

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**  
**(Citation: R. v. Morrell, 2004 NSPC 4)**

**HER MAJESTY THE QUEEN**

-and-

**GREGORY MORRELL**

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D E C I S I O N

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Before: The Honourable Judge Jean-Louis Batiot, J.P.C.

Date of Decision: January 16<sup>th</sup>, 2004

Revised Decision: The text of the original judgement has been corrected incorporating the text of the erratum (released January 29<sup>th</sup>, 2004).

Place Heard: Comeauville, Nova Scotia

Charges: Between the 5<sup>th</sup> day of September and the 28<sup>th</sup> day of September, 2000, at Digby County, Nova Scotia and elsewhere in the Province of Nova Scotia and the City of Toronto, Ontario and elsewhere in the Province of Ontario and elsewhere in Canada,  
1) Sell, trade or barter lobsters which had not been caught and retained under the authority of a license issued for the purpose of commercial fishing or such other license as provided for in subsection 35(2) of the *Fishery (General) Regulations* contrary to section 78 of the *Fisheries Act*.  
2) Sell lobster, caught in contravention of section 7 of the *Aboriginal Communal Fishing License Regulations*, committing an offence contrary to section 78 of the *Fisheries Act*.  
3) Process lobster caught in contravention of subsection 14(1) of the *Atlantic Fisheries Regulations*.  
4) Process lobster caught in contravention of section 7 of the *Aboriginal Communal Fishing License Regulations*.  
5) On the same date at Digby County, Nova Scotia, buy, trade or barter lobster not caught and retained under the authority of a license issued for the purpose of commercial fishing or such other license as provided for in subsection 35(2) of the *Fishery (General) Regulations*.  
6) Purchase lobster caught in contravention of section 7 of the *Aboriginal Communal Fishing License Regulations*.  
All contrary to section 78 of the *Fisheries Act*.

Counsel: Lori-Ann Esser, for the Crown

Clifford Hood, Q.C., for the Defence

1. The Defendant faces various charges under the **Fisheries Act**, R.S. 1985, c. F-14. He is the only remaining defendant on what was originally a multi count, multi defendant information.
2. On September 28<sup>th</sup>, 2000, several Fisheries Officers from Nova Scotia discovered eight marked lobsters at The Mermaid and the Oyster Inc., at 4801 Keel Street, Toronto, Ontario. They had been electronically tagged in Saint Mary's Bay, Digby County, Nova Scotia, three days earlier. The Defence argues this was not an inspection, but a warrantless seizure, and claims a breach of s. 8 of the **Canadian Charter of Rights and Freedoms, Constitution Act, 1982**.

### **Background**

3. Department of Fisheries and Oceans (hereinafter DFO) suspected in the summer of 2000 that Natives fishing under a license for food fishery in St. Mary's Bay, Digby County, Nova Scotia, were selling their lobsters commercially, contrary to the terms of their license. As a result DFO conducted surveillance.
4. On the 25th of September 2000, Fisheries Officers implanted identification chips in ten lobsters in three different lobster traps in the waters off St. Mary's Bay, off Savary Park. These AVID chips (American Veterinarian Identification Devices) are implanted in the body of the lobster, under the carapace, at the tail; they can be read with an instrument detecting the electronic signal. Each chip has its own, unique, identification number.
5. On the 28th of September 2000, eight of these lobsters were seized from the tanks of a retail and wholesale plant in Toronto. This was the missing evidence required to complete an Application to Obtain a Search Warrant, and a warrant was obtained to search certain premises in Nova Scotia.
6. The evidence of the surveillance of the native fishers, of the Defendant trucking seafood to Toronto and of the seizure in the plant where the load was delivered, were presented at trial. The Defendant, in turn, in this application, incorporates most of the evidence heard on the trial proper (but for some exceptions, for instance, Mr. Morrell's evidence on a previous **voir dire**). Crown counsel has agreed to have that evidence so tendered.
7. The evidence in this **voir dire** was completed on November 4<sup>th</sup>, 2003.

