C.A. No. 108481

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. Cheticamp Fisheries Co-Operative Ltd., 1995 NSCA 24

BETWEEN:	
HER MAJESTY THE QUEEN Appellant	Michael J. Wood, John J. Ashley and Pamela J. Clarke-Priddle for the Appellant
- and -	
CHETICAMP FISHERIES CO-OPERATIVE LIMITED, HYLAND ANDERSON LOBSTER SALES LIMITED, JOHN ANDREW BOYD, DANIEL BOYD, GERARD MACEACHERN, VINCENT NOVAK, RONALD BOYD, LEOPOLD CHIASSON, JOSEPH BOUDREAU, GARY MCKAY, BERNARD DEVEAU, JAMES H. MACDONALD, RICKY FRASER, CYRIL JEAN BURNS, JOHN BERNARD POWER, DONNY DEVEAU, SIMON BOURGEOIS, GARRIE B. MACLEAN, RICHARD MACINNES, ALEXANDER BEATON Respondents	Joel Fichaud, Q.C. and Douglas A. Caldwell, Q.C. for the Respondents Appeal Heard: February 7, 1995 Judgment Delivered: March 23, 1995

THE COURT: The appeal is allowed, the decision of the trial judge set aside and the respondents' action dismissed with costs of the trial and of the appeal per reasons for judgment of Chipman, J.A.; Hallett and Pugsley, JJ.A. concurring.

CHIPMAN, J.A.:

This is an appeal from a judgment in the Supreme Court awarding damages to the respondents for the tort of interference by the Department of Fisheries and Oceans of Canada (D.F.O.) with "economic relations" of the respondents.

The respondents fall into two categories: (1) fishermen (ground fish or snow crab) and (2) fish buyers and processors. The fishermen reside in Pictou and Antigonish Counties and Cape Breton Island. They fish in the southern region of the Gulf of St. Lawrence known as the Gulf Region and particularly in the Gulf Area thereof. The buyers carry on business in those areas of Nova Scotia and one of them is also a fisherman.

The action of the respondents was for damages in the amount of dockside monitoring fees paid in 1991 and 1992 which they claim were imposed illegally upon them by D.F.O.

D.F.O. is responsible under the **Fisheries Act of Canada**, R.S.C. 1985, c. F-14 and Atlantic Fisheries Regulations made thereunder for the management of the Atlantic Fishery and in particular, the fishery in the Gulf Region. Over the years, it was found necessary to impose quotas limiting catches in the Atlantic Fishery. Since the imposition of quotas, misreporting of catches by fisheries has been a problem threatening the fish stocks. The first quota system imposed by D.F.O. simply placed an overall quota on the seasonal amount of certain species of fish that could be caught in a specific area. When the quota was reached, the fishery was closed. The trial judge found that this method of imposing a quota was unsatisfactory to the fisherman because it created an undesirable "race for the fish". In due course, D.F.O. introduced a system of Individual Quotas (I.Q.) whereby each fisherman was allocated a limited catch for the whole of the
fishing season. The benefit of this to the fisherman was the assurance of being able to fish for the allocated quota and the ability to select within a given season a time for fishing convenient to the fisherman.

With the introduction of I.Q., an improved system of monitoring was required to ensure that persons did not exceed the amount of fish they were allowed

by their licenses to catch. Generally the move toward I.Q. and tighter monitoring was supported by the fishing industry. D.F.O. had always expressed the view that the increased levels of monitoring required by the I.Q. should be paid for by the industry.

Monitoring was commenced in the Gulf Region in 1990. Cost was not a great concern at that time since the major portion of the financing for the system that year was covered by government grants.

By 1991, however, D.F.O. considered the industry should be responsible for paying most of the cost of dockside monitoring. Accordingly, D.F.O. unilaterally decided to impose dockside monitoring fees upon the fishermen. These fees were not paid directly by the fishermen to D.F.O. D.F.O. entered into an agreement with Inverness County Industrial Commission (I.C.I.C.) whereby the latter provided dockside monitoring pursuant to a schedule of fees furnished by D.F.O. which were payable to I.C.I.C. by the fishermen and buyers. Based on the estimated cost of the monitoring by I.C.I.C., the fishermen were to pay the administration costs and the buyers were to pay the costs of the dockside monitors who weighed and checked the fish as it was off-loaded.

Fishermen obtained a license to fish upon payment of the prescribed fee but were not actually permitted to fish until they had obtained a document referred to as "conditions of fishing". In the Gulf Region, the conditions of fishing would only be issued upon production by the fishermen of an official receipt from I.C.I.C. indicating that an upfront fee had been paid for dockside monitoring. The dockside monitoring program required the payment of fees for off-loading fish and also required the fishermen to off-load their catch only at approved sites displaying a valid "Off-Loading Site Authorization Certificate" and only in the presence of the dockside monitors. Conditions of fishing for licenses specified that unloading could only take place at sites displaying the "Off-Loading Site Authorization Certificate". Proof of payment of

monitoring fees, however, did not appear as a requirement on the face of such conditions of fishing.

