

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. LaPorte, 2011 NSPC 36

**Date:** 20110623

**Docket:** 111557, 2111558  
2111559, 2111560

**Registry:** Sydney

**Between:**

Her Majesty The Queen

- v -

Edwin Paul LaPorte

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**DECISION**

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**Judge:** The Honourable Judge Robert A. Stroud

**Heard:** December 13, 14, 15, 16, 2010,  
and January 17, 18, and June 7, 2011

**Written Decision:** June 23, 2011

**Charges:** Section 78, of the Fisheries Act

**Counsel:** Wayne MacMillan, for the Crown  
Ralph W. Ripley, for the Defence

[1.] The accused was charged with the following offences on Information sworn on the 3<sup>rd</sup>. day of November, 2009, namely:

Between the 22<sup>nd</sup>. day of May and the 29<sup>th</sup>. day of May, 2009, at or Near Louisburg, in the County of Cape Breton, Province of Nova Scotia did: within Canadian Fisheries Waters adjacent to the Coast of Nova Scotia, while carrying on fishing or any related activity under the authority of a commercial license, contravene or fail to comply with a condition of that License, to wit: did fish in a closed area, contrary to S. 7 of the Aboriginal Communal Fishing Licenses Regulations, SOR /93-332, and did thereby commit an offence under S. 78 of The Fisheries Act, R.S.C. 1985, C F-14; and

Within Canadian fisheries waters adjacent to the coast of Nova Scotia, fish for a species of fish to wit: Snow Crab without authorization, contrary to S. 14(1) of the Atlantic Fishery Regulations, 1985, SOR /86 - 21, thereby committing an offence under S. 78 of The Fisheries Act, R.S.C. 1985, C. F – 14; and

Possess fish to wit: Snow Crab, caught in contravention of S. 14(1)(b) of the Atlantic Fishery Regulations, 1985 SOR /86 - 21, contrary to S. 33 of the Fisheries Act, R.S.C. 1985, C. F. – 14; and

Further at the same time and place aforesaid did, in Crab Fishing Area 24, fish for crab during the close time, contrary to Section 52(a) of the Atlantic Fishery Regulations 1985, SOR /86 - 21, thereby committing an offence under S. 78 of the Fisheries Act. R.S.C.

[2.] The Crown withdrew the 4<sup>th</sup> count during the first day of the trial and proceeded only on the remaining three charges.

[3.] Prior to the commencement of the trial counsel for the defendant gave notice that he would be raising Charter arguments pursuant to ss. 8 and 24(2) of the **Canadian Charter of Rights and Freedoms**. That application was dismissed in a written decision dated December 16, 2010, following a lengthy *voir dire*.

[4.] Following completion of its evidence counsel for the Crown requested and was granted the following amendments:

Between the 29<sup>th</sup>. day of May, 2009 and the 1<sup>st</sup>. day of June, 2009, at or near Louisbourg, in the County of Cape Breton, Province of Nova Scotia did: within Canadian Fisheries Waters adjacent to the Coast of Nova Scotia, while carrying on fishing or any related activity under the authority of a Communal License, contravene or fail to comply with a condition of that License, to wit: did fish in an unauthorized area, contrary to S. 7 of the Aboriginal Communal Fishing Licenses Regulations, SOR /93-332, and did thereby commit an offence under S. 78 of The Fisheries Act, R.S.C. 1985, C F-14; and

Between the 22<sup>nd</sup>. day of May, 2009 and the 1<sup>st</sup>. day of June, 2009 within Canadian fisheries waters adjacent to the coast of Nova Scotia, fish for a species of fish to wit: Snow Crab without authorization, contrary to S. 14(1) of the Atlantic Fishery Regulations, 1985, SOR /86 - 21, thereby committing an offence under S. 78 of The Fisheries Act, R.S.C. 1985, C. F – 14; and

On or about the 31<sup>st</sup>. day of May, 2009, at or near Louisbourg, in the County Cape Breton, Province of Nova Scotia, possess fish to wit: Snow Crab, caught in contravention of S. 14(1) of the Atlantic Fishery Regulations, 1985 SOR /86 - 21, or S. 7 of the Aboriginal Communal Fishing Licenses Regulations, SOR /93-332, contrary to S. 33 of the Fisheries Act, R.S.C. 1985, C. F. – 14.

