

SUPREME COURT OF NOVA SCOTIA

Citation: *Rockville Carriers Limited v. Canada (Attorney General)*,
2023 NSSC 146

Date: 20230613

Docket: Hfx No. 512062

Registry: Halifax

Between:

Rockville Carriers Limited

Applicant

v.

The Attorney General of Canada

Respondent

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: February 22, 2023, in Halifax, Nova Scotia

Counsel: Richard Norman and Kelcie White, for the Applicant
Jeffrey Waugh, for the Respondent

By the Court:

A - Introduction

1 - The circumstances underlying the civil claims made by Rockville

[1] Rockville Carriers Limited [“Rockville”] has had an ongoing lobster and fish buying enterprise with a substantial live lobster holding capacity at Town Point, Yarmouth County Nova Scotia. Lobster notably falls within the definition of “fish” as defined in s. 2 of the *Fisheries Act*, RSC. 1985, c. F-14 (the “Act”).

[2] Wentworth Porter is its President.

[3] In November 2019, Rockville was licenced to buy, process and sell (legally obtained) live lobster in the Province of Nova Scotia.

[4] Section 35 of the *Fishery (General) Regulations* (the “Regulations”) makes it an offence to “buy, sell, trade... barter... any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing...”

[5] As Fishery Officer [“FO”] David Wamback summarized it in his affidavit (para. 3):

When fish [lobster included] is caught under the authority of a commercial licence issued by DFO [i.e., the Federal government’s Department of Fisheries and Oceans] it can be retained by the commercial fisher or **it can be [directly] sold to a company or individual that holds a valid buyer’s licence issued by the province of Nova Scotia.** Rockville Carriers had a buyer’s licence issued to them from the province of Nova Scotia.

[My bolding added]

[6] However, per s. 35(2) of the *Fishery (General) Regulations*, even someone with a Provincial Buyers Licence, such as Rockville, can only be in lawful possession of fish, **if that fish was also “caught and retained under the authority of a licence issued for the purpose of commercial fishing”**. Therefore, Rockville could lawfully possess lobsters **only if** they were caught under the authority of a commercial lobster fishing licence, and (if not received directly from the authorized commercial fisher) they were received by Rockville from someone with a Provincial Buyer’s Licence.¹

¹ I infer that these requirements are intended to ensure that lobster bought by commercial buyers is only handled by those authorized to do so (buyer and seller), which would allow DFO to trace an unbroken chain of fisheries participants back to the source which caught and retained the lobsters under the authority of a commercial fishing licence. This unbroken chain of handling the lobster would also allow buyers who receive lobster from a source with a provincial buyer’s licence to have sufficient assurance that the origin of the lobster was lawful (i.e. from an authorized fisher and fished during an open season for the relevant District/Area). Viewed in this way, s. 35(2) of the *Regulations* is consistent with the purposes of the legislation – para. 24 – see *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56.

[7] On the morning of November 15, 2019, Rockville received a shipment of 11,500 pounds of lobsters it had bought from David Pictou's company Kylie & Boys Fisheries Ltd. ["Kylie & Boys"].²

[8] Neither Mr. Pictou nor his company Kylie & Boys had either a commercial lobster fishing licence, or a Provincial Buyer's Licence.

[9] Under the direction of Senior FO Clark Deveau, he and a number of other FOs assembled on Rockville's property on November 15, 2019, in order to inspect the lobster pound premises. There they encountered Wentworth Porter, who spoke on behalf of Rockville to Senior FO Deveau.

[10] Paragraph 4 of Senior FO Deveau's affidavit reads:

On November 15, 2019, I advised Wentworth Porter that neither Kylie and Boys nor David Pictou possessed a commercial fishing licence issued by DFO nor a Nova Scotia Provincial buyer's licence. As such, I advised that they cannot sell fish commercially. I explained to Wentworth Porter that there was no evidence to support that the lobsters he purchased from David Pictou or Kylie and Boys came from an authorized commercial buyer or seller. I advised Wentworth Porter that DFO would be investigating the purchase of these lobsters pursuant to section 35 (2) of the *Fishery (General) Regulations*. I advised him that he was under investigation for purchasing lobsters from a non-commercial source.

[My bolding added]

² Rockville had also received 3,500 pounds of lobsters from Kylie & Boys on November 12, 2019.

[11] Consequently, that afternoon FOs seized 4,400 pounds of live lobster from Rockville, and not long thereafter, released them back into the ocean.

[12] During his cross-examination, Senior FO Deveau clarified that after the seizure of the lobsters on November 15, 2019, he believed the appropriate choices to be:

- if there was proof that the fish were lawfully caught, (but that they were sold to Rockville by someone without a licence to sell them) then DFO would sell the fish; whereas
- if there was no proof that the fish were lawfully caught, and the fish were alive, DFO would return them to the sea.³

[13] Rockville was not charged with any offences under the *Act*.

[14] No compensation was paid to Rockville by The Attorney General of Canada (“Canada”).

[15] Rockville is now suing Canada, *inter alia*, to be fully reimbursed for the loss of the lobsters and the crates in which they were transported.

³ The choice to return unlawfully sourced live fish to the sea, as a general rule, seems appropriate: it would be consistent with the conservation objectives of the legislation (which include making the lobsters again available to be lawfully caught, and to allow them to continue to reproduce); and it would be unseemly for DFO/Canada to realize monies from illegally obtained fish, which it could not return to the person from whom the fish were seized (or the unlawful fisher, if known), therefore Canada would have to keep the ill-gotten monies.

[16] I am satisfied on a balance of probabilities that, on November 15, 2019, Senior FO Deveau honestly and reasonably believed that the lobsters had not been “caught and retained under the authority of a licence issued for the purpose of commercial fishing”, and he also believed that neither David Pictou, nor his company, Kylie & Boys had a commercial fishing licence or Nova Scotia Provincial Buyer’s Licence.

