C.A. No. 100786

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Smith & Whiteway Fisheries Ltd., 1994 NSCA 130

Jones, Roscoe and Pugsley, JJ.A.

BETWEEN:

SMITH & WHITEWAY FISHERIES LIMITED Stewart McInnes, Q.C.	)	
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	David J. Bright, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	May 17, 1994
	)	
	)	
	)	Judgment Delivered:
	)	August 23, 1994
	)	

THE COURT: Appeal dismissed per reasons for judgment of Pugsley, J.A.; Jones and Roscoe, JJ.A. concurring.

PUGSLEY, J.A.:

Smith & Whiteway Fisheries Limited (the "Company") was convicted on February 26, 1992, of failing to furnish a "true return of the Daily Hail Report" of the daily fishing activity for its fishing vessel, "7 Girls", contrary to s. 61 of the **Fisheries Act**. A fine of $5,000, at that time the maximum fine, was imposed by Provincial Court Judge, Ross Archibald.

The Crown filed a sentence appeal to the Supreme Court of Nova Scotia seeking an order that all the proceeds of sale (amounting to $58,387.20) of fish seized pursuant to s. 71(1) of the **Fisheries Act**, be forfeited.

The Company cross-appealed, alleging the findings of the trial judge were contrary to the weight of evidence, the trial judge erred in imposing a fine of $5,000.00, and further that the trial judge was biased or that there was sufficient basis for a reasonable apprehension of bias.

Bateman, J., sitting as a Summary Appeal Court judge, allowed the Crown's appeal ordering that a portion of the catch (valued at $30,000) be forfeited, and dismissed the Company's cross-appeals.

The Company appeals to this Court submitting that:

1. The trial judge, and the Summary Appeal Court judge, erred in not finding the Company discharged the burden of establishing the defence of due diligence;

2. The Summary Appeal Court judge erred in not concluding that the trial judge should have disqualified himself on the basis of reasonable apprehension of bias;

3. The Summary Appeal Court judge erred in ordering a forfeiture of part of the Company's catch.

EVIDENCE:

The Company was issued a 1990 Enterprise Allocation License enabling the "7 Girls", a 94 foot long liner, to catch approximately one million

pounds of cod in specified fishing areas during 1990. No limit was imposed with respect to hake.

On January 8, 1990, the Regional Director General of the Scotia Fundy Region, pursuant to what was then s. 61 of the **Fisheries Act**, directed the Company to file daily reports (hails) of the vessel's activities. The hails were to include information respecting the area fished, and the amount and species of fish caught.

The Department of Fisheries and Oceans (DFO) used the information to calculate the balance of cod which a vessel was entitled to catch, during the remainder of the year under its Enterprise Allocation License. The information was also used by DFO to calculate the balance of cod which could be taken by the competitive fishers in a specified area.

On the vessel's second fishing trip for 1990, covering the period from February 28th to March 14th, Captain Gordon Hallett and first mate, Donald Roy, acting on Hallett's instructions, while fishing on the Newfoundland Grand Banks placed regular calls, purportedly specifying the fishing location and the amount of species of fish caught, to Earl Whiteway, Manager and Secretary-Treasurer of the Company who was located at Lockeport, Nova Scotia.

The hails forwarded on by Whiteway to DFO indicated the following amount in whole weight, of fish by species, caught during the trip:

Cod	55,000	pounds
Haddock	12,500	pounds
Hake	61,000	pounds

In fact, the amount of fish on board was determined by DFO when the ship docked on March 14th, as:

Cod	177,244	pounds
Haddock	0	pounds
Hake	518	pounds

Mr. Whiteway testified that he had clearly instructed Captain Hallett regarding the necessity to make accurate responses and that he had no knowledge that the reports were false until the vessel was inspected by DFO.

DFO seized 72,984 pounds of the catch landed, which represented only part of the amount of the cod not disclosed through the daily hails. The seized fish were sold for approximately $58,000.