### **Arguments**

8. The defence says that the Fishery Officers discovered and seized the evidence under the guise of an inspection, when, in fact, they had reasonable and probably grounds to believe an offence had been committed before the Defendant left Nova Scotia, and they ought to have obtained a search warrant prior to searching the premises. As a result, the search was unreasonable, and a breach of the Defendant's s. 8 **Charter** Right, to be *secure against*

*unreasonable search or seizure*. It relies on the **Comité Paritaire de l'Industrie de la Chemise v. Potash; Comité Paritaire de l'Industrie de la Chemise v. Selection Milton**, [1994] 2 S.C.R. 406 (SCC); **R. v. Inco Ltd.**, (2001), 155 C.C.C. (3d) 383 (Ont. C.A.), application for leave to appeal to Supreme Court of Canada dismissed [2001] S.C.C.A. 436; **R. v. Melnychuk**, [2001] 9 WWR 98 (Sask. Q.B.).

9. The Crown replies that
  - a. the Defendant does not have standing to invoke section 8 of the **Charter** since he did not have a reasonable expectation of privacy, being on business premises belonging to a third party;
  - b. the officers were conducting an inspection, in accordance with their statutory powers, without breaching the Defendant's right under s. 8 of the **Charter**;
  - c. they only acquired reasonable and probable grounds an offence had been committed to apply for a search warrant, once the inspection revealed the presence of the marked lobster and evidence of their sale.

### Issues

10. Counsel have ably argued 4 issues:
  - a. whether the Defendant has standing to raise a **Charter** breach; if so,
  - b. whether the events at the store in Toronto were an inspection or a search;
  - c. whether the Defendant had a reasonable expectation of privacy, protected by s. 8 of the **Charter**;
  - d. whether it was breached.

Should this Court find there has been a **Charter** breach, it is agreed by counsel that a remedy pursuant to s. 24 of the **Charter** will be addressed at a later date.

### Facts

11. Saint Mary's Bay, in Digby County, Nova Scotia, between the mainland and the Digby Neck, is a relatively shallow bay known for being a rich breeding ground for lobsters. It is part of Lobster Fishing Area 34 surrounding southwestern Nova Scotia. Lobster is fished there, as in all of LFA 34, from the last Monday of November to the 31<sup>st</sup> day of May the ensuing year. Thousands of fishers manning hundreds of boats go about the harvest, using lobster pots or traps, sunken to the bottom and attached by a line to a buoy at the surface. All of these must be removed by the closing date.
12. Since the early 1990's, certain aboriginals are permitted, under an **Aboriginal Communal Fishing License**, to be involved in a food fishery during the close period. This is authorized by the Department of Fisheries and Oceans (DFO) and the Regulations it administers. Several members of various native bands partake in this fishery, under the auspices of the Native Council of Nova Scotia, and more particularly through the Netukulimkew'e'l Commission which issues to such member, for LFA 34, up to three yellow tags. They must be attached to each of three traps fished. The conditions of such license specifically forbids the trading, bartering or selling of fish in general and of lobster in particular: such catch can only be used for food, social and ceremonial purposes.
13. DFO became suspicious that lobsters caught under these licenses were not used in the

manner intended. It decided to conduct a more intensive surveillance of the food fisheries. In the present case, surveillance occurred in the eastern end of St. Mary's Bay, between approximately Gilbert's Cove, on the North Shore of St. Mary's Bay and Savary Park on the South Shore (actually St. Mary's Bay is a fairly long body of water with an axis generally north east to south west). The activities of those native fishers involved were observed during the summer months, their manner of fishing, their hauling of lobster pots and transferring lobsters to holding cages; how these were eventually emptied into tote boxes (large plastic containers), then loaded on a half ton trucks, covered with a tarpaulin, and trucked away.