[17] Therefore, on November 15, 2019, Senior FO Deveau honestly and reasonably believed that neither David Pictou nor his company Kylie and Boys was authorized to sell fish commercially, and therefore were not authorized to sell the lobsters to Rockville.

[18] Moreover, after considering the evidence I heard at this trial, which included evidence gathered after November 15, 2019, I am *not* satisfied on a balance of probabilities, that during the relevant time periods here:

1. the lobsters were “caught and retained under the authority of a licence issued for the purpose of commercial fishing”; and
2. David Pictou, or his company, Kylie & Boys had a licence issued for the purpose of the commercial fishing of lobsters, or a Nova Scotia Provincial Buyers Licence.

[19] I am satisfied that on November 15, 2019, the FOs acted in compliance with the *Fisheries Act* and *Regulations*, and acted in good faith and reasonably in the exercise of their statutory authority - specifically including the exercise of discretion to release the lobsters back to the ocean.

[20] I dismiss each of Rockville's claims.

[21] Let me next briefly set out some of the facts I have found.

2 - The facts

[22] Around 12 noon, November 15, 2019, FOs arrived to conduct an inspection of the Rockville operation.

[23] Shortly thereafter Mr. Porter was advised that the FOs would be undertaking an *inspection* of the premises.

[24] Mr. Porter stated (affidavit paras. 19-20):

I advised them that I had purchased [the lobsters] from David Pictou (Kylie & Boys Fisheries Limited), and at that point **I was advised by DFO that they were changing it from an inspection to an investigation.** About 20 minutes later, I was informed by FO Deveau that **I was under investigation for purchasing lobster from a non-commercial source, or from someone without a buyer's licence.**

After informing me of their suspicion, **the Fisheries Officers began inspecting the crates of lobster. Other fisheries officers arrived throughout the afternoon to assist with the inspection and seizure. The officers completed their inspection around 2:40 PM...**

The officers then seized all of the crates in storage in my pound... They also seized paperwork....; [and at para. 15]

After taking delivery [from Kylie & Boys in the morning of November 15, 2019], **Rockville stored the lobster in its pound in crates holding approximately 100 pounds each.**

[My bolding added]

[25] I conclude that it was likely between 2:40 and 3:25 PM, pursuant to s. 51(a) of the *Act*, that FOs cumulatively physically “seized” from Rockville’s holding tanks (which was disputed according to the positions of the Applicant and Respondent, 5,600 or 4,000 pounds of live lobster respectively), which I conclude as a matter of fact was 4,400 pounds of lobster, which Rockville had bought from David Pictou/Kylie & Boys Fisheries Ltd.⁴

[26] Thus, the “seizure” was ongoing and completed at or about 3:25 PM, November 15, 2019, and I conclude that the statutory language applicable, “at the time of seizure” includes that entire time interval.⁵

⁴ In Senior FO Deveau’s affidavit he includes a copy of his own notes. He also includes at Exhibit “A” - a copy of FO Carver’s typewritten and signed notes, and at Exhibit “C” - a copy of notes of FOs Ryan Currie, Simon Robichau, and Jesse Rispoli. No objection was taken by Rockville’s counsel to the inclusion of these notes. On reflection, it would have been preferable for the court to have raised the question of whether they were included for the truth of their contents or not. At this stage, I am inclined to consider them hearsay. However, it is permissible for Senior FO Deveau to have relied upon what he was told by the various DFO personnel involved on November 15, 2019, as a basis for him forming “reasonable grounds” for his official actions and conduct related to the Rockville inspection, investigation, seizures, and release of the lobsters back to the sea; and in order to answer Rockville’s civil negligence pleading that the conduct of the investigation amounted to breach of a standard/duty of care.

⁵ The words “seized” and “seizure” are not defined in the legislation. I bear in mind the words of ss. 10-16, inclusive of the *Interpretation Act*, RSC 1985, c. I-21. **S. 51 of the *Act* reads: “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**

[27] At approximately 3:25 PM, the lobsters, in 44 crates, were loaded onto a DFO vehicle and were driven for approximately 25 minutes to the Federal Government Sandford Wharf, where at approximately 4 PM, the officers began releasing all of the seized live lobsters into the ocean.

[28] I am satisfied that Senior FO Deveau's conduct of the investigation and inspection leading to, and reasons for, the release of the lobsters, were legally justified, reasonable, and not the product of a negligent investigation or conduct by DFO personnel.⁶

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 (a) was caught, killed, processed, transported, purchased, sold or possessed in contravention of this Act or the regulations; ...". Notably, s. 51 of the *Act*, contemplates a broad assortment of items that may be seized, and specifically includes land-based items as opposed to exclusively only those "at sea" where the fishing usually will have taken place: the seizure of "any fishing vessel, vehicle, fish or other thing... obtained by or used in the commission of an offence... or will afford evidence of an offence...". Thus, **s. 51 of the Act clearly contemplates the seizure of live "fish"/lobster/shellfish in a land-based pound, such as is the case here.** Regarding when fish is "seized" and what is meant by "at the time of the seizure" as contemplated by ss. 70(3), 72(4), and 73.2 - the indicia of "seizure" of fish will vary depending on the factual matrix in each case. A helpful discussion can be found under the definitions of "seizure" and "seizure of property" in *The Encyclopedic Dictionary of Canadian Law*, Kevin P. McGuinness, (vol. 3) Lexis-Nexis Canada Inc., November 2021. "Seizure" is defined as including: **"a seizure is a taking of a thing from a person by the police or another public authority without that person's consent"**. "Seizure of property" is defined as including, in relation to actions by a sheriff ... The sheriff **must obviously secure sufficient control over the property in question to be in a position to deliver it to the purchaser** ... Nevertheless, there are instances in which the sheriff is seen to have effected seizure, even though actual possession is not obtained. **The seizure of a chattel may be validly effected where the person having authority to seize informs the person in possession of the chattel of the proposed seizure and where, at the time of giving such notice, the former is in a position actually to lay hands on the goods if his authority is disputed.** Entry upon premises on which goods are situated, together with an intimation of an intention to seize the goods, constitutes a valid seizure." (citing *inter alia*, *Swann v. Earl of Falmouth*, (1828) 8 B & C 456, 108 ER 1112, wherein the Justices gave separate opinions on distinguishable facts – nevertheless the opinions are noteworthy for their consideration of whether the seizing party had ongoing lawful custody thereafter, including whether on the part of the seizing party, there had been an abandonment of the seizure.)

