IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R v. Neary, 2010 NSSC 466

Date: 20101221
Docket: CRAT 328527
Registry: Antigonish

Between:

Her Majesty the Queen

Appellant

v.

Darrel Neary

Defendant

Judge: The Honourable Justice P. Rosinski

Heard: November 10, 2010, in Antigonish, Nova Scotia

Written Decision: December 21, 2010

Counsel: Ronda Vanderhoek, for the plaintiff
Darrel Neary, self represented, for the defendant

By the Court:

[1] This is the oral decision in relation to a summary conviction appeal launched by the Federal Crown in relation to 2010 Court Number 328527 in Antigonish. It related to a charge number 2026915, person number 74529.

[2] Essentially the Federal Crown is appealing a decision of the Honourable Judge John D. Embree of the Provincial Court of Nova Scotia, which decision was rendered April 6, 2010. In that decision he acquitted Mr. Neary of an offence charged against him.

[3] Specifically:

> that on or about the 10th of August, 2009, at or near Ballantynes Wharf, in the County of Antigonish, Province of Nova Scotia, he did:
>
> > have in his possession mackerel less than 25 centimetres in length contrary to s-s 48 (1) of the said *Atlantic Fisheries Regulations,* SOR/86-21, as amended, and thereby commit an offence under s. 78 of the *Fisheries Act*, revised R.S.C. 1985, c.F14, as amended.

[4] The grounds for the appeal here are that the Provincial Court Judge erred in his interpretation and application of s, 48 of the *Atlantic Fisheries Regulations*. The relief

requested is that the Crown requests that this Court should allow the appeal, set aside the acquittal, enter a conviction against Mr. Neary and pass a sentence that is warranted by law or in the alternative, order a new trial before a different Provincial Court Judge.

[5] Now just by way of introduction, s. 78 of the *Fisheries Act* is what is known as a hybrid offence. The Crown is entitled to elect it as an indictable or summary conviction offence. In this matter the Crown elected by summary conviction. The Crown has appealed the summary conviction acquittal. It may do so pursuant to s. 86(2) of the *Fisheries Act* and the procedure afforded by s. 813 and s. 822 of the *Criminal Code of Canada* for summary conviction appeals. *Civil Procedure Rule* 63 governs the matter of process respecting such appeals. This appeal is properly brought before this Court.

[6] As indicated the grounds of appeal are that the trial judge erred in his interpretation and application of s. 48 of the Regulations. The standard of review to be applied by this Court in reviewing the decision of the trial judge, where an error of law is alleged, is that the trial judge must have correctly interpreted, cited and applied

the relevant law. Thus, correctness is the proper standard of review that this Court will use in assessing the trial judge's treatment of the relevant law.

[7] I note that it has become an issue in this case as to the proper interpretation of s. 48 of the *Atlantic Fisheries Regulations* , and because those regulations are in both the French and English language, there may be advantage, although I did not notice any discernable advantage in this case, to regard, having regard to both the French and English in a effort to properly interpret a section such as that and as in the Supreme Court of Canada case *R v. S.A.C.* 2008 SCC 47 or [2008], 2 S.C.R. 675, para(s). 14 to 17 where Deschamps, J. talks about how you would go about that process.

[8] Now turning to the trial Judge's Decision, which is at issue here. The trial judge noted at para. 2 of his Decision:

> "[2] The Crown bears the burden of proving all the elements of that offence beyond a reasonable doubt."

[9] He went on to say at para. 17 of his Decision:

> "[17] In the circumstances here, an offence is created under Section 48 (1) if it can be established beyond a reasonable doubt that Mr. Neary was in the process of

> catching mackerel and that his catch of undersized was incidental to catching longer mackerel, but that ten percent or more of the number of, as a percent of the longer mackerel, were undersized, then that's an offence. And it's going to depend on the size of the catch and the circumstances as to whether a Court is satisfied beyond a reasonable doubt that the catch exceeded, the number undersized exceeded ten percent of the number of longer mackerel."

