

R. v. SACOBIE AND POLCHIES

New Brunswick Court of Queen's Bench Trial Division, Creaghan J., March 24, 1986

David W. Clark and Hillary Drain, for the Attorney General of Canada
Manu Patel, for the Province of New Brunswick
Graydon Nicholas and Gerald Pugh, for Sacobie and Polchies

The accused, members of the Kingsclear Indian Band, were charged and convicted on separate occasions of possessing untagged salmon contrary to s.18(28) of the New Brunswick Fisheries Regulations. Sacobie was also charged with unlawfully selling salmon contrary to s.63 of the Regulations. The accused appealed their convictions. With respect to another transaction the Crown appealed Sacobie's acquittal on a charge of possession of untagged salmon.

The accuseds' defense was a band by-law passed pursuant to s.81 of the Indian Act, R.S.C. 1970, c.I-6 for the preservation, protection and management of fish on the reserve. The by-law did not require salmon to be tagged.

Held: Appeals allowed with respect to convictions for possession of untagged salmon; appeal dismissed with respect to conviction for selling salmon contrary to s.63 of Regulations; Crown appeal dismissed.

1. A conflict existed between two valid federal legislative provisions the band by-law which did not require salmon to be tagged and the Regulations which did. The by-law prevailed because it was the more specific of the two. The convictions for possession of untagged salmon were therefore set aside.
2. There was no conflict between the by-law and Regulations with respect to the provision in the Regulations making it an offence to sell the salmon. The conviction of Sacobie for this offence was confirmed.

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Creaghan J.: On July 5, 1985, William Wells, a federal fishery officer, acting on instructions purchased a frozen salmon for \$10.00 from Patrick Leo Polchies. The sale was made at the Polchies residence located at the Kingsclear Indian Reservation, York County, New Brunswick. As the fish was not tagged, Polchies was charged that he did have in his possession, a salmon, "to which no tag was affixed thereto" contrary to s.18(28) of the New Brunswick Fisheries Regulations.

Polchies' trial took place on October 17, 1985, and three federal officers testified. The defense offered as an exhibit Bylaw No. 2A of the Kingsclear Indian Band entitled A Bylaw for the Preservation, Protection and Management of Fish on the Reserve.

Counsel filed briefs with the trial judge by November 12 and on November 15, 1985, Polchies was found guilty and fined \$500.00.

On the same date, that is, July 5, 1984, Jeffrey Irwin, also a federal officer, purchased a frozen untagged salmon at the residence of Clifford Sacobie on the reserve for \$25.00. This trial took place before the same judge on the same date as the Polchies trial. However, although the price was negotiated with Sacobie it was another person within the Sacobie residence that produced the fish and received the purchase price. On November 15, this charge was dismissed. The Attorney General of Canada appeals on two grounds, that is, error in not finding Sacobie guilty of having possession of an untagged salmon or for being a party to the said offence.

Two other charges were laid against Sacobie both alleging offences on July 20, 1985. The information for both counts was resworn on November 4, 1985, and tried that date before the same judge who requested briefs by November 12. He was found guilty on November 15, 1985. Sacobie was fined \$500.00 for unlawfully selling salmon contrary to s.6.3 of the New Brunswick Fisheries Regulations and fined \$100. 00 for possession of untagged salmon contrary to s.18(28) of the said Regulations.

On July 20, 1985, Sacobie sold five salmon to David Palmer, a provincial employee of the Department of Forest, Mines and Energy, who used a fictitious name and address. This officer had earlier attempted by phone on July 5 to purchase salmon from Sacobie. He was advised by Sacobie that the season was closed until July 17, 1985. Thus, his purchase was delayed until July 20, 1985.

It is necessary to refer to ss.73 and 81 of the Indian Act, R.S.C. 1970, c. I-6 and certain sections of the New Brunswick Fisheries Regulations made under the Fisheries Act, R.S.C. 1970, c.F-14.

