

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Doucette v. Doucette, 2005NSSC46

Date: 20050210

Docket: S.Y. 6430

Registry: Yarmouth

Between:

Lyndon Joseph Doucette, Elizabeth Ann Doucette
and The Estate of William Edward Doucette

PLAINTIFFS

v.

Preston William Doucette

DEFENDANT

Judge:

The Honourable Justice Allan P. Boudreau

Heard:

June 14, 15, 16 and 17, 2004 in Comeauville,
Nova Scotia. Final post trial submissions received on
August 12, 2004.

Written Decision:

February 10, 2005.

Counsel:

W. Dale Dunlop, for the Plaintiffs
Bruce S. Russel, Q. C., for the Defendant

By the Court:

INTRODUCTION:

[1] This case involves a family dispute over the ownership of a valuable lobster licence and two ancillary fishing licences. The present holder of the licences is the defendant, Preston William Doucette (“Preston”). His mother, the plaintiff, Elizabeth Ann Doucette (“Betty Ann”), alleges that she transferred the licences to Preston in 1998 as a trustee with her as the sole beneficial owner. The licences had previously been owned by Betty Ann’s late husband, Billy Doucette (“Mr. Doucette”). Mr. Doucette died suddenly in 1992 without a will. From 1993 to 1998 the licences remained registered in the name of the Estate of Mr. Doucette (“the Estate”) and they were fished by Preston and his brother, the plaintiff Lyndon Joseph Doucette (“Lyndon”), under an arrangement whereby Betty Ann, Preston and Lyndon shared in the proceeds from the annual lobster catches. In August of 1998 Betty Ann transferred the licences to Preston. Preston and Lyndon continued to fish the licences under a revised income sharing arrangement until the fall of 2000, when Preston and Lyndon had a falling out. Preston, as captain of the fishing vessel, fired Lyndon. In 2001, Betty Ann commenced this court action claiming the return of the licences to her sole

control and ownership, alleging that Preston holds the licences as a trustee only. Preston claims the licences were transferred or given to him in 1998 in return for promises to continue to look after Betty Ann financially and to continue to employ Lyndon as a crew. It is general knowledge in the community and the court can take judicial notice of the fact that the value of District 34 lobster licences has increased dramatically since the 1999 decision of the Supreme Court of Canada in the **Donald Marshall Jr.** Case.

ISSUES:

- [2] The main question in this case is under what legal arrangement did Betty Ann transfer the licences in question to Preston in August of 1998?
1. Was it a “bare” trust with Betty Ann as the only beneficial owner?
 2. Was it a trust with multiple beneficial owners?
 3. Was it a transfer in the nature of a contract with promises extracted or obtained from Preston as consideration?
 4. Was it a gift to Preston with conditions subsequent?
 5. What are the financial or accounting repercussions of the Court’s decision regarding ownership of the licences?

FACTUAL BACKGROUND:

- [3] Betty Ann is the mother of Preston and Lyndon. She also has a daughter, Beverly Doucette (“Beverly”). Betty Ann’s husband, Mr. Doucette, had been a lobster fisherman most of his working life. He owned a District 34 lobster licence as well as two other ancillary licences. He also owned a

lobster fishing vessel, the “Preston & Lyndon”, and lobster fishing gear. Mr. Doucette had employed Preston as a crew member on the “Preston & Lyndon” for a number of years prior to his sudden death on December 22, 1992. Lyndon had worked full time as a crew member for his father for approximately one month prior to his father’s death. Both Preston and Lyndon went fishing with their father at an early age and he taught them the trade. Neither of them went to High School, choosing instead to fish with their father. Preston has a grade 6 and Lyndon has a grade 7 education. Preston was approximately 21 years of age and Lyndon was approximately 17 years of age when their father died, just four weeks into the 1992 - 1993 lobster fishing season. Mr. Doucette died intestate; ie., he died without a will.

[4] The family turned to their lawyer, S. Clifford Hood, Q. C., (“Mr. Hood”) of Yarmouth for assistance in dealing with the intestacy. Mr. Hood is reputed to have expertise and considerable experience in dealing with licences and other fisheries matters. It appears the children had a meeting in Mr. Hood’s office shortly after Mr. Doucette’s death. Present were Mr. Hood, Preston, Lyndon, Beverly and Walter Boudreau (“Mr. Boudreau”), Betty Ann’s brother. Betty Ann was apparently in the Yarmouth Hospital by then.

Mr. Boudreau was not sure if this meeting took place before or after a subsequent meeting at the Yarmouth Regional Hospital, but in all probability it was before, as testified to by other witnesses. There was a subsequent meeting at the hospital in early January of 1993 because Betty Ann had been hospitalized shortly after her husband's death. This meeting had been arranged by Mr. Hood in order for the family to sign the probate papers for administration of Mr. Doucette's Estate. It had been agreed by all at the first meeting at Mr. Hood's office, and confirmed at the subsequent hospital meeting, that the three children were renouncing any right to share in their late father's estate in favour of their mother, Betty Ann. While this agreement was confirmed verbally at both meetings, legal documentation to that effect was not prepared. The children thought they were executing such documentation at the hospital meeting, but they were just signing renunciations to administration of the Estate for probate purposes. Nevertheless, all three children testified at this trial and confirmed the verbal renunciation to any claim in the Estate reached in late 2002 or early 2003. No doubt part of this understanding was the agreement that Preston and Lyndon would continue the fishing operation and they and Betty Ann would

share in the proceeds of the lobster catches. It also appears Beverly was to eventually get the fishing shanty owned by Mr. Doucette.

