SUPREME COURT OF NOVA SCOTIA
Citation: *R v. MacKenzie*, 2020 NSSC 398

Date: 20200728
Docket: Yarmouth No. 496245
Registry: Yarmouth

Between:

Her Majesty the Queen

Respondent

v.

Mark Allan MacKenzie

Appellant

LIBRARY HEADING

Judge: The Honourable Justice Pierre L. Muise

Heard: July 28, 2020 in Yarmouth, Nova Scotia

Oral Decision: July 28, 2020 in Yarmouth, Nova Scotia

Summary: Mr. MacKenzie appealed his convictions for failing to comply with a commercial fishing licence condition by blocking escape panels and for fishing lobster during a closed time, as well as the sentence imposed for those offences and six other fisheries offences. They included: two offences of leaving unmarked gear unattended; two offences of leaving fishing gear unattended for more than 72 hours; having an improper entrance size on 10 to 14 Jonah crab traps; and fishing without a valid tag on 2 Jonah crab traps.

Issues: (1) In convicting Mr. Mackenzie of Count 2, did the Trial Judge err by mis-apprehending the evidence?

(2) In convicting Mr. Mackenzie of Count 2, did the Trial Judge err by failing to consider the due diligence defence?

(3) In convicting Mr. Mackenzie of Count 4, did the Trial Judge err in interpreting and applying the definition of fishing in section 2 of the *Fisheries Act*?

(4) In convicting Mr. Mackenzie of Count 4, did the Trial Judge err in finding that the due diligence defence had not been established?

(5) Did the Trial Judge err by imposing a sentence that was demonstrably unfit or excessive?

Result:

1. The Trial Judge's reasons made it clear that he considered the relevant evidence, including the oral evidence of the fishery officers, and gave proper effect to it. He did not misapprehend the evidence by focussing on a photograph that did not depict the alleged contravention.

2. The Trial Judge's conclusion that there was a lack of due diligence was not patently unreasonable or unsupported by the evidence, and he applied the correct test. There was clear evidence of carelessness fueled by the fact that the Jonah crab fishery was not a lucrative one and the Appellant was fishing a lot of traps. There was no evidence of any reasonable protocol or system to monitor whether the Appellant's workers fitted the gear in compliance with the legal requirements.

3. The Crown need not prove that the Appellant's purpose was to catch and retain lobsters, as opposed to throwing them back in the water. The Trial Judge correctly applied the definition of fishing under s. 2 of the *Fisheries Act*, as interpreted in **R. v. Boyd**. The Appellant set, in a lobster fishing area, 10 traps designed for catching lobster, which had not been modified for fishing Jonah crab, on a 39-trap string, along with other lobster traps which had been so modified. Their purpose was to catch lobster and, as soon as they were placed in the water, they were fishing for lobster. Plus, unlike the modified traps, they did catch market-sized lobsters, and that was the main catch.

4. The Appellant advanced that the absence of lobster excluders on the traps that were fishing lobster was due to the inexperienced 12-year-old boy he had hired having used the wrong hog rings to attach them, resulting in them falling off. The Appellant had noticed, by chance, that some of the hog rings installed were wrong and replaced them. However, he had no arrangement or system in place to check the boy's work, and the traps were stacked in a way that prevented a full inspection. The process of loading the traps on the vessel was too quick for a reasonable inspection. The Appellant clearly did not exercise due diligence and the Trial Judge did not err in finding that he had not.

5. The Trial Judge gave sufficient reasons for the sentence imposed. He considered the relevant circumstances, including the Appellant's economic situation. He imposed shorter fishing prohibitions than the Crown recommended, exercising restraint. The fine amounts were reasonable. He noted the finding that the Appellant was lobster fishing was a "legal finding" based on lack of care regarding the traps. The sentence is justified by: the number and circumstances of the offences; their effect on conservation; the late guilty pleas on only two counts; the Appellant's cavalier and careless approach to fishing, despite previous warnings; along with, his extensive and related record. It is proportionate, fit and reasonable. The Trial Judge did not: commit any error in principle; nor, fail to consider or over-emphasize a relevant factor, or err in considering an aggravating or mitigating factor that impacted the sentence.

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Counsel:	Marian Fortune-Stone, Q.C. , for the Respondent Mitchell LeBlanc, for the Appellant

Decision rendered orally July 28, 2020

INTRODUCTION

[1] Mr. Mackenzie was tried in the Provincial Court on an 8-count information alleging he committed offences contrary to the *Fisheries Act* of Canada on November 12 and 13, 2017. On the first day of trial, he entered guilty pleas in relation to Counts 5 and 7.

[2] He was found guilty of the remaining counts.

[3] January 28, 2020, he was sentenced to, amongst other things, a $1000 fine for each offence, and prohibitions from participating in the Jonah crab fishery for one year and in the lobster fishery for the first five days of the 2021 season.

[4] In this summary conviction appeal, he is asking that the convictions in relation to Counts 2 and 4 be overturned, with the accompanying fines being vacated, and, irrespective of the outcome of that portion of his appeal, that this Court allow his appeal from sentence and impose a sentence that does not include a prohibition from lobster fishing, nor any fines. He suggests that the one-year prohibition from Jonah crab fishing is enough.

[5] Count 2, which he contests, alleges that he failed to comply with a condition of his fishing licence by blocking the escape panels. Count 4 alleges that he fished

for lobster in a lobster fishing area during the closed time. As indicated by the Crown, there was no issue about the area being closed. It is merely an issue of whether or not he was fishing for lobster.

ISSUES

[6] The issues raised on this appeal are, broadly, the following:

1. In convicting Mr. Mackenzie of Count 2, did the Trial Judge err by mis-apprehending the evidence?

2. In convicting Mr. Mackenzie of Count 2, did the Trial Judge err by failing to consider the due diligence defence?

3. In convicting Mr. Mackenzie of Count 4, did the Trial Judge err in interpreting and applying the definition of fishing in section 2 of the *Fisheries Act*?

4. In convicting Mr. Mackenzie of Count 4, did the Trial Judge err in finding that the due diligence defence had not been established?

5. Did the Trial Judge err by imposing a sentence that was demonstrably unfit or excessive?

LAW AND ANALYSIS

STANDARDS OF REVIEW

[7] Prior to addressing each question, I will make the following general comments regarding the applicable standards of review.

[8] Justice Fichaud, in **R. v. C.J.**, 2011 NSCA 77, succinctly summarized the standards of review applicable on appeal, at paragraph 19, as follows:

> Questions of law are reviewed for correctness. Factual issues are reviewed for palpable and overriding error. The judge's application of the law to the facts is reviewed as a question of fact unless there is an extricable legal error.

