REGINA v. TIM GEORGE FENTON

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

British Columbia Provincial Court, Shupe J., April 4, 1989

G. Hoffman, for the Crown
B. Charles, for the Defence

The accused, recognized as a member of the Pavillion Indian Band, was charged with unlawfully fishing with a dip net during a period of closure, and with fishing without an Indian food fish permit contrary to the *Fisheries Act*, R.S.C. 1970, c.F-14. He was fishing by traditional means at a traditional site. The defence submitted that neither the members of the band nor their forefathers ever gave up, by treaty or otherwise, their aboriginal right to fish and that the closure, without having been shown to be necessary for conservation reasons, deprived them of their inherent right to fish. It was submitted by the Crown that the accused had to file a *Constitutional Question Act* notice in order to raise the defence that the aboriginal right to fish was paramount over the closure imposed by regulation.

Held: Accused not guilty on both counts.

1. The filing of a *Constitutional Question Act* notice is not a condition precedent to advancing the defence put forward by the accused for the following reasons: the breadth of the right to take fish for food purposes should be interpreted liberally in favour of the Indians and not confined to subsistence; the defence raised is one arising by traditional Indian law which is likely parallel in authority to common law, therefore the accused need not persuade the court that he was fishing lawfully, rather the Crown must persuade the court he was fishing unlawfully; whether closure pursuant to regulation was necessary for conservation reasons should be seen as a factual issue, it can not be presupposed that closure was necessary for conservation purposes; the accused was not arguing that the law was bad, rather that the application was arbitrary and therefore contrary to the stated priority to be given to the Indian food fishery; the accused does not have to establish or show a connection between the absence of a licence or permit and the infringement of aboriginal rights.

2. The accused could only be foreclosed from fishing for food if closure was necessary for purposes of conservation of the salmon stock. There was no evidence to support such a need. It follows that it was not proved beyond a reasonable doubt that the accused was fishing unlawfully, that is so whether he had a Indian food fish permit or not.

3. It must have been the intention of the government in enacting s.35(1) of the *Constitution Act, 1982* that the rights guaranteed and existing since time immemorial would be recognized and therefore not abrogated, denigrated or extinguished without at least consultation and subsequent constitutional enactment.

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SHUPE J.: The defendant Tim Fenton was charged in count one with unlawfully fishing with a dip net during a period of closure on the Fraser River on June 24, 1988, and in count two fishing without an Indian food fish permit issued by the Department of Fisheries and Oceans.

Shortly after 6:00 A.M. on that day the defendant was seen actively participating in fishing for sockeye salmon with a dip net at the Fountain Indian Band's traditional fishing site, the Three Mile Indian Reserve on the Fraser River. The river was closed to such fishing on that day. The defendant is considered by the Pavillion Indian Band to be a member of that band. He was fishing by traditional means at the traditional fishing site, the Three Mile Indian Reserve. The Pavillion Indian Band share that site with the Fountain Indian Band. Chief Marvin Bob of the Pavillion Indian Band gave evidence in a most eloquent, forthright and forceful manner. He says he believes in the court system and that we are all here to seek the truth. The truth he says in this case lies not in the narrow legal issue [raised] by the Crown counsel as to the need of the defendants to file a *Constitutional Question Act* notice to be able to raise its defence of the aboriginal right to fish being paramount over the closure imposed by regulation. Rather, he says, it is a legal question, "Why should we be called upon to prove our innocence," by establishing that it was not necessary to close the food fishery for conservation purposes. He finds it frustrating that such objection or hurdle should be put in the way of the only defence they have to such charges, that is, that neither they nor their forefathers ever gave up, by treaty or otherwise, their

aboriginal right to fish and that the closure on June 24, 1988, without having been shown to be necessary for conservation purposes deprived them of their inherent right to fish. If the aboriginal right to fish is constitutionally entrenched he says as the courts have pronounced it to be, why then should the Indian people be called upon to prove their innocence he argues. He said that the Department of Fisheries invariably say the closure is necessary for conservation purposes, he says that is false. The evidence led before my brother Judge Thomas in the case of *R. v. Adolph and Adolph*, September 11, 1987, Lillooet Registry, 2222 [reported [1988] 2 C.N.L.R. 70] tends to support that position, at least as it concerns the 1986 fishing season, as emerges from page three of the judgment where it was said [p.71 C.N.L.R.]:

> It became clear on or about July 29, 1986, that the run preceded the pre-season estimates for the summer run by a considerable margin, but the benefit of that increase when largely to the commercial fisheries by way of extending their catch and their season, but the Indian Food Fishery was held to its pre-season quota. Some charges were made with respect to the hours and times of fishing, but the changes were not in effect on August 8, 1986.

For at least that year it appears clear the closures of the Indian food fishery was, as Chief Bob has intimated, smoke and mirrors. Little wonder then that the Pavillion Indian Band thinks the same is true of the 1988 season. There is merit in Chief Bob's position. Neither counsel has argued any case law, hence, I am able to render judgment without the necessity of reserving same. The issue here is by virtue or Chief Bob's evidence, different from that that arose in the case of *Roger Adolph et al.*, hence, my judgment in that case rendered yesterday is not binding upon me. There I ruled that the absence of any evidence of the closure being unnecessary for conservation purposes precluded my acceding the defence that the aboriginal right to fish was paramount and was infringed by the closure there in issue.

