R. v. YOUNGMAN

British Columbia County Court, Owen-Flood J., November 12, 1987

D.R. Kier, Esq., Q.C., for the Crown
C. Harvey, Esq., for the respondent

The Crown appealed the acquittal of the respondent on a charge that he operated a commercial fishing vessel in contravention of the terms and conditions specified in the commercial fishing licence issued in respect to the vessel, contrary to section 6(3) of the *Pacific Fishery Regulations, 1984,* and committing an offence under the *Fisheries Act,* R.S.C 1970, c. F-14, s.61(1). The Crown appealed also the finding of a violation of the *Canadian Charter of Rights and Freedoms,* ss.8, 11(h), and 15. The learned trial judge granted a remedy pursuant to s.24(2) of the Charter.

Youngman's vessel, the "Cape Terry", served as a headquarters for a number of herring skiffs which it took to and from the fishing grounds. The Cape Terry provided food and shelter for the fishermen. Sewid worked on Youngman's vessel. Sewid was the holder of a commercial licence which contained a stipulation requiring that it "must be operated by an Indian".

At the material time Sewid was aboard Youngman's headquarters vessel sick with bronchitis. At the material time Youngman and another, whose status is unknown, were on board Sewid's skiff and fishing successfully.

The trial judge held that Youngman was not "operating" the licence and that even if he had been held to be, that the offence under s.61 was one of strict liability for which the defence of "due diligence" was available and had been made out. He further held that the requirement that the skiff be operated only by an Indian was beyond federal jurisdiction in that the federal power is for the protection and preservation of fish stocks only. The measure being for socio-economic purposes is *ultra vires.* Furthermore, the trial judge held that there was no power in the *Fisheries Act* or its regulations which would allow the Minister to impose the restriction. It was further held that the restriction was a violation of the *Canadian Charter of Rights and Freedoms,* s.15 in that it treats Indians differently than it does non-Indians. It was also held that the seizure violated s.11(h) of the Charter in that it allowed the Minister or a Court to impose further penalties on one convicted under s.61 of the *Fisheries Act.* The trial court judge ordered the Crown to pay the value of the seized goods with interest and to pay all the legal costs of the accused.

The Crown argued: (1) that the restriction in the licence was within the powers of the Minister and Parliament; (2) that Youngman was operating the licence; (3) that there was no contravention of the Charter; and (4) that the remedy was beyond the jurisdiction of the court.

Held: Appeal dismissed as to the acquittal of the accused; the order as to costs and compensation was beyond the jurisdiction of the court.

1. The term "operate" in the licence does not and cannot be read to mean exclusively "hands-on operation" of the skiff. A boat may have several indirect operators and also have a direct operator. To be an operator a person does not have to be on board at all times. Sewid was, in a cognate sense, "operating" the skiff; his skiff, licence, presence and consent were inextricably bound with the actions of the respondent.

2. Even if wrong on this point, an acquittal would be registered on the grounds that there was no evidence as to whether or not the second person on the skiff was not an Indian.

3. If Youngman's operation of the skiff were to be considered an offence, it is one of strict liability and the defence of due diligence would be available. The defence has not been made out.

4. The requirement in the licence that the vessel be operated by an Indian is not *ultra vires* of Parliament. It is open for Parliament to manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply to carry out social, cultural or economic goals or policies.

5. *Pacific Fishery Regulation,* s.6(1), allows the Minister to impose the restriction on the licence. Section 6(1) is directed towards the preservation and conservation of fish. A condition as to who may fish comes within the ambit of conservation and preservation measures.

6. The restriction in the licence does not offend s.15(1) of the *Canadian Charter of Rights and Freedoms.* The restriction is a conservation measure designed to conserve fish for all concerned. If it were to be held to offend s.15(1) of the Charter, the restriction would be saved by s.15(2) since its object is the amelioration of the conditions of disadvantaged Indians.

7. The right to fish in tidal waters is not an inherent right but is one subject to being conferred and regulated. The restriction in the licence does not, therefore, offend s.7 of the Charter.

8. Section 58(1) of the *Fisheries Act,* which allows for the seizure of the fish and the net where a fishery officer reasonably believes an offence has been committed, does not offend s.8 of the Charter.

