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October 17, 1986

File #86/1275

BY COURIER

Ms. Beryl Harris,  
B.C. Aboriginal Peoples  
Fisheries Commission,  
Box 12150,  
#611 - 808 Nelson St.,  
Vancouver, B.C.  
V6Z 2H2

Dear Ms. Harris:

I enclose, as requested, a legal analysis of the cases, R. v. Sparrow and R. v. Adolph. After a thorough search we were unable to find a case called Michael.

As per your request, I am also enclosing a copy of Uukw v. R. in Right of B.C. and A.G. Canada, S.C., July 14, 1986.

Yours truly,

RATCLIFF & COMPANY

  
GARY R. YABSLEY

GRY/jmp  
Encls.

M E M O R A N D U M

TO: THE BRITISH COLUMBIA ABORIGINAL PEOPLES  
FISHERIES COMMISSION

FROM: GARY YABSLEY, RATCLIFF & COMPANY

RE: LEGAL ANALYSIS OF THE SPARROW AND ADOLPH CASES

DATE: OCTOBER 17, 1986

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R. v. Sparrow, (Unreported), County Court of Vancouver,  
December 20th, 1985.

Facts

1. The appellant, Mr. Sparrow, a member of the Musqueam Indian Band, was apprehended on March 30th, 1984, fishing with a 45 fathom net in Canoe Passage, part of the Fraser River Estuary which is within Musqueam tribal territory.
2. He was fishing under the Band's Food Fishery License, which permitted the use of drift nets not exceeding 25 fathoms in length.
3. In 1982 and 1983 Food Fishing Licenses permitted Band members to fish with 75 fathom nets.
4. Mr. Sparrow argued at Trial that the permissible net length had been reduced because of a well-publicized and unsuccessful undercover operation which resulted in 25 Band members being charged with selling food fish. None of the Band members were convicted. He felt Fisheries

officials were being vindictive in reducing the net length, rather than doing it for conservation purposes.

5. On the evidence, the Trial Judge found that the Crown had not proven that the net length restriction was necessary as a conservation measure.
6. Mr. Sparrow was convicted of unlawfully failing to comply with the terms of the Indian Food Fishing License by fishing with a 25-fathom net contrary to Section 12(2) of the British Columbia Fishery (General) Regulations and was therefore in violation of Section 61(1) of the Fisheries Act.

#### Issues

1. Had the aboriginal rights of the Musqueam Indian Band been extinguished?
2. Does Section 35 of the Constitution Act, 1982, grant or revive aboriginal rights?
3. Does the Fisheries Act apply to the Musqueam Band if aboriginal rights exist?

#### Decision

The appeal was dismissed.

Reasons

1. Were the aboriginal rights of the Musqueam Indian Band extinguished?

The Court of Appeal in Calder v. The Attorney General of British Columbia, held that aboriginal rights no longer exist in British Columbia. The Supreme Court of Canada split evenly on the issue of aboriginal rights, leaving the decision of the Court of Appeal unreversed.

Although Judge Lamperson agreed that the tenor of the comments made by the Supreme Court of Canada in the Calder case and the recent case of Guerin v. R. indicate that Native people of British Columbia may well have aboriginal rights, he was bound by the Appeal Court decision in Calder.

3. Does Section 35 of the Constitution Act grant or revive aboriginal rights?

Section 35(1) of the Constitution Act reads:

"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

In deciding this issue, Judge Lamperson agreed with the analysis made by Professor Hogg in his text, Constitutional Law of Canada (2d):

"The word existing in ss. (1) probably has the effect of excluding aboriginal or treaty rights that had before April 17th, 1982 been extinguished by voluntary surrender or competent legislation. In other words, section 35 does not retroactively



annul prior extinguishment of Native rights so as to restore the rights to their original unimpaired condition."

Following this reasoning, Judge Lamperson held that if the defendant had an aboriginal right to fish, that right is subject to the Fisheries Act and Regulations. As to Mr. Sparrow's argument that at the time the Constitution Act was passed, he had the right to use a 75 fathom net and that Section 35 precludes any net size reduction from this date forward, Judge Lamperson held that the terms of the licenses are not frozen to those that existed at the time of the passing of the Constitution Act, 1982.

3. Does the Fisheries Act apply to the Musqueam Indian Band if aboriginal rights exist?

As to this issue, Judge Lamperson held that even if Mr. Sparrow had an aboriginal right to fish, this right was subject to the Fisheries Act and Regulations, following the Supreme Court of Canada decision in Regina v. Derriksan, (1976) 71 D.L.R. (3d) 160.

In that case, Laskin, C.J.C., speaking for the Court, said:

"On the assumption that Mr. Sanders is correct in his submission (which is one which the Crown does not accept) that there is an aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission), we are all of the view that the Fisheries Act, R.S.C. 1970 C-F14, and the Regulations thereunder which, so far as relevant here, were validly enacted have the effect

of subjecting the alleged right to the controls imposed by the Act and Regulations. The appeal is accordingly dismissed."

The Sparrow is being appealed, the hearing is set for early November, 1986.

