

IN THE PROVINCIAL COURT OF NOVA SCOTIA
(R. v. Courtnakyle Fisheries Ltd., 2005 NSPC 69)

Date: July 25th, 2005
Docket: 1357858, 1357859, 1357860, 1357861
1357862, 1357863, 1357864, 1357865
Registry: Digby, Nova Scotia

Between:

Her Majesty The Queen

v.

Courtnakyle Fisheries Limited and Dwayne Elton Thériault

Revised Decision: The text of the original decision has been corrected as of this date, May 11th, 2006 and replaces the previously distributed decision.

Editor's Note: The preliminary and trial decisions in this matter were both issued under 2005 NSPC 28. The preliminary decision dated January 21, 2005 will continue to be 2005 NSPC 28. The trial decision of July 25, 2005 has now been assigned the neutral citation number 2005 NSPC 69

Judge: The Honourable Judge Jean-Louis Batiot

Heard: April 7th at Digby, April 8th and May 6th, 2005, at Comeauville

Charge: Contrary to Section 13(1)(a), 13 (1)(b), 17(1)(a), 74(1)(a), and 74(1)(b)(ii) of the Occupational Health and Safety Act and contrary to Section 87(2) of the Occupational Safety General Regulations

Counsel: Murray Judge, for the Crown

S. Clifford Hood, Q.C., for the Defence

1. On the 20th of March 2003 Stephen Moore, an experienced sea urchin diver, failed to surface in his third dive off Petite Riviere, Digby Co., Nova Scotia. A search began immediately involving *Doug's Dream*, his base vessel, owned and operated by the defendants, and others. An RCMP diving team was called in. Constable MacLeod and his team, within three days, found the body in 26 feet of water. An investigation followed as to the cause of death; it resulted in charges against the defendants, heard in one trial (*R. v. Clunas*, (1991), 62 C.C.C. (3d) 551 (C.A.), affd [1992] 1 S.C.R.. 595).
2. I have already rendered a decision in this case holding that the location of these alleged offenses were within the jurisdiction of Nova Scotia; therefore, the *Occupational Health and Safety Act* R.S.N.S. 1996 c-7 (thereafter, the *OHS*) may apply to these circumstances.

ISSUES

3. The defence argues that the *OHS* does not apply to this case, nor does it generally to this industry. It is well recognized in law that a fisher, on a fishing vessel, is a *co-adventurer*: *Re Lunenburg Sea Products Inc., Re Zwicker*, [1947] 3 D.L.R. 195 (N.S.S.C.); he is not an employee, at least under federal pension and income safety legislation: *Comeau's Seafoods Ltd. and The Minister of National Revenue* (1999-1793) (E.I. - 1794) (C.P.P. - 1932) (C.P.P.) (T.C.C., affirmed at 2002 F.C.A. 516 (F.C.A.)); he is responsible for himself, and this duty cannot be visited upon the owner of the vessel, or one of its employees. In the alternative, should the **actus reus** be made out against the defendants, there was no negligence on their part.

EVIDENCE

4. A succinct context is required.

Sea urchin fishery

5. The sea urchin fishery is of recent development in this province. Indeed, Dwayne Elton Thériault is one of its original developers, and began in 1997, having purchased one of the existing exploratory licences for \$5,000.00 (a joke in the community, since it may have been worthless). At first it was thought there could not be a viable fishery in this part of Nova Scotia; however Captain Thériault soon proved the naysayers wrong, and grossed \$400,000.00. Recently, one of the remaining 6 licences was purchased for \$80,000.00, by a witness in this trial. It thus has quickly developed into a lucrative fishery, for owners and divers alike.
6. Sea urchins, marketed particularly in the Far East as a delicacy, multiply, grow and live on the bottom of the sea, here the Bay of Fundy. They are hand-picked, by divers. Although divers could fish from shore, they could not do so commercially, and they need a vessel as a base to get to the fishing grounds, ascertained by the captain, to use as a fishing platform to carry their gear and to collect the bags of sea urchins. They are usually three or four per vessel; one of their numbers stays on deck as back-up; those in the waters are watched by the deck-hand hired by the vessel or the Captain. The divers are responsible for their diving gear and air supply and watch each other as they work.

7. The skipper, the holder of the license allowing the taking of sea urchins - in our case the license specifically states that license 109520, for *sea urchins (gear permitted: diver)*, issued to Dwayne Thériault, was “*to be operated by Dwayne Elton Thériault only*” - looks after the vessel, its navigation. Both the skipper and the deck hand watch for bubbles emitted by divers when under the surface and go to and pick up the sea urchin baskets raised to the surface or sent to the surface by inflatable bags by the divers, to bring them on board and segregate each diver’s contribution..
8. The remuneration of each is based on splitting the gross proceed of sale, usually secured by the skipper or vessel, half for the vessel, half for the divers, less a share paid by all with respect to common expenditures such as employment insurance, trucking, black box (monitoring system), and weigh master. Each diver receives as his share an amount proportionate to what his catch is to the total catch for that day.
9. Divers are responsible for their own safety, such as diving gear, air, safety equipment, time they stay submerged (in accordance with the information obtained from their diving computer or tables), and checking on each other. Some use flippers (fins), others do not. Most carry a much greater amount of diving weights, to offset buoyancy, than is usually recommended, to fight currents and tidal surge as they work on the bottom. They provide also their own safety equipment such as knives.
10. Depending on the grounds and their own abilities, they can earn from two hundred to one thousand dollars a day.
11. A high producing diver would be in greater demand amongst captains; a good captain would also be a desirable asset for divers, to locate the good fishing grounds and to support all fishing activities. The decision to go and where to go is usually discussed amongst all but is ultimately the decision of the Captain. He is after all sole master on board. He would, for instance, forbid an impaired diver to dive.
12. Sea urchin divers tend to be transient: they come and go as they please, in accordance with the demand for their services and the reputation of the vessels. They may work amongst the several vessels involved in this fishery in Nova Scotia or may go to another Province. They tend to be independent, but some have remained with the same skipper for years. Each diver is issued a T-4F slip and feel they can quit at any time.

