R. V. BOB

Unreported.

British Columbia County Court, Diebolt J., 2 August, 1979.

F. Kaatz for the Crown
Miss L. Mandel for the Accused
S. Rush for the Accused

The accused was charged with unlawfully fishing in contravention of a closure effected under the Fisheries Act and Regulation. The accused claimed he had a lawful excuse to fish because he was fishing pursuant to a reserve right, not an aboriginal or treaty right. That under the terms of the Indian Act the Indian Reserve Commission in 1870 established a policy recognizing the Indian right to fish on the site in question; a right which was subsequently acknowledged by allotment in 1881 and confirmed in 1916. Therefore, provisions of the Indian Act prevail over the Fisheries Act and Regulations. Alternatively the exclusive right to fish is a property right which cannot be expropriated by application of the Fisheries Act without express words and adequate compensation.

Held: (Diebolt J.)

1. An exclusive right to fish in the area was established, however, such a right does not render the remainder of the Fisheries Act and Regulations inoperative.

2. An exclusive right to fish is not synonymous with an absolute control over the resource.

3. Whatever the right it would still be subject to federal regulation for conservation purposes.

4. Here there is no expropriation of a property right but a regulation of the time of fishing.

5. Accused found guilty.

* * *

THE COURT: (Oral)

The facts in this case are not in dispute. At approximately 12:30 p.m., July 17, 1978 several Federal Fisheries officers attended at Bridge River at a point three miles north of Lillooet, British Columbia, and observed the Accused, Bradley Bob, fishing. The Accused, a Native Indian and member of the Fountain Indian Band was utilizing a dip net at this fishing site and was seen catching Sockeye salmon which was then taken by a native boy towards a group of natives who were gathered in a circle near a fire a short distance from the fishing site. The fish was seized and Bradley Bob,

who did not produce a fishing permit, was issued an Appearance Notice alleging a breach of Section 19 of the Fisheries Act.

The Bridge River was closed in this area for food fishing at this time by Order of Fisheries Officer D.D. Aurel, pursuant to Section 4 of the B.C. Fishing (General) Regulations. The public notice reflecting this Order is Exhibit "1" in these Proceedings.

The closure of this area was effected for conservation purposes according to Exhibit Number "1".

The Fisheries officers, some nine of them, had come from all over the Province to assist the local Fisheries officer at whose home they had gathered before travelling to the fishing site. There is no question that the Fisheries officers could sense the natives' objection to this closure, and I am satisfied both the Fisheries officers and the native people expected a confrontation of some sort. There was some chanting, singing, and drum beating in the circle of natives, and some members of the news media were standing by. The Indians' objection to the closure was in no small measure due to the fact that for the past two years they have not caught enough fish to satisfy their food requirements.

The fishing site used by Bradley Bob on this occasion is a commonly used fishing rock located at a constricture in the river, at the confluence of Bridge River and Fraser River and is adjacent to an Indian Reserve on both sides of the river.

This particular closure indicated in Exhibit "1", was an extra two-day closure of the river in addition to the usual three-day per week closure, and was imposed in the interests of conservation for the Early Stuart Sockeye run which the Indian people considered to be a valuable run for food fishing purposes.

Much evidence was heard during this four-day Trial to demonstrate the value of fishing to the Indian people and the manner in which they have relied upon their fishing rights. There is no question that the fishing is an integral part of the Indian way of life, and it goes to the very heart of the Indians' existence. Fishing is a staple product of the Indian diet, and fishing is a means of educating the young by passing down traditional methods of fishing from generation to generation. The fishing camps located close to the fishing rocks nearby are used to process fish, teach the young ones the various methods of processing fish and tell stories of the tribes and generations of Indians before them, all of this around the campfire, and all of which is a method of extending the Indians' cultural tradition from generation to generation.

The Indian people have a great respect for their fish, their fishing rocks and the preservation of their fishery. There was evidence to demonstrate the Indians' attempt to manage and conserve their fishery.

The Defence argues that Bradley Bob had a lawful excuse to fish because he was fishing pursuant to a reserve right, not an aboriginal or treaty right, which has been established in law, thus giving him exclusive right to fish in this area at this time unaffected by the closures under the Fisheries Act and Regulations which Defence Counsel says does not apply, but rather that the Provisions of the Indian Act prevail.

