

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Courtney, 2012 NSPC 20

Date: 2012-01-26

Docket: 2198347, 2198490, 2198488, 2198475,2344621, 2198339

Registry: Port Hood

Between:

Her Majesty the Queen

v.

Robert Courtney
Thomas W. Fudge
John MacMullin
Lawrence S. Moore
John Gregory Organ
Joseph Avery Rambeau

Revised Decision: **This decision has been corrected on June 13, 2012.
This replaces the previously released decision.**

Judge: The Honourable Judge Laurel Halfpenny MacQuarrie

Heard: September 13, 2011, in Port Hood, Nova Scotia
September 14, 2011, in Port Hawkesbury, Nova Scotia
September 15, 2011 in Port Hood, Nova Scotia

Oral Decision: January 26, 2012

Charge: On or about the 6th day of September, 2009 at, or near Canadian Fisheries Waters adjacent to the coast of the county of Inverness, Nova Scotia, did unlawfully fish for Halibut in NAFO zone 4T, during a closed time, contrary to s.87(1) of the Atlantic Fishery Regulations, 1985, SOR/86-21, and applicable Variation Order, thereby committing an offence under s.78 of the Fisheries Act, R.S.C. 1985, c F-14.

Counsel: Wayne MacMillan and Jacqueline Porter, for the Crown
Deborah Baker, for the Defence

By the Court:

[1] Robert Courtney, Thomas W. Fudge, John MacMullin, Lawrence S. Moore, John Gregory Organ, and Joseph Avery Rambeau are charged on separate informations that they:

On or about the 6th day of September, 2009 at, or near Canadian Fisheries Waters adjacent to the coast of the county of Inverness, Nova Scotia, did unlawfully fish for Halibut in NAFO zone 4T, during a closed time, contrary to s.87(1) of the Atlantic Fishery Regulations, 1985, SOT/86-21, and applicable Variation Order, thereby committing an offence under s.78 of the **Fisheries Act**, R.S.C. 1985, c F-14.

[2] It was agreed by counsel that the circumstances of these individual charges had a nexus such that they would proceed as a joint trial.

[3] The burden of proof is on the Crown to prove all elements of this offence beyond a reasonable doubt, and as the offence is one of strict liability, the law in that regard from **R. v. Sault Ste. Marie (City)** [1978] 2 S.C.R. 1299 is applicable.

[4] Mr. Courtney, Mr. Fudge, Mr. MacMullin, Mr. Moore, Mr. Organ and Mr. Rambeau are presumed innocent throughout.

[5] This was a lengthy trial with several issues. It, however; was not complicated and the issues are straightforward.

[6] I am going to review portions of the evidence that are necessary for the giving of my reasons in this matter, however I have reviewed the evidence in its entirety as well as the able submissions of counsel. The Court also received and has reviewed some 26 exhibits. At this point I want to thank counsel for their very fair submissions with a very good recall of the evidence as well as the case law that they provided to the Court.

[7] The Crown evidence came from Fishery Officers (F/O) MacPhee, Chiasson, MacIntyre, and LeBlanc, as well as through Captain William Cecil Hardy.

[8] On September 5th, 2009 F/O MacPhee was on boat patrol, having started her shift at midnight September 4th. She was on the Canadian Coast Guard patrol vessel *Point Caveaux*, with Captain Hardy.

[9] They were monitoring the halibut fishery in terms of the percentage of cod that was being caught versus halibut as there was a concern that more cod than halibut was being fished. They observed two vessels, the *John and Ronnie*, and the *Dalton and Madison*. They were hauling gear but only about one hundred hooks each, with very little fish on their hooks, perhaps one of them may have had two fish.

[10] This was reported to F/O Chiasson and F/O MacIntyre when they met later on the Point Caveaux. They had been in the *Fast Rescue Craft (FRC)*. As a result of this they were told to continue monitoring. This direction came from F/O LeBlanc in Chéticamp, their supervisor.

[11] F/O MacPhee next boarded the *Kayleigh & Jess*. F/O Chiasson did not board and remained on the Point Caveaux. During the hour she was on board there were four tubs hauled which contained 14 cod, one shark, and one 20-pound halibut. She reported this to F/O Chiasson. Prior to departing she advised the Captain monitor his radio, Channel 16 as it would be possible there may be a

closure as a result of the high percentage of cod. Channel 16 is monitored by fishers and it is a channel where closures, she said, are broadcast.

[12] She then boarded the *Cove Explorer* and observed 225 pounds of cod in four tubs hauled, and again reported this to F/O Chiasson and advised that Captain of a possible closure, to monitor Channel 16. She then went on board of the Fast Rescue Craft (FRC) and returned to Chéticamp. En route at approximately 1:30pm, they passed the vessel *Forty Roses* which was hauling gear.

[13] On October 16, 2009 F/O MacPhee took a statement from John Gregory Organ, Captain and license holder of the vessel *Jack & Florrie*. On November 9, 2009 she took a statement from Lawrence Moore, who is the Captain and licensed operator of the fishing vessel *Dalton and Madison*. Both statements were tendered through her.

[14] F/O MacPhee knew there was a Conservation Harvesting Plan in place with respect to the rule regarding the bycatch of cod, but was unsure as to the specifics of it. Counsel for the defendants tendered the *Protocol for Monitoring and*

Control of Small Fish Catches, and Incidental Catches in Atlantic Ground

Fisheries, a Department of Fisheries and Oceans document (DFO). F/O MacPhee may have seen the document previously but was uncertain and was not familiar with it.

[15] When questioned as to how catches are monitored in terms of making a decision about closing a fishery, F/O MacPhee felt that in terms of the ground fishery, such would be determined after all gear was in at the end of a day.

[16] F/O Philippe Chiasson was involved with monitoring the fishery as described by F/O MacPhee on the instruction of their supervisor Arthur LeBlanc. His evidence was their shift commenced at midnight on September 4th and two vessels, the *FRC* and the Coast Guard vessel *Point Caveaux* were used, he being the operator of the *FRC*. F/O MacIntyre was with him. They were looking for the Maritime fixed-gear fleet and possible protesters from the NAFO area 4T. The concern was the halibut fishery was opening up for the Maritime Fleet but not the Gulf Fleet and that the latter would go out regardless.

[17] After observing some fishing vessels conversing with some fishers, the meeting with F/O MacPhee took place aboard the *Point Caveaux*. The information received was relayed by F/O Chiasson to his supervisor F/O LeBlanc by radio to Chéticamp.

[18] Instructions were received to continue to monitor and board more vessels and to make observations of the bycatch. At this point F/O MacPhee came on the *FRC* with F/O Chiasson. After a few more hours of observations a regroup was done again on the *Point Caveaux* with observations being transmitted again to the supervisor. The operation for the day was called off and they were to return to Chéticamp.