I am aware that prior to trial in the case of *R. v. Sparrow*, the British Columbia Court of Appeal decision being reported [1987] 2 W.W.R. 577, [1987] 1 C.N.L.R. 145, 9 B.C.L.R. (3d) 300, 36 D.L.R. (4th) 246 that a notice under the *Constitutional Question Act* had, in fact, been filed and served, but I know of nothing in that judgment which makes the filing of such notice a condition precedent to advancing the defence now advanced. I am fortified in this conclusion by these factors: Number one, the passage set out at page 331 of the B.C.L.R., the judgment in the *Sparrow* case where it was said [p.178 C.N.L.R.]:

> What can be said with certainty in this case is that there is a right in the Musqueum to take salmon from Canoe Passage and Ladner Reach, the waters referred to in the licence. It is necessary to distinguish between a right and the method by which the right may be exercised. The aboriginal right is not to take fish by any particular method or by a net of any particular length, it is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians, so food purposes should not be confined to subsistence, in particular this is so because the Musqueum tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish in mere day to day domestic consumption.

The operative words, in my view, being the breadth of the right should be interpreted liberally in favour of the Indians. Two, the decision of the Supreme Court of Canada in an unrelated case, the case of *R. v. Perka et al.*, [1984] 6 W.W.R. 289 at 312, where it was said:

> It seems clear that it is to these statutory exceptions that section 7(2) now section 8(2) of the Criminal Code refers and not to common law defences such as necessity. One who wishes to plead the possession of a licence or other lawful authority in response of a charge of importation bears under section 7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section 7(2) does not place a persuasive burden as to the defence of necessity on the accused.

I see the defence in this case being similar to the defence of necessity. It is one arising by traditional Indian law which is likely parallel in authority to common law, though not precisely, and is clearly not statute law. Hence the defendants need not persuade me, but rather the Crown must, that they were fishing unlawfully. Number three, the issue of whether the closure pursuant to regulation was necessary for conservation purposes can, and should, be seen as a factual issue. Why should every fishery prosecution be seen as a test case necessitating constitutional notice. While I am aware of maxim *omnia presumuntur rite esse acta* it cannot, in my view, be presupposed that simply because the fishing was closed pursuant to regulation that such closure was necessary for conservation purposes. We know that wasn't the case in 1986 for the passage of Judge Thomas's decision which I earlier cited. Four, Chief Bob is not saying the law is bad, rather that the application is arbitrary, contrary to the stated priority to be given to the Indian food

fishery and therefore its application is bad. I fail to see why a constitutional challenge and notice is required to advance that position. Fifthly, this argument was not raised in evidence in the case before Judge Thomas, the cases of *R. v. Adolph and Adolph*, hence, his ruling at page eleven [pp. 76-77 C.N.L.R.] that no connection was shown between the lack of food fishing licence and the shortage of salmon experienced by those defendants and that the defence there advanced accordingly could not succeed does not apply to these facts; the evidence is different. The case therefore is distinguishable in its facts.

In conclusion, the defendant is a native Indian and is recognized as a member of the Pavillion Indian Band. He was fishing by traditional means at a traditional fishing site of his Indian band. He was accordingly exercising his aboriginal right to fish within the context of the judgment of the Court of Appeal of this province in the case of *R. v. Sparrow*. He can be foreclosed from exercising that right only if such closure is necessary for purposes of conservation of the salmon stock. There is no evidence before me of such a need. That is so, even though, earlier on in the trial I overruled a Crown objection taken to the admissibility of Chief Bob's evidence on that point. It follows that it hasn't been proved beyond a reasonable doubt that the defendant was fishing unlawfully when he did; that is so whether he had an Indian food fishing permit issued under the *Fisheries Act*, R.S.C. 1970, c.F-14 [now R.S.C. 1985, c.F-14].

Overall the comments of Judge Martin of the Provincial Court of Manitoba in the case of *R. v. Flett*, [1987] 5 W.W.R. 115 at 121, [1987] 3 C.N.L.R. 70 at 75, are apropos even though he was there dealing with migratory game birds. He said:

> Finally it is not this court which causes the law as expressed in the Supreme Court decisions to be re-evaluated, but rather the fathers of our new constitution who in their wisdom changed the scheme of things in 1982 and inserted section 35(1).

Therefore we are now, in my opinion, under that new regime. Our constitution with the Indian leaders partial approbation makes a new or renewed pledge to those Indians, that their existing aboriginal and treaty rights are recognized and affirmed. By restating this principle in 1982, surely the government intended that rights guaranteed and existing since time immemorial will be recognized and therefore not abrogated, denigrated or extinguished without at least consultation and subsequent constitutional enactment.

As I am obliged by law to do, I resolve the doubt I have favourably to the defendant and find him not guilty of both counts.