RUDY LYLE EVAN WATTS and NORMAN WATTS (Appellants) v. THE QUEEN (Respondent)

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

British Columbia County Court, Hutchinson C.C.J., June 23, 1989

H. Braker and R. Desjarlais, for the appellants
D. Kier, Q.C., and J. Bennie, for the respondent

At the trial the accused Indians were convicted of unlawfully fishing without the authority of a permit. The fishing occurred at a time when the Indian food fishery was closed. The allocation of fish for the Indian food fishery for the location in question was determined by fisheries officers using an averaging process in spite of the objections of the bands involved. The allocation was later reduced because some of the fish had been sold commercially.

Held: Appeal allowed, conviction set aside, acquittal entered.

1. The Department of Fisheries correctly made its first concern the conservation of the resource. Then priority should be given to the Indian food fishery.

2. The Department's approach to ensure the priority of the Indian fishery was fundamentally flawed. The allocation of a quota based on prior allocations in previous years does not take into account the food or societal needs in the current year; the process only determined the average of the number allocated in previous years.

3. The system of determining the allocation was arbitrary, as it only ensures that once conservation needs are met, the Indian fishery will be limited to a maximum number of fish. That kind of limit is not imposed on the other fisheries. It is a limit that has been arrived at without taking into account the food and societal requirements of the bands. The priority guaranteed to them would be met only if they were assured of receiving their proper allotment regardless of the catch taken by the other user groups.

4. The sale of fish is not a part of the constitutionally protected aboriginal right. Nevertheless, the way in which the allocation was reached was not reasonably justified as being necessary for the proper management or conservation of the resource, and so was not in accordance with the principles established in *R. v. Sparrow*, [1987] 1 C.N.L.R. 145 (B.C.C.A.).

* * * * * *

HUTCHINSON C.C.J: The accused are members of the Sheshaht Band; they live on the Indian Reserve near Port Alberni. That band has fished for food and societal needs from the mouth of the Somass River for nearly 200 years. The appellants were convicted of unlawfully fishing on 7 August 1987 without the authority of a permit. They had caught thirty-three sockeye salmon and one steelhead by using a net at the mouth of the Somass River at a time when the Indian food fishery was closed.

The salmon that run up the Somass River are destined principally for Sproat Lake and Great Central Lake. For conservation purposes, the Department of Fisheries each year tries to ensure that 150,000 sockeye reach the Sproat Lake system, and 200,000 reach the Great Central Lake system. In 1987 the biologists predicted a poor return to the Great Central system. Fisheries Officer Freeman described the Departments' approach thus:

> A. So, then, if you would look at it as being a pie, a large pie, Your Honour, the first piece of pie goes to the spawning escapement.
>
> So, then, you have a portion of that pie left and it has to be split up between the native Indian food fishery, the commercial salmon fishery in British Columbia and the recreational fishery in British Columbia.
>
> So, then, what the department does, Your Honour, is after they have taken out the first piece of pie, for spawning escapement, they then determine the reasonable food fish needs in the native fishery, and proportion that part of pie to that user group. Now, then, whatever

is left over, Your Honour, will then be allocated between the commercial and recreational fisheries.

The manner of allocating the number of fish for the native food fishery was also described by Officer Freeman in this way:

> A. What I did was, I looked at the Department of Fisheries and Oceans catch statistics, particularly from 1958 through '85, and I averaged them out and they were very low numbers. So, then what I did, is, I took the recent, the ten year average from 1975 to 1985. And it was a fairly low number. So, what I did was, I then took the period 1980 to '85, Your Honour, and, that averaged out to twenty thousand, Your Honour. And it was the largest of the three, the three methods that I used. And so that is where the twenty thousand figure came from, Your Honour.
>
> Q. Your assumption, then, Officer Freeman, was that catch, the record catch for the ten prior years from '75 to '85, had met the reasonable food requirements of the two bands involved; is that correct?
>
> A. Yes. There were no quotas prior to 1975, and that was the level of catch they were achieving.
>
> Q. And did the two bands agree with you on that?
>
> A. No.

The Sheshaht and Opetchesaht bands requested 46,670 sockeye when they met with the Department of Fisheries in April 1987. A licence was issued in May 1987 to the bands allocating them 30,000 sockeye. The bands were later notified of their openings for gillnet and drag-seine fishing. There were some openings in June, but the run was poor and further scheduled openings were cancelled. Some band members (not the appellants) fished outside the listed openings, so the allocation for the two bands was cut by the Department to 20,000. There were some gillnet openings in lake July and up to and including 7 August when there was a short drag-seine opening. Altogether 19,500 sockeye were taken in 1987 pursuant to the licence issued to the two bands. In addition the bands received a separate allocation under a licence to catch chinook.

The sports fishery and the commercial fishery also had openings. The commercial seine catch for 1987 was 234,000 sockeye, the gillnet catch approximately 15,500 sockeye. The sports fishery opened in late July and closed in December 1987; the 1987 catch was 23,700 sockeye. The early predictions that there would be a poor run and insufficient escapement were incorrect. Both the Sprat Lake system and the Grand Central Lake system had adequate returns and by the end of the July it was apparent that conservation requirements set by the Department of Fisheries would be met, so the commercial fishery and sports fishery were opened.

