SUPREME COURT OF NOVA SCOTIA
Cite as: R. v. Henneberry, 2009 NSSC 95

Date: 20090330
Docket: SBW. 268851
Registry: Bridgewater

BETWEEN:

CLARK ANDREW HENNEBERRY, WESLEY L. HENNEBERRY, MARCEL STEVEN HENNEBERRY, IVY FISHERIES LIMITED, PAUL RAYMOND PARNELL, ANDREW WILLIAM HENNEBERRY, GREGORY BURTON SMITH and JAMES PHILLIP RYAN

APPELLANTS

- and -

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA

RESPONDENT

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	October 6, 7 and 8, 2008 at Bridgewater, N.S.
Counsel:	Thomas E. Hart and David J. Demirkan, for the Appellants Gerald Grant, for the Respondent

[1] On March l, 2006, the eight appellants were convicted by Crawford J.P.C. of a multitude of charges under the *Fisheries Act*, R.S.C. 1985, c. F - 14 (the Act) and *Regulations*: failing to immediately enter confirmation numbers; failing to return incidental catch; the use of a tuna license concurrently with a shark license; failing to hail immediately; permitting an unauthorized person to fish a licence; fishing while a temporary replacement permit was in place; fishing without authorization; fishing without a fisher's registration card; and selling illegally caught fish. The counts were dispensed as follows: Clark Andrew Henneberry, Counts 2 and 10; Wesley L. Henneberry, Counts 3, 4, 5, 6 and 10; Marcel S. Henneberry, Counts 7, 8, 9 and 10; Ivy Fisheries Limited, Count 10; Paul R. Parnell, Count 12; Andrew W. Henneberry, Count 17; Gregory Smith, Count 18 and 19 and James P. Ryan, Count 20. The appellants appeal both conviction and sentence, except for Andrew Henneberry in regards to a s. 78 fine of $5,000.00. At appeal, the conviction appeal of counts 5, 7 and 19 (failing to hail immediately and fishing without a fisher's registration card) were abandoned.

Overview

[2] Ivy Fisheries Limited (the Company) is a Nova Scotia company owned by five members of the Henneberry family. Three of the appellants, Clark, Wesley and Marcel Henneberry, are directors. During the September 16th to December 16th, 2000, time period, Ivy Fisheries Limited utilized two company licences (Jenny May Fisheries Ltd. Lic. No. 109428 and 10474 (Nfld.) Limited Lic. No. 142645) and three individual licences (Marcel Henneberry Lic. No. 109436; Wesley Henneberry Lic. Nos. 109269 and 109441) to fish for Bluefin Tuna (tuna). Five fishing vessels fished under these licences (the *Becky H.*, *Ivy*, *Ivy Rose*, *All of Us*, and *Finseeker*.) In this time period, 176 tuna were recorded as being caught under these licences. One hundred thirty five (135) of the 176 tuna were found to have been caught in contravention of the *Fisheries Act* and *Regulations* and form the product involved in the charges. Ivy Fisheries Limited was found to have sold each and every one of these 135 tuna for a total sales proceeds of $1,196,412.23. Six hundred and Forty-three thousand Two Hundred and Thirty-four dollars and eighty two cents ($643,234.82) of the total sales proceeds, being the value of seventy (70) of the tuna which related to the most serious offences (namely, counts 3, 6, 8, 9, 10, 17, 18 and 20) were apportioned, based on the evidence of a forensic accountant, Brian Crockatt, among the appellants through the imposition of

"additional fines" under s. 79 of the *Act*. The lease licence, 142645, was suspended for a year and each of the appellants were fined under s. 78 of the *Act*.

[3] On count 2, the trial judge found that Clark Andrew Henneberry, a registered fisher, (F.I.N. 7-090268-03) and the on board captain of the fishing vessel "Becky H", fished for and caught 32 tuna under the authority of tuna fishing licence No. 109428 and that he contravened or failed to immediately enter the confirmation number, which was issued by the dockside monitoring company for each of the tuna caught and tagged, in the comment field of the applicable Atlantic Bluefin Tuna Log Documents (the log).

[4] On count 3 the trial judge found that Wesley L. Henneberry, as a registered fisher (F.I.N. 7-270559-02) and the on-board captain of the fishing vessel "Ivy", while fishing under the authority of shark licence No. 108030, incidentally caught 11 tuna and that he contravened or failed to comply with a condition of that licence by failing to immediately return each of the 11 tuna to the water from which they were taken.

[5] On count 4 the trial judge found that Wesley L. Henneberry, as a registered fisher and the on-board captain of the fishing vessel “Ivy”, while fishing under the authority of shark licence No. 108030, concurrently used tuna fishing licence No. 109441 and did thereby contravene or fail to comply with a condition of shark licence No. 108030. She found that while fishing under the authority of shark licence No. 108030 and concurrently using tuna licence No. 109441 he caught and retained 11 tuna.

[6] On count 6 the trial judge found that Wesley L. Henneberry, as the registrant of the fishing vessel “Ivy” and the sole operator thereof named in tuna fishing licence No. 109436, permitted both Gregory Smith and James Ryan to use the vessel in fishing for tuna. She found that Wesley Henneberry allowed the illegal fishing of 24 tuna by unauthorized captains, Gregory Smith and James Ryan, while he himself reported catching 28 tuna during the same time period using the fishing vessel “Ivy Rose”.

[7] On count 8 the trial judge found that Marcel Stephen Henneberry, as the registrant of the fishing vessel “All of Us” and the sole operator thereof named in tuna fishing licence No. 109436, permitted Paul Raymond Parnell to use the vessel

in fishing for tuna. She found that Marcel Stephen Henneberry allowed the illegal fishing of 11 tuna by unauthorized captain Paul Raymond Parnell while he himself fished under the authority of another tuna fishing licence as the on-board captain of the fishing vessel “Ivy Rose” during the same time period.

[8] On count 9 the trial judge found that Marcel Stephen Henneberry, as a registered fisher (F.I.N. 7-300663-01) and the on-board captain of the fishing vessel “Ivy Rose,” fished for and caught 24 tuna on three fishing trips and that he did so while not permitted to be commercially fishing for any species of fish, as per the conditions of a Permit for Temporary Replacement or Substitute Operator that was issued to him as the holder and operator of several fishing licences attached to the vessel “All of Us,” including tuna fishing licence No. 109436.

[9] On count 12 the trial judge found that Paul Raymond Parnell, as a registered fisher and the on-board captain of the fishing vessel “All of Us,” fished for and caught seventeen tuna under the authority of tuna fishing licence No. 109436 and the Permit for Temporary Replacement or Substitute Operator issued to Marcel Henneberry, and that he contravened or failed to comply with a condition of that licence on seventeen separate occasions by failing to immediately enter the

confirmation numbers issued by the dockside monitoring company for each of the tuna caught and tagged in the comment field of the applicable Atlantic Bluefin Tuna Log Documents (the log).

[10] On count 18 the trial judge found that Gregory Burton Smith, as the on-board captain of the fishing vessel “Ivy,” fished for and caught 23 tuna and that he did so without authorization under tuna fishing licence No. 109441, which licence could only be operated by Wesley L. Henneberry.

[11] On count 20 the trial judge found that James Phillip Ryan, as the on-board captain of fishing vessel “Ivy,” fished for and caught one tuna and that he did so without authorization under tuna fishing licence No. 109441, which licence could only be operated by Wesely L. Henneberry.

[12] With respect to each of the counts, the applicable log documents were tendered into evidence by the Crown and marked as separate exhibits. Each log represented a separate fishing trip and indicated that the total tuna reflected in each count were caught, tagged and retained. The forensic accountant, Brian Crockatt, gave evidence in conjunction with the documentary evidence referred to by him,

and established to the satisfaction of the trial judge that all of the tuna reflected in each count were subsequently sold by the Company.

[13] On count 10 the trial judge found that Ivy Fisheries Limited sold each and every one of the 135 tuna involved in all the counts. She also found that Wesley, Marcel and Clark Henneberry, in their capacities as directors of the company acquiesced and participated in the sale and personally shared in the sale proceeds.

[14] On count 17 the trial Judge found that Andrew William Henneberry participated in the sale of 135 tuna by Ivy Fisheries Ltd. and that he also personally shared in the sale proceeds.

Standard of Review

[15] Section 813 (a) of the *Criminal Code* provides the appellants with the right to appeal from the convictions entered and sentence passed by the trial judge. Section 822(1) and (6) of the *Code* set forth the powers of the Summary Conviction Appeal Court. It incorporates by reference Sections 683 to 689 of the

Code, thereby conferring on the Summary Conviction Appeal Court judge the appellate review powers that the Appeal Court would have in hearing an appeal from a verdict and sentence. The court, therefore, is entitled, pursuant to Section 686 (1) (a) to allow the appeal if the trial verdict was unreasonable, the trial court erred on a question of law or under Section 686 (1)(a)(iii) "....on any ground there was a miscarriage of justice," and is entitled, pursuant to section 687(1) to consider the fitness of the sentence appealed against and may dismiss the appeal or vary the sentence within the limits prescribed by law for the offence.

Issues

[16] The thirteen grounds proceeded with by the appellants can be reduced to the following issues:

1. Did the learned trial judge err in determining that the appellants' rights to a trial within a reasonable time as guaranteed by s.11(b) of the *Charter* had not been infringed by the delay that occurred in this case?

2. Did the learned trial judge err in determining the admissibility of documentary evidence tendered by the Crown? If not, did the trial judge err in the use that she made of the documentary evidence?

3. Did the learned trial judge err in her interpretation and appreciation of the principle of strict liability?

4. Did the learned trial judge err in determining the admissibility of expert opinion evidence?

5. Did the learned trial judge err in determining the admissibility of testimonial evidence given by Scott Mossman and, if so, whether there is any reasonable possibility that the verdict in question would have been different had the error not occurred?

6. Did the learned trial judge err in concluding that the evidence presented at trial was sufficient to prove each of the appellant's guilt beyond a reasonable doubt? In other words, were the verdicts were reasonable and supported by the evidence at trial?

7. Did the learned trial judge err in her interpretation and appreciation of s. 79 of the *Fisheries Act*?

8. Whether the sentences imposed by the learned trial judge were manifestly excessive, given the nature of the offences and the purpose and principles of sentencing in the regulatory context?

9. Should this court, in the absence of a *Charter* Application before the learned trial judge, undertake on its own initiative an inquiry into Andrew William Henneberry's wheelchair access to the Lunenburg and Liverpool courthouses and determine whether that access has prejudiced the appellant's right to make full answer and defence and his right to the equal protection and equal benefit of the law without discrimination based on physical disability, thereby constituting a breach of the appellant's rights under s-s.7, 11(d) and 15 of the *Charter*?

Issue 1

Did the learned trial judge err in determining that the appellants' rights to a trial within a reasonable time as guaranteed by s.11(b) of the Charter had not been infringed by the delay that occurred in this case?

[17] The appellants brought two applications pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms* for a stay of proceedings on the grounds that their *Charter* rights to a trial within a reasonable time had been infringed.

[18] On January 8, 2004, the trial Judge dismissed the first application attributing to the Crown a delay of seven months three weeks out of a total 24 month period from the laying of the first information in January 2002 to decision on January 8, 2004. Out of a total of 24 months to January 4, 2004, she found 16 months (six months for disclosure, three months for review of disclosure, seven months docket delay) was due to inherent time requirements of the case and thus neutral time, and that of the balance of eight months, one week was due to the appellants bringing a motion with short notice and the rest (seven months and three weeks) was attributable to the Crown either directly due to Crown actions, or indirectly, as institutional delay.

[19] On March 1, 2006, the trial judge dismissed the second application attributing to the Crown 25 days of delay out of a total period of 24 months and nine days from the January 8, 2004 decision to the hearing of the second application on January 16, 2006, which was also the date for oral closing arguments. Out of the total of 24 months and 9 days from January 9, 2004 to January 16, 2006, she found 280 days were waived by the appellants, either explicitly (70 days) or implicitly (210 days); 144 days were attributable to inherent case requirements; 290 days were attributable to the appellants; and 25 days were attributable to the Crown.

[20] After adding the 25 days of delay under the second application to the 7 months and 3 weeks delay under the first, and weighing that delay against what she concluded to be minimal prejudice suffered by the appellants, the trial judge then concluded that the total delay attributed to the Crown was not unreasonable, and, as such, the appellants' rights under S. 11 (b) had not been infringed.

[21] Subsection 11 (b) of the *Charter* seeks to protect both the individual rights of the accused and the interests of society. The protected interests of the individual are the right to security of the person, the right to liberty and the right to a fair trial.

Society's interest is the institutional value of having charges resolved on their merits after trial and in having those trials held within a reasonable time. (*R. v. Morin,* [1992] 1 S.C.R. 771 at p. 786.)

[22] The onus to establish a violation of their s. 11 (b) rights was on the appellants. The Crown conceded that the length of the delay per each application (24 months and 24 months and 9 weeks) warranted an inquiry into the issue of reasonableness.

[23] In accordance with the jurisprudence (*R. v. Morin, supra.*), the trial judge recognized that there were five factors to be considered when deciding whether the delay was unreasonable and a stay warranted: 1) the length of the delay; 2) waiver of time periods; 3) the reasons for the delay, including unavoidable inherent time requirements of the case and limits on institutional resources; 4) prejudice to the accused; and 5) balancing of the problems that the delay caused for the appellants against the public interest in seeing that the normal charges are properly disposed.

[24] Institutional or systemic delay starts to run when the parties are ready for trial, but the system cannot accommodate them. What constitutes an acceptable period of institutional delay will vary depending on the nature and the circumstances of each case. There are no fixed or inflexible time limits, and no judicially-created limitation period. Guidance on the approximate permissible scope of institutional delay is provided in *R. v. Morin, supra*. The Supreme Court set out a period of institutional delay of between eight to ten months between committal and trial as the "administrative guideline" for Provincial courts. This is a factor to be weighed in the overall assessment of the reasonableness of the total delay (*R. v. Allen* (1991), 110 C.C.C. (3d) 331 (Ont. C.A.) at p. 345, aff'd [1997] 3 S.C.R. 700).

[25] Complicated, document-laden cases with multiple charges and multiple accused increase the inherent time reasonably required to instruct counsel, comply with disclosure obligations, review large quantities of complicated documents, retain and instruct experts and coordinate. This fact was not lost in the trial judge's analysis.

[26] The appellants submit that the trial judge erred in her allocation of delay; i.e., attributing waiver to the appellants between September 25, 2005, and November 28, 2005, when none existed; attributing half of the delay to the appellants in rescheduling oral closing arguments from November 28, 2005, to January 18, 2006; and in her minimization/failure to consider evidence of prejudice caused by the delay, such as the length of the delay; the nature of the offences; protracted legal fees in excess of hundreds of thousands of dollars; increased scrutiny and modification of licence conditions by the Department of Fisheries and Oceans (DFO) causing increased expenses; inability to transfer licences; harm to reputation, sale of assets, demotions, uncertainty, anxiety, stress, and economic hardship.

May 2 to November 28, 2005. Waiver of time passed.

[27] The trial judge found that the appellants implicitly waived the period between May 2 and November 28, 2005, (210 days) by agreeing to dates for the submission of written closing arguments, which were to be filed on January 19, 2005, and February 11, 2005, and then June 15, 2005, and July 6, 2005, and after confirming the need for oral argument, asking for a date to conduct oral arguments

(November 28, 2005 and later January 16, 2006). She noted that earlier dates were available and that the agreed dates were chosen at least in part to accommodate the schedule of the appellants' counsel. As they had expressly waived the 70 days between February 21, 2005 and May 2, 2005, she found a total of 210 waived days.