14. Ms. Melanson is a member of the Native Council of Nova Scotia and was allowed to fish one of those specially authorized traps, tag number 00120. Her husband was issued a *special circumstances assistance certificate* to help her fish it. Their daughters Melissa and Melanie were also fishing one trap each, tag numbers 00119 and 00316 respectively.
15. Since lobsters, once out of a tagged trap, cannot be identified with a particular fisher, two Fishery Officers, Dan Fleck and Felton d'Entremont located these three traps on St. Mary's Bay on September 25<sup>th</sup> 2000, hauled them up and, having found lobsters in each of them, tagged, with an AVID tag, each of three lobsters in traps number 00120 and 00316, respectively, and four lobsters in trap number 00119. These lobsters were then replaced in the *bedroom* or *parlor* of the trap (the bait is placed in the *kitchen* of the trap, two different sections of the same trap), after having verified that their AVID reader could read the number of each of these AVID tags.
16. AVID tags are described as small pellets made of enduring material. They are inserted under the carapace, in the tail of the lobster; they can be read electronically by a special instrument, a reader; each number is a specific and unique identification number. A Fishery Officer then keeps it for his record. I will refer to AVID tagged lobsters as "marked lobsters".
17. Each trap bore a Native Council of Nova Scotia 2000 tag described as: *Mi'kmaq, Netukulimk, Jake'j* (*lobster*, in Mi'kmaq). The officers removed the lobsters of legal size (measured with a gauge, no females with spawn attached, known as *berried*), and inserted the following pellets:
  - a. in trap number 00316, AVID tag numbers were:
    - i. 123651295A,
    - ii. 123622365A, and
    - iii. 123773161A;
  - b. the second trap, 00120, again,
    - i. 123568651A,
    - ii. 123557520A, and
    - iii. 123556570A;
  - c. trap 00119,
    - i. 123579120A,
    - ii. 123662674A,
    - iii. 123946547A,
    - iv. 123833512A.

18. A similar operation was repeated on the 26<sup>th</sup> and the 28<sup>th</sup> of September. These lobsters, 42 of 47 marked lobsters, were recovered the following day on board the Cygnus, a Canadian Coast Guard vessel.
19. The Fishery Officers knew the location of these traps Later on September 25<sup>th</sup>, Mr. Melanson was observed hauling them from the waters of St. Mary's Bay. Then the Melansons, aboard their boat, steamed toward Savary Park, hooked onto the buoys, hauled up from the bottom holding traps, three on two buoys, transferred the recently caught lobsters to them, towed two of these traps to the beach, then dragged them to near the Native camp. Then Mr. and Mrs. Melanson and Mr. and Mrs. Gavel (daughter and son-in-law) apparently transferred lobsters from the holding traps into four tote boxes which are placed on the back of a half ton truck and covered with wet rags, the usual practice, to protect the fish from the elements.
20. Mr. Melanson drove that vehicle onto Highway 101, toward Digby, in an easterly direction. That truck was observed by several Fishery Officers. It stopped at a service station shortly before the exit to Digby. Mr. Melanson used the telephone for a few seconds; then proceeded, on the same highway; Fishery Officer Bishara followed it at some distance, past the Digby exit ramp, through an area known as Joggin Bridge, close to Smith's Cove. It did not appear at the level intersection, nor was it seen continuing on up the hill, on Highway 101. It had vanished.
21. Close to that intersection is the building known as G.E.M. Fisheries. It is owned by Gregory Morrell, the Defendant. His activities were also under observation. Shortly after 8 p.m. that same day, after Mr. Melanson made the phone call, Mr. Morrell was observed arriving at G.E.M. Fisheries, then leave for perhaps ten minutes. When he came back he backed his distinctive truck (an F-250 Ford with dual rear wheels) to unload four tote boxes. Three of these boxes appeared heavy. The observations were made from some distance; there was no confirmation as to their exact content.
22. Officers continued the surveillance of G.E.M. Fisheries. In the early hours of September 27<sup>th</sup> a large white truck, described as a cube truck, with a refrigeration unit and a loading boom, arrived, together with other vehicles; 29 styrofoam boxes were loaded (officers could hear the squeaking of styrofoam), then covered with a blanket. By 4:30 a.m.; the doors were closed and Mr. Morrell drove the cube truck toward Digby.
23. It was seen at the Digby exit, passed the Irving Station; its back (loading) door was closed so the content could not be observed. Several officers then continued to follow the Defendant's truck, first on the Digby Ferry to St. John, New Brunswick, and then on to Toronto where it arrived between 9 and 10 a.m. on September 28<sup>th</sup>, at The Mermaid and The Oyster, on Keele Street (continuity is admitted). From the officers' observations, the loading door of the truck had never been opened during this whole transit even when the truck had stopped at a garage in New Brunswick for engine trouble; at the same time, they did not have it under observation at all times (onboard the ferry, for instance).
24. The unloading took place for nearly six hours. At about 3:55 p.m. Atlantic time (they say

3:00 p.m. Toronto time – all times are given as Atlantic time), during regular business hours, Fishery Officers, supported by some RCMP officers – Mr. Morrell described some as OPP Officers (Ontario Provincial Police) – entered the premises to conduct an inspection. There were plain clothes officers but two wore uniforms. They described The Mermaid and The Oyster as a retail/wholesale fish selling business, with several areas, such as receiving and office spaces, and six large lobster holding tanks, with attendant pumps and plumbing to circulate the water in which lobsters are kept.