[5] At these first two meetings it was agreed that Preston and Lyndon would fish the licences, particularly the lobster licence, using Mr. Doucette's vessel, the "Preston & Lyndon", and the rest of the fishing gear, under a proceeds sharing arrangement between the two of them and Betty Ann. This arrangement was that Betty Ann would receive 60% of the gross proceeds from the lobster catches, from which she would pay the fishing expenses such as bait and fuel. Preston and Lyndon would each get a 15% share of the catches. It is not clear what the remaining 10% represented, presumably it would go to pay for another crew member as it appears it takes a crew of three to run a lobster fishing operation of this nature. This arrangement continued for some five years.

[6] During this time the licences had been transferred to and remained registered in the name of the Estate. It is not clear when the parties were advised that it was Department of Fisheries and Oceans ("DFO") policy that these fishing licences would have to be transferred to a named fisherman at some time in the future, but this probably occurred a short time after the granting of the administration of the Estate and when the licences were actually transferred

in the name of the Estate. The parties understood that the licences could remain registered in the name of the Estate for a maximum of five years.

[7] The initial arrangement for revenue sharing between the parties continued uninterrupted for some five years. By 1997 the parties were aware that they should direct their minds to the DFO policy which required that the licences registered in the Estate be transferred to a named fisherman within five years. Mr. Doucette had died in December of 1992 and the licences had been transferred to the Estate in January of 1993. Preston had been fishing the lobster licence and running the fishing operation as captain under designation by Betty Ann since January of 1993. A meeting was arranged for Betty Ann, Preston and Lyndon to discuss the five year DFO policy with their lawyer, Mr. Hood. There is some considerable disagreement as to when this meeting took place.

[8] It is important for the court to determine when this meeting to discuss the DFO policy took place because Betty Ann alleges that she signed the transfer of the licences to Preston on August 13, 1998, immediately upon leaving a meeting at Mr. Hood's office. She alleges that present at the meeting with Mr. Hood were Betty Ann, Preston, Lyndon and Kenneth Saulnier ("Mr. Saulnier"). Mr. Saulnier is the accountant who has been

doing the books and financial statements for the Doucette fishing operations.

[9] Mr. Saulnier testified that he was present at a meeting in Mr. Hood's office close to before the five year maximum expired, or shortly thereafter. He said he is hard of hearing and that he did not pay much attention to what was being said at the meeting.

[10] Mr. Hood initially swore an affidavit that this meeting was held in November of 1997 and some of his notes bear a notation of November 15, 1997. However, upon reflection and consulting his files opened registry, Mr. Hood testified that he could not rule out August 13, 1998, although that date would have been a Saturday when he does not have regular office hours.

[11] Lyndon testified that he attended only one meeting at Mr. Hood's office to discuss the transfer of the licences, and that that was in 1997 or 1998. He said it was also at that meeting that the sharing of the proceeds between Betty Ann, Preston and himself was changed. He said his mother no longer wanted to be involved in paying any of the bills or expenses for the fishing operation and it was agreed that she would get 25% of the gross revenues after direct expenses such as bait and fuel were paid and Lyndon and Preston

would share the remainder at 37½ % each. There is a note in Mr. Hood's file with the notation November 15, 1997 with a reference to 25% and a reference to "Preston - name". This note also contains comments regarding a will for Betty Ann.

[12] Betty Ann testified that the new revenue sharing arrangement took effect in 1997. This would be consistent with a meeting at Mr. Hood's office in the middle of November 1997, before the fall lobster season which commences the last Monday of November each year.

[13] Andrea Doucette ("Andrea"), Preston's wife, testified that her husband attended a meeting at Mr. Hood's office in November of 1997, before the start of the fall lobster season. She said she was aware that the five year DFO policy for keeping the licence in the Estate was coming up soon. Andrea also testified to setting up new banking arrangements in November of 1997 in order to accommodate the new revenue sharing arrangement which had been agreed at the meeting in Mr. Hood's office earlier that month.

[14] Preston testified that he did not recall very much about the meetings shortly after his father's death. He said he recalled meeting at the Yarmouth Hospital and it was agreed that his mother would be in charge of the Estate

and that he would run the boat and hire Lyndon. He also testified that some time after his father's death, Mr. Boudreau, his mother's brother, approached him to buy the licences. He said he also asked his mother to buy the licences but she was apparently unwilling to sell at that time; however, according to Mr. Boudreau, this only occurred when Preston and Lyndon were not getting along.

[15] Mr. Boudreau also testified that he was aware there was a meeting at Mr. Hood's office approximately four years after the licences had been placed in Betty Ann's name (presumably he meant in the name of the Estate). He said Betty Ann wanted her sons to fish the licences because that is what their father wanted.

[16] The evidence is overwhelming and I find that a meeting to discuss the status of the licences took place at Mr. Hood's office in mid November of 1997. Present were Mr. Hood, Betty Ann, Preston, Lyndon and Mr. Saulnier. The details of what took place at that meeting are very sketchy; however, certain things appear to have been clearly decided. Preston and Lyndon would continue to fish the licences, particularly the lobster licence. Betty Ann, Preston and Lyndon would share in the proceeds of the catches. Betty Ann would get 25% of the gross proceeds after payment of the direct expenses.

