IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Paul 2003 NSSC 164

Date: 20030813
Docket: S.H. No. 194330
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

-and-

Jerome Paul

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: June 4, 2003 in Halifax, Nova Scotia

Written Decision: August 13, 2003

Counsel: Appellant's Counsel - Paul Adams

Respondent's Counsel - S. Clifford Hood, Q.C.

By the Court:
Wright J.

INTRODUCTION

[1] This is a summary conviction appeal brought by the Crown from the sentencing decision of Judge Brian D. Williston rendered in Halifax Provincial Court on January 24, 2003. The sentence pertained to two related licensing offences committed by the Respondent contrary to s. 14(1)(b) and s. 56(1) respectively of the *Atlantic Fishery Regulations*. Section 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14 makes a breach of a regulation an offence under the Act.

FACTUAL BACKGROUND

[2] The facts of this case are not in dispute. They are recited at length in paragraphs 1-4 of the Appellant's factum and since its recitation of the facts is expressly adopted in the Respondent's factum, I will simply incorporate them by reference in this decision as follows:

1. On January 10, 2003, the Respondent, Jerome Paul, was found guilty of the following offences:

   (1) Between August 23, 2000 and August 25, 2000, inclusive, in Canadian Fisheries Waters adjacent to the Province of Nova Scotia, fish with or have on board a vessel a crab trap without a valid tag issued by the Minister securely attached to the frame of the trap in the manner for which the tag was designed contrary to s. 56(1) of the *Atlantic Fishery Regulations*, SOR/86-21, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14; and

   (2) Between August 23, 2000 and August 25, 2000, inclusive, in Canadian Fisheries Waters adjacent to the Province of Nova Scotia, fish for crabs without being authorized to fish for crabs contrary to s. 14(1)(b) of the *Atlantic Fishery Regulations*, SOR/86-21, and did thereby commit an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14.

2. The facts upon which these findings of guilt were based are as outlined in the *Agreed Statement of Facts* exhibited at trial:

1. The accused, Jerome Patrick Paul, was the captain of the fishing vessel Lady Deborah, while it was engaged in fishing for snow crab in Canadian Fisheries Waters adjacent to the Province of Nova Scotia between August 23 and August 25, 2000.

2. On August 23, 2000, the Lady Deborah was observed from a DFO surveillance aircraft by F/O Hector Smith in an area known as Bickerton Ridge, in Canadian Fisheries Waters adjacent to the Province of Nova Scotia. During several hours of aerial surveillance of the Lady Deborah on August 23, F/O Smith observed the vessel fishing snow crab gear. The vessel's crew was observed setting and hauling snow crab traps on a number of occasions. A number of snow crab traps were also observed on the deck of the Lady Deborah. The snow crab fishing activity was captured on videotape from the DFO surveillance aircraft.

3. On August 24, 2000, fishery officers aboard a DFO surveillance aircraft placed the Lady Deborah under surveillance and the vessel was again observed engaging in snow crab fishing activity in Canadian Fisheries Waters adjacent to the Province of Nova Scotia. The vessel's crew was observed setting and hauling snow crab traps on several occasions. The snow crab fishing activity on August 24, 2000 was also recorded on videotape from the DFO surveillance aircraft.

4. On both August 23 and 24, 2000, the specific positions where the crew of the Lady Deborah were setting and hauling the snow crab traps were recorded by fishery officers aboard the DFO surveillance aircraft.

5. On August 25, 2000, the captain of the Lady Deborah, Jerome Patrick Paul, hailed into J.K. Marine Services Limited and indicated that the vessel would be landing and offloading approximately 17,000 pounds of snow crab at the dock in Louisbourg, Nova Scotia, at approximately 6:30 a.m. that day. This information was relayed to Atlantic Catch Data, a Dockside Monitoring Company, and Cyprian LeBlanc, a dockside observer, was dispatched to observe the offloading of snow crab from the Lady Deborah. Upon his arrival at dockside in Louisbourg, Mr. LeBlanc confirmed that Jerome Patrick Paul was the captain of the Lady Deborah. Mr. LeBlanc then observed the offloading of 17,357 pounds of snow crab from the Lady Deborah at dockside in Louisbourg on August 25, 2000. The offloading of the snow crab from the Lady Deborah on August 25 was recorded on videotape by DFO personnel. The particulars with respect to the snow crab caught by the Lady Deborah on August 23 and 24 (and offloaded from the vessel on August 25, 2000) were recorded in a "Crab Monitoring Document" prepared and signed by Mr. LeBlanc, as the dockside observer, and Jerome Patrick Paul, as captain of the Lady Deborah. A copy of the "Crab Monitoring Document", which verifies that the Lady Deborah offloaded 17,357 pounds of snow crab on August 25, 2000, is attached hereto as Appendix "A".