[9] Justice Saunders, in **R. v. Taylor**, 2008 NSCA 5, at paragraphs 35 to 37, provided the following expansion, with references omitted:

> 35 Appeals restricted to questions of law alone generally engage a standard of correctness.
>
> 36 The interpretation of a legal standard has always been considered a question of law. The application of a legal standard to the facts, while a question of law for jurisdictional purposes, is treated as a mixed question of law and fact for standard of review purposes.
>
> 37 A question of mixed fact and law may, upon further reflection, constitute a pure error of law subject to the correctness standard.

[10] Justice Saunders, in **R. v. Henneberry**, 2009 NSCA 112, at para 14, stated that: “Failure to properly apply the correct legal standard to a set of facts constitutes an error of law.”

[11] In **R. v. Pottie**, 2013 NSCA 68, Justice Farrar articulated the test for review of fact finding in a manner very similar to that expressed in **R. v. Nickerson**, [1999] N.S.J. No. 210 (N.S.C.A.), at paragraph 6. Justice Farrar, at para 16, stated:

> The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis, the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.

[12] Justice Saunders, in **R. v. Skinner**, 2016 NSCA 54, at paragraphs 21 and 23, provided the following guidelines for reviewing findings of fact. He stated:

> [21] … When errors are said to have occurred in such things as a trial judge deciding what facts to accept and what reasonable inferences to draw from those facts; or apportioning weight to the evidence the judge chooses to accept; or resolving matters of credibility; those errors are tested on appeal using a much different yardstick. There, considerable deference is paid to the trial judge's decisions and a broader latitude for tolerance is invoked when such rulings are challenged in this Court. In the context of criminal appeals, questions of fact will not be disturbed unless they are found to be unreasonable or unsupported by the evidence. Slightly different language is used in the context of civil appeals where factual findings will not be interfered with unless they are said to be the product of palpable and overriding error.
>
> ….
>
> [23] … [A] judge's decisions on questions of fact are not evaluated on a standard of correctness. A high degree of deference is accorded. Even though opinions may differ with regards to particular factual rulings, they will not likely be disturbed because the margin or tolerance for deviation is wide enough to accommodate other outcomes which are reasonable and find support in the evidence…

ISSUE 1: In convicting Mr. Mackenzie of Count 2, did the Trial Judge err by mis-apprehending the evidence?

[13] **R. v. Morrisey**, [1995] O.J. No. 639 (C.A.), described misapprehension of evidence as referring to "a failure to consider evidence relevant to a material issue,

a mistake as to the substance of the evidence, or a failure to give proper effect to evidence".

[14] It added that, except for jurisdictional purposes, such as in Crown appeals from acquittal, most errors "under the rubric of a misapprehension of evidence will not be regarded as involving a question of law". Thus, the standard of review would not be one of correctness.

[15] The court in **R. v. Lohrer**, 2004 SCC 80, at paragraph 2, stated:

> *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[16] Our Court of Appeal, in **R. v. Newman**, 2020 NSCA 24, at paragraph 30, summarized the applicable principles as follows:

> A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. The misapprehension must have played an essential part in the reasoning process that led to conviction. And it is not to be confused with a different interpretation of the evidence than that adopted by the trial judge.

[17] The wording of the charge was that Mr. MacKenzie, between November 12 and 13, 2017, in NAFO fishing area 4X, being in the Canadian fishing waters adjacent to the coast of Nova Scotia, while fishing under the authority of a licence

issued for the purpose of commercial fishing, did contravene or fail to comply with a condition of the licence by blocking the escape panels contrary to section 22(7) of the *Fishery General Regulations* SOR/93-53, thereby committing an offence under section 78 of the *Fisheries Act* of Canada.

[18] Subsection 22(7) of the *Fishery General Regulations* states:

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

[19] The condition of his Jonah crab licence which it was found he failed to comply with is the condition in Licence Condition 8. It states:

> No person shall fish with, or have on board the vessel, a Jonah crab trap unless that trap has in the exterior walls of each parlour not more than 250 mm from the floor:
>
> (I) at least one unobstructed circular opening the diameter of which is not less than 79 mm and at least one unobstructed rectangular opening which is not less than 44 mm (height) by 127 mm (width); or,
>
> (II) two unobstructed circular openings the diameter of each of which is not less than 79 mm.

[20] The Trial Judge, in rendering his decision, reviewed the evidence, including the following evidence related to Count 2:

> The officers also testified the traps seized were defective as panels designed to allow for the escape of animals were not in compliance with the regulations. The modified lobster traps seized had escape panels that were blocked by a combination of either zip ties or strings. In traps brought up by the fishery officers, the fishery officers were able to observe them and testified in relation to their state.

[21] When directly addressing Count 2 he stated:

> The Crown evidence made out the *actus reus* of the offence showing the escape panels were obstructed.

[22] Leaving aside the appellant's fair trial argument for now, he argues that the Trial Judge referring to "panels" (plural) suggests that he was referring to the photographs in Exhibit 1, none of which include the contravening blocked escape panel, instead of the oral evidence of the fishery officers. He further suggests that, if he had been considering the evidence relating to the one contravening escape panel, he would have referred to Exhibit 2B, which shows a double-hole escape panel with orange twine.

[23] Mr. Mackenzie testified that Exhibit 2B depicted what he saw as being an attempt to repair a broken escape panel.

[24] It would have been preferable for the Trial Judge to make reference to that photograph, at least as an example of obstruction of the two-hole escape panel.

[25] However, the evidence presented was such that it was not necessary for him to do so. No one, including Mr. Mackenzie, testified that the photo depicted the actual allegedly contravening escape panel. Therefore, it provided little more in the way of supporting evidence than the oral evidence of the fishery officers.

[26] In addition, it would have been insufficient for the trial judge to refer only to the single double-hole lobster escape panel that was alleged to be in contravention

of Licence Condition 8. That is because, if the same trap had at least one circular opening of at least 79 mm and at least one rectangular opening of not less than 44 mm x 127 mm, the trap would have been in compliance with Licence Condition 8. To exclude that possibility, the Crown had to present evidence of all of the potential escape panels, and the Court had to address them.

[27] Contrary to the submissions of the Appellant, the evidence regarding the other escape panels, was not simply background information.

[28] The Trial Judge clearly referred to the testimony of the officers. That runs contrary to the argument that he considered the photographs and not their oral evidence.

[29] Both fishery officers testified that, in the one trap that had insufficient unobstructed escaped panels, there was twine reducing the opening to below the required dimensions. Both made reference to the fact they were talking about circular openings, and discussed their relationship to the other rectangular openings, in the context of Licence Condition 8.