9. Section 58(5) of the *Fisheries Act,* which allowed the Minister or the convicting court or judge to order forfeiture of the net and fish in addition to any other punishment imposed, is to the extent that it purports to give such power to the Minister, a violation of s.11(h) of the Charter, and to that extent is severable. (As noted by Judge Owen-Flood, this power was removed from the Act on October 15, 1985.)

10. Section 24 of the Charter does not give the court the power to make an order of costs and compensation for fish seized and disposed of under the *Fisheries Act.*

*** * * * * ***

OWEN-FLOOD J.: The Crown in the right of the Attorney General of Canada appeals the acquittal of the respondent on a charge that he:

> ...on or about the 8th day of March, A.D. 1985, at or near the Town of Comox, in the County of Nanaimo, in the Province of British Columbia, did UNLAWFULLY operate a commercial fishing vessel in contravention of the terms and conditions specified in the commercial fishing licence issued in respect of the vessel, CONTRARY TO SECTION 6(3) of THE PACIFIC FISHERY REGULATIONS 1984, thereby committing an offence contrary to Section 61(1) of the Fisheries Act.

The Crown appeals not only the acquittal but also the ruling of the learned Provincial Court Judge who, apart from granting an acquittal, also held that the *Canadian Charter of Rights and Freedoms* had been violated insofar as ss.15, 8, and 11(h) were concerned.

The learned Provincial Court Judge having held that, then went on to grant pursuant to s.24(2) of the Charter a remedy in respect of a significant quantity of fish and nets that were seized by the fisheries officers on the 8th of March, 1985 when they apprehended the respondent.

The remedy which the learned Provincial Court Judge granted was a direction that Her Majesty the Queen in the Right of Canada:

(a) pay to the respondent, "as trustee of his group, interest on the value of the net and the sale proceeds from the fish seized at the rate of 9% per annum from March 8, 1985 to date of payment" and

(b) pay all legal costs and disbursements incurred by the respondent or on his behalf in defending him together with the costs of witnesses and such transportation and accommodation costs as may have been incurred by him and his witnesses.

The Facts in the Case at Bar

The facts were agreed to between the parties and were as follows:

1. Tommy Sewid was the holder of a commercial fishing license issued under s.7 of the *Fisheries Act,* R.S.C. 1970, c.F-14 which, pursuant to s.6(1)(e) of the *Pacific Fishery Regulations, 1984* contained a provision specified by the Minister in the license stipulating that it "must be operated by an Indian."

2. At the material time Tommy Sewid was aboard the headquarters, or mother ship, and was not actually on board the herring skiff because his bronchitis was seriously bothering him.

3. At the material time Gordon Youngman, an admitted non-Indian, was with another person, about whose status there was no evidence, on board the herring skiff.

4. As the learned Provincial Court Judge held in his reasons, Tommy Sewid worked on Gordon Youngman' 5 vessel, the Cape Terry. It was their headquarters. It took the herring skiffs to and from the fishing grounds. It provided food and shelter for the fishermen.

As skipper, Youngman told Sewid to stay aboard the Cape Terry, and himself boarded Tommy's skiff, with Jim Dobinson, who steered and looked after the motor. Youngman operated the fishing gear. While successfully fishing, Youngman was accosted by a fisheries officer who after inquiry, seized the net and catch, for forfeiture.

The Issues

The learned Provincial Court Judge, in his extensive reasons, divided this case into ten issues, and I do likewise.

Issue 1 - "Was Gordon Youngman the ODerator of the Skiff at the time to the Exclusion of Tommv Sewid?"

The learned Provincial Court Judge concluded that Gordon Youngman was not "the operator" of the skiff at the time to the exclusion of Tommy Sewid. In so concluding the learned Provincial Court Judge held:

> It is to be noted that the commercial fishing license refers to the operation of the license, not of the skiff. The skiff is normally operated by two persons, one steering and controlling [sic] the direction and speed of the vessel, the other operating the fishing gear. The headquarters vessel is essential for maintaining the life, and to some extent, the comfort of the fishermen. It is not clear from the wording of the license condition which part of the vessel or vessels is to be operated by an Indian. The fishing gear is dependent on the mobility of the skiff; the skiff is dependent on the headquarters vessel; the operators of each of the functions of the skiff depend on the headquarters vessel for their survival.