Preston and Lyndon would each share the remainder equally; ie, 37½ % each. It also appears the possibility of placing the licences in Preston's name may have been discussed at the meeting, as indicated by the notation "Preston - name" on Mr. Hood's notes (see Exhibit 1, Tab 11). It also appears from this note that provisions for a possible will for Betty Ann were discussed; however, that is all we can conclude took place at that meeting. Mr. Hood believes the concept of placing the licences in Preston's name "in trust" for Betty Ann was discussed; however, his notes make no such mention. Preston testified that he could not recall the concept of a trust agreement being discussed at the November 1997 meeting. He said the first time he could recall hearing about this allegation was when he received the October 5, 2000 letter from Mr. Hood (Exhibit 1, Tab 31). Preston testified that he had to seek legal advice to see what the trust allegation meant.

[17] Lyndon testified as to his recollection of the understandings reached at the November 1997 meeting. He said the licences were to be transferred to Preston because the licences had to be transferred to someone. He said Preston and he would continue to fish the licences under a new proceeds sharing arrangement with Betty Ann. He viewed it as a sort of partnership arrangement. The notes found at Exhibit 1 - Tab 11 also bear the notation

“Partnership”. Mr. Hood also testified that the concept of a partnership was discussed at the meeting at which the proceeds sharing was revised.

[18] Mr. Hood testified that, after this meeting in his office, he had contemplated documenting a trust agreement, but that a partnership agreement may have been sufficient in this case. He said the three people trying to live off the fishing operation appeared to be in agreement.

[19] Preston has more or less the same recollection of the November 1997 meeting as Lyndon. Preston testified that a will for Betty Ann was discussed and that he would have the licences and that when he died they would always stay in the family.

[20] The proceeds sharing arrangement between the parties continued after November 1997. Preston was captain of the lobster fishing operation and Lyndon was a crew aboard the vessel, “Preston & Lyndon”. Betty Ann received 25% of the gross catch after payment of the direct expenses and Preston and Lyndon shared the remainder equally. There was no mention of any trust agreement after the November 1997 meeting, and the evidence does not establish any attempts by Betty Ann to impose or confirm such an agreement until the fall of 2000, after the falling out between Preston and Lyndon.

[21] Prior to the falling out between Preston and Lyndon, Betty Ann transferred the licences in question to Preston. The evidence is clear and uncontradicted that on August 13, 1998, some nine months after the November 1997 meeting at Mr. Hood's office, Betty Ann, unexpectedly, "out of the blue", telephoned Preston to come and get her to go to the DFO office and transfer the licences in his name. Betty Ann testified that, before going to DFO on August 13, 1998 to transfer the licences into Preston's name, they went to Mr. Hood's office for a meeting to discuss the terms under which the licences would be transferred. She said that present at that meeting were Mr. Hood, Betty Ann, Preston, Lyndon and Mr. Saulnier. She said it was agreed that the licences would be transferred to Preston "in trust", to hold for Betty Ann as the sole beneficial owner. She testified she and Preston then went directly from Mr. Hood's office to the DFO office to effect the transfer. If the November 1997 meeting with the same parties took place, which I have found that it did, then the same parties could not have been at another meeting at Mr. Hood's office for the same purpose because all except Betty Ann, that is , Preston, Lyndon and Mr. Saulnier said they only attended one such meeting. Moreover, August 13, 1998 was a Saturday when Mr. Hood's office did not have regular business hours. Mr. Hood could not remember

when such a meeting was held and he could only go by his notes and files opened registry. Mr. Hood testified that neither of these records could identify the date of such a meeting, the best they can do is identify possibilities.

[22] Preston's wife, Andrea, could recall the incident of the telephone call from Betty Ann to Preston requesting he pick her up to attend at the DFO offices, but she did not recall any mention of attending at Mr. Hood's office.

[23] The preponderance of the evidence does not support that such a meeting took place on August 13, 1998. On the contrary, I find that the preponderance of the evidence establishes that no such meeting took place and that Betty Ann is mistaken in this regard.

[24] I am satisfied that Betty Ann called Preston on August 13, 1998 to pick her up and take her directly to the DFO office to effect a transfer of the licences to him, and that is precisely what occurred.

[25] Betty Ann testified that she had no intention to just give the licences to Preston outright. She said Preston was to keep the licences for all three of them, her and her two sons. She also later testified that the licences were to be held for her and that she had only changed the name on the licences to avoid losing them. It is noteworthy that she did not testify that the licences

were held “in trust”. Betty Ann testified she had waited for months for papers from Mr. Hood’s office regarding the licence arrangements, but that she never received any. She then said that she asked for the papers for the first time on August 13, 1998. She testified she then waited for months but that she never saw any papers. Betty Ann denied telling Preston on the way to the DFO office that she was transferring the licences to him on the conditions that he continue to look after her financially and continue to employ Lyndon.

[26] Betty Ann testified that she dealt exclusively with Kelly Blacklar to effect the licence transfers at the DFO office on August 13, 1998. She denied that Francine Starr was present or that she had any discussions with her. Betty Ann testified the only thing she said in the Fisheries Office was that she “was changing the licence to hold it for her”. Francine Starr testified that she saw Betty Ann come into the DFO office on August 13, 1998 and go to Kelly Blacklar. Ms. Starr testified that she recognized Betty Ann and that she went around the counter to talk to her. It is not in dispute that only Betty Ann and Preston attended at the DFO office. Ms. Starr testified that she advised Betty Ann that she could have an extension and that she did not have to transfer the licences at that time. She said Betty Ann indicated “she

was O.K. with that”. Ms. Starr testified there was no mention by Betty Ann or anyone else of any other agreements regarding the licences. She said nothing else was mentioned by Betty Ann or Preston. She said it was just a routine licence transfer.