[30] Even Mr. Mackenzie testified that the configuration of the twine in Exhibit 2B only left 90% of the opening. Even if that was confirmed to be the offending escape vent, Mr. Mackenzie's evidence would be corroborative of that of the fishery

officers. Also, despite testifying on direct examination that Exhibit 2B looked like a fix of a broken escape panel, he testified on cross-examination that if he had seen that he would not have let it go back in the water as it was.

[31] Therefore, the evidence at trial clearly supports the Trial Judge's conclusion.

[32] I find no misapprehension of evidence on the part of the Trial Judge in relation to Count 2.

[33] The Appellant's trial fairness argument appears to flow from the judicial comments, in **Morrisey,** that, where there has been a misapprehension of evidence, the appellant would not have received a fair trial, even if the evidence at trial was capable of supporting a conviction. As I have found no misapprehension of evidence, there is nothing to lead to an unfair trial.

[34] As a tangential argument, the Appellant submits that the Crown initially presented its case, in the violation report, on Count 2, as being based on obstruction of an escape panel with orange twine, then, at trial, advanced it based on completely different evidence, and did not present photo evidence of the contravening escape panel, making the trial unfair to the accused.

[35] As noted by the respondent Crown, if the Appellant was of the view that it created trial unfairness, it ought to have been raised before the Trial Judge. It was not.

[36] More importantly, the evidence at trial was consistent with the obstruction being with orange twine. Officer Clark-Doherty confirmed that Exhibit 2B showed a lobster escape panel, blocked with twine. She did not know whether it was the one that led to the charge. However, she assumed that it was because it was blocked off and she knew that it was a circular opening that had been blocked off. She disagreed that it was a fix and said it looked like the other escape hatches that were blocked off, causing the opening to be too small (i.e. smaller than the minimum dimensions). She also clarified that, though there were other single circular openings blocked off, this was the only one that had both circular openings blocked off. She explained that blocking off one circular opening, was not illegal if there was a rectangular escape panel of sufficient size that was also unobstructed.

[37] Officer Matheson testified that the contravening trap had twine partially obstructing some of the holes which made it illegal because it had no unobstructed escape mechanism in place. He added that the obstruction was such that it did not meet the legal test in the Licence Condition.

[38] As I indicated, the reference to the other obstructed escapes was merely to cover off eventualities that might raise a reasonable doubt regarding whether the trap was compliant with Licence Condition 8. The Crown did not change its case. Mr. Mackenzie had all the disclosure. The Defence had ample opportunity to, and did, test the Crown witnesses on whether what they perceived as an obstruction was one or not.

[39] In addition, all the traps were returned to Mr. Mackenzie well before trial. He could have had the actual gear or pieces of gear that were allegedly nonconforming to present in evidence. Instead, he said he took what was good off the trailer and brought the rest to the dump.

[40] The allegation of Crown change of tactics causing trial unfairness is unfounded and has no merit.

ISSUE 2: In convicting Mr. Mackenzie of Count 2, did the Trial Judge err by failing to consider the due diligence defence?

[41] The Court in ***R v Croft***, 2003 NSCA 109, at paragraph 9, confirmed that a determination in relation to whether an accused has established the defence of due diligence is a finding of fact and added:

> An appellate court has no jurisdiction to interfere with a trial judge's finding with respect to due diligence unless such a finding is patently unreasonable and unsupported by the evidence.

[42] However, of course, whether he used the incorrect test for due diligence would be a question of law reviewable on a standard of correctness.

[43] **Sault Ste. Marie**, at pages 1325 and 1326, set out the test for a due diligence defence, stating:

> [T]he defendant must only establish on the balance of probabilities that he has a defence of reasonable care.
>
> ….
>
> … [T]he 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.

[44] This defence is also codified in section 78.6 of the *Fisheries Act*, which states:

> 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.

[45] In **Griffin v. R.**, 2018 PECA 21, in dealing with a situation involving a fishing captain who, as in the case at hand, relied on crew to carry out the relevant tasks, the court, at paragraphs 19 to 21, highlighted that the accused, to establish a due

diligence defence, has the onus of showing he had a system in place to prevent infractions.

[46] Starting at page 165 of the Transcript, the Trial Judge cited the same test for the defence of due diligence from **Sault Ste. Marie**, as reproduced in **R. v Boyd**, 2010 NSSC 417.

[47] At page 215 of the Transcript, the Trial Judge made the following comments in relation to whether Mr. Mackenzie had made out the defence of due diligence specifically in relation to Count 2:

> While the accused explained that some attempts at having either attempted to have panels installed, there is really not sufficient evidence to make out a defence of due diligence. The accused's evidence already, as I said, showed a disregard for having proper good condition gear.

[48] The Trial Judge's general comments on due diligence can be found at pages 214 and 217 of the Transcript, where he stated:

> [T]he entire testimony of the Defence or of the accused exhibited a clear lack of due diligence by the accused in relation to the Jonah fishery.
>
> ….
>
> I should also add that the overall evidence by the accused showed that in relation to the fishery surrounding Jonah crabs, the accused exhibited a wanton disregard for the concept of due diligence. The contributing factors appear to be a lack of the fishing being lucrative and, in my words, the dabbling of the accused in an experimental fishery. These factors both lead to an abandonment of any sense of due diligence … .

[49] The Trial Judge also preceded those comments by a review of some of the due diligence evidence presented by Mr. Mackenzie, including the following:

> He stated that he did not use the good gear like he would utilize in lobster fishing. In discussing gear, the accused said he was not as fussy with Jonah crab gear as he was with gear used during the lobster fisheries. They were, as he said 'junky old lobster gear'. He stated this was the case as he was not 'putting any money into pots'. When asked about broken vents, the accused said he didn't see that he was … did not see that given he was rushing through the gear. The accused went on to say that if he had to go over every trap with a fine-tooth comb we'd only be hauling one string of gear a week.

[50] Therefore, the Trial Judge used and applied the correct test.

[51] The question which remains is whether his decision is patently unreasonable or unsupported by the evidence.

[52] As I indicated, even Mr. Mackenzie testified that, if he had noticed the reduction of the circular escape vents, he would have not let it go back in the water. He said the crew looks over the traps as they are hauling them up, and about 90% of the time they notice if there are problems. He said they have to move the gear quickly because they are fishing 750 traps, and do not have time to go through them with a fine-tooth comb. He surmised, in relation to the defective escape vent, that his crew probably mentioned it and he probably told them to fix it. However, he agreed that he did not check to make sure that it got fixed.

[53] As noted in **Henneberry**, *supra*, at paragraph 28, once the Crown has proven the *actus reus*, to avoid liability, the accused must prove that he took all reasonable care.

[54] Mr. MacKenzie did not present evidence of any directions he gave to his crew, or protocol or system that he put in place, to ensure that any twine or other additions to an escape vent that needed to remain open was installed in such a way as to ensure the required unobstructed opening was maintained. He did not indicate that he had any process or procedure to check their work, not even when they alerted him that there was a problem.