[10] It is clear from the trial judge's Decision that he is treating s. 48(2) as an element of the offence to be proved here by the Crown beyond a reasonable doubt.

[11] He, in his last para. of his Decision, at para. 27 said in part:

> "[27] So, based on the evidence I heard, Mr. Neary, you have to be a little bit more careful about how you're catching mackerel, no question about that. But I'm not prepared to say the Crown's proven you guilty of this offence beyond a reasonable doubt that you had more then ten percent of your catch in undersize. You probably did, but there's a doubt., so you're not guilty."

[12] So clearly the trial judge here has determined that s. 48(2) constitutes part of the elements of the offence that must be proven by the Crown in order to obtain a conviction.

[13] Now with that background, what were the facts that were found by the trial judge? It was undisputed that Mr. Neary had been fishing for mackerel and he was

not using gill nets and that as a result of that one fishing trip when he returned to the wharf in Ballantynes Cove, he had in his possession mackerel that were in fact less then 25 centimetres in length at 7 o'clock, approximately in the morning that day. And about 10:00 a.m. the Department of Fisheries officers properly took five random samples of fish from the remaining catch and found that they were, contained a number of undersized mackerel. The references in the transcript in the Appeal book are at p. 39, line 7. The first sample showed 25 small mackerel, 25 longer mackerel. The second sample at p. 45, line 17 showed 33, smaller mackerel, and 17 larger. The third sample at line 10 of p. 46, shows, 26 smaller mackerel and 24 larger. These are all 50 size samples. The fourth sample at p. 74, line 17 shows 39 of 50 mackerel, were small. And the fifth sample at p. 75, line 1 showed 35 of 50 mackerel were small. So there was substantial percentages of small mackerel among the large mackerel.

[14] Now, how many mackerel Mr. Neary actually had in his possession however was in dispute because: Firstly, when he brought his mackerel caught onto the wharf at approximately 7:00 a.m. the catch was in 2 tote boxes primarily, which were not weighed nor were the number of fish caught counted or measured. Secondly, between 7:00 a.m. and 10:00 a.m. when the fisheries officers arrived a number of individuals took up to, what could have been as much as one third of the total catch for their own

consumption from the tote boxes leaving as little as, two thirds of the original catch which was available to the fisheries officers to sample. Thirdly, the fisheries officers were only able to inspect, if you will, the depleted catch not the entire catch, and more over numerous witnesses testified that the individuals who had taken up to the one third of the catch previously, had taken the larger mackerel in preference to the smaller ones.

[15] Now with that back drop I turn again to the trial Judge's Decision. At para. 4 of his decision he said in part: "... the principal issue is, what does the evidence establish about the percentage of Mr. Neary's catch? ..." and I will add in there in brackets ["that were undersized"]. That was the question that the trial Judge focussed on. What does the evidence establish about the percentage of Mr. Neary's catch that were undersized?

[16] He went on to conclude that since the Department of Fisheries officers were not able to inspect the **entire** catch of the mackerel landed at 7:00 a.m., therefore the Crown could not rely on the 5 samples that the Department of Fisheries officers took sometime after 10:00 a.m. and pursuant to the statutory requirements of s. 48(3), which could in a proper case prove that the entire catch had greater than 10 percent

undersized mackerel potentially-and this is references to the trial Judge's Decision at paras. 11 and 15.

[17] Now the Crown's position as the Appellant here is that the trial Judge erred in interpreting s. 48(3) as requiring that the **entire** catch must be sampled in order for the Crown to have had the benefit of s. 48(3) and thereby prove that more then 10 percent of the catch of Mr. Neary was undersized mackerel and he consequently, should be found guilty. And this is at paras. 29, 32, 35 and 37 and 38 and those are references to the Appellant's factum.