Buyers were forced to participate in the dockside monitoring program by paying an upfront deposit to the monitoring company for an Off-Loading Site Authorization Certificate. Only upon production of such a certificate at an approved site could they take delivery of fish.

Credit was ultimately given to the fishermen and buyers for the upfront payments against fees payable by them during the year.

In 1991, the two respondent buyers paid fees of $8,654.37 and $1,764.75 respectively and most of the respondent fishermen paid either $275.00, $725.00 or $1,000.00. The total paid by buyers in the Gulf Area in 1991 was $248,915 and the total paid by fishermen was $614,620.00.

While as the trial judge found, the majority of fishermen were in favour of a dockside monitoring program, they were not in favour of paying for it. Fishermen and buyers mounted considerable opposition to the payment of such fees and in response, D.F.O. paid for dockside monitoring in the early months of 1992. By the end of May, however, D.F.O. announced to the industry that unless the fishermen themselves put in place a dockside monitoring program by June 1, 1992 there would be no further fishing in the area. In response, Ivan Deveau of the respondent Cheticamp Fish Co-Operative Limited assisted in locating a company to provide dockside monitoring service. Although some of the procedures were changed, the fishermen were informed that a fishing license and conditions would not be issued unless they agreed to pay dockside monitoring fees and the buyers were informed that they could not off-load the fishing boats without paying these fees.

The trial judge found that with respect to the fees paid both in 1991 and 1992, the respondents were obliged to pay them in order to operate a commercially

viable fishing business.

The trial judge reviewed several pieces of legislation and in particular, the **Fisheries Act** and the Regulations thereunder dealing with fishing licenses and fees. In his view, none of the legislation authorized D.F.O. to impose dockside monitoring fees. Government must, he held, have clear statutory authority in order to impose monetary charges upon an individual. The mere fact that such fees were paid to a third party as a condition of licensing made no difference, as the Minister could not legally do indirectly that which he had no power to do directly. The trial judge found that in the case of the buyers there was no federal legislation prescribing fees payable by them. D.F.O. had unilaterally decided that as the buyers were an integral part of the fishing industry they too should contribute to the cost of dockside monitoring since the program was beneficial to the whole of the industry. However beneficial dockside monitoring might be, there was not in his view authority in D.F.O. for imposing any type of fees upon the buyers. They had no choice but to pay the fees because they could not carry on commercially viable businesses without the supply of fish which was available only at authorized unloading sites. Thus in the opinion of the trial judge, D.F.O. had no legal power to charge fees for the Off-Loading Site Authorization Certificate.

As to the fishermen, although the Minister had a discretion to issue a license, such must be in a manner consistent with the law, and in particular the **Fisheries Act** and the Regulations. Only the Governor in Council had the power to prescribe the fees to be charged for licenses and to make regulations respecting the terms and conditions under which a license might be issued.

The trial judge concluded that D.F.O.'s requirement that fishermen and buyers pay fees to dockside monitoring companies as a prerequisite to obtaining licenses to fish, quota allocation and Off-Loading Certificates was not authorized by law and therefore illegal.

The trial judge then observed that since dockside monitoring fees were not paid to D.F.O. no action lay against D.F.O. for the return of fees paid. The respondents could recover the amount of the fees only if they were entitled to recover damages representing them. They were entitled to damages only if the illegal actions of D.F.O. amounted to tort by a Crown servant for which Her Majesty would be liable by virtue of sections 3 and 10 of the **Crown Liability and Proceeding Act**, R.S.C. 1985, c. C-50. The respondents contended that the actions of D.F.O. constituted three different torts: (1) interference with economic relations; (2) intimidation and (3) abuse of public authority such as was found in **Roncarelli v. Duplessis** (1959), 16 D.L.R. (2d) 689 (S.C.C.).

The trial judge reviewed the nature of the tort of "interference of economic relations" and considered that it comprised three elements: (1) unlawful conduct by the defendant; (2) carried out deliberately with the intention of causing damage to the business of the plaintiffs; and (3) damage thereby caused to the business of the plaintiffs.

The trial judge then referred to his finding that the scheme requiring the payment of dockside monitoring fees was unlawful in the sense that it was unauthorized by law even if it was not a violation of a specific provision of law. He then dealt with D.F.O.'s argument that its motive was not to cause harm but rather to carry out the legitimate departmental goals of fish conservation and resource management in a manner consistent with the policy of government fiscal restraint. The trial judge said that what must be considered is not D.F.O.'s motive but rather its conduct in forcing the respondents to participate in a scheme which it had no lawful power to impose. The trial judge held that the required intent for the second element would be satisfied if D.F.O.'s officials knew that their actions in imposing dockside monitoring fees were unlawful, or they were reckless as to whether or not such actions were unlawful. The

trial judge opined that it may be questionable whether D.F.O. knew their actions were unlawful. However their conduct in proceeding with the scheme in the face of advice given to them that it was not legally authorized, and with the knowledge that there were other options for raising monies that were lawful, satisfied the element of recklessness required for ill motivation. The trial judge referred to the options for the lawful raising of monies which D.F.O. rejected as too inconvenient, the advice received from numerous quarters that the scheme was not authorized as well as an admission by the assistant deputy minister of fisheries to this effect. From this, he concluded that the conduct of D.F.O. officials in forcing dockside monitoring fees was deliberate and done with the intention of causing damage to the respondents, thus satisfying the second required element.