[55] Considering these points, the Trial Judge's decision on this issue is supported by the evidence, and the lack of evidence from Mr. Mackenzie, and is not patently unreasonable.

ISSUE 3. In convicting Mr. Mackenzie of Count 4, did the Trial Judge err in interpreting and applying the definition of fishing in section 2 of the *Fisheries Act*?

[56] Count 4 alleges that from November 12 to 13, 2017, while fishing under the authority of a licence issued for the purpose of commercial fishing, Mr. MacKenzie did fish for lobster in a LFA (which is well known to be a lobster fishing area) during

the closed time set out in Schedule XIV, contrary to section 57(1)(a) of the *Atlantic Fishery Regulations* 1985 SOR/86-21, thereby committing an offence under section 78 of the *Fisheries Act*.

[57] This raises a question of law to be reviewed on a standard of correctness.

[58] Section 2 of the *Fisheries Act* states that "***fishing*** means fishing for, catching or attempting to catch fish by any method".

[59] In rendering his decision, the Trial Judge quoted paragraphs 10 to 19 of **R. v. Boyd**, *supra*, which provides a thorough review of the case law regarding the definition of "fishing" in section 2 of the *Fisheries Act*. I will not recite those paragraphs. However, I will consider them in my decision.

[60] In that case, the court, despite authority from Newfoundland to the contrary, concluded that no actual catching of fish was required to meet the definition.

[61] In doing so, it applied a broad, liberal and inclusive interpretation, consistent with the conservation, management and other purposes of the *Fisheries Act* and related regulations.

[62] At paragraph 12, it cited with approval the 1897 decision of the Supreme Court of Canada in **Gerring v Canada,** which stated:

> The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession.

[63] The Appellant argues that the apparent discrepancy in authorities can be reconciled by requiring, in the case at hand, proof that Mr. Mackenzie's purpose was to catch and retain lobsters, as opposed to throwing them back in the water. In support, he relies on the comments at paragraph 15 of **Boyd**, reproduced from **R. v. Kehoe**, that " 'fishing' means 'any act' for the purpose of gaining possession of fish and not 'every act' in a continuum of acts for that purpose."

[64] He then goes on to argue that, since the Trial Judge accepted that Mr. Mackenzie would throw back any lobster brought up with the gear, his purpose was not to catch or retain lobsters, thus he was not fishing for lobsters, but rather treating them as a bycatch. He added that the Crown would have needed to prove he retained the catch before the offence was complete (or at least that he planned to do so).

[65] These arguments ignore the fact that this is a strict liability offence. Therefore, the Crown is not required to prove *mens rea* or intention. It need only prove an act of fishing.

[66] Our Court of Appeal, in **R. v. Saunders**, [1989] N.S.J. No. 407 (C.A.), ruled that the Crown did not need to prove the accused intended to fish for pollack. It had been accepted that he was fishing for haddock but caught pollack instead.

[67] In that case, the fisher did retain the fish, saying that, having caught it in his drag, he did not want to waste the resource by dumping it at sea. That could be seen as a distinguishing feature. However, a counterbalancing distinguishing feature is that the gear used for haddock and pollock were the same. In the case at hand, Jonah crab gear is different from lobster gear.

[68] Mr. Mackenzie presented two cases from the British Columbia Provincial Court dealing with fishing for salmon with a barbed hook. The accused in both cases said they were fishing for other species. The two cases are **R. v. Rupp,** 2015 BCPC 301, and **R. v. Dicesare,** 2016 BCPC 409. Both differentiated "fishing" from "fishing for" and found that an intention to fish for salmon was required. The accused in **Rupp** was convicted on the basis of being reckless as to whether he would catch salmon. The accused in **Dicesare** was acquitted. The difference appeared to be that Rupp was in a location known to be a salmon fishing location, whereas Mr. Dicesare was not.

[69] In the case at hand, Mr. MacKenzie was in a lobster fishing area and agreed at trial that lobster co-exist with crab. Plus, he was fishing with a trap designed for lobster, not a hook.

[70] More importantly, neither of those British Columbia Provincial Court decisions override **R. v. McKinnell Fishing Ltd.**, 2016 BCSC 312, upheld on appeal, 2016 BCCA 472, where the Court of Appeal concluded there was no difference between "fishing" and "fishing for", such that the *Gerring* definition applied, and adding "for" did not limit the scope of what constituted fishing. **McKinnell** was one of the many "drifting" cases. So, the facts are not of assistance here.

[71] It is the purpose of the impugned act that must be looked at, not the purpose or intention of the accused.

[72] In this case, the clear and uncontradicted evidence of the fishery officers was that 10, of the string of 39 traps, did not have lobster excluders at the entrances. They also testified that they were catching lobsters. Only those traps, and the traps that had the entrance reducers pried open to beyond the minimum allowable opening, had lobsters that were market size in them.

[73] Therefore, they were not strictly lobster traps modified into Jonah crab traps. They were still lobster traps. The purpose of lobster traps is to catch lobsters. As soon as they are put in the water they are fishing for lobster.

[74] The Trial Judge's comments in relation to Count 4 show that he applied the definition of fishing from **Boyd** and based his finding of guilt on Mr. Mackenzie having the impugned lobster traps in the water without the entrance reducers required to use them for Jonah crab fishing. Those comments also imply that his decision was further based on the evidence that there were about 50 lobsters in the 39-trap string belonging to Mr. Mackenzie. That string had 10 traps without entrance reducers and three or four in which the entrance reducers had been bent open. The market-size lobsters were only in those 13 or 14 traps. In addition, they were not in the 40-trap string belonging to Mr. Mackenzie in which he did have entrance reducers. The evidence of the fishery officers was that there were very few lobsters, if any, of any size in the traps that had entrance reducers.

[75] The Trial Judge's comments were as follows:

> The definition of lobster fishing was dealt with in **Boyd**. Here, following **Boyd**, there was clear evidence of lobster fishing. There was the accused's lack of due diligence in ensuring his equipment met regulatory standards that led to the lobsters being in the traps. While I do accept that had he landed those traps he would've tossed the lobsters overboard, I am still compelled to find him guilty when following the Supreme Court of Nova Scotia's directives in **R. v. Boyd**.

[76] I digress for a moment to comment on the apparent basis for the trial judge accepting that Mr. Mackenzie would have thrown the lobster overboard. The Trial Judge's comments on that point were:

> In relation to the lobster found in his gear, the accused was very clear that during the Jonah season, any lobster brought up with the gear were thrown back. He expressed concern with the sustainability of the lobster fisheries.