[18] Mr. Neary's position in this Court is that, basically the trial judge got it right. The Crown has to prove as an element of the offence, that the provisions of s. 48(2) have been met. That being that the catching of the mackerel was incidental to the catching of larger or longer mackerel and more importantly that:

> "(b) the number of mackerel less then 25 cm ... retained during any one fishing trip does not exceed 10 % of the number of longer mackerel caught and retained during the fishing trip."

[19] His point, and that taken by the trial Judge, was that the **entire catch** must be sampled, and failing that the Crown can not rely on the sampling methodology, short cut if you will, that is provided for in s. 48(3) of the Regulations.

[20] Now with that background I will turn to an analysis from my perspective of what is the situation in this case. To my mind the key question is: what are the elements of the offence in the case of an allegation under s. 48(1) of the *Atlantic Fisheries Regulations*? Section 48(1) of the Regulations in English reads "Subject to ss. (2) and (4), no person shall fish for, buy, sell or have in his possession any mackerel that is less than 25 cm in length."

[21] So it would seem at least that ss. (1) requires the Crown to prove that you have possession of mackerel, and one or more of those are less then 25 centimetres in length. However, s. 48(1) also speaks about "subject to ss. (2) and ss. (4)" which latter subsection is not relevant here. Subsection (2) reads:

> "(2) Subsection (1) does not apply with respect to mackerel that are less than 25 cm in length where
>
> (a) the catching of the mackerel was incidental to the catching of longer mackerel; and

> (b) the number of mackerel less than 25 cm in length retained during any one fishing trip does not exceed 10 % of the number of longer mackerel caught and retained during the fishing trip."

[22] Subsection (3) sets out a formula and that the percentage in s. 48(2)(b) shall be determined on the basis of a formula or 4 or more samples taken from the catch, which each sample containing 50 or more mackerel.

[23] So do the requirements that the mackerel which are short, have to be proved by the Crown to have been caught incidental to the catching of longer mackerel **and** that the amount of those short mackerel do not exceed 10 percent of the number of longer mackerel caught and retained during that same fishing trip?

[24] I will note that there is still under the Act itself in s. 78.6 what is called a due diligence defence which could, in some circumstances, protect a fisherman from being convicted in relation to really any offence under the Act, but it could apply to this offence of s. 48(1) of the Regulations as well. It reads:

> "No person shall be convicted of an offence under this Act if the person establishes that the person:

(a) exercised all due diligence to prevent the commission of the offence; or

(b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent."

[25] So, regardless of s. 48(2) and the measuring of the catch and the 10 percent and such, it is possible for a fisherman to rely on this s. 78.6 as well to show that they were diligent in preventing the commission of the offence, and there are cases where fisherman have done their own sampling and in fact being acquitted. One of those is reported as *R v. Levi Snook*, file number 0805A-00294 a Decision of Judge Porter, of the Newfoundland Provincial Court on November 22, 2005. It is apparently available publicly under the search for 2006 CanLii 43062. In that case the acquittal is rendered because the fisherman had made his own diligent efforts to avoid having undersized fish, I believe, it was herring in that case.

[26] I might note parenthetically here that s. 44(2)(b) of the *Atlantic Fisheries Regulations* contains an almost identical provision regarding herring and that was the subject of the *Snook* case.

[27] So really back though to the trial Judge's position that s. 48(2) is an element of the offence that the Crown has to prove. I will refer to a couple of cases here, but, I certainly can indicate that it is my legal opinion that s. 48(2) is **not** part of the offence.

[28] Perhaps I'll refer just briefly to a Decision *R v. Saunders*, [1989], 94 N.S.R. (2d) 224, Decision of the Nova Scotia Court of Appeal authored by Justice MacDonald. In that case, I'll just summarize, it involved the *Atlantic Fisheries Regulations*, and Mr. Saunders was convicted of fishing for pollock during the closed time. He testified that he had been fishing haddock, and when the catch turned out to be pollock, he decided to sell it rather then return the fish to the sea as required by Regulations.

