IN THE PROVINCIAL COURT OF NOVA SCOTIA

R

vs

MARCEL HENNEBERRY
WESLEY HENNEBERRY

(Cite as:R. v. Henneberry, 2001 NSPC 25)

DECISION

The Honourable Judge C. H. F. Williams , JPC
Delivered orally October 5th, 2001

COUNSEL: Mr. S. McDonald, Crown Attorney
Mr. B. Church, Defence Attorney

R v. Marcel Henneberry
Wesley Henneberry

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Introduction

Commercial fishing in "Canadian fisheries waters" is an industry regulated through a system of licences and quotas. Canada, as a member of the International Committee on the Conservation of Atlantic Tuna (ICCAT), in accordance with its membership obligations, sets annual catch quotas for large pelagic fish species found within its area of maritime control. In the summer of 1999, the Department of Fisheries and Oceans(DFO), the regulatory body, became aware that Canada had reached the national quota for swordfish as their landings were higher than was anticipated. Because landing swordfish is an unavoidable by-catch of fishing for tuna, reaching the cap on the national swordfish allocation at that early stage, was in effect, imposing an embargo on the tuna fishing season that was due to commence in the Fall.

As a result, officials of DFO negotiated a deal with the Nova Scotia Swordfisheries Association that allowed a limited number of vessels to fish under their tuna licences. The agreement, which in effect approved a national overrun, also authorized and limited the vessels collectively to a by-catch of swordfish tallying fifteen tonnes. Twelve vessels accepted the negotiated deal and each, by their license, was allowed an individual non-transferable tally of swordfish by-catch limited to 1.2 tonnes or 1250 kilograms.

The defendant, Wesley Henneberry, was the holder of a license to fish for tuna. He accepted the negotiated conditions for tuna fishing in the Fall of 1999. His brother, the defendant, Marcel Henneberry, was the captain of a vessel, "All of Us." He was operating under the terms and conditions of his brother's tuna license.

While fishing for tuna, Marcel Henneberry landed swordfish that exceeded the quota specified in the license to fish for tuna. In addition, although he was aware and knew that he should call in the "round weight" of all fish by specie to an approved Dock Side Monitoring Company he did not do so. Instead, because he felt that it was more convenient and less hazardous at sea to do so, he called in the "dressed weight" of all the species of fish that he landed.

Consequently, both defendants are charged under the provisions of the ***Fisheries Act*** for failing to comply with the conditions of their licence by exceeding the maximum amount of swordfish permitted to be retained. Additionally, they are charged with failing to hail the accurate round weight of all fish by species to an approved Dockside Monitoring Company prior to returning to port. These offences allegedly occurred at or near Sambro in the Halifax Regional Municipality on 27th

November 1999.

Issue

The issue here is whether the defendants can successfully raise the defence of due diligence in that they took all reasonable care to comply with the conditions of the issued tuna licence.

Evidential Finding of Facts

On the total evidence, I find that the material and relevant facts are:

1. Before the beginning of the Fall 1999 tuna season, the DFO realized that Canada, as a member of ICCAT, had reached its national quota for swordfish landings. Because swordfish was a natural by-catch of fishing for tuna, this situation created a dilemma for designated tuna fishers.

2. As a result, the DFO negotiated a deal with the Nova Scotia Swordfishermen's Association, (the Association), an advocacy group, that would permit its members, who were interested, to fish for tuna until an overall total overrun of 15 tonnes of swordfish were landed. Each vessel was limited to a non-transferable swordfish by-catch of 1.25 tonnes or 1,250 kilograms. This total was stipulated in the licences to fish for tuna. (Exhibits 12, 16).

3. The purpose of the permitted 15 tonnes swordfish overrun was to allow the tuna fishers to earn a livelihood during the Fall tuna season which otherwise would not have been allowed. Thus, the permitted overrun would be deducted from the "longline fleet's Other Tuna fishery in Year 2000 (or 2001, at the discretion of the Department)." (Exhibits 15, 16).

4. Wesley Henneberry possessed a tuna licence that stipulated a non-transferable quota of 1250 kilograms (round weight) of an incidental catch of swordfish. The license required that the holder hail to an approved Dockside Monitoring Company the accurate round weight of fish by species on board his vessel. He signed the licence which is indicative of his understanding and acknowledgement of its terms and conditions. (Exhibit 12).