I agree with the learned Provincial Court Judge. The term "operate" in this context does not and cannot be read to mean exclusively "hands-on operation" at all times. It has a wider meaning.

Mr. Sewid had the license. He was present on the mother ship which, together with the fishing skiff, was part of the fishing operation. The fact that he was not on the skiff was due to what the learned Provincial Court Judge termed as "involuntary incapacity".

To interpret the fishing license in the manner urged by the Crown would mean that the license holder would have to do all the work personally with regard to the operation of the boat. A boat may have several indirect operators and also have a direct operator. A shipping company may operate a liner, and so may its captain and crew. To be an operator a person does not have to be, of necessity, on board at all times.

I find that the term "operate" is used in the wide sense as it was used in *Ex Parte Thomson: re Maxwell (1953), 53* S.R. (N.S.W.) 91.

I also apply by analogy the reasoning of Cormack D.C.J. in *Capaniuk* v. *Sluchinski* (1963), 44 W.W.R. 455 where, in the context of a sawmill, the learned judge held at p.457:

> From the foregoing it can be seen that the term "operator" is wide enough to embrace the executive or entrepreneur at the one end of the work scale and the craftsman, the mechanic or the man doing the work at the other end....

Similar reasoning was applied by the Alberta Court of Appeal in *R* v. *Twoyoungmen (1979),* 48 C.C.C. (2d) *550,* [1979] 3 C.N.L.R. 85 where the Alberta Court of Appeal per Prowse J.A. in the context of motor cars held at p.559 C.C.C. [p.95 C.N.L.R.]:

> "Operation", however, may be given two distinct meanings - a wider meaning when used figuratively (as where a person "operates" a fleet of vehicles by organizing a system of activity, without necessarily driving any of the vehicles himself), and a more narrow meaning restricted to the physical acts or omissions of the operator of a vehicle while it is being

driven.

In that case Prowse J.A. went on at p.560 C.C.C. [pp.95-96 C.N.L.R.] to hold:

> When general and specific words are associated together, and where they are capable of analogous meaning, the general words should be restricted to their more specific analogous meaning, *noscitur a socus,* except where doing so would be contrary to the clear intention of the statute as a whole.

There was evidence from which the learned trial judge could conclude, as indeed he did, that:

> ...Tommy Sewid was, in a cognate sense, "operating" the herring skiff; his skiff, license, presence, and consent were inextricably bound with the actual physical actions of Gordon Youngman.

If I am in error on the point, I would have upheld the acquittal at any event, because there was no evidence before the court below as to whether or not the second person, who was operating the herring skiff with the respondent, was a native Indian.

Issue II - "If an Offence was Committed. was it an Offence of Absolute or Strict Liability. and if it is a Strict Liability Offence. has an Adequate Defence been Adduced?"

The learned trial judge cited *Re s.94(2) of the Motor Vehicle Act, R.S.B.C. 1979, Chapter 288,* [1985] 2 S.C.R. 486 where at p.515 Lamer J. held:

> A law enacting an absolute liability offence will violate s.7 of the *Charter* only if and to the extent that it has the potential of depriving of life, liberty or security of the person.
>
> Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has the potential as of the moment it is open to the Judge to impose imprisonment.

The trial judge then pointed out that s.61(1) of the *Fisheries Act* as amended provides that the person found guilty of an offence under that Act "is liable, on summary conviction, to a fine not exceeding $5,000 or to imprisonment for a term, not exceeding 12 months or to both...." The trial judge then concluded that the offence was therefore an offence of strict liability as opposed to absolute liability.

I agree with the learned trial judge on that point.

The learned trial judge went on to hold that if the term "operate" meant that there had to be a native Indian on the herring skiff itself at all times then the defence of due diligence had been made out.

The trial court reached its conclusion by applying the dictum of Lord Reid in *Gartside* v. *Inland Revenue Commissioners,* [1968] A.C. 553, [1968] All E.R. 121, where at p.612 Lord Reid said:

> ...it is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent and in light of the reasonableness of the consequences which follow from giving it a particular construction.