[77] Those comments suggest that part of the basis for accepting his evidence was that he was concerned with the sustainability of the lobster fisheries. That is an overgeneralization of Mr. Mackenzie's evidence. His evidence was that he was completely against the summer fishery, which he saw as conservation time for the lobsters, such that summertime fishing jeopardized the stocks. The activities in question in this case were not occurring in the summer. It was at mid-November, just before the opening of the LFA 34 lobster season.

[78] In addition, if the Trial Judge was going to use Mr. Mackenzie's comments related to stock conservation to support the credibility of his comments that he would throw the lobsters back, he ought to have permitted the Crown to cross-examine him on his prior fisheries-related offences. Instead, he cut off that line of questioning by the Crown.

[79] Further, having 10 traps out of 39 without entrance reducers, without even any dislodged entrance reducers still located in the trap, where they would naturally fall,

would justify an inference that the reducers were deliberately left off to catch and retain lobsters.

[80] For these reasons, I question the Trial Judge's finding of fact that the lobsters would have been returned to the sea. However, the Crown has not raised that finding of fact as an issue, and the Trial Judge had the advantage of seeing the Accused testify. Therefore, I must pay deference to that finding of fact.

[81] The Appellant argued that the requirement in Licence Condition 6 was meant to address the situation, such that it should be dealt with only as a breach of that condition, and not as illegal fishing of lobster.

[82] Licence Condition 6 states:

> When using modified lobster traps the entrance shall be rectangular with the opening no more than 76 mm (3 ") in height with no limit on the length of this opening.

[83] With no reducer on the entrance, even with the usual lobster trap escape hatches being blocked, not only does the trap fail to meet the requirements of a lobster trap legally modified to fish Jonah crab, it also remains a lobster trap with inadequate escape hatches. That was the state of the contravening traps in the case at hand.

[84] A distinguishing feature between the two offences is, at least arguably, that the lobster trap is not fishing until it is placed in the water in a lobster habitat, while an illegally modified lobster trap may be used as part of a Jonah crab fishing operation, merely as being part of a string of traps being carried on a vessel on the way to being dumped in the water to fish Jonah crab.

[85] Such a distinguishing feature is supported by the comments cited from **R. v. Kehoe**, in **Boyd**, at paragraph 15, that:

> [H]aving lobster traps aboard a fishing boat and dropping that trap over the side will, in appropriate circumstances, be an act of fishing just as much as the act of hauling a trap which has a lobster inside.

[86] It would be contrary to the purpose and intent of the *Fisheries Act* to foreclose the possibility of a conviction for fishing lobster with lobster traps having no entrance reducer merely because those traps are part of a string of lobster traps properly modified to fish Jonah crab.

[87] That would create a situation where, particularly within the last two weeks preceding the lobster fishing season, Jonah crab fishers could simultaneously be fishing crab and lobster with no risk of a conviction for fishing lobster out of season. Such a situation would be untenable, even if there was no intention to keep the lobsters, such as where the fisher would simply be using the process to test new lobster fishing grounds.

[88] As testified to by Officer Matheson, when discussing the requirement to check gear within 72 hours, while in the trap, fish, including lobsters, may be killed by others in the trap, which wastes the resource, irrespective of whether the fisher intends to retain the fish remaining alive.

[89] That is particularly so in circumstances such as those in the case at hand where, as testified to by the fishery officers, there were very few crabs amongst the lobsters in the traps that had no reducers. The main catch was lobsters. They were not a by-catch. They were the main catch. In addition, the traps had been in the water for 7 to 8 days.

[90] As noted in **Canada (Attorney General) v. Savory**, [1990] N.S.J. No. 384, (upheld 1992 CanLII 2556 NSCA), enforcement practicalities are a consideration in interpreting regulatory offence provisions.

[91] In circumstances such as those in the case at hand, fishery officers would have to be within viewing distance to see whether Mr. MacKenzie freed the lobsters into the ocean, or kept them onboard, or put them in a cage in the ocean for retrieval when the season opened. If the fishery officers can see him, he can see them and halt his retention activity while being observed. That would make enforcement impractical and overly onerous.

[92] Mr. MacKenzie's lawyer, in cross-examination of Officer Matheson, suggested he might have been able to install a microchip in one of the lobsters. However, that would not address the situation where the lobsters would be retrieved from a cage in the ocean after the start of the lobster season. Mr. Mackenzie would simply need to say that the same lobster that he dumped overboard must have crawled into his lobster pots after the start of the lobster season.

[93] I disagree with the Appellant's suggestion that availability of both offences in the case at hand creates an ambiguity importing the principles of strict construction and lenity.

[94] Mr. MacKenzie does raise a valid concern that, carried to extremes, this approach could lead to a conviction of fishing for lobster even where a single entrance reducer was missing. However, in those circumstances, it would be much less likely that such a charge would be laid because those circumstances themselves would help support a due diligence defence. The circumstances of the case at hand are far different. Over one quarter of the traps in the string were missing entrance reducers. That cries out for a finding of at least lack of due diligence, and potentially deliberate omission.

[95] Mr. Mackenzie expresses concern that penalizing the use of lobster traps with no entrance reducers in this manner risks leading to illegal fishing charges merely

for having such traps aboard the vessel. Whether that would be a problematic situation would depend on the circumstances. If the trap or traps had been removed from a string to bring to shore to install a legal entrance reducer, it would not make sense. If the trap or traps were onboard, within a string of other traps, all of which were baited and ready to dump into the water, it may make sense. However, in the former situation, the due diligence defence would likely prevail.

[96] For these reasons, I find that the Trial Judge did not err in interpreting and applying the definition of fishing in section 2 of the *Fisheries Act*, and, he did not err in concluding that the Crown had proven the *actus reus* of fishing.

ISSUE 4: In convicting Mr. Mackenzie of Count 4, did the Trial Judge err in finding that the defence of due diligence had not been established?

[97] I have already outlined the applicable legal principles and standards of review.

[98] In addition to reciting the test, and making the general overall comments on due diligence, as already indicated, the Trial Judge made the following due diligence comments specifically related to Count 4:

> There was the accused's lack of due diligence in ensuring his equipment met regulatory standards that led to the lobsters being in the traps.

[99] Regarding the absence of lobster excluders at the entrances of 10 traps from the 39-trap string that was hauled, the trial judge said the following.

> [T]he accused blamed part of the illegal openings on the pots on a young crewmember who mixed up the stainless steel rings with the rusty rings. The rusty rings were not to be used as they were designated to falloff in the water after a period of time. The young individual, Nathan Nickerson, testified he helped get gear ready for the season. His testimony made it clear that, overall, any discerning captain would have had his work double-checked.