As to the third requirement element, this was satisfied since the respondents in fact paid the fees and thus incurred damage or loss to that extent as a result of D.F.O.'s conduct.

The trial judge therefore found that D.F.O. committed the tort of "unlawful interference with economic relations" and was liable in damages to the extent of the fees paid. Even though some of the respondents had signed agreements to pay, they had not done so voluntarily. Each of the respondents was entitled to recover the amount of dockside monitoring fees paid.

It was not necessary for the trial judge to consider whether D.F.O. had also committed the tort of intimidation or breached the principles set out in **Roncarelli v. Duplessis, supra**. The respondents have raised these two issues by Notice of Contention.

The issues on this appeal are therefore whether the actions of D.F.O. amounted to any of the referenced three torts against the respondents.

UNLAWFUL INTERFERENCE WITH ECONOMIC RELATIONS:

Counsel on this appeal did not dispute that this tort consisted of the three elements referred to by the trial judge. In **Clerk and Lindsell on Torts** 16 ed. (London: Suite and Maxwell 1989), the author says at p. 850:

> "There exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another. In such cases the plaintiff is availed of a cause of action for this "clearly recognized" but "relatively undeveloped tort" which is different from those so far discussed."

This tort is best known by the branch thereof that deals with interference with contractual relations.

In my opinion, the actions of D.F.O. in imposing the dockside monitoring fees were unlawful in that they were not authorized by law. The trial judge's conclusion in this respect was correct. Such action amounted to a misuse of the statutory power to license fishing. The scheme embarked upon involved raising money from the buyers and the fishermen to provide a service for which they were not willing to pay. Such a misuse of power on the part of D.F.O. certainly cannot be commended however laudable its objective. I agree that the first element of the tort was established by the respondents.

As to the second element - the use of the unlawful means with the object and effect of causing damage to another - I agree that what must be looked at is the intention and not the motive of the defendant where there is any difference between the two.

The intention to cause injury is an essential element of this tort. **Clerk and Lindsell, supra**, continue the discussion at p. 851:

> "So, where the defendant commits an actionable wrong, such as inducing a breach of contract by X, or committing, authorizing or procuring a breach of copyright, deliberately to harm the plaintiff, he commits the tort. So too, where A perpetrates deceit upon B, intending to cause damage to C, he is liable to C whether or not damage is also suffered by B (the illegal means were in their nature actionable even if

> B's cause of action was not complete). But where a defendant union brought its members out on strike in breach of employment contracts in a dispute with the employer, who was consequently unable to fulfil functions under statute to the damage of the plaintiff abattoir owners, they could not sue the union because the damage, though an unavoidable byproduct of the strike, was not the consequence of any intention to injure them. The "purpose or intention of inflicting injury on the plaintiff" is an essential criterion of the tort. This has been repeatedly affirmed both in the English and the Commonwealth decisions; the move from intentional to foreseeable injury is "not a step but a leap"."

So, in **Van Camp Chocolates Limited v. Aulsebrooks Limited** (1984), 1 N.Z.L.R. 354 the New Zealand Court of Appeal affirmed that the intent to injure was an essential ingredient of the tort. The court said at p. 360:

> "If the reasons which actuate the defendant to use unlawful means are wholly independent of the wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far."

In **Barretts and Baird (Wholesale) Limited, et al v. I.P.C.S., et al** (1987), IRLR 3. Henry, J. of the High Court of Queen's Bench Division in England dealt with an application to discharge an ex parte injunction restraining the defendants from interfering with the business of the plaintiff abattoir owners. The Meat and Livestock Commission was a statutory body helping to maintain guaranteed prices for fat stock and administering subsidies under the E. E. C. Common Agricultural Policy. M.L.C. employed fat stock officers based at private abattoirs to deal with the certification process relating to M.L.C.'s work. I.P.C.S., after balloting its members, carried out a number of one day lightning strikes. The plaintiff abattoir owners secured an ex parte injunction against the union from interfering with the business of the plaintiffs by such strike action as would cause M.L.C. to be in breach of its statutory duties, so as to cause damage to the plaintiffs.

On the hearing to extend the ex parte injunction, Henry, J. held that while

there was an arguable case that the breach by the fat stock officers of their own contracts of employment with M.L.C. was an unlawful means for the purpose of the tort of interfering with business, there was no arguable case that such officers had the intention to injure the plaintiffs. Henry, J. discussed the nature of the tort of interfering with business relations at page 6, paragraph 28:

> "I come then to the first tort - interference with the plaintiff's trade or business, including his contractual relations with his employees, by unlawful means. This is now a clearly recognised tort (see Lord Reid in **Stratford v. Lindley** (1965) AC 269, and Lord Diplock in **Merkur Island Shipping Corp v. Laughton**, [1983] IRLR 218). The basic ingredients of that tort are common ground; first that there should be interference with the plaintiffs' trade or business (there clearly is such interference here); secondly, that that should be the unlawful means, that is in issue in this case; thirdly that that should be with the intention to injure the plaintiffs, that too is in issue in this case; and fourthly, that the action should in fact injure him. It is common ground that the plaintiffs have been injured by the Fatstock Officers' action in this case."