The "exclusive right" referred to is the exclusive right mentioned in Section 7 of the Fisheries Act.

The historical background for the Defence assertion of an exclusive right to fish was given most eloquently and thoroughly by Dr. Barbara Lane. Her evidence, coupled with Exhibit "23" which she co-authored described the Indian Reserve Commission from its inception. Exhibit "23", entitled Recognition of B.C. Indian Fish Rights by the Federal-Provincial Commission, is a report prepared for the Union of B.C. Indian Chiefs, by Robert B. Lane and Barbara Lane, dated September of 1978. I refer firstly to the instructions mentioned in the report given to the Dominion Commissioner, Mr. Anderson, dated August 25, 1870; at page six,

> "While it appears theoretically desirable as a matter of general policy to diminish the number of small reserves held by an Indian Nation, the circumstances will permit them to concentrate them on three or four large reserves, thus making them more accessible to missionaries and school teachers, you should be careful not even for this purpose to do any needless violence to existing tribal arrangements and especially not to disturb the Indians in their villages, fishing stations, fur trading posts, settlements or clearing, which they may occupy and to which they may be especially attached, which may be of interest to retain. Again, it would not be politic to attempt to make any violent or sudden change in the habits of the Indians or those who are now engaged in fishing, stock raising, or any other profitable branch of industry should be diverted from their present occupations or pursuits in order to induce them to turn their attention to agriculture. They should rather be encouraged to persevere in that industry or occupation they are engaged in, and with that in view, should be secured in position of the villages, fishing stations, fur posts and other settlements or clearing which they occupy in connection with that industry or occupation, unless there are some special objections to so doing, as for example when the Indian settlement is within an objectionable proximity to a city, town or a village of white people."

A policy not unlike that directed to Commissioner Anderson was also given to Mr. McKinley, the Provincial Commissioner, on the 23rd of October, 1876, and appears on page six of Exhibit "23",

> "You will avoid disturbing them in any of their proper and legitimate associations whether of the chase or fishing or pastoral or agricultural, and you will seek to avoid in all cases either disturbing their minds or unnecessarily raising their hopes."

These comments are also found in Exhibits "7" and "9" in these Proceedings. Exhibit "23" relates the history of the Commission commencing with a three-man Commission which was dissolved and then Commissioner Gilbert M. Sproat was then sole Commissioner for two years until Peter O'Reilly was appointed. Mr. O'Reilly's instructions are described in Exhibit "14", and in the Order-in-Council dated July 19, 1880 and Exhibit "37" in these Proceedings.

Referring to that Order-in-Council on page three, it states,

> "W. Truck suggests that the Reserve Commission, instead of being placed as at present under the direction of the Indian Superintendent for British Columbia, should act in his own discretion in the furtherance of the joint suggestions of the Chief Commissioner of Lands and Works, representing the Provincial Government and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and the reserves to be established, and that the actions of the Reserve Commission should in all cases be subject to the confirmation by those officers and that in failing their agreement, any and every question and issue between them should be referred for settlement to the Lieutenant-Governor whose decision should be final and binding."

O'Reilly's allotment, and in particular the Bridge River allotment which is described in Exhibit "15" and upon which the Defence relies, required confirmation by the Chief Commissioner of Lands and Works for the Provincial Government, and the Indian Superintendent representing the Dominion Government. Exhibit "15" describes O'Reilly's allotment to the Bridge River Indians of September 1, 1881 as follows:

> "The exclusive right of salmon fishing on both sides of the Fraser River from a quarter mile south of Bridge River upstream to the Fountain Indians' Fishery, a distance of about three miles."

There is no doubt that this allotment includes the site where Bradley Bob was observed fishing on July 17, 1978.

Defence Counsel says that Exhibits "18" and "19" together with the recent documents received and now exhibited being the Minutes of the Decision of the Bridge River Decision, the Affidavit of David Borthwick, dated July 24, 1979, and the Schedule of Indian Reserves in the Dominion for the

year ended March 31, 1913, demonstrate confirmation by both the Federal and Provincial Governments through their respective agents aforementioned.

