**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** [R. v. Leahy], 2004 NSPC 62

**Date:** November 25, 2004
**Docket:** 1205073/1205074
**Registry:** Sydney

**Between:**

The Queen

v.

John Gary Leahy

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| **Judge:** | The Honourable Judge B. Williston |
| **Heard:** | March 4, 2004<br>June 4, 2004<br>Sydney, Nova Scotia |
| **Charge:** | Section 78 Fisheries Act (s-s. 22(7) )Fisheries General Regulation (Two counts) |
| **Counsel:** | Mr. J.M. Denis Lavoie , for the Crown<br>Mr. Ralph W. Ripley , for the Defence |

**By the Court**:

The accused is charged that he did, between May 26, 2002, and June 2, 2002, inclusive, at or near Louisbourg, Nova Scotia, in Snow Crab Fishing Area 23, while carrying out any activity under the authority of a license, contravene or fail to comply with any condition of the licence by failing to ensure the electronic monitoring system was fully operational and in use during the entire fishing trip from the time the vessel left port until the vessel returned to port, contrary to s-s. 22(7) of the Fisheries (General) Regulations, SOR/93-186, thereby committing an offence under s. 78 of the Fisheries Act, R.S.C. 1985, c.F-14;

AND FURTHER: that the aforementioned individual did, between May 26, 2002, and June 2, 2002, inclusive, at or near Louisbourg, Nova Scotia, in Snow Crab Fishing Area 23, while carrying out any activity under the authority of a licence, contravene or fail to comply with any condition of the licence by failing to immediately cease all fishing activity when the electronic monitoring equipment became inoperative or malfunctioned, contrary to s-s. 22(7) of the Fisheries (General) Regulation, SOR/93-186, thereby committing an offence under s. 78 of the Fisheries Act, R.S.C. 1985, c.F-14.

The issues before me arise from a *voir dire* into the admissibility of documentary evidence obtained on the accused's vessel, Patches III.

**FACTS:**

The accused, John Gary Leahy is a commercial fisherman.

On May 29, 2004, Fishery Officer Pat Young was informed that the accused was at sea on a fishing trip for crab on board his vessel, the Patches III. The personnel involved in the vessel monitoring system informed him that the Department of Fisheries and Oceans had not received any positions for this boat during its fishing trip which started on May 27, 2004.

When the Patches III returned to port in Louisbourg, Nova Scotia, from that fishing trip on June 1, 2004, Fisheries Officers Pat Young and John Williams boarded the vessel in the early hours of the morning. The officers went to the wheelhouse and Fishery Officer John Williams requested to see the accused's licence, conditions of licence, and log book.

During this time period Fishery Officer Pat Young examined the Vessel Monitoring Unit (commonly called the "black box"). This is an instrument designed to transmit signals to a global positioning satellite. Fisheries Officer Young specifically looked at the log-in light on the front of the unit and

determined it was not in the “on” position and therefore not transmitting any signal. Fishery Officer Young then advised Fishery Officer Williams of his findings. Fishery Officer Williams, who already had possession of the fishing licence, conditions of licence and log book, then seized these documents. These documents are the only items at issue in this application.

At no time was a search warrant obtained regarding the entry upon the Patches III. The Crown concedes that there were no urgent circumstances in this case which would make it impractical to obtain a warrant.

**ARGUMENT:**

The Crown argues that the actions of the Fishery Officers in boarding the accused’s boat amounted to an “inspection”. Section 49(1.2) and s. 49.1 of the Fisheries Act provide as follows:

> 49(1) Subject to subsection(2) for the purpose of insuring compliance with this Act and the regulations, a fishery officer or fishery guardian may 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 or other thing in respect of which this Act or the regulations apply and may
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> (a) open any container that the officer or guardian believes on reasonable grounds contains any fish or other thing in respect of which this Act or the regulations apply;

(b) examine any fish or other thing that the officer or guardian finds and take samples of it;

( c) conduct any tests or analyses and take any measurements;

(d) require any person to produce for examination or copying any records, books of account or other documents that the officer or guardian believes on reasonable grounds contain information that is relevant to the administration of this Act or the regulations.

(1.2) The owner or person in charge of a place that is inspected by a fishery officer or fishery guardian under subsection (1) and every person found in the place shall

(a) give the officer or guardian all reasonable assistance to enable the officer or guardian to carry out the inspection and exercise any power conferred by this section; and

(b) provide the officer or guardian with any information relevant to the administration of this Act or the regulations that the officer or guardian may reasonably require.