6. Mr. Sheldon Chant, a representative of J.K. Marine Services Limited, then agreed to purchase the Lady Deborah's snow crab catch on behalf of the company from the vessel's captain, Jerome Patrick Paul. The total purchase price paid by J.K. Marine Services Limited for the Lady Deborah's snow crab catch offloaded on August 25, 2000, was $48,599.60.

7. On August 30, 2000, F/O Jerome Julien proceeded aboard the Canadian Coast Guard Vessel Edward Cornwallis to the location in Canadian Fisheries Waters, adjacent to the Province of Nova Scotia, where the Lady Deborah had been recorded setting snow crab traps on August 23 and 24, 2000. F/O Julien was able to retrieve and seize 13 conical snow crab traps that had been set at this location on those dates by the crew of the Lady Deborah (under the direction and supervision of the vessel's captain, Jerome Patrick Paul). The snow crab traps seized had green Indian Brook tags attached to them.

8. On September 28 and 29, 2000, while aboard the Canadian Coast Guard Vessel Earl Grey, F/O Bill Ehler seized an additional 22 snow crab traps that had been set by the crew of the Lady Deborah (again, under the direction of the vessel's captain, Jerome Patrick Paul) between August 23 and August 25, 2000. The 22 traps seized on September 28 and 29, 2000, were located in Canadian Fisheries Waters adjacent to the Province of Nova Scotia using specific information as to the position of these snow crab traps as recorded by Jerome Patrick Paul in the "Crab Monitoring Document" attached hereto as Appendix "A". These traps also had Indian Brook tags affixed to them.

9. The snow crab traps seized by F/O Julien on August 30, 2000 and by F/O Ehler on September 28 and 29, 2000, respectively, did not have valid tags issued by the Minister of Fisheries and Oceans attached to them as is required under s. 56(1) of the Atlantic Fishery Regulations SOR/86-21.

10. On September 15, 2000, the accused, Jerome Patrick Paul, provided a voluntary cautioned statement to Fishery Officers John Williams and Richard Muise in which he admitted to being the captain of the Lady Deborah during the fishing trip that ended with the offloading of snow crab in Louisbourg on August 25, 2000. The accused confirmed the accuracy of the "Crab Monitoring Document" which detailed the crab fishing activity aboard the Lady Deborah between August 23 and 25, 2000 (see Appendix "A"). Mr. Paul also confirmed that the snow crab traps he used during that fishing trip were tagged with Indian Brook tags.

3. On the afternoon of August 25, 2000, Fishery Officers Williams and Muise advised J.K. Marine Services Limited that the proceeds of sale of the 17,357 lbs. of snow crab offloaded from the "Lady Deborah" earlier that day were being seized. By that time, J.K. Marine Services Limited had already made an advance payment on the purchase of the snow crab catch (in the amount of

$10,000.00) payable to the Respondent, Jerome Paul. As a result, Fishery Officer Williams directed officials with J.K. Marine Services Limited to provide the remainder of the purchase price ($38,599.60) in the form of a cheque made payable to the Receiver General of Canada. This cheque was subsequently seized pursuant to a Search Warrant executed on the premises of the law firm, Lorway MacEachern, counsel for J.K. Marine Services Limited, on October 3, 2000.