The value of the catch, not seized, was sold for approximately $106,000 and the proceeds went to the Company.

FINDINGS OF THE TRIAL JUDGE:

The trial judge concluded that there was no doubt that the Crown had established a ***prima facie*** case against the Company with respect to an offence of strict liability. The real issue was whether the Company had been able to establish a due diligence defence, and that depended, the trial judge continued, on whether or not he accepted the evidence of Mr. Whiteway.

The trial judge concluded that Mr. Whiteway was not credible, and accordingly rejected his evidence that he was unaware of the erroneous information forwarded to him to pass on to DFO. The trial judge was satisfied that Crown had proven beyond a reasonable doubt the charge against the Company and concluded the Company had failed to establish the defence of due diligence.

The trial judge imposed a fine of $5,000 but did not order forfeiture of any part of the catch:

> "In regard to the forfeiture, it's my view that the fish were legally caught, and that the vessel holder/owner and the crewmen should not be penalized by forfeiture simply because the skipper of the vessel for whatever reason and one could have their suspicions, for whatever reason... made improper hails. Therefore, I am not going to impose forfeiture."

SUBSEQUENT EVENTS:

On April 13, 1993, the Crown, represented at trial by Michael A. Paré, appealed seeking an order pursuant to s. 72(1) of the **Fisheries Act** that all of the proceeds of sale (approximately $58,000) of the fish seized by the fisheries' officers, be forfeited.

On April 15, 1993, the Company filed a Notice of Cross-appeal. Its counsel, Stewart McInnes, Q.C., deposed in an affidavit filed with the Court:

> "That on the 23rd day of March, 1993, Michael A. Paré, counsel for The Attorney General of Canada, the Appellant herein, advised me at Halifax that:
>
> (a) His Honour Judge Ross B. Archibald and the said Michael A. Paré had for a period of time carried on the practice of law as partners in the Province of Nova Scotia immediately prior to the time His Honour was appointed as a Judge of the Provincial Court;
>
> (b) His Honour Judge Ross B. Archibald was the subject of investigation under the **Aeronautics Act** in 1992 and that Michael A. Paré gave evidence before an inquiry in the nature of character evidence and further testified to the capabilities of the Honourable Judge to properly operate an airplane in accordance with the requirements of the legislation."

Counsel, by agreement, filed with the Court, a transcript of the relevant evidence of Mr. Paré which was, in fact, given before the Civil Aviation Tribunal on December 11, 1990. The transcript was not received by Mr. McInnes until April 29, 1993.

It reads in part:

> "A. I'm responsible for the supervision and coordination of all fisheries prosecutions in Atlantic Canada and I'm also the Native Litigation Coordinator for the Atlantic Region.
> Q. And are you familiar with the applicant, Ross Archibald?
> A. I am familiar with Ross.
> Q. And how long have you known him?
> A. I've known Ross since approximately 1975, originally as a practitioner solely and then subsequently as a friend and a partner in a law firm.
> Q. And are you able to comment on his general character?

A. As I indicated, I come at this from somewhat of a bias. He's a friend. I like Ross personally. I think that he's a responsible and dedicated individual, hard-working, a man who can be trusted.
Q. Are you a pilot yourself?
A. No, I'm not.
Q. Have you had the opportunity to fly with Mr. Archibald?
A. I have on a number of occasions.
Q. And you can tell us where to and from?
A. Okay, I've flown with Ross to Edmundston, Montreal, Boston, Augusta, Maine, Charlottetown, Halifax.
Q. And, on your observations during those flights, can you comment on his competency and flying ability?
A. I found Ross to be very careful, deliberate, calm under pressure, what I'd perceived as pressure, on one occasion anyway. We were -- I don't know if you want the particulars of this, but we were flying from, if memory serves me correctly, Edmundston to Moncton -- yes, Edmundston to Fredericton to Moncton -- and I think it was between Fredericton and Moncton that the carburettor iced over, the engine stopped causing considerable concern to myself, but Ross was very patient, went through, I assume, the various procedures that one does under those circumstances and eventually the engine started up again -- I gather it had something to do with engine free-flowing air, so I was told -- and landed the plane without incident. And I was, quite frankly, very impressed. I don't know if I would have shown that kind of patience.
Q. Would you have any concerns yourself about flying with Ross Archibald again today?
A. None whatsoever."