25. The Fishery Officers had brought with them some equipment from Nova Scotia, such as a scanner, a photocopier and an AVID tag reader. It took however nearly two hours to check more than 2,000 pounds of lobsters. In the meantime the officers also inspected documents. The task was to inspect whether any of these tanks contained those lobsters marked with an AVID tag. Within approximately two hours, eight such lobsters were located, in three of the six tanks: they matched the numbers recorded some three days earlier in St. Mary's Bay, Nova Scotia, that is to say
- a. 123662674A
  - b. 123773161A
  - c. 123579120A
  - d. 123557520A
  - e. 123651295A
  - f. 123622365A
  - g. 123556570A
  - h. 123568651A

These were seized, pursuant to s. 51 of the **Fisheries Act**.

26. The evidence shows that there were some one thousand pounds of lobsters in the tanks before Mr. Morrell made his delivery and it is acknowledged that (Exh. 21) he delivered twenty seven boxes at forty pounds each of mixed lobsters, i.e. of different sizes, and forty seven pounds of culls, which are described as damaged lobsters or perhaps soft shelled. The former at \$7.50 a pound and the latter at \$6.50 a pound, together with delivery freight of \$845.25, for a total invoice of \$9250.75. That was the only invoice that day from G.E.M. Fisheries. There had been many on prior dates.

### **Standing of the Defendant**

27. In order to advance a claim of a breach of charter rights, the Defendant must show that he has standing to do so. The Crown argues that he does not as he cannot show that he had a reasonable expectation of privacy at the Mermaid and Oyster in Toronto. This issue was dealt with as part of the **voir dire** in which much of the trial evidence was incorporated. The Crown relies on **R. v. Edwards** (1996), 45 C.R. (4<sup>th</sup>) 307 (S.C.C.); **R. v. Khuc** (2000), 142 C.C.C. (3d) 276 (B.C.C.A.); **R. v. Novak** (2000), 139 B.C.A.C. 15, and; **R. v. Pugliese** (1992), 71 C.C.C. (3d) 295 (Ont. C.A.).
28. Mr. Morrell had arrived at the Mermaid and the Oyster at about 10 a.m. on the 28<sup>th</sup> of September 2000. He explained that about a year before he had met two persons in Toronto and they had discussed and agreed to enter into a joint venture to sell fish retail and wholesale, in Toronto. As a result Mr. Morrell delivered six tanks and attended at Toronto

for about a month to install them. It required a lot of work: changing the sinks around, and installing several systems, such as plumbing, electrical, and refrigeration. It was at his cost, including the residency costs. He considered this an investment, as a third partner. He was, thus quite surprised when Crown counsel showed him the incorporation documents of The Mermaid and The Oyster Inc., which omitted mention of his name entirely.

29. Indeed to Mr. Morrell's mind he had been involved in a partnership, not a corporation, where all three were to share profits equally, one third each. He did not have any copy of lease agreement, for the premises, nor any documents with respect to partnership but he *would not have provided some \$30,000 or \$40,000 worth of equipment in a building and I would not have supplied it if I had not been a partner.*
30. In addition to the delivery and installation of the tanks he had provided some signature at a bank. He had a key to that building and he would attend from time to time to make deliveries to it, perhaps once every two months. He would also fly there from his business in Digby as problems required his attention. He did business with Mermaid and Oyster or Mermaid and The Oyster – not the corporate entity – as evidenced on several invoices made by G.E.M. Fisheries, all for delivery of fish, principally of lobsters. He mentions that the venture did not seem to be well financed and he often had to wait for payment of his deliveries, usually amounting to several thousands dollars, and would have to accept post dated cheques.
31. The Mermaid and The Oyster is no longer in business. Mr. Morrell has begun, or had initiated at the time of testifying, on March 25<sup>th</sup>, 2003, a suit in Small Claims Court in Toronto to obtain monies owed to him, first for products not paid for and, I presume, for an accounting and/or recovery of his initial investment.
32. The issue between Mr. Morrell and his two associates is of course a civil matter. Here the issue is whether Mr. Morrell had a reasonable expectation of privacy.
33. In **Edwards, supra**, it was found that the boyfriend of a tenant, in whose apartment drugs were discovered, who had a key to the apartment but did not share in its cost, was a privileged guest. He could not have a reasonable expectation of privacy. The criteria to assess an expectation of privacy are (the list is not closed):
  - a. presence at the time of the search;
  - b. whether the person has control over the place, including the ability to regulate access or egress;
  - c. status as to ownership;
  - d. historical use;
  - e. the existence of subjective expectation of privacy and whether, objectively, such expectation is reasonable.
34. In **Khuc, supra**, babysitters, in a residence subjected to a warrantless search, could not have an expectation of privacy; nor was an accused found to have standing to attack a search warrant, even though he had a key to the commercial warehouse where he had a marihuana grow operation, without a lease, and was not the owner (**Novak, supra**); nor did the building