[28] There was no reason for the trial judge, during the trial exchange with counsel on July 13, 2005, not to appreciate the appellants' positive response to her stated understanding that the November 28, 2005, oral submission date had been agreed to by counsel to be anything but unequivocal. Given that agreement, she felt no need to seek assurance from counsel, as she had done previously with respect to dates, that the 138-day period would not be grounds for delay argument. The record reflects that possible institutional delays were very much a live issue for the judge in this case and exchanges with counsel occurred about this issue. Counsel unquestionably would have known that was why she sought confirmation of her understanding that the date of November 28, 2005, had been agreed to by them. The trial judge did not set a date by herself, rather, she set the date that counsel clearly agreed upon. (*R. v. MacNeill*, [2006] N.S.J. No. 472 (S.C.)).

[29] Besides this, she had made it clear to counsel during their May 2, 2005, exchange concerning the very question of whether there would be oral argument following written submissions, that upon positive confirmation of the need, dates would not be an issue: “We’ll make Friday available.” (Vo. 6, page 2128). Counsel’s discussion with the clerk on July 13, 2005, was in the hallway and nothing was raised directly with the trial judge when she sought to confirm the date arrived at was by agreement.

[30] Furthermore, if indeed it was otherwise than an agreement, the trial judge did not err in finding that the 138 days from July 13, 2005, to November 28, 2005, were waived by the appellants. As Sopinka J. said in *Morin*, at page 801:

> ...the court may take into account the accused’s own inaction in assessing prejudice. An accused’s inaction in bringing his plight to the attention of the court could mean that the accused was ‘content with the pace at which things were proceeding and that therefore there was little or not prejudice occasioned by the delay.’

November 28, 2005 - January 16, 2006 (46 days)

[31] The trial judge found that the adjournment of oral closing arguments from November 28, 2005, to January 16, 2006, was caused in part by the Crown’s action

of filing an additional written submission on November 22, 2005. She did not accept the Crown's characterization of it as being an oral argument submitted in writing; rather, she deemed it an extension of the Crown's July 13, 2005, written closing submission, warranting a delay of oral closing argument to allow for response. She found, however, the appellants were also at least partly responsible for the delay, as the adjournment was required not only to reply to the Crown's additional brief, but also to prepare for and make a second s. 11 (b) *Charter* motion. She apportioned responsibility for the 49 days equally between Crown and the appellants (25 days each).

[32] Although unquestionably the appellants' second s. 11 (b) application, on January 16, 2006, had its genesis in the Crown's unexpected filing of an additional written submission on November 22, 2005, thus necessitating a delay of the scheduled oral submissions from November 28, 2005, to January 16, 2006, the appellants' application quite properly was not confined to that sole delay issue. It was inclusive and required time to prepare. It was a defence motion and a matter of choice. The trial judge did not err in attributing a half portion (25 days) of the delay to the defence.

[33] The appellants raise the sufficiency of the trial judge's reasons relating to prejudice and question whether she fully considered this matter. As explained in *R. v. R.E.M.*, 2008 SCC 51, a trial judge's reasons serve three main functions: to explain the decision to the parties, to provide public accountability and to permit effective appellate review. These functions are fulfilled if the reasons for judgment explain the basis of the decision reached. The question is not whether the reasons detail every step of the reasoning process or refer to a piece of evidence or argument led by counsel. A lack of reference to a piece of evidence does not mean the evidence was not considered. To suggest such is pure speculation. The task for the appellate court is simply to ensure that, read in the context of the entire record, the trial judge's reasons demonstrate that she was alive to, and resolved, the central issues before the court. The focus of the Appeal Court should not be on omitted details.

[34] The trial judge was alive to the issue of prejudice even though her findings of less than eight months institutional and Crown delay on the first application, and less than nine months cumulatively on the last, meant that the delay was not unreasonable, as it was below the upper acceptable range of the *Morin* guidelines and thus the need for a prejudice analysis was questionable. Given that a *prima*

facie or threshold case for unreasonable delay was not made out by the appellants, *per* McLachlin, J. in *Morin* at p. 810, there was no need for the trial judge to proceed further. However, Sopinka, J's comments at p. 807 should be borne in mind:

> While I have suggested that a guideline of eight to ten months be used by courts to assess institutional delay in Provincial Courts, deviations of several months in either direction can be justified by the presence or absence of prejudice.

[35] The trial judge's analysis pertaining to prejudice provides a complete spectrum for determining the reasonableness of the delay. On both occasions, she properly determined the appellants liberty interests were not affected by the delay, in that they were not incarcerated nor subject to conditional release, and that only their security interests were affected by various means that she specifically considered and recited in the first application; i.e. by the notoriety of the case over a significant period of time, both before and after laying of the charges, by restrictions on the transfer of their fishing licences and by ongoing business inconvenience resulting from the seizure and retention of business files and the piecemeal and disorganized return of copies. On both occasions, she concluded there was little, if any, actual prejudice to them, over and above the normal

prejudice suffered by anyone charged with such regulatory offences. At no point did the initial prejudice from being charged become prejudice caused by institutional delay. In reaching her conclusion in January 2004, she relied upon the fact that two thirds of the time (16 months and 24 months) when the prejudice occurred, was time required for the proper handling of the case and upon the fact of no restrictions existing on their liberty. Similarly, in January 2006 when she concluded that the actual prejudice to the appellants security interest had been slight, she placed it in the context of the extremely small proportion of the elapsed time (i.e. 25 days) that was attributable against the Crown.

[36] There was no evidence that the delay from the time the charges were laid to trial in any way undermined the appellants' right to make full answer and defence. The case was document-driven. The trial judge did not err in her analysis.

[37] Even accepting that the trial judge erred in characterizing the September 8, 2005, to November 28, 2005, delay for oral argument as "waived" by the appellants, rather than institutional delay of anywhere up to 82 days, or at the very least, erred in attributing 25 days to the appellants for the November 28, 2005, to January 16, 2006, delay, rather than attributing it all to Crown delay, the

institutional and Crown delay of the combined s. 11(b) applications (7.3 months, 82 days and 25 days) would at best only just exceed the Supreme Court of Canada's acceptable guideline range by three months. This assumes the appellants' counsel "deemed" date of September 8th for hearing oral arguments would simply have been assigned without factoring in any discussion about later in the month. If only 25 days of Crown delay is considered, the cumulative delay comes within the acceptable range. In my view, neither scenario on the *Morin* analysis would change the conclusion of the delay being reasonable.

[38] As to whether the appellants' rights to a trial within a reasonable time were violated, they were not. The trial judge made no error with respect to the application of appropriate legal principles to her findings of fact as determined from the evidence adduced. In my view, the delays in this case were properly characterized, do not constitute as unreasonable delay, should not trump society's interest in a trial on the merits, and do not result in a breach of the appellants' s. 11 (b) *Charter* rights.

Issue 2

Did the learned trial judge err in determining the admissibility of documentary evidence tendered by the Crown? If not, did the trial judge err in the use that she made of the documentary evidence?

[39] Various documents were seized during searches of the premises of Ivy Fisheries Limited and of the Dockside Monitoring Company. The documents tendered by Crown included business records of the DFO, introduced by affidavit (such as fishing licences and licence conditions); documents seized by DFO from the Dockside Monitoring Company offices; and documents seized by DFO from the offices of Ivy Fisheries Limited.

[40] The appellants contend that the trial judge erred in admitting DFO's documents that were not attached to affidavits and in admitting seized documents tendered by the Crown. They argue the trial judge erred in law and made erroneous findings of fact by determining that certain documents were business records and by drawing unreasonable and unsupportable inferences from the documents. The appellants contend, in particular, that Section 30 of the *Canada Evidence Act* , which permits the tendering of business records was not complied with. The Crown allegedly proved as business records, only documents introduced by fishery officer's affidavits, those being licenses and registration. Crown

allegedly failed to properly tender certain other DFO documents, in particular, Atlantic Bluefin Tuna Log Documents (the log(s)), as well as documents seized from the Dockside Monitoring Company and from Ivy Fisheries. As such, the appellants submit that the documents cannot be used for proof of the truth of their contents.

The Trial Judge's Decision

[41] The defence made certain submissions respecting the manner in which the documents had been tendered and used. The trial judge said;

> "With respect, the defence seems not to fully understand the nature and purpose of documentary evidence. Contrary to what the defence argues, documentary evidence can be direct evidence as stated in *McWilliams' Canadian Criminal Evidence* 4th ed. at 21:20:
>
> > A document may be tendered as proof of the truth of its contents, that is as direct evidence, or as original evidence. It may be original evidence and not be proof of its contents. It is important to keep clearly in mind what the purpose is, because this affects the mode of proof.
>
> Also, documents seized from the accused are admissible, not under the business records exemption to the hearsay rule, but as
>
> > Documents made by or under the direction of an accused...tendered to prove the truth of the contents as an admission against interest. [*McWilliams, op. cit.* 21:20:10]

> or, more generally, as documents found in the possession of the accused, which are *prima facie* admissible against him, subject to relevancy being shown. *McWilliams*, *op.cit.* 21.30.10.
>
> As the defence has admitted that all of the documents before the court "have been admitted as meeting the basic test of relevance" (Defence closing arguments, January 13, 2006, p. 8), all of the documents seized are admissible against the defendants either for the truth of their contents or for any other relevant purpose, subject to any explanation proffered by the defence (*McWilliams, op. cit.* 21.30.10 and cases cited therein) and subject to the court's determination of the probative value to be accorded to each individual document in the over-all context of the Crown's case on each charge before the court.

[42] The trial judge then held that documents seized from the accused were admissible, even if not under the business records exemption of the hearsay rule, as documents against interest. They were made by and under Ivy Fisheries Limited's direction and were found in its possession. They were prima facie admissible, subject to relevancy. Given the appellants' agreement that all of the documents before the court were relevant, the trial judge considered all of the seized Ivy Fishery documents to be admissible for the truth of their contents, subject to any explanation proffered by the appellants, and subject to a determination of the probative value to be accorded to each document in the context of each charge.

Analysis

[43] All of the documents that were tendered at trial as documentary evidence and that now form part of the evidentiary record were admitted into evidence by the trial judge to prove the truth of the facts on matters stated therein. This occurred by agreement between the parties. The documents involved included DFO file documents, such as logs completed by the captain/operator and retained by DFO; the DFO documents attached to registry officer's affidavits (including licences, registrations and licence conditions); documents seized from the offices of Ivy Fisheries; and documents seized from the Dockside Monitoring Company, Atlantic Catch Data Limited.

[44] A Notice of Intention to Produce Business Records under the *Canada Evidence Act* was provided. The lead investigator, Fishery Officer Mossman, gave evidence respecting the content, the use and purpose of the log documents. A procedural decision was made to have all of the documents that were attached to the Notice of Intention to Produce dealt with on an individual basis and pre-marked. Prior to Fishery Officer Mossman's testimony with respect to the proof and admissibility of documents, the appellants' counsel advised that they would consent to the admission of all 128 documents, subject only to consideration of the

relevance of particular documents to particular offences. The only dispute as to admissibility at trial related to five documents, which the trial judge dealt with before the crown closed its case.

[45] When the appellants agreed that the documents would be admitted into evidence and marked as exhibits, with the only caveat being relevancy with respect to a few documents, the appellants waived the requirement of formal proof that would normally be required under s. 30 of the *Canada Evidence Act.* Fishery Officer Mossman who retrieved the original fishing log documents was in a position to testify to the documents; but, was not called upon to testify to the pre-conditions under s. 30, which had been admitted by the appellants. Fishery Officer Mossman testified to the substance of the documents and how they related to the charges. Having reviewed the documents previously disclosed and subsequently attached to the Notice of Intention to Produce, defence counsel indicated consent to their admission. There was no suggestion that admissibility remained subject not only to relevancy but also to proof under s. 30. No issue was raised respecting the validity of the search warrant or the admissibility of seized documents.

[46] Admissibility was a live issue at trial, and was specifically addressed by counsel and the trial judge. That the above was the understanding of the trial judge and Crown counsel is clear from the record. For example, during the direct examination of Fishery Officer Mossman on December 2, 2003, the trial judge gave counsel the following direction:

> .... "Perhaps you can also, *since they've agreed to admissibility*, actually get the exhibits numbered before we come back in." (emphasis added) (Vol. 2, p. 77.)

[47] By this point, certain licences and registration documents had been admitted, attached to the affidavit of the DFO licencing clerk, Charlene Robitaille, as had Atlantic Bluefin Tuna Log Document for October 3rd - October 4th, 2000 (Exhibit #4); Tuna Tag Notification Report 12 (Exhibit #5); Tuna Trip Summary (Exhibit #6); and Atlantic Bluefin Tuna Log Document for October 8th - October 18th, 2000 (Exhibit #7). Obviously, the court understood that admissibility was not an issue, that agreement had been reached subject to relevancy and that the documents should be pre-marked as exhibits.

[48] Before Fishery Officer Mossman was recalled to prove the first exhibit, counsel indicated that he had "reviewed the documents" that crown counsel had

reorganized, that they were the same documents he had already seen and that he had "no difficulty with them". Counsel added:

> .... "I have *no problem with the document being admitted* and all that sort of thing *as far as its validity* and that, but I'm just questioning whether ....." (emphasis added). (Vol. 2 p. 46.)

[49] This understanding is similarly reflected in an exchange with the court respecting Exhibit 1, when counsel equated Fishery Officer Mossman's role to licencing clerk Robitaille's role as affiant in relation to s. 30 preconditions for attached DFO records and commented on the purpose of the file records to be addressed by Mossman. Counsel stated:

> ... "He (Mossman) can only produce the documents as they were found in the files and then they speak to themselves as, the same as, Ms. Robitaille's affidavit." (Vol. 2, p. 53.)

[50] On December 4, 2003, before recalling Fishery Officer Mossman, crown counsel provided the court with a summary and update respecting the state of the documents:

> . . . "*Mr. Hart has reviewed the documents and they are largely admitted* and there is just a few that we will comment on as we get to them and concern has arisen regarding them. The other thing I should say, is that Officer Mossman will testify but once we reach binder number three, there is a legal issue that my friend and I would like to discuss before those documents are commented upon." (emphasis added). (Vol. 2, p. 86.)

[51] Later that same day, while dealing with Exhibit 48 (B) which he was not sure he had seen before, appellants' counsel raised another caveat, besides relevancy, and in the process agreed with the court that its admissibility and disclosure were not in issue.

> Mr. Hart: And just to interject. Your Honour, this particular document, I'm sure it may be somewhere but this was brought up by the officer just at the time of the break and I, frankly, don't recall seeing this before, but I am sure it is there some where and *my friend has undertaken to point out where it is so that there is no issue with regards to disclosure and so on.*
>
> The Court: *To its admissibility and disclosure* I guess.
>
> Mr. Hart: *Yes. So that is the only caveat on that one*. I believe that's 48 (B) is it?
>
> The Court: Yes, 48 (B) and this — *so what you are saying is this is acceptable to you providing it has been disclosed?*
>
> Mr. Hart: Yes. Thank you Your Honour. (Emphasis added.) (Vol. 2, pp. 1120-121.)

[52] At the end of the trial, before the Crown closed its case, the defence moved for the exclusion of certain Crown exhibits. The defence first moved to formally

tender "all the exhibits that have been marked for the purposes of the trial, the ones that are not in dispute..." (Vol. 5, pp. 1806-1807.) The motion related to the admissibility of six exhibits seized from Ivy Fisheries pursuant to a search warrant, all of which had been put in evidence through the evidence of Fishery Officer Mossman. The Crown argued that it was too late in the proceedings to raise such an objection. In the course of this argument, the court pointed out to Mr. Demirkan that, despite the defence complaints about the form in which the Crown presented the exhibits, there had been an opportunity to cross examine Fishery Officer Mossman and raise any objection. Mr. Demirkan responded that the defence had agreed, "to dispense with proof of the search warrant, [because] Officer Mossman didn't actually seize them. We had agreed to dispense with . . .the requirement to call the officers in to say "I am officer Smith." "I seized this document."' (Vol. 5, p. 1825.) He agreed that the defence had agreed to continuity of the documents and the validity of the search warrants, but added that the objection to relevancy remained. In the course of argument as to relevancy, Mr. Demirkan said:

> Mr. Demirkan: .... my understanding of what we were going to do is to do it this way. ... Mr. Hart and I had made various objections and had said that we are not agreeing to the relevancy of all these, but we would agree to the other aspects that we've discussed and that, at the end of trial, the Crown would be tendering these - they weren't exhibits until now. Well, the ones that are in dispute still aren't exhibits.
>
> The Court: Right.