(1.3) A fishery officer or fishery guardian who takes a sample under paragraph (1) (b) may dispose of it in any manner that the officer or guardian considers appropriate.

(2) Where any place, premises, vessel or vehicle referred to in subsection(1) is a dwelling-house, a fishery officer or fishery guardian may not enter that dwelling house without the consent of the occupant except under the authority of a warrant issued under subsection(3).

49.1(1)A fishery officer with a warrant issued under subsection (2) may enter and search any place, including any premises, vessel or vehicle, in which the officer believes on reasonable grounds there is

(a) any work or undertaking that is being or has been carried on in contravention of this Act or the Regulations;

(b) any fish or other thing by means of or in relation to which this Act or the Regulations have been contravened; or

c) any fish or other thing that will afford evidence in respect of a contravention of this Act or the Regulations.

(2) Where on ex parte application a justice of the peace is satisfied by information on oath that there are reasonable grounds to believe that there is in any place referred to in subsection (1) any fish or other thing referred to in subsection (1), the justice may issue a warrant authorizing the fishery officer named in the warrant to enter and search the place for the thing subject to any conditions that may be specified in the warrant.

(3) Notwithstanding subsection (1), a fishery officer may exercise the power of search referred to in that subsection without a warrant issued under subsection (2) if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

(4) For the purposes of subsection (3), exigent circumstances include circumstances in which the delay necessary to obtain the warrant would result in danger to human life or safety or the loss or destruction of evidence.

(5) In carrying out a search of a place under this section, a fishery officer may exercise any power mentioned in subsection 49(1), (1.1) or (1.3).

The Defence submits that the fishery officers were conducting an investigation and not an inspection when the vessel was boarded. As no search warrant was obtained nor were there urgent circumstances making it impractical to

obtain a warrant, the defence submits that this was a warrantless seizure which should be excluded under s. 8 of the Charter.

The Crown argues that the documents in question were properly seized under the authority of s. 51 of the Fisheries Act which reads:

> A fishery officer or fishery guardian may seize any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act, including any fish that the officer or guardian believes on reasonable grounds.
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> a) was caught, killed, processed, transported, purchased, sold or possessed in contravention of this Act or the regulations; or
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> b) has been intermixed with fish referred to in paragraph (a).

Following the seizure, the documents were copied and given to the accused. Since then, the documents have been detained pursuant to s. 71(1) of the Fisheries Act which provides:

> Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.

**ISSUES**:

1. Whether the warrantless seizure of the documents violates s. 8 of the Charter of Rights and Freedoms.

2. Whether the provisions of s. 51 and s. 71(1) of the Fisheries Act contravene s. 8 of the Charter and should be declared to be of no force and effect.

**LAW AND ANALYSIS:**

(I) **Introduction**:

It is first necessary to briefly review the principles of law governing search and seizures as it has developed under s. 8 of the Canadian Charter of Rights and Freedoms hereinafter referred to as the Charter.

Following this analysis, I will then consider whether sections 51 and 71(1) of the Fisheries Act violates s. 8 of the Charter and, if so, the

appropriate remedy under s. 52(1) of the Constitution Act , 1982. Finally, if a s. 8 Charter breach is found, it will be necessary to determine whether the evidence obtained thereby is to be excluded from the trial pursuant to s. 24(2) of the Charter. Should this Court find that 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.

(ii) **Principles Governing s. 8 of the Charter**:

Section 8 of the Charter states:

> Everyone has the right to be secure against unreasonable search and seizure.

In Hunter et al v Southam Inc. (1984), 14 C.C.C. (3d) 97, Dickson J. (as he then was) on behalf of the Supreme Court of Canada, arrived at the following conclusion about s. 8 of the Charter.

> (1 ) "...an assessment of the constitutionality of a search and seizure... must focus its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective." (p. 106);
>
> (2) the purpose of section 8 of the Charter is "to protect individuals from unjustified State intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they out to have occurred in the first place. This, in my view, can only be

> accomplished by a system of prior authorization, not one of subsequent validation." (p. 109);
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> (3) "...where it is feasible to obtain prior authorization,...such authorization is a pre-condition for a valid search and seizure." (p. 109);
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> (4) "a warrantless search [is] prima facie 'unreasonable'...[and it is necessary] for the party seeking to justify a warrantless search to rebut this presumption of unreasonableness." (pp 109 - 110).