owner have standing to attack a search warrant when its execution brought to light evidence implicating him, obtained in one of the apartments rented to a tenant (**Pugliese, supra**).

35. Mr. Morrell, from the evidence adduced, obviously had an interest with the Mermaid and Oyster. He did not know it to be a corporation. From his point of view he was a third partner, having made a capital contribution of thirty to forty thousand dollars. Being involved with others, it was still a separate entity from him, to which he would sell products and from which he expected payments for that product. Indeed he accepted cheques.
36. He was not knowledgeable about its capitalization and management, but knew it was often short of money. He was dealing with it at arms length.
37. The Small Claims Court action he has filed was first to obtain payment of an unpaid delivery. It is not identified as to whether it involves that shown in exhibit 21. It is also to resolve the whole issue of ownership, I infer, or what is owed, by whom, to the accused.
38. I would accept that such investment entitled him to some consideration, perhaps as investor rather than part owner. It is clear that his status vis à vis The Mermaid and The Oyster Inc is subjectively based. In law, on September 28<sup>th</sup>, 2000, The Mermaid and The Oyster Inc was a corporation, an independent entity from the Defendant. It was a third party.
39. Nevertheless from his point of view he felt he was a part owner, a partner, and he may have had some subjective expectations of privacy, being in premises which he was entitled to access, a retail and wholesale fish business, open to the public during business hours. Very relevant are the statutory parameters imposed on those who engage in the retail and wholesale business of fish buying and selling, as governed and regulated by the **Fisheries Act**.
40. Those involved in such highly regulated industries enjoy a very limited expectation of privacy. They exercise a privilege to earn a good livelihood in a limited access and protected fisheries; they must abide by the rules and regulations controlling the exercise of that privilege, wherever they may be.
41. The Defendant has advised that he is a licensed fisherman and can harvest and sell his own product, without a Provincial License. Selling his own product, he would be aware for instance of section 18 of the **Fisheries Act** regulating the licenses for lobster pound. We must not forget that on September 28<sup>th</sup> the lobster fisheries in LFA 34 was closed and there is no evidence that he was involved in fishing lawfully for lobsters anywhere else in Nova Scotia, or elsewhere for that matter; thus, he may have been obtaining fish from others; he would be aware that Fisheries Officers would be interested in this activity.
42. He would also be aware of the powers of Fishery Officers, pursuant to section 49 of the said **Act**, to *enter and inspect any place, including any premises, vessel or vehicle, in which the officer or guardian believes on reasonable grounds there is any work or undertaking or any fish*. He would know the definition of *fish* which includes lobsters (s. 2 (b), **Fisheries Act**); and of the fact these Officers may *open any container, examine any fish or other things*; or



*require any person to produce for examination or copying any records, books of account or other documents (Fisheries Act, s. 49(1) (a) to (d)). He would be aware of the documents and records he must keep and provide upon request ( Fisheries Act, s. 61.(1)) such as number, sex, size, weight, species, product form, value or other particulars of any fish caught, cultured, processed, transported, sold or purchased and time and place, when such fish was purchased, the type of vessels, given method used of buildings, equipment, product and methods all relating to the proper management and control of fisheries or the conservation and protection of fish (Fisheries Act, s. 61.(2)).*

43. No doubt he would know the requirements under s. 61(3) of the duties to keep books, and under ss.(4), to provide information.