[29] On appeal to a County Court Judge, the County Court Judge over turned his conviction on the basis that he was not fishing "for pollock" and there was reasonable doubt that he intended to fish for pollock.

[30] The Nova Scotia Court of Appeal subsequently overturned the County Court Judge and found that being convicted of having fished for pollock is not an offence for which he had to have intended to have fished for pollock, but that it was a strict

liability offence. Thus if he had in fact pollock in his catch, he would only escape liability for this strict liability offence if he could show that he was duly diligent in trying to avoid having pollock in his catch. And it is just for the general proposition regarding strict liability offences that I mention this in the context of the present case.

[31] At para. 17 MacDonald, J. said: "It is clear to me that both Judge Freeman [the County Court Judge] and Mr. Hood [the lawyer for Mr. Saunders] treated this case as one requiring full mens rea," [or intention, criminal intention that is my paraphrasing], I do not agree. In my opinion, this is a regulatory offence of strict liability as explained by Dickson, J. (as he then was), in *Regina vs City of Sault Ste. Marie*, [1978], 2 S.C.R., 12 99 and 40 C.C.C. (2d) 353. In that case Dickson, J., said (pp. 373-374:...):"

> "I conclude for the reasons which I've sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving 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. ...
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

[32] And MacDonald, J. in the *Saunders* case goes on to note that Dickson, J. later said at pages 375 and 6 in *Sault Ste. Marie*:

> "Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care."

[33] So that is just by way of introduction. Perhaps I will also refer to our Court of Appeal on this question of whether this is an offence that includes s. 48(2) or just s. 48(1) and that is *R v. Henneberry* 2009 NSCA 112 a decision penned by Saunders, JA. of the Court of Appeal. And a review of paras. 28, 31 and 33, I find of assistance in this case. In para. 28 Saunders, JA. said:

> "28 There is no dispute that the offences under the Fisheries Act and the Regulations for which the appellants were convicted are all strict liability offences. Any consideration of this category of offence begins with R. v. Sault Ste. Marie (City), ... There, Dickson, J. (as he then was) reviewed the three categories of offences as: offences requiring proof of mens rea; offences of absolute liability; and offences characterized as strict liability offences."

[34] Next he goes on in para. 31 in *Henneberry* to say:

> "31 As was made clear by Justice Dickson in Sault Ste. Marie, in cases involving strict liability, once the Crown has proved beyond a reasonable doubt the essential elements of the offence (which, in strict liability offences, is the actus reus)," [That is a Latin term for the doing of the act]:
>
>> the offence is prima facie imported. At this point - - to borrow the language from the Supreme Court's subsequent decisions - - liability is "conditionally" imposed. Ultimate liability may be avoided if the accused satisfies the burden to prove, on a balance of probabilities, that he or she was duly diligent or acted under a reasonable or mistaken belief. Such a defence will be assessed on a reasonable person's standard. Failure to establish this defence will result in criminal liability and conviction for the offence."

[35] And, to similar effect at para. 33. I might note in *Henneberry* the charges included (the Henneberry's were a family that owned Ivy Fisheries Limited):

> "Five [of their] fishing vessels fished under these licenses and during this three month interval 176 bluefin tuna were recorded as being caught. Of those 176 bluefin tuna, 135 were found to have been caught in contravention of the Fisheries Act,"

[36] And they were found to have sold these 135 blue fin tuna for actually almost 1.2 million dollars.

[37] So that is an indication that generally, from that and also from another case in the Nova Scotia Court of Appeal, *Saunders* and the *Sault Ste. Marie* case, which also

tends to support the proposition generally in regulatory offences, which this is one of, that they tend to be considered strict liability offences. That is, the doing of the act, for example having possession of the fish, will be the conditional, if you will, requirement for finding of guilt. That can be rebutted by the accused person if they can show it is more likely then not that they were duly diligent. Either in trying to avoid being in possession of that many small fish, as in this case, or they were basing their view on some mistaken set of facts, which if true would have allowed them to be found not guilty.