⁶ Including his decision to specifically release them at the Sandford Wharf, because it was a federally owned wharf nearby, which would be less likely to have members of the fishing community/public present as would wharves in Yarmouth, thereby reducing the likelihood of any harassment or confrontation, and avoiding unnecessary officer

[29] I am further satisfied:

1. given all the circumstances, including that the lobsters were released into the ocean starting at approximately 4 PM, that their release was effected within a time interval that Parliament would have intended to include, and be consistent with the phrase “at the time of the seizure”;⁷ and that
2. their release was a *bona fide* and reasonable exercise of discretion by Senior FO Deveau pursuant to s. 70(3) of the *Act* (“may dispose of [the lobsters] in any manner the officer or guardian considers appropriate...”) and s. 73.2 (“may, at the time of the seizure, return to the water any fish that the officer or guardian believes to be alive”).⁸

safety concerns. I also conclude it was reasonable not to release the lobsters into the water near Rockville’s premises.

⁷ See Justice Nadon’s reasons in *George Denton and Associates Ltd. v. Canada*, [1993] FCJ No. 1029, (which I prefer to Justice MacKay’s more restrictive interpretation in *Longmire v. Canada*, [1993] FCJ No. 977), wherein he considered the wording of the present s. 74(2) of the *Act* and concluded “the words ‘at the time of the seizure’ used in present section 74(2) must not be interpreted strictly; rather they should be read as meaning ‘at about the time of the seizure’.”

⁸ Given my conclusions regarding Senior FO Deveau having reasonable grounds to conclude that the lobsters were unlawfully caught, and the surrounding circumstances, as I noted elsewhere, it was a reasonable exercise of his discretion to return the lobsters to the water. I also bear in mind that: 1) the Supreme Court of Canada at para. 24 in *Ulybel* endorsed our Court of Appeal’s words in *Canada (Attorney General) v. Savory*, (1992), 108 N.S.R. (2d) 245 (N.S. C.A.), that: “The Act and the Regulations have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the Act and the Regulations is to properly manage and control the commercial fishery.” (My underlining added); and 2) that the words “at the time of seizure” appear in ss. 72(4) and 73.2, but not s. 70(3) of the *Act*.

B - The Legal Position of Rockville

[30] Rockville says that Canada did not have authority under the *Act* or *Regulations* to seize, take custody of, and return the lobsters to the ocean; and in any event, Canada should be responsible in these circumstances to pay Rockville compensation pursuant to its civil claims (negligence; misfeasance in public office; and conversion/detinue).

[31] In its February 1, 2023 brief, Rockville states:

The central fact giving rise to Rockville’s claim is the disposal of the seized lobster into the ocean on November 15, 2019. (para. 37);

It is Rockville’s position that the Attorney General of Canada is liable in both negligence and conversion. In its view, DFO’s compliance with the *Fisheries Act* is central to the analysis of both causes of action. (para. 41);⁹

Rockville was a *bona fide* purchaser for value. It had no notice that there was anything improper about the origin of the lobster. (para. 48);

To conclude, the forfeiture provisions [ss.72(4) and 73(2) of the Act] are either not applicable or were improperly applied. (para. 53);

...

Section 51 of the *Fisheries Act* grants Fishery Officers certain powers of seizure... A Fishery Officer’s authority under section 51 is circumscribed by sections 70 – 78 of the *Act*... The disposal of its lobsters did not comply with these provisions [the Crown specifically relies on each of sections 70(3), 72(4) and 73.2 of the Act as authority for disposing of the lobsters as it did]. (paras. 42-3)

⁹ Rockville has also claimed against Canada on the basis of the tort of “misfeasance in public office”. However, Rockville does not develop this argument in its oral or written argument. Nevertheless, I will directly consider it. I canvassed this cause of action in *Howe v. Rees*, 2022 NSSC 230, at para. 58 - I am very satisfied, on a balance of probabilities, that Rockville has not established this tort was committed.

[32] Rockville says in relation to each of these:

s.70(3) of the Act reads:

A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

[33] To rely on this section the Fishery Officer must have “custody of any fish or other perishable things seized” – however, Rockville says that the lobsters were not “perishable”, and therefore this section does not apply; moreover even if the Court finds the lobsters were “perishable”, “the Fisheries Officers involved made the hasty unilateral decision to release Rockville’s lobster into the ocean within hours of seizure without making any attempt to sell it... DFO could have easily secured a buyer. Had DFO taken basic steps to sell the lobster, there would be proceeds of sale to compensate Rockville... Rockville was deprived of all due process and forced to incur significant financial losses – despite being an innocent party... This provision can – and should – be read as permitting DFO to sell seized perishables for proceeds when possible, such proceeds to be returned to the suspect or accused at the close of proceedings (unless the Crown secures a conviction, in which case all or a portion of the seized fish or proceeds would be forfeited to His Majesty pursuant to s. 72(2))”.

[34] Rockville argues that its interpretation is consistent with the legislative framework which does not allow for the disposition of seized property before the close of proceedings – see for example ss. 71(3) and 73.1 of the *Act*; and that the Supreme Court of Canada in *Ulybel, supra*, at para. 38, recognized that, “the scheme of the Act reflects the presumption of innocence and the related principle that the property of an accused should be preserved until culpability is finally determined, except in the case of perishables where it is in the interest of the accused that the seized perishables be sold”.