Section 29 of the Act allows a fisheries officer to enter onto property to inspect the property to ensure compliance with the Act. Section 49.1 provides the authority for the officer to enter and search property where that officer has reasonable and probable grounds to believe that an offence has been committed under the Act. Under s. 49.1, the fisheries officer must have a warrant.

In R. v Douglas [2000] B.C.J. No 2701 (Prov Ct) Judge Lenaghan explains that s. 29(1) of the Act relates to searching property for the purposes of investigating an offence under s. 35(1):

> Section 49.1 makes it clear that once a fishery officer has "reasonable grounds" to believe that work or undertaking is being carried on in contravention of the Act or regulations, the officer must apply for and obtain a warrant from a justice of the peace, before he

> or she can enter and search the place where the work or undertaking is located. Upon the warrant being issued by the justice of the peace, the officer may in the words of subsection 49.1(5), "exercise any power mentioned in subsection 49(1), (1.1) or (1.3)". Moreover, in my view, once s. 49.1, becomes engaged in connection with a particular work or undertaking, believed, on reasonable grounds, to be operating or to have operated in contravention of the Act or regulations, recourse to s. 49(1) with that particular work or undertaking except as allowed by s. 49.1(5). That is to say, fishery officers cannot lawfully exercise the powers set out in s. 49(1) unless they obtain prior authorization in the form of a warrant. While this requirement of prior authorization does not necessarily change the offence before the Court from a regulatory to a quasi-criminal one, it doesn't , in my view, affect the nature of the actions taken by the fishery officers in the sense that they were no longer engaged in the administrative inspection and therefore had to comply with the requirements set out by the Supreme Court of Canada in Hunter, supra. Moreover, those activities, which intruded upon the privacy interest as already discussed, may have a significant effect on any subsequent analysis pursuant to s. 24(2) of the Charter.

**INSPECTION vs. SEARCH:**

The word "inspection" is not defined in the Fisheries Act.

In R. v. Kinnear (1997), 148 NFLD & P.E.I.R. 163 (P.E.I.S.C.) (affirmed on appeal (1997), 151 NFLD & P.E.I.R. 83 (C.A.) Matheson J. examined the difference between an "inspection" and a "search" under s. 49(1) of the Fisheries Act. At trial there was evidence that the Department of Fisheries and Oceans had received a complaint about illegal undersized lobster fishing by three named vessels and three individuals, including the accused Kinnear. A few days later fisheries officers went to the dock to inspect the catch being landed by the vessels in

question. The accused's vessel was boarded and undersized lobsters were discovered on the boat. The trial judge held that what had occurred was a search and therefore that a warrant should have been obtained. He excluded the evidence under s. 24(2) of the Charter.

In allowing the Crown appeal, Matheson J. was of the view that when considered in context, the officers' activities were properly characterized as an "inspection" authorized under s. 49(1) of the Fisheries Act. In her decision, Matheson J. referred with approval to the decision of Chief Judge Thompson (as he then was) in R. v. Hackett (1988), 67 NFLD & P.E.I. R. 353 (Prov. Ct.) at p. 166 of her decision:

> Inspection is not defined in the Act. However, Chief Judge Thompson discussed the distinction between an inspection and search in R. v. Hackett (1988), 67 Nfld & P.E.I.R. 353, at pp. 355-56. He referred to the Black's Law Dictionary definition of inspection as follows:
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> > "A critical examination, close or careful scrutiny, a strict or prying examination, or an investigation."
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> > Black's defines "search as follows:
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> > "An examination...with a view to the discovery of...some evidence of guilt to be used in th prosecution of a criminal action for some crime or offence with which (a man) is charged."