[19] The following day F/O Chiasson commenced patrol again on the *Point Caveaux* but after an hour and a half or so, the patrol was aborted near Bay St. Lawrence. He assumes the Captain did this because of weather for safety reasons.

[20] F/O Chiasson became aware the evening prior, a Variation Order, tendered as C-1, had been issued which closed the ground fishery.

[21] F/O Chiasson was involved in trying to make contact with fishers to determine if people were still fishing, including calling them or their spouses, or their association, or through to their boat.

[22] He spoke to the Captain of the *Jack and Florrie*, John Gregory Organ who was aware of the closure from the night before as a result of a conversation with another fishing captain, and at that point he was preparing to haul his gear and cease fishing. No other details of the contact he referred was given.

[23] F/O Chiasson explained that catch estimates were done by a volume metric approach, for example, a plastic pan of cod is estimated to be 125 pounds. He was not familiar with the *Procedures for Monitoring and Control of Small Fish and Incidental Catches* though knew there was a formula to calculate the percentage of small fish as well as catch or bycatch, but was not 100% sure as to what it was. It is his understanding that a catch is calculated by weight and not for a time period.

[24] F/O Chiasson understood the Variation Order closing the fishery was issued around supper time or shortly thereafter on September 5th and if he had have been so directed by his supervisor he would have been able to call fishers via ship-to-shore that evening.

[25] On October 16, 2009 F/O Chiasson took a written statement from the Joseph Avery Rambeau and the same was tendered by consent to the Court. He is the Captain and license holder of the *Kayleigh & Jess*.

[26] F/O John Angus MacIntyre told the Court that his usual place of work is in Port Hood but was asked to go to Chéticamp on September 5th to assist in the monitoring of the halibut fishery. His evidence is consistent with that of F/Os MacPhee and MacIntyre as to what they did and saw on this particular date.

[27] His observations were that there was a high incidence of cod bycatch in the halibut fishery. This was done by sight and reported to F/O Chiasson. He did not board any of the vessels captained by any of the defendants in this matter. He said

that there had been a test fishery which is used to establish the expectations of what the catch will be when a fishery opens.

[28] William Cecil Hardy, Commanding Officer currently with the Canadian Coast Guard search and rescue vessel *Spindrift* testified that on September 5, 2009 he was the Captain of the Coast Guard vessel *Point Caveaux*.

[29] He was accepted as qualified to give evidence as it relates to charting the locations of the six vessels captained by the defendants on September 6, 2009. These locations were determined based on the coordinates received by him from the tendered logs of the various vessels, and the chart was tendered.

[30] The chart shows two zones, a 4VN and a 4T zone. All coordinates for the defendants fall within the 4T area.

[31] Captain Hardy gave an explanation about the various VHF radio channels used by Coast Guard, fishers and the like. On the *Point Caveaux* he had two VHF radios, one being always set at Channel 16, which is an emergency channel, and

monitored continuously. This monitors Maydays, receives notices to mariners of safety issues, weather updates and Notice to Fishers.

[32] His second radio is generally turned to a working channel, he referred to it as a “listening channel” where you pay attention to what is going on in the local area with other fishers, often Channel 6.

[33] Captain Hardy testified that notices to Captains of vessels and Notice to Fishers are different broadcasts. That in his experience any broadcast as a Notice to Fisher would be on Channel 16. Fishers would hear it as a call-up. A fisher would get a notice for example of a closure of a fishery or an opening of a fishery and be told to turn to another channel for details.

[34] On September 6th he was steaming to a fishing ground on the *Point Caveaux* but turned back because of poor weather. The weather was becoming progressively worse as they travelled out to sea and he made the decision to abort.

[35] F/O Arthur LeBlanc is the detachment supervisor at the Chéticamp Department of Fisheries and Oceans office.

[36] On September 4th he received information that there was to be an opening of the halibut fishery for the 4T Maritime Region Based Fleet. This occurred because of a test fishery that had been conducted with favourable results, whereas there were not favourable results for the Gulf Fleet, so in essence there was one fleet going fishing while the other was not.

[37] He received information that the Gulf Fleet was threatening to perform a protest fishery on the grounds the next day, being September 5th. He had telephone communication with a representative from the Gulf Fleet and advised that if they went and set gear when they were closed to the fishery, such would be considered illegal activity and enforcement would have to take place.

[38] An enforcement plan was prepared by him to address any potential protest and as directed, to monitor the bycatch of cod being caught by the Maritime Fleet.

[39] Staff were organized to conduct the same, along with the *Point Caveaux* and their crew.

[40] Late in the evening on September 4th he was notified by a representative of the Gulf Fleet that they did not intend to set illegal gear and that if anything there may be a peaceful demonstration.

[41] The following morning as he arrived at his office, his staff were tasked with monitoring the bycatch. During the morning he received reports of observations and sent e-mails to his Chief and Regional Director advising of findings. A report was received around noon and forwarded, and a third and final report was received from staff mid afternoon and again updated to his superiors.

[42] At 6:00pm he received notification that a Variation Order had been issued to close the fishery at midnight, September 5, 2009.

[43] The Regulations Unit with DFO is responsible for providing this information to fishers. His understanding was that a summary of the Variation Order is faxed

or e-mailed to the Canadian Coast Guard radio station which broadcasts over marine radio. In his 20 years with the Department, when the Fleet is on the grounds, this is the method regularly used.

[44] In response to a question as to how his office responded to this Variation Order at the local level, the plan was the following morning a patrol would go back to the ground to ensure the fleet had left.

[45] On September 6th, the fleet were approximately 60 miles out and because of weather this planned patrol was aborted. He instructed F/O Chiasson once he returned to port to verify through the hail system and through telephone calls to confirm whether the fleet had returned back to port or was still on the grounds.

[46] In his 21 years with DFO and with respect to the ground fishery, this would have been the first time that he knew of Fishery Officers being directed to board vessels to determine bycatch. Generally when there was patrol to the ground fishery it was to look at where they were fishing, composition of their gear,

whether they were using the right hook sizes, checking licenses, log books, minimum sizes of halibut and the like.

[47] F/O LeBlanc was aware of a Conservation Harvesting Plan that was in place for the 4VN fishers, the defendants in this case who were fishing in the 4T zone on the date in question. Such plans are put in place prior to the fisheries being open.

[48] He was shown an exhibit, the Harvesting Plan for the period April 1, 2009 to March 31, 2010 in which the regulations regarding cod fish bycatch are outlined. Such appear at page 2, item 3, "...the maximum total bycatch of cod in 4T is 30% or 100 pounds per day, whichever is greater".