[35] Firstly, I note that in *Ulybel, supra*, the company was charged with offences, which directly engages concepts like the presumption of innocence and could support the related general principle that property of an accused should be preserved until culpability is finally determined. However, generalized freestanding “fairness” concerns are not determinative in the present circumstances. Secondly, as Justice MacKay noted in *Longmire, supra*, (paras. 27-30):

I am not persuaded that the fishery officer, if he was acting within discretion authorized by [the present section 73.2 of the Act] can be said to have breached a duty of fairness owed to the plaintiff. There is no evidence the officer acted in bad faith... No argument of fettering discretion was here advanced... was suggested that the individual fishery officer concerned Mr. Kiley, had his own standard policy to return live scallops to the water where they were seized for fishing in closed waters... It cannot be said that Mr. Kiley did not consider that possibility... rather that testimony indicates there were reasons why Mr. Kiley from his experience, ordered the shell scallops to be returned to the water in this

case. Essentially the argument that the fishery officer breached a duty of fairness owed to the plaintiff seeks to establish that he ought to have permitted the plaintiff's request to shuck the scallops from their shells, or that he made the wrong decision. It seems to me that argument denies the very discretion that it is conceded, for purposes of this argument, was vested in him for it implies that in the circumstances only one course of action, that desired by the plaintiff, was open to the officer.... If his action was authorized within the limits of that discretion, it cannot be said on the basis of the evidence here presented that he violated any duty of fairness owed to the plaintiff in ordering the return of shell scallops to the water.

[My underlining added]

[36] Moreover, I conclude on a balance of probabilities that:

1. at trial, Rockville has not established that “at the time of seizure”, the lobsters were lawfully the property of Rockville;
2. the FOs had ample reasonable grounds to believe “at the time of seizure” that the lobsters were unlawfully in the custody of Rockville;
and
3. the DFOs acted in good faith throughout.

[37] This concept of the “taking” of a private property by the State without compensation, has most recently been addressed, albeit in distinguishable circumstances, in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022

SCC 36:

[18] A "taking" is a "forcible acquisition by the Crown of privately owned property ... for public purposes" (K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at § 5:1). It may take the form of a constructive taking (effective

appropriation of private property by a public authority exercising its regulatory powers), or a *de jure* taking (formal expropriation), by (in the case of land) taking title.

[19] To be clear, not every instance of regulating the use of property amounts to a constructive taking. Governments and municipalities holding delegated provincial regulatory authority (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 2) validly regulate land in the public interest without effecting "takings", properly understood (see *Compliance Coal Corporation v. British Columbia (Environmental Assessment Office)*, 2020 BCSC 621, 13 L.C.R. (2d) 215, at para. 91). The line between a valid regulation and a constructive taking is crossed where the *effect* of the regulatory activity deprives a claimant of the use and enjoyment of its property in a substantial and unreasonable way, or effectively confiscates the property (Horsman and Morley, at § 5:2). Put simply, "in order for a Crown measure to effect a constructive taking of property, private rights in the property must be virtually abolished, leaving the plaintiff with '*no reasonable use*' of the property" ...

...

[21] At common law, taking of property by the state must be authorized by law, and triggers a presumptive right to compensation which can be displaced only by clear statutory language showing a contrary intention — that is, an intention *not* to compensate...

[22] It is important to stress that the rule contemplates that governments have the power to immunize themselves from liability to pay compensation for a taking. While, as we explain, we do not "expand" that liability but merely affirm it, the point is that governments may effect takings without paying compensation, so long as the enabling statute clearly expresses that intention.

[My underlining added]

[38] **Sections 72(4), 73(2) and 77** of the *Act* read:

72(4) Where the ownership of any fish or other thing seized under this Act cannot be ascertained at the time of the seizure, the fish or thing is thereupon forfeited to Her Majesty.

73(2) Subject to sections 75 to 77, any fish or other thing forfeited to Her Majesty under subsection 72(4) shall be disposed of after the expiration of thirty days from the day of forfeiture, as the Minister directs.

77 Sections 74 to 76 do not apply to

(a) any fishing gear or equipment that has been disposed of pursuant to subsection 73(3); or

(b) any fish that have been returned to the water pursuant to section 73.2.

[39] The Crown relies on s. 72(4) for the disposal of the lobsters. Effectively, it says that unless on November 15, 2019, Rockville had been able to show it has lawful possession of the lobsters, it is not the “owner” thereof within s. 72(4) of the *Act*, and therefore I should conclude that ownership of the lobster “cannot be ascertained at the time of seizure”.

[40] Rockville says (para. 46 brief) that:

[it] was clearly the owner of the lobster... Nothing in [s. 35(2) *Fishery General Regulations*] requires fish buyers such as Rockville to satisfy themselves of the legality of a catch. Rockville did not have a duty to investigate the source of the lobster or request evidence of its origin from the vendor. Rockville was a *bona fide* purchaser for value. It had no notice that there was anything improper about the origin of the lobster. ...¹⁰ If the court nonetheless accepts that ownership was not ascertainable at the time of seizure, DFO overstepped its authority by disposing of the forfeited property in the manner it did... Subsection 73(2) states that the property forfeited pursuant to s. 72(4) is only to be disposed of 30 days after seizure ... The Act is clear: if ownership was in fact unascertainable, DFO was required to wait a minimum of 30 days before disposing of the seized lobster.

[41] In its Reply brief, Rockville argues that:

[Canada] suggests ownership of Rockville’s lobster was unascertainable at the time of seizure as Rockville was unable to produce conclusive evidence of origin. With respect, the Respondent conflates the concepts of ownership and origin... The fact that DFO could not

¹⁰ No jurisprudential authority was given in support of this proposition. In my opinion, where such regulatory provisions govern fisheries participants conduct, the equitable doctrine of “*bona fide* purchaser for value” is inapplicable. Moreover, I am satisfied that Rockville was not a *bona fide* purchaser.

conclusively determine the original source of the catch does not mean *ownership* was unascertainable.