5. Marcel Henneberry, an experienced fisher of twenty two years, operated under the license of Wesley Henneberry. His swordfish landings exceeded his license quota by 2, 067 kilograms with an approximate value of $20,860.00. (Exhibit 13). On November 23, 1999, he was aware that he had exceeded his licence quota but continued to fish until November 27, 1999. Additionally, he recorded in his logs and hailed in the dressed weight of fish by species on board his vessel. His license

required that he hail in the "accurate round weight of fish by species." (Exhibit 12).

6. A fish is "dressed weight"when its entrails, head, fins and gill are removed and the fisher then weighs it. A fish is "round weight" when it is measured whole and its body mass is estimated by the use of conversion factors. (Exhibit 2).

The Law

Here, we are dealing with a "public welfare" or "strict liability" offence which is, as put by Dixon J., in ***R. v. City of Sault Ste. Marie*** (1978), 40 C.C.C. (2d) 353 (S.C.C.), at p. 374:

> [An offence] in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or he took all reasonable steps to avoid the particular event.

In addition, the ***Fisheries Act***, R.S.C, 1985, c. F-14 (as amended), s.78.6 states:

> No person shall be convicted of an offence under this Act if the person establishes that the person
>
> (a) exercised all due diligence to prevent the commission of the offence; or
>
> (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

Likewise, s.78.4 states:

> In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by a person in respect of any matter relating to any operations under a lease or licence issued to the accused pursuant to this Act or the regulations, whether or not the person is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent of the accused.

Analysis

The Crown submitted that because fishing is a regulated industry, a licence to fish is a contract between the license holder and the DFO. Further, since the language of the license is clear and unambiguous, it was incumbent upon the holder of each licence to ensure that anyone operating under its authorization adhere strictly to its terms and conditions. Additionally, Marcel Henneberry, as an experienced and diligent fisherman, had an obligation to read the licence and to check his required documentation with respect to fish location. Marcel Henneberry knew that he had exceeded his quota but continued to fish and deliberately disregarded the rules with respect to his license and the manner in which he should weigh the fish and record their weight.

On the other hand, the defence submitted that Marcel Henneberry, at all times material, acted with due diligence. He reviewed his license with fisheries officers and he was of the view that if he exceeded his current limit it would be adjusted in the next year's catch. Furthermore, as he was only targeting tuna the profuse and unexpected catch of swordfish created a dilemma as he could not return them to the ocean. Additionally, from his experience, it was dangerous and impractical to hail swordfish in round weight and he merely followed the practice of many fishermen who also hailed in dressed weight. The DFO appeared to have acknowledged this difficulty when in 2000 it changed its regulations to allow fishermen to hail in dress weight. Consequently, according to this hypothesis, he took all reasonable steps and had an honest belief that his acts of omission and commission were innocent.

I think that, in this case, there are two critical factors:

> (a) the actual terms of the deal worked out between the DFO and the Association on behalf of its members, and,
>
> (b) what a reasonable fisher, with knowledge of all the surrounding circumstances, and applying his mind to the information provided, would realistically understand them to mean.

When I consider the communication between the DFO and the Association (Exhibit 15) and the Association and its members, (Exhibit 16), it is clear that all parties understood that a difficulty existed that needed to be resolved to permit the fishing for tuna in the Fall of 1999. The resolution was that the DFO would permit a total overrun of 15 tonnes of swordfish by-catch. This overrun would be "deducted from the year 2000 longline fleet Other Tuna fishery." Each vessel participating in this proposal was limited to a non-transferable incidental swordfish catch of 1.25 tonnes. When that quota of swordfish was reached, the fisher must stop fishing for tuna and return to shore. That was in essence the information that the Association faxed to its members on October 2, 1999. (Exhibit 16).

I note however, that the stipulation of each vessel limit was not included. I conclude, from the total evidence, this was because on October 2, 1999, the number of fishers who would accept the proposal was not yet identified. An Association meeting on October 4, 1999, that was attended by Wesley Henneberry, settled that twelve members accepted the proposal. The terms and conditions were explained to them. Additionally, the E-mail messages from DFO to the

Association on October 5, 1999 at 1:31 P.M. and 5:05 P.M., confirmed the quota for each vessel. (Exhibit 15). That quota was also stipulated in the licence, Exhibit 12.