> The issue before the trial judge was whether this was an "inspection" under s. 49(1) of the Act or a "search" requiring a warrant under s. 49(1)(1) of the Act. He determined it was a search for which a warrant was required. However, not every search requires the authorization of a warrant. In this case there was sufficient information to found a warrant. If the fisheries officers cannot conduct an inspection under s. . 49(1) of the Act when they receive a tip, which is insufficient to found a warrant, they cannot fulfill the purpose of the Act. Section 49(1) does not refer to only random or arbitrary inspections. It uses the phrase "believes on reasonable grounds." I agree with Chief Judge Thompson in Hackett where he says at p. 359:
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> > Section 35 of the Fisheries Act provides that a fishery officer may enter vessels "in order to carry out such inspections as he deems necessary to ensure compliance with the Act and the Regulations. That provision, in my view, was intended by Parliament to cover situations involving not only routine inspections but also situations where there is insufficient evidence to justify the issuance of a warrant. To hold otherwise would be to hold that a fishery officer can examine a vessel with no grounds to do so whatsoever, other than the fact that there is gear on board, but that he cannot do so where he has information which is sufficient only to bring his grounds minimally above those which are sufficient to justify a routine inspection such as that set out above. "

The P.E.I. Court of Appeal in Kinnear, supra, affirmed Matheson J.'s decision stating at p. 85:

> The fact that the officers may have been prompted to do an inspection by a complaint does not change the character of what they were doing so as to require prior authorization under s. 49.1.

In our present case, I am satisfied that the Fisheries Officers did not have enough information prior to boarding the Patches III which could justify the issuance of a search warrant. While the officers may have had "concerns" based on

having received no signals from the vessel on the vessel monitoring system during its fishing trip which started on May 27th, 2004, this information would not even minimally satisfy the requirements for a search warrant.

The characterization by Fisheries Officer Young and Fishery Officer Williams that this was an "investigation" does not change the fact that both he and Fishery Officer Williams were conducting an "inspection" when they boarded the Patches III on May 27, 2002. There were no reasonable grounds to believe that an offence under the Fisheries Act had been committed. At most, there was a suspicion that there might have been a violation of the Act, or Regulations. No warrant was necessary in the circumstances. Although the inspection was not random nor routine and was directed specifically at the Patches III, nevertheless this was a true inspection of the sort contemplated and authorized by s. 49 of the Fisheries Act.

The Nova Scotia Court of Appeal in R. v. Wilcox (2001), 192 N.S.R. (2d) 159 (N.S.C.A.) held that the mere fact that a fishery officer may suspect an individual of non-compliance does not convert a valid inspection into a unreasonable search within the meaning of s. 8 of the Charter. The Court stated at page 202:

> ....The nature of an inspection as provided for by s. 49 is less intrusive than a forcible entry and search and such an inspection generally carries with it neither the stigma nor the more draconian consequences of a criminal investigation: See *Comite Paritaire* at 421. The inspection occurs in the course of participation in a highly regulated industry: see *Fitzpatrick, supra*, at para. 49. The business character of the documents gives rise to a lower expectation of privacy: see *Fitzpatrick, supra*. Finally, the inspection in issue here occurred on business premises, where reasonable expectations of privacy are generally lower: see *Comite Paritaire*, supra, at 420. Taking all of these factors into account, I do not accept the proposition that an inspection of business premises in the fisheries context engages the Hunter requirement of prior judicial authorization where the officers are investigating a suspect offence but do not have reasonable and probable grounds to obtain a search warrant.

**WHETHER SECTION 8 OF THE CHARTER VIOLATED:**

In The Queen v. Evans (1996),104 C.C.C. (3d) 23 (S.C.C.) Sopinka, J. referred to s. 8 of the Charter in the following terms:

> "As the court stated in Hunter v. Southam Inc., ...the objection of s. 8 of the Charter is to protect individuals from unjustified State intrusions upon their privacy."

Clearly, it is only where a person's reasonable expectations of privacy are some how diminished by an investigatory technique that s. 8 of the Charter comes into play. As a result, not every form of examination conducted by the government will constitute a "search" for constitutional purposes. On the contrary, only where those state examination constitute an intrusion upon some reasonable privacy interest of individuals does the government action in question constitute a "search" within the meaning of s. 8."

Section 49 of the Fisheries Act was reviewed by the Nova Scotia County Court in R. v. Kent (1991), 109 N.S.R. (2d) 335 (N.S.Co. Ct.). Palmeter J. concluded the

following regarding the status of fishermen who were licensed pursuant to the Act at page 189:

> Does the appellant, being a licensed fisherman under the Act and Regulations have a reasonable expectation of privacy. I think not. I accept the contention of the Crown that there was no reasonable expectation of privacy to be protected, in that the appellant as a licensed lobster fisherman was voluntarily participating in a regulated and licensed industry. I further accept that in a regulatory and administrative context persons subject to regulatory control must assume that those administering the regulations under which they operate can take reasonable measures to ensure compliance. I agree, however, that these measures cannot be of unreasonable notice such as to infringe the sanctity of one's dwelling or person. In fact, the Act provides for this and in these cases envisages the use of a search warrant.