[5.] Also, following completion of the Crown's evidence, counsel for the Defendant made a motion for a directed verdict with respect to the amended charges. By written decision dated June 7, 2011 a verdict of not guilty was directed in relation to Count 2 and the defence proceeded on Counts 1 and 3.

**Count 1:**

[6.] Defence counsel has taken the position that the Crown has failed to prove this count beyond a reasonable doubt because (A) there was insufficient evidence with respect to the communal license, and (B) that the Defendant was fishing in an unauthorized area.

[7.] The Crown called a total of eight witnesses and the solicitor for defendant called one witness.

**(A) The Communal License.**

[8.] Section 4 of the *Aboriginal Communal Fishing Licenses Regulations* provides:

- (1) The Minister may issue a communal license to an aboriginal organization to carry on fishing and related activities.
- (2) The Minister may designate, in the license,
  - (a) the persons who may fish under the authority of the license, and
  - (b) the vessels that may be used to fish under the authority of the license.
- (3) If the minister does not designate the persons who may fish under the authority of the license, the aboriginal organization **may** designate, in writing, those persons.

- (4) If the Minister does not designate the vessels that may be used to fish under the authority of the license, the aboriginal organization **may** designate, in writing, those vessels.

**(emphasis added)**

[9.] The Crown introduced Exhibit 1 entitled: “A Single Fishing Season Agreement” dated April 21, 2009 between **MEMBERTOU**” as owner of the vessel “Sulia’n” and the Defendant as “Captain”. It is stated to be for the fishing season commencing on April 1, 2009 and expected to end on or about March 31, 2010. Under paragraph 10 it authorizes “fishing for and harvesting marine species and lawfully permitted by-catch in Canadian fisheries waters pursuant to and in compliance with the fishing license of its owner under the Fisheries Act.”

[10.] The defendants arguments on this issue are: (i) Exhibit 1 refers only to **MEMBERTOU** and not the “band”; (b) the signatures on Exhibit 1 have not been proven; (iii) George Smith, manager of the Membertou

Band indicated during cross examination that he was unable to find any resolution, etc. authorizing a designation to the Defendant; (iv) there is no evidence that a form similar to Exhibit 2 that was used by the Millbrook Band was proven in this case; and (v) Blair Doyle, the manager of the Membertou Band at the time Exhibit 1 was signed should have been called to prove that exhibit.

[11.] The provisions of s. 4 of the Aboriginal Communal Fishing Licenses Regulations are not mandatory. The definition of “designated” in s. 2 was repealed in 2002 and there is no particular form of designation necessary. Exhibit 1 was obtained by Mr. Smith from the business records of his employer, the Membertou Band, and Exhibit 13 - the Fishing Licence- was issued to the Membertou Band Council in care of Blair Doyle, Mr. Smith’s predecessor. The agreement is, in my view, *prima facie* evidence of the arrangement between the Band and the Defendant in spite of lack of specific proof of the signatures and the failure to attach a copy of the license to it. Therefore, in the absence of

any evidence to the contrary, I am satisfied that it constitutes proof beyond a reasonable doubt of the Defendant's communal licence with the Membertou Band and his designation as Captain of the Sulia'n fishing vessel.

**(B) Proof the Defendant was fishing in an unauthorized area.**

[12.] This issue is more complicated because it pits the expert evidence of the Crown witnesses against Mr. Dakin who was called to give evidence on behalf of the Defendant.

[13.] Fisheries Officer David Sinclair, the chief investigator and file manager of this case, testified that, as a result of information received from Fisheries Officer Raymond Rockwell, he ran a tracking procedure on the fishing vessel Sulia'n and passed the information received on to Fisheries Officer Donald Horne.



[14.] Officer Horne testified that vessel he information about the fishing vessel Sulia'n from Officer Sinclair and he passed it on to the department's surveillance unit. He met the vessel in Louisburg, Nova Scotia at 8 am. on May 31, 2009 and boarded the vessel along with Fisheries Officers MacIntosh and MacNally. He identified the Sulia'n from photo # 9381 of Exhibit 5. and identified Mr. LaPorte its captain. They seized the fishing vessel along with its catch and kept the vessel running while officer MacIntosh conducted a search of the vessel's computer.