[38] In the *Saunders* case, 1989 94 N.S.R. (2d) 224, again this was involving the *Atlantic Fishery Regulations* and this is the case I had referred to earlier. Mr. Saunders was convicted of fishing for pollock during closed time. That again is another instance where our Court of Appeal has held and not surprisingly that this, offences under the *Atlantic Fishery Regulations* generally speaking would be considered strict liability offences. So that suggests to me that generally speaking, the interpretation that s. 48(1) constitutes the offence, and that s. 48(2), of Regulations does not constitute part of the offence, is appropriate.

[39] Perhaps I will note as well that it is possible that s. 48(2), although not an element to the offence, could be seen as either an exemption, exception, proviso, excuse or qualification prescribed by law under s. 794(2) of the *Criminal Code*.

[40] I have examined a number of cases about whether this is so, and generally speaking, I would conclude that it is unlikely, in my view, that s. 48(2) is actually, an exception, exemption, proviso, excuse or qualification prescribed by law as per s. 794(2).

[41] Without going into the greatest of detail, the cases I looked at were *R v. P. H.* [2000], O. J. No. 306 a Court of Appeal Decision, paras. 7 and 14 to 15.

[42] *R v. MacKenzie*, [1990] P.E.I. J. No. 65 Decision of McQuaid, J. as he then was, that was respecting s. 92.1(1)(a) of the *Atlantic Fisheries Regulations*.

[43] *R v. Daniels*, [1990] B.C.J. No. 2379 a Court of Appeal Decision regarding Sanitary Regulations regarding shellfish I believe. And *R v. D.M.H.*, [1991] N.S. J. No. 417, of our Court of Appeal.

[44] So my general sense is that this is not one of those exceptions under s. 794(2) of the *Criminal Code*.

[45] Then thirdly, is it a due diligence defence essentially statutorily created? And I do conclude that is what s. 48(2) is. In that respect I have reviewed of course the *Sault Ste. Marie* case from the Supreme Court of Canada, as well as from our own courts, Court of Appeal decisions in *R v. Croft* which is 2003 NSCA 109 or 218 N.S.R. (2d) 184; it is the decision of Saunders, JA, and *R v. Harris*, [1997], 165 N.S.R. (2d) 73, it is a decision of Roscoe, JA..

[46] Now in the *Croft* case by Saunders, JA, the facts there were that Mr. Croft was fishing for lobster, he caught a 100 to a 150 pounds, and that was inspected by Department of Fisheries and Oceans. From the inspection it was determined that he had 6 short lobsters, less than 82.5 millimetres, and as a result he was convicted at trial for possession, unlawful possession of undersized lobsters contrary to s. 57(2) of the *Atlantic Fisheries Regulations*. He appealed to this Court and the appeal was dismissed, and then he appealed to the Court of Appeal.

[47] The Court of Appeal dismissed his appeal and noted in relation to this offence and it is, s. 57(2) of the *Atlantic Fishery Regulations* and it read:

> "No person shall possess, in a Lobster Fishing Area set out in column I of an item of Schedule XIV, a lobster of a length that is less than the length set out in column III of that item."

[48] And Saunders, JA. goes on to say:

> "The charge is made out simply by proving the *actus reus*, which is then subject only to the limited statutory defences provided in the Act.
>
> [12] Section 78.6 provides:

[49] And he goes on to read that section which I have referred to as well. Then in para. 13 of that Decision he notes:

> "13 Section 78.6 (a) permits a defence of due diligence. Section 78.6 (b) allows a defence based on reasonable and honest mistake of fact. This is essentially a statutory codification of the two defences to strict liability offences described in R. v. Sault Ste. Marie,"

[50] So there again we have a situation where there are undersized lobsters, and it is considered a strict liability offence. Now in fairness, in that case, *Croft*, there is no s. 48(2) equivalent.