[49] F/O LeBlanc was familiar with the DFO procedures for incidental bycatch policy and had recently reviewed the formula used to calculate incidental bycatch contained therein. When the bycatch of September 5th was calculated he did not use that formula but rather relied on the observations of the Fishery Officers as relayed to him.

[50] Heather Ozon works for the Canadian Coast Guard as Officer-in-Charge at the Coast Guard Radio in Sydney, Nova Scotia. She has been there for the past four years and is very familiar with Notice to Fishers and broadcasting of the same.

[51] She explained to the Court that a VHF radio is a “very high frequency” radio that a lot of smaller vessels use, whereas an MF radio is a “medium frequency”. The VHF is a megahertz band and the MF is a kilohertz band. VHF is generally receivable between 40 and 50 nautical miles from shore and transmits at the same distance, obviously depending on geographical features in each area.

[52] The Marine Communications and Traffic Services from Sydney broadcasts on a number of channels, with the Coast Guard using Channel 16 for distress and calling frequency. On it there are call-ups for broadcasts and any time they are required to contact a vessel, Channel 16 would be used or for reaching the Coast Guard, or for an emergency situation.

[53] Call-ups are used for weather broadcasts, notices to shipping broadcasts and general marine information broadcasts including Notice to Fishers.

[54] The MCTS Sydney Broadcast Schedule was identified by Ms. Ozone. It is followed each day for the broadcasts and the one in evidence was in place in September 2009. She identified the weather broadcasts from the schedule that are done on VHF and on MF at 0040 UTC, 0740 UTC, 1440 UTC, 2010 UTC. On the Continuous Marine Broadcast weather runs continuously.

[55] The time on the schedule is UTC which is Universal Coordinated Time and it has a three hour time difference with Atlantic Daylight Time such that 6:00 UTC would be 3:00 pm local time. Notice to Fishers are broadcast at 0740 UTC and 2010 UTC which would be 4:40am and 5:10pm local time. Her evidence was that the only Notices to Fishers on the call-up Channel 16 are those two. UTC time is often referred to as Zulu(Z).

[56] Ms. Ozon identified a document that included a log entry from their message data system. It completed by the operators on duty after, in this case a telephone

call, was received. At page 2 there is a Fishery and Oceans Canadian Coast Guard document "Notice to Fish Harvesters" that was broadcast as such verbatim on the dates, times and on the frequencies noted, and by individuals listed. For example on September 5, 2009 at 2211 Zulu or UTC time the notice was broadcast on the Continuous Marine Broadcast channel. The notice indicated as follows:

PURSUANT TO THE FISHERY (GENERAL) REGULATIONS AND BY GULF REGION CLOSED TIME VARIATION ORDER 2009-096, THE HALIBUT FISHERY BY VESSEL CLASSE A40 (HALIBUT FISHERS FROM MARITIMES) WILL BE CLOSED FROM SEPTEMBER 6 to DECEMBER 31, 2009, IN DIVISION 4T. REFER TO GULF REGION CLOSED TIME VARIATION ORDER 2009-096, ISSUED ON SEPTEMBER 5, 2009, OR CONTRACT YOUR LOCAL FISHERY OFFICER FOR FURTHER INFORMATION OR VISIT THE DFO WEB SITE.

[57] She advised there was no call-up before this was placed on the Continuous Marine Broadcast indicating that if fishermen were tuned into Channel 16 they would not have been aware that such was on the Continuous Marine Broadcast.

[58] The next broadcast would be at 4:40am local time on September 6th, and would be broadcast on the Marine Information Broadcast including weather and Notice to Fish Harvesters, this would have been broadcast on 2749 kilohertz as

well as the Continuous Marine Broadcast, meaning such would have been announced on Channel 16.

[59] During the broadcast cycle or loop the Notice to Fishers, for example during a 24 hour period from September 5th to September 6th would have been played three times an hour in English and three times an hour in French.

[60] Verna Docherty, Senior Advisor in Fisheries Management, Department of Fisheries and Oceans testified. She is involved in the groundfish file in the Maritime region and in particular her job entails the Scotia Fundy region. She understood the defendants in this matter to be halibut fishers in the 4VN, Scotia Fundy region.

[61] They were authorized to overlap into the 4T Gulf zone because of a sector management policy from 1982. They fish under the *Scotia Fundy Conservation Harvesting Plan* and receive their licenses and conditions from that side. Variation Orders in 4T for the fixed gear fishery are the responsibility of the Québec region.

[62] Ms. Ozon was familiar with the Variation Order in this particular case and it being issued from the Gulf Region and not Québec.

[63] Ms. Docherty identified the DFO document entitled *Procedures for Monitoring and Control of Small Fish Catches and Incidental Catches in Atlantic Ground Fisheries*. It is the Department's policy for small fish and incidental catch protocols. It outlines that a Variation Order is invoked when people have too much bycatch or when there are too many small fish.

[64] Observations are usually made by three groups of people including fishery officers, dockside monitors and at-sea observers.

[65] Once a decision is made to issue a Variation Order the Regulations Division becomes involved after approval and the same is disseminated. It is her understanding Notice to Fishers include broadcast to the Canadian Coast Guard. She provides recommendations as to how much time should elapse between

receiving the information and the Order actually being issued so as to give fishers sufficient time to respond.

[66] In making such a determination she would consider such things as how many individuals are at sea, when they went to sea, how much gear was left in the water and the like. Speaking for the groundfish in her Region she said, “generally from the time that I would make the request and allow the entire process to flow through would be about 24 hours”.

[67] Ms. Docherty was asked to make comment on the Conservation Harvesting Plan in 4T, which provides that the maximum total bycatch of cod is 30% or 100 pounds per day, whichever is greater. She explained that for quantities caught above 100 pounds of cod, the fisher then has to be able to show that they have caught enough catch that cod is only 30% of it.

[68] In the Scotia Fundy Region it is not usual for a Variation Order in the fixed gear fleet to be issued while fishers are at sea. She had no recollection that such a

closure of that type would have ever taken place in groundfish since 2006, when she started.

[69] The practice has been to consult with Management Board in advance of an opening date and a fixed closure date. When asked whether fisherman are use to having DFO consult with them in that regard, she replied in the affirmative with respect to Scotia Fundy.

[70] John Gregory Organ testified he had been a fisherman for over 30 years and is the Captain of the vessel *Jack & Florrie* which is 32 feet. He has a crew of himself and one other and has 24 tubs of trawl and steams 45 miles to his fishing grounds, which is about a six hour trip.