Section 73(1) of the Indian Act states that the Governor in Council may make regulations

- (a) for the protection and preservation of fur-bearing animals, fish and other game on reserves.

Section 81 deals with the powers of a band council. It states that the council of a band may make bylaws not inconsistent with the Indian Act or with any regulation made by the Governor in Council or the Minister for

- (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.

It has been established that there are no regulations in existence under s.73(1)(a) of the Indian Act. It is also agreed to by all counsel that under the provisions of s.81 of the Indian Act that the Kingsclear Indian Band has passed a valid bylaw entitled Bylaw No. 2A for the Preservation, Protection and Management of Fish on the Reserve.

This bylaw which contains 23 sections was passed by the band council April 19, 1979. A certified copy of the bylaw was received in evidence endorsed with registration No. SOR/79-472, 13 June, 1979.

Section 8 of the bylaw is as follows:

- 8. Members of the band shall be permitted to engage in fishing upon Kingsclear Indian Band waters or within the reserve during the open season by any means except by the use of rockets, explosive materials, projectiles, or shells.

By s.34 of the Fisheries Act the Governor in council can make regulations for the conservation and protection of fish. Certain sections of the New Brunswick Fisheries Regulations are referred to. Firstly, s.18(28) which is the basis of three of the four charges on appeal. This section regulates the fishing of salmon. Subsection 28 reads as follows:

- (28) No person shall be in possession of any salmon unless a salmon tag is affixed thereto in accordance with subsections (22) to (24), the Fish and Wildlife Act of New Brunswick or the Fish Inspection Act of New Brunswick.

The bylaw is silent concerning the use of tags. In fact, it was some years after the Department of Indian Affairs had approved the bylaw that the Fisheries Regulations were amended to provide for the use of tags and offences for non-compliance in New Brunswick.

Section 18(22) of the Regulations now provides that a tag shall be affixed forthwith after a salmon is caught and retained. Subsection 23 defines the various colors of tags to be used for different situations. It is s.18(23)(b) that applies to the present charges. It reads as follows:

- (b) orange, where salmon is caught and retained by an Indian or an Indian band that fish for food pursuant to s.6.1 or 6.2.

Sections 6.1, 6.2 and 6.3 of the Regulations made after the bylaw are special provisions respecting Indians of the Province. Section 6.1 does not apply to any of the charges, however, 6.2 is important and permits both Polchies and Sacobie to fish for salmon without a license and with the use of a net. It places some restrictions on the size of the net and the time for fishing. Section 6.2 is as follows:

6.2(1) Notwithstanding subsection 13(6), any member of the Kingsclear Indian Band may, without a license, fish for food by means of gill nets in those waters of the Saint John River lying between the lateral extension of the upstream and downstream boundaries of the Kingsclear Indian Reserve.

- (2) No person fishing pursuant to subsection (1) shall fish

- (a) during the period from October 13th to May 31st in any year;

(b) by means of a gill net

(i) that is greater than 30 m in length,

(ii) the mesh size of which is greater than 140 mm extension measure,

(iii) that contains, in the web or any portion thereof, monofilament in single or multiple strands, or

(iv) that is not set in a stationary manner with one end of the web fastened securely to the shore;

(c) during the period from 8:00 hours on Friday of each week to 8:00 hours on the Monday next following; or

(d) after a fishery officer has posted notice on the Kingsclear Indian Reserve that 900 salmon have been taken.

(3) The Chief of the Kingsclear Indian Band shall at all times maintain an accurate record of the number of salmon taken pursuant to subsection (1) and shall produce such record to a fishery officer on request.

(4) No person shall at any time set a net in the waters referred to in subsection (1) after eight nets have been set in those waters.

The offence of July 20, 1985, against Sacobie and for which he was fined \$500.00 was for selling contrary to section 6.3 which states as follows:

6.3(1) No person shall buy, sell, trade or barter or offer to buy, Sell, trade or barter any fish caught in accordance with section 6.1 or 6.2.