The Crown thereafter was represented by David J. Bright, Q.C.

Mr. Bright submitted to Justice Bateman on the appeal, an affidavit deposed by Mr. Paré on January 19, 1994 which read in part:

"3. I was engaged in private practice in the Town of Amherst, Nova Scotia and was a partner in the practice of law with Ross B. Archibald (now Judge Archibald) from September 1, 1981, until May or June of 1985.

4. In the intervening years, I have had intermittent contact with Judge Archibald but have not socialized with him in any way on a regular basis, nor do I keep in contact with him on a regular basis.

5. Immediately upon leaving the courtroom after the sentencing of his client, on March 23, 1993 counsel for Smith & Whiteway Fisheries Limited, Stewart McInnes, Q.C. told me, among other

things, that he had learned that Judge Archibald and I were partners in the practice of law and that he further understood that I had testified for Judge Archibald at a disciplinary hearing before the Judicial Council in Halifax. It was his feeling that Judge Archibald should never have heard the case.

6. To the best of my recollection, I then told Mr. McInnes, among other things, that our partnership had ceased quite some time ago and that I had not testified for him at the Disciplinary Hearing in question. I also told him that I had testified for Judge Archibald under subpoena in a hearing before the Civil Aviation Tribunal. I also advised him that Judge Archibald and I do not now enjoy a close relationship which would have required his removing himself from the hearing of this case.

7. From this conversation I was of the firm opinion and belief that Stewart McInnes, Q.C. was aware of my previous relationship with Judge Archibald in the practice of law prior to the sentencing going ahead, and that he had never at any time raised this matter before the Honourable Judge Archibald either during the Trial or at any subsequent time.

8. The Civil Aviation Hearing was convened for the purpose of determining if Judge Archibald should be re-instated as a private pilot.

9. While testifying for Judge Archibald before the Civil Aviation Tribunal on December 11, 1990, I referred to him as a 'friend'. The usage of the word 'friend' was meant in the generic sense."

10. I never testified on behalf of Judge Archibald at the Discipline Hearing before the Judicial Council not do I recall ever being asked to testify."

By letter of January 20, 1994, addressed to Justice Bateman, Mr. McInnes advised:

"I am happy to clarify at the time when I first was apprised of the potential relationship of Mr. Paré and the Magistrate. The first advice given to me was on the morning of March 23, 1993, at the time of sentencing. I was advised that Mr. Paré and Judge Archibald had been in practice together and that Mr. Paré had perhaps supported Judge Archibald's case before a tribunal. The particulars and the details are unknown to me so immediately following the sentence hearing I spoke to Mr. Paré to advise him of the information I had just received and which formed the basis of the affidavit which I originally filed herein. I was never in a position to make a suggestion of bias until I had spoken to Mr. Paré and

> secured the appropriate information. This information is not 'new evidence' but affects a matter of procedure."

DECISION OF THE SUMMARY APPEAL COURT JUDGE:

Justice Bateman dealt with the allegations of reasonable apprehension of bias, as a preliminary issue.

Mr. Bright requested that if Justice Bateman were to consider the contents of Mr. McInnes' affidavit of April 15, 1993, he sought leave to cross-examine Mr. McInnes on the contents of the affidavit.

No request was made to cross-examine Mr. Paré on the contents of his affidavit of January 19, 1994.

