HER MAJESTY THE QUEEN (Respondent) V. DOROTHY VANDERPEET (Appellant)

[Indexed as: **R. v. Vanderpeet**]

British Columbia Supreme Court, Selbie J., August 14, 1991

L. Mandel and L. Pinder, for the appellant
D.R. Kier, Q.C., and M. Sperling, for the respondent
C. Harvey, Q.C., for the intervenor, the Pacific Fishermen's Alliance, et al.
J.K. Lowe S, for the intervenor, Fisheries Council of British Columbia

The appellant appealed her conviction of selling salmon caught under a valid Indian food fish licence contrary to s.27(5) of the *British Columbia Fishery (General) Regulations,* made pursuant to the *Fisheries Act,* R.S.C. 1985, c.F-14. At trial it was held that the Sto:lo aboriginal right to fish for food did not include the right to sell or barter the catch. On appeal the appellant contended that, as a member of the Sto:lo people, selling fish was her aboriginal right and that this right was protected by s.35(1) of the *Constitution Act, 1982,* that this right had not been extinguished, and that the restricting legislation was an unjustified infringement on that right and therefore of no force or effect.

The court dealt with the plaintiffs first two contentions by determining whether the aboriginal right to fish included the right to sell or barter fish caught, and by setting out the manner in which the issue of extinguishment was to be determined.

Held: Appeal allowed on question of whether the aboriginal right to fish includes the right to sell or barter. The Sto:lo peoples aboriginal right to fish includes the right to barter or sell. The issues of extinguishment and, if necessary, infringement and justification were returned to trial for determination.

1. Considerations made by the trial judge with respect to the effect of the sale of Indian food fish were held to be irrelevant to the issue of whether the right to sell or barter existed as an aboriginal right and therefore constituted an error in law.

2. The burden is upon the claimant to prove that an aboriginal right exists. However, the burdens of proof beyond a reasonable doubt and proof on a balance of probabilities have been tempered by certain concepts laid down regarding the interpretation of aboriginal rights and therefore evidence must be considered accordingly.

3. The trial judge erred in using contemporary tests for "marketing" to determine whether the Sto:lo did trade in fish. Given a liberal view of the evidence, it was determined that in antiquity the right of the aboriginal person to dispose of fish other than by eating it or using it for ceremonial purposes included the right to sell, barter or exchange the fish. This right was not frozen in time and therefore could evolve to the present situation whereby fish could be disposed of by selling them.

4. The test for determining extinguishment has been settled in the province by *Delgamuukw* v. *B.C.,* [1991] 5 C.N.L.R. 1 which recognized the power of the Crown to extinguish aboriginal rights if the legislation showed a clear and plain intention to do so. *Delgamuukw* held that express statutory language was not a requirement for extinguishment and that extinguishment could be implied from constitutional and legal arrangements put into place since contact. On the facts in this case, however, mere regulation of the method of fishing cannot be said to imply extinguishment of the specific right to sell or barter the fish. That distinct aboriginal right is capable of being extinguished quite independently of the overall right to fish. Whether it was extinguished is an issue of fact to be determined by the trial court.

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SELBIE J.: Mrs. Vanderpeet sold ten salmon which were lawfully in her possession and which had been lawfully caught under a valid Indian Food Fish Licence. To sell of barter fish caught under such a licence is an offence under the Fisheries Regulations (s.27(5)). She was convicted and fined $50. She appeals her conviction arguing that selling fish is her aboriginal right and protected by s.35(1) of the *Constitution Act, 1982.* She further says that that aboriginal right has not been extinguished. Lastly she says that the legislation purporting to restrict that unextinguished right is

an unjustified infringement on that right and therefore of no force or effect.

Section 35(1) of the *Constitution Act, 1982* reads:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

It was admitted by the Crown at trial that the fish were caught in accordance with an aboriginal right in the Sto:lo, as a people, to fish. Mrs. Vanderpeet is a member of the Sto:lo. Whether that aboriginal right to fish includes the right to sell or barter the catch is the first issue.

If the answer is that it does, then the issue becomes whether such right has been extinguished.

If the answer is that it has not been, then the issue becomes whether the aboriginal right to sell fish has been infringed by the regulations.

If they have, then the last issue becomes whether the regulations infringing those rights are justified.

The Aboriginal Right

The learned trial judge found that the aboriginal right to fish did not include the right to sell or barter those fish. His reasoning began with a consideration of the effect of the sale of Indian food fish (Reasons for Judgment, October 29, 1990, p.2) [reported supra, p.155 at 156]:

> It was made apparent from the outset of this trial that despite the nominal amount of fish involved in this case, the illegal catch and sale of Indian food fish is of immense size and consequence.

This statement was followed by statistics from fishery officers as to these matters and a concern as to an Indian lobby for . .. an increase in the Indian food fish allocation when it appears that the fish are harvested for purposes other than for food or ceremony" [p.157, *supra*]. A concern was also expressed regarding ". . . quality standards in fishing and processing" [p.157*, supra*]. These considerations obviously had an important bearing on his eventual determination as to whether the right to sell or barter existed as an aboriginal right. With respect I consider that these factors are irrelevant to that issue and their consideration constitutes an error in law. They may have a bearing on the questions of extinguishment and justification but not, in my view, on the existence of the right itself.