44. Justice La Forest stated, in **Thompson Newspapers Ltd et al. v. Director of Investigation and Research et al.**, (1990) 54 C.C.C. (3<sup>rd</sup>) 417 (S.C.C.), at p. 475

*Since the adoption of the Charter, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context.*

Further, at p. 476,

*In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature o participating in such activity.*

45. La Forest J. juxtaposes this lower expectation to that found in criminal investigation, at pp. 476-477:

*...For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such [criminal] investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirements of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.*

46. It was the first time that the Defendant faced what he calls a search, what the Crown calls an inspection, of the commercial (as opposed to the catching) side of fishing. He had experienced inspections on board his vessel. At any rate, being involved in a highly regulated industry, and licensed to do so, he is deemed to know the parameters within which he may operate, and what he may expect from Fisheries Officers.

47. I cannot conclude the Defendant's expectation of privacy, at The Mermaid and The Oyster Inc., on the 28<sup>th</sup> of September, 2000, was, objectively, reasonable. As a result, he does not have standing to raise a s. 8. Nevertheless, since the evidence of the reasonableness of the search has been tendered in this *voir dire*, for the sake of completeness, I will address it.

### **Inspection or Search**

48. The Defence has tendered into evidence an *Information To Obtain a Search Warrant* a document signed by Eldon Young, Fishery Officer, of some 27 pages, legal size, describing in great detail his grounds for making the application. It went forward once the marked lobsters were located at The Mermaid and The Oyster, at about 5 p.m. Toronto time. It authorized a search of certain properties, including Mr. Morrell's home, between the hours of 8 p.m. on September 28<sup>th</sup> and 10 a.m. on September 29<sup>th</sup>.
49. The affidavit in support of the application contains detailed evidence of the various observations made of several aboriginal fishers occupied in St. Mary's Bay, including those holding the tag numbers described above; as well as it describes the various activities at G.E.M. Fisheries – G.E.M. Fisheries Ltd. (George Denton and Associates) in the application – and the different meetings that were observed between Mr. Morrell and some of these aboriginal fishers from about the 18<sup>th</sup> day of August 2000 to the date of the application. This evidence is in much greater detail than that provided at the trial, and in this **voir dire**.
50. The central issue raised by that evidence and that contained in this Information to Obtain is whether, in the absence of the AVID tagged lobsters found in Mermaid and Oyster Inc., there were reasonable grounds, as opposed to suspicions, to obtain a search warrant at the time the inspection was commenced in Toronto, that is to say, reasonable grounds that an offence was, is, or is about to be committed.
51. We know that there were reasons to believe, on the 25<sup>th</sup> of September, in the evening, that Mr. Melanson was trucking lobsters in the four tote boxes loaded in the back of the half ton truck. We also know that he stopped to make a phone call just prior to reaching the Digby exit; that he continued on the 101 highway, which crosses the highway leading to Smith's Cove; that his truck *disappeared* or, more precisely, that the Fishery Officers following the truck, or observing the intersection, lost sight of that truck. We also know that, a few minutes later, Mr. Morrell drove back to the G.E.M. Fisheries building located near that intersection and unloaded four tote boxes. Further, we know from the evidence that, aside from the intersection of Highway 101 and the Landsdown Road – which crosses the highway – there is another driveway directly off Highway 101, just prior to the intersection. Probably Mr. Melanson's truck exited the highway onto that driveway, and possibly there was a meeting between Mr. Melanson and Mr. Morrell. Indeed Fishery Officers went to check (F.O. Hutchins) and could detect some tire tracks on the driveway, by a salvage yard. These may be consistent with Mr. Morrell's truck tires. But there was no direct evidence of a meeting between Mr. Morrell and Mr. Melanson that evening shortly after 8 p.m. on September 25<sup>th</sup> 2000, nor whether the tote boxes contained lobsters.
52. Fishery Officer Young did not believe that this amounted to reasonable grounds, only to

suspicious that there was a delivery of native lobster. It is only when the marked lobsters were discovered, together with the invoice, that he could conclude he had reasonable grounds to believe an offence had been committed, i.e., a commercial sale of lobsters caught by aboriginal fishers for food, social or ceremonial purposes. He went forward with his application to obtain, an application which had been in the process of preparation for several days. The presence of that tagged lobster in Toronto was crucial, since the presence of lobster at G.E.M. Fisheries would be consistent with its sale, or simply its storage. The latter would be legal.