[15.] After he was finished the Defendant and his crew left around 9 am. Officer Horne then went back to his office to prepare the documentation for a search warrant leaving the remaining officers in charge of the Sulia'n. He returned later on June 1<sup>st</sup>. with Officer Sinclair and executed the search warrant. During the course of his search he seized the following documents:

Exhibit 13 – The Sulia'n's fishing license;

Exhibit 14 – A Log Book containing Crab Monitoring Document  
06251 containing information required by The  
Department of Fisheries and Oceans;

Exhibit 15 – A scribbler containing notes;

Exhibit 16 – A Hillroy Notebook;

Exhibit 17 – Chart # 4045; and

Exhibit 18 – Chart # 4013

[16.] Fisheries Officer Raymond Rockwell testified that he was engaged in aircraft patrol on May 29, 2009 along with Rick Tobin and Steve Wamboldt covering Fishing Area 24. He had a list of vessels that were permitted to fish in areas 23 and 24. Around 7.42 am he came across the Sulia'n and observed it for about ten minutes. He gave instructions to the pilot to go lower so they could take digital photos. He produced a series of photographs numbered 9377 to 9389, inclusive, which were entered as Exhibit 5.

[17.] Richard Tobin testified that he was a sensor operator for Provincial Airlines in 2009 and his duty was to operate radar, cameras and computers on board aircraft. He was involved in an online surveillance of the Sulia'n on May 29, 2009 along with Officer Rockwell. Upon receiving latitude and longitude references from the latter he used a forward looking infrared system known as Airborne Data and Acquisition 8, a moving mapping system that picks up heat signals and takes video pictures showing the latitude and longitude of the aircraft from time to time. He produced documents which were marked with the following exhibit numbers:

Exhibit 7 – Reflecting two locations of the Sulia'n on May 29, 2009;

Exhibit 8 – A chart reflecting the two locations referred to in Exhibit 7;

Exhibit 9 – A chart showing the various flight paths taken by the aircraft prior to taking the pictures in Exhibit 5;

Exhibit 10 – Another chart showing the position of the Sulia'n;

Exhibit 11 – Calculations for the location of another point on exhibit 10 raised during cross examination; and  
Exhibit 12 – Calculations for the location of a second point requested during cross examination.

[18.] During his cross examination Mr. Horne indicated that he obtained his navigational experience during 23 years naval service and had never taken a course in navigation. He also indicated that, while there may be some confusion about the terms “magnetic north” and “true north” the use of those terms would not make any difference when plotting a specific location. When questioned on re-direct by Crown counsel he indicated that the distance between the two points referred to in Exhibits 11 and 12 would be one nautical mile to the northwest in Exhibit 10.

[19.] Mr. Marcus Pidgeon testified that he is a multi media designate for Eastern Airlines and is responsible for all software on board surveillance aircraft. His job is to take care of all fishing information obtained by such aircraft and has done so for five years. In this case he processed all

evidence from the flight reported by Officer Rockwell in June 2009. He said the camera from the aircraft was connected to a computer and fed into their system, resulting in the information that appears on the top left of the photos in Exhibit 5. He also indicated that the latitude and longitude readings indicate the position of the aircraft and he doesn't do anything to manipulate the images.

[20.] Fisheries Officer William Patrick Young testified he had twenty four years experience as a fisheries officer. The extent of his involvement in this case was to provide security for the Sulia'n until 6 am. on June 1<sup>st</sup>. and take possession of the snow crab seized and collect a check for its value.

[21.] Fisheries Officer Eric MacIntosh was qualified as an expert in navigation following a voir dire for that purpose. Exhibit 21 contains his Curriculum Vitae.

[21.] He testified that on May 31, 2009 he was working in the Shelburne area of Nova Scotia when he was asked by Officer Horne to go to Louisburg to wait for the Sulia'n to dock and he subsequently approached the Defendant. After formatting a "thumb drive" he inserted it in the Sulia'n's computer and made a copy of it. He then waited for a warrant to be executed before proceeding with its examination. He discovered that no data had been saved but was able to determine positions of the vessel on the western side of Crab Fishing Area 23 from the vessel's Random Access Memory (RAM).

[22.] Officer Horne also looked at information contained in Exhibit 15 and produced a chart marked Exhibit 22 that represents the location of Sulia'n and buoys based on sources of information with the blue markings representing the data from the RAM and the black markings the data recorded in Exhibit 15. By comparing the license conditions to the position of Buoy 14 (the most westerly) he determined that it was 4.69 miles west of fishing area 23 (in area 24).

[22.] The blue markers taken from the RAM were considerably further to the east but still 1.19 nautical miles inside area 24, as indicated in the Final report on page 6 of Exhibit 22.