Whether the right exists is a question of proof for those claiming it. In doing so certain concepts have been laid down for dealing with evidence in matters such as this involving the native Indian:

Nowegijick v. *The Queen,* [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89 at 94, 144 D.L.R. (3d) 193 at 198, [1983] C.T.C. 20, 83 D.T.C. 5042, 46 N.R. 41:

> . . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

R. v. *Agawa,* [1988] 3 C.N.L.R. 73 at 89, 53 D.L.R. (4th) 101, 43 C.C.C. (3d) 266:

> The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration.

R. v. *Sparrow,* [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 at 180, [1990] 4 W.W.R. 410,70 D.L.R. (4th) 385,46 B.C.L.R. (2d) 1,56 C.C.C. (3d) 263, 111 N.R. 241:

> . . . the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
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> See generally *R.* v. *Sparrow, supra* pp.407-409 [D.L.R., pp. 179-81 C.N.L.R.]

These broad principles apply equally to aboriginal rights as to treaty rights *(R.* v. *Sparrow, Supra).* I take the effect of them to be that the ordinary burdens of proof beyond a reasonable doubt and

proof on a balance of probabilities have been tempered by these concerns and evidence must be considered accordingly.

Looking, then, at the facts in the light of these principles and ignoring for the purpose of this issue the evidence of the fisheries officials, the evidence comes from three elderly Indians who gave oral histories to show that in antiquity their antecedents did barter and trade in salmon. As well Dr. Daly, an expert in the field of social and cultural anthropology, drawing on his readings and personal contacts, gave as his opinion that the Sto:lo Indians engaged in barter and trade. Mr. Morton, an historian, gave evidence the effect of which I take to be that the Sto:lo took advantage of the presence of the Hudson's Bay Company and expanded any rudimentary bartering and trading inclinations they had. In rebuttal the Crown called Dr. Dewhurst, an anthropologist and ethno-historian, who gave evidence that the Sto:lo were a "band" not a "tribe", a distinction which he took to be somewhat crucial in his opinion that the Sto:lo had no "regularized organized trade" in salmon. The Crown also called Dr. Stryd, an archaeologist with a strong background in anthropology. There are three of his statements that I would like to set out as being significant in an assessment of the weight to be put on the expert opinions offered by all parties –

(Nov. 6, 1989 p.23):

> I think that we've heard a lot of discussion in this case about band versus tribal societies and I don't particularly wish to enter into that foray . . . I think it's very difficult to argue that prehistorically a particular kind of social organization existed. I think its one of the most difficult things to demonstrate. Next to language, I think social structuring must be the most difficult item to reconstruct based on material culture.

(Nov. 6, 1989, p.21):

> . . . It is very hard to correlate material culture with cultural identity, linguistic identity, or social identity and we actually have to be very cautious when we make statements like "The Sto:lo have long enjoyed systems of trade." *Somebody might have been trading. It might have been the Sto:lo, but we can't say for - with any kind of certainty.* (The emphasis is mine.)

(Nov. 7, 1989, p.31):

> Q. . . . You say there's evidence of trade in non-perishable items throughout much of the archaeological record for British Columbia?
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> A. Well, that's right. In my point of view, the tendency to trade is one that's very human and if you have things that you have that you don't need and your neighbours have something that you would like that they are willing to, that they don't need, that it seems very obvious that some kind of exchange of goods would take place *and the earliest part of the human condition to exchange items* (sic). I think that we find that throughout the pre-history of British Columbia. I really can't think of any region of the Province or time period where we have sites that there really isn't some evidence for at least some kind of exchange of goods. (The emphasis is mine.)

In addition, I take the doctor to say that while he can opine with some degree of certainty that there was an exchange of non-perishable goods in the area, he cannot say that there was one m perishable goods because any remains would leave little or no trace. He does not rule such trade out.

These quotes of this highly qualified witness typify the unsatisfactory state of the evidence on all sides on this issue - honest uncertainty brought about by insufficient hard evidence. Each attempts, through the eyes of their own expertise and study, to peer into the misty past of an aboriginal peoples and each only succeeds, in this area of trade, in educated, albeit shrewd opinion.

The court appealed from dealt with the evidence in the following way - at page 9 [p.160, *supra*] of the Reasons for Judgment the court summed up:

> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John Dewhurst in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in

> aboriginal times. Such trade as took place was either for ceremonial purposes or Opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only . . . It was the establishment of the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon . This court concludes on the evidence, therefore, that the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish.

With respect, in my view the learned judge erred in using contemporary tests for "marketing" to determine whether the aboriginal acted in ways which were consistent with trade albeit in a rudimentary way as dictated by the times.