[42] Rockville also separately argues that its preferred interpretation of “the relevant *Fisheries Act* provisions ... [is] consistent with the scheme of the *Fisheries Act*, which safeguards the interests of suspects and accused persons through a general prohibition against the disposal of seized items before the close of proceedings. It is also consistent with jurisprudence emphasizing the need to protect the interests of a suspect or accused in *Fisheries Act* proceedings until culpability is determined. Among the cases which support the Applicant’s interpretation of the *Fisheries Act* is... [the reasoning in] *R. v. Mood*, 1999 NSCA 55. (para. 24)... The argument rejected by the Court of Appeal is ultimately DFO’s argument in this proceeding. DFO says a Fishery Officer can use his or her discretion to seize fish without any exigent reason and have it forfeited without any supervision from the courts. That is not what Parliament intended.”¹¹ [My underlining added]

¹¹ I note there are a number of distinguishable factual and legal differences in *Mood*, some of which include: that the fisher in that case pleaded guilty to an offence of permitting crew not named in a licence to use his fishing vessel to collect lobster traps; at the trial level, the court imposed a fine, but pursuant to s. 72(1) no discretionary forfeiture of the lobsters was ordered. Upon a Crown appeal, mandatory forfeiture was ordered pursuant to s. 72(2), and the fisher appealed to the Court of Appeal. That court stated in conclusion: “**24 In my view the interpretation of s. 72(2) of the *Fisheries Act* adopted by Nunn J. leads to a number of problematic results. The most serious is that 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. There can be no supervision by the courts over mandatory forfeiture. If seized on the reasonable belief of fisheries officers, valuable catches, the property of honest crew members, could be confiscated for minor and otherwise unconnected infractions of the *Fisheries Act*.** This surely was not

[43] **Section 73.2** of the *Act* reads:

Notwithstanding anything in sections 70 to 73.1, a fishery officer or fishery guardian who seizes any fish under this Act may, at the time of the seizure, return to the water any fish that the officer or guardian believes to be alive.

[44] Rockville says:

[This section] permits Fishery Officers to return to the water any fish they believe to be alive at the time of seizure... While there is little judicial commentary on this provision, we submit it is intended to allow for the release of live fish at sea, or on the wharf, when the fish will likely die if not immediately released... This was not the situation facing DFO on November 15, 2019... Further, s. 73.2 only allows for the release of seized fish at the time of seizure. The Fishery Officers disposed of the lobster sometime later, at a location some distance from Rockville's facility – despite the fact that Rockville's facility is also located on salt water.

[My underlining added]

[45] The most specific and relevant jurisprudential commentary regarding this section is found in Justice MacKay's decision in *Longmire, supra*, at para. 22:

The processes provided in sections 71 to 77 demonstrate concern for the interests of those who have a claim to goods that are seized. In the context of these provisions, subsection 73(4) [73.2 presently] seems quite extraordinary in authorizing a fishery officer to require disposal of live fish, once they are seized, by returning them to the water, at the time of

what Parliament intended. **25 In the present case the forfeiture imposes punishment on crew members who were not charged or convicted of any offence, but whose livelihood is derived from a share of the catch for which they had honestly set the traps a few days earlier. There is no evidence they were conscious an offence had been committed, because permission is routinely granted to ailing skippers to stay ashore.** The appellant's wrongdoing lay merely in neglecting to call and report himself sick to the Department of Fisheries before he authorized the crew to tend the traps. It was obviously not an attempt to circumvent the Department's policies as to the ownership and operation of fishing licences. **The amount of the fine was determined in the belief there would not also be a forfeiture.** **26 The summary conviction appeal court erred in determining that forfeiture was mandatory under s. 72(2) on the facts of the present case.** In refusing to order forfeiture Judge Prince, the trial judge in Provincial Court, was exercising his discretion, presumably under *s. 72(1)*, and in so doing committed no reversible error. I would allow the appeal, set aside the forfeiture, and restore the disposition of the trial court." [My bolding added]

seizure, even though at that stage there is no determination that the person from whom they are seized has committed an offence. **The purpose of that subsection must surely be conservation and preservation, not merely of a species in general terms but of the fish actually found live in possession of one who is considered to have committed an offence under the Act or regulations. Otherwise, there would be no need to specify that return to the water of fish believed to be alive is to be done at the time of seizure.**”

[My bolding added]

[46] There the plaintiff fisherman was charged, and acquitted. As a result, no forfeiture order was issued in relation to the catch seized. He brought an action for reimbursement, or in the alternative, damages for the value of the scallops in the shell returned to the sea on the orders of the fishery officers. Justice MacKay concluded: “I find that the plaintiff is entitled to recover the value of shell scallops seized and later returned to the water on order of a fishery officer who was not acting within the authority delegated by subsection 73(4) of the Act.” (para. 32)

[47] **Negligence** – In relation to the negligence claim, Rockville says the FOs owed Rockville a duty of care, and the officers breached the standard of care [that of a reasonable officer in like circumstances], and consequently damages ensued:

(para. 79) The officer’s failure to abide by the *Fisheries Act* is evidence of negligence... while breach of statute does not necessarily result in civil liability, it is well settled that failure to abide by statutory requirements may be evidence of negligence... *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 is the leading authority on this point [citing paragraph 42]:

1. Civil consequences of breach of statute should be subsumed in the law of negligence.

2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.

3. Proof of statutory breach, causative of damages, may be evidence of negligence.

4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

(para. 84) The officer's failure to dispose of the seized property in accordance with the Fisheries Act is good evidence they breached the standard of care... Even absent the Fisheries Act, the officer's actions were so egregious that it is obvious their conduct fell below the standard of care. It was plainly unreasonable for the officers to release the lobster into the ocean within hours of commencing their investigation, before Rockville had the benefit of any kind of due process... The officers were familiar with the other fish buying enterprises in the area and could have easily secured a willing buyer... The officer's decision to release the lobster into the ocean is inexplicable.

[My underlining added]

[48] **Conversion** – The tort of conversion is established when:

- a) the defendant commits a wrongful act involving goods of the plaintiff; (para. 94)
- b) the wrongful act consists of handling, disposing, or destroying the goods; and
- c) the defendant's actions have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.