53. In **R. v. Shiers**, a recent decision of the Nova Scotia Court of Appeal (December 9<sup>th</sup> 2003, [2003] N.S.C.A. 138) at issue was the sufficiency of the Information To Obtain a Search Warrant in the case of a drug trafficking investigation. At trial, the reviewing judge had found that the issuing Judge could not have concluded that there was such sufficient evidence. The Court of Appeal overturned this decision on the grounds that the reviewing Judge did not defer to the issuing Judge's reasonable inferences from the evidence presented, i.e. that the issuing Judge has a discretion to exercise; this implies drawing inferences from the facts presented.
54. In that case, the Information To Obtain had presented circumstantial evidence of the presence of the accused making a drug transaction outside his residence, part of a quantity of marihuana in a large plastic bag containing about a hundred and fifty to two hundred grams of *gammed up marihuana* (at para. 21). The Information To Obtain further showed that the applicant, an officer with fifteen years experience in drug investigation had said that the presence of zip lock baggies containing marihuana in one gram quantities was consistent with trafficking, and further evidence, such as scales and sales records, might be found in his near-by residence, all tending to prove the charge of trafficking. The reviewing Judge had only said that the evidence did not tie the accused *entering or leaving that residence* (at para. 25).
55. The Court of Appeal, at para. 26, concluded, however, that  
*the issuing Judge was entitled to draw a reasonable inference that 1) at some point Mr. Shiers [the accused] would return to his residence along with the remaining marihuana in the plastic bag; and 2) items such as scales and score sheets would remain at Mr. Shires residence even if Mr. Shires was temporarily absent.*  
Obviously, the evidence of the experienced police officer/applicant was important.
56. In the case at bar there was no search warrant at the time surveillance was conducted or the inspection was begun in Toronto on the 28<sup>th</sup> of September. Was there sufficient grounds to apply for one, as the Defence suggests? It may be that an issuing Judge, had F.O .Young so applied, might have inferred that there was a transaction, unobserved, given the surrounding circumstances established by the Information To Obtain, between Mr. Melanson and Mr. Morrell on the 25<sup>th</sup> of September 2000 at or near Smith's Cove, and that such transaction was a sale, and not simply a delivery for storage, in light, it could be inferred, of the apparent secretive way it had been conducted. But there was no such application, and I can only speculate as to what may have occurred. If such application had been granted, however, I would, in reviewing it, have to defer to the issuing Judge's exercise of discretion.

57. What I know from the evidence is that the Applicant/ Informant believed he did not have such reasonable grounds, a) because there was no direct observation of such a transaction; and b) even if there had been it would have been consistent with a sale or a delivery for storage, and thus no evidence of an offence. Officer Young believed that much of the lobster fished by Mr. Melanson was not used for food. Until the discovery of the marked lobster, to his mind, there was no evidence that a sale had occurred. I accept his evidence.
58. I conclude that up to that point there was no ground to obtain a search warrant, but there were only strong suspicions to continue with surveillance and an inspection, pursuant to the powers and jurisdiction granted to officers by the **Fisheries Act**, in the discharge of their statutory obligations to regulate the fisheries.
59. Therefore **Inco, supra**, which held that once an officer, enforcing a regulatory power, has reasonable grounds to believe an offence has been committed, he must obtain a search warrant, and cannot, under the guise of an inspection, question a suspect and seize documents, is inapplicable; so are the other cases cited by the Defendant.
60. The inspection, at The Mermaid and The Oyster, Inc., was unusual in that it involved a long surveillance, different provinces, and several police officers. It was, nevertheless, an inspection as authorized by the **Fisheries Act**: the Officers had reasonable grounds to believe there was fish on the premises. (s. 49.(1))
61. I must conclude, given the statutory restrictions imposed on those involved in the fisheries in Canada, and even though the Defendant believed he had an interest, that the premises were that of a third party and the Defendant does not have standing to raise the **Charter** issue as there was no reasonable expectation of privacy. Further, if it had been so, the work the officers did was an inspection and not a search as argued.

Dated at Annapolis Royal, this 16<sup>th</sup> day of January, 2004.

Jean-Louis Batiot, J.P.C.