The accident

13. On the 20th of March 2003, Captain Thériault, a deck hand and four divers, including the deceased, were fishing for sea urchins some three hundred feet offshore, on the Bay of Fundy, on “*Doug’s Dream*”, a fishing vessel purchased by Mr. Thériault. He is a director of Courtnakyle Fisheries Ltd (thereafter, Courtnakyle), holds the fishing licence to harvest sea urchins, and was captain of the vessel. In late morning, Mr. Moore was missing. Immediately Captain Thériault started a search, quickly involving other vessels. The Coast Guard and the RCMP were contacted. The body of Mr. Moore was retrieved. Dr. Smith, Medical Examiner, performed the autopsy.

14. As a medical examiner and an experienced diver, Doctor Smith concluded that Stephen Moore died of accidental drowning. Upon examination of the body, he found that Mr. Moore had carried some 80 pounds of weights in two belts and two ankle weights whereas the usual additional weight, given his build, ought to have been 30 pounds. But it is a practice amongst sea urchin divers to be overweighted, in order to stay at the bottom where they harvest sea urchins and to be less affected adversely by water currents.
15. Doctor Smith also noted that Mr. Moore was not wearing fins and that he apparently had unbuckled, through quick releases, two of three buckles of his homemade weight jacket (26 kilos). This, together with a normal weight belt of 19 pounds, were caught by the crotch strap of his diving pack, donned improperly over his weight belts: the diving pack prevented a quick and easy detachment of the weight belts in an emergency.
16. Doctor Smith also noted that the valve on Mr. Moore's chest was not connected to the tanks by a "whip" (hose).
17. The heavy weight is required to offset buoyancy. An alternative is to use a compensator, which uses compressed air to inflate and add to buoyancy. It can also be deflated.
18. It appeared to Doctor Smith that the deceased attempted to release his weights and his diving pack but was unsuccessful in doing so as the weight belts got caught in the back straps. He also found that there was no diving knife and that heavy gloves worn by divers could make it more difficult to open the "squeeze buckles" when, using the thumb and index, one squeezes to release.
19. Constable T. MacLeod, a thirty year diving veteran and a Supervisor with the RCMP diving team, retrieved Mr. Moore's body from 26 feet of water after three days of searching. He received and inspected all of the equipment of the late Mr. Moore and noted the following issues:
 - a. the weight vest was a rather heavy 26 kilos; both the vest and the weight belt were worn under the harness holding the pack and tank on his back, contrary to normal use and practice.
 - b. no buddy system, apparently; certainly Mr. Moore was not tied to anybody else; this may be the practice with sea urchin divers, but is contrary to good diving practice;
 - c. the diving knife was missing. The scabbard was attached to the *computer*, not a good location. A better one is to an arm or on the chest, within the front triangle, for easy, quick and convenient reach, by either hand, in an emergency. Indeed he recalls one of the incidents he investigated, where a drowned diver was found in the position of trying to reach for his knife tied near his right ankle, unfortunately in vain.
20. Constable MacLeod also testified that as a supervisor of the dive team he would be in charge of the divers onboard a vessel and no one else would exercise that supervision. However as a supervisor he would discuss matters of diving strategies with the captain of the vessel, including requirements for the vessel and the engine to be stopped so that the vessel would not present any danger to the divers once in the water.

21. Special knowledge is required for competent supervision such as knowledge of diving tables which indicate the amount of time you may spend at a given depth and how often you should surface. At 26 feet, depending on the health of the subject and the effort exerted, one could be down with one full tank of air for up to an hour and fifty minutes.

THE CHARGES

22. As a result of the investigation, the informant lays the following charges contrary to the *Occupational Health and Safety Act* R.S.N.S. 1996 c-7 (thereafter *OHSA*), against Courtnakyle, as an employer, and Dwayne Thériault, as an employee, that each, between the 19th day of March and the 23rd day of March 2003, did:

a. *Being an employer:*

1) at Little River, Digby Co. NS, fail to take every precaution that is reasonable in the circumstances to ensure the health and safety of persons at or near the workplace, by allowing a diver to dive without a knife, secondary air supply, standby diver, recall system, diver buoy and life line, contrary to Section 13(1)(a) and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7;

2) and further, did fail to ensure Divers were equipped with adequate safety equipment, contrary to section 13(1)(b) and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

3) and further, fail to follow a code of practice contrary to Section 74(1)(b)(ii) and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

4) And further, fail to ensure the propeller on the vessel "Doug's Dream" was adequately guarded contrary to Section 87(2) of the *Occupational Safety General Regulations* and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

b. *Being an employee:*

1), at or near Centerville, Digby Co. NS, fail to take every precaution that is reasonable in the circumstances to ensure the health and safety of persons at or near the workplace, by allowing a diver to dive without a knife, secondary air supply, standby diver, recall system, diver buoy and life line, contrary to Section 17(1)(a) and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

2) and further, fail to ensure Divers were equipped with adequate safety equipment, contrary to section 17(1) and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

3) and further, fail to follow a code of practice contrary to Section 74(1)(b)(ii) and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

4) And further, fail to ensure the propeller on the vessel "Doug's Dream" was adequately guarded contrary to Section 87(2) of the *Occupational Safety General Regulations* and thereby did commit an offence under Section 74(1)(a) of the *Occupational Health and Safety Act*, R.S.N.S. 1996, c.7.