[23.] On cross examination officer Macintosh acknowledged that there was no indication who made the notations on Exhibit 15 and that he did not know the date of the positions in Exhibit 22. He also admitted that when plotting that exhibit he only referred to the license conditions and not the Regulations.

[23.] Mr. John A. Ells, a geodetic analyst with Canadian Hydrographic Service, Department of Fisheries and Oceans, Ottawa, Ontario, the final witness called by the Crown, was qualified by consent as an expert in plotting maritime boundaries and limits, performing Least-Squares adjustments, and integrating and validating data for use in CHS products and services.

[24.] He testified that following receipt of a DVD from Officer MacIntosh (Exhibit 23) he validated his mapping and compared it to the license conditions in Exhibit 13. He also verified that the western boundary line of area 23 was accurate as shown on Exhibits 24, 25, and 26 and compared that to positions 4 and 5 on page 7 of Exhibit 13. He indicated that NAD 83 was used by both he and Officer MacIntosh in their calculations. He said NAD 27 is outdated and the difference is insignificant, but he used it for comparison purposes.

[25.] When questioned about RHUMB Lines referred to in pages 6 and 7 of Exhibit 13 he said they are lines of constant bearing which remove ambiguity caused by the curvature of the earth. When checking the coordinates of the location of the Sulia'n he found it to be .6 miles inside area 24.

[26.] The only witness called by the defence was Duane Dakin who was qualified to give expert evidence on the use of electronics in marine



navigations and charting after a voir dire. He introduced Exhibit 28 entitled “Charts and Nautical Publications Regulations, 1995 which states in section 5(3) that charts may be in electronic format and Exhibit 29 – “Horizontal Chart Datums And Position Accuracy” that cautions against using a Global Positioning System unless the receiver datum is the same as the chart datum, or the position is converted.

[27.] Mr. Dakin introduced a chart marked Exhibit 30 in which he charted both the western boundary of CFA 23 according to the license conditions (as shown in Exhibits 24, 25, and 26), and the same boundary based on the Atlantic Fishery Regulations. The result disclosed very little difference between the two.

[28.] He also introduced a chart marked Exhibit 31 on which he charted the western boundary of CFA 23 by extending the lines significantly beyond the area indicated by Fishery Officer MacIntosh and John Ells in those same exhibits. The result indicated that the Sulia’n was a mere

fifty meters west of the western boundary of CFA 23 and stated that it was such that it could not be shown on a paper chart such as Exhibit 31.

[29.] Mr. Ells, however, testified that extending the bearing to such a larger map could cause the bearing to be off by up to 3½ kilometers. Mr. Dakins' also attempted to minimize that position on page 3 of his report (VD 2.) dated May 10, 2011.

[30.] Exhibits 5 introduced by Fisheries Officer Rockwell, Exhibits 7, 8, 9, and 10 introduced by Richard Tobin, and Exhibits 24, 25 and 26 introduced by Fisheries Officer MacIntosh and confirmed by John Ells all clearly indicate that Mr. Laporte was engaged in fishing outside CFA 23.

[31.] After considering the totality of the evidence, I have concluded beyond a reasonable doubt that Mr. Dakins' methodology in extending the western boundary of CFA 23 beyond the area indicated in Exhibits 24, 25, and 26 was flawed. As a result, I reject his evidence.

[32.] In addition, I find that Mr. Dakins' attempt to justify his finding that the Sulia'n was within 50 meters of the western boundary line of CFA 23 on page 3 of his report seriously undermined his objectivity because the vessel was clearly engaged in fishing in CFA 24.

[33.] I am therefore satisfied beyond any reasonable doubt that Mr. LaPorte was fishing under the authority of a communal license and that he was fishing in an unauthorized area between the 29<sup>th</sup> day of May and the 1<sup>st</sup> day of June, 2009.

[34.] The 2<sup>nd</sup> count, (formerly count 3), flows from count 1. Since the conviction on that count resulted in a contravention of S. 7 of the Aboriginal Communal Fishing Licenses Regulations, SOR /93-332, contrary to S. 33 of the Fisheries Act, R.S.C. 1985, C. F. – 14. I therefore find him guilty of that charge as well.

**DATED** at Sydney, Nova Scotia this 23<sup>rd</sup>. day of June, 2011.

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**ROBERT A. STROUD**  
**A Judge of the Provincial**  
**Court of Nova Scotia.**