. Those regulations are subject to change and monitoring by the federal fishery officers, depending on the particular statue of the fish at the time in question. In other words, if the fish are becoming depleted in a certain area it is certainly within the power of the federal fishery officers to regulate that by restricting the amount of fish that the Indians take or that fishermen may take, or that portion not commercial, and there are numerous ways that could be monitored which are certain and incidental to the proper management of that resource, but in my view neither section 26 subsection (1) nor section 7 subsection (1) of the regulations fall within that scope.

Therefore, with respect to section 26 I find that it is not necessarily incidental to the thrust of the federal legislation and is therefore ultra vires the federal government. With respect to section 7 subsection (1) it is a broader section and deals with some aspects which I have not been asked to consider at all, particularly with respect to game fish or marine animals. Marine animals were not mentioned to me at all during the case and this case does not deal in any way with marine animals and I am unable to say whether the section would still apply to marine animals, but certainly in my view with respect to the transportation of salmon under section 7 subsection (1) of the regulations which would require a licence to transport salmon for any distance at all within the province, that section in not necessarily incidental to the federal authority and I therefore find that with respect to salmon it is also ultra vires the federal government.

The net effect of that, of course, is that I have found that the sections are ultra vires. There are no charges to meet. In effect the two accuseds have been charged under regulations enacted in my view without proper legislative authority and therefore the charges against them are dismissed.