THE OCCUPATIONAL HEALTH AND SAFETY ACT

23. The *OHSA* creates mutual responsibilities for the health and safety of all, on all those present at a workplace, to ensure the safety of each worker present, to be discharged in accordance with the level of authority of each (s.2). This **Act** provides for different *duties and precautions*, depending on the status of each worker, be they employer (s.13), owner (s. 19), independent or dependent contractor (s. 14), supplier (s. 16), self-employed person (s. 18), constructor (s. 15), or employee (s. 17). The latter would include a dependent contractor (s.3(i)). These responsibilities are triggered by the worker's presence at a *workplace* (s.3(ah)); their discharge is commensurate with that person's ability to do so and the working relationship that exists between two or more parties, and their respective authorities (s. 23). I include the relevant sections of the *OHSA*, for ease of reference, in *Schedule A*.
24. There is no doubt that *Doug's Dream* meets the definition of *workplace*, as a place where someone *is or is likely to be engaged in any occupation and includes any vehicle or mobile equipment used or likely to be used by an employee in an occupation* (*OHSA*, s.3(ah)). Fishing is an *occupation* (s. 3(t), i.e., *any employment, business, calling or pursuit*), and the vessel was used to transport divers and products, and as a mobile work platform.
25. This statute is applicable to these circumstances, should the defendants be caught by the definition of *employer* or *employee*, as charged (*R. v. Murphy, 2004 NSPC 30*).

THE ACTUS REUS

Background of Order (s. 66)

26. Officers Dave Sullivan and Charles Pothier of the *Occupational Health and Safety Division* of the *Department of Labour, Nova Scotia*, had conducted an inspection of a fishing vessel, named *Doug's Dream*, and of *employer representative* Dwayne Thériault. They filed a report on December 20th, 1999, making recommendations to the *Executive Director of the Department of Labour*, of that *Division*, to issue an order “*to adopt the Sea Urchins Harvesting, Health and Safety guidelines*”.
27. These apparently were agreed upon by a *Sea Urchin Harvesting Committee, Safety Meeting*, of December 26th 1996, a meeting between industry and government representatives (including Charles Pothier). It is entitled *Requirements for 1996 Sea Urchin Harvesting Season* and it contains the various requirements, for divers and boats, and a general discussion. That document was then made the subject matter of a **Code of Practice**, on January 4th, 2000. It was sent to Dwayne Thériault, with the following dictate:
- “*In accordance with inspection report 310651 [the one already mentioned] the employer is required to adopt this “sea urchin harvesting health and safety guidelines” as a code of practice or submit alternate documentation, acceptable to the Director, that will be imposed as a code of practice by the Director.*
- This required code of practice will remain in effect until superceded by a diving regulation made pursuant to the Occupational Health and Safety Act. This order shall be carried out on or before January 10th 2000.*
- Further, you are to notify the officer in writing upon compliance, in accordance with section 56. The order and compliance notice are to be made available to employees*

in the workplace in accordance with section 39. Failure to comply with the above orders is an offence under section 74 of the Occupational Health and Safety Act 1996.

28. Mr. Jim LeBlanc, the Executive Director and author of the order, wrote to Mr. Dwayne Thériault on January 12th 2000, acknowledging an apparent telephone message of January 10th 2000, with respect to the order. It invited Mr. Thériault to make alternative *work procedure*. There was no further communication in writing.
29. The order was issued pursuant to section 66(1) of the *OHSA*. There is no evidence it was appealed, within 14 days, as provided by section 67(1) of the same **Act**. The full content of this Code of Practice is included as **Schedule B**.
30. Discussions then were also held on divers' certification. It was decided that certification as a rescue diver would be voluntary that year (1996). A decision to make this certification mandatory was to be determined. Also discussed was the possibility that research be carried out in regards to the use of other dive tables.

Employer/employee

31. Courtnakyle Fisheries Ltd. was incorporated on April 14th, 2000 and showed Dwayne and Lisa Thériault as applicants as well as Directors. The annual statement of 1st of March 2003 showed the same directors, and Lisa Thériault as Agent for Courtnakyle Fisheries Ltd.
32. Filed in evidence was Mr. Moore's T-4F, issued by Courtnakyle Fisheries Ltd., for the year 2002 showing that the deceased had gross earnings of \$9,896.42, with a similar amount shown as employment insurance insurable earnings. He paid \$217.30 in E.I. premiums.
33. The Defence, as mentioned, argues that Mr. Moore was not an employee and correspondingly Courtnakyle Fisheries Ltd. was not his employer. It relies on *Comeau's Seafoods Ltd. v. The Minister of National Revenue*, **supra**. At issue in that case was whether a scallop fisherman engaged on a scallop dragger, was engaged in "*pensionable employment and insurable employment within the Federal legislation*", within the meaning of the federal legislation, if they were employed through a *contract of service* (*Employment Insurance Act* S.C. 1996, c. 23 and *Canada Pension Plan* R.S.C. 1985, c. C-8). The decision followed and applied *Wiebe Door Services Ltd. v. Minister of National Revenue* 87 D.T.C. 5025 generally approved by the Supreme Court of Canada in *671122 Ontario v. Sagaz Industries Canada Inc.* [2001], 204 D.L.R. (4th) 542, and held that fishers were working under a contract for services as opposed to a contract of service. It examined the various criteria, such as 1) ownership of tools of the trade; 2) degree of control experienced by the employee; 3) chance of profit for risk of loss.
34. Fishermen in the scallop fishery sign on as crew members, work in the dragging and shucking of scallops at sea, and are remunerated equally from a portion of the total catch. They also bear some of the expenses for the trip.
35. Crucial in the learned trial judge's decision was *Re Lunenburg Sea Products Limited, re:*