... the fishery officers committed a wrongful act by disposing of Rockville's lobster in a manner that is not authorized under the Fisheries Act. Unauthorized disposal of private property by a public authority is a 'wrongful act' sufficient to establish conversion [*Lepage v. Bowen Island Municipality*, 2021 BCSC 1077] ...

(para. 99) The disposal of Rockville's lobster was not authorized under the Fisheries Act and was therefore a wrongful act.

(para. 100) The remaining two elements are readily established. The wrongful act (that is, the unauthorized disposal of the lobster into the ocean) clearly involved Rockville's property, and completely deprived Rockville of its title and right to that property... The remedy for conversion is 'that the defendant pay the value of the chattel at the time it was

wrongfully taken together with any consequential loss'. Accordingly, Rockville is entitled to recover profits lost based on the unauthorized disposal of its lobster.”¹²

...

The Applicant seeks the following relief:

- a) an order requiring [Canada] to pay \$70,915.90. This figure represents 5606 pounds of lobster at \$11 per pound, plus prejudgment interest in the amount of \$9249.90 (5% per annum for three years);
- c) costs of this Application.

[My underlining added]

C - The Legal Position of Canada¹³

[49] Canada says that the release of the lobsters was authorized by each of the following sections of the *Act*:

- 1) the lobsters were “forfeited” to it, by operation of law, because (after good faith, diligent, and reasonable efforts), their “ownership... cannot be ascertained at the time of seizure” (per s. 72(4)); or
- 2)
 - a) as “perishables”,¹⁴ through the reasonable exercise of discretion by Senior FO Deveau, it was entitled to “dispose of [the lobsters seized] in any manner the officer... considers appropriate”, which included, by returning them to the ocean (per s. 70(3)); or

¹² Regarding the crates and paperwork, Rockville’s position at para. 103 of their Brief is: “the court will hear evidence that Rockville’s crates and paperwork (both seized at the same time as the lobster) were returned to it by a fishery officer in the Fall of 2022.”

¹³ It also denies its DFO personnel were in any manner negligent, or that they are liable for the conversion of Rockville’s property.

¹⁴ I rely upon ss. 10-16 of the *Interpretation Act*, R.S.C. 1985, c. I-21, and the definitions of “perishable” in *The Encyclopedic Dictionary of Canadian Law* (Lexis-Nexis Canada, 2021) Volume 3, P-115: “Any matter subject to deterioration due to lengthy transmission time or exposure to extremes of heat and cold.”; and in the *Shorter Oxford English Dictionary*, Oxford University Press, Ely House, London (Third edition, 1970): “liable to perish; naturally subject to speedy decay... [Cowper] perishables like fish and flowers 1895.” I also examined the French wording “marchandises perissables”, which is defined in a manner consistent with the English definition.

b) through the reasonable exercise of discretion by Senior FO Deveau, (per s. 73.2) [“Notwithstanding anything in sections 70 to 73.1 [Disposition of seized things], a fishery officer... who seizes any fish under this Act may, at the time of the seizure, return to the water any fish that the officer... believes to be alive.”].

[My underlining added]

D - A further examination of the factual and legal context herein

[50] In summary, Rockville sued Canada claiming the lobsters’ value as \$169,500, and that it is entitled to that amount because DFO’s actions constituted an abuse of public office, conversion of Rockville’s property, and these actions were consequent to a negligent investigation.

[51] Rockville also seeks aggravated and punitive damages, and costs of this Application in Court on a solicitor-client basis.¹⁵

[52] In Rockville’s Notice of Application in Court filed January 21, 2022, it pleads that “without explanation, the Fisheries Officers seized approximately 15,000 pounds of live lobster in crates... The purchase market value of the lobster is \$169,500... The Applicant seeks restitution for the market value of the lobster and/or crates, in an amount exceeding \$169,500.” These pleadings were not

¹⁵ In its Notice of Application in Court, Rockville claimed specifically: “Due to DFO’s high-handed conduct, including the misuse or abuse of public powers, Rockville seeks aggravated and punitive damages. Rockville seeks its costs of this Application on a solicitor-client basis.” These claims were not elaborated upon further in the written materials or oral argument. Bearing in mind the relevant considerations, I find no evidentiary support for any of these claimed items.

amended. However, Mr. Porter stated in his affidavit that between October 16 and November 15, 2019, Rockville purchased 96,970 pounds and sold 91,364 pounds of lobsters, and in his testimony, that he believed there remained 5,606 pounds of lobster which were seized. In its brief, Rockville further specifies at para. 105 that it seeks \$61,666 plus pre-judgment interest for the lobsters (which is based on 5,606 pounds of lobster at \$11 per pound). Regarding how many lobsters were seized and released back into the ocean and their cost, I specifically accept the evidence of Senior FO Deveau, in addition to other reliable evidence that leads me to conclude that they seized 4,400 pounds of lobsters (encased in 35 crates and 9 partially filled crates, and that an average crate would hold approximately 100 pounds of lobster) and the cost to Rockville was \$11.30 a pound on November 12, 2019 and November 15, 2019 or a total of \$49,720 plus prejudgment interest.¹⁶

[53] I will next examine whether Rockville and DFO personnel acted in compliance with the legislation.¹⁷

¹⁶ In his affidavit (para. 20) Mr. Porter stated: “I believe it was more”. Mr. Porter estimated the lobsters could be sold for \$12.75 per pound (para. 16 affidavit) or \$56,100. Regarding the seizure of Rockville’s 44 crates, per s. 71(4) of the *Act*, which Mr. Porter estimated original cost was \$40 each (para. 15 affidavit), these were returned in October 2022, and no serious argument was made regarding their detention – *inter alia*, (see para. 41, February 1, 2023, brief) no specific calculations were presented as to their ongoing value and the loss of their use in the intervening period. I conclude that Rockville’s not having had them was not a material matter.