[71] On September 5, 2009 he started to set shortly after midnight and did not finish until 4 or 5 o'clock in the morning, and started to haul back between 7:00 and 8:00am. It takes him in good weather, about 12 hours to haul his complete trawl.

[72] He has two VHF radios on his vessel and normally has one on Channel 6, his working channel and the other on Channel 16. On September 5th after he finished hauling he baited gear for a couple of hours, finishing about 9:30 at night, had a bit of a rest and then started setting gear about 3:00am on September 6, and then started hauling back again at 7:00am, usually daylight.

[73] The weather on the morning of September 6th was terrible, with 30 knots of wind from the north, it was very rough and he had to be extra careful and slow things down, which makes for a long hard day, meaning two, three or four hours on top of the usual 12.

[74] He first heard about the fishery being closed on September 6th around noon. He heard a phone call from a fishery officer in Chéticamp to Joey Rambeau, inquiring as to whether Mr. Rambeau was aware that the fishery was closed, asking him to retrieve his gear and go back to port.

[75] Mr. Organ kept on working, hauling his gear in until that was complete. He did not set any gear after hearing this conversation.

[76] It is Mr. Organ's experience that a Variation Order closing a fishery takes effect at midnight on the date of the Variation Order. He explained that the radios on his vessel are located in the wheelhouse where it is dry. The hauling and setting of gear is done outside in a separate area. He never listens to the Continuous Marine Broadcast, nor does he have a reason for so doing. Mr. Organ was quite surprised that the fishery was closed as in his 30 plus years of fishing he has never received notice of a Variation Order while at sea.

[77] Mr. Organ explained that Channel 16 provides marine notices, safety notices, the weather or that Notice to Fishers are going to broadcast on other channels. He does not keep his radio on Channel 16 to receive a Notice to Fishers because in his 30 years there has never been a change in the fishery while at sea. He has heard Notice to Fishers on that channel but not in relation to such a

variation. He is also aware that fishers would then be directed to Channel 21 or 83 to get the full text of any such notice.

[78] Mr. Organ has never had a fishery officer board his vessel to look at the composition of his catch in terms of the species catch and any bycatch, nor was he aware that fishery officers were boarding boats on this particular day to look at the same. He had the *Point Caveaux* come along side of him for about five minutes that day, looked at what he was doing and left, which is common. Mr. Organ was not advised as to the reason for their coming aside him.

[79] Mr. Organ as noted, gave a statement to Nadia MacPhee in which he was asked to explain why he was fishing during a closed time on September 6. His answer was, "Well, we understood the broadcast meant at 12:00 midnight or 11:59pm on September 6." He was asked whether he heard that the fishery had closed and he responded "no". He heard rumours on Channel 6 on September 5th that something was closing the night of September 6th, however; he did not know who was talking and he did not know that it applied to the halibut fishery. He did not change channels, for example to the Continuous Marine Broadcast to follow up

on the same. The rumour was for midnight on the 6th and he was going to finish fishing by noon or early afternoon on the 6th so it was of no concern to him.

[80] Mr. Organ has been involved in other fisheries such as snow crab and any Variations he received always gave a day or two advance notice of such a closure, sometimes up to a week.

[81] Robert Courtney is the Captain of the *John & Ronnie*, having been a fishermen for over 30 years in the groundfish industry. On September 5th, 2009 he had 24 tubs of trawl on his 40 foot vessel and was fishing about 48 miles from his home port of Dingwall, it being about a seven hour steam.

[82] The order that opened the fishery was to open on September 2nd and close on September 8th, but Mr. Courtney said there was a gentlemen's agreement that no one would go fishing until weather conditions were suitable, so all vessels would be able to go out. On September 3rd and 4th everyone stayed ashore waiting for more favourable weather which explains why no one went fishing until September 5th.

[83] Mr. Courtney has been the President of the North of Smokey - Inverness South Fishermen's Association for 15 years. It represents a large majority of the fishers in both 4VN and 4T. When the Department of Fisheries have issues on the Scotia Fundy side Ms. Docherty will contact him as he is also a member of the Groundfish Management Board. They will discuss such things as the opening and closing of fisheries before anything is put into place. In the Gulf, Ms. Docherty is also the person that he will be involved with.

[84] Mr. Courtney explained that for the three seasons prior to this one he had been fishing halibut, and that the catch of halibut as compared to cod would vary. Sometimes for three days he may get halibut and for the next day he may get nothing but cod, and then on the last day he may get a mixture, so until he finished his trip, and the other vessels came a shore, and it was determined what everyone caught, they would not know what the percentage of halibut to cod was, and certainly no one would be expecting a closure at sea.

[85] He and others have sat around a table with the Department of Fisheries drafting and ironing out the details of the protocol, and that numbers are only calculated at the end of a day, and there would be no reason for anyone to expect the closure of the fishery for boats that had only been on the water for 12 hours, as there would be no calculations done.

[86] On September 6th he started setting his gear about 2:00 am and did not know anything about a closure until noon when he heard a conversation between Mr. Organ and Mr. Rambeau on Channel 6. As a result he did not set anymore gear.

[87] He was very surprised at the closure and has never experienced a closure like this. To quote Mr. Courtney he says, "It just blew him away". There was not even a chance to get gear out of the water.

[88] It is Mr. Courtney's habit to have one of his radios tuned to Channel 6 and the other to Channel 16. Sometimes he may switch to others channels because of other radio frequencies used in a particular area. He is aware that on Channel 16 there will be call-ups for notification to fishers. His radio is such that if it is on

another channel and the Coast Guard cuts in, it will switch automatically and go to Channel 16. For example, if the “not fish” message had have come on his radio at 4:40 am on September 6th and it was not on Channel 16 it would have automatically flipped to that channel to hear the message.

[89] This Notice to Fishers that went out, he said did not specify what fishers it was referring to, if it was fishers in Shelburne, Yarmouth, Newfoundland, Québec, or wherever, it was just a notice. He was asked the questions:

- Q. So when you heard that message, you didn't know that it applied particularly to you. Okay.
- A. No way of knowing who it... and knowing the way that the fishery is ran, that the calculations are done at the end of 24 hours, wasn't expecting anything to be announced.
- Q. Okay. So when you heard that, based on the catch that you'd gotten to that point, you didn't feel that it was likely that that message applied to you.
- A. No, not the time that had elapsed from the opening to that time.
- Q. So you admit then that you heard the call-up ...
- A. I ...

Q. ... on Channel 16 ...

A. I heard ...

Q. ... at 4:40 ...

A. I heard ...

Q. ... in the morning.

A. I hear maybe ten calls a day, but unless it's pertaining to me ... I'm not sure, of that particular call, if I heard it or not, but I didn't hear anything that was pertaining to me.