[100] The evidence of Nathan Nickerson clearly revealed that he was only 12 years of age when he was working on Mr. Mackenzie's traps and had no prior experience in doing so. He did not know much about it, nor what could happen, for instance, if he used the wrong hog rings to attach the entrance reducers. Neither Mr. Mackenzie nor anyone from his crew brought to his attention that he had done anything wrong. It is only after the fishery officers had hauled the traps that he learned something was wrong.

[101] Mr. Mackenzie provided the following evidence.

[102] He had been captain of his own lobster fishing vessel for 17 or 18 years, and fishing for a year or two before that. It had been his second summer fishing his Jonah crab licences. Because he had two crab licences, he fished 750 traps.

[103] The season starts mid to late June and ends in mid-November, i.e. in the bulk of the period of time during which LFA 34 is closed.

[104] Because the value of the Jonah crab was significantly less than lobster, and they did not know whether the fishery would work, they kept costs down by using "junk bait, junk pots, nothing of real value".

[105] His crew will usually tell him if there's "too much wrong with a trap". A "wire reducer would be important" and considered too much. About 90% of the time they notice when there's something wrong. However, it would take too long to "go over every pot with a fine-tooth comb". He and the people who worked on the gear were "kind of on the same page as to what was supposed to be there".

[106] For the wire reducers that go at the entrances they have to use the stainless-steel hog rings. They used the plain steel or rusty hog rings for the fallout escapes. He thought Nathan Nickerson had got into the wrong box of hog rings and used the plain steel ones for the reducers.

[107] When Nathan Nickerson began working on the gear, they peeked in on him as they slowly started him off. However, he worked for 10 days or two weeks.

[108] While urinating Mr. MacKenzie looked over and noted three or four traps that had the wrong hog rings on the reducer. They look different because one is black and the other shiny. They changed whatever they came across.

[109] Missing reducers would be much more noticeable than something like a trap tag.

[110] However, there was a lot of gear to go through, and it was hard to see the traps when they were all stacked in a block as you could not walk between all of them. He would have had to have re-stacked them all and did not know if he had room in his parking lot to do so.

[111] They looked at the traps when they were "going aboard the boat" and did not notice "anything overly out of whack".

[112] That season he had a fresh crew and it was the first time they had fished Jonah crab. He did not handle or go through the traps himself. He just made sure everyone was on the same page. They know if something is wrong they have to fix it and "that's about that".

[113] As noted in **Griffin v. R.**, 2018 PECA 21, at paragraph 19:

> In the context of an employer who has delegated work to an employee due diligence consists of setting up and implementing a system to prevent breaches of the law.

[114] In the circumstances of the case at hand, there was even a greater onus on Mr. Mackenzie, a fishing captain with over 18 years of experience, to ensure he set up a system to inspect the work of Nathan Nickerson, a 12-year-old who had absolutely

no experience working with lobster traps, particularly after discovering three or four pots that had the wrong hog rings on the reducer.

[115] He put no such system in place. He allowed the placement of the traps in a large pile to make it such that it was impossible for him to inspect all the traps. It is only by chance, while urinating, that he noted a few traps with the wrong hog rings attaching the entrance reducers. The only other review of the traps was in the process of loading. Given the large number of traps, and Mr. Mackenzie's evidence that he had an inexperienced crew and they had to move through them quickly, in the circumstances, those were not reasonable measures. In fact, there were essentially no measures taken and there was no system or protocol in place.

[116] In my view, the Trial Judge applied the correct legal test for the due diligence defence. His finding that due diligence had not been made out was not patently unreasonable and was supported by the evidence.

[117] Therefore, he did not err in finding that the defence of due diligence had not been established.

ISSUE 5: Did the Trial Judge err by imposing a sentence that was demonstrably unfit or excessive?

[118] The Supreme Court of Canada, in **R. v. Lacasse**, 2015 SCC 64, dealt at length with the standard of review, as well as the approach to review, on sentence appeals.

[119] The Ontario Court of Appeal, in **R. v. Adan**, 2019 ONCA 709, at paragraphs 102 to 106, provided the following summary extract of principles from **Lacasse**:

> [102] The principles that govern our statutory authority to consider the fitness of a sentence imposed at trial are uncontroversial and in no need of elaboration. Four brief points will suffice.
>
> [103] First, sentencing judges are in the best position to determine a just and appropriate sentence that pays heed to the sentencing objectives and principles set out in the *Criminal Code*. It is especially so where the sentence is imposed after a contested trial. Accordingly, appellate courts accord substantial deference to sentencing decisions when exercising their powers of review under s. 687(1) of the *Criminal Code*: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at paras. 11, 48.
>
> [104] Second, an appellate court is entitled to intervene under s. 687(1) of the *Criminal Code* where the sentencing judge erred in principle, failed to consider a relevant factor, or erred in considering an aggravating or mitigating factor, but only if it appears from the sentencing judge's decision, read as a whole, the error impacted had an impact on the sentence ultimately imposed: *Lacasse*, at paras. 43-44.
>
> [105] Third, the mere fact that a judge deviates from the proper sentencing range does not, on its own, justify appellate intervention. The choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot, on its own, constitute a reviewable error. Apart from errors of law or principle that impact the sentence, appellate intervention is only warranted where the sentence imposed is demonstrably unfit, that is to say, clearly unreasonable: *Lacasse*, at paras. 11, 51-52.
>
> [106] The final point concerns aggravating and mitigating factors. While it is an error to consider an element of the offence an aggravating factor, such an error must have had an impact on the sentence imposed to permit appellate intervention: *Lacasse*, at paras. 42-44. Likewise, a sentencing judge's decision to weigh aggravating and mitigating factors in a particular way does not, in itself, permit appellate intervention unless the weighing is unreasonable: *Lacasse*, at para. 49, 78.

[120] Our own Court of Appeal, in **R v Livingstone; R. v. Lungal; R. v. Terrris**, 2020 NSCA 5, at paragraphs 7, 9 and 10, summarized the principles applicable to sentence appeals as follows:

> [7] Appellate review of sentencing decisions is highly deferential; an appellate court may not intervene absent an error in principle, or unless the trial judge failed to consider a relevant factor, overemphasized the appropriate factors or where the sentence is demonstrably unfit … .
>
> ….
>
> [9] A deviation from a sentencing range is not an error in principle unless it "departs significantly and for no reason from the contemplated" range … .
>
> [10] Recently, in *R. v. Chase*, 2019 NSCA 36, this Court identified three fundamental steps in the sentence appeal analysis process:
>
> > [23] To set the stage for the analysis that follows, three discrete points are particularly relevant in this case. First, demonstrating that the sentencing judge made a mistake is not enough. The legal error must have been one that impacted the result (*Lacasse* at ¶44). Second, the principle of proportionality is fundamental to the sentencing process. Proportionality is to be determined both on an individual basis (linking the accused to the crime) and by comparing sentences imposed for similar offences committed in similar circumstances. Accordingly, individualization and parity of sentences must be reconciled if a sentence is to be proportionate (*Lacasse* at ¶53). Proportionality will be reached through "complicated calculus" whose elements trial judges understand better than anyone else (*L.M.* at ¶22). Proportionality "is grounded in elemental notions of justice and fairness, and is indispensable to the public's confidence in the justice system". (*R. v. Safarzadeh-Markhali*, 2016 SCC 14 at ¶70). Third, the principle of parity of sentences is secondary to the fundamental principle of proportionality. Trial judges are seized with the responsibility of properly weighing the "various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed" (*Lacasse* at ¶54).