ADDITIONAL FINDINGS OF FACT

4. The Learned Trial Judge made the following additional findings of fact:

[3] The defendant, Jerome Paul, is a Mi'kmaq and a member of the Indian Brook First Nation. Early in the year 2000, Mr. Paul entered into discussions with officials from the Department of Fisheries and Oceans regarding his interest in fishing for snow crab with his vessel the Lady Deborah.

[4] Steve Wilson, the manager of Aboriginal Operations for the Department of Fisheries and Oceans had a meeting with the defendant on June 8, 2000 in Dartmouth, Nova Scotia. Mr. Wilson testified that DFO policy was that under the Aboriginal Fishing Strategy these licences would be communal in nature and therefore issued to the Indian Bands which then had the authority to decide who was going to fish.

[5] Linda Hunt, an employee at the Aboriginal Fisheries Branch of the Department of Fisheries and Oceans in Dartmouth, Nova Scotia, testified for the Crown regarding her duties in the issuance of Communal Fishing Licenses for the First Nations in the Maritime Region.

[6] During the year 2000, Ms. Hunt was involved in the issuing of Commercial Communal licenses to First Nations for their allocation of snow crab in furtherance of a process put in place by the Department of Fisheries and Oceans. In the case of the Indian Brook First Nation, of which the Defendant is a member, the allocation of snow crab was determined by the Department of Fisheries and Oceans to be one hundred (100) tons.

[7] Ms. Hunt was directed by Steve Wilson to prepare two licenses, for fifty (50) ton of snow crab each, for Indian Brook First Nation. Exhibit 2 was one of the licenses prepared and signed by Ms. Hunt as a licensing authority on June 8, 2000. This Commercial Communal Fishing License No. SF10087254 authorized the Indian Brook First Nation and the vessel Lady Deborah to engage in snow crab fishing for the period June 9, 2000 to December 31, 2000 in area 24C where the defendant was fishing on the 25th of August, 2000.

[8] Ms. Hunt further testified that this document was never rescinded and continued to be valid until December 31, 2000. Ms. Hunt explained in her testimony that the license was a communal one issued in the name of the Chief and Council of the Indian Brook First Nation and that it was then up to the Chief and Council as to whom they wished to fish under the license.

[9] Chief Reginald Maloney of the Indian Brook First Nation and the step-father of the Defendant, refused to accept the offer by the Department of Fisheries and Oceans maintaining the Mi'kmaq treaty right to fish and regulate their own fishery. In not accepting the license Chief Maloney made it clear that

the Indian Brook First Nation was not using the license. As a result of Chief Maloney's indication that the Commercial Communal Fishing License issued by the Department of Fisheries and Oceans to the Indian Brook First Nation would not be accepted, the license and the 40 tags issued on it remained in the office of the Department of Fisheries and Oceans in Dartmouth, Nova Scotia.

[10] Instead, the Indian Brook First Nation issued its own license and accompanying tags to the Defendant to fish for snow crab. The license contained essentially the same conditions and restrictions as the one provided by the Department of Fisheries and Oceans, except that it was more confining as to the time period, restricting fishing from July 28, 2000 to October 15, 2000. Chief Maloney testified that the Indian Brook First Nation used the same conditions and terms as the license prepared by the Department of Fisheries and Oceans because they wanted to establish themselves in the fishery by using laws and regulations that were acceptable to other fishers, especially in the crab fishery which was quite new to them.

[3] In openly committing these offences, without confrontation or obstruction, the Respondent laid the groundwork for a test case whereby he challenged the authority of the Minister of Fisheries to impose regulations to control licensing activity in the aboriginal fishery in the aftermath of the *Marshall* decision of the Supreme Court of Canada in 1999, specifically in relation to the snow crab fishery. The Respondent was unsuccessful at trial, however, in pressing the argument that he was improperly tried under the *Atlantic Fishery Regulations* rather than the *Aboriginal Fishing and Communal Regulations*. The Respondent was further unsuccessful in asserting that the Department of Fisheries and Oceans ("DFO") owed a duty to accommodate him as an aboriginal in the licensing process. His due diligence defence was also rejected by the trial judge in entering a conviction on both counts.