> Mr. Demirkan: The ones that we've just tendered are. But until they would be tendered, that's when that issue would be dealt with. The issue of continuity and all that have been dispensed with. (Vol. 5, pp. 1828-1829.)

Describing the genesis of this procedure, Mr. Demirkan added:

> Mr. Demirkan: .... Is it by McWilliams or by any other book? I don't know. But this was - *I think we had raised the relevancy issue,* Your Honour, and - *on certain documents. Not on all of them.*
>
> The Court: Right.
> Mr. Demirkan: *And we dispensed with the proof of most of them and we didn't object to most of them, but there are a few that are, they are problematic*.... (emphasis added). (Vol. 5, p. 1830.)

[53] In allowing the defence motion to proceed the trial judge noted that, "It's clear that the defence understanding was that because of the document heavy nature of the case, it would be given an opportunity at the close of the Crown's case before formal tender to make arguments regarding admissibility." (Vol. 5, p. 1837.) Counsel went on to address Exhibits #85, 86, 101, 126, 127 and 130(5) as the only problematic documents. The trial judge ruled on each as to admissibility on the basis of relevance.

[54] The alleged inadmissibility of documents was not an element of the defence's subsequent motion for a directed verdict.

Business Records as an Exception to the Hearsay Rule

[55] In principal, “all documents tendered for the truth of their contents are hearsay and only admissible if there is an applicable exception to the hearsay rule.” (*R. v. Martin* (1997), 152 Sask. R. 164 (Sask. C.A.) at para. 31: citing J.D. Ewart, Documentary Evidence in Canada, (Carswell, 1984 at p. 12.)) One such exception applies to business records. There are several foundations for the hearsay exception for business records: the common law (both as a categorical exception and by way of the principled hearsay exception analysis) and the *Canada Evidence Act.*

[56] The common law exception to hearsay rule for business records was described in *Ares v. Venner*, [1970] S.C.R. 608 at page 626 where the issue was the admissibility of nurse’s notes. In *R. v. Wilcox* (2001), 192 N.S.R. (2d) 159, the Court of Appeal restated the common law rule on business records as a categorical exception to the hearsay doctrine, at paragraph 49;

> 49 . . .“All respondents accept R. v. Monkhouse, [1988] 1 W.W.R. 725 (Alta. C.A.) as an accurate statement of the requirements for such admissibility. The following passage from the judgment of Laycraft, C.J.A., for the Court at p. 732 sets out the applicable principles:

> In his useful book, Documentary Evidence in Canada (Carswell Co., 1984), Mr. J. D. Ewart summarizes the common law rule after the decision in Ares v. Venner as follows at p. 54:
>
> > ...the modern rule can be said to make admissible a record containing (I) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.
>
> To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded. . . . it is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records. ...

[57] Section 30 of the *Canada Evidence Act* creates a statutory exception to the common law hearsay rule. This section provides, in part, as follows:

> 30.(1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.
>
> . . .
>
> (6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence

> under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

[58] The appellants assert that "documents are not direct evidence". As noted, the trial judge pointed out, documentary evidence can be direct evidence and quoted *McWilliams* in Canadian Criminal Evidence, 4th Ed. loose leaf, para. 29-20).

[59] Similarly, as Cromwell, J.A. (as he then was) pointed out in *Wilcox,* documentary evidence is real evidence, whose authenticity must be proven before it is admissible. In other words, "it must be shown to be, in fact, what it purports to be", (*Wilcox* at para. 62). In my view, consenting to admissibility resolves any question as to authenticity and the quality of that consent was sufficient. This point was made by Crown counsel in closing submissions at trial; "if they are not authenticated they never would have been admitted in the first place....that one of the...pre-conditions of the admissibility of business records - that it is authenticated."

Fisheries Act - Case Law

[60] The most substantial consideration of documentary evidence in the context of charges under the *Fisheries Act* is found in *Wilcox*, supra. It is a significant decision with respect to the application to the hearsay rule to documentary evidence in *Fishery Act* prosecutions. It does not, however, address formalities by which documents enter the evidentiary record but, rather, is more concerned with the nature of the document itself.

[61] In *Ross v. R.* (1991), 92 Nfld. PEI 51, the appellant appealed his conviction for failing to provide a "true return" as required by the *Fisheries Act*, when the quantity of fish shown on his log did not correspond with the quantity of offloaded at the dock. He argued, inter alia, that the requirement to provide a true return violated his right to silence under the *Charter* . The Appeal Court rejected this position, holding that the use of a true return document, prepared by the fish plant manager, as evidence was permitted by section 30 (1) of the *Canada Evidence Act*. The return was made in the usual course of business. Any question as to the accuracy of the recording of the document information would have been answered

by the plant manager at trial. The following comments by Puddester, J. are informative:

> "This issue arises... because,... at trial the fishery officers themselves did not testify, from information given through their own observations, as to the landed weight of the catch from the second trip. Rather, the Crown tendered only documentary evidence with respect to proof of this fact.
>
> The Crown attempted to enter two separate documents in this regard. The first was a "true return" requested of and provided by the manager of the fish plant where the appellant's catch was offloaded. The second was a type of "invoice" document, again prepared by the plant manager, containing the quantity of codfish offloaded from the appellant's vessel.
>
> At the time each of these documents was identified at trial by the fishery officer who received them, the defence objected to their being admitted in evidence for proof of the truth of their contents. The transcript indicates that the documents were thereupon marked for identification purposes, with the intention of being sought to be formally introduced through the supporting testimony of the fish plant manager himself.
>
> When the plant manager testified, the transcript indicates that of the two documents, only the second, the "invoice", was sought to be introduced, and was in fact received by the court as an exhibit.
>
> The issue here involves the provisions of s. 30 of the Canada Evidence Act, R.s.C., E-10. That section provides in part:
>
> > 30.(1) - Where oral evidence in respect of a matter would be admissible in a legal proceedings, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceedings on production of the record. (*Ross* at paras 38 -32).

[62] The appellant took the position that, "under s. 30 (1), the information in a "record" may only be received if that same information could be given orally. The argument proffered was that the manager would not be permitted to come to court and testify orally as to what others had told him, in proof of the truth of that information. Therefore, neither of the written "records" prepared by the manager could be received under s. 30(1)." (*Ross*, at para. 45).

The court said:

> "As to this, I note that the wording of s. 30(1) does not fully support the argument advanced by the defence. The qualifying words of that section are "where oral evidence in respect of a matter would be admissible...". It then provides that a business record is admissible if it "contains information in respect of that matter...". Under the literal wording of the section, the contents of the information in the business record are not required to be exactly the same as the oral evidence on the point. But beyond this, in my view, the intention of the section is clear. If oral evidence from one person, or a chain of persons, within the business could be called to provide the information, then the business record itself can be so produced. Thus, for example, in the case here, it would presumably be open to the Crown to have called the individual employees who actually weighed the offloaded fish, to give evidence as to the quantities, and then to call the plant manager to say that he took the information that these employees provided and in turn compiled it in the form of the business record here under consideration. I see no requirement in s. 30(1) itself limiting the qualifying condition to oral evidence from only the person who prepared the document in question.
>
> Even beyond such analysis, the purpose for the admission of business records in the complexities of today's society can only be advanced by accepting some degree of hearsay input. For example, where the information of relevance in the proceedings is, by necessity, an amalgam of information coming from several sources within the business, it would be contrary to the purpose of the section to require that the individual

> component documentation could be provided, but that no "business record" could be provided with respect to the amalgamated information. (*Ross,* at paras. 46-47).

Puddester, J. went on to discuss the reasoning underlying s. 30 exception to the rule against hearsay:

> "It seems to me that the basic principle underlying the exception created by s. 30 (1) to the rule against hearsay evidence stems in part from the inherent trustworthiness or verification of the truth of the contents of such records. Further it recognizes the practical difficulties in requiring an individual to be called - or a chain of individuals even more so - to prove the truth of such business records.
>
> It also recognizes that, in all likelihood, related to the facts here, even had the individual employees who offloaded the fish been called, with the tally records, they would have no better evidence to give than the tally records themselves. In all likelihood, they would have no independent recollection of the individual quantities offloaded and weighed by them repeatedly on the day, but could only rely on the tally records themselves to support the truth of those quantities.
>
> In this case, the off-loading and tally process was generally described by the manager from his knowledge of the day-to-day operations of the plant, and it creates a circumstantial guarantee of the accuracy of the information recorded on those tally sheets. Any question as to the accuracy of the re-recording of that information by the manager onto the invoice document is met by the fact that the manager was present at the trial, and was subjected to cross-examination.
>
> In the circumstances, I find no error of law by the learned trial judge in admitting the "invoice" prepared by the fish plant manager as evidence with respect to the quantity or weight of fish unloaded from the appellant's vessel. (*Ross* at paras. 61-65).

[63] As reflected in *Ross*, there is no doubt that the business records doctrine presumes that the records will be used to establish the truth of their contents. This is an essential point, and one that has not been appreciated by the appellants in the present case, as the trial judge noted. While it was open to the appellants to challenge the evidence in those documents at trial, this does not mean that the documents are not "real evidence" of the matters contained therein.

[64] Furthermore, the accused has the right to adduce evidence to challenge information contained in a business record and corroborate his own account of the relevant events. (*R. v. Ralph* (2002), 220 Nfld. and P.E.I. 351.)

Filing Documents by Consent

[65] There is authority for the proposition that filing documents by consent does not in itself bind the court to accept the documents for proof of their contents. (*Bottrell v. Bottrell* (1994), 91 B.C.L.R. (2d) 300; *Winnipeg South Child & Family Services Agency vs. S.(R.)* (1986), 40 Man.R. (2d) 64; *Samuel v. Chrysler Credit Canada Limited*, [2007] B.C.C.A. 431). The principle criticism advanced by the courts in these cases relates to the practice of placing large quantities of documents

before the court and expecting the trial judge to distinguish the relevant from the irrelevant, while failing to sufficiently connect the documents to the specific issues. However, the principle that consent to admission may not automatically render the documents admissible for the truth should not allow a party that has consented to the admission of documents as business records to retroactively argue that documents cannot be used as direct evidence. Though defence counsel complained on several occasions of the mass of Crown documents, there is no suggestion here that the specific relevance of each document relied upon by the Crown was not made clear to the trial judge.

Documents in Possession of the Accused

[66] The documents seized from the appellants' premises were in the actual possession of the accused. Further, they were records the appellants were obliged by law to maintain. As such, they are "admissible to show the accused's knowledge of [their] contents, his connection with and state of mind with respect to the transaction to which [they relate]." If the appellants "recognized, adopted or acted on the documents, [they became] admissible for the truth of [their] contents under the admissions exceptions to the hearsay rule." (*R. v. Wood*, [2001]

N.S.C.A. 38 (paras. 113-115.) This third requirement was discussed in *Wood* in the following terms;

> The next question is whether these documents were admissible for the truth of their contents on the basis that the appellant "recognized, adopted or acted on" the documents. The documents in issue were ones Mr. Wood was obliged by law to keep and produce on demand to Mr. Brookfield. By personally handing the documents to Mr. Brookfield, pursuant to his demand, the appellant recognized and adopted them; see R. v. d'Eon (1988), 83 N.S.R. (2d) 142 (N.S.C.A.). They were records kept under the direction of the appellant and their meaning and purpose was explained by the legal requirements to maintain them and by Mr. Brookfield's testimony. They were, then admissible as evidence of their truth; see R. v. Smart (1931), 555 C.C.C. 310 (Ont. C.A.). (*Wood*, at para. 116).

Conclusion

[67] The admission and use of documentary evidence was addressed during the trial and there is no substance to the rather vague objection raised by defence in closing submissions and argument before this court. There was no possible reason for the defence to believe that the Crown was proffering the documents for any other purpose than to establish the facts stated therein, as contemplated by the *Canada Evidence Act*. This was not a situation where the requirements of the *Canada Evidence Act* were neglected or insufficiently established. The appellants' counsel categorically stated the documents held at the various offices by consent

were admissible. The Crown and the trial judge relied on that statement, and the trial proceeded accordingly. At the close of the Crown's case, defence raised specific objections to the relevancy of several individual exhibits, which the court addressed. There was no suggestion that there was any qualification or limit on the consent that had been given at the beginning of the trial. Nor was the issue raised on the motion for directed verdict.

[68] The trial judge's observations of the defence seemed to misunderstand the principles of documentary evidence are well founded.

[69] The documents tendered at trial and now forming part of the evidentiary record were properly admitted by the trial judge into evidence for the proof of the truth of the facts or matters stated therein. Having been admitted, the question of what "weight" or "purpose" should be attached to the documentary evidence is a matter for the trier of fact.

[70] I would dismiss this ground of appeal.

Issue 3

Did the learned trial judge err in her interpretation and application of the principles of strict liability?

[71] Strict liability is one of three categories of offences and is addressed and elaborated upon in the seminal Supreme Court of Canada case, *R. v. Sault Ste. Marie (City)* (1978), 40 C.C.C. (2d) 353 (S.C.C.), at page 393.

> **. . .** 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 that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

[72] A further summary of what the category of strict liability entails as a principle and required standard of proof is provided in *R. v. Wholesale Travel Group Inc*. (1992), 68 C.C.C. (3d) 193 (S.C.C.), at page 237.

> . . . The *Sault Ste. Marie* case recognized strict liability as a middle ground between full *mens rea* and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither *mens rea* nor negligence; conviction may follow merely upon proof

> beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence. Thus, Sault Ste. Marie not only affirmed the distinction between regulatory and criminal offences, but also subdivided regulatory offences into categories of strict and absolute liability. The new category of strict liability represented a compromise which acknowledged the importance and essential objectives of regulatory offences but at the same time sought to mitigate the harshness of absolute liability which was found, at p. 363 C.C.C., p. 171 D.L.R., to "violate" "fundamental principles of penal liability".: the defence of due diligence.

[73] Appropriately, no issue is taken with the fact that all offences created by the *Fisheries Act* and the *Regulations* are strict liability offences.

[74] Throughout her decision, when dealing with individual counts, the trial judge employed the Supreme Court of Canada words "*prima facie*". At paragraph 36, she provided the following context and demonstrated an understanding of the appropriate principles of strict liability.

> "As stated above, these are all strict liability offences; in regard to each of them once the Crown has established a *prima facie* case, the issue shifts to the defendant to establish a defence of due diligence or mistake of fact or law. As no such evidence was called by the defence on any of these charges, the issue on each charge will be simply whether or not the Crown has met its initial burden, which is the

absence of any defence evidence, will become proof beyond a reasonable doubt. Issue raised by the defence in regard to each charge will be considered within this over all framework."

[75] By using the words "*prima facie*" throughout her decision, as she addressed the charges overall and individually, the trial judge was not using the standard of proof applicable to a motion for directed verdict of "some evidence" rather than proof beyond reasonable doubt, as the appellants allege. Any such suggestion is simply wrong.

[76] The trial judge's reference to "*prima facie*" unequivocally refers to that stage of the trial proceedings where the Crown has proven beyond a reasonable doubt the essential factual elements of the regulatory offences charged, (i.e. the *actus reus*: the prohibited act of failing to comply with the licence conditions attributable to a person in position to exercise control over or have responsibilities for the activity, under the authority of the licence and to prevent the prohibited act from occurring; but, failing to do so) thereby leaving it open to the appellants to avoid liability by establishing a due diligence defence on the balance of probabilities. They offered no such evidence.

[77] At paragraph 30, addressing the lack of *mens rea* requirement and the responsibility of the licence holder and anyone fishing under the holder in a

regulatory scheme, the trial judge correctly identified a fundamental error in the appellants' closing argument, where they stated,

> Most of the charges in this matter relate to licence conditions. It is submitted that the onus is on the Crown to establish what conditions apply, to whom they apply, what the fisher in question knows of the conditions and that the fisher in question saw the conditions and that the conditions in question were on board the vessel at the time of the alleged infraction.