The learned trial judge, having adopted that principle, then went on to hold:

> This is a commercial fishery; the objective as far as the fishermen are concerned is primarily economic. It appears to me to be reasonable commercially for a person to substitute for another person within the group so long as the person whose place is being taken is not thereby put to a disadvantage. There is no evidence before me that Mr. Sewid, for whose benefit the license condition had been imposed, lost anything through the actions of Mr. Youngman. It appears that had not Mr. Youngman taken over Sewid's skiff, the entire group of fishermen, including Sewid would have been the losers.
>
> So far as the Canadian public is concerned, there is evidence the substitution of Mr. Youngman for Mr. Sewid made no difference to the fish stocks or fish catch.
>
> I find it is not common, nor is it necessary for a group of fishermen to take with them an extra Indian to substitute for occasional illness; I find it is not reasonable to expect a skiff not to be operated in the event of casual illness of an Indian operator.

> I, therefore, find that Mr. Youngman has adduced sufficient evidence on the balance of probabilities, to establish the defence of due diligence.

I do not agree with either the conclusion or the reasoning of the learned trial judge.

I apply the dictum of Lord Reid that an ambiguous word or phrase is to be construed in light of the mischief, which the provision is designed to prevent and the reasonableness of the consequences, which flow from giving it a particular construction.

Accordingly, I accept that it is, as the learned trial judge said, "not reasonable to expect a skiff not to be operated in the event of casual illness of an Indian operator. " However, having said that, I find that all that simply buttresses the conclusion that I have already reached - that the term operate" should be given a wide liberal meaning and does not mean "hands on" operation. It has nothing to do with the defence of due diligence.

If I am mistaken in my finding that the term "operate" is to be given a wide and liberal meaning, and if the term "operate" does actually mean operate in the herring skiff itself, then I would find that in this case the defence of due diligence has not been made out.

That is because the accused at Bar, in operating the skiff without a native Indian on board, if that is what he did, would have been under a misapprehension of law.

The maxim *ignorantiajuris haud non excusat* still holds true, and mistake of law is no defence.

Issue III - "Is the Condition that the Licensed Skiff be Operated only by an Indian. Ultra Vires the Federal Legislature?"

The learned trial judge concluded that the stipulation that the licensed vessel be operated only by an Indian was *ultra vires.*

The learned trial judge did so on the basis of the decision of the Federal Court in *Gulf Trollers Association* v. *Minister of Fisheries and Oceans and Shinners,* [1984] 6 W.W.R. 220 where at p.228 Collier J. held:

> Conservation and rehabilitation of stocks to my mind, fall within protection and preservation" of the public resource. Management and control, if necessarily incidental to protection and preservation also fall within federal legislative power.
>
> I do not, therefore, accept the contention on behalf of the respondents that there is power, federally, to manage and control fisheries for the benefit of Canadians, quite distinct from any protection or preservation considerations.
>
> The respondents' decisions of 16th April were, to my mind, prompted by two disparate and pervading reasons; conservation and soci-economic management allocations.
>
> The second purpose was, in my view, beyond permissible constitutional powers. The two considerations were inextricably mixed. In those circumstances, the Court cannot segregate. The decisions must fall. This whole matter of when administrative decisions can, in those circumstances, be successfully challenged is analysed in de Smith's judicial Review of Administrative Action, 4th edition (1980) by J.M. Evans, pages 325-32. I refer particularly to the passage at page 332:
>
> > (5). ...was any of the purposes pursued an unauthorized purpose? If so, and if the unauthorized purpose has materially influenced, the actor's conduct, the power has been invalidly exercised because irrelevant considerations have been taken into account,
>
> and the reasons of P.O. Lawrence J. in *Sadler* v. *Sheffield Corp.,* [1924] 1 Ch. 483 at 504-505.

The learned trial judge then went on to hold:

> From the evidence before me, the purpose of "Indian only" licenses, has nothing whatsoever to do with protection and conservation of fish stocks.