[4] At the time of sentencing, the trial judge granted the Respondent a conditional discharge with supervised probation for a period of one year together with a community service requirement. The trial judge also made an Order of Forfeiture in respect of the

fishing gear used in the commission of the offences and further ordered the forfeiture of a portion of the proceeds of sale of the unlicensed snow crab catch which had been seized by the Crown. More specifically, the trial judge directed that of the funds seized in the amount of $38,599.60, the sum of $28,599.60 be forfeited to the Crown with the remaining $10,000 to be returned to its rightful owner. The Crown did not seek forfeiture of the additional sum of $10,000 which had been earlier advanced to the Respondent by the prospective fish buyer. In the result, the Respondent was permitted to retain approximately 40% of the value of the illegal catch.

[5] That sentence did not sit well with the Crown which has brought an appeal on the following two grounds:

(1) That the sentence imposed at trial was demonstrably unfit or clearly inadequate, given the offences proven and the record of the Respondent;

(2) That the trial judge erred in his interpretation and application of the mandatory forfeiture provisions contained in s. 72(2) of the *Fisheries Act*.

FIRST ISSUE - FITNESS OF SENTENCE

[6] In defining the scope of appellate review in relation to sentence, the Crown refers to s. 687(1) of the *Criminal Code* (applicable to summary conviction sentence appeals by virtue of s. 822(1) of the *Code*), which reads as follows:

> 687(1) **Powers of court on appeal against sentence** - Where an appeal is taken against sentence the court of appeal shall, unless a sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> (b) dismiss the appeal.

[7] The case law on the standard of review to be applied on a sentence appeal was recently canvassed by the Nova Scotia Court of Appeal in *R. v. MacDonald* (2003) NSCA 36. In that decision, the court referred to two leading decisions of the Supreme Court of Canada (at paragraphs 15 and 16):

[15] More recently, in *R. v. Shropshire*, [1995] 4 S.C.R. 227; [1995] S.C.J. No. 52 (Quicklaw)(S.C.C.) Iacobucci J., for a unanimous Court, said:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[16] Similarly, in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; [1996] S.C.J. No. 28 (Quicklaw) (S.C.C.), Lamer, C.J.C. said, for a unanimous Court, at pp. 565-566:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code ...
>
> . . . The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly. (Emphasis Added)

[8] The Crown in its submissions argues that the sentence imposed by the trial judge here is demonstrably unfit and inadequate, given the offences proven and the prior record of the Respondent (which consists of offences committed on two prior occasions in the year 2000 for fishing out of season, resulting in the imposition of fines totaling $12,500). The Crown submits, in summary, that this is not an appropriate case for the granting of a conditional discharge (under the test articulated by the British Columbia Court of Appeal in *R. v. Fallofield* (1973) 13 C.C.C. (2d) 450) and that by imposing such a sentence here, the trial judge has ignored the need for deterrence (both specific to the Respondent and in general in respect of others who would fish illegally). The Crown ties in with that the need to enforce conservation measures. It further contends that the granting of a conditional discharge, if allowed to stand in this case, would serve to undermine DFO's licensing authority which is essential to achieving fishery management goals.

[9] After canvassing the case law in this context, which stresses the need for deterrence to encourage statutory compliance and the courts' intolerance of allowing fishers to retain any financial benefit from illegal fishing activity, Crown counsel considers the sentence imposed in this case to be unprecedented in such a commercial fishing violation. The Crown therefore requests that the conditional discharge be set aside, that convictions be entered, and an appropriate fine imposed.

[10] The imposition of a fine as an appropriate penalty for regulatory offences under the *Fisheries Act* resonates throughout the decided cases (see, for example, the decisions in this province in *R. v. MacKinnon* (1996) 154 N.S.R. (2d) 217 and *R. v. Ross* (1990)

96 N.S.R. (2d) 444). In the latter case, Judge Freeman (as he then was) commented that "a fine reflecting the value of the seized catch, as a measure of the magnitude of the offence, together with suspension or cancellation of licenses would appear to be the appropriate sanction in usual cases ".