¹⁷ As indicated elsewhere, an analysis of the civil claims requires some examination of the legislation, however Canada’s compliance or non-compliance with the legislation is not necessarily determinative of whether the civil claims will succeed.

1 - The legislation puts a heavy onus on fisheries participants

[54] The fishing, and the commercial buying and selling of “fish”, are highly regulated activities.

[55] The *Fisheries Act* places great responsibilities on those expressly authorized to participate in the fishery.¹⁸

[56] The following sections are from the *Act*:¹⁹

Licences for lobster pounds

18 (1) No one shall maintain a pound or enclosure in which lobsters, legally caught during the open season, are retained for sale during the close season at a place where the pound or enclosure is located, or for export therefrom, except under a licence from the Minister, and no lobsters shall be taken from any such pound or enclosure and disposed of during the close season at the place where it is located, except under a certificate from a fishery officer or fishery guardian, setting out the pound or enclosure from which the lobsters were taken and that they had been legally caught during the open season.

Unlawful sale or possession

33 No person shall purchase, sell or possess any fish that has been caught in contravention of this Act or the regulations.

[My underlining added]

[57] As His Honour Judge Wayne Gorham pointed out in *R. v. Crocker, Young and Gauvin & Noel Co. Ltd.*, [2018] N.J. No. 390 (NLPC), one indicia of this

¹⁸ *Inter alia*, see the rigorous self documenting and reporting obligations, and “duty to assist” fisheries officers placed on those involved in the fishing, buying and selling and processing of “fish”- for example, ss. 49(1.2) and 61-63 of the *Act*.

¹⁹ At the relevant times the location of the pound was adjacent only to Districts/Areas that were “close season”.

heavy responsibility, is that such offences in violation of the legislation are treated not as “true criminal” offences, but rather as “strict liability” offences, with consequently greater responsibility for adherence to the legislation being placed on those expressly authorized to participate; and commensurately lesser legal protections:²⁰

²⁰ Although his decision to convict on the s. 72(1) *Fisheries Act* offence was overturned on appeal (2023 NLSC 3), that does not lessen the correctness of the comments I rely upon herein. The original principles were consolidated by the court in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299. (See also *R. v. Saunders* (1989), 94 N.S.R. (2d) 224 (N.S. C.A.)) : “56 We have the situation therefore in which many courts of this country, at all levels, dealing with public welfare offences favour: (1) *not* requiring the Crown to prove *mens rea*; (2) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence. The courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years. 57 **It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that both the concept of absolute liability and the creation of a jural category of public welfare offences are the product of the judiciary and not of the legislature.** The development to date of this defence, in the numerous decisions I have referred to of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine. 58 **The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence.** This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care. 59 In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. **While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.** 60 I conclude, for the reasons which I have sought to express, that **there are compelling grounds for the recognition of three categories of offences** rather than the traditional two: **1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence. 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Estey C.J.H.C. so referred to them in *Hickey's case*. 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.” [My bolding added]**

THE NATURE OF FISHERIES ACT OFFENCES

42 Offences contrary to the *Fisheries Act* and its regulations constitute offences of strict liability (see *R. v. Keoughk* (2006), 260 Nfld. & P.E.I.R. 278 (N.L. T.D.) and *R. v. Rideout*, 2014 NLCA 29 (N.L. C.A.), at paragraph 6). Thus, the Crown must prove beyond a reasonable doubt that the accused committed the *actus reus* of the offence with which the accused is charged, but the Crown does not have to establish that the accused intended to commit the *actus reus* of the offence.

43 If the Crown can prove that the accused committed the *actus reus* of the offence, the accused will be convicted unless she or he can establish that they acted with all due diligence or pursuant to a mistake of fact (see section 78.6 of the *Fisheries Act* and *Griffin v. R.*, 2018 PECA 21 (P.E.I. C.A.), at paragraph 16). In *R. v. St. John's (City)*, 2017 NLCA 71 (N.L. C.A.), the Court of Appeal pointed out that "*R. v. Sault Ste. Marie (City)* [1978 CarswellOnt 24 (S.C.C.)] directs that the procedure to be followed in a case of [strict liability] requires that the *actus reus* must first be established, and if so, then the defence of due diligence must be considered" (at paragraph 68).

[58] Justice Saunders noted in *R. v. Croft*, 2003 NSCA 109, regarding the

Fisheries Act:

12 Section 78.6 provides: Due diligence defence 78.6 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.

13 Section 78.6(a) permits a defence of due diligence. Section 78.6(b) allows a defence based on reasonable and honest mistake of fact. This is essentially a statutory codification of the two defences to strict liability offences described in *R. v. City of Sault Ste. Marie*, (1978) 40 C.C.C. (2d) 353 (S.C.C.). Both the trial judge and the SCAC judge recognized that in order to obtain the benefit of the due diligence defence, **Mr. Croft was obliged to prove on a balance of probabilities that he was duly diligent in fishing for lobster, that is that he had taken all reasonable steps to ensure that his lobsters were not undersized or, put another way, that he was in no way negligent.** *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 (S.C.C.); *R. v. Belliveau* (1986), 76 N.S.R. (2d) 234 (N.S. C.A.); *R. v. Gerhardt* (1989), 91 N.S.R. (2d) 276 (N.S. Co. Ct.). They also recognized that the question of whether the appellant took all reasonable steps to avoid violating the Regulation was a question of fact for the trial judge. *Belliveau*, supra, at ¶ 11. Based on the evidence adduced at trial we see no error of law on the part of the SCAC judge in concluding that the trial judge's rejection of the due diligence defence was not patently unreasonable. [My bolding added]

[59] Section 2.1 of the *Fisheries Act* states:

The purpose of this Act is to provide a framework for

- (a) the proper management and control of fisheries; and
- (b) the conservation and protection of fish and fish habitat, including by preventing pollution.