Zwicker, [1947] 3 D.L.R. 195 (N.S.S.C.). There, the Supreme Court of Nova Scotia, in banco, held that the Nova Scotia Wartime Labour Relations Board did not have jurisdiction over fishermen and shipowners, as employee/employers, for purposes of certification, since their term of employment was a *species of partnership*, more akin to a co-adventure (at pp. 203-4):

the owners of the ship are to provide the ship with all necessary tackle together with provision and salt. The fishermen provide certain minor equipment such as dory sails, dory compasses, bait tubs, etc. The joint undertaking pays for captain's commission, bait, ice, oil, lubricating oil, certain wages to the cook and engineer. The owner or agent is authorized to sell the fish caught as he may think fit -- not for the owners or for the ship, as I understand the agreement, but for the benefit of all who are entitled to share in the undertaking. He is bound to make an accounting according to the terms of the agreement.

36. In the sea urchin fishery, divers provide their own gear, including tanks and air and they split the gross income with the captain 50/50, after sharing some of the expenses such as a black box - without which they could not go fishing - transportation, and weigh master, and an administrative fee to equate their contribution to Employment Insurance. Generally the captain, or owner, sells the harvest, although it is said divers could make their own arrangements as well (the evidence is not specific on this point; I infer the vessel would remit to each diver, in kind, the quantity of sea urchins to which each would be entitled, after all deductions were made, including the vessel's share. But how would all expenses be equated to a dollar amount, without such amount being known as the price is yet to be obtained? What about EI contributions? There is no evidence on these particulars). There is also evidence that on one occasion, they assumed their share in the loss of a contract due to a bankruptcy.
37. The decision to select fishing grounds is really that of the skipper, with a great deal of input by the divers. It is the divers who decide when to do down, and how long they remain below the surface, in accordance with their computer generated data. The divers tend to look after each other with respect to safety. The captain, and his deck hand, keep a look out for them, and manoeuvre the vessel, constantly, in the presence of waves, current and winds, the proximity of rocks or shore, the location of each diver and the sea urchins baskets popping up to the surface, to be hooked and lifted by the deck hand.
38. The lift bags are collected, and segregated on deck in accordance with the name of each diver, in preparation for final settlement.
39. The evidence indicates that the Captain in fact makes the call to move out or not and is in charge of the operations of the vessel. He provides the vessel, he transports and picks up the divers, allows them to go fishing, and transport the catch back to shore, where he or the company has made arrangements for the landing, the sale and the transport. It appears the fishing trip is a day trip.
40. In effect the activities amount to a symbiotic relationship: neither the vessel nor the diver can fish sea urchins commercially without the other, and both need the license holder.

41. Depending on the richness of the fishing ground, the weather and the depth of water a diver can earn between two hundred and one thousand dollars per day.
42. There is no evidence the divers receive vacation pay. There was, however, a great deal of evidence of how independent, even nomadic and unreliable divers could be, even that they were more important to the common enterprise than the vessel or the captain. Yet, the fact they may not show up for work, or quit at any time, does not negate the fact that, while on board, they are subject to the captain's command, and the reason they board the vessel is to fulfill a contract for their services.
43. I can conclude, echoing *Re Zwicker*, that divers in this fishery are co-adventurers: they are contractors, who, using their special skills, equipments and training, harvest by hand, from the bottom of the sea, sea urchins. They do so from a boat, for the account of Courtnakyle in this case. The company issued the necessary cheque to them, less the agreed upon deductions. Each diver is remunerated, based on the amount he has in fact harvested, and not, unlike scallop dragging, on the total catch.
44. The divers provide their services, under the auspices of the licence. Only Captain Thériault could fish that licence. Without him, they could not have fished; nor could they do so commercially, without *Doug's Dream*.
45. I can come to no other conclusions that the divers, including the deceased, were contractors, and given their degree of dependence on Courtnakyle or Captain Thériault, were *dependant contractors*, within the meaning of s. 3 (i) of the *OHSA*; therefore, according to s. 3 (o) of the same *Act*, they are deemed to be employees for purposes of the *OHSA*, which provides its own, complete scheme of definitions.
46. It can be argued that the Captain could not order a diver to dive once on board – and there is evidence to that effect – clearly the enterprise on which they were all embarked was to fish for sea urchins; a diver who would refuse to dive, without reasonable grounds, would, in my opinion, have very limited opportunity, if any, to go out again. They embarked aboard the vessel, with the consent of the captain, to dive. And it is clear the captain could prevent the dive, for good reasons, including the diver's own safety (his drunkenness, for instance) and that of others.
47. In this area, there are only 6 licences for sea urchins. Divers, to fish commercially, must dive under one of these. Only one, according to the evidence, is owned by a diver who hires his own skipper.
48. Even though some are transient, other divers remain steadily employed with the same captain or boat. There is evidence Mr. Moore worked only part of the season with these defendants; there is no concrete evidence he was working with others, although it may have been the case (he only worked some 80 days out of over 300 with Courtnakyle). This only emphasizes that they, like other workers, such as carpenters, work under a contract for services. But when they were on board, they provided their services to that captain, that boat,

and that company.