[78] Once the Crown proved beyond a reasonable doubt that the appellants had failed to comply with a licence condition, a *prima facie* case was made out. Each of the trial judge's references to *prima facie* was in this context, as she was satisfied on the whole of the uncontradicted evidence, the factual elements of the offences had been proven beyond a reasonable doubt. She correctly addressed such in her analysis of the facts per offence. The Crown had no burden of proving either *mens rea* or negligence. As the Crown is relieved from the burden of proving *mens rea*, the Crown does not have to adduce evidence to prove intent or knowledge on the part of the appellants. The very nature of regulatory offences is such that the Crown is not able to establish intent to commit an offence. As the Crown is relieved from the burden of proving negligence, negligence is presumed from the bringing about of the prohibited act or omission that constitutes the *actus*

reas of the offence and, as noted, the onus shifts to the defence to establish "due diligence" or "mistake of fact" on a balance of probabilities. No such defence evidence was called.

[79] The fact that these offences were offences of strict liability meant that the Crown did not have to prove such matters as alleged by the appellants, i.e., that the appellants knew of the existence of the licence conditions; that they knew what the licence conditions meant; that they knew they were in fact committing an offence; that the licence conditions were on board the vessels at the time of the offence or actually attached to the licence and that actual permission was given to anyone to use a vessel.

[80] No error was committed by the trial judge in her interpretation or application of strict liability principles.

Issue 4

Did the learned trial judge err in determining the admissibility of expert opinion evidence?

[81] For expert opinion evidence to be admissible, the four interdependent criteria established in *R. v. Mohan*, [1994] 2. S.C.R. 9 are applicable: 1) the evidence is relevant to some issue in the case; 2) the evidence is necessary to assist the trier of fact; 3) the evidence does not violate an exclusionary rule; and 4) the witness is a properly qualified expert. Once these criteria are met and the evidence found admissible, the expert can testify and provide expert opinion evidence.

[82] Two experts called by the Crown were a forensic accountant, Brian Crockatt, and a handwriting expert, Terry Pipes. The appellants take issue with the admissibility of both experts' opinion evidence and with the trial judge's determination of such.

Brian Crockatt

[83] The appellants contend that the trial judge did not correctly apply the relevance and necessity admissibility criteria as outlined in *Mohan*, *supra*, arguing that the Crown's failure to tender into evidence a full copy of Mr. Crockett's report at trial rendered his opinion evidence inadmissible; that Mr. Crockatt's failure to provide opinions or conditions in his expert report admitted at sentencing rendered it an improper expert report and inadmissible as it "did not meet the proper standard for admissibility as expert evidence"; that sources of information relied upon by Mr. Crockatt to formulate his opinion were not admissible evidence and no weight should have been attributed to his opinion; that the expert lacked knowledge of the documents he was using to formulate his opinion and that the expert replaced the trier of fact.

[84] Brian Crockatt, a Chartered Accountant and certified forensic investigator with some twenty years experience, was qualified as an expert chartered accountant with specific focus on forensic accounting. He provided expert opinion evidence at trial that focussed on whether a sale occurred in regards to each of the 135 Bluefin Tuna caught under the five licences utilized by the Company in

contravention of the *Act* and *Regulations*, by conducting a tracing analysis from the moment they were caught and tagged, through to sale. In his testimony, he conducted nineteen separate sample tracing analyses to illustrate and to prove that Ivy Fisheries Limited sold each of the 135 tuna and stated the conclusions of his analysis to be:

> My conclusions are presented in – more clearly in Schedule 1, because I include the buyer, and I include amounts which I realize are not relevant at this point, but my conclusion is that each of the tags that I have on the schedule was caught as described by the vessel at the dates described, and sold to the buyer, with the proceeds distributed as noted in my Schedule 1. Ivy Fisheries receiving at least a part for all of the tags and Ivy Fisheries accounting for the total proceeds for all of the tags.

[85] He also provided an expert opinion on sentencing that focussed on values and proportioning of the sales.

[86] On May 2, 2003 in accordance with the Notice requirements of s. 657.3 of the *Criminal Code*, Mr. Crockatt's report was provided to the appellants. Against a background of 1) the appellants making it known that they strenuously opposed the admissibility of the expert opinion evidence on the basis of relevancy and

necessity; 2) defence counsel, in Crown counsel's experience, regularly objecting to expert reports being admitted; and 3) the Crown believing she would be unable, "in light of existing case law", to argue convincingly to admit the report into evidence, as the expert would be testifying, Crown counsel did not seek to admit Mr. Crockatt's report, but only after having offered to finalize the paring down of attached documents to alleviate those that had become irrelevant and still being advised it made no difference to the appellants position. Two schedules, schedule I and II, attached to the report, were however, at the trial judge's direction , used for "demonstrative purposes" throughout his testimony and for that purpose only i.e., to assist the judge in following his testimony, were marked exhibits 135 and 136.

[87] The fervour with which the appellants opposed relevancy and necessity criteria of the expert's evidence at trial is reflected in counsel's comments during the argument on the admissibility motion;

> ....From my perspective, if they delete all the irrelevant portions of this report, there wouldn't be anything left, at all. So, you know, I am not surprised that my friend is not offering it because it is irrelevant. (Vo. 4, page 1072.)

[88] The trial judge's ruling clearly reveals that she applied the first two *Mohan* criteria of relevance and necessity in a proper fashion, and, in so doing, properly declared him an expert witness able to give opinion evidence in his field, as his qualifications were never in serious dispute and no exclusionary rule of evidence raised. It cannot be seriously disputed that the evidence given by Mr. Crockatt relates to a fact in issue at trial. Relevancy lay in his evidence going to the issue of sale of the fish. He traced the documents through to sale to establish the fact that they were sold, down to the very dollar and cent, the essential element of counts 10 and 17. As the trial judge ruled, his evidence was necessary to assist her to deal with technical accounting issues, in that he was able to draw her attention to the details and to provide the inferences not readily apparent to an ordinary observer in circumstances where there was a mass of paper of a technical sort and an unfamiliarity with the type of documents that a bookkeeper would use to keep track of fishery records. The expert's opinion evidence provided a tracing analysis that speaks for itself in its specificity and complexity. Through his evidence and the paper trail of exhibits, he was able to guide the court step by step, document by document, as to how each tag associated with a tuna went through to sale and the location of the proceeds. From that, the trial judge drew her own conclusions

(paras. 125 and 132). It was open to her to accept all, part or none of the expert's conclusions and drawn inferences once admitted.

[89] I see no merit in the submission that the trial judge erred in allowing the expert to testify when his report was not admitted into evidence. In addition to leading evidence solely through the oral testimony of an expert, expert evidence may be led through a sworn report under s. 657.3 (1) of the *Code* or through a combination of *viva voce* testimony and an expert report. The expert's proposed testimony is the evidence, not the report, and the expert report if there is one, may be marked as an exhibit at the trial judge's discretion. ®. *v. M.L.*, [1998] O.J. No. 4480). That is very different from saying that in order for the expert to be allowed to testify and offer opinion evidence, his report, once prepared and provided to defence under s. 657.3(3)(b)(I), must be admitted into evidence, or there is no opinion. Certainly, s. 657.3(3)(b)(ii) of the *Code* contemplates that no report need be prepared in order for an expert to testify. For disclosure purposes, in circumstances where there is no report, a summary of the opinion the expert anticipates giving at trial, inclusive of the grounds on which it is based, is provided to defence. Mr. Crockatt's report, in essence, was nothing more than the expert's intended proposed testimony, which he gave. The evidentiary foundation was

modified by elimination of information sources deemed to be irrelevant through earlier rulings.

[90] The appellants' right to cross-examine Mr. Crockatt was not prejudiced in any way, as the appellants' counsel had received a complete copy of his report in May 2003, attached to a notice under s. 657.3 of the *Criminal Code*. All of the source materials relied upon by him to complete his report were provided through disclosure to the appellants' counsel. The facts and information upon which Mr. Crockatt relied in formulating his opinion were before the court as admissible evidence and had been adduced into evidence as such. Schedules I and II of his report were tendered into evidence and marked exhibits 135 and 136, with values blocked out for trial at defence counsels' request, and used solely for "demonstration purposes" at the trial judge's direction. He provided the oral particulars of the schedules derived from documents otherwise admitted into evidence, documents necessary to his tracing analysis.

[91] The principles applying to the admission of expert evidence were established by the Supreme Court in *R. v. Lavellee,*, [1990] 1 S.C.R. 852 at 893. Once qualified, an expert opinion is admissible if relevant, even if it is based on second

hand (hearsay) evidence. The expert's opinion is entitled to some weight once there is some admissible evidence to establish the foundation for it. The more an expert relies on facts not proven in evidence, the less weight the trier of fact may attribute to the opinion. The opinion is not inadmissible because of that reliance; but, if there is no admissible evidence to establish the foundation, the opinion is not entitled to any weight. It is for the trier of fact to weigh and accept or reject the opinion evidence. Deference is owed to the trial judge in matters of weight.

[92] When Mr. Crockatt testified, his opinion, if not exclusively, certainly predominantly was based on admissible evidence that was adduced into evidence as such. This strong foundational evidence allowed the trial judge to verify the opinion. As determined under issue two, there is no merit in the appellants' submission that the documentary evidence was not admissible. Reliance, if any, upon unproven/hearsay evidence was inconsequential. The answer to whether in the absence of the unproven matters, the expert would have given the opinion at all is a resounding yes.

[93] Accordingly, for the above reasons and those stated previously, with respect to admissibility of evidence, I find the appellants' claim that the expert's opinion is

inadmissible or should be disregarded because the expert lacked knowledge of documents and because his opinion was based in part, if not totally, on unproven facts or hearsay evidence (such as statements made by the appellant Andrew Henneberry), to be without merit. The trial judge complied with the principles enunciated in *Mohan* and *Lavallee*. She did not err.

[94] Mr. Crockatt used his knowledge, forensic accounting techniques, expertise in assembling, cross-referencing, reviewing and tracing massive amounts of documents, to demonstrate his very tangible but complicated accounting conclusion that the tags had gone through to sale. In doing so, he did not usurp the role of the trial judge. It was entirely up to the trial judge to accept some or all of the expert's conclusions and inferences or to reject his opinion evidence. She was not obligated to take the expert's opinion on point as conclusive, but did so.

Terry Pipes

[95] Terry Pipes, a civilian member of the Royal Canadian Mounted Police, with some twenty-plus years experience, was qualified as an "examiner of question[ed] documents" - a handwriting expert. His April 2002 forensic laboratory report (Exhibit 77) relates to Marcel Henneberry's counts 8 and 9.

[96] The application of the *Mohan* criteria for admissibility of expert opinion evidence raised in regard to Brian Crockatt's evidence is not in issue with respect to Terry Pipes.

[97] The appellants' submissions with respect to Terry Pipes are threefold. Firstly, they contend the trial judge erred in qualifying Mr. Pipes as an expert and admitting his opinion evidence, not because of non-compliance with *Mohan* factors/criteria, but because of the "scanty" quality of his report and because the notice requirement for Mr. Pipes's testimony as an expert under s. 657.3 of the *Code* was not adequate, in that the documents referred to in his report were not attached to it, although they had all been disclosed. Secondly, they contend his

conclusion as an expert was fundamentally flawed and of no weight, in that, in conducting his analysis, he had no "known signature to which to compare other signatures, i.e. no evidence before the court that the signatures the expert says are known are known." Thirdly, they contend his "report was admitted into evidence in error" as it did not meet the basic criteria for an expert report, more particularly, the report failed to outline the basis for its "very brief conclusions". Accordingly, the appellants say, the evidence of Mr. Pipes ought not to have been considered by the learned trial judge.

[98] For the following reasons, I see no merit in these submissions. The trial judge did not err in admitting his expert opinion evidence or in the manner in which she dealt with the opinion evidence.

[99] Some eight to nine months prior to Terry Pipes testifying on March 4, 2009, the appellants were in receipt of the respondent's Notice of Intention to Produce his two-page forensic laboratory report that listed all the documents that he looked at in reaching his conclusions. All of these documents had earlier been disclosed and indeed were in evidence through another witness by the time Mr. Pipes testified. The appellants' request for a report with documents attached rather than

only being listed, was complied with by the respondent's office months before Terry Pipes testified. The report provided also corrected mis-described documents and exhibit numbers. During his testimony, Mr. Pipes ensured each document coincided with the one that he referred to in the list that he created for his report.

[100] Accordingly, there was compliance with the Notice requirements of the *Code*. In any event, the remedy for failure lies in s. 657.3(4), not in holding an expert's opinion inadmissible. Certainly, there was no prejudice to the appellants. Their right to cross-examine Terry Pipes was not prejudiced in any way since their counsel received a copy of his two-page report on May 1, 2003, in accordance with the notice requirements of s. 657.3 of the *Criminal Code*. The source documents referred to in the report, although not attached to the report but listed, had been provided to the appellants' counsel through the disclosure process and all were entered in evidence at trial. In December 2003, some three months before Mr. Pipes testified, their counsel received a second copy of the report, with the documents attached.

[101] The quality of the report, although hardly determinative by its length, goes to the weight to be afforded to the expert's opinion by the trial judge and not to admissibility.

[102] To suggest there was no known signature of Marcel Henneberry for analysis is simply wrong. Mr. Pipes provided opinion evidence to the effect that exhibits 78, 81 and 83 (Atlantic Bluefin Tuna Log Documents for fishing trips dated October 3, 2000, to October 4, 2000; October 6, 2000, to October 8, 2000; and October 7, 2000, to October 9, 2000) were not in fact signed by Marcel Henneberry. Exhibit 88, the Swordfish/Shark Long Line Monitoring Document for the fishing trip dated October 3, 2000, to October 11, 2000, a seized document from the place of business of Ivy Fisheries Limited, did in fact provide the handwriting expert with a reliable known signature specimen for Marcel Henneberry, because it was a monitoring document actually signed by him as captain. It was a specimen signature that Mr. Pipes, as an expert, considered appropriate for his analysis, and to which he was able to and did apply his trained eyes. Cross-examination did not result in the trial judge reaching any other conclusion about the quality of the document and the expert's use of it in the circumstances. Furthermore, corroborative evidence reveals that an on-board

fishery observer, David Murphy, was out to sea with Captain Marcel Henneberry during the same fishing trip related to Exhibit 88, and filed his own reports (Exhibits 95 and 96) inclusive of the vessel and captain involved. In addition to Exhibit 88, there were also three other known signature specimen documents for Marcel Henneberry relating to fuel purchases and cheque payment (Exhibits 86). Using all four of these documents as specimen handwriting for Marcel Henneberry, the expert concluded that the log documents (Exhibits 78, 81 and 83) in respect to count 8 were not in fact signed by Marcel Henneberry.

[103] With respect to count 9, Exhibit 88 was again used as a known signature. Terry Pipes provided opinion evidence to the effect that the individual who recorded the handwritten information in Section (e) of Exhibits 87, 89 and 90 (Atlantic Bluefin Tuna Log Documents for October 12, 2000, to October 19, 2000; October 20, 2000, to October 22, 2000; and October 23, 2000, to October 28, 2000.) was the same individual who recorded the handwritten information in section (d) of Exhibit 88 and in section (d) of Exhibits 91, 92, 93 and 94.

[104] This was used along with David Murphy's evidence and seized documents (Exhibits 102 and 104) to support the Crown's position that Marcel Henneberry

and not Vernon Rudolph was the captain on board the “Ivy Rose” when it fished for and caught 1, 13 and 10 tuna as noted, respectively, in the Atlantic Bluefin Tuna Log Documents, Exhibits 87, 89 and 90.