Dealing with the ingredient of intent to injure Henry, J. said at paragraph 66:

> "The next necessary ingredient in this still relatively undeveloped tort of interfering with the trade or business of a person by unlawful means is what we have called the 'intent to injure'. That is useful shorthand but insufficiently precise to be useful as a legal test here. To make an individual striker liable in tort to any third party damages by that strike the test, in my judgment, must in Lord Diplock's words in **Lonrho Ltd. v. Shell Petroleum (No. 2) supra**, be that the striker's predominant purpose must be injury to the plaintiffs rather than his predominant purpose being his own self-interest. Perhaps essentially the same test is expressed slightly differently by the Court of Appeal in the New Zealand case of **Van Camp Chocolates Ltd. v. Aulsebrooks Ltd.** (1984) 1 NZLR 354 where (on facts which need not concern us) the plaintiffs sued for

interference with their trade or business by unlawful means, namely, breach of confidence, claiming damages for lost sales and lost sales reputation. A preliminary point of law was argued as to the necessary intent to injure the plaintiffs necessary to establish the tort. It was there said:

> 'In principle, as we see it, an attempt to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct. If the defendant would have used the unlawful means in question without that intent, and if that intent alone would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. . ."

And at paragraph 69 Henry, J. said:

> ". . . There was no evidence of any independent, let alone predominant, desire to injure the plaintiffs at whose premises they work. Naturally, the effect of their withdrawal of their labour will damage the plaintiffs. Naturally, the union, when sending out the ballot papers, will refer, with apparent satisfaction, to the 'major disruption caused by the first one-day stoppage'. But the primary purpose of the breach of their contracts of employment by the FOs was to seek an improvement in their pay and conditions. Clearly, damage to the various plaintiffs was an unavoidable by-product of that withdrawal of labour and was a readily foreseeable consequence and, perhaps, in the case of some FOs, a not undesired consequence on the basis that the greater the disruption caused the greater the pressure for a satisfactory

> settlement with the MLC and the sooner the return to normal working. But there is no evidence to suggest that the FOs would not have struck if their industrial action had not injured these plaintiffs. On the evidence the desire to strike was the cause of the injury to the plaintiffs rather than the desire to injure the plaintiffs being the cause of the strike... ."

In **Copyright Agency Ltd. v. Haines**, [1982] 1 N.S.W.L.R. 182 McLelland, J. said at p. 193:

> "The proposition sought to be gained from the English cases is that it is an actionable tort 'if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit' (**Acrow (Automation) Ltd. v. Rex Chainbelt Inc.**, [1971] 1 WLR 1676 at p. 1682; [1971] 3 All ER 1175, at p. 1181, quoted in **Carlin Music Corporation v. Collins**, [1979] FSR 548, at p. 552), or more succinctly: 'A man who is carrying on a lawful trade or calling has a right to be protected from any unlawful interference with it': **Ex parte Island Records Ltd.** [1978] Ch 122, at p. 136. No such general proposition can however stand with the decision of the House of Lords in **Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)** [1981] 3 WLR 33, at p. 40; [1981] 2 All ER 456, at p. 463, where Lord Diplock, with whose speech all other members of the House agreed, referred to the rule which he said Lord Denning MR appeared to enunciate in **Ex parte Island Records Ltd**. 'that whenever a lawful business carried on by one individual in fact suffers damage as the consequence of a contravention by another individual of any statutory prohibition the former has a civil right of action against the latter for such damage', and said that he was unable to accept that this is the law. If the wide general proposition stated in the earlier English cases is not a valid proposition of law in so far as it would embrace acts unlawful because they are prohibited by statute, it cannot in my opinion be accepted as a valid proposition of law at all.

. . .

> However, if there is such a general principle of tortious liability, it seems to me that one essential criterion of its application must be the existence in the mind of the wrongdoer of a purpose or intention of inflicting injury on the plaintiff. No such purpose or intention is made out in the present case."

These cases support the conclusion that both in Great Britain and in other parts of the Commonwealth there is a requirement that the purpose or intention of the unlawful conduct at issue must be to inflict injury upon the plaintiff. It must be more than just an incidental or foreseeable result of the conduct.

In **Gerrard v. Manitoba** (1992), 98 D.L.R. (4th) 167, the plaintiff's claim against the Manitoba government was stated by their counsel on argument to be that the Executive Director of the Manitoba Agricultural Lands Protection Board maliciously interfered in the economic or trade relations between the plaintiffs and prospective purchasers of farm lands owned by the plaintiffs. The Board had power to grant exemptions to a prohibition against a sale of agricultural lands to non-residents. The Executive Director of the Board, Muirhead, did not consider the proposed purchasers of the plaintiff's property were satisfactory from an agricultural standpoint, and he recommended to Canadian immigration authorities that the purchasers not be granted resident status. On an appeal from a dismissal of the plaintiff's action, Scott, C.J.M. stated at p. 172:

> "The law is clear that for the tort of interference with economic relations to be found:
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> > 'Malice, in the sense of spite or ill-will, is no longer an essential element. But the aim and purpose of the defendant's conduct is material in so far as it bears on whether he acted with the necessary intent of procuring a breach of contract in order to strike at the plaintiff.'
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> (Fleming, **The Law of Torts**, 6 Ed. p. 654). In other words, the conduct must be targeted at the particular plaintiff."

