SPARROW V. THE QUEEN ET AL.

British Columbia Court of Appeal, Nemetz C.J., Seaton, Macdonald, Macfarlane and Esson JJ.A., December 24, 1986

M.R.V. Storrow, Q.C., L.F. Harvey and A.K. Fung for the appellant D.R. Kier, Q.C., and J.D. Cliffe, for the respondent
E.R.A. Edwards, Q.C., and H.R. Eddy, for the Intervenor, Ministry of Attorney General
A. Pape, L. Mandell and H. Slade, for the Intervenor, Tribal Councils and Bands

The appellant, a member of the Musqueam Indian band, was charged under s.61(1) of the Fisheries Act, R.S.C. 1970, c.F-14 with the offence of fishing with a drift net longer than that permitted by the terms of the band's Indian Food Fishing Licence. The appellant contended that because he had an aboriginal right to fish, the net length restriction was inconsistent with s.35(1) of the Constitution Act, 1982 and was thus rendered of no force and effect by s.52 of the Act. The constitutional question before the court was whether s.35(1) limited the federal power to regulate Indian fishing.

The appellant was convicted at trial, his appeal to the County Court was dismissed.

Held: Conviction set aside, new trial ordered.

1. Both the trial judge and the County Court judge erred in deciding the case on the ground that they were bound by the decision of the British Columbia Court of Appeal in Calder v. A-G. B.C. (1970), 74 W.W.R. 481 to hold that the appellant had no aboriginal right to fish.

2. Section 35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under s.92(12) or (24) of the Constitution Act, 1867. The power to regulate fisheries, including Indian access to the fisheries continues, subject only to the new constitutional guarantee that the aboriginal rights existing on April 17, 1982 may not be taken away.

3. It is necessary to distinguish between a right and a method by which a right may be exercised. The right to take fish for food purposes should be interpreted liberally in favour of the Indians and should not be confined to subsistence because the Musqueam tradition and culture Involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere daily domestic consumption.

4. The general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. The limitation upon that power is, in allocating the right to take fish, the Indian food fishery is given priority over the interests of other user groups and by s.35(1) of the Constitution Act, 1982 it is a constitutionally protected right and cannot be extinguished.

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THE COURT: Before April 1982 is was clearly the law that fishing by Indians, even if in exercise of an aboriginal right to fish, was ' subject to any controls imposed by the Fisheries Act, R.S.C. 1970. c.F-14 and the regulations made thereunder. The issue on this appeal is whether that power to regulate is now limited by s.35(1) of the Constitution Act, 1982:

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

The appellant, a member of the Musqueam Indian band, was charged under s.61(1) of the Fisheries Act with the offence of fishing with a drift net longer than that permitted by the terms of the band's Indian Food Fishing Licence. Throughout, he has admitted having done that but has contended that, because he has an aboriginal right to fish, the net length restriction is inconsistent with s.35(1) and is thus rendered of no force and effect by a.52 of the Constitution Act, 1982. He was convicted at trial in the Provincial Court. His appeal to the County Court having been dismissed, he now appeals to this court.

In this court, counsel for the Attorney General for British Columbia appeared In support of the federal Crown on the constitutional question whether s.35(1) limits the federal power to regulate Indian fishing. The several tribal councils and bands named in the style of cause were permitted to intervene to make submissions on that question in support of the appellant.

The Musqueam Indian band has a reserve located on the north shore of the Fraser River. That site, upon which there has been a Musqueam village for hundreds of years, is close to the mouth of the river and within the city limits of Vancouver. It is those reserve lands which were the subject matter of the action against the federal Crown which culminated in the judgment of the Supreme Court of Canada reported as Guerin et al. v. The Queen, [1984] 2 S.C.R. 335, (1985) 1 C.N.L.R. 120. The issues in this case do not directly concern the reserve lands or the waters adjacent to them. They arise out of the band' a right to fish in another area of the Fraser River estuary known as Canoe Passage. That is in the South Arm of the Fraser, some ten miles from the reserve. Lying between the reserve and the South Arm are the islands of the estuary including Sea Island, the site of the Vancouver International Airport, and Lulu Island, the western end of which is occupied by a largely urban Municipality of Richmond.

The fishing which gave rise to the charge took place on May 25, 1984. Canoe Passage is part of the area which was the subject of the Indian Food Fishing Licence Issued to the band for the one-year period beginning March 31, 1984. That licence authorized members of the band to fish for salmon to be used as food for themselves and their families. It set out a number of restrictions relating to the type of gear, fishing times, identification cards and other matters including the restriction of length of drift nets to 25 fathoms.

The practice of issuing annual licences had begun in 1978, replacing the earlier system of issuing licences for specific days. The first five annual licences had permitted a net length of 75 fathoms - the 25 fathom limit was introduced in the licence for the year commencing March 31, 1983.

The Statutory Scheme

The licences were issued under the authority of the Fisheries Act, s.34 of which confers a broad power to make regulations for carrying out the purpose and provisions of the Act. The Act makes no reference to Indians or to aboriginal rights to fish although a-34.5, dealing with marine plants, provides:

> 34.5 Nothing in sections 34.1 and 34.4 shall be construed to prevent traditional harvesting of marine plants by aborigines for their use as food.

The regulations relevant to this case are the British Columbia Fishery Regulations. The most relevant regulation is:

Indian Food Fishing

> 27.(1) In this sect I on "Indian food fish licence" means a licence Issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.
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> (2) No Indian shall, while fishing or transporting fish caught under the authority of an Indian food fish licence, fail to carry with him and produce on the demand of a fishery officer or fishery guardian
>
> (a) his Indian food fish licence; or
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> (b) where the Indian food fish licence is issued to a band,
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> (i) a copy thereof endorsed by him and by the council of the band, or
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> (ii) a signed document from the council of the band that authorizes him to engage In fishing thereunder.
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> (3) No Indian shall operate a gill net when fishing under the authority of an Indian food fish licence unless
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> (a) a floating tag or buoy is attached to one end thereof; and
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> (b) the tag or buoy is legibly marked with that licence number and the initials of that Indian.
>
> (4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

The significance of licences in the statutory scheme is shown by this regulation:

> 4.(1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the Wildlife Act (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.
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> (2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.
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> (3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.
>
> (4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.
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> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

Section 2(1) of t he regulations, the interpretation section, includes these definitions which are relevant to s.27:

> "band" has the same meaning as in the Indian Act;
> "council of the band" has the same meaning as in the Indian Act;

History of Regulation

The history of regulation of Indian fishing is set out in some detail in the judgment of Dickson J. (now C.J.C.) in Jack v. The Queen, [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, [1979] 2 C.N.L.R. 25. The facts of that case were in many respects similar to those in the present one. Jack, and other members of the Cowichan band, were convicted of fishing for salmon during a prohibited period. The prohibition was effected by an order made under the British Columbia Fishing Regulations. The defence was that the prohibition was invalid on a constitutional ground, viz. that Article 13 of the Terms of Union upon which British Columbia entered confederation had "sanctified" a colonial policy of permitting Indians to fish for food without regulation; and that it was therefore not competent to the federal government to regulate that right except for the purpose of conserving the fishery. The judgment of Laskin C.J.C., joined in by five other