CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. No.: 74458

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

TOSHIDE ITO

Respondent

Michael A. Paré, Esq., Counsel for the Appellant.
Thomas Pittman, Esq., Counsel for the Respondent.

1992, January 7th, Bateman, J.C.C.:- This is an appeal from a decision of the Provincial Court. Mr. Ito was convicted of one offence under the **Tuna Fishery Regulations,** requiring tagging, and acquitted of several others. The Crown appeals the acquittals and Mr. Ito appeals his conviction and sentence.

The facts are generally agreed. Mr. Ito, in his capacity as broker supervised the preparation of 3 bluefin tuna for shipment to Japan. The Department of Fisheries tag which was attached when the fish was caught had fallen off one of the fish. The tags were removed from the other two in the process of trimming them for shipment. The tags, once removed, cannot be reattached to the flesh of the tuna. Mr. Ito wrapped the fish in plastic and taped the broken tags

to the wrapping. He believed he was complying with the **Regulations.** The fish were seized in an airport inspection. Mr. Ito was charged with removing the tags on the three fish and with possessing untagged tuna - a total of six counts.

The Learned Provincial Court Judge acquitted Mr. Ito on two of the first three counts (removing the tags). He convicted on the third count and, applying **Kienapple v. R** (1974), 15 C.C.C. (2d) 524 (S.C.C.), acquitted on the possession charge in relation to that same fish. He accepted the defence of due diligence as regards all other counts.

There is no suggestion that Mr. Ito intended to make illegal use of the tags.

The **Regulations** read:

> "12(1) Where a bluefin is caught and killed, the person that killed the bluefin shall forthwith attach to it a numbered tag issued by the Minister for that purpose.
>
> (2) No tag that is affixed to a bluefin shall be removed therefrom except at the time the bluefin is prepared for consumption.

> 13 No person shall, without lawful excuse, have in his possession any dead bluefin or portion thereof unless there is attached thereto a numbered tag referred to in section 21.

The Respondent says, that the Learned Trial Judge wrongly interpreted the requirement that the tag be "attached" or "affixed" to the tuna. Judge Curran interpreted the words to mean that the tag must be attached to the flesh of the tuna.

The Respondent submits that it is sufficient for the tag to remain associated with the tuna, for example, attached to the wrapping.

The Department says, however, that the purpose of the **Statute** and **Regulations** is conservation of the tuna fishery. A limited number of tuna are permitted to be caught. The Department does random checks of tuna carcasses to ensure they are legal. Unless the tag is attached to the flesh of the tuna the Department has no way of ensuring that the tag is not being reused. Once a tag has been affixed to the flesh it cannot be removed without breaking. The Department is concerned that permitting tags to be attached to the wrapping would facilitate tags being used for one fish, then sent back

to a fisherman and used for another fish. There is a number on each tag. The Department has a system in place to enable it to check a tag number and determine if the tag has already been used for another fish. The evidence before the Trial Judge indicated, however, that the Department's ability to check the tag numbers is time consuming. Additionally, it is dependent upon there being accurate and timely reporting of each tuna caught. That does not always occur. Hence, the Department cannot, by checking the number on the tag, always accurately determine whether it has been previously used.

The Respondent says that to require the tag to be fixed to the flesh of the tuna at all times is impractical in a commercial fishery. The tuna is often cut into parts for shipment to various separate destinations. The single tag cannot serve that purpose. Similarly, the fish is trimmed for shipping to minimize weight and maximize presentation - the tag is therefore innocently removed if it is attached to a waste portion of the fish. The Department responds that when such events occur, the Department of Fisheries will accomodate with duplicate or substitute tags.

In support of the argument that the strict interpretation of 'attached' is impractical and not consistent with a commercial fishery, the Respondent seeks to introduce new evidence.

Both counsel agree that evidence occurring after the conclusion of the trial is admissible. I am not convinced, however, that the authorities extend to the admission of the type of evidence proposed by the Respondent. The Department opposes admission of the evidence.

The Respondent seeks to introduce affidavit evidence of Mr. Ito relating to the preparation of tuna for sale in September of this year - one year after the date of the offence charged. The Affidavit, which is supported by two other Affiants, relates an occasion when a fishery officer attached tags to tuna for shipment by taping the tags to the plastic wrapping of the tuna.

The test for the admission of fresh evidence is set out in **Palmer and Palmer v. R.**, (1979), 50 C.C.C. (2d) 193 (S.C.C.). Summarizing:

(1) the evidence should not be admitted if, it could have been adduced at trial.

(2) the evidence must bear upon a decisive or potentially decisive issue.

(3) the evidence must be capable of belief.

(4) the evidence must be such as would be expected to have affected the result.

I make no finding as to whether this type of evidence is within the contemplation of the authorities permitting the introduction of new evidence.

The Respondent says the evidence is tendered to properly set out the impracticality of attaching the tags to the flesh of the fish in a commercial fishery. In my view the evidence of the actions of one fishery officer is not determinative of that point. Further, the interpretation of the regulation is not driven by whether or not it would create difficulties for the commercial fishery. The Regulation is to be interpreted in accord with the plain language of the text. Only if the text is ambiguous should there be resort to other aids. The evidence sought to be introduced is in this context, not determinative of a decisive issue. I will not admit the evidence.

The Learned Trial Judge determined that "the plain meaning of the words is that the tags are required to be fastened in some way to the body of the tuna and not merely placed on top of it."

In **British Columbia** v. **Henry Samson Belair Ltd.** [1989] 2 R.C.S. 24 (S.C.C.) at p. 31 McLachlin J. states, as to the construction of statutes:

> "In approaching this task, I take as my guide the following passage from Driedger, **Construction of Statutes** (2nd ed. 1983), at p. 105:
>
> The decisions...indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
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> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end."