Q. Okay. But you did hear Notices to Fishers ...

A. Well, I ...

Q. ... over the course of those two days.

A. Yes, I hear ...

Q. Or, sorry, call-ups for Notices to Fishers.

A. Yes. We hear it numerous times. But anything pertaining to us, 4VN-based vessels fishing in 4T, there was nothing ... to my knowledge ... I heard nothing. But, to my knowledge, there was nothing broadcast.

[90] Further Mr. Courtney testified:

Q. Okay. So just to be clear then, it's conceivable that you heard a message which just said something like, Notice to Fish Harvesters.

A. I can't say I did.

Q. Okay. And if you had heard a message like that, would you have felt that it pertained to you?

A. No. Knowing the fishery and knowing the criteria for closure and knowing all the ways that things are in the fishery and my past 30-odd years experience, I would have had no reason to suspect that there was anything pertaining to us in a fishery that we were only 12-14 hours into.

[91] Fisheries Officers aboard a zodiac had according to Mr. Courtney observed him hauling catch for about a half an hour on the morning of September 5th. He said this was unusual, it is usually only a 5-10 minute stop beside him. Though it was unusual it was a beautiful day and they were taking pictures and he did not really have any reason to think there was anything out of the ordinary going on. He had no communication with anyone aboard the zodiac, nor the bigger boat that came up for about 10-15 minutes.

[92] His radio is in a separate location in the wheelhouse from where he would be setting or hauling gear. The wheelhouse is enclosed to keep water from the electronics and where the trawl is hauled is a separate area again. He has a break

from about midnight to 2:00 am where he would go into the wheelhouse. He and his other crew member would take turns standing watch and resting.

[93] Mr. Courtney has been involved in the ground fishery for 30 plus years and has never been on the water and received a closure notice through a Variation Order.

[94] Johnny MacMullin has been a fisherman for 30 years and was Captain of the *Rodderick Rose* on September 5th, 2009, a 38 foot vessel with 50 tubs of trawl. He left port on the evening of the 5th and landed on the fishing grounds the morning of September 6th. He hauled in six hours before he left, leaving a contact number that he could be reached at.

[95] To get to his fishery he had 82 miles to go with the weather not being the best. When he arrived, he started setting his gear. En route he heard one of his fellow fishermen say that the fishery was closed that night, being September 6th at midnight. He had this conversation with a Mr. Reardon on Channel 6. Mr. MacMullin was not listening to Channels 21 or 83 for weather, as he checks such

before he leaves home and once he is at sea, notwithstanding it can change fairly quickly, he has no choice but to stay.

[96] Mr. MacMullin was familiar the 2009 Conservation Harvest Plan for 4VN. The bycatch rules for that zone were 1500 pounds per week, each trip or 3000 pound bi-weekly trip. It is monitored on a monthly basis. It is his experience that most long-line fisheries, when they close, do so at midnight.

[97] Mr. MacMullin too has fished for more than 30 years and along with this being a long weekend in September, and the Department of Fisheries having opened the fishery for 72 hours, it was his understanding that such would not be closing.

[98] Asked whether he would expect if there was a Notice to Fishers that it would have been broadcast over the radio and he replied that he had not received it in 30 years so he did not know why he would expect it. He knows that notices are broadcast all the time but this is not one that he would have in any way anticipated.

[99] Mr. MacMullin explained that the wheelhouse door is closed, where the radio is. He has a 300 horse power engine running underneath his feet, he has a hauler running and has three crew plus himself and what he hears on the radio is very limited. When he heard the Coast Guard and Mr. Organ and Mr. Rambeau talking that was confirmation for him. He ceased fishing, he took his gear out of the water.

[100] Mr. MacMullin has never, while on the water in his fishing career, ever received a notice to fisher that applied to him.

[101] Thomas Fudge has been a fisherman for 54 years and on September 5th, 2009 was the Captain of the Forty Roses, a 44 foot 8 inch boat that had 30 tubs of trawl aboard . His son now fishes that boat and they had 114 mile steam from their port in Louisbourg.

[102] His knowledge about the fishery being closed came on September 6th at about 10:00am from Robert Courtney. They had 26 tubs of gear in the water and

had to haul it in. They could not leave \$25-30,000 worth of gear in the water after not even one day of fishing.

[103] In his 54 years on the sea, including being a skipper since 1965, this is the first time he ever heard of a closure while the boats were out. They always receive 24 hours notice and he called this a disgrace. He told the Department of Fisheries, “they had made fools of us, proud men”.

[104] Mr. Fudge had three radios on his vessel, two VHF and a sideband. One was on Channel 6, one was on Channel 16 and the other was on 2749. He did not hear any call-ups for Notice to Fishers on any radios.

[105] Lawrence Samuel Moore, a fisherman for over 30 years, Captain of the *Dalton and Madison*, had on this trip three crew members plus an observer. He left on September 4th, reaching the fishing grounds on September 5th.

[106] Mr. Moore had 30 tubs of trawl to set and haul back which would have ended his day at about 10:00 pm.

[107] His knowledge of the fishery being closed came after the first night of hauling gear. He was steaming to another part of the fishing grounds to get ready to set the next day and heard from a crew member that another fisherman said the fishery was closing the next night at midnight.

[108] When he heard this information he turned his radio to the continuous Channel 21 and heard that the fishery was closing on September 6th. He heard that broadcast at 10 or 11:00 pm Saturday, September 5th. He took the announcement to mean September 6th at 11:59 pm midnight, as every fishery that he has every been involved in has always had a midnight closing.

[109] Joseph Avery Rambeau, the Captain of the *Kayleigh & Jess* has been fishing for approximately 15 years. On September 5th he had 27 tubs of trawl on his 32 foot vessel which takes him three hours to set, and depending on weather anywhere from 10-15 hours to haul. On September 5th the weather was a bit rougher than usual.

[110] His notice of the fishery closure came on September 6th when he had a discussion with a Fishery Officer advising of the same. He was told that he was fishing in a closed zone and was asked to personally call the fleet, and he assured he would call as many as he could get in touch with as he knew gear was being hauled. Mr. Rambeau stopped fishing at that point as well.

[111] He contacted Mr. Organ and a few others who's names he could not recall, plus attempted to get in touch with more.

[112] Mr. Rambeau confirmed that Fishery Officers on the *Zodiac* and *Point Caveaux* came along side his vessel with one Fishery Officer boarding. They had general conversation about the weather and the like and there was no discussion with her about any closure in the fishery. This was the first time in his 15 years that he had a Fishery Officer board his boat for an hour.