[27] Preston testified that Betty Ann telephoned him unexpectedly on August 13, 1998 and said “Come get me and we’ll go to DFO”. He said he took his truck and went to pick her up. He testified that on the way to the DFO office Betty Ann told him she would give him the licences and that he would have to take care of her and hire his brother. Preston said that he would do that. Preston testified that the licence was not a gift because he had to take care of Betty Ann. He said she did not elaborate on “taking care of her”.

[28] The preponderance of the evidence indicates and I am satisfied that Betty Ann told Preston on the way to the DFO office that she was transferring the licence to him and that he had to continue to look after her by paying her customary share of the proceeds from the lobster catches and continue to employ Lyndon as a crew on the fishing operation. In other words, their then current sharing arrangement would continue. That is precisely what occurred until the fall of 2000. There was never any mention of any trust agreement by any of the parties and there is no evidence that such an

agreement or documentation for such an agreement was pursued for the two years after August of 1998.

[29] Preston and Lyndon had a falling out in the spring of 2000. This culminated with Preston terminating Lyndon's involvement as a crew member on the "Preston & Lyndon". The troubles began during the 1998 - 1999 lobster fishing season. Lobster traps belonging to the "Preston & Lyndon" fishing operation had gone missing from some of their trawls. It was thought that someone had stolen these traps. It was then decided to appropriate some replacement traps from other fishermen's trawls. Some traps were taken and brought to a wharf. Preston and Lyndon were both charged with theft but the matter appears to have been eventually settled with apologies to the local fishermen. In 2000 the entire crew of the "Preston & Lyndon" were charged with keeping undersized lobsters and heavy fines were imposed as well as a one month sanction on the use of the lobster licence.

[30] The situation had developed to the point where local lobster buyers were refusing to purchase the "Preston & Lyndon's" catch. The lobsters had to be trucked for sale approximately one hour away to Meteghan. It appears the local fishing community placed a great deal of the blame on Lyndon for the appropriated traps and the undersized lobsters; however, the evidence shows

that both Preston and Lyndon were equally culpable. Nevertheless, local buyers were prepared to deal with the “Preston & Lyndon” and purchase its catch, but not if Lyndon was employed on board the vessel.

[31] Preston appeared to be placing the blame on Lyndon for the troubles of the fishing operation, but regardless of who was at fault, it is clear that the relationship between Preston and Lyndon was becoming strained, particularly aboard the fishing vessel. It appears the two hardly spoke to each other.

[32] During September of 2000 Preston consulted with Mr. Hood about the situation with Lyndon. There was a meeting at Mr. Hood’s office at which were present Mr. Hood, Preston, his wife Andrea and William Carroll, Preston’s father-in-law. The discussion centred around the situation between Preston and Lyndon and what could be done in the circumstances. Preston acknowledged his obligation to have Lyndon as part of his crew in the fishing operation, as well as his financial obligation to Betty Ann. The purpose of the September 2000 meeting with Mr. Hood was to seek advice and consider what options may be available to Preston. Preston had previously complained to Mr. Hood about Lyndon and this had resulted in the letter of May 3, 2000 to Betty Ann (Exhibit 1, Tab 29). Mr. Hood had

advised Betty Ann to seriously consider selling the licences and rig. Mr. Hood had also advised Preston that, as captain, he could fire Lyndon if he did not follow Preston's orders. This advice had come about as a result of the undersized lobster violations and charges. It appears that Preston had at that time placed most of the blame on Lyndon, which we now know was not correct. In any event, Preston, his wife and father-in-law met with Mr. Hood to see what could be done.

[33] Preston was presented with a few options at this September, 2000 meeting. He could try to work things out with Lyndon (most likely with Betty Ann's intervention), he could attempt to buy out any interest Lyndon may have in the fishing operations, or, if these failed, he could terminate Lyndon, if, as Captain, he felt it was necessary for the fishing operation.

[34] Preston testified he talked to Betty Ann but that nothing happened. Apparently his mother could not understand why her sons could not get along. Preston met Lyndon and offered to pay him \$100,000.00 for Lyndon to terminate his involvement and interest in the fishing operation. Lyndon declined and Preston told him he was being terminated as a crew on the fishing operation. When Betty Ann found out about the termination, she

apparently sided with Lyndon. She told Lyndon that if he could not fish, then Preston would not fish either.

[35] The title and ownership of the family fishing vessel, the “Preston & Lyndon”, and the gear, had remained in the Estate. Only the licences had been transferred to Preston. Betty Ann and Lyndon then proceeded to take all the electronics and navigational aids out of the “Preston & Lyndon”, rendering it unusable to Preston for the 2000 fall lobster season which was about to commence.

[36] Shortly after Preston terminated Lyndon, Betty Ann and Lyndon attended at Mr. Hood’s office. The result of that meeting is Mr. Hood’s letter dated October 5, 2000 to Preston and Lyndon (Exhibit 1, Tab 31). This letter represents the first time we see any written mention of the allegation that Preston holds the licences only as a trustee for Betty Ann. Preston has testified that this letter represents the first time he became aware of the allegation that he was holding the licences only as a trustee for Betty Ann. He has also testified that it is after the receipt of the October 5, 2000 letter that he sought legal advice to see what the legal implications of the trust allegations were. Preston continues to deny that the licences were transferred to him as a “bare trustee”. Betty Ann now wishes to regain full

control and ownership of the licences and to transfer them to Lyndon's name so he can fish the lobster licence.