On January 25, 1994, Justice Bateman advised counsel that she would dispose of the issue without allowing Mr. Bright to cross-examine Mr. McInnes.

Justice Bateman said in part:

> "There is nothing on the face of the decision nor in the record of proceedings before the Trial Judge that reflects any obvious bias, although that is not the test...Bias, in fact, is not suggested by the Respondent. The focus was whether there was a reasonable apprehension of bias in the eyes of an objective observer."

After considering that the matter was raised for the first time on appeal, and that the application was similar to an application to admit fresh evidence, Justice Bateman concluded:

> "I am not satisfied that the factors raised by the Respondent are such as to meet the Palmer test, in particular, that the alleged relationship between the Trial Judge and Crown Attorney is such as to bear on a potentially decisive issue or one which could have affected the result. Approaching the matter from a different perspective, I am not satisfied that the connection between the Crown Attorney and the Trial Judge was sufficient to raise a reasonable apprehension of bias."

Submissions were then allowed by the Crown and on behalf of the Company with respect to the remaining issues.

Concluding that there was ample foundation for the findings of credibility made by the trial judge, Justice Bateman dismissed the Company's cross-appeal, concluded that the trial judge had the power to order seizure, and to give adequate effect to the requirement of general deterrence, ordered a partial forfeiture in the amount of $30,000.

Issue One:

> The trial judge and Summary Appeal Court judge, erred in not finding the Company discharged the burden of establishing the defence of due diligence.

The Company acknowledges that the defence of due diligence "centers on the finding by the trial judge that he could not accept the evidence of Earl Whiteway", but argues that conclusions of fact based on credibility are not immune from appeal, citing the opinion of Macdonald, J.A. of this Court in **Rhodenizer v. Rhodenizer** (1953) 31 M.P.R. 127 (N.S.S.C)[in banco].

The Company's appeal to this Court, however, arises pursuant to **s. 839(1)** of the **Criminal Code**, which provides:

> "An appeal to the court of appeal as defined in **s. 673** may, with leave of that Court or a judge thereof, be taken on any ground that involves a question of law alone, against
>
> (a) a decision of a court in respect of an appeal under **s. 822**; or
>
> (b) a decision of an appeal court under **s. 834**, expect where that court is the court of appeal.

This Court, as defined in **s. 2** of the **Code**, is the "court of appeal" referred to in **s. 839**.

Is there any question of law involved for which leave to appeal ought to be granted? Whether Mr. Whiteway was worthy of belief is a question of fact not a question of law.

The question of whether the proper inferences were drawn by the trial judge from the facts is purely a question of fact as well. (**Gauthier v. The King** [1931] S.C.R. 416)

Issue Two:

> The Summary Appeal Court judge erred in not concluding that the trial judge should have disqualified himself on the basis of apprehension of bias.

The appellant does not submit that the trial judge was biased in fact.

While Justice Bateman refers to the **Palmer** test, I interpret her decision to be based upon the conclusion that Mr. McInnes had failed to satisfy her that there was a reasonable apprehension of bias.

The question of reasonable apprehension of bias was raised at the appeal level for the first time, as here, in the case of **Re Energy Probe and Atomic Energy Control Board** (1985), 15 D.L.R. (4th) 48 (Fed. C.A.).

In that case, Heald, J. for the majority stated at p. 56:

> "It is clear and beyond dispute that the question of reasonable apprehension of bias was not an issue before the trial judge...Likewise, to deal with the matter on appeal, when it was not an issue in the Trial Division, would severely prejudice the other parties as was pointed out by counsel for the Attorney General of Canada and the A.E.C.B. He made the point that had the matter of reasonable apprehension of bias been an issue in the Trial Division, he might well of considered it advisable to introduce evidence directed toward that issue which, in his view, was a separate and distinct issue from the sole issue below, namely pecuniary bias."

No such argument was raised by the Crown before Justice Bateman. The Crown, of course, had tendered Mr. Pare's affidavit of January 19, 1994.