Scott, C.J.M. then observed that the law was essentially similar with respect to the tort of misfeasance in public office. After reviewing the evidence he said at p. 173:

> ". . . Similarly, with respect to other alleged evidence of malice or an abuse of his position by Muirhead, there is ultimately a lack of convincing evidence that he improperly intruded into the two transactions in question for the purpose of causing injury to **Gerrard**."
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> At p. 174 he concluded:
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> ". . . In the absence of malice or deliberate conduct calculated to interfere with economic or trade relations to the detriment of the plaintiffs, there can be no liability, and such is the result here."

The Court of Appeal then reviewed the evidence, finding that there was no establishment of cause and effect between the actions of Muirhead and the frustration of the two proposed sales and also that the damages had not been established.

This case is, in my opinion, further authority for the proposition that an intention to do harm to the plaintiff is an essential element of the tort of interference with economic relations, as well as the tort of misfeasance in public office.

In the instant case the trial judge concluded that the necessary intention could be inferred if D.F.O. officials knew that their action in imposing the fees was unlawful or was reckless as to whether or not they were unlawful. He said:

> "In the case at bar, however, what must be examined is not D.F.O.'s motive for advancing dockside monitoring, but rather the conduct of D.F.O.'s representatives in forcing the plaintiffs to participate in a scheme they had no lawful power to impose upon them. The required intent for the second element will be satisfied if the officials of D.F.O. knew that their actions in imposing dockside monitoring fees were unlawful or were reckless as to whether or not they were unlawful."

With respect, this is not the test. What the case law requires is an intention to cause the damage. Mere knowledge of D.F.O. officials that their actions

were unlawful or recklessness as to whether or not they were unlawful is not, in itself, sufficient evidence of intention to do harm. I have already referred to the fact that the purpose or intention of inflicting injury is an essential element of the tort. The courts have stopped short of substituting for an intention to cause damage to the plaintiff a mere foreseeability that such damage may result from the unlawful conduct. A constructive intent to injure or foreseeable injury may have a place in the tort of conspiracy but not in my opinion in the tort of interference with economic relations. See **Canada Cement LaFarge v. B. C. Lightweight Aggregate Ltd. et al** (1983), 145 D.L.R. (3d) 385 at 398 - 9 (S.C.C.), Fleming, **The Law of Torts**, 7th Edition, (1987), p. 663, note 45, p. 665 especially note 59. I think that recklessness is more akin to foreseeability than it is to intention. If any lesser standard of intention were required, it still seems clear that the offending conduct must be "directed at" the plaintiff.

I do not find in the cases any suggestion that the ingredient of intention to injure can be found to exist merely because the defendant knew the conduct at issue was unlawful or was reckless as to whether or not it was. In coming to the conclusion that he did, the trial judge has erred. He has used conduct relevant to the first criterion to satisfy the second. He has, in my opinion, made a leap which is not recognized by the jurisprudence.

The question arises therefore whether the evidence does disclose an intention on the part of D.F.O. to injure the respondents. In my opinion, it does not. At the outset, it is useful to keep in mind that D.F.O. was not shown to have in mind any interest other than the proper management of the fishery. The tort of unlawful interference with economic relations has developed largely in the context of the private business world, particularly in relation to trade disputes. It has been developed with hesitancy - witness the very clear requirement that a plaintiff must establish on the defendant's part an intent to do injury. The reader will find a good historical discussion

of the development of the law of torts that relate to impairment of economic interests in Fleming, supra, p. 660-670. The tort is an intentional tort, that is one where the wrongdoer desires to bring about injury to another. It has rarely been used to address unlawful conduct of government and those acting on its behalf. This, of course, is not to say that it is not possible for servants of the Crown to commit such a tort - as we shall see - and it is necessary to review the circumstances to see if the officials of D.F.O. did intend to cause economic injury to the respondents.

There is no evidence in the record to indicate that D.F.O. had any ulterior motive, entertained any extraneous consideration or otherwise acted in a manner inconsistent with what it perceived to be the best long term interests of the fishermen and the buyers. The trial judge stopped short of finding that D.F.O. officials knew that their actions were unlawful. He said:

> "At best it may be questionable whether D.F.O. officials knew that their actions were unlawful. However, I have no difficulty in concluding that their conduct in proceeding with the scheme in the face of all the advice given to them that the scheme was not legally authorized in knowing the proper courses to follow to ensure that the fees were lawful, satisfies the element of recklessness required for the ill motivation that Mr. Wood correctly argues must be present."