[37] In order to continue lobster fishing and to commence the fall 2000 fishing season, Preston leased a replacement vessel and he purchased some additional gear. The "Preston & Lyndon" was no longer available to Preston because it had been rendered unusable by Betty Ann and Lyndon when they removed the navigational aids from the vessel in retaliation for Preston having fired Lyndon. As a result, the operation incurred the additional expenses of the leased vessel and another crew member had to be hired to replace Lyndon; however, the expenses of the latter was offset by the fact that Lyndon was no longer being paid a share of the lobster catch proceeds.

[38] Preston has continued to fish the lobster licence up to the present; however, he did not pay Betty Ann any share of the proceeds from the lobster catches from November 2000 to May of 2002. He testified he paid his mother for the November 2002 to May 2003 lobster season. At trial Preston testified he was willing to continue paying his mother because he had purchased a new boat and the payments were lower. Preston testified that the reason he did not pay his mother after November 2000 was because he had the additional expenses of leasing a replacement vessel and buying replacement gear;

however, it was clear from his evidence that he has no detailed knowledge regarding the financial aspects of his fishing operations or of his personal finances. These matters appear to be all left to his wife, Andrea, and his accountant, Mr. Saulnier.

[39] Mr. Saulnier testified he did not tell Preston that he was not able to give his mother any money. Mr. Saulnier also testified that Betty Ann had been historically paid an average of \$17,000.00 per year from the fishing enterprise. Even though Preston had to pay some \$75,000.00 in additional expenses to lease a boat and purchase some additional gear during the period November 2000 to 2003, it appears that there would have been sufficient funds available to pay Betty Ann her average payment of approximately \$17,000.00 per year. The curtailing of payments to Betty Ann was primarily motivated by the fact she and Lyndon had rendered the "Preston & Lyndon" unusable by Preston. Moreover, the continued use of the lobster licence by Preston has enabled him to transfer it to a new vessel for the 2002, 2003 and 2004 - 2005 lobster fishing seasons. As a result of Preston purchasing a new vessel which can fish further offshore, he has been able to more than double the gross lobster landings of his operation. The evidence satisfies me that Preston could have continued to pay Betty Ann at her average annual

payment of \$17,000.00 from the fall of 2000 to the present. In his post trial submission, Preston acknowledges his continuing obligation to pay Betty Ann; however, he has offered a reduced amount, one half of the average annual payment for the years 2001 to 2003, primarily because of the additional expenses of leasing a replacement vessel for the “Preston & Lyndon”. Preston has offered to pay Betty Ann the sum of \$18,000.00 for the year 2004, without any reduction.

[40] Preston does not acknowledge any legal obligation to pay Lyndon any monies in settlement of any interest he may have in the fishing licenses or arising from his termination as a crew member on Preston’s lobster fishing operation. It is clear that Preston would not have received any significant financial benefit from Lyndon’s termination because he would have had to hire a replacement crew for Lyndon. Lyndon testified that, except for the fishing period immediately following his termination, he has replaced his lobster fishing income. In his post trial brief, Lynton takes the position that he will make no claim for damages from Preston if Betty Ann receives the licences back to her sole control and ownership. Very little evidence was presented regarding any income losses caused by Lyndon’s termination from the crew of Preston’s lobster fishing operation in the fall of 2000. Lyndon

testified that he fell upon hard times for the period immediately following the termination and that his income at boat building was only half of his fishing income. He also testified he has been doing well financially in recent years. The only other evidence are Lyndon's income tax returns for the years 1997 to 2003 inclusive, which were placed in evidence by agreement. These show the following incomes from fishing, employment and employment insurance combined:

1997 - \$25,000.00
1998 - \$23,300.00
1999 - \$33,900.00
2000 - \$19,200.00
2001 - \$28,200.00
2002 - \$41,400.00
2003 - \$48,000.00

These income tax calculations were not testified to by Lyndon and the variations from year to year were not explained. It appears Lyndon would have the court infer that the variation for the year 2000 was all caused by his termination; however, that is a leap which I am not convinced I should make. There was no evidence regarding mitigation in this case. The burden is on a plaintiff to prove causation on a balance of probabilities and this was not done in this case.

AUTHORITIES AND ANALYSIS:

[41] The parties agree that Preston retained or assumed certain obligations to Betty Ann and Lyndon as a result of the transfer of the licences into his name. They disagree on how the relationship should be characterized. Betty Ann contends that it was an express “bare” trust, or alternatively a resulting or constructive trust, all with herself as the sole beneficial owner. Preston contends the transfer of the licences was in the nature of a contract with the consideration being his promises to continue to look after Betty Ann (one assumes financially) and to continue to employ Lyndon as a crew member aboard the lobster fishing operation. As mentioned earlier, the details of these arrangements were not specified at the time; however, they continued as before. This continued for some two years after the licence transfers. The primary position of Preston bears similarities to a gift with conditions subsequent. Preston’s alternate position is that if a trust was created or resulted from the transfer of the licences, then it was a trust with three equal beneficiaries, namely Betty Ann, Preston and Lyndon.