The words of Lord Hewart, C.J. in **Rex v. Sussex Justices**, Ex parte McCarthy (1924), 1 K.B. 256 at 259, are generally cited when an issue respecting apprehension of bias arises:

> "...it is not merely of some importance, but is a fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Lord Denning, after referring to these words, wrote "Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: the judge was biased." (**Metropolitan Properties Co (F.G.C.) Ltd. v. Lannon** (1969), 1 Q.B. 577 at 599.)

The test for us was set out by Laskin, C.J.C., in **Committee for Justice and Liberty v. National Energy Board** (1976), 68 D.L.R. (3d) 716 (S.C.C.) at p. 733:

> "This court on fixing on the test of reasonable apprehension of bias, as in **Ghirardosi v. Minister of Highways** (B.C.), [1966] S.C.R. 367, and again in **Blanchette v. CIS**, [1973] S.C.R. 833 (where Pigeon, J. said at p. 842-3 that 'a reasonable apprehension that the judge might not act in an entirely impartial matter is ground for disqualification') was merely restating what Rand, J. said in **Szilard v. Szasz**, [1955] S.C.R. (3d) at pp. 6-7, in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it may be'. "

It is necessary at the outset to determine what consideration, if any, should be given to the affidavit of Mr. Paré deposed on January 19, 1994.

The affidavit was tendered to Justice Bateman and presumably read by her, although no reference to it appears in her decision.

In particular, paragraphs 3, 4, 6, 7, 8, and 9, of the affidavit are significant and shed light not only on the relationship between Mr. Paré and Judge

Archibald, but also speak of the impression that Mr. Paré was attempting to create when he referred to Judge Archibald as a "friend".

A similar issue arose in **Ringrose v. College of Physicians etc,** [1977] 1 S.C.R. 814 where de Grandpré, J., on behalf of the majority stated at p. 821:

> "The second preliminary matter is the admissibility of the Registrar's affidavit. The trial judge had no hesitation to admit and to make it a basis of his decision and the Court of Appeal quite properly came to the same conclusion. Before that Court, appellant's counsel referred to a number of cases, in particular to **Szilard v. Szasz** (supra) and **Ghirardosi v. Minister of Highways** (supra) allegedly supporting his proposition that the affidavit was inadmissible. The Court of Appeal through Prowse J.A. rejected the proposition in the following words (D.L.R. at p. 589):
>
> > 'In my view these cases merely support the conclusion that when circumstances exist from which a reasonable apprehension of bias arises evidence is not admissible for the purpose of establishing that a person the law presumes to be biased was not in fact biased. They do not purport to deal with the question of the admissibility of evidence for the purpose of having the relevant circumstances before the court so that it may consider whether in those circumstances a reasonable apprehension of bias arises'."

Justice de Grandpré continues:

> "This is a correct summary of the law and it is not contradicted by the reasons of Laskin, C.J. In **PPG Industries Canada Limited et al v. The Attorney General of Canada**, [1976] 2 S.C.R. 739 which refer to:
>
> "the introduction of evidence to explain away a situation which raised a reasonable apprehension of bias affecting that party's position in respect of the decision in which he challenged (p.748)."

On the basis of the foregoing, I would permit the introduction into evidence of Mr. Paré's affidavit, except for paragraph (9). What Mr. Paré meant by the use of the term "friend" is not relevant, but what is relevant is "the impression which would be given to other people" by the use of the word (see Denning, L.J., in **Metropolitan Properties Co. (F.C.G.) Ltd v. Lannon** (***supra***)).

The impression that a member of the public could reasonably receive from the evidence of Mr. Paré given before the Tribunal, in light of the background illustrated by those paragraphs in the affidavit to which I have referred, is as follows:

1. Mr. Paré and Ross Archibald were partners in the practice of law in the Town of Amherst from September 1, 1981 to May or June, 1985.
2. Since 1985, up until January of 1994, Mr. Paré had intermittent contact with Judge Archibald but did not socialize with him "in any way on a regular basis, nor do I keep in contact with him on a regular basis."