[105] When an expert witness is called to testify, s. 657.3(4) of the *Code* provides for noncompliance with subsection (3)’s various criteria of notice, providing a report, or summary of opinions by such methods as adjournments to allow for cross-examination of the expert witness, ordering production of materials and calling of witnesses. There is no suggestion whatsoever that expert opinion evidence is to be disregarded or held inadmissible for noncompliance with providing a report, let alone for noncompliance with its substance. In any event, it is not the report but the testimony of the expert that forms the substantial evidence of his opinion for purposes of the trial. The report supplements or clarifies this evidence. All documents used in formulating Mr. Pipes’ opinion eventually were admitted as evidence at the trial proper.

[106] Given the eight to nine month period of time that elapsed from the appellants’ receiving the report to Mr. Pipes testifying, there was no reason for the trial judge to determine that the appellants were unable to prepare for the evidence

of the expert so as to require an adjournment or order further particulars, pursuant to s. 657.3(5) and, more to the point, neither were requested.

[107] Given the nature of the expertise, I am not persuaded that much more was needed to be said than providing the methodology in the report, which Mr. Pipes noted to be by visual and microscopical examination and comparison of the questioned specimen handwriting, hand printing and numbers. He was subject to cross-examination.

[108] I would dismiss this ground of appeal.

Issue 5

Did the learned trial judge err in determining the admissibility of testimonial evidence given by Fishery Officer Scott Mossman and, if so, is there any reasonable possibility that the verdict in question would have been different had the error not occurred?

[109] The appellants argue that the trial judge "misdirected" herself by admitting hearsay evidence of Fishery Officer Scott Mossman and allowing him to testify in a narrative format as to alleged facts of which he had no personal or direct knowledge. Officer Mossman's role as a lead investigating and exhibit officer, was

to identify and address each of the hundred-plus documents he tendered in evidence. He provided the details about the documents and how they related to the charges. It was his role to show the court how these documents were relevant, one of the major preconditions of admissibility. Due to his experience and training as a Fishery Officer, he was also familiar with certain types of the documents tendered, such as fishing licences and conditions and fishing logs. It was open to him in this capacity to provide commentary on same and to relay to the court how and what they provided by way of information, how they were relevant to the specific charges and thereby assist the court in understanding the sequence of steps/events necessary to produce the information contained therein and the significance of these documents. The fact he read from some of the documents during his testimony is of no consequence, as the contents of the documents went in as evidence to prove the truth of the facts stated therein and they spoke for themselves.

[110] In my view, the trial judge made no error of law and I would dismiss this ground of appeal.

Issue 6

Did the learned trial judge err in concluding that the evidence presented at trial was sufficient to prove each of the appellants' guilt beyond a reasonable doubt? In other words, were the verdicts reasonable and supported by the evidence at trial?

[111] The appellants submit that the evidence at trial did not support the verdicts of guilty, and that there is either no evidence or insufficient evidence. In effect, they argue that the verdicts are unreasonable within the meaning of s. 686 (1) (a) of the *Criminal Code.*

[112] To succeed on this ground, the appellants must persuade the court that the verdicts are not ones which, on the evidence, could have been reasonably rendered: see *R. v. Biniaris*, [2002] 1 S.C.R. 381 at paras. 34-36. The general rule is that where the issue involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent a palpable and overriding error (*Housen v. Nikolaison*, [2000] 2 S.C.R. 235 at paras. 22, 23, 36 and 37). In considering this issue, the appellate court should only interfere with such findings if "... the record, including the reasons for judgement, disclose the lack of appreciation of relevant evidence and more particularly, the complete disregard of such evidence...". Absent such palpable error, an appellate court has "... neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence." ®.

v. Harper, [1982] 1 S.C.R. 2 at para. 5). Appeal courts owe and invariably accord great deference to trial judges on findings of fact, including the inferences drawn from those facts.

[113] In my view, the essential factual elements of each count are established overwhelmingly by the evidence at trial. The appellants' misunderstanding of facts adduced flows for the most part from their misguided positions in regards to direct evidence and strict liability, none of which was rebutted by any evidence adduced by the appellants. As there was no evidence before the court upon which to conclude on a balance of probabilities that the appellants had exercised all reasonable care to avoid regulatory violations, there was no due diligence defence for the court's consideration (*Fisheries Act*, s. 78.5). Where admissible evidence establishing all essential elements of the offence has been adduced, the fact that the appellants did not present any evidentiary base for a due diligence defence becomes determinative of the issue. In my opinion, when the whole of the evidence in respect to each offence is considered, the facts are such as to be inconsistent with any other reasonable conclusion than that reached by the trial judge.

[114] I will now turn to various issues raised by the appellants in regards to individual counts.

[115] With respect to Count 2, the appellants contend that pursuant to s. 61 of the *Fisheries Act* and the conditions of tuna licence 109423, the obligation of maintaining the Atlantic Blue Fin Tuna Log Document, so as to provide information regarding the fishing activities for each fishing trip, rested with the licence holder, Jenny May Fisheries Ltd. Therefore, it is argued, the trial judge erred in placing both the obligation to enter the dockside monitoring company's confirmation numbers immediately in the comment field of the log, and the resulting failure to comply with that obligation, on the captain, Clark Henneberry, in circumstances where the fishing licence authorizing him to fish for tuna was a company licence issued to Jenny May Fisheries Ltd. This, they argue, is true of any situation where the person charged is not the licence-holder. I will address the issue in the context of Count 2.

[116] Clark Henneberry, as a registered fisher and captain of the vessel Becky H. fished for and caught some 32 tuna under the authority of tuna licence 109423. The facts that no confirmation numbers for the tuna were recorded in the fishing

log and that the confirmation numbers were issued by the dockside monitoring company for each tag were admitted at trial.

[117] The pertinent sections of the *Fisheries Act* read as follows:

> 61.(1) The following persons may be required under this Act to provide information or to keep records, books of account or other documents:
>
> (a) any person who engages in fishing;
>
> (b) any person who purchases fish for the purpose of resale;
>
> © any owner, operator or manager of an enterprise that catches, cultures, processes or transports fish; and
>
> (d) any agent or employee of a person referred to in paragraphs (a) to ©;
>
> (2) A person referred to in subsection (1) may be required to provide information or to keep records or other documents relating to any of the following matters:
>
> (a) the number, sex, size, weight, species, product form, value or other particulars of any fish caught, cultured, processed, transported, sold or purchased
>
> (b) the time and place at which any fish was caught or landed and the person, enterprise or vessel by which the fish was caught or landed;

> (3) A person referred to in subsection (1) shall keep any records, books of account or other documents that may be required by the regulations or by the terms and conditions of any lease or licence issued to the person under the Act and the records, books of account or other documents shall be kept *in the manner and form and for the period prescribed by the regulations, lease or licence*. [Emphasis added.]

[118] The 2000 Bluefin Tuna Fishing Licence Conditions Maritimes Region specified for person(s) fishing under the authority of Tuna Licence 109423 issued to licence holder Jenny May Fisheries Ltd. that are relevant, and that form part of the conditions required to be signed by the licence holder, read as follows:

> HAIL REQUIREMENTS
>
> . . .
>
> 19. You are required to hail to a Dockside Monitoring Company that has been approved or designated by the Department immediately after a bluefin tuna has been caught and tagged or when a bluefin tuna tag has been damaged and is no longer useable. The hail must include the vessel name; the vessel registration number; the Master's name; your bluefin tuna licence number; the serial number of the bluefin tag used; the accurate round weight in pounds of the bluefin tuna; the flank length and the dressed length of the tuna in inches (see below); the date; the local time (using the 24 hour system).
>
> 20. You will be issued a confirmation number by the Dockside Monitoring Company confirming that your hails in item 18 and 19 has been received. This number is to be entered immediately in the comment field of the Atlantic Bluefin Tuna Log Document.
>
> .....

> 24. You are required to have the weight and species of fish landed from your vessel verified by an Observer (dockside). The Master of the Vessel is required to provide access to the Vessel and the fishing records to the assigned Dockside Observer. . . .
>
> 25. You are <u>not</u> permitted to land (offload) any fish or portions thereof from the Vessel unless all of the following conditions are adhered to:
>
> > (a) The Observer(s) (dockside) is present onboard the vessel to verify the *Atlantic Bluefin Tuna Log Document is fully completed by the Master of the Vessel and* verify the weight and species of the catch in the vessel; (Emphasis added.)
>
> . . .
>
> 27. Pursuant to section 61 of the *Fisheries Act* you are required to provide information regarding your fishing activities in the Atlantic Bluefin Tuna Log Document that is available from the Department. You are required to complete this document in accordance with the instructions supplied in the Atlantic Bluefin Tuna Log Document. In addition you are also required to record the number of lines and configurations (tended line and angling gear) in the Atlantic Bluefin Tuna Log Document. For trips in which you have caught fish, you are required to supply the Dockside Monitoring Company with a copy of all monitoring documents within 7 days after returning to port. You are also required to provide any documents requested by a Fishery Officer immediately upon demand.
>
> 28. Failure to comply with item twenty-seven (27) will be a relevant factor, as an aspect of conservation and management of tuna, in the decision whether or not a licence and/or conditions of licence for bluefin tuna will be issued to you for the 2001 bluefin tuna season.

[119] All fishers are required by s. 61 of the *Fisheries Act* to provide fishing logs and hail reports to DFO officers, and failure to do so constitutes an offence under s.

78 of the *Act,* resulting in a fine or, in the case of a second or subsequent offence, imprisonment, or both. ®. *v. Fitzpatrick,* [1995] S.C.J. No. 94 at para. 4).

[120] The licence conditions deem that the step of recording the confirmation numbers issued for each tuna tag be done immediately in the comment field of the fishing log. It is not a question of waiting for the task to be performed by someone else later. A person on the vessel must record the information in the log.

[121] The *Act* contemplates records or other documents being kept by any person who engages in fishing, or any person who is the owner, operator or manager of an enterprise that catches fish or any person who is the agent of either the person(s) engaging in fishing or the agent of the owner, operator or manager of the company that catches fish. That person is mandated to keep any record or documents required by the regulations or by the terms and conditions of any licence issued to the person under the Act and to do so in the manner and form prescribed by the regulations or the licence.

[122] Clark Henneberry was the captain of the vessel Becky H. and as such, engaged in fishing.

[123] Under the terms of the licence, at least one specific manner of record-keeping is prescribed in condition 25 (a). The Master of the Vessel, the captain, in that capacity alone, is specifically charged with “fully” completing the log document so that the onboard dockside observer is able to verify all log particulars before granting permission to land (off load) any fish. The observer’s presence on board the vessel is for the purpose of verifying the log document “is fully completed by the Master of the Vessel.” License conditions 25 (a) prescribes that log keeping in its entirety is to be completed by the captain and places that obligation squarely upon his shoulders. Clark Henneberry, as captain, failed to complete the log fully.

[124] With respect to Count 3, the fact that Wesley Henneberry had also been issued a tuna licence at the time he incidentally caught and failed to return Bluefin Tuna while fishing under the authority of a shark licence, is irrelevant and immaterial to the issue of whether he committed the offence of failing to comply with the conditions of the shark licence.

[125] When determining whether or not there had been a failure to comply with condition 9 of Wesley Henneberry's shark licence, requiring him not "to use the exploratory shark licence concurrently with another large pelagic licence" i.e. Bluefin Tuna, the essential element of Count 4, the trial judge properly found no vagueness or ambiguity in the word "use" and thus dismissed the contention that the Crown needed to establish that Wesely Henneberry was "doing two different types of fishing under two different licences at the same time." As she correctly stated, and found, "the word "use" in condition 9 is not accidental. It is broader than the term "fish"; and, whatever else it may mean, in this context it is broad enough to include hailing out under two licences for the same trip." This was the very conduct that the appellant engaged in. By hailing out under a shark and tuna licence when conditions of one of the licences prohibited the licencee from using the other concurrently with it, an offence of failing to comply with a condition of the licence was committed. This, however, is quite apart from fishing the shark licence with the condition that all incidental catch, i.e., tuna are to be returned immediately to the water and rather than doing so, landing and selling it, thereby failing to comply with the condition of the shark licence and committing the offence charged in Count 3. The rule against multiple conviction set out in *Kienapple v. R.*, [1975] 1 S.C.R. 729, demands the offences have no distinguishing

elements. This is not so here. There is no relationship of proximity between facts or offences for the rule to apply between counts 3 and 4.

[126] With respect to counts 6 and 8, according to the appellants Wesley and Marcel Henneberry, the judge erred in her interpretation and application of s. 78.2 of the *Fisheries Act* which reads:

> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted.

[127] The trial judge concluded that the Crown had established that both Wesley and Marcel Henneberry, as directors of the Company under s. 78.2 acquiesced and participated in the commission of the offence of permitting a person other than themselves, i.e., unauthorized captains Smith, Ryan and Parnell, to use the vessels "IVY" and "All of Us" respectively, to fish for and catch tuna, under licences issued only to the appellants. Neither appellant was granted a Temporary Vessel Operator Permission. As the appellants called no evidence on which a defence to

the strict liability offence could be founded, she found them guilty of counts 6 and 8 respectively.

[128] I will not re address the issue of sufficiency of evidence by commenting on the specifics of their acquiescence as directors other than to state that the facts are overwhelmingly clear on all elements of these offences and not somehow diminished in anyway by the acquittal of Paul Parnell on the very distinguishable count 14. As stated earlier, with respect to each of the 11 counts, I am satisfied as to the admissibility of the evidence and that on the totality of the evidence, the facts are inconsistent with any other reasonable conclusion than that reached by the judge.

[129] The appellants' contention that s. 78.2 cannot apply because the corporation was not charged has no merit. The fact that the corporation was not charged for counts 6 and 8 offences is true, but the *Act* makes it categorically clear that the corporation need not be charged with the offence in order for the directors to be charged. There is no other way to interpret the words, "whether or not the corporation has been prosecuted".

[130] With respect to Count 9, the trial judge, pursuant to s. 22(7) of the *Fishery General Regulations*, concluded that Marcel Henneberry, as a registered fisher and on-board captain of the vessel Ivy Rose, fished for and caught 24 tuna under authority of Licence No. 142645 and that he did so when not permitted to be commercially fishing for any species of fish per the Permit for Temporary Replacement or Substitute Operator that was issued to him as holder and operator of Licence No. 109436 and as a condition thereof. The agreed-upon Permit provided that Marcel Henneberry, as the original operator of the licence, relinquished all rights and privileges to any commercial fishing activity or other forms of gainful employment during a set period. Thus, Marcel Hennberry failed to comply with a condition of License No. 109436 when he fished on the vessel Ivy Rose under the authority of Licence No. 142645. Subsection 22(7) reads as follows:

> No person carrying out any activity under the authority of a licence shall contravene or fail to comply with any condition of the licence.

[131] The appellant contends that he cannot be convicted of failing to comply with a condition of a licence unless it is proven that the condition contravened was a

condition of the licence under which he was actually fishing (licence No. 142645) at the time of the commission of the offence.

[132] The Crown's position, as noted in submissions, is as follows:

> 357. " . . . it is not required to prove that the condition contravened was a condition of the licence under which the Appellant happened to be fishing at the time of the commission of the offence. (In this case, the Appellant was fishing under Licence No. 142645 issued to 10474 (Nfld.) Limited when he contravened a condition of Licence No. 109436.) Rather, the Respondent is required to prove that the condition contravened was a condition of the licence under which the Appellant carried out any activity. (In this case, he carried out any activity under Licence No. 109436.) In other words, the Respondent's position is that s. 22(7) of the *Fishery (General) Regulations* should be interpreted to mean that a fisherman holding a licence and, therefore "carrying out any activity under the authority of a licence", is not permitted to contravene the conditions in the licence issued to him. It does not mean that a fisherman holding a licence can be found to have contravened a condition of that licence only if it is established that he was actively fishing that same licence at the time of the commission of the offence. Such a restrictive interpretation of s. 22(7) of the *Fishery (General) Regulations* would be unreasonable, given the extensive and varied conditions that may be imposed on fishing licences for the proper management and control of fisheries and the conservation and protection of fish.
>
> 358. Therefore, the Respondent submits that it is not an essential element of this offence to prove that the condition contravened was a condition of the licence under which the Appellant was actively fishing, but merely that he was a person engaged in the fishing

> industry under the authority of a licence and that he failed to comply with the conditions of his licence.