(2) No person other than an Indian shall have in his possession any fish caught under the authority of a licence referred to in section 6.1.

The use of tags is not mentioned in ss. 6.1, 6.2 or 6.3. However, the next and final section of the provisions respecting Indians, that is, 6.4 provides that an Indian may obtain a permit and then transport a salmon from the reserve to his residence off of the reserve provided the fish is tagged in accordance with ss. 18(22) to (24). That, of course, means an orange tag.

Bylaw 2A of the Kingsclear Reserve after submission and approval by Ottawa became a statutory instrument under an Act of Parliament so provided for and thus has the same status as the New Brunswick Fisheries Regulations.

None of the salmon was tagged, therefore it is obvious, as found by the trial judge, that this fact violated s.18(28) of the Fisheries Regulations. Yet, it is equally obvious at the same time that the salmon were fished and in possession of the Indians in compliance with a valid band bylaw passed pursuant to the Indian Act.

In my opinion the issue for the three of fences contrary to s.18(28) of the Regulations cannot be determined without a finding in law as to which of two valid federal legislative provisions should prevail. It is hardly necessary to mention that Bylaw No. 2A can be varied or repealed by regulations made under s.73 of the Indian Act except to state that no such action has taken place to make the bylaw conform to the provisions of the Fisheries Regulations.

I am satisfied that in general the Fisheries Regulations apply to Indians. I am also satisfied that the bylaw regulates fishing on the reserve. Each enactment establishes different conditions to be enforced by different officials. Both seem to be complete schemes as found by Millard C.C.J., in the County Court of British Columbia, in R. v. Jimmy dated May 6, 1985, not reported [judgment of British Columbia Court of Appeal reported supra at p.77].

In the Jimmy case it was held that the provisions of the bylaw and the B.C. Fisheries Regulations were in conflict and as the bylaw was "the more specific enactment of the two", it prevailed.

The Jimmy case was cited with approval in a recent ruling in the Judicial District of Newcastle. I refer to R. v. Barnaby et al., [reported [1987] 2 C.N.L.R. 125] an appeal following a conviction

contrary to the N.B. Fisheries Regulations where the Eel Ground Indian Band and Red Bank Indian Band had bylaws with sections somewhat similar to s.8 of Bylaw No. 2A.

I am satisfied there is a conflict between the provisions of the bylaw and Regulation 6.2 cited earlier in full. It is also my opinion that the requirement that Indians of the Kingsclear Reserve be restricted to 900 salmon is, as held by Millard C.C.J., "repugnant" to a valid bylaw passed for the "preservation, protection and management of fish" in this reserve.

The requirement to affix orange tags is an indirect method to count and limit the number of salmon that otherwise would be controlled by the "Fishery Officers" appointed by the band and by declaring a "closed season" from time to time.

I have not overlooked the fact that the transcript of the trial on November 4 discloses at page 45 that on June 7, 1985, a federal officer delivered 900 tags to the band manager with instructions that "the tags were to go on these salmon when they came out of the water". This evidence only applied to the provincial prosecutions against Sacobie for selling and possession of an untagged salmon.

Although not evidence, it was explained in argument that in addition to the bylaw and Regulations there was also an agreement of some kind between federal officers and the Board for the distribution of the tags. It is hardly necessary to state that non-compliance with such an agreement is not an offence.

I therefore find that neither Polchies nor Sacobie, both members of the Board, are guilty of offences contrary to Fisheries Regulation 18(28) and that their convictions for possession of untagged salmon are set aside and the fines, if paid, are ordered to be refunded. The appeal of the acquittal of Sacobie for a similar offence is dismissed. They should have been charged with selling.

It is also my opinion that Regulation 6.3(1) is not in conflict with the provisions of Bylaw No. 2A. It is a valid enactment prohibiting the sale of salmon authorized to be caught for food by members of the Kingsclear Band. The conviction of Sacobie for this offence is confirmed and his appeal dismissed.

There will be no order as to costs.