It therefore seems to me that because of the prolonged negotiations between the DFO and the Association on behalf of its members concerning the status of the tuna fishery, it is reasonable to infer, and, I do infer, that the Association membership was aware that if they fished for tuna they would be limited to an overrun of 15 tonnes incidental by-catch of swordfish on a fleet basis. Further, those members who accepted the proposal would be operating, for the season, under a limited licence with a non-transferable individual quota. The purpose and objective of the general overrun was to permit tuna fishers to have and to receive an economic opportunity that would otherwise be unavailable. Thus, the individual quota was critical for the management of fish stocks. That factor was conveyed to the membership. (Exhibit 16). It is therefore reasonable to conclude and, I do, that all members were aware of the extraordinary set of circumstances and would have understood that they had to be realistic and pragmatic about the situation should they wish to earn a livelihood.

Marcel Henneberry is an experienced fisher. He was a fisher since age fifteen years. He is now thirty-seven years old and is the skipper of the vessel "All of Us." When he received a copy of the licence he read it and was aware of its terms and conditions. Also, he went over the terms and conditions of the licence with the onboard Fisheries Observer. From these discussions, he felt that, despite the clear language of his licence, he was entitled to land 1250 kilograms of swordfish on each trip that he might take. However, Wesley Henneberry, who had attended the Association's meeting on October 4, 1999, had informed him that there was a fleet limit of 15 tonnes of incidental swordfish by-catch.

Despite the fact that sixty of the sixty-one Association members hailed in "dressed weight" prior to 2000, the existing Regulations and the terms of the licence required that all weight should be hailed in "round weight." Additionally, the Association had advised its members to hail in "round weight." In any event, Marcel Henneberry, in testimony, took the view that it was impractical and dangerous to hail in "round weight." To do so would mean, because of time and weather, a possible loss of gear and injury from thrashing swordfish. Further, even though he acknowledges that he was a participant in a regulated industry, in his view, the licence conditions were unrealistic. On board ship, he was too busy to covert from "round weight" to "dressed weight" or in the reverse. Therefore, he chose to hail in "dressed weight" as he saw no difference between the two methods of ascertaining the weight of the fish. He never applied the conversion factors as his only concern was "dressed weight."

When I assess the witnesses' testimonies and observed them as they testified, I was left with the impression that Marcel Henneberry did not agree with the terms and conditions imposed by the licence. Accordingly, he made no conscientious efforts to comply with its terms. His self-interested interpretation of the imposed vessel limit was an indication of his mind set with respect to regulated fishing. This mind set was further demonstrated when he failed to verify the accuracy of his catch by using the conversion factors. Likewise, when the onboard Fisheries Observer advised him that he had reached his limit of incidental by-catch of swordfish, he decided to continue

fishing as he felt that any over-fishing by him would be deducted from the year 2000 quota.

However, because of his experience and awareness of his responsibility under the licence it is difficult to conclude that he could have held a reasonable and honest belief that his way of doing things was the correct way and that the licensing provisions were wrong. In short, I find that he failed to accept the terms and conditions of the licence as a precondition to engage in the tuna fishery. Concluding that he was naive through inexperience was difficult.

In reviewing this matter I conclude that it is difficult to accept, in the present circumstances, the genuineness of Marcel Henneberry's assertion that he had an honest belief that he could fish in excess of his individual quota. Everything points to the contrary. He knowingly and for convenience hailed in "dressed weight" instead of "round weight" as his licence required him to do. Although he could use conversion factors that were available, he did not as he felt that he was too busy to do so. His purported reliance on the Association's fax of October 2, 1999 is neither credible nor reasonable when I consider his experience, knowledge of the terms and conditions of his licence, the efforts of the Association on behalf of its members and the notification of the onboard Fisheries Observer.

Conclusion

I have reviewed the case authorities presented by counsels. However, in this case, on the evidence that I accept, I find, for the reasons stated above, that Marcel Henneberry cannot take advantage of the defence of due diligence nor a mistaken but honest belief in the requirements of his licence. In my opinion, he has not established, on a balance of probabilities, that he exercised all due diligence to comply with the terms of his licence or that he could reasonably and honestly believe, in the circumstances, that he was permitted to exceed his individual nontransferable quota of swordfish. Accordingly, I find him guilty as charged and will enter convictions on the record.

The offences against Marcel Henneberry, who operated under the licence, is established and proved. There is no evidence before me that his operations were "committed without the knowledge or consent of the [licence holder]." Therefore, as the licence holder, Wesley Henneberry will also be found guilty as charged.