[11] As counsel for the Respondent urged upon the trial judge, however, this was not by any means a usual case. Indeed, it evolved as a test case in the aftermath of the *Marshall* decision by the Supreme Court of Canada in 1999 and the uncertainty which initially clouded the parameters of that decision. The Respondent was then trying to establish a career in the fishery and went to the DFO office to ascertain the terms upon which he might obtain a snow crab license. As recited in the Statement of Facts, he learned he could not get around the fact that the license had to be issued to the band communally and then allocated to individuals by the band under that authority. The Respondent became stymied in pursuing his livelihood as a fisher by the refusal of the band to accept the DFO license available to it. Instead, the band sought to assert its right to regulate its own fishery in the aftermath of the *Marshall* decision by issuing its own licenses that mirrored the same terms and conditions contained in the DFO license. One such license was purportedly issued to the Respondent whereupon he began fishing openly under the watchful eyes of DFO surveillance personnel. As noted by the trial judge, there was nothing stealthy about the Respondent's fishing activity and indeed, he hailed into port and signed the pertinent crab monitoring documentation which verified that his boat had offloaded 17,357 pounds of snow crab on August 25, 2000.

[12] Once charged shortly thereafter, the Respondent, in his defence, questioned the authority of the Minister to impose regulations to control licensing activity in the aboriginal fishery, specifically in relation to snow crab. In testing the Minister's authority, the Respondent also entered into an Agreed Statement of Facts recited above. As noted by the trial judge, the Respondent acted throughout in complete cooperation with the authorities in respect of their duties and the execution of them. There was no confrontation or obstruction of any sort.

[13] Because of the uniqueness of the case, and the personal circumstances of the Respondent, the trial judge chose to adopt the individualized approach to sentencing. He quoted at length from the recent unreported decision of Handrigan J. of the Newfoundland Supreme Court in *R. v. Cluett* (rendered 2002/10/09) who in turn cited with approval the recent text by Alan Manson on the Law of Sentencing in the following passage:

> "It is a little misleading to talk about a range of sentencing for an offense. Alan Manson in the Law of Sentencing, 2001, says that there are two approaches to sentencing at work in this country, the tariff and the individualized. The individualized approach is reserved for special categories of offenders such as the mentally ill and the young and intermediate and inadequate recidivists. Manson suggests that the individualized sentence is motivated by utilitarian concerns and that the tariff response applies to cases where the offense requires a sanction that reflects general deterrence or denunciation. In these cases, the interests of rehabilitation are subordinated. Manson thinks that tariff sentencing is more clearly a retributive response. He also concedes that sentencing is a highly discretionary matter and does not lend itself to formulaic calculation. Short of providing some guidelines in an attempt to avoid too much disparity in sentencing ranges, tariffs and individualized sentences are no more than guidelines to the sentencing judge. Manson concludes his discussion of this aspect of sentencing with two observations. Discretion continues to be the hallmark of sentencing in Canada, and while errors can be rectified on appeal, it will become increasingly hard to reverse discretionary choices. A sentence must fit the crime and the offender by taking into account a myriad of factors, with the ultimate goal being the protection of society. Breaches of the fisheries general regulations are punished under Section 78 of the *Fisheries Act* where, as in this case, the

> prosecution proceeds as a summary conviction matter. The only limitation on sentence for a first offense is that it must be by way of a fine and the fine cannot exceed one hundred thousand dollars ($100,000). There is no minimum fine so that the discharge provisions of the *Criminal Code* are a sentencing option. If an absolute discharge can be granted, and it may, and the maximum fine is one hundred thousand dollars ($100,000), these two options establish the extreme parameters for sentences that may be imposed under this legislation. That is, in a manner of speaking, a very broad range to consider, but it also highlights the latitude that has been given to sentencing judges."

[14] The trial judge in the present case recognized that deterrence and conservation factors are to be emphasized in imposing sentences for *Fisheries Act* violations and that no one should be seen to profit from illegal fishing activity. However, the trial judge was satisfied here that by imposing the sentence that he did, the Respondent would not profit from his unlawful fishing activity. He went on to say that the significance of the conservation factor was lessened substantially in this case because the fishing activity carried out was in full compliance with the conditions that would have applied had the band Council accepted the license available from DFO. He noted the other outstanding fines above mentioned and concluded that the appropriate sentence to be imposed on the unique facts of this case were a conditional discharge with supervised probation for one year, community service, forfeiture of all fishing gear used in the commission of the offences, and forfeiture of the sale proceeds of the catch seized by search warrant, save and except $10,000 which he directed be returned to its rightful owner.