[113] Mr. Rambeau has a VHF radio on his vessel and it is usually on Channel 6. Mr. Rambeau was also aware of the Conservation Harvesting Plan during this time and knew the goal was to keep the cod catch as low as possible.

[114] Mr. Rambeau relies on his fellow fishermen to advise him if there is a Variation closing a fishery during an otherwise open time. He knows they exist but generally gets them from others. If he is on land he would confirm information received through a web site that is posted for the North of Smokey fishermen.

[115] Arthur LeBlanc confirmed that he was the Fishery Officer who placed the telephone call to the *Kayleigh & Jess* and spoke with the Captain who identified himself as Joe. He told Mr. Rambeau that the fishery had closed, which Mr. Rambeau was not aware of. He also asked Mr. Rambeau to contact the other fishermen in the fleet and gave him particulars of the Variation Order. He was asked to cease fishing and retrieve his gear.

[116] That is a synopsis of the evidence and exhibits tendered, but as I said at the outset I have reviewed and considered it all.

[117] As noted earlier, this is a strict liability offence and the law from the Supreme Court of Canada in **R. v. Sault Ste. Marie (City)** (*supra*), is applicable.

Justice Dickson, (as he then was), stated:

In the present appeal the Court is concerned with offences variously referred to as ‘statutory’, ‘public welfare’, ‘regulatory’, ‘absolute liability’ or ‘strict responsibility’, which are not criminal in any real sense, but are prohibited in the public interest. (Sherras v. De Rutzen [[1805] 1 Q.B. 918].) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.

[118] The decision looks at the evolution of absolute and *mens rea* offences with consideration being given to the establishment of a second class of offences that are concerned primarily with public welfare. The conclusion of the Court was as follows:

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proof by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. **Offences 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 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 if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Este so referred to them in Hickey's case. (emphasis added)**

3. Offences of absolute liability where it is not open to the accused who has exculpate himself by showing that he was free of fault.

[119] The burden of proof is on the Crown to prove the *actus reus*, that each of these gentlemen on the date as shown in the information, did unlawfully fish for halibut in NAFO zone 4T during a closed time.

[120] There is no dispute that each of them were involved in halibut fishing on the date alleged in the offence charged.

[121] The first issue the Court was asked to consider was what was effective time of closure in the Variation Order 2009-096.

[122] The Closed Time Variation Order, 2009-096 for the Gulf Region issued at Moncton, New Brunswick, September 5, 2009 by the Regional Director-General provided:

3. The closed time as fixed by subsection 87(1) and set out in items 6(3) of Schedule XXIII of the *Atlantic Fishery Regulations, 1985* is hereby varied so that no person shall fish for halibut by means of vessel class A40 from September 6 to December 31, 2009, in Division 4T.
4. This Order shall come into force on the date of signature and remains in force until December 31, 2009, at which time the close time shall revert to those set out in Schedule XXIII of the said Regulations.

[123] Included with the order was also the Notice for Broadcast to Halifax and Sydney which states:

NOT FISH

PURSUANT TO THE FISHERY (GENERAL) REGULATIONS AND BY GULF REGION CLOSED TIME VARIATION ORDER 2009-096, THE HALIBUT FISHERY BY VESSEL CLASSE A40 (HALIBUT FISHERS FROM MARITIMES) WILL BE CLOSED FROM SEPTEMBER 6 TO DECEMBER 31, 2009, IN DIVISION 4T

REFER TO GULF REGION CLOSED TIME VARIATION 2009-096, ISSUED ON SEPTEMBER 5, 2009, OR CONTACT YOUR LOCAL FISHERY OFFICER FOR FURTHER INFORMATION OR VISIT THE DFO WEB SITE.

[124] Mr. MacMillan is right that **R v. Arenburg** (1988), 87 N.S.R. (2d) 164 is not strictly applicable to the case at bar, the reference therein to the **Newell** decision is of some consequence. Justice Freeman (as he then was), stated:

...I could not take Judicial notice of the Variation Order. It is an order and not a regulation; it must be proved by the Crown.

[125] I included that reference because it is important to confirm that there is a burden on the Crown to prove the Variation Order and that it is not a regulation. As noted in **Arenburg** (*supra*), only if such is proved can a Court then look at whether there was a closed time.

[126] Mr. MacMillan on behalf of the Crown refers the Court to the ***Fishery (General) Regulations*** which are applicable to the ***Atlantic Fishery Regulations***, the contravention of which is alleged in the case at bar.

[127] In particular he referred to section 4 of the **Fishery General Regulations** which provides:

4. Where a period of time is set out in any of the Regulations listed in subsection 3(4), the period

(a) unless otherwise specified begins at 00:00 h on the first day set out and ends at 24:00 h on the last day set out; (emphasis added)

(b) begins and ends in each calendar year except that where the period is stated to end on a day in a month that occurs earlier in a calendar year than the month in which the period begins, that period begins in one calendar year and ends in the next calendar year.

[128] Mr. MacMillan argues that such makes it abundantly clear that the time referred to in the Variation Order of September 5, 2009 commences at 00:00 hours on September 6th and ends on the last day at 24:00, thereby including all of September 6th. He asserts that in effect, the closure was at midnight on September 5th and that is consistent and logical with a reading of that provision, there is no

requirement to go to the **Statutory Instruments Act** as suggested by the Defendants with respect to this issue.

[129] Counsel for Mr. Courtney, Fudge, MacMullin, Moore, Organ & Rambeau asserts that the Variation Order should be interpreted according to the **Interpretation Act**, R.S.C., 1985, c.I-21 and such would mean the fishery in question did not close until September 7th, at which time the defendants had removed their gear and stopped fishing.

[130] Ms. Baker argues that section 4 of the *Fishery (General) Regulations* refers to a time period set out in Regulations and is not applicable to Variation Orders, and that if it were so, it would expressly state either in section 4 or in section 6 which deals specifically with Variation Orders.

[131] She further argues that as it does not specifically refer to Variation Orders the Court is then required to turn to section 2(a) **Statutory Instruments Act** R.S.C., 1985, c.S-22 (formerly the **Regulations Act**).

“Statutory Instrument”

(a) means any rule, **order**, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (emphasis added)

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by conferring on any person or body of powers or functions in relation to a matter to which that instrument relates,

[132] She further refers to the **Interpretation Act** and section 2 therein which provides the following definition for “regulation”:

...includes an **order**, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (emphasis added)

(a) in the execution of a power conferred by or under the authority of an Act or

(b) by or under the authority of the Governor in Council....

[133] Further the “Computation of Time” is expressed as follows in section 27 of the **Interpretation Act** as follows:

27.(1) Where there is a reference to a number of clear days or “at least” a number of days between two events, in calculating that number of days the days on which the events happened are excluded.