In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes - the words "sell," "barter," "exchange," "share," are but variations on the theme of "disposing." It defies common sense to think that if the aboriginal did not want the fish for himself there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by todays standards. I am satisfied that when the first Indian caught the first salmon he had the "right" to do anything he wanted with it - eat, it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons that "right" to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch -to do otherwise would court punishment by his god and by his people. One of the social changes that occurred was the coming of the white-man, a circumstance, as any other, to which he must adjust. With the white-man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs [sic] change with them -and he did. A money economy eventually developed and he adjusted to that also - he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it - the right evolves with the times (see *Simon* V. *The Queen,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366). So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlach and the like - he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. It is my view that the learned judge imposed a verdict inconsistent with the evidence and the weight to be given it.

I am assisted in these conclusions by reference to the cases of *R.* v. *Horseman,* [1990] 1 S.C.R. 901, [1990] 3 C.N.L.R. 95, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353, 108 N.R.1 and *Pasco et al.* v. *CNR et al.,* (1989) [1990] 2 C.N.L.R. *85,* 56 D.L.R. (4th) 404, 34 B.C.L.R. 344 (B.C.C.A.).

Extinguishment

The test for determining extinguishment has now been settled in this province by the case of *Delgamuukw et al.* v. *Her Majesty the Queen et al.* (unreported - March 8, 1991 Smithers Registry #0843) [reported [1991] 5 C.N.L.R. 1] where McEachern C.J.B.C. (as he then was) said at page 238 [pp.223-24 C.N.L.R.J:

> On the question of express statutory language I note the recent finding of Cory J., speaking for the majority in *Horseman* v. *The Queen,* [1990] 1 S.C.R. 901 [[1990] 3 C.N.L.R. 95, [1990] 4 W.W.R. 97, 73 Alta. L. R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353, 108 N.R. 1] that:
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> > … the onus of proving either *express or implicit* extinguishment lies upon the Crown. (My emphasis)
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> This question of extinguishment was considered again in a unanimous judgment of the

Supreme Court of Canada in *Sparrow* which is the most recent authoritative statement on the question. At p.1109 [p.175 C.N.L.R.] the Court recognized the power of the Crown to extinguish aboriginal rights. Speaking of tidal fishing the Court said:

> There is nothing in the *Fisheries Act* or its detailed regulation that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual basis rather than a communal basis in no way shows a clear intention to extinguish. These permits were merely a way of controlling the fisheries, not defining underlying rights.

I conclude from this passage that the aboriginal right to fish for food would indeed be extinguished if the legislation showed a clear and plain intention to do so. [The emphasis is mine]

At the same page, the Court settled the test for extinguishment when it said:

> The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

It is significant, in my judgment, that the Court made this pronouncement regarding the test for extinguishment in the context of a discussion of *Calder,* which was concerned with the colonial period, and also that the Court did not include express statutory language as a part of its test. *I therefore conclude that express statutory language is not a requirement for extinguishment.* [The emphasis is mine]

The unanimous decision of all the judges (in *Sparrow)* so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific, isolated intention on the part of the historical actors, but rather to the consequences they intended. In other words, the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished.

The court in *Delgamuukw* then found from constitutional and legal arrangements put into place since contact that, although not expressly stated, impliedly the claims had been extinguished:

> As the intention of the Crown must be ascertained objectively from a consideration of all the circumstances in their historical setting, I find the Crown clearly and plainly intended to, and did, extinguish aboriginal rights in the colony by the arrangements it made... (pp.244-245) [p.229 C.N.L.R.]

From this I conclude that the Crown had the power to extinguish aboriginal rights regarding fishing. It cannot be said to have done so merely by reason of its regulating the methods of fishing (cf. *Sparrow).* One of the rights involved in the right to fish is the right to sell or barter the fish. That specific right, in my view, is capable of being extinguished quite independently of the overall right to fish. The issue as to whether it was is one of fact which involves considerations of evidence and legislation.

For example, the *Salmon Fishery Regulations for British Columbia* adopted in 1878 were, as noted in *Sparrow* (p.399 [D.L.R; p.173 C.N.L.R.]), the first such legislation to mention Indians. It is arguable that while they "regulated" the means by which the Indians fished they "prohibited" (extinguished?) the sale or barter of them. This question was not decided in *Sparrow* where the Court specifically declined to comment on the sale or barter of fish.

In the instant case the court appealed from did not deal in its judgment with the matter of extinguishment because it held that the right did not exist. Having found as I have it is obvious the question must now be addressed and done so in light of the test for extinguishment as laid down in *Delgamuukw, supra.* If the trial court rules that the right has not been extinguished it is my view that it will then be necessary for the court to consider whether the strictures against selling or bartering are an infringement of the aboriginal right to fish and, if they are, whether such infringement is justifiable.

The appeal is allowed on the question as to whether the aboriginal right to fish includes the right to

sell or barter. That question is answered in the affirmative. The matter is now returned to the trial court for determination on the issue of extinguishment and, if necessary, on the issues of infringement and justification.