49. The evidence otherwise tendered as to whether divers are self-employed or not pursuant to other legislation is not very helpful, given the extensive definition of the relationships at a workplace provided by the *OHSA*. I conclude that divers come within the definition of *dependant contractors*, in s. 3 (i), since, they come with their own specialized equipment, are economically dependant on Courtnakyle and Captain Thériault, to fish commercially, work mainly for them or for their benefit, and while on board, are more like employees than independent contractors. They may work for others, but do not do so at the same time.
50. Courtnakyle Fisheries thus comes within the definition of employer, as provided by s. 3
(p) "employer" means a person who employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor.
as it issued the T4F slips, arranged for the transport of the urchins, had an official payroll number (for Revenue Canada purposes), issued records of employment, and charged an administrative fee.
51. There is evidence that Captain Thériault was a director of the company, and that there had been dealings between him and the officials of the Department of Labour. There is ample evidence he is an experienced skipper, an interested party, purchased the vessel, was involved in the development of this fishery, and was acting that day as captain of *Doug's Dream*. But there is insufficient evidence he was an *employee* of the company, indeed that he was employed, as opposed to being present that day as an owner, or a director, or an investor or contractor. His presence as a captain and licence holder is consistent with any of these titles; if the latter one, he would be in command and thus not *dependant*. Yet he is specifically charged in the capacity of employee, and none other. I cannot conclude beyond a reasonable doubt that the **actus reus**, in that capacity, of these offences has been established against him.

Uncaged propeller

52. The Crown has conceded that there are two groups of charges, the one dealing with the caged propeller, and the others, dealing with the particular *duties and obligations* of the employer, since those are the only charges remaining.
53. The vessel was grounded at low tide shortly after the accident and two photos were taken of the four-blade propeller. They show half a cage or shield on the port side and none on the starboard side. Further they show some rust color holes on the starboard side of the keel, which likely had received bolts in the past. They do not appear to have been used recently. There was no evidence of any accidental running aground or hitting of objects. I do not accept the evidence that the second half of the cage was in place at the time of the accident. Yet the *boat requirements* contained in **Schedule B** clearly require that a cage guard be around the propeller. This is a requirement imposed by s. 87(2) of the *Occupational Safety General Regulations*, pursuant to s. 82 of the *OHSA*.
54. The wording of the charge reflects the wording of the subsection and repeats the adjective

“adequate”. It is argued that to have a guard on the port side, the side on which the ladder used by divers to access the vessel, meets the requirement of adequacy. Yet knowing the divers usually fall back into the water and could do it on either side of the vessel, given the currents and, certainly on the day in question, the lack of visibility under water, I do come to the conclusion that the Crown has established the **actus reus** of this count: there ought to have been a cage around the propeller, for the protection of divers.

Allowing diver to dive without proper safety equipment

55. The first count accuses the employer to have allowed a diver to dive without a knife, secondary air supply, standby diver, recall system, diver buoy and life line, contrary to s. 13(1)(a). This appears to be more than one matter of complaint, each of which ought to have been the subject of a separate count (see s. 789(1)(b) of the *Criminal Code of Canada*, R.S.C. 1985, Chap. C-46); however there was no objection taken to that count and, obviously the defendant “*knew the case he had to meet*” (*R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299). Indeed the evidence was fully explored as to these allegations.
56. The evidence clearly establishes a lack of *secondary air supply, standby diver and diver buoy and life line*.
57. The evidence with respect to the lack of a knife is not conclusive: not finding a knife after three days in 26 feet of water subject to the ebbs and flows of strong tides and currents does not amount to the lack of a knife upon diving when leaving the deck; some witnesses say Mr. Moore did not have one; Captain Thériault indicates otherwise; Mr. Moore was an experienced diver.
58. The Crown has not established the issue of a lack of standby divers since one of the divers was on deck while the others were below the surface. That day that diver had a headache and had to come back on board; but he was still available and ready to dive, and did dive.
59. The recall system in place was rustic, but appeared effective: banging on the metal dive ladder, or revving of the engine. Either could be heard some distance under water.
60. These requirements are included in *divers requirements* in the order in **Schedule B**. The charge is of course against the employer to have allowed a diver to so dive, insufficiently equipped. The Crown has established the **actus reus** of diving without
 - a. a secondary air supply. It was the practice;
 - b. a buoy and life line: there was a refusal or a preference on the part of divers not to use them, and the employer allowed them to dive without them, in breach of the order, and of s. 13(1)a) of the *OHSA*.
61. The other two counts, referring to the same issues, are more general in nature. In accordance with the Crown’s position that only one be retained, and given their duplicitous nature, I need not deal with them.
62. Those are strict liability offences in accordance with the *City of Sault Ste. Marie* and I will now turn to the issue of due diligence as there are no issues with respect to mistake of facts.