Clearly, this was the result that was intended by our forefathers, and it seems the logical and legal result of the documentation. Additionally, to the extent that it had the authority to do so, the McKenna-McBride Commission in 1916 confirmed Mr. O'Reilly's allocations. Accordingly, there will be a finding that an exclusive right to fish does exist as the result of the allotment by Peter O'Reilly on September 1, 1881, and described in Exhibit "15" of these Proceedings.

That, however, does not end the matter. The Defence argues that the exclusive right of fishing as allotted by O'Reilly is the same right as mentioned in Section 7 of the Fisheries Act and thus the Minister is forbidden to issue licences resulting in Section 29 of the Regulations becoming inoperative, vis a vis Indians. This means, according to Miss Mandel's argument, that the Fisheries Act is subordinate to the Indian Act.

Defence concedes that the Federal Government could have closed the river on this occasion under the Provisions of the Indian Act, which it is argued, contains all the machinery for the management of Indian fisheries. Obviously, and understandably, the Indian people may feel more comfortable with the belief that under the Indian Act they would have greater input and control. The evidence in this case discloses some attempt by the Indians to manage their fisheries and practice some form of conservation. No one would dispute that the Indian does not respect the Indian fishery, nor would he wish to see this exhaustible resource diminish, for after all, the fishery is an integral part of his existence, as aforementioned. There was not, however, evidence to support more than an embryonic attempt to provide a comprehensive management and conservation programme. No one can dispute the need for conservation. If each Indian Band, for example, had its own management and conservation programme, the result could be conflicting management and conservation regulations which could then result in a confused and ineffective conservation plan which ultimately could ruin the entire fishery for all purposes. This would, inter alia, adversely affect the Indians' way of life. Surely, an overall scheme under the Fisheries Act with technical input and expertise gathered from many sources, including the Indian people, would be more effective and result in a greater assurance of protection for this very valuable resource.

Returning then to the exclusive right to fish, this Court is not of the view that the existence of such a right renders the remainder of the Fisheries Act and regulations inoperative, vis a vis the Indian people. An exclusive right to fish is not synonymous with an absolute control over the resource. Moreover, the special licencing power for food fishing found in Section 29 of the Fishing Regulations flows from Section 34 of the Fisheries Act, and not Section 7. This Court is inclined to the view that the "licences" referred to in Section 7 are different in nature than those referred to in Section 29 of the Regulations.

The recent case of Regina versus Jack, the decision dated July 18th, 1979, is the latest pronouncement from the Supreme Court of Canada. Although this case was considered by Heard J. in the first instance in the Nanaimo Provincial Court to be one concerning an aboriginal right, the Chief Justice in his reasons said,

> "Hence even if the fishing rights claimed were established, they would have been properly subordinated to conservation of the fisheries in the particular river."

In referring to Mr. Justice Dickson's reasons in Regina vs. Jack, at page 12, he said,

> "What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of the fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit."

At page 13, he states further,

> "What protection, then is afforded Indian fishing by article 13 of the 'Terms of Union'? At a minimum, one can say that 'a policy as liberal' requires no discrimination against the Indian fishery as opposed to the commercial or sports fishery. I also think that one could go further -- the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents. Thus, when it comes time to take into consideration the emergence of commercial and sports fisheries, one could suggest that 'a policy as liberal' would require clear priority to Indian food fishing and some priority to limited commercial fishing and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource -- effectively unknown to the regulatory authorities prior to 1871 -- should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen."

On page 15, he says,

> "Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and

> necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of argument."

On page 16, he states,

> "But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by article 13, just as such conservation measures override other taking of fish."

In Derrickson vs. the Queen, [1976] 6 W.W.R. 480, our Chief Justice says in his rather short reasons and I will read it in its entirety,

> "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. F-14, 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."

This case was one involving aboriginal rights. However, Mr. Justice Robertson in his reasons of the B.C. Court of Appeal says at page 4,

> "Equally I cannot see that the language of the regulations under the Fisheries Act in question here admits of any exceptions. This would in itself be sufficient to dispose of the matter, but, as in the case of Regina v. Sikyea, there is an additional reason for thinking that the regulations under the Fisheries Act apply to Indians, notwithstanding their rights (if any) under the Proclamation."