[15] As defence counsel pointed out, the plight of the Respondent, caught in the middle as he was between the licensing regulations administered by DFO and the position of independence asserted by the band Council, is that he has now been put out of the fishing business altogether which he had embarked upon to leave the welfare system behind.

[16] It has been said in countless appellate court judgments that trial judges, sitting as front line judges with the advantage of having seen and heard all of the witnesses, are entitled to considerable deference in their sentencing decisions. As quoted earlier in this decision from *Shropshire*, a variation in the sentence should only be made if the appellate court is convinced that it is not fit, i.e., clearly unreasonable. Because of the uniqueness of the case at bar, I am not persuaded that the sentence imposed by Judge Williston is unfit or unreasonable. He did not, in my view, proceed upon an error in principle or misjudge the relevant factors in crafting the sentence that he imposed. Accordingly, the first ground of appeal raised by the Crown is dismissed.

SECOND ISSUE - FORFEITURE OF ILLEGAL CATCH

[17] Of perhaps even greater concern to the Crown in bringing this appeal is the trial judge's order of only partial forfeiture of the proceeds of the illegal catch which, it is argued, offends the mandatory forfeiture provisions contained in s. 72(2) of the *Fisheries Act*. In considering this ground of appeal, there are three relevant statutory provisions which read as follows:

> Forfeiture of things
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> 72(1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.
>
> Forfeiture of fish
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> 72(2) Where a person is convicted of an offence under this Act that relates to fish seized pursuant to paragraph 51(a), the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.
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> Seizure of fishing vessel, etc

> 51. A fishery officer or fishery guardian may seize any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act, including any fish that the officer or guardian believes on reasonable grounds
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> (a) was caught, killed, processed, transported, purchased, sold or possessed in contravention of this Act or the regulations.

[18] It should first be noted that after hearing the submissions of counsel, and before rendering his sentencing decision, the trial judge asked the Crown counsel then appearing on the matter what his position was with respect to the jurisdiction of the court to order a partial forfeiture of the proceeds of the illegal catch. Crown counsel spontaneously made brief reference to s. 72(2) of the Act and after then skimming through the cases that had been submitted to the court (none of which were apparently relevant on the point), acquiesced with defence counsel's position that there was precedent in the case law generally for an order of partial forfeiture to be made. Although conceding that partial forfeiture was an available option, Crown counsel argued that to slice the forfeiture provision would not be appropriate in this particular case.

[19] The trial judge then proceeded to give his oral decision. He again referred to the test case nature of the proceeding, the positive manner in which the Respondent had acted, and his complete cooperation with the authorities in respect of their duties. He concluded that even with the partial forfeiture order he was about to make that the Respondent had realized no profit from the fishing activity which had been found to be unlawful. The trial judge also took into account the further forfeiture order he was about to make in respect of all the Respondent's fishing gear used in the commission of the offences. He took into account as well the other fines owing (in the aggregate of

$12,500) and the cost of enforcement. He commended the Respondent for trying to get on with his life in the wake of the decision and in the final analysis, directed that part of the seized proceeds of sale (viz. $10,000) be returned to its rightful owner (presumably either the Respondent or the band Council) so that at least there would be "some equilibrium maintained". He did not indicate how he arrived at the amount set.

[20] The trial judge went on to say that he had considered, at first blush, making a forfeiture order for the entire amount of the sale proceeds seized in the amount of $38,599.60 as sought by the Crown. However, after considering the Respondent's personal circumstances, the submissions of counsel and the other factors above noted, he settled on the amount of $28,599.60 as the least amount that should be subject to forfeiture.