The decision of Collier J. in that case was overruled by the Federal Court of Appeal in *Minister of Fisheries and Oceans and Shinners* v. *Gulf Trollers Association,* [1987] 2 W.W.R. 727 where, speaking for the court, Marceau J. at p.738 held:

> The power conferred on Parliament in s.91(12) of the Constitution Act, 1967, is not qualified, in my understanding, by any inherent condition that it be used to pursue some specific objectives and not others. Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply carry out social, cultural or economic goals and policies. In fact, in my view, unless and until the party attacking legislation on division of power grounds identifies a possible trespass on a specific law-making power of the other level of government, the purpose for which a piece of legislation was passed is of no concern of the courts.

That being so, I find that the stipulation by the Minister in a fishing license that the licensed vessel be operated only by an Indian is not *ultra vires.*

Issue IV - "Is Regulation 6(1) Capable of Bearing the Interpretation Which the Minister Gives it of Permitting the Minister to Impose a Stipulation that a Herring Skiff must have a Native Indian Operating it Directly on Board at all Times?"

The learned trial judge concluded that Regulation 6(1) was not capable of bearing such an interpretation.

I do not agree. I find the Minister is authorized to impose the stipulation in question.

Regulation 6(1) reads:

> 6.(1) The Minister may specify in a commercial fishing licence issued under section 7 of the *Fisheries Act* the following terms and conditions:
> (a) the species and quantity of fish that may be caught;
> (b) the type, quantity, size and length of fishing gear that may be used;
> (c) the authorized area and location of the commercial fishing;
> (d) the form and manner of submitting catch and fishing data; and
> (e) any other terms and conditions.

The learned trial judge, in his reasoning, said:

> In my view, it is clear that subsections (a), (b), (c) and (d) of s.6(1) of the Regulation relate to the species of fish, the method of fishing, the location of fishing, and the collection of fishing data. It appears to me that these matters are clearly concerned with the management and control of the fishery in tidal waters.
>
> It appears to me that subsection e, s.6(1)(e) in referring to "any other terms and conditions", is restricted to those terms and conditions which relate to matters of management and control of the fishery. In other words, subsection (e) is confined to matters which are *ejusdem generis* with the previous subsection (a) - (d). In this connection, I refer to page 297 of the 12th edition of Maxwell "Interpretation of Statutes":
>
> > The General word which follows particular and specific words of the same nature as itself takes it meaning from them and is presumed to be restricted to the same genus as those words.
>
> It goes on:
>
> > According to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislature.
>
> Quoting Cockburn, C.J. in *R.* v. *Cleworth* (1864), 4 B.S. 927 at page 932." [sic]
>
> Imposing a condition that the license be operated only by an Indian has nothing to do with the previous subsections, and therefore, even if the condition was within the legislative authority, it would not be a proper use of that authority to impose such a condition pursuant to that sub-section.

I find like the learned trial judge that the *ejusdem generis* rule of interpretation applies.

However, I also find each of the stipulations specified in clauses (a) to (d) inclusive in Regulation 6(1), dealing as they do with species and quantity of fish, type and quantity of fishing gear, authorized area and location of fishing, and the form and manner of submitting catch and fishing data, are concerned and have one purpose only in common - the preservation and conservation of the fisheries.

That is what they all have in common, and I find that the minister may accordingly, within the ambit of the *ejusdem generis* rule, impose any other stipulation that serves the purpose of conserving the fisheries. That being the case, a condition as to who may fish, is indeed a relevant and cognate one that comes within the ambit of s.6(1) of the Regulation.

Issue V - "Is a Stipulation in the License that a Native Indian must at All Times have Hands-On Operation in the Actual Herring Skiff Itself a Violation of S.15 of the Canadian Charter of Rights and Freedoms?"

The learned trial judge held that it was.

I find that it is not Section 15 of the Charter reads:

> 15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2). Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Fisheries Act* and the Regulations issued thereunder constitute legislation which draws distinctions between Indians and non-Indians. They give certain rights to and impose certain duties on native Indians.