Accepting that this is a finding that D.F.O. was "reckless" as to whether or not its scheme was authorized, the evidence does not support the inference that it intended to harm the respondents or even, to use the term found in some of the authorities that its actions were "directed at" the respondents. They were directed at the proper management of the fishery, in the context of the various crises faced by it.

The documentary evidence emanating from D.F.O. officials - much of it introduced by the respondents - painted a very clear picture of what was going on from 1990 to 1992. D.F.O. was forced to adopt a policy of fiscal restraint. It considered itself at a crossroad concerning the management of the Atlantic Fishery and in particular, ground fish and snow crab. Stocks were declining and there was a strong feeling that

buyers, as well as fishermen, were involved in underreporting at the dockside. Over and over again, it is stated that underreporting was threatening the health of the fish stocks. Added to this, was a downturn in the fishery. An aggressive enforcement strategy was needed for ensuring the integrity of the I.Q. program. The cost of developing such a strategy would impose an unsupportable burden on D.F.O.'s resources. The only option was to call upon the industry to finance the program. It was recognized that this would not be well received, but there was no practical alternative. Even though D.F.O. knew that the respondents would not be pleased, this was but a by-product of the scheme and not its objective.

On December 14, 1990, a news release from the Minister of Fisheries contained the following:

> "'The future of the Gulf of St. Lawrence fishery is in the hands of all those who depend on and benefit from this important resource,' said Mr. Valcourt. 'The key to rebuilding the stock is partnership. Governments, fishermen and processors must work together to restore this valuable fishery. Our commitment to charting a new course must be based on cooperation, integrity and responsibility. There is no room for misreporting and discarding of catches,' added the Minister.
>
> . . ."

Additional documents created throughout 1991 underline the themes of declining fish stocks, underreporting, the urgent need for policing the fishery, D.F.O.'s inability to finance it and the need for the industry to do so. On May 6, 1992, in an open letter to the industry, the Deputy Minister of Fisheries said:

> "The recent Budget called for a major reduction in the Department's appropriations. Additional program cuts within the department are required to address shortfalls in other important areas. As a result, it has been necessary to review our expenditures against our priorities. This has led to the decision that the Department will not provide funds for dockside monitoring programs beyond May 31, 1992.
>
> . . .

> Given the importance of these programs to participants, I encourage fishermen and processors to carefully consider the individual advantages of verifying individual catches in each fishery and to design, manage and fund their own programs. I see this as an opportunity for the Atlantic industry to take responsibility for its own regulation in an area which provides direct financial benefits to participants.
>
> This approach had been discussed with the Task Force on Dockside Monitoring. While many Task Force members would have wished to see DFO fund the program, the fiscal reality led to this approach. . ."

The evidence indicates that in view of D.F.O.'s professed inability to pay for the costs of dockside monitoring, the probabilities are that without a system paid for by the fishermen and the buyers there would be none. As a consequence of that, there would either be no fishing at all or at best an overall quota system with a reduced quota. In fact, as the trial judge found, D.F.O. served notice in June of 1992 that it was going to shut down fishing in the area if the fishermen and buyers did not organize and pay for a dockside monitoring program. The buyers and the fishermen then put the 1992 program in place. Indeed, on June 24, 1993 D.F.O. advised crab fishermen in two areas of the region that unless dockside monitoring was paid for by the industry for the 1993/94 season, I.Q. would be revoked and the total allowable quota would be reduced by half to compensate for underreporting.

Thus the result would have been either no fishing or at best the global quota system with much inconvenience to the respondents as a whole. I am driven to the conclusion therefore that the dockside monitoring system was of considerable value to the respondents. In effect, what went on here was, in the face of declining government revenues, the lesser of two evils. The system which was imposed was undoubtedly of value to the respondents because it ensured the continuation of I.Q. and the protection of honest fishermen against the actions of dishonest fishermen.

The respondents say that in imposing the lesser of two evils upon them, D.F.O. did the same thing as did the marketing agency in the case of **Gershman v.**

Manitoba Vegetable Producers Marketing Board (1976), 69 D.L.R. (3d) 114. I do not agree.

In **Gershman** the defendant Producers Marketing Board engaged in a series of actions directed against Gershman and his company, Gershman Produce Company Limited. The Manitoba Court of Appeal at p. 116 found that it was not necessary to set out the findings of the trial court in detail. However, it is clear from the report that the Gershman Company had previously engaged in litigation disputing the validity of the **Natural Products Marketing Act** under which the defendant Board functioned. The defendant Board had concurred in, if not encouraged, a number of prosecutions against the Gershman Company and when that company had found itself in financial difficulties, the defendant Board had, on two occasions, proceeded to petition for its bankruptcy. Gershman subsequently went to work for another company in the produce marketing business, Stella Produce Company Limited. The defendant Board then passed a resolution that until the monies owed by the Gershman Company were paid in full, the Board would not provide credit to any customer of the Board who employed a principal of the Gershman Produce Company Limited in a responsible capacity. The effect of this was to force the Stella Company to discharge Gershman without adequate notice and force the cancellation of an arrangement which was in progress whereby Gershman would acquire shares in the Stella Company.