TRUSTS (INTRODUCTION):

- [42] Betty Ann and Lyndon (collectively “the plaintiffs”), claim a trust - whether or not it was an express one - arose from the transfer of the licences to Preston. Preston argues that the evidence shows no intention to create a trust, and that the true nature of the arrangement was a full conveyance of the licences to himself in return for his promise to continue to “look after” his mother and to employ his brother. There can be no disagreement and it is well established that licence-holding trusts are common in the fishing industry and are enforceable. There is a line of case law to this effect, including *Theriault v. Corkum* (1993), 121 N.S.R. (2d) 99 (C.A.); *Fish Reduction Ltd. v. Malone* (1997), 163 N.S.R. (2d) 340 (C.A.); and *Goulden v. Smith*, 2003 NSSC 215 (S.C.)
- [43] The parties appear to agree that, if a trust existed, the beneficiaries were Betty Ann, Preston and Lyndon. (See plaintiff’s post trial brief at Paragraph 15 and the defendant’s post trial brief at paragraphs 103 - 109.) Further, they appear to agree substantially on the reciprocal obligations that were undertaken in the agreement, though characterizing them differently. However, Preston’s position is that there was no trust, both on the evidence and on account of the *Statute of Frauds*, R.S.N.S. 1989, c.442, as amended. If a trust exists, he says Betty Ann cannot reclaim the trust property because

she did not reserve a power of revocation. Additionally, Preston claims that if a trust did exist, it was not a bare trust because he - as trustee - still had duties to perform other than simply holding the licences for the beneficiaries. In the further alternative, if there was a bare trust, the equity remains in the beneficiaries and there is still no power of revocation.

EXPRESS TRUSTS:

[44] The plaintiffs say the three certainties have been fulfilled and that an express trust was created. While it does not appear that there was an express trust, it may be useful to briefly review the basis upon which the plaintiffs make such a claim:

(a) **Certainty of intent.** No specific words are necessary, but intent to create a trust must be demonstrated. As Gillese writes in *The Law of Trusts*, Essentials of Canadian Law Series, IRWIN LAW, 1997, the “language employed must convey more than a moral obligation or a mere wish as to what is to be done with certain property. The language used need not be technical, so long as the intention to create a trust can be found or inferred with certainty”. On this point, the plaintiffs say it is clear on the evidence that Betty Ann never intended to give up complete ownership of the lobster licence. They point to various actions by Preston - such as his

consultation with Mr. Hood before firing Lyndon - as evidence that he knew he did not have full control or ownership of the licence. They also refer to Mr. Hood's notes and evidence to support the contention that Betty Ann continued to own the licence, or believed she did. Further, she retained title to the vessel and gear, an indication that she intended to retain some ownership and control of the fishing operation. I note that the plaintiffs refer to Mr. Hood's experience with trusts in the fishing industry. This would also support the conclusion that if a trust was intended, it would have been in writing. It is difficult to see how an intention to create a trust can be found with any certainty in the circumstances.

(b) Certainty of subject matter: This requirement has “two components. First, a trust must have property which can clearly be identified as its subject-matter. Second, the terms of the trust must either define the portion which each beneficiary is to receive or vest the discretion to so decide in the trustees.” The plaintiffs say the specific property here is the lobster licence. As to portions, the latest arrangement provided that the brothers split the net profits after Betty Ann received 25 per cent of the gross profits. Preston appears to argue that the percentages are not certain, and suggests that, in the event a trust does exist, the respective interests should

be based on an appraisal of the value of the licences, divided into interests of one-third for each beneficiary.

(c) **Certainty of objects:** This refers to certainty of beneficiaries of the trust. The plaintiffs claim that Betty Ann made it clear that she and the two sons are the beneficiaries; however, as stated above, the details of the beneficiaries' interests were not discussed or clearly identified at the time of the transfer of the licences to Preston.

[45] If there is found to be no express trust, then the *Status of Frauds* would be of no consequence.

RESULTING TRUST:

[46] Alternatively, the plaintiffs argue that there is a resulting trust. There is a presumption "that if an owner . . . causes property to be placed in the name of another . . ., then a trust has resulted of which the transferor is the beneficiary (see *Levy v. Levy Estate* (1981), 50 N.S.R. (2d) 14 (S.C.T.D.)). This presumption is founded on "the premise that equity does not assume gifts" (See *Levy*, supra). According to Gillese, *Law of Trusts, supra* at page 95, a resulting trust is a limited concept that may only be found in certain circumstances. *Oosterhoff on Trusts*, 6th Edition, Thomson/Carswell 2004 describes these circumstances as follows at pages 503 - 504:

Resulting trusts may be divided into two broad categories. The first occurs when a settlor transfers assets to trustees and thereby creates or intends to create an express trust. If the express trust fails to arise or fails to dispose of the entire beneficial ownership of the trust assets, the remainder normally results to the settlor or to his or her estate.

Resulting trusts in the second category arise when one person (A) voluntarily transfers an asset to another person (B) or when A purchases an asset and directs the vendor to transfer the asset to B. In these situations, equity usually presumes that A did not intend that B should take the asset beneficially and, therefore, B will hold the asset on resulting trust for A unless the presumption is rebutted.

The plaintiff's claim that the first proposition should be applied due to the failure of the alleged express trust as a result of mistake. In this scenario Betty Ann is said to have acted under a fundamental mistake as to what she was doing when she transferred legal title to Preston, while intending to maintain some control. She argues that, as a result, "the initial trust should be found void and no proprietary benefits should be retained against her, since no property had passed. According to Gillesse, *The Law of Trusts*, at pages 97 and 98, a resulting trust is presumed because equity does not assume a gift when a gratuitous transfer of property has been made. Thus equity places the burden on the transferee to prove a gift - that is, to provide evidence of an intention contrary to the presumption that a trust was intended. While an express trust is concerned with "actual intention", a resulting trust is concerned with "assumptions about intention". *Oosterhoff*

on Trusts at page 597 says it appears that it is the apparent donor's intention, and not the recipient's intention, that will rebut or confirm a presumption.