[121] Our Court of Appeal, in **Newman v. R.**, *supra*, at paragraph 31, provided the following summary based on **Lacasse**:

> A deferential standard of review applies to sentence appeals. This Court would only intervene if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of the appropriate factors. To warrant our intervention, an error in principle must have had a bearing on the sentence.

[122] Moral blameworthiness is a relevant consideration in strict liability offence sentencings, despite *mens rea* not being a requisite element in proving guilt: **R. v. Pederson**, 2000 SKQB 255, para 17.

[123] Mr. Mackenzie was sentenced in relation to the following 8 offences contrary to the *Fisheries Act* :

- two offences of leaving unmarked gear unattended;
- blocking an escape panel;
- two offences of leaving fishing gear unattended for more than 72 hours;
- fishing for lobster during a closed time;
- having an improper entrance size on 10 to 14 Jonah crab traps; and,
- fishing without a valid tag on 2 Jonah crab traps.

[124] Mr. MacKenzie submits the following.

[125] Fishing prohibitions are usually reserved for situations where there is a high degree of moral culpability, such as where the violation is egregious or motivated by greed. In this case, he: did not properly maintain his gear; misunderstood how

long he could leave his traps unchecked; and, switched vessels due to mechanical difficulties and did not remark his buoys.

[126] This argument ignores that: ignorance of the law is no excuse; being in a regulated fishery, it is his obligation to determine which rules he has to follow, he has an obligation to ensure his gear is compliant (but he had a significant number of traps that were noncompliant); and, he switched vessels in August (therefore he had plenty of time to mark and switch buoys between then and mid-November). Plus, even the markings showing the VRN of his prior vessel were so faint as to the barely decipherable. In those circumstances, particularly considering his lengthy record of fisheries convictions and the multiple warnings he has received in the past, his actions demonstrate a higher degree of moral blameworthiness than he submits. However, I do agree that the Trial Judge's finding that Mr. MacKenzie would have returned the lobsters to the water, removes an element of greed that would demonstrate an even higher degree of moral blameworthiness.

[127] Mr. MacKenzie provides an estimate of the financial losses he can expect from the fishing prohibitions. He expects losing between $200,000 and $250,000 in revenue in the first five days of the lobster season, and $274,000 in crab fishing revenue for the year. He says it is not clear whether the trial judge considered the effect of the prohibitions on the sustainability of his fishing business.

[128] First of all, his estimated losses in the crab fishery are inconsistent with his evidence at trial. At trial he testified that crab fishing was not anything that you could depend on for income and, in the summer of 2019, he could not find anyone to buy his crabs.

[129] One cannot simply consider the revenue he will lose while suspended, one also has to consider the expenses he will save. His total revenue from 2018 was $895,000, while the net company income was just over $142,000. Averaged out, the expenses are over 84% of his income, leaving less than 16% for net income. That reduces a gross revenue loss of $200,000 to $32,000. One cannot parse out which portion of his fishing activities the expenses apply to. So, it is a very rough approach.

[130] Plus, even if he loses $200,000 by missing the first five days of the lobster season, he will still have other lobster revenue exceeding $420,000, if it stays as it was in 2018.

[131] Even if one also considers 16% of the $274,000 2018 crab revenue, despite market issues in 2019, that only adds a net loss of $43, 840.

[132] Secondly, moments before rendering his sentencing decision, the trial judge heard remarks from Mr. Mackenzie, that span 2 ½ pages in the transcript. In those remarks, Mr. Mackenzie emphasized that suspension of his Jonah crab licence for

two seasons, and of his lobster licence for one season, would be financially devastating to his company, family and employees, as all of his income was from those two fisheries. He explained that he had a long-lining licence, but it was hard to support his family and keep his company going in that fishery. He said he had yearly company debt payments of $87,000. He described how his children, former spouse and current spouse depend on his income. He described how he and others were pioneers in the Jonah crab fishery which created employment for over 40 people. The prohibition would put them out of work. He said he would be forced to sell his company.

[133] In his decision, the Trial Judge specifically noted that the accused's economic situation was amongst the factors that he considered.

[134] It was enough for him to consider the evidence that Mr. MacKenzie would have to sell his company, without getting into the details of how much of a loss he would suffer, particularly considering that he did not impose a two-year prohibition from crab fishing, and did not impose a one-year prohibition from lobster fishing, despite the Crown having requested those lengthy prohibitions.

[135] He only imposed a one-year prohibition from crab fishing, after having heard at trial that Mr. Mackenzie had been unable to find someone to buy his crabs in 2019 at that point, in any event.

[136] He only imposed a five-day prohibition from lobster fishing, to start at the beginning of the 2021 season. That will result in much less of a loss and give Mr. MacKenzie plenty of time to arrange his financial circumstances so that he would not have to sell his company.

[137] Mr. MacKenzie also argues that the trial judge improperly considered a prior conviction for which Mr. MacKenzie had not yet been sentenced. There was nothing improper about considering a prior conviction, even if the sentencing had not yet occurred. It is still a prior finding of guilt.

[138] He suggests that the Trial Judge may have overemphasized his attentiveness to his traps and the regulations under which he was required to fish. The Trial Judge's comments in that regard were as follows:

> [T]he the accused had little regard for the requirements to ensure that the fishery was one where conservation was taking place. It showed a lack of judgment or lack of care in relation to making sure that his vessel registration number was in order, that the pots he was using were in order, all of which again - has a background of prior records.
>
> In relation to the lobster, the illegally fishing lobster charge, I do note that that arose largely because of the lack of care in the pots. There is no evidence that the Crown had found him in possession of lobster or selling lobster or otherwise engaged in that aspect of the fishery and it is certainly a legal finding that he was fishing lobster.

[139] There was evidence that: failure to check traps within 72 hours is an important conservation issue; he left faded VRN's from a prior vessel on his buoys months after fishing with a replacement vessel; there was a significant number of

noncompliant pots; and, the lobster pots without enclosure reductions were fishing lobster. That evidence clearly supported the Trial Judge's comments and does not reveal any overemphasis on the part of the trial judge.