Further on the same page, after a reference to Section 32 of the Indian Act, he says,

> "The regulations were obviously intended to apply generally to Indians."

And on page five, Mr. Justice Robertson reviewed and referred to a decision of Regina vs. Francis, and Mr. Justice Hughes' comments at page 195,

> "There can be no doubt that since the decisions of the Supreme Court of Canada in Sikyea v. The Queen, and R. v. George, legislation of the Parliament of of Canada and Regulations made thereunder, properly within s.91 of the B.N.A. Act, 1867, are not qualified or in any way made unenforceable because of the existence of rights acquired by Indians pursuant to treaty."

The Supreme Court of Canada in Kruger and Manual v. The Queen made further comment on Indian fishing rights. The case is reported [1976] 4 W.W.R. 300. Interestingly, it was again Mr. Justice Dickson's reasons, and at page 305 he says,

> "However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulations and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection and statutory protection, Indians are brought within Provincial regulatory legislation."

The issue as to whether the Indian Act or the Fisheries Act prevails was raised in Rex vs. Charley, County Court, Vancouver, British Columbia, December 14th, 1925, decision of Cayley J. Although the facts are somewhat different, Cayley J.'s comments on page three are interesting,

> "In the absence of all decisions on the subject and as I am told that this case is merely a test case which may proceed to a higher court, I give the decision pro forma (although well aware that this is more an opinion than anything else) that the Indian Act is not an exclusive code and that there is no ground for the contention that no Act of Parliament of Canada can apply to Indians except as found within the four corners of the Indian Act; that other acts of Parliament of Canada have equal force with the Indian Act in dealing with Indians unless exception is made; that therefore the Fisheries Act is an Act competent for the Dominion Parliament to pass and the only question is whether it any way violated the spirit of Section 13 of the Act of Union and that is a question which does not affect the right of the Parliament to pass the Fisheries Act, although it might suggest a doubt as to whether it was an altogether right thing to do in view of Section 13, of the Act of Union."

Interestingly, the tenor of that case seems to have been followed by the recent Supreme Court of Canada decision. It seems that the tenor of all of the comments referred to herein would seem to indicate that whatever the right, it would be subject to regulation for conservation purposes.

Because this Court has found an exclusive right to fish does exist, it is unnecessary to consider the very novel argument that such a right exists because of the principles of property law and in particular the ad medium filum-aquae rule regarding the ownership of the beds of fresh water lakes and rivers and supported in Canadian Explorations Limited vs. Rotter, [1961], S.C.R., page 15. The appellant in that case, however, was the holder of a Certificate of Indefeasible Title to the particular parcel of land and the case at bar involves Indian reserve lands. It would seem to me that this distinction would make a very significant difference to the result.

Finally, Defence argues in the alternative that the exclusive right to fish is a property right and the application of the Fisheries Act and Regulations results in an expropriation of the Indian rights and this cannot be done except expressly and not indirectly, and in any event not without proper compensation.

The answer to that argument is found, it seems again, in Mr. Justice Dickson's reasons in Kruger and Manuel vs. The Queen (supra) at page 302 and 303,

> "The third point can be disposed of shortly. The British Columbia Court of Appeal was not asked to decide, nor did it decide (as I read his Judgment) whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibition affects previously enjoyed rights in ways not being compensatory. The Wildlife Act illustrates this point. It is aimed at wildlife management, and to that end regulates the time, place and manner of hunting game. It is not directed to the acquisition of property."

There is no expropriation of the right (indeed if such a property right exists) but a regulation of the time of fishing as envisaged by the reasons of Mr. Justice Dickson in Kruger and Manuel vs. The Queen, (supra). So long as the priorities as earlier indicated in Mr. Justice Dickson's reasons in Regina vs. Jack are maintained, and any closure of the river for conservation purposes does not "fall primarily upon the Indian fisheries", then it cannot be said that the right is expropriated.

For the foregoing reasons, Bradley Bob has not established a lawful excuse for his fishing on the day in question in contravention of the closure effected under the Fisheries Act and Regulations, and accordingly, and somewhat reluctantly, this Court finds him guilty as charged.

(COURT CONCLUDED.)