R. v. Adolph, (Unreported), County Court Yale, February 18th, 1986.

#### Facts

Four members of the Fountain Indian Band in British Columbia were convicted at Trial for contravening Regulations passed pursuant to the Fisheries Act, namely:

1. Victor Adolph, Jr. was convicted of fishing with a net in the Fraser River near Lillooet without carrying a license permitting an exemption to the general August 28th closure.
2. Cyril William Ned was fishing with a net on the Fountain Indian Reserve on August 28th, 1983 and while he had a Food Fish License, the food fishery was closed on August 28th, 1983.
3. Ivan Gabriel Adolph was fishing with a net in the Fountain Indian Reserve and while fishing, did not carry a license.
4. Roger Luke Adolph was convicted of obstructing a Fisheries officer when he was in the process of arresting Ivan Adolph, thereby wilfully obstructing a Fisheries officer in the execution of his duty.

Each Band member appealed his conviction and the appeals were heard together.

#### Issues

1. Does the Royal Proclamation of 1763 apply to the Province of British Columbia?
2. Have the aboriginal rights of the Fountain Indian Band Indians been extinguished by legislation?
3. Does Article 13 of the Terms of Union place a constitutional limitation on the capacity of the Federal Government to legislate with respect to Indian rights?
4. Do Sections 25 and 35 of the Constitution Act, 1982 impose a constitutional limitation on the Federal Crown to legislate in respect of the Fountain Indian Band fishery?

#### Reasons

1. Does the Royal Proclamation of 1763 apply to the Province of British Columbia?

The appellant argued that the Royal Proclamation formally and permanently defined Indian/Crown relations for the present and future and applied to British Columbia at the time British Columbia became a Crown colony. They further argued that the policy of the Royal Proclamation was followed in pre-Confederation British Columbia and that this policy was confirmed in Guerin v. The Queen, [1984] 6 W.W.R. 481.

In Guerin, the Supreme Court of Canada found that the Crown had a fiduciary responsibility to the Musqueam Indian Band and that this fiduciary responsibility had its roots in the concept of aboriginal title and further that the Crown first took this responsibility in the Royal Proclamation.

However, the Judge held that the Supreme Court of Canada in Guerin made it clear that the fact that an Indian Band had a certain interest in land did not itself give rise to this fiduciary relationship, rather, it arose in Guerin because the Band had surrendered parts of its lands to the Crown. He held, therefore, that Guerin v. The Queen does not constitute authority for the argument that the Royal Proclamation of 1763 applies to the Province of British Columbia, and further that he was bound by the British Columbia Court of Appeal decision in Calder that the Royal Proclamation does not apply to British Columbia.

2. Have the aboriginal rights of the Fountain Indian Band Indians been extinguished by legislation?

The Judge thoroughly canvassed the Judgments in Calder et al. v. The Attorney General of British Columbia and concluded that although the Supreme Court of Canada was split on the issue of whether the Nishga's aboriginal title had been extinguished by general land enactments, he was bound by the Court of Appeal Decision in Calder which held that they were. He further relied on the Supreme Court of Canada decision in Regina v. Derriksan, 31 C.C.C. (2d) 575, where the Court held that even if the aboriginal right to fish in British Columbia did

exist and even if the same had not been extinguished, that the Fisheries Act, R.S.C. 1970, and the Regulations thereunder, would subject the aboriginal right to fish to the controls that are imposed by the Fisheries Act and Regulations.

3. Does Article 13 of the Terms of Union place a constitutional limitation on the capacity of the Federal Government to legislate with respect to Indian rights.

On this issue the Judge canvassed the decisions in Jack v. The Queen, 48 C.C.C. (2d) 246 and Regina v. Adolph, 47, B.C.L.R. 330.

Article 13 of the Terms of Union reads:

"13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies."

In Jack, Laskin, C.J.C., stated at page 250:

"...I see nothing in Article 13 that could possibly operate as an inhibition on Federal legislative power in relation to fisheries. Whatever policy may have existed in pre-Confederation British Columbia of toleration of Indians fishing for food in rivers or other waters of Vancouver Island and of British Columbia before and after that Island became part of the Colony, there does not appear to have been any basis in law to ordain the policy. Nor can any legal sanction for such Indian fishing rights be spelled out of Article 13."

In Regina v. Adolph, Taggart, J.A., following the decision in Jack v. The Queen, held that in the absence of language within Article 13 limiting powers of Parliament to legislate in relation to Indian fishing rights, there is no constitutional limitation on the Federal legislative power in relation to Indian fishing rights in British Columbia.

The Judge held that he was bound by the decisions in Jack v. The Queen and Regina v. Adolph.

4. Do Sections 25 and 35 of the Constitution Act, 1982, impose a constitutional limitation on the Federal Crown to legislate in respect to the Fountain Indian Band fishery?

On this issue the Judge, following Professor Hogg's interpretation of the word "existing" in Section 35 and the Supreme Court of Canada decision in Jack, held that if an aboriginal right to fish does exist in British Columbia, it exists subject to regulations set out in

the Federal Fisheries Act, and more specifically to the British Columbia Fishery (General) Regulations.

The appellants in this case have filed notice to appeal the decision.