In determining whether a statute is quasi-criminal or regulatory, the authorities suggest that the test is not based solely on the nature of the penalty imposed, but rather on the conduct sought to be regulated and the general purpose of the legislation.

The case law certainly suggests that the Fisheries Act is administrative or regulatory in nature and that regulatory inspection in that context is predicated as a recognition of the diminished expectation of privacy in this highly regulated industry.

In R. v. Fitzgerald (1995), 102 C.C.C. (3d) 145 (S.C.C.), the Supreme Court of Canada dealt with the requirement to complete a daily log pursuant to s. 6 of the Fisheries Act and whether such could be used in evidence on a charge related to overfishing. The court held that there could be little expectation of privacy in the log sheets in question as they were expected to be provided to state officials in any event. Therefore, it was held that there was no breach of the Charter based on self-incrimination. The court concluded at page 164:

> My conclusion that it is not abusive for the state to prosecute those who overfish, using their own hail reports and fishing logs as evidence of the offence, is strengthened by reference to this Court's jurisprudence on the application under s. 8 of the Charter in the regulatory context. In applying a contextual approach under s. 8, this Court has repeatedly emphasized that searches and seizures of documents in relation to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context. This is because a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business; see in particular my reasons in both *Thomson Newspapers, supra,* at pp. 475-7 C.C.C.,...and *R. v. Potash* (1994), 91 C.C.C. (3d) 315 at pp. 325-6 and 328... *sub nom. Comite paritaire de l'industrie de las chemise v. Potash* as well as those of Wilson J. in *R. v. McKinlay* Transport Limited, (1990), 55 C.C.C.(3d) 530 at pp. 542-5..., L'Heureux-Dube J in *Potash,* at pp. 343-4 C.C.C....and Sopinka J. in *R. v. Plant* (1993), 84 C.C.C. (3d) 203 at p. 211-15... In my view a similar standard should be applied to the use in a regulatory prosecution of records that are statutorily compelled as a condition of participation in the regulatory area.
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> > Little expectation of privacy can attach to these documents, since they are produced precisely to be read and relied upon by state officials. Similarly, I do not believe it is inconsistent with the principles of fundamental justice for the Crown to rely upon these documents in the prosecution of overfishing. The documents should not be equated to involuntary confessions to investigators, reflecting as they do instead the voluntary compliance by commercial fishers with the statutory requirements of the regulated fishing regime. The principle against self-incrimination under s. 7 of the Charter should not be understood to elevate all records produced under statutory compulsion to the status of compelled testimony at a criminal or investigative hearing.

In our present case, the activity (crab fishing) is permitted only under a license issued pursuant to the Fisheries Act. It is a highly regulated activity. The premises sought to be inspected was a boat used for crab fishing. The fisher, the accused, was required to produce his license and, by implication, the conditions attached to his license, on the demand of a fishery officer pursuant to s. 11 of the Fishery (General) Regulations.

When Fishery Officer Williams was advised by Fishery Officer Young that the Vessel Monitoring Unit "log-in" light was not in the "on" position, Officer Williams "seized" the fishing license, conditions of license and log book that he already had in his possession.

Section 51 of the Fisheries Act states:

> 51. A fishery officer or fishery guardian may seize any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act, including any fish that the officer or guardian believes on reasonable grounds
>
> (a) was caught, killed, processed, transported, purchased, sold or possessed in contravention of this Act or the regulations; or
>
> (b) has been intermixed with fish referred to in paragraph (a).

The defence maintains that "documents" are not included within the phrase "any fishing vessel, vehicle, fish, or other thing" in Section 51 of the Fisheries Act. The defence argues that "fishing vessel", "vehicle", and "fish" are all tangible non-documentary items and that applying the doctrine of *ejusdem generis* to "other things" these general words are limited to the same kind as the particular words.

That principle is defined in "The Construction of Statutes" by E.A. Driedger (Toronto: Butterworth, 1974) at p. 92:

> A fuller statement of the *ejusdem generis* doctrine is found in decisions, namely, that where general words are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context of the general scope and curve of the Act that Parliament intended that they should be given a broader signification.