[47] The party attempting to rebut the presumption of a resulting trust may point to any evidence, including circumstantial evidence; eg., the continued proceeds sharing arrangement between the parties for some two years after the August 1998 transfer of the licences to Preston. (See Gillese, *The Law of Trusts*, at Page 105.) Also the presumption may be partially rebutted if it is proven that the donor intended to give some, but not all, of the property. (See *Oosterhoff on Trusts*, at page 600.) This line of reasoning has potential application in this case as there is a significant amount of direct and circumstantial evidence that Betty Ann intended to transfer some beneficial ownership to Preston as well as Lyndon, but not to transfer all of it because she also wanted to continue to receive a benefit from the licences.

[48] Both Gillese, *The Law of Trusts*, and *Oosterhoff on Trusts* have been critical of the presumption of a resulting trust and how strongly it should be applied. They point out that this presumption must be balanced with the presumption of advancement as between parent and child. The plaintiffs say the presumption of advancement does not apply as between mother and child, relying upon Edwards Estate v. Bradley, [1957] S.C.R. 599. This is

a questionable depiction of the present state of the law. *Oosterhoff on Trusts* at page 597 writes that it is presumed that parents intend to give to their children, at least until the children achieve full financial independence. The evidence shows that neither Preston nor Lyndon were financially independent at the time of the transfer of the fishing licences to Preston. In fact, both were entirely dependent on these licences for their livelihood. In the present case, there appears to be no obstacle to a resulting trust, especially one with all three parties as beneficiary.

CONSTRUCTIVE TRUST:

[49] In the further alternative, the plaintiffs argue for a constructive trust, which can be imposed regardless of the parties' intentions. They say there was a fiduciary relationship between Preston and Betty Ann based on the facts that he is her eldest son and she was "in and out of hospital" at the time of the transfer, and that he was captain of the fishing vessel and controller of her interest in the proceeds. As such, the plaintiffs say, equity would impose a constructive trust. While there is no precise definition of a "constructive trust", one of the established applications of this form of trust is to prevent unauthorized profit - that is, "unauthorized gain" - by fiduciaries. A fiduciary (including a trustee) may not benefit from his position; if he does,

the beneficiaries are entitled to the profit. Whether there has been an unauthorized gain is a question of fact, involving an evaluation by the court. It should be emphasized that the constructive trust is a remedial device that is designed to redress inequality. I find that this concept does not apply in this case regarding the beneficial ownership of the licences. However, this concept may apply to the non-payment of Betty Ann's average annual payment from the proceeds of the lobster catches during the period 2000 to the present.

GIFTS:

[50] A "gift *inter vivos*" has been described as "a gratuitous transfer of property from the owner to another, with the full intention on the part of both donor and donee that the thing shall not be returned to the donor but shall be retained as the donee's own". (See *Canadian Encyclopedic Digest*.) The relationship of a condition subsequent or precedent to a gift *inter vivos* is described in *Halsbury's Laws of England*, 4th Edition, Butterworths, London 1993, volume 20:

A condition precedent is one to be performed before the gift takes effect. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift; but, if a condition subsequent is void, the gift remains good . . .

The principle has been described in similar terms in Nova Scotia case law. In **Belliveau v. Riopel et al.** (1988), 88 N.S.R. (2d) 181 (S.C.T.D.), the court compared conditions precedent and subsequent, and stated that where there was a condition subsequent, “vesting occurs earlier, subject to a possible divestment at a later date.” If a condition subsequent is “inconsistent with and repugnant to the gift”, the condition is void and the donee takes the gift free of the condition. It also appears that a condition subsequent that is impossible will be rejected, leaving the gift an absolute one. *Halsbury’s* suggests that, while there “may be cases where, in the circumstances, an attempted or inchoate performance is sufficient . . . this is not the general rule” . . . In summary, an attempt to perform the condition will not normally save the gift.

[51] In the present case, if the transfer of the licence was a gift, it was subject to conditions. The parties agree that Preston accepted obligations as a result of the transfer of the licences into his name; he would continue to support his mother and to employ his brother. If these obligations amount to conditions subsequent, the gift would terminate in the event that they were not carried out.

CONCLUSIONS:

[52] I will deal with the questions raised by the issues in the following order: I will first deal with the questions that are answered in the negative, followed by the question or questions that are answered in the affirmative.

[53] **1. Was it a “bare” trust with Betty Ann as the sole beneficial owner?**

The answer to this question must clearly be **No**. The plaintiffs have failed to establish, on a balance of probabilities, that Betty Ann intended to create such a trust. The facts I have outlined do not support such a proposition. There was never any mention of such a trust when the licences were transferred to Preston in August 1998, nor at any time from the time of Mr. Doucette’s death in 1992 to the fall of 2000. No documentation supporting such a position was ever prepared and there are no notations to that effect anywhere. I find that the concept of a “bare” trust was never explained to the parties. In fact, the testimony of both Mr. Hood and Lyndon speaks of a partnership type arrangement rather than a trust. Mr. Hood testified that he would have considered a partnership agreement sufficient because the parties seemed to be in agreement as to how they should all benefit from the licences. I find there was no certainty of intent, subject matter or objects such as to create a “bare” trust in favour of Betty Ann. I also find that the concept of constructive trust does not apply to the ownership of the licences.

- [54] **3. Was it a transfer in the nature of a contract with promises extracted or obtained from Preston as consideration? or 4. Was it a gift to Preston with conditions subsequent?**

These questions are related and I will deal with both of them together.