3. Mr. Paré was subpoenaed before the Tribunal to give evidence. Although not a pilot himself, Mr. Paré testified that he was very impressed with Judge Archibald's flying capabilities and spoke about those capabilities in such terms as "careful, deliberate, calm under pressure", as a consequence of having flown with Judge Archibald on at least seven occasions. The year or years in which those trips occurred, is not stated.

4. Mr. Paré spoke of Judge Archibald's character in positive terms "responsible and dedicated individual, hard-working...a man who can be trusted".

5. Mr. Paré quite properly advised the Tribunal of his relationship with and his feelings towards Judge Archibald:

   "I come at this at somewhat of a bias...He is a friend.
   I like Ross personally."

The following guidelines, I suggest, are discernible from the authorities.

1. There is a presumption a judge will carry out his oath of office to render justice impartially.

Under the provisions of s. 4 of the **Provincial Court Act**, c. 238, R.S.N.S. (1989), every Provincial Court judge before taking office is obliged to take and subscribe the following oath:

> I,.....,.of.....in the County of.....,make oath and say, that I will well and truly serve our Sovereign Lady the Queen in the office of a judge of the provincial court, and I will well do right to all manner of people after the laws of the Province without fear, favour, affection or ill will. [Emphasis added]

The Canadian Judicial Council has sponsored and distributed to all Federal Court judges a booklet entitled "Commentaries on Judicial Conduct".

The author writes (at p. 64):

> "When a close friend appears before a judge as litigant or as counsel, judges usually disqualify themselves. The degree of friendship which leads to that result is, however, difficult to define. One experienced judge said to us that the test is essentially subjective. 'If you feel uncomfortable about the situation," he said "then you should step down'." (Emphasis added)

It is common knowledge that judges take steps to ensure that they will not sit, "if they feel uncomfortable" about certain parties or litigants who are slated to appear before them.

Disqualification is committed to the sound discretion of the trial judge.

Counsel in this Province, as well as elsewhere, I am sure, follow the practice of notifying the Court Registrar when it appears that a close friend might be presiding over a matter in which he or she is involved, so that an alternate judge can be secured.

The Barristers of this Province are governed by a code of ethical and professional conduct which was distributed to the Profession in February of 1990.

Under the heading "Duties to the Court", one of the guiding principles provides:

> "A lawyer has a duty not to...appear before a judge when the lawyer, the lawyer's associates or the client have business or personal relationships with such judge that give rise to real or apparent pressure, influence or favouritism affecting the impartiality of such judge or that might place the lawyer in a preferred position."

There is a presumption Barristers will adhere to the Code of Ethics of the profession.

2. The test is an objective one and involves ascertaining whether a reasonable and right-minded person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned.

3. The reasonable person is presumed to possess knowledge of all the circumstances.

4. A lawyer who wishes to object to a presiding judge on the ground of reasonable apprehension of bias is expected to make the recusal motion with reasonable promptness after ascertaining the grounds for filing the motion; otherwise there will be a waste of judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes (**Preston et al v. U.S**. (1991), 923 F. (2d) 731 (U.S. Court of Appeals Ninth Circuit).

   In **Rex v. Sussex Justices,** Exparte McCarthy (supra) Lord Hewart, J. commented to the same effect at 259:

> "in those circumstances, I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of acquittal on the facts, and then, on a conviction being recorded, decided to take the point."

5. The usual remedy, if a reasonable apprehension of bias, is established, would be to vacate the judgment and remand the case for retrial by a different judge.