The Interpretation Act, Ch. I-21, R.S.C. 1985 provides the following in Section 12:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

In R. v. Chute [ 1977] N.S.J. No. 308 (N.S.C.A.) Roscoe, J.A. reviewed the approach to be used in interpreting fisheries legislation and confirmed s. 12 of the

*Interpretation Act* must be given precedence regardless of the potential penal consequence which may flow from a conviction.

The Supreme Court of Nova Scotia in Corkum v. Nash (1991)98 N.S.R. (2d) 364 referred to the rules of construction to determine the meaning of words and Davidson J. stated at p. 371:

> One starts with the intention of the legislature. As stated in the Construction of Statutes by E.A. Driedger at p. 55:
>
> > The comprehension of legislation is, in a sense, the reverse of the drafting process. The reader begins with the words of the Act as a whole and from a reading of these words in their setting, deduces the intention of Parliament as a whole, the legislative scheme, and the object of the Act, and then makes construction of the particular enactment harmoniously with the words, framework and object of the Act.
> >
> > The intention of the legislature was to permit the Province to take control of watercourses in order that watercourses and the water are preserved for the benefit of the public.

In R. v. Ulybel Enterprises Limited, [ 2001] 2 S.C.R. 867 (S.C.C.) Iacobucci J. considered the intention of Parliament in enacting The Fisheries Act and the Regulations and stated at p. 881:

> It is convenient at this stage to provide some background to the Fisheries Act and the specific provision at issue in this appeal. The principal object of the Fisheries Act has been found by a number of appellate

> courts to be that as summarized by the Nova Scotia Court of Appeal in R. v. Savory (1992), 108 N.S.R. (2D) 245, at para. 14:
>
> > The *Act* and the *Regulations* have been passed for the purpose of regulating the fishery; regulatory legislation should be given a Liberal interpretation. A major objective of the *Act* and the *Regulations* is to properly manage and control the commercial fishery.
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> See also R. v. Corcoran (1997), 153 Nfld. & P.E.I.R. 318, at paras. 22-25; R. v. Vautour (2000), 226 N.B.R. (2d) 226 (Q.B.), at paras. 10-11 and 13; R. v. Chute (1997), 160 N.S.R. (2d) 378 (C.A.).

Justice Iacobucci went on to state at p. 883:

> In numerous cases, this Court has endorsed the approach to the construction of statues set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> This famous passage from Driedger "best encapsulates" our Court's preferred approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23. Driedger's passage has been cited with approval by our Court on frequent occasions in many different interpretive settings which need not be mentioned here.

Considering the legislative intent and purpose of the Fisheries Act in properly managing and controlling the commercial fishery, I conclude that "documents" pertaining to the fishery and fishing activities are included within the interpretations of "other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act".

I am satisfied that the seizure in this case was reasonable in the circumstances and was not made in breach of s. 8 of the Charter.

**CONSTITUTIONAL CHALLENGE TO SECTIONS 51 AND 71(1) OF THE FISHERIES ACT**

The defence submits that s. 51 should be declared of no force and effect when used in "investigative circumstances". The defence further submits that since s. 71(1) does not provide for judicial authorization of the detention of items, it is contrary to the Charter of Rights and Freedoms and should be declared of no force and effect.

**A) WHETHER s. 51 OF THE FISHERIES ACT WHICH PROVIDES FOR THE POWER TO SEIZE EVIDENCE IS CONSTITUTIONALLY VALID**:

The defence submits that s. 51 of the Fisheries Act is contrary to s. 8 of the Canadian Charter of Rights and Freedoms in that it authorizes an agent of the state (a fisheries officer or fishery guardian) to seize items without the benefit of prior judicial authorization.

Section 8 of the Charter, not only protects an individual's right to be secure against unreasonable searches but against unreasonable seizures as well. R. v. Dyment (1988), 45 C.C.C (3D) 244 (S.C.C.)

This court must therefore examine whether s. 51 which authorizes "seizure" of the documents is reasonable and therefore constitutionally valid.

The documents were seized during a valid inspection under s. 49 of the Act after the fisheries officer formulated grounds to believe that an offence under the Fisheries Act has occurred.