The appellants argue that the Indian food fishery allocation was not sufficient for the band's food and societal needs, and until those needs were satisfied their right to fish was constitutionally guaranteed. They rely on *R. v. Jack*, [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, [1979] 2 C.N.L.R. 25 and *R. v. Sparrow*, [1987] 2 W.W.R. 577, 9 B.C.L.R. (3d) 300, 36 D.L.R. (4th) 246, [1987] 1 C.N.L.R. 145. In the latter case, the British Columbia Court of Appeal said at page 178 of the latter report:

> The general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. The essential limitation upon that power is that which is already recognized by government policy as it emerges from the evidence in this case. That is, in allocating the right to take fish, the Indian food fishery is given priority over the interests of other user groups. What is different is that, where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to such priority. Furthermore, by reason of s.35(1) it is a constitutionally protected right and cannot be extinguished.

In the case at bar the Department of Fisheries correctly made their first concern the conservation of the resource by ensuring adequate escapement. Then, as was clearly stated in *R. v. Sparrow*, *supra*, priority should be given to the Indian food fishery. The trial judge in this case found "the allotment was ample for their food needs." (Page 6 of his reasons for judgment.)

The evidence of how the allocation was established has been referred to. No allocation was granted to the sports fishery or the commercial fishery. In this way, the Crown argues that the priority of the aboriginal native fishing rights was ensured.

In 1987 the allocation of the number of sockeye for food and societal needs was settled arbitrarily by the Department of Fisheries. It was well below the number requested by the bands; an undisclosed quantity was taken off for the sale of fish, as the Department, perhaps correctly, concluded the food and societal needs did not include commercial sales. There was evidence of the bands' estimate of their requirements. Fisheries Officer Freeman did not think that was the best way to determine what their needs were, and his evidence on this point was as follows:

> Q. In fact, would you not say, it is the bands which are in the best position to decide what the reasonable food and cultural requirements of the two bands are?
>
> A. No, I would not.

Patricia Berringer, an anthropologist called by the appellants, described the importance of sockeye salmon for the Sheshaht Band in her report thus:

> To the Sheshaht sockeye salmon has a special meaning. One of the explanations for this may be that their principal river, the Somass, is one of only a handful of west coast salmon streams that supports sockeye runs. Sockeye is a 'prestige' food; "we serve it to someone, you give him the best." Food has always symbolized better than anything else the significance of the gift, the acceptance of the gift and, in due course, the return gift---composite elements of the reciprocity cycle.

The Department's approach to ensure the priority of the Indian fishery appears to have two fundamental flaws, both of which are contrary to the trial judge's conclusion.

1. The allocation of a number based on prior allocations in previous years does not take into account the food or societal needs of the native people in the current year. The process described by Fisheries Officer Freeman only determined the average of the number allocated in previous years. What occurred in those years apart from the bald statistic is not known but there must have been some other considerations, e.g. the conservation requirements of those years, the predicted returns for those years, and the weather conditions that pertained then that would affect the ability of the sockeye to run up the river to the spawning grounds. Those factors would be likely to affect the validity of a quota set from an average of previous years. The result of averaging has no relevance to the food and societal needs of the bands in 1987. For those reasons, I find the trial judge erred when he said he was satisfied the allotment was ample for their food needs. On the evidence before him the trial judge could not have come to that conclusion as the proper considerations had not been taken into account by the Department of Fisheries when they reached their figure. The allotment was not based on the band's requirements, but the Department's averaging of their previous figures which was not linked to their needs.

2. The system of settling on a figure for an allocation was arbitrary on the part of the Department of Fisheries. An allocation only ensures that once the conservation needs are met, the Indian fishery will be limited to a maximum number of fish. That kind of limit is not imposed on the other fisheries. It is a limit that has been arrived at without taking into account the food and societal requirements of the Sheshaht Band. The number of 46,670 sockeye requested by the bands was based on their assessment of their food and societal needs. The priority guaranteed to them would be met if they were assured of receiving their proper allotment regardless of the catch taken by the other user groups; however no such assurance was given. Instead a maximum figure was set with the strong possibility on 7 August 1987 of none if very little of it being harvested.

This limit in 1987 on the number of sockeye for the food fishery was based in part on the fact that some of them were sold. I accept the trial judge's reasoning that the sale of fish is not a part of the constitutionally protected aboriginal right. Nevertheless, the way in which the allocation was reached was not reasonably justified as being necessary for the proper management or conservation of the resource, and so was not in accordance with the principles established in *R. v. Sparrow, supra*. In that decision the court said at page 178:

> Those regulations which do not infringe on the aboriginal food fishery, in the sense of reducing the available catch below that required for reasonable food and societal needs, will not be affected by the constitutional recognition of the right. Regulations which do bear upon the exercise of the right may nevertheless be valid, but only if they can be reasonably

> justified as being necessary for the proper management and conservation of the resource or in the public interest. These purposes are not limited to the Indian food fishery.

Had the trial judge applied those principles to the facts before him he would have acquitted the appellants. As he did not I find he erred in law.

For those reasons I allow the appeal, I set aside the conviction and direct an acquittal be entered.