(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

(4) Where a time is expressed to begin after or to be **from** a specified day, the time does not include that day. (emphasis added)

[134] In **R. v. Bouchard** (1976), 11 Nfld. &P.E.I.R. 253 the common law with respect to interpretation of fixed periods of time is discussed with the conclusion being that when time is expressed to begin after or from a specified day, or to continue until such, the time does not include that day. Ms. Baker asserts that such is consistent with the provisions in the **Interpretation Act** that she referenced.

[135] She further submits if there is any confusion with respect to interpretation of Statutes, Pierre Côté in his text *Interpretation of Legislation in Canada*, states that if in any penal statute there is a conflict as to meaning or scope, the general principles of interpretation are applicable, and that the most favourable interpretation is an entitlement of the defendants.

[136] There is an apparent conflict between section 4 of the *Fishery (General) Regulations* which refers to times set out in the Regulations and how such is to be interpreted versus the provisions in section 27(4) of the **Interpretation Act** with respect to computation of time.

[137] The Court agrees with the submissions made by Ms. Baker that there is a conflict here and that such should be resolved in favour of the defendants. Section 4 of the *Fishery (General) Regulations* specifically talks about regulations. Section 2 in the **Interpretation Act**, states that a “regulation includes an order”.

[138] Section 4 of the *Fishery (General) Regulations* states that **unless otherwise specified** the period beings at 00:00 on the first day set out.

[139] The Court interprets the Variation Order's use of the word "**from**" to be that which is **otherwise specified** (as per section 4 above) and thus as there is no further computation of time outlined in the *Fishery (General) Regulations* the Court must then look to sub-section 27(4) of the **Interpretation Act** which uses the word "from".

[140] In so doing this Court finds that the wording of the Variation Order "from September 6" is to be interpreted such that it does not include that day, September 6th, and the Variation Order became effective September 7th.

[141] On September 7th none of the defendants in this case were in contravention of the Variation Order and therefore were not fishing during a closed time. I find all six defendants not guilty. The Crown has not proven beyond a reasonable doubt the *actus reus* of the offence.

[142] Even if this Court is incorrect in its interpretation of the legislation as it applies to the time of the closure I would also find the Crown has not met the

burden of proof on it, being one of a balance of probabilities, as it relates to effective notice of such Variation Order.

[143] The *Fishery (General) Regulations* provides the following with respect to notice of a Variation Order:

7.(1) Subject to subsection (3), where a variation order is made under section 6 notice of the variation shall be given to the persons affected or likely to be affected by the variation by one or more of the following methods:

(a) broadcasting the notice over a commercial or marine radio station, a radio station operated by the Department or a radio station located on a vessel under contract to the Department that broadcasts in the area or in the vicinity of the area affected by the variation;

(b) publishing the notice in a newspaper that is circulated in the vicinity of the area affected by the variation;

(c) posting the notice in the area of in the vicinity of the area affected by the variation;

(d) transmitting the notice by electronic means to those persons;

(d.1) posting the notice on the web site of the Department or of the Province;

(e) having a Fishery Officer or Fishery Guardian give oral notice thereof to those persons;

(f) Publishing the notice in a current sport fishing publication, published periodically by the applicable province or by the Department.

[144] The Crown argues that the Variation Notice was sent to MCTS for broadcast on Halifax and Sydney Coast Guard Radio and the times of such are exhibited before the Court as an original script for broadcasting. The script also shows the frequency on which they were broadcast and the individuals who read the same.

[145] The script on September 5 and 6, 2009 as it was broadcast was:

September 5, 2009	7:11 pm	(22:10Z)	Continuous Marine Broadcast
September 6, 2009	4:40 am	(07:40Z)	2749
September 6, 2009	5:10 pm	(20:10Z)	2749 KHZ
September 6, 2009	7:46 pm	(22:46Z)	Continuous Marine Broadcast

[146] This the Crown says complies with section 7(1)(a) of the *Fishery (General) Regulations*.

[147] The Crown further asserts that section 11(2) of the **Statutory Instruments Act** has also been complied with. It provides:

(2) No regulation is invalid by reason only that it was not published in the *Canada Gazette*, but no person shall be convicted of an offence consisting of a contravention of any Regulation that at the time of the alleged contravention was not published in the *Canada Gazette* unless

(a) the regulation was exempted from the application of subsection (1) pursuant to paragraph 20(c), or the regulation expressly provides that it shall apply according to its terms before it is published in the *Canada Gazette*; and

(b) it is proved that at the date of the alleged contravention **reasonable steps** had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it. (emphasis added)

[148] It is agreed by counsel that the issue here is whether reasonable steps had been taken to bring the substance of the Variation Order to the notice of the fishermen affected by it, that is those who were at sea in this particular case.

[149] It is the Crown's position that DFO took the step of notifying by broadcast over a Commercial and Marine Radio notice of the Variation Order.

[150] It is also the Crown position that F/O LeBlanc testified that he spoke personally with Captain Rambeau and notified him. This being of course on September 6th.

[151] There was evidence from F/O MacPhee that when she was on board the *Kayleigh & Jess* she told Joseph Rambeau that there may be a possible closure because of the high percentage of cod being caught without any further detail as to when, as it relates to time.

[152] Ms. Baker on behalf of her clients argues that DFO failed to fulfil its legal obligations and they were unable to show on the balance of probabilities that reasonable steps had been taken.

[153] She referred the Court to the decision in **R v. Hussey** (1993), 106 Nfld & P.E.I.R 126.

[154] Mr. Hussey was charged on an information with a violation of Section 87(1) of the *Atlantic Fishery Regulations* by fishing for a species of groundfish during a closed time and thereby committing an offence under Section 78(a) of the **Fisheries Act**. This offence was alleged to have happened on the 26th and 27th days of March, 1992.

[155] The Variation Order closed the fishery “during the period beginning on March 26 and ending on December 31”, and was to come into force “on the 26th day of March, 1992”. The Canadian Coast Guard Radio Station in St. Lawrence, Newfoundland broadcast the facsimile transmission of the Notice to Fisherman. It was from the Regional Director-General, Newfoundland Region, giving notice of

the Variation Order in the cod fishery advising such would close effective midnight March 25, 1992.

[156] This broadcast was placed on the Continuous Marine Broadcast and was transmitted at 5:03 pm and first broadcast on the medium frequency at 6:33 pm.

[157] Mr. Hussey was on the sea at this time.