[133] The Crown's response is in my view correct. By virtue of holding licence No. 109436, and therefore "carrying out any activity under the authority of a licence," Marcel Henneberry was not permitted to contravene conditions in the licence issued to him. This reflects Hallett J.A.'s analysis in *R. v. Savory* (1992), 108 N.S.R. (2d) 245, when he interpreted the now repealed Regulation 33(2), a much narrower version of Regulation 22(7). His attention was directed at the words, "no person fishing under the authority of a licence shall contravene or fail to comply with any condition of the licence", rather than the present words, "no person carrying out any activity under the authority of licence shall...". After stressing the regulatory context of the *Act* and *Regulations* at page 248, Justice Hallett stated:

> . . . "Conditions may be imposed on licences that would be consistent with the objective of properly managing and controlling the fishery and within the scope of Regulation 33(1). In my opinion, Regulation 33(2) simply means that a fisherman holding a licence and therefore "fishing under the authority of a licence" is not permitted to contravene the conditions in the licence issued to him. It does not mean that such a person can be found in contravention of the Act and the Regulations only if he is actually apprehended in the act of catching fish. Such a restrictive interpretation of Regulation 33(2)

> would be unreasonable given that the object and purpose of the Act and Regulations is to properly manage and control the fishery.
>
> Therefore, it is not an essential element of an offence under Regulation 33(2) to prove the licensee was fishing in the narrow sense, but merely that he was a person engaged in the fishing industry under the authority of a licence and that he failed to comply with the conditions of his licence, ...

Marcel Henneberry was such a person. The trial judge did not err in her interpretation.

[134] In addition, the trial judge appropriately dismissed the late challenge to the constitutional validity of the licence condition set out in the Permit. No notice had been provided to either Attorney General and, as argued by the Crown, if one turns to the merits, the breadth of s. 22(1) of the *Fishery General Regulations*, which authorize the Minister of Fisheries and Oceans to specify conditions in a licence that are "for the proper management and control of fisheries and the conservation and protection of fish" is such as to easily accommodate the authority to impose the provision of the Permit that the appellant agreed to.

[135] With respect to Count 10, the trial judge concluded that the Company sold the illegally caught tuna and that the three named directors, Clark, Wesley, and

Marcel Henneberry acquiesced and participated in the sale by accepting their shares of the proceeds, pursuant to S. 78.2 of the *Fisheries Act.*

[136] The individual directors argue that they cannot be convicted of this offence because the offence as charged in the information does not refer to s. 78.2 of the *Fisheries Act.*

[137] The trial judge, in quoting Barry, J. (as he then was) in *R. v. Pratas* (2000), 190 Nfld. and P.E.I.R. 153 (Nfld. S.C.) at para. 25, did not err. There is no basis in law for this submission. S. 78.2 of the *Fisheries Act* neither describes an offence nor creates an offence. That is addressed in s. 33 and s. 78 respectively. Section 78.2 simply describes the basis upon which liability may be established. It is not a substantial requirement of a count in an information. "The different ways by which a person may become a party need not be specified. (See, Ewaschuk, *Criminal Pleadings and Practice*, at pp. 15-2 to 15-3, and *R. v. Cousins* (1997), 155 Nfld. and P.E.I. R. 169 (Nfld. C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 543, 120 C.C.C. (3d) vii)." ®. *v. Pratas*, *supra* at para. 25.)

[138] The corporate appellant submits that it should not be convicted of this offence because it is not a sole director/sole shareholder corporation.

[139] I see no merit in this submission and draw from the Crown's response. Reliance is placed by the appellants on *R. v. Pratas*, *supra* which, on this issue, stands for nothing more than the simple fact that when a corporation is a sole director/shareholder corporation it is virtually impossible for that director/shareholder to assert that he did not "direct, authorize, assent to, acquiescence in or participate in" the commission of the offence by his own company. Whereas here, however, there are several corporate officers. Their respective liability for the commission of an offence committed by the corporation is dependant upon the Crown adducing evidence to show that they "directed, authorized, assented to, acquiescenced [sic] in or participated in" the commission of that offence. This statutory imputation of liability to the officers, directors or agents of the corporation is a separate issue altogether from whether the evidence establishes that the corporation has actually committed an offence. In the result, a corporation can be shown to have committed an offence even though it cannot be proven that any corporate officers "directed, authorized, assented to, acquiescenced

[sic] in or participated in" the corporation's illegal behaviour. Here, the evidence adduced supports guilty verdicts for both the corporation and the directors.

[140] Finally, with respect to Count 10, the appellants argue that it is an offence charged in the alternative to other offences charged in the information and as such, the rule against multiple convictions in *Kienapple*, *supra*, applies between Count 10 and those other alternative offences.

[141] This submission fails given the necessity of a relationship of sufficient proximity as between the offences which form the basis of the charges against the accused for the rule to apply. As noted earlier, the requirement of sufficient proximity of offences is satisfied only if there is no additional and distinguishing element between the offences. ®. *v. Prince*, [1986] 2. S.C.R. 480). The essential element of Count 10 is the prohibited act of selling tuna caught in contravention of the *Fisheries Act and Regulations*. No other offence charged involves the sale of fish.

[142] With respect to Count 12, as noted, the trial judge determined that Paul Parnell, a registered fisher and captain of "All of Us" fished for and caught 17 tuna

under the authority of Permit for Temporary Replacement or Substitute Operator issued to Marcel Henneberry in respect of tuna licence #109436 and failed to comply with the licence condition to immediately enter issued confirmation numbers in the comment field of the fishing logs.

[143] The appellant argues the obligation to complete the log rests with the licence holder, Marcel Henneberry, pursuant to s. 61 of the *Fishery Act* and Licence Conditions. I am not persuaded by this submission. Being authorized under the Permit, the appellant is presumed to know and to have accepted the terms and conditions associated with it, which includes the completion of hail reports and fishing logs and the prosecution of those who fail to complete the documents ®. *v. Fitzpatrick, supra*, at paras. 40 and 41; see Exhibit #75 condition items 19, 20 and 25 (a) as per Count 2.)

[144] I conclude none of the arguments raised result in the verdicts being unreasonable for err of law or fact and law.

Issue 7 & Issue 8

Did the learned trial judge err in her interpretation and appreciation of S. 79 of Fisheries Act? Whether the sentences imposed by the learned trial judge

were manifestly excessive, given the nature of the offence and the purpose and principles of sentencing in the regulatory context?

[145] The appellants submit that the trial judge imposed excessively harsh and punitive sentences that failed to take into account appropriate sentencing principles, and that the trial judge failed to properly consider mitigating factors. The appellants submit that the fines, which they describe as “massive” are “grossly disproportional and overly harsh” given that the fish were tagged, hailed, and within quota. They also take issue with the license suspension.

[146] The appellants must establish that the sentences imposed by the trial judge were “clearly unreasonable”, “clearly excessive”, or that the sentencing judge applied wrong principles or imposed a sentence that lies outside an “acceptable range”. ®. *v. Shropshire*, [1995] 4 S.C.R. 227 at para. 46 -48, 50.)

[147] The purpose and principles of sentencing generally are found in ss. 718, 718.1, 718.2 of the *Criminal Code* and the fundamental principle, S. 718.1 provides that, “[A] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[148] Being a body corporate, Ivy Fisheries Limited falls within the *Criminal Code* definition of “organization”. Section 718.21 contemplates a number of additional considerations when a court imposes a sentence on an organization.

[149] In the specific, relevant provisions to the sentencing analysis are ss. 78, 79 and 79.1 of the *Fisheries Act* which provide as follows:

> Punishment not otherwise provided for
>
> 78. Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars, and for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or
> (b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.
>
> Additional fine
>
> 79. Where a person is convicted of an offence under this Act and the court is satisfied that as a result of committing the offence the person acquired monetary benefits or monetary benefits accrued to the person, the court may, notwithstanding the maximum amount of any fine that may otherwise be imposed under this Act, order the person to

pay an additional fine in an amount equal to the court's finding of the amount of those monetary benefits.

Lease or licence cancelled, etc.

79.1 Where a person is convicted of an offence under this Act in respect of any matter relating to any operations under a lease or licence issued pursuant to this Act or the regulations, in addition to any punishment imposed, the court may, by order,

(a) cancel the lease or licence or suspend it for any period the court considers appropriate; and

(b) prohibit the person to whom the lease or licence was issued from applying for any new lease or licence under this Act during any period the court considers appropriate.

[150] The sentencing judge correctly noted that the paramount principles of sentencing in a regulatory context such as the *Fisheries Act* is "deterrence, both specific and general...". In *R. v. Grandy and Bell* (1992),113 N.S.R. (2d) 85 at para. 13 (Co. Ct.), the court underlines the importance of deterrence in *Fisheries Act* sentencing;

> *In the context of regulatory offences in general and particularly relating to offences under the Fisheries Act and Regulations, and other Acts dealing with the fishing industry, general deterrence is the paramount and overriding principle to be considered in imposing sentence.* (Emphasis added). This is certainly applied in sentences imposed by our courts in Canada under the *Coastal Fisheries Protection Act.* Although this is different Legislation our courts have recognized that deterrence both general and specific, is the most important factor to be considered for the purpose of protecting our fishery resources....

[151] In *R. v. MacKinnon* (A) (1996), 154 N.S.R. (2d) 217 (S.C.) paras. 17-19, Edwards, J. commented on the role of deterrence in fines in *Fisheries Act* sentencings*;*

> The principle of specific deterrence is rooted in the notion that legal sanctions will serve to discourage the same offender from reoffending. In sentencing an accused, the court should balance the need for general deterrence to others, with the need for a specific deterrence to the accused...
>
> The need for penalties which strongly encourage statutory compliance are of particular importance within the context of regulatory offences such as those under the *Fisheries Act.* In such case, the natural resources are in danger of being depleted or destroyed and thus, the effects of such violations have wide ramifications for society. Given the difficulties involved in enforcing Fishery Legislation and the expense involved in protecting the resource, it is extremely important for courts to do their utmost to encourage compliance with the Legislation.
>
> *The fine must be substantial enough that it will send a message to the public that illegal activities will not be tolerated by the courts. The amount of fine should take into consideration both the seriousness of the offence and the general principles of sentencing... . A fine should not be so low that it will be seen as a license fee or as a mere cost of doing business. A low monetary penalty may also be considered an affront to those, the majority, who do comply with the Act. (Emphasis added.)*

[152] In *R. v. Cox*; *R. v. Forsey*, [1999] N.J. No. 264 (Nfld. Prov. Ct.), Handrigan, P.C.J. (as he then was) made similar points about deterrence and the requirement “to protect the fishery resources” at paras. 20-21;

> 20 The offences of which the accused have been convicted are serious breaches of the fisheries legislation. The regulations are designed to protect and preserve a valuable resource and any contravention of them must be taken seriously. Deterrence must be a primary consideration, both specifically of the accused and generally, of other members of the public who are inclined to act in the same manner. Penalties must be imposed to reflect the seriousness of the offences and to achieve the deterrence that is requisite. Ultimately, any penalty must be such as to communicate to the accused that there is a high risk associated with their illegal activities, both for the resource they are affecting and to themselves for their conduct.
>
> 21 I have been urged by counsel for the accused to forego imposing any fine on them in light of all of the factors that I have outlined above. He says it would be unfair for them to have to suffer any pecuniary penalty beyond those costs which are a natural consequence of their actions. I do not agree. The Fisheries Act is a penal statute, at the nub of a conservation and protection regime. It has a wide discretion built into it as to the remedies that may apply for violations of it, and its associated regulations. It is not simply an administrative tool. I feel that, aside from all of the calculations that may be done, as to the gains or losses experienced by an accused, that some penalty is necessary to achieve the principles of sentencing I stated above.

[153] Similarly, in *R. v. Reid*, [2001] B.C.J. No. 1886 (S.C.), at paras. 12-13,

Lowry, J. said;

> 12 I consider the Crown to be on firm ground in contending that general deterrence must, in most instances, be the paramount consideration in passing sentence for an offence committed in respect of a commercial fishery. Here it seems to me it was essential to consider a disposition that would serve that purpose. The licensing of a vessel is important. It carries with it the requirement of detailed reporting without which the management of any given fishery is undermined. The illegal sale of fish product without a license frustrates the administration of the Act and must be discouraged. That would seem to require some form of penalty being imposed on the accused to deter others who may be inclined to commit the same or a similar offence.
>
> 13 While the circumstances in other cases which counsel cite are not really comparable with the subject illegal sale of octopus, it is of some significance that I have been referred to no case where a violation of regulations governing a commercial fishery has resulted in neither a fine nor an order of forfeiture where there has been a benefit derived from the illegal activity that could be forfeited.

[154] In *R. v. Ross* (1990), 96 N.S.R. (2d) 444 (Co. Ct.), Freeman, J. (as he then was) considered the sanction that would be appropriate to reflect the need for deterrence under the *Fisheries Act.* He referred to *Thompson Newspapers Ltd. vs. Director of Investigation in Research Combines Investigation Act et al* [1990] 1 S.C.R. 425 at paras. 17-19, where La Forest, J. considered the distinction between criminal, quasi criminal and regulatory offences;

17 La Forest's words must be kept in mind:

> "When measured against the relatively low probability of detection, the possibility of suffering a loss by way of a fine may seem inconsequential as compared to the likelihood of making or increasing profits . . ."

18 La Forest considered imprisonment as an acceptable alternative sanction for combines offences. While imprisonment is not to be ruled out in serious fisheries cases, there are other sanctions to be considered. Forfeiture of an illegal catch is not a strong deterrent and may be compared with depriving a thief of his loot. Forfeiture of the vessel, vehicles or equipment, on the other hand, may be seen as inappropriate or too harsh.

19 *A fine reflecting the value of the seized catch, as a measure of magnitude of the offence, together with suspension or cancellation of licenses would appear to be the appropriate sanction in usual cases.* (Emphasis added.)

[155] The trial judge addressed the specifics of each offence on each count in determining appropriate fines. Speaking of the offences generally, she said;

> These are serious charges each involving multiple breaches of licence conditions in a lucrative but seriously threatened fishery. Taken together they establish a pattern of behaviour which can only be described as a deliberate, concerted effort, to catch the maximum number of tuna, regardless of the rules. The offenders here seem to have treated the quota as a target to be met, rather than an upper limit to their fishing activity. It is important that they learn that

their fishing licences represent a privilege, not a right, and that in exercising that privilege they are exploiting a resource that belongs to the people of Canada.

[156] The various offenders were sentenced as follows;

Clark Andrew Henneberry

Count 2 - *Failed to enter confirmation number immediately in the comment field of the Atlantic Bluefin Tuna Log Document.* The numbers of trips and fish involved indicated that the failure to enter confirmation numbers was "more than mere inadvertence". The trial judge added: "Although as the defence submitted, these fish were otherwise legally caught and accounted for, the failure to enter confirmation numbers immediately allows for the possibility of discarding and high grading, which has an effect on conservation efforts by decreasing the accuracy of the reports on which Canada and ICCAT depend for setting conservation targets and fishing quotas. It is therefore, not the "negligible" offence that the defence attempted to portray." The trial judge imposed a fine of $7,500.00 on account of 32 tuna; she cited as precedent, fines of $3,000.00 imposed on account of one and two tuna in *R. v. Dixon, 1999,* N.S.PCt. Case No. 856283 and *R. v. Nickerson,* 1999, N.S. PCt. Case No. 864880.