[51] The other case, *Harris* is a little more comparable. In that case Mr. Harris violated his ground fish license by taking haddock in excess of the quantity permitted. He took 847 pounds of haddock in excess of the quantity permitted. He had followed his **usual** custom of estimating fish weight by noting how it measured on the pen boards and he assumed that **as usual** his crew member had followed his instructions with regards to the amount of fish in the pens. He was acquitted in Provincial Court as the trial judge concluded that he has demonstrated more likely than not, a reasonable and honest belief in the existence of the above facts, which if true would have rendered his conduct innocent, that is he relied on the other people.

[52] Appealing to the Supreme Court the Decision was found to be not reasonable, and he was convicted. And on appeal to the Court of Appeal, it reinstated the trial Judge's acquittal.

[53] So again although there is not the s. 48(2) equivalent there, we have an example where it seemed to be a regulatory offence that is strict liability. And of course I have referred to the *Snook* case as well already.

[54] It seems that the way s. 48 is structured, it is most consistent with a finding that s. 48(1) is a strict liability offence. That is that, once you are found in possession of under sized mackerel that is, if you will, the initial aspect of the offence is proved. Then there is available though to a fisher person s. 48(2) which indicates that it is not an offence, ss. 1 will not apply, if you can show: One, the catching of the mackerel was incidental to catching of longer mackerel. I say parenthetically as well, who is in a best position, if you will, and maybe the only position to say where did the fish actually come from. It would be the person who was fishing who could then say the catching is incidental to catching of longer mackerel.

[55] Secondly in s. 48(2) (b), that the number of mackerel retained during any one fishing trip does not exceed 10 percent of the number of longer mackerel caught. Well again it is, although we had an argument here about the, whether the whole catch had to be sampled or not, but who better knows what mackerel were actually retained during any one fishing trip, I would suggest than the fisher person?

[56] So it does seem that the design of s. 48(2) is a **statutory due diligence defence**. It is one way that the fisherman is protected from having by catch, provided the by

catch is not too great, and it does not exceed 10 percent, the smalls do not exceed 10 percent of the number of longer mackerel catch.

[57] Having concluded that brings me to the point where obviously I disagree on this issue with the trial Judge. The trial Judge found that the Crown had to prove, under ss. 2, essentially that not only was Mr. Neary in possession of under sized mackerel, but in fact that more, well the formula, and I would not, I am simplifying it, but that the shorts exceeded 10 percent of the number of longer mackerel caught and retained, however you measure that, and the measurement is one suggested measurement here in s. 48(3).

[58] In so far as the trial Judge did find that the Crown had to prove beyond a reasonable doubt as **an element of the offence** in this case, that s. 48(2)conditions had been shown to be so, I disagree. In my view the trial Judge erred in placing that additional burden on the Crown in this case. He had to be correct about his interpretation of the law, and in that respect, and in my respectful opinion he erred.

[59] That being the case it is appropriate for me to treat the verdict of acquittal as reversible and I do set aside the acquittal. In so far as the, if you will, the remedy is

concerned I have concluded Mr. Neary, I am sorry for all the legalese, but basically I have concluded that the trial Judge made a mistake in his interpretation. And now it falls to me to determine whether the appropriate thing here is to order a new trial or whether it is appropriate for me to register a conviction, which I will just point out, I can theoretically do, and then I could impose a sentence or I could remit it or return it to the trial judge for actual sentencing. And this is under s. 686(4) of the *Criminal Code*, which gets adopted in this procedure.

[60] And I will just read that, it says

> "If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial and not criminally responsible on account of mental disorder"

[61] So there is more than one thing covered, but this does cover appeal from acquittal; "the court of appeal;" which in this case is me, "may (a) dismiss the appeal;" O.K. I have not done that "or (b) allow the appeal," which I have done; and "set aside the verdict and (i) order a new trial , or" (ii)

> [unless it is a verdict of] a judge and jury, enter a verdict of guilty with respect to the offence of which in its opinion, the accused should have been found guilty, but for the error in law and pass a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law."