[21] It is not expressly stated in the trial judge's sentencing decision whether he was intending to make his partial forfeiture order under the mandatory provisions of s.72(2) or the discretionary provisions under s.72(1). If he purported to do so under s. 72(2), he did so, in my opinion, in error. As Crown counsel argued on this appeal, there does not appear to be any precedent for the partial forfeiture of fish (or proceeds realized from its disposition) when the mandatory forfeiture provisions of s. 72(2) apply. This is not surprising because the plain meaning of s. 72(2), in my view, is that the mandatory forfeiture requirement, whenever that section applies, extends to the entirety of the unlawful catch, or any proceeds realized from its disposition.

[22] That begs the key question on this branch of the appeal as to whether or not s. 72(2) of the Act applies on the facts of this case. Crown counsel, in arguing that it does apply, refers to the legislative history in respect of these provisions, and in particular the 1991 amendments when the present section 72 of the Act came into force. As noted by Iacobucci, J. in the recent decision of the Supreme Court of Canada in *R. v. Ulybel Enterprises Ltd.* [2001] 2 S.C.R. 867 (at paras. 26-27), these amendments were primarily concerned with increasing the severity of penalties to deter the abuse of the fishery resource and make it uneconomical for rogue fishermen to flout the *Fisheries Act* and the Regulations. It was observed that one of those penalties long used by the courts in such cases is the power of forfeiture.

[23] Crown counsel further points out (quoting from Driedger's Construction of Statutes (Second Ed. 1983 at p. 87), that under the modern approach to judicial interpretation of statutes, "the words of an Act are to be read in their entire context and in their grammatical or ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". As Justice Iacobucci went on to say in *Ulybel* (at para. 29), this famous passage from Driedger best encapsulates the Court's preferred approach to statutory interpretation.

[24] It is the submission of the Crown that Parliament's obvious purpose in enacting s. 72(2) was to prevent a fisher from retaining an illegal catch. The legislative intent of s. 72(2) has been interpreted less broadly, however, by the Nova Scotia Court of Appeal in *R. v. Mood* (1999) 174 N.S.R. (2d) 292. In *Mood*, the essential facts were that the accused pleaded guilty to unlawfully permitting another person, not named in his fishing

license, to use his vessel to haul in previously set lobster traps while he remained ashore. At issue on the appeal was whether, in addition to the imposition of a fine, the lobster or their value should have been forfeited pursuant to s. 72(2) of the *Fisheries Act*. The Nova Scotia Court of Appeal reviewed s. 72(2) relating to forfeiture and held that the offence did not fall within its scope. It concluded that mandatory forfeiture under s. 72(2) required that the commission of the offence relate to the fish. There, the offence did not relate to the fish as contemplated by the section; rather, the fish were caught in relation to the offence. This was not considered to be a reversible equation.

[25] In reaching this conclusion, the court framed the test for mandatory forfeiture in the following terms (at paras. 15-17):

> 15. . . . The test for mandatory forfeiture is whether a person is convicted of an offence under the **Fisheries Act** that "relates to fish seized". That is, were the fish a necessary element of the offence? In this case they were not.
>
> 16. The requirement for mandatory forfeiture is not made out because the *fish were caught in relation to the offence* as the Crown submitted, that is, merely in *connection* with it. This turns the language of s. 72(2) on its ear. The requirement is only made out when the *commission of the offence relates to the fish*. It is not a reversible equation. Here the commission of the offence could not have related to the fish seized because it related to permission to use the boat and whether fish were caught was irrelevant. In my view the interpretation is clear: forfeiture is mandatory under s. 72(2) only when the offence was in relation to the fish that were seized, and they were an essential element of it.
>
> 17. The correct interpretation does not detract from enforcement efforts. If fish are caught in circumstances of flagrancy that makes it just they should be forfeited, even though they are not a necessary element of the offence under the **Fisheries Act** for which a person is convicted, the court has discretion to order them seized as a "thing" under s. 72(1). Both ss. 72(1) and 72(2) can result in the forfeiture of fish. Forfeiture is mandatory under s. 72(2) if the offence *relates* to the fish, if it is an offence that could not be committed without catching them. However, if the fish seized under s. 51 are merely incidental to, or connected with the offence, the court is not bound by statute to order them forfeited, but it has discretion to order forfeiture under s. 72(1) if the circumstances warrant it.