The defence submits that at that point there were no urgent circumstances that restricted the fisheries officers from following the provisions of the Fisheries Act to obtain a judicially authorized warrant to seize the documents. It further submits that the use of s. 51 in this manner without a warrant lacks the procedural guarantees and safeguards enunciated in Hunter et al v. Southam Inc. (1984), 14 C.C.C. (3D) 97 (S.C.C.) and should be declared unconstitutional.

In that decision Dickson J. stated at p. 106:

> I begin with the obvious. The Canadian Charter of Rights and Freedoms is a purposeful document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to restrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for government action. In the presence case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confirm any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search and seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure and not simply on its rationality in furthering some valid governmental objective

It is important to note that s. 51 deals with seizure and is not another separate search provision of the Fisheries Act. The question is whether the seizure under the Act is reasonable if the thing seized was obtained pursuant to a valid statutory authority under sections 49, 49.1 or 50 or pursuant to the common law provisions relating to plain view, consent or search incident to arrest.

In the present case, the request for the fishing license and log book was authorized by s. 11 of the Fishery (General) Regulations and was not a search. Furthermore, the fisheries officers were carrying out a valid inspection under s. 49 of the Fisheries Act. The officers did not have reasonable grounds to believe an offence under the Act had

taken place before Officer Pat Young informed Officer John Williams that the log-in light on the Vessel Monitoring Unit was not in the "on position".

Officer Williams already had the fishing license and conditions of license in his possession pursuant to his request under s. 11 of the Regulations and during the exercise of his constitutionally valid inspection powers under s. 49 of the Act. He seized the documents after he formulated grounds to believe that an offence under the Fisheries Act had occurred.

The documents in this case contain information with respect to which the accused has little or no expectation of privacy. R. v. Fitzgerald (supra)

The issue of the constitutional validity of s. 51 depends on whether or not the enactment is reasonable. The defence argues that in allowing a warrantless "seizure", there is an infringement of s. 8 of the Charter by virtue of proper procedural guidelines and preconditions. The question requires a weighing or balancing between the individual's right to a reasonable expectation of privacy as compared to the degree of intrusiveness by the State as considered in Hunter v. Southam Inc., supra.

It is very important in balancing the interest of the individual against the state that this is a regulatory offence and not a criminal one. Furthermore, it is important to keep in mind that the documents sought to be admitted into evidence were required by law to be produced by the defendant on the request of a fishery officer. There should be little reasonable expectation of privacy in relation to these regulatory documents.

The documents already in the possession of Fisheries Officer Williams were seized as evidence of an offence under the Fisheries Act only after he formed a reasonable belief that an offence had been committed under the Fisheries Act. In this case, the use of s. 51 in these circumstances meets the constitutionally recognized threshold for the seizure of evidence and is constitutionally valid.

**B) WHETHER S. 71(1) OF THE FISHERIES ACT, WHICH PROVIDES FOR THE POWER TO DETAIN EVIDENCE SEIZED, IS CONSTITUTIONALLY VALID?**

The defence submits that s. 71(1) of the Fisheries Act should be declared unconstitutional as it contains no provision by which the detention of items seized is reviewed by a judicial officer until the conclusion of a trial. As a result, the defence

maintains that the section should be determined by this court to be of no force and effect and contrary to s. 8 of the Canadian Charter of Rights and Freedoms.

Section 71 of the Act reads as follows:

> 71.(1) Subject to this section, any fish or other thing seized under this Act, or any proceeds realized from its disposition, may be detained until the fish or thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded.
>
> (2) Subject to subjection 72(4), a court may order any fish or other thing seized under this Act to be returned to the person from whom it was seized if security is given to Her Majesty in a form and amount that is satisfactory to the Minister.
>
> (3) Subject to subsection 72(4), where proceedings are not instituted in relation to any fish or other thing seized under this Act, the fish or thing or any proceeds realized from its disposition shall be returned to the person from whom it was seized;
>
> (a) on the Minister's decision not to institute proceedings; or
>
> (b) on the expiration of ninety days after the day of the seizure or any further period that may be specified in an order made under subsection(4).
>
> (4) Where a court is satisfied, on the application of the Minister within ninety days after the day on which any f ish or other thing is seized, that detention of the fish or thing for a period greater than ninety days is justified in the circumstances, the court may, by order, permit the fish or ting to be detained for any further period that may be specified in the order.