The conduct of the defendant respecting the Stella Company was characterized by the Manitoba Court of Appeal as not in good faith. The trial judge commented that it was difficult to believe that this drama came from Manitoba in 1974 and not from the pages of medieval history. It is clear from the foregoing very brief recital of the facts that the defendants had gone to extensive lengths to injure the plaintiff. As O'Sullivan, J. A. said at p. 123 that the defendant Board:

> ". . . Without legal justification and for a wrongful purpose, caused the Stella Company and its shareholders to

> terminate their relationships with the plaintiff and caused knowingly substantial damage to the plaintiff in his business. The Board was not acting in the good faith exercise of any of its official powers."

I am of the view that this case is clearly distinguishable from circumstances before us. Put at its worse, the conduct of D.F.O. can be characterized as carelessness whether or not its actions were authorized by the statute. I have already indicated that in my view the motives of D.F.O. were to help the fishery and not to harm the respondents. **Gershman** is clearly distinguishable. In **Gershman**, the Manitoba Court of Appeal concluded that the conduct of the defendant amounted to the tort of intimidation and the tort of unlawful interference with economic interests. The threatened action of the Board was designed to interfere with the Gershman family. It was, as the court pointed out, a matter of "black-listing". Such a conduct was "illegal" and quite beyond the scope of its authority (p. 124).

D.F.O.'s concerns with respect to the legal avenues available to finance dockside monitoring (amending the **Act**, imposing fees for fishermen under the Regulations or imposing "user fees" by Order in Council under s. 19-19.3 of the **Financial Administration Act**) were that they did not permit D.F.O. to force buyers to contribute to the program, there were time constraints and that they would be "administratively difficult".

It is beyond question that D.F.O. had the authority to stop fishing in the area at any time.

In the circumstances, the only inference is that the intention of D.F.O. in engaging in its unauthorized scheme was to provide a benefit to the respondents as a whole, not to injure them. I conclude that the second element of the tort has not been established.

As to the third element of the tort, the trial judge said:

> "The third required element has also been satisfied since the

> plaintiffs, in fact, paid dockside monitoring fees thus incurring the damage or loss caused by the conduct of the defendant."

With deference, this is not sufficient proof of damages. True, the respondents paid fees. But they received value for the money paid.

I would find that damages have not been established. Whether the value received by the respondents was less than commensurate with the fees was not established. Dockside monitoring was, on the whole, an item of considerable cost in dollars. The total paid by buyers and fishermen in the Gulf Region in 1991 was nearly $900,000. I have already referred to the value of the system to the fishermen and buyers in that it permitted the continuation of fishing and in particular fishing with individual quotas. The trial judge found that the industry favoured dockside monitoring. It just did not wish to pay for it. The trial judge found that the overall quota system was not satisfactory and that I.Q. was beneficial. The burden of proving damages rests with the respondents and it was for them to show, if they could, that they did not receive value equal to the monies paid by them. That has not been done.

The respondents have not established that the appellant committed the tort of interference with economic relations against them.

INTIMIDATION:

The tort of intimidation is discussed in **Clerk & Lindsell on Torts**, **supra,** at p. 729:

> "The tort of intimidation:
>
> > A commits a tort if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C. The name of 'intimidation' was attached by the House of Lords in 1964. [**Handor Production Ltd. v. Hamilton**, [1983] 1 A.C. 191] The tort, like the tort of procuring a breach of contract, is one of intention and the

> plaintiff, whether it be B or C, must be a person whom A intended to injure. Doubts about the existence of this tort were set at rest by **Rookes v. Barnard** [(1964) AC 1129.]..."

Again this tort, like that of interference with economic relations has been developed largely in the context of the private business world but it can apply to the Crown with respect to the acts of its servants.

In **Rookes v. Barnard**, **supra**, the House of Lords dealt with a claim against members of a union for damages as a result of the union urging its members to threaten withdrawal of services from the plaintiff's employer if he were not removed from his position. The threat here was thus not made to the plaintiff but to his employers who first suspended him and later terminated his employment. They were not in breach of their contract in so doing. At the trial the jury found that there was a conspiracy to threaten strike action by members of the union for the purpose of securing the appellant's withdrawal from his position. The House of Lords held that the plaintiff was entitled to recover damages as he had established against the members of the union a good cause of action at common law for the tort of intimidation which was not defeated by the **Trade Disputes Act**, 1906.

In **Rookes, supra**, the threatening conduct of the defendant was unlawful because it would amount to a breach of their contract of employment. The action they sought of their employer was lawful. The employer could terminate the plaintiff's employment as it did. However, the intent of the threats was to cause harm. As Lord Reid pointed out at p. 373:

> ". . . The question in this case is whether it was unlawful for them to use a threat to break their contracts with their employer as a weapon to make him do something which he was legally entitled to, but which they knew would cause loss to the appellant."

At p. 397 Lord Devlin referred to **Salmond on Torts**, (13th Edition) p. 697 where the author noted that the tort of intimidation can take two forms: (a) intimidation

of the plaintiff himself by threatening an unlawful act to cause the plaintiff to do something resulting in loss and (b) intimidation of other persons to cause injury to the plaintiff. In both cases, however, the intention to cause harm to the plaintiff is at the heart of the conduct giving rise to liability.