The Court of Appeal of British Columbia in *Re Andrews and Law Society of British Columbia et al.* (1986), 27 D.L.R. (4th) 600 has considered s.15 of the Charter. McLachlin J.A. at p.605 states:

> Legislation which classifies or differentiates between groups or individuals does not, *per se,* violate the requirement of equal protection or benefit....
>
> However, s.15 does not merely refer to laws that deny individuals the equal protection and equal benefit of the law. It stipulates that for there to be a violation, the denial of equal protection and benefit must be by legislation (or an executive act or an order) that discriminates. It is therefore necessary to consider what the phrase "without discrimination" means in s.15.

The court concludes that for discrimination to exist the distinction must be pejorative. This conclusion was cited with approval by MacGuigan J. in *Re Headley and Public Service Commission Appeal Board* (1987), 35 D.L.R. (4th) 568 at 575 (.C.A.).

In *Re Andrews and Law Society of British Columbia et al.,* supra, the court poses the question, "What is the nature of the analysis under s.15?" McLachlin J.A. at p.609-610 states:

> My response to the first question is that the question to be answered under s.15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected. I include the word "fair" as well as "reasonable" to emphasize that the test is not one of pure rationality but one connoting the treatment of persons in ways which are not unduly prejudicial to them. The test must be objective, and the discrimination must be proved on a balance of probabilities: *R.* v. *Oakes,* supra [[1986] 1 S.C.R. 103, *65* N.R. 87, 26 D.L.R. (4th) 200], (applying this test to s.1.). The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means

adopted are unreasonable or unfair.

Applying these tests, I find that the stipulation in the license is not discriminatory. The purpose of the legislation is to conserve the fisheries in the interests of all concerned. In the face of this objective the regulations have provided for this vessel to be licensed so that native Indians may be involved in the herring roe fishery. The impugned distinction is both reasonable and fair. I find that it does not come within the ambit of s.15(1) of the Charter.

If I am in error in that, I find that at any event it is a law that is saved by virtue of s.15(2) of the Charter as it is a law that has for its object the amelioration of conditions of disadvantaged groups. It is a law that is for the betterment of disadvantaged native Indians.

Issue VI - "Does the Stipulation in the License that a Native Indian must at All Times be in the Herring Skiff Operating it in a Hands-On Manner Violate S.7 of the Canadian Charter of Rights and Freedoms?"

On this point I agree with the trial court.

The learned trial judge held that the imposition of such a stipulation did not offend against s.7 of the Charter. Section 7 reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The learned trial judge applied the decision of the Privy Council in *Attorney General of British Columbia* v. *Attorney General of Canada,* [1914] A.C. 157 (P.C.) where the court held that fishing in tidal waters is a public right or liberty that may be regulated by the federal parliament It is a right that is subject to conferring and regulation. It is not an inherent right, and thus does not fall within the definition of life, liberty and security of the person.

Issue VII - "Did the Seizure of the Fish and Net Violate S.8 and/or Alternatively 5.11(h) of the Canadian Charter of Rights and Freedoms?"

The learned trial judge concluded that the seizure did violate s.8 of the Charter. The learned trial judge held:

> From the evidence of Mr. Kehl, the net being used by Mr. Youngman and the fish he had caught were seized by him for the purpose of forfeiture, not evidence.

I find that the seizure is not a violation of s.8 of the Charter. I find thus for the following reasons:

1. Section 58(1) of the *Fisheries Act* reads:

> 58.(1) A fishery officer may seize any fishing vessel, vehicle, fishing gear, implement, appliance, material, container, goods, equipment or fish where the fishery officer on reasonable grounds believes that
>
> (a) the fishing vessel, vehicle, fishing gear, implement, appliance, material, container, goods or equipment has been used in connection with the commission of an offence against this Act or the regulations;....

The Act then goes on to provide that that which is seized, or the proceeds of it, may, on conviction of an accused, be ordered forfeited by the convicting court or judge, and further that such a decision in itself may be appealed to a higher court. The Act further provides that the items in question or the proceeds thereof are to be returned unless proceedings are instituted.