Wesley L. Henneberry

(a) **Count 3** - *Failed to return immediately all other species of fish caught incidentally to the water from where it was taken as required by the 2000 Exploratory Porbagle Shark Licence Conditions;*

Count 4 - *Used an Exploratory Shark Licence concurrently with another large pelagic licence to wit; Bluefin Tuna Licence as not permitted by item 9 of the 2000 Exploratory Porbagle Shark Licence Conditions;*

With respect to these two offences, the trial judge said:

"The defence argued that these offences had no effect on conservation, as all the tuna caught were reported, and that there was no attempt to conceal what was being done as the offender hailed out on both licences. This ignores the fact that if the offender had properly fished the Shark Licence those eleven tuna would either not have been caught or would have been returned to the sea alive, giving them a chance at continued life and reproduction. It also ignores the fact that the onus is not on the dockside monitors but on the licence holder to know and to abide by the conditions of each licence. Wesley Henneberry, in the opinion of the court, either was extremely negligent in not reading his licence conditions or deliberately disregarding them. In either case, he is solely responsible for these serious offences."

The Defence suggested a section 78 fine of $5,000.00 in total for the two offences, while the Crown sought fines in the range of $10,000.00 to $15,000.00 for each. The trial judge imposed fines of $8,000.00 for each offence (plus a section 79 fine of $1,010.28 to deprive the offender of the benefit of the offence.)

(b) **Count 5** - *Failed to hail to a Dockside Monitoring Company immediately after a Bluefin tuna had been caught, as required by the 2000 Offshore Tuna Licence.* The trial judge followed the same reasoning as on count two, imposing a fine of $7,500.00 on account of 16 tuna.

(c) **Count 6** - *Permitted another person to use a vessel as operator in fishing for any species referred to in the Atlantic Fishery Regulations, 1985 without the person using as operator, being named in the licence authorizing the vessel to fish for that species of fish, contrary to the Atlantic Fishery Regulations.* The trial judge noted that this offence involved four trips by two illegal captains, catching 28 Bluefin tuna with a total sales value of $226,130.40 of which the offenders apportioned share was $2,688.03. The trial judge commented;

"This is the second type of "double fishing" involved in this case. It is significant that this offender had been found guilty of both types. In my opinion, this offence is the most serious committed by the offender, both for its consequences for conservation and for the fact that it involved two other fishers in this wrong doing. There can be no question as to the deliberate nature of this offence. It was obviously a conscious decision to double the fishing efforts of Ivy Fisheries Limited."

The trial judge distinguished *R. v. Mood*, [1999] N.S.J. No. 59 (C.A.) where an alcoholic fisherman who was ill allowed his crew to go to sea without him to haul lobster traps - in order to avoid breaching another regulation - and was fined $2,000.00 Noting the great difference in circumstances, she said;

> In the present case, the defendant allowed four trips to be made under two different captains, not because he was ill, but because he was fishing at the same time as captain on another vessel.
>
> In *Mood* the catch was worth $6,000.00 as opposed to over $200,000.00 in the present case. If one were to assess fines simply on the basis of the value of the illegal catch, a fine in the order of $75,000.00 would be warranted here. I find that, given that there will be orders depriving the offenders of the value of the illegal catch, a fine in the amount of $25,000.00 will be sufficient, plus an additional fine under s. 79 in the amount of $2,688.03, as requested by the Crown.

Marcel Stephen Henneberry

(a) **Count 7** - *Failed to hail at a Dockside Monitoring Company immediately after a Bluefin Tuna had been caught as specified in item 20 of the 2000 Offshore Tuna Licence*. Following the example of count 5, the trial judge imposed a fine of $7,500.00.

(b) **Count 8** - *Permitted another person to use a vessel as operator in fishing for any species referred to in the Atlantic Fisheries Regulations, 1985 SOR/86-21 without the person using as operator being named in the licence authorizing the vessel to fish for that species of fish.* Following Count 6, the trial judge held that, "the same s.78 fine is appropriate here in the amount of $25,000.00, plus a s. 79 fine in the amount of $862.97, the offender's apportioned share of the sales price of the fish.

(c) **Count 9** - *Failed to relinquish his rights and privileges to any commercial activity during the period outlined in Permit for Temporary Replacement or Substituted Operator.* The trial judge stated that this offences was, "another type of double fishing and is equally serious in its conservation consequences. Whether or not quota was exceeded, and whether or not another Captain could have taken the offender's place, the fact is that he chose to fish when he was not allowed to do and thereby made a valuable catch of 24 tuna which might otherwise have remained as breeding stock." As such, the same s. 78 fine as had been imposed on Count 6 ($25,000.00) was appropriate, as well as a s. 79 fine of $4,053.66, the offender's portion of the proceeds of sale of the 24 tuna.

Paul Raymond Parnell

Count 12 - *Failed to enter confirmation number immediately in the comment field of the Atlantic Bluefin Tuna Log Document as specified in item 20 of the 2000 Bluefin Tuna Fishing Licence Conditions Maritime Region.* The trial judge compared this offence to Count 2 and imposed an identical fine of $7,500.00.

Gregory Burton Smith

(a) **Count 18 -** *Fished for any species of fish set out in Schedule 1 of the Atlantic Fisheries Regulations, 1985 SOR/86-21 without authorization.* As an employee, the trial judge commented, it was possible that this offender bore less responsibility for this offence than did Wesley Henneberry, the license holder and a principle of the company. However, as with Count 6, Mr. Smith, "had a duty to

be aware of all the licence conditions and should have know, if he did not, that he had no authority to fish under that license." The defence suggested a fine of $2,500.00 to $3,000.00; the crown proposed $10,000.00. In the circumstances including "the seriousness of the offence and the somewhat lesser degree of responsibility of the offender," the trial judge imposed a fine of $10,000.00, plus a fine of $2,688.03 representing his apportioned share of the sale proceeds.

(b) **Count 19 -** *Fished for any species of fish set out in Schedule 1 of the Atlantic Fisheries Regulations, 1985 SOR/86-21 without holding a Fishers Registration Card.* The trial judge said this was, "perhaps the least serious of all the offences before the court," and "the only offence on which the Crown and Defence recommendations are in substantial agreement. Defence suggested $500.00; Crown, $500.00 to $1,000.00." She imposed a fine of $500.00.

James Phillip Ryan

Count 20 - *Fished for any species of fish set out in Schedule 1 of the Atlantic Fisheries Regulations, 1985 SOR/86-21 without authorization.* The defence proposed a fine of $2,500.00 and the Crown proposed between $10,000.00 and $15,000.00. Applying reasoning parallel to that on Count 18, the trial judge imposed a fine of $5,000.00, plus an additional fine $11.59 representing the offender's apportioned share of the sale proceeds.

Ivy Fisheries and Directors - Wesley Henneberry, Marcel Henneberry and Clarke Henneberry

Count 10 - *Purchased, sold and possessed fish caught in contravention of the Fisheries Act or the Regulations SAR.* The company sold illegally caught fish. As directors of the company, Clarke Wesley and Marcel Henneberry participated in these sales and received a share of the sale proceeds (as outlined in the other counts). The Crown sought substantial fines against the company pursuant to ss. 78 and 79. The Defence submitted that there was no

need for large fines against Ivy or the Directors because the fish involved had been "fined" under the individual charges and there was no evidence here of a master mind directing these infractions. The trial judge agreed with the Defence that, although illegal fishing and selling were "distinct delicts" there was some overlap with the other offences, particularly in respect of the Directors. As such, the principle of totality was considered. She rejected the submission that there was no planning, however, holding that it was "apparent that there was a coordinated effort to maximize profit from the Tuna Fishery, even if that meant breaking the rules and regulations." As such, she imposed a s. 78 fine of $25,000.00 upon the company. As to the directors, she imposed fines of $10,000.00 against each, "bearing in mind the principle of totality and the degree of overlap between these counts as against the company and as against each individual director as well as the lesser degree of overlap of this "selling count" with the various "fishing" counts against them....". Under s. 79 she imposed a fine in the amount requested by the Crown of $625,909.15. She also imposed a one year suspension of fishing license no. 142645, as requested by the Crown.

Andrew William Henneberry

Count 17 - *Purchased, sold and possessed fish caught in contravention of the Fisheries Act or the regulations.* The trial judge held that, "although he participated in the sales by arranging them and by receiving a portion of the proceeds in the form of "finder's fees", he had little, if any control, or actual knowledge of the commission of the fishing offences. His role was therefore less blameworthy than that of the other participants in the selling offence." Accordingly, she imposed s. 78 fine of $5,000.00 and a fine under s. 79 of $6,011.12 representing his apportioned share of the proceeds of sale of the 70 tuna. As noted, the s. 78 fine is not appealed from.

[157] The trial judge stated that, “the first step in providing an adequate deterrent sentence in this type of case is depriving the offenders of the benefit of their illegal fishing activity.” She went on to state that it was also necessary to impose “fines and other penalties sufficient to send the message to the specific offenders to other fishers and to the public at large, not only that the stocks will be protected, but that taking the chance of breaching the rules and regulations governing the fishery does not pay. She accordingly, imposed fines under s. 78 of the *Fisheries Act*, as set out in the summary above.

[158] S. 78 interacts with S. 79, which permits the imposition of an “additional fine” in an amount equal to the court’s finding of the amount of monetary benefits acquired or accrued to the offender.

[159] The Newfoundland Court of Appeal addressed s. 78 and s. 79 in *R. v. Oates*, [2004] NJ. No. 29 and *R. v. Meade*, [2004] NJ. No. 49. Wells, C.J.N.L. remarked on the relationship between the two section in *Oates*;

> 18 “... Obviously, parliament would be concerned that the penalty imposed under section 78 might have no deterrent effect in circumstances where the potential for reward from the prohibited activity could be greater than the risk of loss from imposition of

penalties. In such circumstances something more than a fine pursuant to section 78 would be needed. Section 78 provides only for the penalty that may be imposed, solely by reason of a person having been convicted of such an offence. Section 79 empowers the court to remove any profit to be made by carrying on the illegal activity. Only when such additional penalty is imposed, is the penalty imposed under section 78 fully effective as the penalty appropriate for such an offence in similar circumstances. ...

17 It should be noted that section 79 provides only for "an additional fine". Logically, a fine cannot be "additional" unless it is imposed in addition to some other fine or penalty, such as a fine under section 78. It can only be imposed if the condition precedent provided for in section 79 is established. That condition precedent is: the court, having imposed a fine under section 78, also being "satisfied that as a result of committing the offence the person acquired monetary benefits or monetary benefits accrued to the person". Again, that is precisely the consequence that results from the interpretation and application of the summary conviction appeal court judge. . . .

20 Not only is the court's power to impose an additional fine, under section 79, limited to any circumstance in which the court finds that a monetary benefit has accrued to the convicted person, the amount of the additional fine that may be imposed is also specified. It must be "in an amount equal to the court's finding of the amount of those monetary benefits" ... The court cannot choose to take into account any fine imposed under section 78 and, as a result, reduce the additional fine imposed. The statute is explicit. Any additional fine must be "equal to" the amount of the monetary benefits that the convicted person is found by the court to have acquired as a result of the illegal activity for which the conviction was entered. By that means, the integrity of the section 78 fine is preserved. It must be the fine appropriate to that offence, based on application of the principles of sentencing, and as the summary conviction appeal court judge decided, "without consideration of

> any benefit of the offender". Any such benefit is to be dealt with pursuant to section 79.

[160] The appellants take issue with the manner in which the trial judge calculated "monetary benefit" under s. 79. The trial judge imposed fines under s. 79 on the basis of the gross sales value of the fish involved. She rejected the appellants' argument that fines under s. 79 should be based not on gross sales, but on profit after the deduction of legitimate business expenses. The appellants relied on the Newfoundland Court of Appeal decisions in *Oakes* and *Meade.* In *Oakes*, Wells, C.J.N.L. interpreted the term, "monetary benefit" in s. 79 "as requiring the deduction of expenses incurred in the activity involved in producing it. If such expenses are not deducted, it is not "monetary benefit", it is "product value". The Appellants maintain that the trial judge erred in holding that "monetary benefit" refers to gross earnings rather than net earnings.

[161] In deciding that gross sales value should determine the amount of s. 79 fines, the trial judge accepted that, "gross income is a monetary benefit to any enterprise, whether or not there is a profit after all expenses have been deducted.... . There is a monetary benefit to any enterprise in being able to pay

its expenses; without gross income from which to pay expenses no enterprise can stay in business long." Furthermore, she said;

> To narrow the meaning of "monetary benefit" in this context to "net profit" is to overlook the paramount purpose of sentencing in a regulatory context; to deter both the offender and others in his/her position from engaging in the illegal activity. If offenders known that if caught, they will be deprived of the entire benefit of their illegal catch and that they will, therefore, have to pay for the cost associated with their illegal fishing from other sources, the cost benefit analysis will make illegal fishing much less attractive and they may be less likely to "take a chance" and if they know that even if caught, expenses will be covered."

[162] As such, the trial judge concluded, 'the term 'monetary benefits' in s. 79, at least in the case before me, should be equated with the sale price of the tuna." In my view, this is the correct approach to a s. 79 fine.

[163] The trial judge correctly noted that neither *Oakes* nor *Meade* appear to have been followed outside Newfoundland and Labrador, that is, by courts not bound by the Newfoundland and Labrador Court of Appeal. Decisions are sparse aside from the Newfoundland decisions. In *R. v. Reid, 2001 B.C.S.C. 1307,* the summary conviction appeal court imposed a s. 79 fine in the amount of the proceeds of sale. There is no suggestion that this amount should be reduced to

the net profit. Similarly, in *R. v. Rideout*, [2005] N.S.J. No. 9; affirmed, 2005 N.S.C.A. 133, the trial judge determined the respondents should not be entitled to the benefits derived from the illegal catch in the amount of $35,362.25, being a discretionary forfeiture of the full proceeds of the catch, as the principle of general deterrence would not be properly addressed. Again, there is no suggestion that this amount should be reduced to the net profit. In *Ross*, supra at para. 18 Freeman, J. considered, "the value of the seized catch" as part of the appropriate sanction. The Crown's position that if sentences are to be effective deterrents under the *Fisheries Act*, offenders cannot expect to retain their illegal catch or any proceeds realized from its disposition is logical and more in keeping with the principle of deterrence.

[164] In my view, the reasoning of the trial judge is preferable to the Newfoundland line of cases. The offenders cannot expect to receive the benefit of illegal activity otherwise, a fine is not a deterrent, it is the cost of doing business.

[165] In the event that her interpretation of s. 79 was incorrect, the trial judge held that the accused must establish legitimate business expenses on the balance

of probabilities. Failing that, the product value represents the best available evidence of monetary benefit. Although argued by the appellants, there is certainly no onus on the Crown to have to establish such expenses. The trial judge concluded on the evidence that the appellants had not met this burden and so the best evidence of monetary benefit remained the sale price. Accordingly, she allowed the s. 79 fine in the full amount requested by the Crown ($643,234.82), as apportioned by the Crown accountant expert, Brian Crockatt.

[166] The appellants allege the Crown's accounting expert, Mr. Crockatt, admitted on cross examination, there were valid expenses incurred over the course of the season in question, including wages paid to other individuals, fuel costs, ice and food. The line of cross examination to which the Appellants refer did not, in fact, include any admissions by Mr. Crockatt that the expenses referred to should be deducted for the purposes of determining the amount of a s. 79 fine. He agreed, essentially, that a fishing operation would involve expenses and that those expenses would be deducted in calculating net revenues. He maintained, however, that the total revenue was a monetary benefit. To reiterate, it is fundamentally out of keeping with the principles of deterrence that a s. 79 fine should be based on profit alone.

[167] The appellants say the trial judge made "erroneous findings of fact" by accepting Mr. Crockatt's qualifications of gross earnings (which was based on seized Ivy Fishery records) and by discounting the appellants' evidence regarding deductions, which was provided by Ivy Fisheries bookkeeper/office manager and was based on the same settlement sheets and other records that the Crown's accountant relied on. While admitting that these records were "imperfect" not having been kept for the purpose of a forensic audit, the appellants submit that they were the same records relied upon by the bookkeeper. With respect to the evidence, the trial judge said;

> [31] In the present case, the only evidence offered by the defendants as to their expenses was the testimony of Ms. Henneberry as to the expenses she deducted in the trip settlement for the period September 16th to December 16th 2000. On cross examination it became clear that not all of these expenses related to the tuna fishery. More importantly, the Defence put no evidence before the court as to which and what proportions of the expenses could properly be ascribed to the 70 tuna for which the Crown seeks the sale price by way of additional fine(s).
>
> [32] I conclude that the defence has not met the burden of establishing on the balance of probabilities the expenses that ought to be deducted from product value. The evidence before the court as to the monetary benefit to the offenders of those 70 tuna is therefore the sale price established by the Crown.