[26] The court then went on to make a comparative examination of the structure of ss. 72(1) and 72(2), zeroing in on the distinctive wording of the latter section in the following passage (at para. 20):

> . . . The phrase "offence under this Act that relates to fish seized pursuant to s. 51(a)" in s. 72(2) is a term of art clearly not intended to mean the same thing as "any thing seized under this Act by means of or in relation to which the offence was committed" in s. 72(1). When parallel provisions discuss associated concepts in significantly different language, it is sound, statutory interpretation to assume that differing effects are intended. Section 72(1) emphasizes what a court may order to be forfeited when a person is convicted of <u>any</u> offence under the Act. Section 72(2) defines the kind of offence - - <u>one that relates to fish seized under s. 51</u> - - that makes forfeiture mandatory. It appears to be intended to apply most obviously to "catching" offences, such as taking or keeping fish of the wrong species or the wrong quantity or in the wrong place at the wrong time with the wrong gear, rather than licensing offences such as the present one which govern who can own and operate fishing boats.

[27] The court also observed (at para. 22) that if s. 72(2) were to be interpreted otherwise (i.e., if it is considered to mean that fish seized under s. 51 must be forfeited upon conviction for any offence under the Act), it would transform the fisheries officers' discretionary power to seize on reasonable belief into a provision for mandatory forfeiture, thereby hampering supervision by the courts over mandatory forfeiture.

[28] In applying the *Mood* test to the facts of the present case, the inescapable conclusion is that the offences with which the Respondent was charged did not relate to the fish as contemplated by s. 72(2); rather, as in *Mood*, the fish (in the form of snow crab) were caught in relation to the offences. Again, as in *Mood*, the fish were not a necessary element of the offence. As noted by Justice Freeman in *Mood* (at para. 5), the act of fishing does not require that fish actually be caught. Indeed, the first of the two related offences in the case at bar is made out by the accused simply having on board a

vessel a crab trap without a valid tag issued by the Minister securely attached. This is similarly a situation in which fish did not enter the picture until after all elements of the offences were in place.

[29] Counsel for the Crown argues that the *Mood* case is distinguishable on the facts in that the Respondent here had no valid commercial license to fish for crab and hence it was unlawful for him to take snow crab under any circumstances. While that factual distinction can be made, the case is not distinguishable in principle. It sets out the test to be applied in determining whether the mandatory forfeiture provisions in s. 72(2) apply. That decision is binding upon this court and leads me to the conclusion that the mandatory forfeiture provisions of s. 72(2) do not apply to the Respondent's catch in this case. We are dealing here with licensing offences which lack the requirement that the commission of the offences relate to the fish within the meaning of s. 72(2).

[30] In the result, the trial judge hearing this case had the option of making a partial forfeiture order in respect of the proceeds of sale of the illegal catch but only in the exercise of his discretionary power available under s. 72(1) of the Act (see, as a case example, *R. v. Smith & Whiteway Fisheries Ltd.* (1995) 133 N.S.R. (2d) 50). This second ground of appeal should therefore be allowed but only to the extent that the trial judge purported to make such an order on the footing of s. 72(2) (if indeed that is the section he relied upon). In fairness to the trial judge, however, he was sidetracked by the erroneous position of Crown counsel then appearing before him that an order of partial forfeiture was within the court's power to make under s. 72(2). Neither did he have the

benefit of the legal arguments more fully developed by Crown counsel for purposes of the present appeal.

[31] There remains to address the validity of the order of partial forfeiture which the trial judge made in the amount of $28,599.60. The trial judge considered a number of factors (summarized at paras. 19-20 of this decision) in settling on that amount. Although it was a questionable decision, in my view, not to order forfeiture of the entire amount of the seized proceeds of the illegal catch, I am mindful of the deference which ought to be accorded by an appellate court to a sentencing judge, particularly in the exercise of discretionary powers. In my view, the discretion exercised by the trial judge here in making a partial forfeiture order does not warrant intervention by this court where that option was otherwise available under s. 72(1). That order should therefore be permitted to stand in the final outcome.

J.