DUE DILIGENCE

63. Mr. Roger Denton is a sea urchin diver and has been so for six or seven years and is fully qualified to do so. In December 2004 he also purchased a license and a boat so that he is now a boat owner. He spent one hundred thousand dollars to do so. He continues to dive and hires a captain. He has been a diver for Dwayne Thériault on two of his vessels since 1999. It is unclear when he stopped and went with another fisherman. He says that the boat is more dependent on divers than divers on the boat, that he is not sure how the 50/50 arrangement to share a catch was determined since it was before his time but that the captain has no say in how divers dive, only when and where they do. He uses now extra air (500 pounds) sufficient to come back from 150 feet down and has done so since the Code of Practice was initiated. He continues to dive even though he is a boat owner because he loves to dive. He recognizes that there is more money being a boat owner even though more expenses than simply a diver. He dove for three or four years with Mr. Thériault. He did not feel in any danger while *“I worked for him and felt safe”*.
64. He emphasizes that divers are responsible for their own safety and their own gear and pay for it all. He recognizes as well that both the captain and other divers do look after each other to some extent at least for what is obvious such as not allowing a drunk diver to dive or one not going down without a mask, obviously noticeable deficiencies. Practices vary with each boat with respect to wearing fins. He is quite adamant however that a buoy and line are a hindrance and pelican buoys are only good at slack times, i.e. four times a day for between one and twenty minutes. At any other time the current drags the buoy below the surface. he also mentioned that he was dragged out because of the current when attached to such a buoy.
65. He prefers to dive and *“work light”*, less weight, no buoy line, with fins. He finds it more comfortable, as opposed to a buoy line, more lead, more gear, but without fins.
66. Aside from looking after each other to some extent, divers compare computer time and how much time they were down and rely entirely on computers now since it is so much simpler than the use of diving tables; yet that complicated process can be learned.
67. 50/50 is equal rewards except that the boat owners get 50 percent of each diver; that equal responsibility does not extend to diver’s safety or what divers do on the bottom.
68. Dwayne Thériault is a captain since age 17; he is now 41. He is very experienced. He has taken 65 footers off shore at age 18. He is also very intense and appears to have taken these charges very seriously. *Doug’s Dream* was his second boat and he fished it until a day after the Stephen Moore accident.
69. Mr. Thériault is very opinionated and takes great exceptions to the practices that the Department of Labour wishes to implement in this fishery. He says that they attempt to impose practices from Eastern Nova Scotia, where there is very little tide and current and apply them to the Bay of Fundy with large tides, upward to forty feet, strong current – up to seven knots – and make the captain responsible for both the vessel and the divers when in fact divers are a group on their own, who do not accept any direction and indeed would

resist any directions by non-divers with respect to diving equipment, security and practices.

70. He says they use the buddy system here and thus there is no need of second air or air reserve and on the day in question, on this third dive, Steven Moore dove between Roy Sollow and Jonathan Wishart, a true buddy system. Stephen Moore was his most experienced diver and a very good worker. Roy Sollow, on that dive, got three bags of sea urchins. Jonathan Wishart, an experienced diver but not a sea urchin harvester got one bag and when they discovered the body of Stephen Moore he had a bag about a quarter full. This has led Captain Thériault to believe that Stephen Moore did not have sufficient air and was in trouble very early into the dive.
71. Mr. Thériault denies the allegations. He believes that he was a careful skipper but his responsibility was to his boat, to his crew member and to get the divers on the proper spot to dive after having located, through his plotter, sea urchins. Then they were on their own with respect to their own safety to dive and to surface. His responsibility was to make sure that the vessel would stay out of their way, and locate the urchin baskets coming to the surface, attached to their inflated buoys.
72. He very strongly argued against the use of buoys and lines. His evidence was that the divers would often cut the lines off as they were in their way. Indeed he said that Stephen Moore cut the line on the third fateful dive. It is not a practice of the divers to attach themselves to a buoy; they estimate this practice to be dangerous, given the current. Dwayne Thériault also says that the visibility on the ebb tide that day became very bad whereas it was clear on the flood tide. Mr. Moore was in an accident in about ten feet of water at low tide. Within fifty minutes Captain Thériault had six divers looking for Mr. Moore. The RCMP eventually found him three days later. The lack of visibility was obviously a real difficulty.
73. The divers use lift bags: they drag them along, filling them with harvested sea urchins; once full, the diver inflates quickly the attached buoy sending the bag, and the diver, to the surface. One great advantage: the buoy is very visible, protruding about three feet above the surface.
74. The captain is at the wheel constantly. The boat is close to shore, in strong tide and current. The skipper has to pay attention to buoys, to lobster pots, to the divers, to the lines, more particularly at low tide, which expose more floating lines. That day they could see the bubbles emitted by divers very clearly.
75. He recalls the discussions with respect to the Code of Practice. He has attended those meetings. He recalls Mr. Pothier, a friend, explaining his duties as a boat owner and is adamant that the divers' duties were explained to them at a different meeting and each had their own responsibilities and the captain was not responsible for the divers' responsibilities.
76. The thrust of his testimony is that he, nor Courtnakyle, was never an employer of the diver. The company was incorporated after the Code of Practice was explained to him. Fishermen have always been self employed even though they may be deemed to be employees for CPP

or for EI premiums. They share 50/50 in the gross income once certain deductions are made for trucking, for instance, or the black box, the weigh masters, that the divers share in the loss in the case of a bankrupt purchaser where some fifteen thousand dollars was not paid and they respectively assumed the loss. That the T4 were issued to crew member, an employee, who may have been chosen by the divers or hired on the diver's recommendation. Otherwise the divers were issued T4F slips. There were no deductions because they were not employees. He knows that in New Brunswick the practice is to pay divers fifty five percent of the gross as they hire the crew member. The company charged divers an administration fee when, to avoid being taken advantage of by Nova Scotia buyers who only paid them fifty cents a pound, they had to go and sell to the States for two dollars U.S. a pound but it meant that they had to act as agent in order to obtain EI – he called it UI – stamps for the divers. But this was a technicality: even though they were shown as employees, they were not, nor was Courtnakyle Fisheries an employer.