I find that this case is on all fours with that before the Court of Appeal of British Columbia in *Milton et al* v. *R. in Right of Canada,* [1987] 2 W.W.R. 622, [1987] 2 C.N.L.R. 101 where Craig J.A. held [pp.110-Ill C.N.L.R.]:

> I have concluded that the trial judge erred in deciding that the provisions of ss.58(6) and 59(5)(b) and (c) are inconsistent with s.8 of the Charter but he was right in deciding that they are not inconsistent with s.2(e) of the *Canadian Bill of Rights* or s.11(d) of the Charter and, accordingly, I would allow the appeal and dismiss the cross-appeal....

The fisheries officers seized the nets because they thought reasonably they had been used in connection with an offence against the Act or the regulations. Forfeiture could result from the seizure but not necessarily; accordingly, it is not correct to say that seizure was for the purpose of forfeiture. Whether there will be forfeiture of the applicant's interest will depend on the outcome of the application under s.59(2) and s.59(5)(b).

I think that the trial judge erred, too, in stating that "the test of reasonableness must focus on the impact on the subject of the seizure and not on rationality of furthering some valid government objective."

Dickson J. observed at p.156 that the purpose of the Charter was to guarantee and to protect "within the limits of reason" the rights and freedoms stipulated in the Charter and went on to say that the assessment of the constitutionality of a statute authorizing a search or seizure [p.157]:

> …must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, *and not simply* on its rationality in furthering some valid government objective. [The italics are mine].

At pp.159-60, he amplified his remarks by stating that the guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation and that:

> ...an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

The trial judge seemed to think that there is only one concern, namely, the impact on the subject of the seizure, but it is obvious from the judgment of Dickson J. that there are two considerations for the court: (1) the impact of the seizure on the subject; (2) the seizure's rationality in furthering some valid government objective.

Dickson J. observed that, in resolving the problem, the court must consider the balance of competing interests and that the court should consider the circumstances prior to the search or seizure (not the subsequent circumstances) and that, normally, a precondition of governmental intrusion upon an individual's expectations of privacy must be "prior authorization" but he conceded that "it may not be reasonable in every instance to insist on prior authorization" [p.161].

Applying the reasoning of Mr. Justice Craig by analogy to the case at Bar, I conclude that there was no violation of s.8 of the Charter.

Section *58* of the Act provides a complete code for the seizure with the provision that a person is not to be deprived except in accordance with the principles of fundamental justice.

The learned trial judge in regard to s.11(h) of the Charter held that s.58(5) could violate s.11(h) of the Charter. Section 11(h) of the Charter reads:

> 11. Any person charged with an offence has the right
> . . .
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;...

The learned Provincial Court Judge was dealing with s.58(5) as it existed at the date of the seizure, namely March 8, 1985. Section 58(5) at the time contained a provision which read:

> 58.(5) Where a person is convicted of an offence under this act or the regulations, the Minister or the convicting court or judge may, in addition to any punishment imposed, order that
>
> (a) any vessel, vehicle, article, goods or fish seized pursuant to subsection (1), or
> (b) be the whole or any part of the proceeds of a sale referred to in subsection (3), be forfeited, and upon such order being made the vessel, vehicle, article, goods, fish or proceeds so ordered to be forfeited are forfeited to Her Majesty in Right of Canada.

On October 15, 1985 that section was amended by the deletion of the term "the Minister" so that as it now reads it is simply the convicting court or judge who may order forfeiture.

The learned trial judge, however, concluded that, as he put it in his judgment:

> In so far as it purports to authorize an additional punishment which may be imposed by the Minister after a Court proceeding, or by a court or judge separate from, or without regard to, the original sentencing court or judge, such a construction of s.58(5) offends against s.11(h) of the *Charter* and is therefore of no force and effect.

I agree with the learned trial judge insofar as he finds that the authorization of the Minister as opposed to the authorization of the court to order a forfeiture constitutes a violation of s.11(h) of the Charter, but that is a matter that is severable and indeed is distinct from the power granted by s.58 to make the seizure, and accordingly I find that the material parts of s.58 of the *Fisheries Act* which are germane to this case do not violate s.11(h) of the Charter.

Issue VIII- "If the Rights Guaranteed by the Charter have been Breached. what Remedy is the Trial Court Competent to Afford and what Remedy, if there is a Remedy. is Appropriate in these Circumstances?"