[62] So that is where I stand at this point, and perhaps this is a good opportunity to see what the position of each of you is regarding whether I should order a new trial here or whether there should be a conviction entered. And if there is, you know and I understand Mr. Neary you would not agree with my decision, but assuming for the moment that it is correct you should maybe tell, let me know if you have anything to say about whether there should be a new trial as opposed to a conviction entered.

[63] And let me just back up and tell you that in relation to the legal test, for me, about whether I can convict you having not having heard the trial obviously I am at a disadvantage. But there is an allowance for this and essentially I will just **paraphrase** here, it says before a court may exercise its jurisdiction and enter a conviction rather than order a new trial, so that is what I am considering, it has to be shown that **all the factual findings necessary to support a verdict of guilty must have been made by the trial judge at the trial, either explicitly or implicitly or not be an issue.**

[64] So basically the test is are all the factual findings necessary to find somebody guilty already made by the trial Judge, even though he found you not guilty. I know

that is a bit of a stretch, but that is the test for me. Maybe what I will do is I will hear from Ms. Vanderhoek first and if you have something further you would like to say then you know that will, help you perhaps, right.

... [Submissions made] ...

[65] So as I was saying, before the submissions were made basically whether to order a new trial or enter a conviction in relation towards an offence is really governed by the principles in the Supreme Court of Canada case, *Cassidy* [1989] 2 S.C.R. 345, and just summarizing from *Martins Criminal Code* 2010, p. 1338:

> "before the, [this] Court may exercise its discretion under subsection 4 (b) (ii) and enter a conviction rather then order a new trial, it must be shown that all finding necessary to support a verdict of guilty must have been either explicitly or implicitly made or not be in issue."

[66] So the question is, have the findings of, fact required to make a finding of guilt been made in the trial, and in my view they have been, because there was no dispute about the fact that there were undersized mackerel, each of the 5 samples, that are referred to, demonstrated: 25 of 50 were small, 33 of 50 were small, 26 of 50 were small, 39 of 50 were small, 35 of 50 were small. So that in itself, you know for what

its worth, is, its about 150 fish thereabouts were small. So, there is no question that the necessary findings to show that Mr. Neary was in possession of undersized mackerel were made, in fact they really weren't in dispute. What was in dispute was whether he could show a statutory due diligence under s. 48(2). The trial Judge mistakenly in my view, took s. 48(2) to be an element of the offence. Had he had not done so he would have had no other evidence upon which to determine, or to conclude that Mr. Neary was in fact duly diligent. The evidence was that Mr. Neary himself had done no measuring, and the evidence was of course that the officers had done some measuring, and at least at that point in time, showed there were under-sized mackerel.

[67] So that being the case, I am satisfied that this a proper case to enter a conviction on the offence. However, this is certainly not my area of expertise in so far as the sentencing is concerned, and in my view it would be more appropriate and it would give Mr. Neary an opportunity to further explain, if you will, his situation to the sentencing Court. Which he has not had a chance to do yet. If I were to remit the matter for sentencing to the trial Court, it's to the trial court and not to the trial Judge.

[68] So the order of the Court will be, that the acquittal will be overturned and reversed, I find it is appropriate and I can properly enter a conviction here for the offence under s. 48(1) of the *Atlantic Fisheries Regulations*, but that I feel it appropriate to remit the matter of sentence to the trial Court, which is the Provincial Court and to impose a sentence that is warranted in law.

[69] What that means is that a conviction is entered here at this Court, but the trial Court, which is the Provincial Court, not the same Judge, is instructed to impose a sentence basically because that Court is more familiar with fishery offences and it will also give you a opportunity to present evidence that you want to present on the sentencing as well. As I say that's not the expertise of this Court and it makes sense to me in this situation that that is the best course of action.

J.