77. Indeed he could not tell the divers when to go in, never did it “*I never pushed a diver in any way*” although he may very well have prevented a diver from going in if he was drunk for instance.
78. There is no requirement in the Code with respect to wearing flippers. The RCMP have their own practice, but they are not fishing and they have certain powers that fishermen do not have such as clearing all the lobster pots from an area where they want to dive.
79. He depended on divers who may come and go. Cory Melanson stayed for two years for instance and was steady. Stephen Moore drifted; he only worked seventy to eighty days out of three hundred and eighty plus days of fishing with him. Divers come in top areas to work on top landing boats. They are nomads, opportunistic and jumped ship often.
80. Captain Thériault obviously had very strong views, but I have already determines some of these issues against the defendant. The issue is whether there was due diligence in avoiding committing the **actus reus**, as found, of *uncaged propeller, diving without a secondary air supply, or without a buoy and line*.
81. His evidence, and particularly that of Mr. Denton, an actual diver, establish that in the waters fished, the current and the tide rendered the buoy useless but for a very limited time each tide. Indeed it could create a danger, as illustrated by Mr. Denton. It is a matter that ought to have been discussed at the Safety Committee level, or suggested to Mr. Leblanc, who invited the submission of alternative safety procedures in his letter. This was not done; yet, in light of this evidence, I can conclude the defence has established due diligence on that point.
82. Due diligence, however, is not established on a balance of probabilities with respect to secondary air supply. It could easily be checked – it is obvious if it is donned or not – and it provided that measure of safety, in case of failure, for whatever reason, of the main air supply. The divers requirements call for the buddy system or the secondary air supply, and Captain Thériault describes the fateful dive as being in accordance with that system. However, the divers were not tied to each other, or within sight of each other; at any rate,

they dove to harvest from the ocean floor, their attention drawn away from other divers. A true buddy system ensures each diver's equipment is checked by another diver, and each is in contact with another when submerged, even tied to each other. Even Captain Thériault admits that this system was inadequate, when he expresses his opinion that Mr. Moore ran out of air early in his third dive. It was not a substitute for a secondary air supply.

83. There is no due diligence with respect to the uncaged propeller count. The requirement is simple and succinct. There is evidence it was complied with in the past. The lack of the starboard cage was simply due to the lack of a timely repair, since it appears it could have been checked easily, at low tide, if the vessel was grounded, or by any of the divers.
84. On the whole of the evidence, I find the Crown has established, beyond a reasonable doubt, counts 1 and 4 against the corporate defendant (*R. v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.)).

Dated at Annapolis Royal, this 22 day of July, 2005.

Jean-Louis Batiot, J.P.C.

Schedule A

Occupational Health and Safety Act

(Selected sections)

Internal Responsibility System

2 The foundation of this Act is the Internal Responsibility System which

(a) is based on the principle that

(i) employers, contractors, constructors, employees and self-employed persons at a workplace, and

(ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace,

share the responsibility for the health and safety of persons at the workplace;

(b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party's authority and ability to do so;

(c) includes a framework for participation, transfer of information and refusal of unsafe work, all of which are necessary for the parties to carry out their responsibilities pursuant to this Act and the regulations; and

(d) is supplemented by the role of the Occupational Health and Safety Division of the Department of Labour, which is not to assume responsibility for creating and maintaining safe and healthy workplaces, but to establish and clarify the responsibilities of the parties under the law, to support them in carrying out their responsibilities and to intervene appropriately when those responsibilities are not carried out. 1996, c. 7, s. 2.

Interpretation

3 In this Act,

(g) "contractor" means a person who contracts for work to be performed at the premises of the person contracting to have the work performed, but does not include a dependent contractor or a constructor;

(h) "contracts for work" includes contracting to perform work and contracting to have work performed;

(j) "dependent contractor" means a person, whether or not employed under a contract of employment and whether or not furnishing the person's own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another on such terms and conditions that the person is

(i) in a position of economic dependence upon the other,

(ii) under an obligation to perform duties mainly for the other, and

(iii) in a relationship with the other more closely resembling that of an employee than an independent contractor;

(o) "employee" means a person who is employed to do work and includes a dependent contractor;

(p) "employer" means a person who employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor;

(t) "occupation" means any employment, business, calling or pursuit;

(ae) "self-employed person" means a person who is engaged in an occupation on that person's own behalf but does not include a dependent contractor;

(ah) "workplace" means any place where an employee is or is likely to be engaged in any occupation and includes any vehicle or mobile equipment used or likely to be used by an employee in an occupation. 1996, c. 7, s. 3; 2000, c. 28, s. 86.

Employers' precautions and duties

13(1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

(b) provide and maintain equipment, machines, materials or things that are properly equipped with safety devices;

- (c) provide such information, instruction, training, supervision and facilities as are necessary to the health or safety of the employees;*
- (d) ensure that the employees, and particularly the supervisors and foremen, are made familiar with any health or safety hazards that may be met by them at the workplace;*
- (e) ensure that the employees are made familiar with the proper use of all devices, equipment and clothing required for their protection; and*
- (f) conduct the employer's undertaking so that employees are not exposed to health or safety hazards as a result of the undertaking.*

(2) Every employer shall

(a) consult and co-operate with the joint occupational health and safety committee, where such a committee has been established at the workplace, or the health and safety representative, where one has been selected at the workplace;

(b) co-operate with any person performing a duty imposed or exercising a power conferred by this Act or the regulations;

(c) provide such additional training of committee members as may be prescribed by the regulations;

(d) comply with this Act and the regulations and ensure that employees at the workplace comply with this Act and the regulations; and

(e) where an occupational health and safety policy or occupational health and safety program is required pursuant to this Act or the regulations, establish the policy or program.
1996, c.7, s. 13.