The learned trial judge held that ss.15(h) and 11(h) of the Charter had been violated and that he had the jurisdiction to grant remedies pursuant to s.24(1).

The remedies that he granted were an order that the Crown pay to the respondent:

> (a) ...as trustee of his group interest on the value of the net and sale proceeds from the fish seized at the rate of 9% per annum from March 8, 1985 to the date of payment, and
> (b) all legal costs and disbursements incurred by him or on his behalf in defending him, together with the costs of witnesses and such transportation and accommodation costs as may have been incurred by him and his witnesses.

In making this finding the trial court added:

> The rate of interest is a rough average of the rates of interest paid under the Court Order Interest Act, RSBC 1979, c.[sic].
>
> The legal costs and disbursements may be taxed by the Registrar of the Provincial Court at Courtenay.

I find, as I have already observed, that there was no violation whatever of any of the Charter rights of the respondent, and therefore there can be no question as to his being entitled to a remedy pursuant to s.24 of the Charter.

If I am wrong in that conclusion, and if there is a violation of Charter rights such as to entitle a remedy under s.24 of the Charter, then I find in awarding costs under a prosecution under the *Fisheries Act,* there is no power in a trial court under this Act or at all to award costs.

In that regard I follow by analogy the reasoning of the Supreme Court of Canada dealing with the *Customs Act* in *Deputy Minister of National Revenue* v. *Industrial Acceptance Corp. Ltd. (1958), 15* D.L.R. (2d) 369 where Cartwright J. held at p.374:

> Admittedly, the vehicle was legally seized as forfeited under the Act. The relief claimed by respondent is of an exceptional and statutory nature. The special jurisdiction conferred in the matter, by Parliament, to a Judge of the Superior Court, is exhausted, in my view, once the application for relief has been heard and decided on the merits. Parliament has not seen fit to provide for the imposition of costs in the matter. That there was no intention of Parliament to allow the rule governing as to costs in ordinary procedure, under the *Civil Code of Procedure,* to obtain on an application made under s-s.(5) of s.166, is made clear when the terms of this subsection are contrasted with those of s-s.(6) of s.166, providing for a right of appeal from an order given under s-s.(5), and which, in part, enacts that "the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the court of appeal from orders or judgments of a judge.

In *Attorney-General of Canada* v. *The Honourable Judge Rowles, A Judge of the County Court of*

Vancouver et al. (unreported) March 7, 1986 (Vancouver Registry CC 860163), where in declining to order costs in a prosecution matter the Chief Justice held at p.2:

> There are, in my view, good policy reasons why there should be no costs in criminal matters except where expressly authorized by the *Criminal Code.* It may be that this Petition is not, strictly speaking, a criminal matter but I think it is close enough to be given that characterization. The practice in this Province, however, has always been that costs are not payable in criminal proceedings unless specifically authorized by Statute. This arises out of the restrictive construction placed upon Code Section 438 in re *Christiansen* (1951), 100 C.C.C. 289 (B.C.S.C.) at 293, which seems to be the rule in most provinces (see *Regina* v. *Brown Shoe Co. of Canada Ltd. (No.2),* 11 C.C.C. (3d) 514 (Ont.H.C.).

Likewise, I apply the reasoning of The Honourable Mr. Justice Dohm in *R.* v. *Swakum* (unreported) January 24, 1984 (Kamloops Registry 5C060). There the court was considering whether or not under the *Fisheries Act* a trial court had discretion to grant a remedy pursuant to s.24 of the Canadian Charter directing that the accused be compensated for fish seized and disposed of under the *Fisheries Act* by a fisheries officer. At p.4 Mr. Justice Dohm held:

> I do not think that a Provincial Court Judge has any authority to make the order [i.e. for compensation] that Judge Thomas made. It is in the nature of an order of mandamus. The Provincial Court has never had the authority and the Charter does not give it to him. In the circumstances I would find that Judge Thomas did err and I will make no order for compensation.

I find that the Provincial Court had no jurisdiction to make the order for costs and compensation which it purported to make in this case.

Conclusion

In the result, because of my finding on Issue I as to the meaning of the term "operate", I dismiss the appeal against the acquittal of the respondent.