[168] The law as to summary conviction appeal court's ability to review the trial judge's findings of fact is clear. This court cannot simply re-weigh the evidence and make new findings of fact (*R. v. Galloway*, [2007] NSCA 10 at para. 20). The appellants' complaint concentrates on the trial judge's weighing of evidence. There is no principled basis upon which to find the trial judge's findings are not reasonably capable of supporting the trial judge's conclusions.

[169] The appellants also argue that the trial judge failed to consider the discretionary nature of s. 79 fine and applied the provision, "in a manner contrary to legal norms". The appellants submit that the word "may" in s. 79 indicates that an additional fine is discretionary, "over and above the fines ordered against the individuals for each of the various offences." The appellants contend that each of the s. 79 fines relates to, "a series of alleged errors committed by individuals throughout the course of the fishing season, which resulted from an audit of all the books and records many months after the fact. This, they submit, is different from a situation where a fishery officer seizes the catch of a particular fishing trip at the dock. To levy a fine in addition to numerous other fines which combined, totals $839,734.83 in addition to a

licence suspension, the appellants submit, “goes far beyond the measured exercise of discretionary sentencing power”.

[170] In the Crown’s view, s. 79 is part of “a package of penal provisions intended to deter offenders, in part, by preventing the retention of an illegal catch or the monetary benefits derived from its disposition.” Like the forfeiture of fish or proceeds under ss. 72(1) and (2), an additional fine under s. 79" may be compared with depriving a thief of his loot” and by itself should not be considered a strong enough deterrent. The *Fisheries Act* allows the court to apply various penalties - including forfeiture, fines and additional fines - in order to fashion a sentence that adequately addresses the over riding principle of deterrence.

[171] The context for the trial judge’s s. 79 conclusion is found in the following relevant facts;

1. During the September 16th to December 16th, 2000 time period, Ivy Fisheries Limited utilized five licences to fish for Bluefin Tuna. Five vessels fished these licences. In this time period, 176 Bluefin Tuna were recorded as caught under these licences. Some 135 of the 176 Bluefin Tuna were caught in contravention of the *Fisheries Act* or its regulations and are involved in the charges before this court.

2. Ivy Fisheries Limited sold each and every one of these illegally caught 135 Bluefin Tuna. The total proceeds realized from the sale was $1,196,412.53.

3. $643,234.82 is the sales value of the 70 tuna related to the most serious offences, namely: counts 3, 6, 8, 9, 10, 17, 18 and 20.

4. Forensic Accountant, Brian Crockatt apportioned the sale proceeds of $643,234.82 amongst the convicted recipients for counts 3, 6, 8, 9, 10, 17, 18, and 20.

5. After having determined that the only relevant evidence before the court as to the amount of monetary benefit derived from the sale of these 70 Bluefin Tuna, was the sale value thereof, the learned trial judge apportioned the sale proceeds of $643,234.82 amongst the convicted recipients for counts 3, 6, 8, 9, 10, 17, 18, and 20 through the imposition of additional fines under s. 79 of the *Fisheries Act*.

[172] The trial judge made clear findings of guilt at trial, made definite findings respecting the gravity of the offences and the responsibility of the offender, and was clear that deterrence was the predominating consideration in the sentencing. The appellants offer no principled reason to reduce or eliminate the s. 79 fines on the basis that they were excessive. Even if this court believes that s. 79 fines should have been in different amounts, there is no apparent basis to conclude that wrong principles were applied or that the fines did not fall into a reasonable range.

[173] The Crown points out that the court's "routinely" impose licence suspensions for regulatory violations in the commercial fishing context. The rational for a licence suspension was discussed in *R. v. Cluett*, (2002), 217 Nfld. and P.E.I. R. 87, (Nfld. S.C.T.D.):

> [63] Each one of these components of the sentence imposed on the Appellant has a "educational" or "instructive" aspect to it; the community service and probation orders are obviously of that kind. They are designed to inform the appellant and others in the community of the foolhardiness of his wrongful activity. However, the fine and the prohibition from fishing, aside from simply punishing the appellant, also serve that purpose. The appellant knows by the amount of the fine imposed on him that there is a substantial penalty for not adhering to the regulatory scheme that has been put in place to protect the fishery. Others who become aware of it will be informed by the same measure.
>
> [64] However, it is the prohibition from fishing that will be of greater service in deterring the appellant and others. The appellants will not be able to start the fishery when the season opens in 2003, as he has been wanting to do all his adult life. He will know by that limitation that he does not have an unrestricted right to harvest the resource but only enjoys it as a privilege that will be taken away if he does not act to preserve and sustain the resource. The appellant's lobster fishing peers in that area of Fortune Bay, NL. will know that the appellant cannot go back fishing in 2003 when they do. It will certainly be a matter of public comment and discussion and so will the reason why he cannot do so. Hence, others who become informed of that development will learn, as does the appellant, that their status vis-a-vis, the fishery and their obligation to practice wise husbandry in how they deal with the resource. By that means, the prohibition with serve as the most

> demonstrative of the remedies employed by the trial judge in his bid to achieve deterrence.

[174] In this case, the trial judge imposed a licence suspension under s. 79.1 of the *Fishery Act* and made the following remarks in relation to the license suspension;

> [92] Dealing with the Crown's request for a one year suspension of fishing license number 142645, I note that it is an enterprise allocation licence for tuna unspecified and is the only one of the licenses involved in these offences which has been in active use by the company every year to the present. Like all of the licences involved, since the laying of these charges it has been "frozen" as to transfers by the issuance of a Suspension Pending Notice. Although the registered owner of this licence is 10474 (Nfld.) Ltd. it has apparently been leased by the defendant company for some considerable period of time.
>
> [93] Suspension of a fishing licence involved in the offence is one of the sentencing options available to achieve the paramount principle of deterrence under the Fisheries Act. I find that, in the overall context here, suspension of this licence for the period requested is warranted and it will be ordered.

[175] The appellants contend the trial judge did not have jurisdiction to issue a licence suspension and prohibition against Fishing License No. 142645, which was owned by 10474 (Nfld.) Ltd. a company that was "not implicated in this matter". According to the appellants, to prohibit 10474 (Nfld.) Ltd. from

applying for a new lease or licence is contrary to the "plain and ordinary meaning" of s. 79.1. This is an insupportable reading of the provision. S. 79.1 distinguishes between "a person convicted of an offence under this Act in respect of any matter relating to any operations under a lease or licence issued pursuant to this Act or the regulations," and "the person to whom the lease or the licence was issued". On its face, the section does not require that the person to whom the licence was issued be convicted of an offence, or charged with one, for that matter. Nor, does it require that the person convicted be the licence owner; all that is necessary is that the conviction be "in respect of any matter relating to any operations under a lease or a license". Implicit support for this view is found in the comments of Decary, J.A. in *Joys v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 385 at par. 34, that the person to whom a licence is issued, "assumes with his signature responsibility for compliance with the *Fisheries Act* and Regulations."

[176] Furthermore, the appellants also contend that there is no indication that the Suspension Pending Notice referred to by the trial judge was provided to the owner of the licence. There does not appear to be any denial that it was provided,

and the appellants do not elaborate on the effect of such an omission, if it were established.

[177] Finally, the appellants say the "massive fines in this case, given that the fish were tagged, hailed, and within quota, is grossly disproportional and overly harsh." The appellants have not offered any principled basis for their claim that the sentencing judge erred. Their position appears to be that the fines are excessive because they are higher than fines that have been imposed in other fishery cases. In their "sampling of fines in fishery cases", if indeed the point is to reflect fines attributable to less serious offences, they failed to reference the fairly recent Nova Scotia Court of Appeal affirmation of a $5,000.00 fine imposed for a conviction of possessing six short lobsters. (*R. v. Croft*, 2003 NSCA 109). Of the cases listed by the appellants, virtually none have facts that resemble the facts here. It should also be noted that s. 78 contemplates fines up to $100,000.00 for first offences prosecuted on summary conviction. Fines cannot be considered to be inappropriately high simply because the appellants would have preferred lower ones.

[178] I agree with the Crown's submission that the trial judge considered the established sentencing range together with the circumstances of the offences. The trial judge properly emphasized deterrence in the context of conservation related commercial fishing violations and imposed penalties sufficient to strongly encourage statutory compliance. The trial judge's decision is entitled to difference. The penalties fall within the established sentencing range and were not excessive or unreasonable in the circumstances. The Crown illustrates this with the following points;

1. Ivy Fisheries reported gross fishing income of $5,027,178.13 in 2000.

2. During September 16th to December 16th, 2000 time period for all species of fish recorded as being caught under licences utilized by Ivy Fisheries, the total sales value was $1,854,182.40. During the same time period, 176 Bluefin Tuna were recorded as being caught under licences utilized by Ivy Fisheries Ltd. The total sales value of those 176 Bluefin Tuna is $1,550,212.04.

3. 135 of the 176 Bluefin Tuna were found by the trial judge to have been caught in contravention of the *Fisheries Act* or its regulations and are involved in the charges before the court. The total sales value of 135 illegally caught Bluefin Tuna is $1,196,412.53. The total sale values of the 70 Bluefin Tuna related to the most serious offences is $643,234.82.

4. The trial apportioned only the sale proceeds of $643,234.82 amongst those convicted for counts 3, 6, 8, 9, 10, 17, 18 and 20 and not the sale proceeds for all 135 illegally caught Bluefin Tuna.

[179] The appellants point to no error in principle that would justify interference with the sentences. Determining s.78 fines, the sentencing judge considered the ranges suggested by the Defence and the Crown; while the fines were typically higher than those suggested by the Defence, this does not render them unfit. The trial judge took note of the circumstances of the offenders, including each individual's family and income status, and their status as a principal or employee of Ivy Fishery Limited. She recognized the primacy of deterrence in regulatory sentencing, particularly in the fishery, where a scarce and declined resource is put at risk by overfishing.

[180] I would dismiss these grounds of appeals.

Issue 9

Should this court, in the absence of a Charter Application before the learned trial judge, undertake on its own initiative an inquiry into Andrew William Henneberry's wheelchair access to the Lunenburg and Liverpool courthouses and determine whether that access has prejudiced the appellant's right to make full answer and defence and his right to the equal protection and equal benefit of the law without discrimination based on physical disability, thereby constituting a breach of the appellant's rights under s-s.7, 11(d) and 15 of the Charter?

[181] The appellants claim that the trial judge erred in failing to stay the charge against Andrew Henneberry, who was hindered in attending portions of the trial due to lack of wheelchair access. On two occasions, once leading up to the trial and once during the sentencing hearing, Mr. Henneberry was unable to enter courtrooms in Liverpool and Lunenburg, respectively, due to lack of wheelchair access. The appellants say the failure to facilitate access constitutes a breach of Mr. Henneberry's rights under s. 15 of the *Charter of Rights and Freedoms*, on the grounds of disability. Although their Amended Notice Pursuant to *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, states this ground of appeal relates to Section 7, being the right to make full answer and defence and Section 15 issues, their factum focuses on Section 15. Neither case cited is of any particular assistance on the facts of this proceeding, (*R. v. La* [1997] 2 S.C.R. 680; R. v. Morrissey, [2003] O.J. No. 1475).

Events

[182] The first occasion when Mr. Henneberry was unable to access court facilities was during proceedings at the Liverpool courthouse. The wheelchair access ramp had not been cleared of ice and snow and the adjoining door into the courtroom could not be opened. Once this was brought to the court's attention

steps were taken to clear the ramp and the door. During that time, Mr. Henneberry had to sit in his truck in the parking lot. Mr. Henneberry did not miss any actual court time nor was there any suggestion of the *Charter* issue at the time.

[183] At the opening of proceedings on May 25, 2006, the apellant's counsel, Mr. Hart, informed the trial judge that Mr. Henneberry had arrived at the courthouse but was unable to get into the Lunenburg courtroom. The trial judge said, "[W]e could have switched courtrooms." Mr. Hart said he had not been aware of the problem until Mr. Henneberry asked whether he could get into the courtroom. Mr. Hart added, "I'm not suggesting that we don't go ahead...". the trial judge said, "He certainly has a right to be here....". Mr. Hart stated that Mr. Henneberry was not willing to be carried in, not only for reasons of "pride", but also because "he doesn't want to be trapped, if something happens...". The trial judge had inquiries made about moving the sentence hearing back to Bridgewater for the afternoon, but his proved impossible. Mr. Hart took responsibility for not raising the issue earlier and accepted the trial judge's remark that, "Your clients hadn't shown up any other time and I guess I wasn't thinking of their being here today.... And even if I had, I'm not sure that that would have occurred to me."

There was no suggestion from the appellant that the proceeding should be adjourned, let alone any hint that a *Charter* violation was taking place.

Conclusion

[184] The events in Lunenburg, as noted by the Crown, appear to relate more so to whether the lack of wheelchair access to the courthouse prejudiced Mr. Henneberry's right to make full answer and defence at his sentencing hearing under s. 7 and s. 11 (d) of the *Charter*. Although not cited by the appellant as an authority, Justice Warner in *R. v. Francis* 2007 NSSC108 at para. 30 raises the possibility of a remedy for a s. 15 complaint by an accused in the position of Mr. Henneberry. Whether the issue is one or both, I decline to exercise my discretion "to provide a 'second shot' to raise an issue which could have been raised at trial" before the trial judge. (*R. v. Toor* 2001 ABCA 88 at praas. 12-18; 20, 21, 22 quote, 23 and 24; *R. v. Hayes* [2003] O.J. No. 4590 (Ont. C.A.) at para. 64; *R. v. Dizon* [2005] O.J. No. 4496 (Ont. S.C.J.) at para. 16; *R. v. Rahey*, [1987] 1 S.C.R. 588 at para. 16). In the circumstances, it is contrary to the principle of finality to permit a fresh *Charter* argument on appeal (*Dizon*, supra at para. 17; *Perka v. R.*, [1984] 2 S.C.R. 232 at para. 240; *R. v. Logan* (1988), 46 C.C.C. (3d) 354 (Ont. C.A.) at para. 50 (affirmed at [1990] 2 S.C.R. 731); *R. v. Seahoyer*, [1991] 2 S.C.R. 577).

[185] First of all I simply note, there is no reason to conclude that such a remedy must be in the form of a stay of the charges against the accused. Section 24(1) provides only that, "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Moreover, the appellant not only failed to raise a *Charter* challenge at trial; but, in addition, the facts that are now said to establish the right to a *Charter* remedy were discussed by counsel, with no suggestion that a remedy was required. The fact that the appellant had advanced other *Charter* challenges at trial indicates that this was "not a case where appellant's counsel was unfamiliar with his client's *Charter* rights". (*Dizon*, supra at para. 16). Above all, the appellant raises the *Charter* issue for the first time on appeal. There are no apparent circumstances that support dealing with the issue at this stage such as a change in the law or having the potential to reverse the conviction. Furthermore, even if there had been a failure to grant an adjournment and at issue was whether the trial judge erred in so doing, this is not a question of pure law; rather, "whether the learned trial judge erred in refusing to grant an adjournment in these circumstances is a question of mixed fact and law" and thus, an issue dependant upon findings of fact as well as a matter of the trial judge's discretion (*Toor*,

supra at para. 12 and 13-18). Moreover, the lack of evidence led by the Crown at trial on any potential Section 1 justification, which could then be relied upon on appeal militates against allowing a fresh *Charter* argument on appeal. (*R. v. Beardy* (1993), 83 Man. R. (2d) 308 at para. 5).

Disposition

[186] The appeal is dismissed. The stay of the fishing licence suspension expires within five hours of the release of this judgment.

J.