Precautions to be taken by contractors

14 Every contractor shall take every precaution that is reasonable in the circumstances to ensure

(a) the health and safety of persons at or near a workplace;

(b) that the activities of the employers and self-employed persons at the workplace are co-ordinated;

(c) communication between the employers and self-employed persons at the workplace of information necessary to the health and safety of persons at the workplace;

(d) that the measures and procedures prescribed pursuant to this Act and the regulations are carried out at the workplace; and

(e) that every employee, self-employed person and employer performing work at the workplace complies with this Act and the regulations. 1996, c.7, s. 14.

Employees' precautions and duties

17(1) Every employee, while at work, shall

(a) take every reasonable precaution in the circumstances to protect the employee's own health and safety and that of other persons at or near the workplace;

(b) co-operate with the employer and with the employee's fellow employees to protect the employee's own health and safety and that of other persons at or near the workplace;

(c) take every reasonable precaution in the circumstances to ensure that protective devices, equipment or clothing required by the employer, this Act or the regulations are used or worn;

(f) comply with this Act and the regulations.

(2) Where an employee believes that any condition, device, equipment, machine, material

or thing or any aspect of the workplace is or may be dangerous to the employee's health or safety or that of any other person at the workplace, the employee shall

(a) immediately report it to a supervisor;

(b) where the matter is not remedied to the employee's satisfaction, report it to the committee or the representative, if any; and

(c) where the matter is not remedied to the employee's satisfaction after the employee reports in accordance with clauses (a) and (b), report it to the Division. 1996, c.7, s. 17.

Nature and extent of duties and requirements

23(1) A specific duty or requirement imposed by this Act or the regulations does not limit the generality of any other duty or requirement imposed by this Act or the regulations.

(2) Where a provision of this Act or the regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.

(3) Notwithstanding subsection (2), but subject to subsection (5), where the person with the greatest degree of control fails to comply with a duty or requirement referred to in subsection (2), the other person or persons on whom the duty or requirement lies shall, where possible, comply with the provision.

(4) Where the person with the greatest degree of control complies with a provision described in subsection (2), the other persons are relieved of the obligation to comply with the provision only

(a) for the time during which the person with the greatest degree of control is in compliance with the provision;

(b) where simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense; and

(c) where the health and safety of persons at the workplace is not put at risk by compliance by only one person.

(5) Where the person with the greatest degree of control fails to comply with a provision described in subsection (2) but one of the other persons on whom the duty or requirement is imposed complies with the provision, the other persons, if any, to whom the provision applies are relieved of the obligation to comply with the provision in the circumstances set out in clauses (4)(a) to (c) with the necessary modifications. 1996, c.7, s. 23.

Orders and consequences of orders

55(1) An officer may give an order orally or in writing to a person for the carrying out of any matter or thing regulated, controlled or required by this Act or the regulations, and may require that the order be carried out within such time as the officer specifies.

(2) Where an officer makes an oral order pursuant to subsection (1), the officer shall confirm the oral order in writing.

(3) For greater certainty, an oral order is effective pursuant to this Act before it is confirmed in writing.

Power to require code of practice

66(1) The Director may, in writing, require an employer to establish a code of practice or adopt a code of practice specified by the Director.

(2) A code of practice established or adopted pursuant to subsection (1) may be revised or required to be revised from time to time by the Director. 1996, c.7, s.66.

Offences and penalties

74(1) A person who

(a) contravenes this Act or the regulations; or

(b) fails to comply with

(i) an order or direction made pursuant to this Act or the regulations, or

(ii) a provision of a code of practice adopted pursuant to Section 66,

is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred and fifty thousand dollars, or to a term of imprisonment not exceeding two years, or to both a fine and imprisonment.

(2) In addition to a fine imposed pursuant to subsection (1) or (3), the court may impose a fine not exceeding twenty-five thousand dollars for each additional day during which the offence continues.

(3) Where a person is convicted of an offence pursuant to this Act and the court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine imposed pursuant to subsection (1) or 92), a fine in an amount equal to the estimation by the court of the amount of the monetary benefits. 1996, c.7, s. 74.

Schedule B

Code of Practice

Requirements for 1996 Sea Urchin Harvesting Season

Divers Requirements:

Those registered and working in the industry prior to September 1995 require minimum certification Level 1 and advanced certification by October 1, 1996.

Those seeking registration after September 1995 must have a minimum certification Level 1, fifty (50) open water dives and be certified in an advanced course or a higher certification.

Divers must descend and ascend by diver buoy. N.A.U.I., P.A.D.I. or D.C.I.E.M. diving tables to be followed or use dive computer.

Log book to be kept to record dive time and depths.

If full suited safety diver is not used then divers must dive in pairs using the buddy system or have fully redundant secondary air supply. (I.e. pony bottle, wing bottle) This redundant secondary air supply is mandatory.

Must carry emergency signal buoy system such as pop buoy or pelican floats as well as a knife, depth gauge and audible alert system.

Unless neoprene dry suit is used a buoyancy compensator vest must be worn.

All scuba cylinders must be visually inspected internally every year and hydrostatically tested every five years.

Scuba tank air to be certified to C.S.A. Standard Z18-M854.3.8 every six months.

No diving below solid ice surfaces.

No diving at night.

Boat Requirements:

Red and white diagonal flag to be flown when divers are down.

One person on board at all times must be certified in St. John Ambulance or Canadian Red Cross Standard First Aid as well as CPR and Oxygen Resuscitation.

One #2 First Aid kit to be on board.

One Oxygen resuscitator to be on board.

Cage guard required around all propellers.

Emergency diver recall system to be in place.

Visual contact with all diver buoys must be maintained at all times.

Vessel log book to record dive times, depths and any unusual events to be maintained.

All vessels are to be equipped and operated in accordance with Transport Canada regulations according to vessel size.