Regulation 12(2) under which Mr. Ito was charged, prohibits removal of a tag "that is affixed to a bluefin". On two of the three fish a tag was affixed to the flesh or fin and was removed. It is not necessary, as regards these first three charges, to determine how the tag is to be attached.

The tag was attached to the flesh in one case and the fin in the other and was removed by Mr. Ito. On the plain meaning of the words of the section he committed the offence. The tags were removed. Keeping them associated with the fish did not keep them attached or affixed as they had been.

With all respect to the Learned Trial Judge I do not agree that Mr. Ito exercised due diligence in attempting to avoid the commission of the offence; as due diligence has been defined by the Appeal Division.

In **R v. Kennedy**, unreported, Nov. 19, 1991, Chipman J.A. says at p. 3:

> "A defence of due diligence is available to the respondent if, in the words of Dickson, J. in **Her Majesty the Queen v. The Corporation of The City of Sault Ste. Marie**, [1978] 2 S.C.R. 1200 at 1326, he:
>
> > '...reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.'
>
> The respondent was under no misapprehension of fact. He intended his actions, which actions clearly in law amounted to angling as defined in the Regulation."

And at p. 4:

> "The position in which the respondent finds himself is neatly put by Freeman, J.A. by this court in **Denton v. R.** (as yet unreported, S.C.C. No. 02391, April 3, 1991) when he said at p. 3:
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> > 'In any event, the defence of due diligence was not established on the facts. Legally, the Appellant was fishing within a closed area. He intended to do each of the acts that together constituted the offence. He wrongly supposed that what he was doing when caught could not be considered fishing. From the perspective of the deck of a fishing boat, this may seem a narrow distinction, but it is a clear one.'"

While the finding of due diligence by the trial judge is a question of fact, the defence must be properly defined. The Respondent admits that he willingly removed the two tags, mistakenly believing that if he ensured the tags remained with the fish, he would be in compliance with the Regulations. He did not accidentally remove the two tags or take care that they were not removed. He intended to do the act which constituted the offence The defence does not lie. Mr. Ito's mistake was one of law.

Accordingly, I agree with the finding of the Learned Trial Judge as to the one conviction. I find Mr. Ito guilty under S. 12(2) with respect to the removal of the

tag attached to the dorsal fin of the second fish, and acquit in relation to the fish from which the tag separated itself.

As to the charges under Regulation 13, the plain words of the regulation, when read in the context of the Statute and Regulations as a whole, lead me to conclude as did the trial judge that "attached" means affixed to the flesh of the fish. The thrust of the Regulations and the Statute is control and regulation of the fishery with a view to preservation of the species.

The argument that this interpretation is onerous for those involved in the commercial fishery is not sufficient, in my view, to override the clear intent. Any other interpretation is not only expansive of the plain language, but would invite the practice of recycling tags. This is inconsistent with the intent of the legislation.

The Respondent argues, in the alternative, that Mr. Ito was preparing the fish for consumption, and thus the tags could be removed. Mr. Ito's evidence is clear that he was preparing the fish for shipment in a raw state.

I have consulted a number of dictionaries, all of which define 'consume', and therefore consumption, to mean eating or devouring.

Again, on the plain meaning of the words of the regulations, it cannot be said that Mr. Ito removed the tag in the context of preparing the fish to be eaten. Arguably every activity from the catching of the fish on, is ultimately directed toward end consumption of the product. I am satisfied that the intention of the regulation permitting removal on preparation for consumption is to cover removal of the tag at the final processing stage.

The remaining question, then, is whether Mr. Ito exercised due diligence as regards the charges under S. 13. I have outlined, above, the narrow context of the due diligence defence. Mr. Ito removed the tags from two of the fish. The tag had fallen off the third. Believing he was in compliance with the Regulations by keeping the tags with the fish he continued to deal with the product and attempted to ship it to Japan. As above, he willingly did all of the acts which constitute possession of the fish. He took no steps to avoid possessing untagged tuna. His mistake was a mistake of law.

This is a strict liability offence. Persons with innocent motives can be caught in the result. That is the consequence of attempting to balance the rights of an accused with the very important objective of conserving our diminishing resources.

In the result, Mr. Ito, is guilty on two of the three counts of removing the tag from the tuna under S. 12(2). As held by the Learned Trial Judge he is entitled to an acquittal in relation to the third fish from which the tag separated.

I also find him guilty on the three counts of possession of untagged tuna under Regulation 13.

The Crown concedes that in this instance, if there is a conviction entered under the Section 12(2) charges, the entry of conviction should be stayed on the Section 13 charges in relation to the same fish - applying **Kienapple**.

As to the Trial Judge's finding of guilt on the single charge under S. 12(2), I find he correctly applied the **Kienapple** principle.

The Respondent has appealed the Trial Judge's sentence on the one count. He ordered a fine of $250.00 or 30 days in lieu and forfeiture of the tuna (a value of $1066.00). The Respondent submits that the order of forfeiture took both counsel by surprise. The record indicates, however, that the Crown left open to the Court the matter of forfeiture.

Counsel for the Respondent spoke against it. In the face of those submissions the Learned Trial Judge ordered as he did. The sentence was well within the range of penalties open to the Court. I can see no reason to disturb the sentence.

The matter is remitted back to the Trial Judge for sentencing on the further four charges. The matter of **Kienapple** is for the Trial Judge, on sentence.

The Appeal is allowed and the cross appeal dismissed with costs to the Crown.

Nancy Bateman

A Judge of the County Court
of District Number One