In the pre-Charter decision of Bergeron et al v. Deschamp et al (1977) , 33 C.C.C. (2d) 461 (S.C.C.), Chief Justice Laskin cited with approval the statement of Lord Denning in Ghariet al v. Jones [1969] 3 ALL E.R. 1700 and stated at p. 462:

> Apart from the fact that there is no general statutory authority in England as there is here to issue search warrants, and that, accordingly, common law rules determine most cases whether documents seized by the police in the course of their investigation of a criminal offence may be retained as evidence, it is apparent from the reasons of Lord Denning that it is the Courts and not the police who determine whether adequate grounds exist for retaining seized documents.

In Bergeron et al v. Deschamp et al (supra) the court held that it should not be left to the police to decide which documents from a number of illegally seized documents should be returned to the court.

The defence submits that since the common law, even prior to the Charter, indicated it is the courts and not the police who determine whether adequate grounds for retaining items exist, that s. 71 does not withstand the test as laid out in Hunter et al v. Southam Inc. (supra).

In the post Charter decision of R. v. MacFarlane (1992), 76 C.C.C. (3d) 54 (PEI CA) the accused submitted that s. 11 and s. 122 of the Narcotic Control Act were inconsistent with s. 8 of the Charter as the Act did not provide for the reporting of items seized during a search to the authority who authorized the search warrant. The accused argued that the reporting return to the judicial authority should have been included in the Narcotic Control Act as it is in the Criminal Code to eliminate any discretion in the police

as to the use of the seized items and to protect against abuse of the seizure power. The accused further argued that it is implicit in Hunter v. Southam Inc. (supra) that not only must an impartial arbiter authorize the search but that arbiter must also be able to supervise the search and whatever is seized. The Court of Appeal of P.E. I. rejected the contention of the accused that the absence of reporting provisions in the Narcotic Control Act were inconsistent with s. 8 of the Charter and declared the search and seizure scheme under that Act to be reasonable.

The provisions of the Fisheries Act are similar to the repealed Narcotic Control Act in regard to the absence of a reporting provision. At the same time the Fisheries Act sets out a complete legislative framework for dealing with items seized pursuant to lawful authority.

The Supreme Court of Canada dealt with this comprehensive scheme in the Fisheries Act with regard to seized things in the case of R. v. Ulybel Enterprises Ltd. (supra). Mr. Justice Iacobucci stated at pp. 886 - 887:

> As noted above, the *Fisheries Act* creates offences and imposes penalties in order to further its object of the proper management and control of the commercial fishing industry. In this appeal, we are particularly concerned with the scheme of that part of the *Fisheries Act* falling under the heading "Disposition of Seized Things" The provisions in that part of the *Fisheries Act* provide authority to deal with the property of

> a person accused of an offence under the *Fisheries Act*. Fisheries officers have the authority to seize property that they have reasonable grounds to believe was involved in the commission of an offence under the *Fisheries Act* (s.51). Seized property can be detained until forfeiture or the close of proceedings (s. 71(1)), or returned to the owner upon the positing of security (s. 71(2)). Persons convicted of an offence may be responsible to compensate the Crown for costs incurred in the seizure, storage, or disposition of seized property (s. 71.1). Except in respect of perishables (s. 70(3)), there is no authority to dispose of or forfeit property before conviction and the close of proceedings under the *Fisheries Act*. Upon conviction, property can be order forfeited to Her Majesty (s. 72) or applied to the payment of fines (s. 73.1(2)). An innocent party that claims an interest in forfeited property may apply for an order declaring that his or her interest is not affected by the forfeiture (s. 75(1)).
>
> It makes sense that the *Fisheries Act* would deal exhaustively with property seized under the *Fisheries Act* given the special nature of the kinds of property at issue: fish, fishing vessels, and equipment. The respondent argues that s. . 489.1 of the *Criminal Code*, R.S.C. 1985, C. c-46, also applies to the seized property of a person accused of an offence under the *Fisheries Act*. However, s. 489.1 begins with the words, "Subject to this or any other Act of Parliament...". Therefore, because the federal *Fisheries Act* also deals with the property of a person accused of an offence under that Act, in my view, s. 489.1 of the *Criminal Code* has no application in this case.

The Court found that in this regulated industry with its principle objectives of proper management and control of commercial fishing that it made sense that the Fisheries Act deal with property seized.

I am satisfied that the provisions of s. 71 of the Fisheries Act are reasonable and not constitutionally deficient and do not violate s. 8 of the Charter.

Judgement Accordingly.