The leading Canadian case is **Central Canadian Potash v. Saskatchewan** (1979), 1 S.C.R. 42. This establishes that an essential element of the tort of intimidation is the intention to cause damage to the plaintiff.

Laskin, C.J.C. speaking for the Supreme Court of Canada referred to **Rookes, supra** at p. 81 as having confirmed the existence of the tort of intimidation. In **Central Canadian Potash, supra**, the appellant, a potash producer, was told by the minister responsible under the **Mineral Resources Act of Saskatchewan** and acting pursuant to Regulations under the **Act**, to limit production or risk cancellation of its mineral lease. The Regulation under which the minister purported to act was subsequently found to be **ultra vires**. The appellant claimed that the minister had committed the tort of intimidation against it. After concluding that a government official charged with the enforcement of legislation should not be found guilty of intimidation because the statute being enforced is ultimately found **ultra vires**, Laskin, C.J.C. went on at p. 90:

> "This brings me to the latter portion of the definition of intimidation from Clerk and Lindsell which I have adopted. 'The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure. The authority for this statement is found by the authors in the judgments of Lord Devlin and Lord Evershed in the **Rookes** case, and I am in agreement with it. There is no evidence that the deputy minister intended to injure the appellant. The correspondence, and particularly the letter of September 20, 1972 make it clear that his purpose was to induce compliance with an existing legislative scheme."

While **Central Canadian Potash** is distinguishable from the present case, I take it to be an unequivocable affirmation that the intent to injure is central to the tort

of intimidation. This, like the tort of interference with economic relations, is also an intentional tort.

It is not necessary to decide whether in fact in 1991 or 1992 D.F.O. threatened to commit an act or use means unlawful against the respondents. This is particularly doubtful with respect to 1992 where the "threat" appears to be to close the fishery - something which D.F.O. had a legal right to do. It is not necessary to explore these issues further because it is clear that the tort requires proof of an intention to cause harm. I have already concluded that that was not the case.

The respondents have also failed to establish damages for the reasons I have previously given.

THE PRINCIPLE OF RONCARELLI v. DUPLESSIS

The facts in **Roncarelli** are not similar to the circumstances in the present case. There the Premier of Quebec wished to punish **Roncarelli** for his activities on behalf of Jehovah Witnesses. To that end he persuaded the Quebec Liquor Commission to cancel a liquor license held by **Roncarelli** (at pleasure) on grounds which the courts found were clearly extraneous to the objects and purposes of the licensing act. Rand, J. said at p. 705:

> "The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are compatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the 'discretion' of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.
>
> In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be

> suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretions' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate: and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted."

In the case before us the elements of intention to do harm and action which is incompatible with the purposes envisaged by the statute are absent. I have already dealt with the former. As to the latter, unlike **Roncarelli** where the Premier of Quebec had no statutory authority to deal with liquor licenses, D.F.O. had statutory authority and a duty to deal with the management and control of the fishery. Its actions, even if not fully authorized, were not incompatible with the purpose envisaged by the statute.

Roncarelli was referred to by the Manitoba Court of Appeal in **Gershman, supra**, at p. 123. The court pointed out that the principle established is that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive their powers. A citizen who suffers damages as a result of flagrant abuse of public power aimed at him has a cause of action for damages. In **Gershman, supra**, the defendant Board had, in the opinion of the court, flagrantly abused its powers. It acted for a wrongful purpose, specifically to injure the Gershman Company and its principals.

Again, in **Gerrard, supra**, the Manitoba Court of Appeal spoke of the tort of misfeasance in public office in the context of a public officer acting in the knowledge that there is no power to do what is being done and for the purpose of causing injury

to the plaintiff. In **Dunlop v. Woollahra Municipal Council** (1981), 1 All E.R. 1202, Lord Diplock, writing for the Privy Council briefly discussed the tort of misfeasance by a public officer in the discharge of public duties or abuse of office. He said that in the absence of malice the passage by a municipal authority of a resolution without knowledge that it was devoid of legal effect, did not give rise to this tort.

In my opinion, **Roncarelli** is distinguishable particularly in that the abuse there was flagrant, not connected with the purposes for which the powers were given and done with the specific intent of harming the plaintiff. Intention to do harm on the part of D.F.O. to the respondents was not established. The trial judge stopped short of finding that D.F.O. knew that its actions were unlawful. The most that he was prepared to say was that D.F.O. was reckless whether they were unlawful. This conduct lacks the degree of egregiousness exhibited by the defendants in **Roncarelli** and **Gershman**. The principal difference is in the absence of the intention to do harm.

Again, and in any event, the respondents have not established damages suffered by them as a result of D.F.O.'s actions.

In the result I would allow the appeal, set aside the decision of the trial judge and dismiss the respondent's action with costs. For the purposes of fixing costs of the trial I would set the amount involved at $35,000 and apply Scale 3 thereto. The appellant should recover from the respondents such amount, together with disbursements when taxed. The appellant should also recover the costs of the appeal, being 40% of the trial costs, together with disbursements when taxed.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.