Preston has argued strenuously that, the licences were put in his name as an outright transfer in the nature of a contract. However, nothing in the relationship between the parties changed as a result of the transfer to Preston in August of 1998. The parties continued to share the benefits of the licences as they had done since January of 1993, albeit with a different benefits sharing arrangement which had been agreed upon in November of 1997.

- [55] The facts do not support a verbal contractual arrangement. The parties continued to operate the fishing operation as a partnership, all sharing in the benefits on the same basis they had agreed to in 1997, that is, for the financial benefit of all three.

- [56] If the August 1998 transfer of the licences to Preston had been anything but a form of trust, then it could possibly have been a gift *inter vivos*, with conditions subsequent. However, on the facts and the circumstances of this case, I find that was not the intention of Betty Ann when she transferred the licences to Preston. Her intention was that the three parties would continue

to own and benefit from the resource, the licences, as they had in the past, that is a three way partnership in the fishing operation. The facts and circumstances of this case do not convince me, on a balance of probabilities, that Betty Ann intended Preston to be the outright owner of the licences, subject only to vague conditions regarding “taking care of her” and “employing Lyndon”. These conditions would be so vague that they would be impossible to enforce. What Betty Ann most probably intended was that all three parties continue to enjoy the benefits of ownership from the licences as they had in the past. That is precisely what occurred for some two years after the transfer in August of 1998. Therefore, the answers to questions number 3 and 4 is **No**.

[57] **2. Was it a trust with multiple beneficial owners?**

The answer to this question is **Yes**. The parties had operated the fishing enterprise since January of 1993 as a joint venture, as partners. There was no differentiation between Preston and Lyndon with regard to the sharing of benefits from the licences. After November of 1997, the parties shared the benefits of the licences more or less equally. Betty Ann received 25% of the gross catches after payment of the direct fishing expenses, primarily bait and fuel. Preston and Lyndon shared the rest equally; ie., 37 ½ per cent each.

From these shares they had to pay a third crew plus other expenses. That looks very much like a three way equal partnership, which is what was testified to by Lyndon and Mr. Hood.

[58] I find that the doctrine of resulting trusts is the legal principle which more appropriately applies to this case. In the circumstances, both the presumptions of resulting trust and of advancement have been partially rebutted. With regard to trusts, the presumption that the transfer was a “bare” trust is clearly rebutted by the actions of the parties after the transfer in August of 1998, as I stated earlier. Similarly the presumption that the transfer was an outright gift to Preston, subject to vague conditions, has been rebutted, also for the reasons mentioned earlier.

[59] In the circumstances of this case, what Betty Ann most probably intended was that Preston hold the beneficial ownership of the fishing licences in trust for all three of them, Betty Ann, Preston and Lyndon. This is consistent with the actions of all the parties from 1993 to 1997 and from 1997 to the fall of 2000. The facts show that the arrangement was viewed by all as more or less an equal partnership, especially from November of 1997 to the fall of 2000. This conclusion is also supported by the notations on Exhibit 9. Betty Ann was acting in a manner that she considered consistent with the wishes

of her late husband. She intended that the fishing licences continue to be used for her benefit and that of her two sons. Walter Boudreau, in his testimony, confirmed that that was the family's intention and in accordance with the wishes of the late Mr. Doucette.

SUMMARY:

[60] In the final analysis, I find that Preston holds the title to the three licences in question as a resulting trustee for the equal beneficial ownership of himself, Betty Ann and Lyndon. With regard to the average annual payments of \$17,000.00 not made to Betty Ann from 2000 to the the end of the lobster season in May 2005, the doctrine of constructive trust would apply to those funds and Preston would be liable for any such unpaid amounts, plus interest at the rate of 2.5 per cent per annum on any amounts owing. Any such unpaid amounts which pertain to partial years will have to be pro-rated, depending upon which portion of the calendar year's lobster season is unpaid.

[61] With regard to Lyndon, as I have stated earlier, any damages as a result of his termination as a crew on the lobster fishing operation have not been established on a balance of probabilities. Even though it appears he

experienced some reduction in income for the calendar year 2000, causation for this reduction was not proven.

[62] With regard to the disposition of the three fishing licences in question, as I said earlier, each party owns one third of each licence. Preston shall have the opportunity to purchase Betty Ann and Lyndon's respective one third interest in the licences by paying each of them one third of the fair market value of the licences on or before June 30, 2005. Since the parties did not provide evidence of the value of these licences, the parties will have to either agree on valuation, supported by appraisals, or the matter will have to be decided by subsequent application to the court. Any such application shall be made no later than June 10, 2005.

[63] If Preston is unwilling to purchase Betty Ann and Lyndon's respective one third shares in the said licences by June 30, 2005, then Betty Ann shall have the same opportunity to purchase Preston and Lyndon's respective one third shares in the licences on or before July 29, 2005.

[64] If Betty Ann is unwilling to purchase the said shares, then Lyndon shall have the same opportunity to purchase Betty Ann and Preston's respective one third shares in the licences on or before August 31, 2005.

[65] If none of the parties are willing to purchase all of the one-third shares in the three fishing licences, and they fail to agree upon other acceptable arrangements, then the licences shall be listed for sale and sold on the open market with each party being entitled to receive a one third share of the net proceeds form the sale.

[66] In any case other than Preston purchasing the licences, he shall be required to effect and sign a transfer of the said licences to the purchaser.

COSTS:

[67] In view of the result, namely that success has been more or less equally divided, it is my view that each party shall bear their own costs of these proceedings.

[68] I will grant an order accordingly, prepared by counsel for the defendant and consented as to form by counsel for all parties.

Boudreau J.