[158] Ross Kelly, a Fisheries observer, was on board Mr. Hussey's vessel and had advised Mr. Hussey of the possible closure of the fishery around noon on March 25th. He suggested to Mr. Hussey that he monitor frequency 2182 Khz, the "distress" channel for a broadcast or message pertaining to a closure. Mr. Hussey's vessel had three radios for transmitting and receiving VHF frequencies, a sideband as well as two telephones, one mobile and one cellular.

[159] Mr. Hussey had no first hand knowledge of the quota having been caught in this particular fishery and it being closed until an aircraft flew over at noon on March 27th and he was boarded.

[160] Handrigan, P.C.J held there was inadequate notice of the closure of the fishery by the Department of Fisheries and Oceans. The initial communication through the Coast Guard Radio at 5:03 pm was not sufficient in that the fishery was to be closed seven hours hence. There was evidence from F/O Durdle that the Department of Fisheries and Oceans endeavours to give at least 24 hours notice of a closure of a fishery. Handrigan J. stated:

Certainly that was not given in this instance, and the inadequacy of the notice is much amplified by the fact that it was designed, at least in part, to be complied with by vessels at sea, accessible to communications from shore only by sideband radio, on medium frequency, through Coast Guard Radio Stations, or mobile or cellular telephones.

[161] Judge Handrigan was also concerned that there was no evidence from the Department of Fisheries that their reliance on broadcast to fishermen, who are at sea, with either VHF, medium frequency transmitters or sideband, would in fact reach them, in terms of either the geographical distance or if in fact the fishers had their radios tuned to the appropriate stations.

[162] Judge Handrigan stated:

In light of the many distractions to be dealt with by the accused in the wheelhouse while on the fishing grounds, it is not surprising that he did not get this message. In the circumstances, and particularly in light of the short notice for the closure of this fishery, I would expect the Department of Fisheries and Oceans (Canada) to have done more: The Canadian Navigator II was equipped with a mobile telephone and a cellular telephone. The numbers for each of which were with the department. It is not an unreasonable expectation, to conclude that the department should have made individual contact with the vessels which were at sea fishing or destined for the fishing grounds. There was a Fisheries Observer from Sea Watch aboard each of these vessels and from the amount of contact with Ross Kelly, the Observer aboard the Canadian Navigator II, had with shore... I could only conclude that there would be little difficulty, if any, in making contact....

[163] Further he states:

Much is made of the fact that Ross Kelly spoke to the accused on March 25, 1992 around noon and indicated that the accused should monitor frequency 2182 Khz for a broadcast with the possible closure of the fishery. The accused has adequately explained that the use of the radio sets on board his boat, and I'm satisfied that with the chaotic activity of the fishery in a small area the radios were more than reasonably deployed in trying to monitor the activities of other fishing vessels to avoid calamity. However, no substance was given to the 'rumours' which had been heard by Ross Kelly and by the accused himself, beyond vague references at best second hand and third hand to the accused.

[164] It is the decision of this Court that the notice from the Department of Fisheries and Oceans provided to the halibut fishery in the case at bar falls far short of reasonable.

[165] The legislative scheme that allows for Variation Orders does not operate in a vacuum. It is a considerable power given to the Regional Director-General in Section 6 of the *Fishery (General) Regulations* that he may by order, vary the closed time.

[166] The evidence of Verna Docherty, Senior Advisor Fisheries Management Maritime Region that Variation Orders such as the one at issue in this case should have a minimum 24 hours advance notification is compelling. She, after making a recommendation about a Variation Order to the Regional Director-General and it being approved, has it sent to the Regulations Unit with the 24 hour notice recommendation.

[167] Her evidence was consistent with the evidence of all the fishermen charged in this case, that she has never seen a Variation Ordered for the ground fishery when vessels were on the sea.

[168] The first broadcast of the notice of closure was at 7:11 pm on September 5, 2009 being 4 hours and 49 minutes before the closure was to take effect, which according to the Crown, if such had of been accepted was midnight, September 5th.

[169] This broadcast at 7:11 pm however was on the Continuous Marine Broadcast and not on Channel 16 where Notice to Fishers are typically broadcast. The first broadcast of such, often referred to as a call-up, was not until 4:40 am on September 6, 2009, being almost five hours after the fishery had closed, if again one were to agree with the interpretation of the Crown.

[170] Mr. Docherty's evidence as to broadcast times, channels, frequencies and content was confirmed by Heather Ozon, Officer-in-Charge, Canadian Coast Guard Radio Sydney.

[171] The law in **R v. W.(D)**. [1991] 1 S.C.R. 742 is applicable to the evidence of the defendants. It provides that if I believe the accused or do not specifically reject their evidence in that it might reasonably be true, they must be acquitted. It also

provides that if I disbelieve one or any of them, that is if their evidence is rejected, then before a conviction can enter I have to be convinced beyond a reasonable doubt of the guilt of any one or more of the accused on the whole of the evidence.

[172] In this particular case I accept the evidence of each of the defendants, testimony in its entirety. Specifically, as it relates to this issue, the Court heard the collective evidence of almost 200 years of fishing in which none of them have ever received notice of a closure of a fishery while at sea. That evidence is very important to this Court. Further that evidence makes sense to this Court, taking into account what the job is they were doing.

[173] The evidence of the defendants was consistent as between direct and cross-examination and with that of those of them who gave statements. It is corroborated in many aspects by the Fishery Officers, Ms. Ozon and Ms. Docherty. They had good recall and gave details of these events.

[174] The fishermen gave this Court a sense of their occupation, of it involving very long days, which are very labour intensive, that are handled by two, three or

perhaps four crew at the most, in circumstances where there is loud noise and very little rest and weather and other vessel traffic to contend with.

[175] The time that it takes for the fishermen to set their gear and then haul it and bait it to set it again can often lead to upwards of 18 plus hour days. During their downtime, so to speak, they are either keeping watch or trying to grab a bit of food and rest.

[176] For the Department of Fisheries and Oceans to issue a Variation Order as in this case with what I would term next to no legitimate notice is surprising. This is a very significant fishery and to put fishermen in the position that each of these Defendants were placed in is truly regrettable.

[177] I find that in the context of this particular fishery, in that it had commenced, such was known to DFO because of the hail in obligations of fishers, the shortness of notice of the Variation Order set these fishermen up for contravention of it. As one Captain testified it was simply illogical to think that they would be able to

comply with such an order with their gear in the water, they certainly were not just going to leave it there and return to port.

[178] Ms. Baker also argued before the Court that these fishermen had an honest by mistaken belief in a set of facts which if were true would render their fishing innocent.

[179] Again referring to the **Hussey** decision (*supra*), and for the reasons just provided on the issue of notice, I would find also that such a defence would be open to each and every one of them.

Laurel Halfpenny MacQuarrie
A Judge of the Provincial Court
for the Province of Nova Scotia