In the present case, I conclude:

- Mr. McInnes' motion was brought in a timely fashion;

  Justice Bateman's finding that:

  > "This was not a circumstance where the judge had been asked by counsel to recuse himself, as the facts were not known to counsel <u>at the relevant time</u>", [emphasis added]

  supports Mr. McInnes' assertion that the knowledge which gave rise to his submission only came to his attention after the trial before Judge Archibald.

- The mere fact that Mr. Paré and Ross Archibald were partners in the practice of law in the Town of Amherst from 1980 to 1985 does not lead one to reasonably conclude that Judge Archibald could not carry out his judicial responsibilities impartially, when Mr. Paré appeared before him in 1992;

- The testimony given by Mr. Paré before the Tribunal, in light of the explanation of the background circumstances contained in paragraphs 3 to 9 in his affidavit, does not lead a reasonable right-minded person to question Judge Archibald's impartiality.

While the presumption that a judge will carry out his oath of office to render justice impartially may be rendered inoperative by cogent evidence, it was not in this case. The friendship between Judge Archibald and Mr. Paré does not give rise, in my opinion, to a "real likelihood of bias". (de Smith's **Judicial Review of Administrative Action**, 4th ed., p. 267)

Issue Three:

The Summary Appeal Court judge erred in ordering a forfeiture of part of the Company's catch.

The trial judge imposed a fine of $5,000 which was the maximum fine at the time. The legislation was subsequently amended to increase the maximum to $100,000.

Mr. McInnes argues that the imposition of the maximum fine was excessive since the Company had no record of any previous fishery violation.

He further submits that the Order of Forfeiture imposed by Justice Bateman:

I. Was beyond her jurisdiction since the fish "were legally caught"; and

2. Rendered the punishment "unfit" (**R.v. Cormier** (1974), 9 N.S.R. (2d) 687 (N.S.C.A.)).

Mr. McInnes argues that under s. 71(1) of the **Fisheries Act**, a sentence of forfeiture can only be ordered where fish had been seized by the fisheries officer, acting in the reasonable belief that:

> "the fish, or any part thereof had been caught, taken, killed, transported, bought, sold, or had in possession contrary to any provision of this Act or the regulations".

The fish in question, he submits, were caught legally pursuant to the authority vested in the Company under its Enterprise Allocation License. If the fish were legally seized, they were not subject to forfeiture.

However, s. 72(1) of the **Fisheries Act** at the time of this offence, provided that:

> "Where a person is convicted of an offence under this Act or the regulations, the convicting judge may, in addition to any punishment imposed, order that any thing seized pursuant to section 71(1), or the whole or any part of the proceeds of a sale referred to in subsection 71(3), be forfeited and, on an order being made, the things so ordered forfeited is forfeited to Her Majesty in right of Canada."

The Company was obliged to make an accurate daily hail detailing the area fished, and the amount of species of fish caught. This was a necessary requirement in order to preserve the stocks of the North Atlantic Fishery. The fish that were seized were in the possession of the Company and provided evidence of the misreporting carried out by the Company.

I am satisfied Justice Bateman had the power to order seizure pursuant to s. 71(1) and s. 72(1) of the **Fisheries Act.**

With respect to the Company's submission concerning "fitness" of the sentence, there is no specific statutory right to appeal a summary appeal sentence to this Court.

The right to appeal sentence to the Summary Appeal Court was granted both to a defendant in a summary prosecution, as well as to an informant, pursuant to s. 813(a)(ii) and s. 813(b)(ii) of the **Criminal Code**.

A decision or order of the Summary Appeal Court may only be appealed pursuant to s. 839(1)(a) of the **Code** to this Court "on any ground that involves a question of law alone".

There is ample authority that the fitness of a sentence does not raise a question of law alone. (**R. v. Guida** (1989), 51 C.C.C. (3d) 305 (Que. C.A.))

CONCLUSION:

I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.

C.A. No. 100786

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SMITH & WHITEWAY FISHERIES LIMITED Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
HER MAJESTY THE QUEEN Respondent	)	PUGSLEY, J.A.