[140] Mr. MacKenzie argues that the Trial Judge did not set out the reasons for his sentence, which justifies this Court moving away from a deferential approach and intervening, because it is unable to understand why the Trial Judge imposed the sentence. In support he cites **R. v. Guha**, 2012 BCCA 423.

[141] The Trial Judge's sentencing decision reveals the following.

[142] He noted the conservation purpose of fisheries regulation.

[143] He emphasized Mr. Mackenzie's very significant record of fisheries offences, and repeatedly noted its aggravating effect.

[144] He, justifiably, considered Mr. Mackenzie's lack of regard for following regulations, and his lack of judgement or care in ensuring they are followed.

[145] He was alive to the fact that his finding of lobster fishing was, in his words, a "legal finding", thus, he did not overemphasize its impact on sentencing.

[146] He specifically stated that he considered Mr. Mackenzie's financial situation.

[147] Thus, the Trial Judge did provide reasons explaining why he imposed the sentence he did.

[148] Mr. Mackenzie, at sentencing and on this appeal, for comparison purposes, referred to cases, reported only in newspapers, in which fishing prohibitions were imposed and emphasized that the reasons, in those cases, included gross violations and/or cheating other fishers out of a natural resource.

[149] He referred to the case of **Earl Boudreau**, who was fined $50,000 and given a three-year lobster fishing prohibition. He had retained 6220 undersize lobsters. He had a prior record for having previously retained a large quantity of illegal lobsters. He had also been crewmember on a vessel found in possession of 5330 illegal lobsters.

[150] He referred to the case of **Daniel Doucette**, who was found in possession of 5330 undersize lobsters. He was fined $50,000 and given a two-year lobster fishing prohibition.

[151] The lobster fishing prohibitions in those cases were 72 to 100 times the lobster fishing prohibition imposed by the Trial Judge in this case. Thus, even considering that it is the first five days of the season, a very lucrative part of the season, the prohibitions in those cases were still many times longer than, or more extreme than,

those imposed in the case at hand. The fines for individual offences were 20 to 50 times as high as the fines imposed on Mr. Mackenzie.

[152] Though the Trial Judge imposed a one-year prohibition on Jonah crab fishing, that was on the heels of evidence that it was not a fishery that could be depended upon for income and that there was difficulty finding a market.

[153] Therefore, it is clear that the Trial Judge in the case at hand respected the principle of restraint, as he imposed suspensions much shorter than what the Crown had requested.

[154] There is no indication that the Trial Judge imposed the fishing prohibitions for the same reasons as in those cases.

[155] His imposition of prohibitions that were much shorter than that recommended by the Crown, his comments on Mr. Mackenzie's cavalier and careless approach to fishing, and his emphasis of Mr. Mackenzie's extensive prior record, illustrate that those were the reasons for the imposition of the fishing prohibitions and the remaining portions of the penalty.

[156] Mr. Mackenzie also referred to a sentencing of **Clearwater Seafoods** in 2019 for what the media described as a gross violation in the lobster fishery. He highlighted that Clearwater has exclusive right to use a large fishing ground. It had

been warned twice not to store traps on the ocean floor while not in use, but it continued to do so. When hauled up, the traps contained 15,000 pounds of lobster. A $30,000 fine was imposed. There was no indication of prior record.

[157] Given the previous warnings, that may have been a lenient sentence. However, it does not mean that the sentence imposed by the Trial Judge in the case at hand is demonstrably unfit or excessive.

[158] The **Clearwater** case demonstrates the aggravating effect of previous warnings. In the case at hand, there was evidence at trial of previous warnings being issued to Mr. Mackenzie. The Trial Judge did not refer to those in his sentencing. They would have provided additional aggravating effect and additional, though unnecessary, support for his sentence.

[159] The three cases referred to involved sentencing for one offence.

[160] Mr. Mackenzie was sentenced by the trial judge for eight offences. He had 18 prior fisheries convictions, between 2006 and 2018. They included offences related to lobster and Jonah crab. He had already received, in 2007, a suspension from lobster fishing in the last week of the season. That was for fishing untagged lobster traps. There was evidence before the Trial Judge, at least at trial, of prior warnings having been issued to Mr. Mackenzie.

[161] I caution as well that, though I referred to these cases, the references were merely based on newspaper reports of the cases and, therefore, they may not accurately reflect what happened in those cases. If they do, the comments I have made are applicable.

[162] In **MacKinnon v. R.**, 2019 PESC 33, the court dismissed an appeal from a sentence which included a $10,000 fine and a five-day lobster licence suspension, commencing on the opening day of the season. The accused, an inexperienced commercial crab fishing captain, fishing a licence owned by a third party, possessed over 200 illegal female crabs. Some of them were hidden and used as lobster bait. Those circumstances were more serious than the circumstances in the case at hand. However, it was a single offence. He had no prior regulatory record and had pled guilty. Those were significant mitigating features that do not exist in the case at hand. Mr. Mackenzie only pled guilty to two offences and only on the day of trial. That greatly reduces the mitigating effect that the guilty pleas may have. **MacKinnon** itself illustrates that fishing suspensions are not reserved for the most egregious offenders.

[163] In addition, as argued by the Crown, the nature and circumstances of the offence are not the only things that make an offender egregious. In the case at hand, the following make Mr. Mackenzie a sufficiently egregious offender: the number of

offences (8); their effect on stock conservation, as described in the DFO Impact Statement, and the evidence of Officer Matheson; and, the number of prior convictions (18).

[164] It is clear, and it would have been abundantly clear to the Trial Judge, that Mr. Mackenzie's disregard for fisheries regulations, and that of others who might similarly disregard them, had to be denounced and deterred. Otherwise, left unchecked, the health of the fish stock would be left at higher risk. As noted by the Crown, given the prior sentencing measures, there were little other avenues left, short of jail, to provide sufficient denunciation and deterrence.

[165] Considering these points, and applying a deferential standard of review, I cannot find that the Trial Judge who sentenced Mr. Mackenzie:

- made an error in principle;
- failed to consider, or over-emphasized a relevant factor, or erred in considering an aggravating or mitigating factor, that impacted the sentence imposed;
- imposed a sentence that was disproportionate to the circumstances of the offence and the offender; or,

- Imposed a sentence that was demonstrably unfit or clearly unreasonable.

[166] Therefore, the sentence must stand as imposed.

CONCLUSION

[167] Based on my comments and conclusions on each of these questions, I dismiss Mr. Mackenzie's appeal in its entirety.

ORDER

[168] I ask Counsel for the Crown to prepare the order.

Pierre L. Muise, J.