[60] These themes were generally elaborated upon by the court in *Ulybel, supra*:

24 It is convenient at this stage to provide some background to the *Fisheries Act* and the specific provision at issue in this appeal. **The principal object of the *Fisheries Act* has been found by a number of appellate courts to be that as summarized by the Nova Scotia Court of Appeal in *Canada (Attorney General) v. Savory* (1992), 108 N.S.R. (2d) 245 (N.S. C.A.), at para. 14:**

The Act and the Regulations have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the Act and the Regulations is to properly manage and control the commercial fishery.

See also *R. v. Corcoran* (1997), 153 Nfld. & P.E.I.R. 318 (Nfld. T.D.), at paras. 22-25; *R. v. Vautour* (2000), 226 N.B.R. (2d) 226 (N.B. Q.B.), at paras. 10-11 and 13; *R. v. Chute* (1997), 160 N.S.R. (2d) 378 (N.S. C.A.).

[My bolding added]

2 - I conclude that Rockville did not comply with the Act and Regulations

[61] I had available to me as evidence, the affidavit and rebuttal affidavit of Wentworth Porter, and his examination thereon; the affidavits of FOs Deveau and Wamback and their examination thereon.

[62] The officers' testimony was presented in a clear and appropriately disinterested manner. I found their testimony to be truthful and reliable. They are both experienced investigators in a heavily regulated industry. Senior FO Deveau was acting as the supervisor of the other FOs on November 15, 2019, and conducted himself appropriately.²¹

[63] In his affidavit, which evidence I accept unless otherwise noted, as I do in relation to FO Wamback's affidavit, Senior FO Deveau, states that on November 15, 2019, FOs "conducted a routine compliance inspection... noticed 35 [full] crates and 9 partially filled crates of lobster... **asked [Mr. Porter] to provide paperwork establishing from whom [Rockville] bought these lobsters. [Mr. Porter] advised... [they were] bought from David Pictou on November 12 and 15, 2019.**"

[64] Where the officers' evidence differs from that of Mr. Porter, unless I state otherwise, I accept the officers' evidence. I infer that Mr. Porter was surprised by the arrival of the officers, and that their inspection so quickly lead to an

²¹ I understood his evidence to be that, in addition to what he personally saw and heard, he accepted the information he received from the other officers to the extent that he was not simultaneously able to make personal observations of the matters described by those officers, *inter alia* as contained in their "Witness Evidence" summaries attached to his affidavit. While he cannot testify to the truth of those matters that he did not personally observe or hear, he can rely upon the other FOs relaying of such information to him before he took action or made decisions, in determining whether he had a reasonable basis, and, if required, reasonable grounds, for making decisions.

investigation; he was upset at what was taking place, and did not make notes upon which he could later refresh his memory as to what had happened. I found his testimonial credibility diminished due to concerns with its reliability and veracity.²²

[65] Senior FO Deveau advised Mr. Porter that:²³

Neither Kylie & Boys nor David Pictou possess a commercial fishing licence issued by DFO nor a Nova Scotia Provincial Buyer's Licence. As such, [he] advised that they cannot sell fish commercially. [He] explained to Wentworth Porter that there was no evidence to support that the lobsters he purchased from David Pictou or Kylie & Boys came from an authorized commercial buyer or seller... DFO would be investigating the purchase of these lobsters pursuant to section 35 (2) of the Fishery (General) Regulations... [and] that he was under investigation for purchasing lobsters from a non-commercial source.

[66] Mr. Porter testified that, "from years of talking to him", he concluded David Pictou [I infer he meant with a commercial fishing licence or in an otherwise legal fashion] "fishes" [he *presumed* it was District aka Area 34, because Mr. Pictou did not say where the lobsters (delivered on November 12 and 15, 2019) had been fished] and usually "buys" [fish] from others [I infer he meant to suggest he believed that Mr. Pictou, or his company, had a Provincial Buyers' Licence]".

²² See for example, the court's acceptance of "credibility" as having 2 components (veracity and reliability) in *R. v. Perrone*, 2015 SCC 8, approving of the reasons in 2014 MBCA 74, at para. 26.

²³ In his testimony, FO Deveau stated that while at Rockville's premises on November 15, 2019, he spoke to Mr. Pictou by telephone and that Mr. Pictou's answers were vague and "didn't answer my questions correctly".

[67] I conclude it unlikely that Mr. Porter honestly and reasonably held those beliefs on November 15, 2019. These purported facts appear to be just that – and no more. He did not reference any official DFO confirmation as the basis for his belief that Mr. Pictou (or his company) had status as, a licenced Provincial Buyer, or entitlement to take part in the commercial lobster fishery; nor did he cite an instance where Mr. Pictou himself stated to him that he had the necessary status or licence(s).

[68] Mr. Porter's evidence, to the extent that it is found to be credible, is relevant *inter alia*, to support any argument of due diligence by him that he exercised in relation to Rockville's receiving the lobsters in question from David Pictou, or why he may have had an honest and reasonable mistaken belief that Mr. Pictou (or his corporation) was entitled to commercially fish for lobster or was lawfully entitled to sell the lobsters to Rockville. Mr. Porter never directly and expressly asserted such beliefs.

[69] From the evidence herein, I am satisfied that District 34 was close at all relevant times in question here. Moreover, neither did Mr. Porter suggest that Mr. Pictou caused him to believe that the lobsters originated from District/Area 35.

[70] Mr. Porter acknowledged in his testimony that he had been prosecuted in February 2019 for offences contrary to s. 35(2) of the *Fishery General Regulations* in relation to halibut. This evidence is only relevant to Mr. Porter's recent knowledge of, and experience with, the legislation, including Rockville's responsibilities under the legislation and the nature and manner of such investigations and prosecutions. I cannot put any weight on his halibut offence experience in February 2019, except insofar as that experience should have made him even more cautious in November 2019.

[71] Section 35(2) of the *Regulations* reads:

Sale of Fish

35 ...

(2) Subject to subsection (3), **no person shall buy, sell, trade, barter or offer to buy, sell, trade or barter any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing**, a licence issued under Part VII, a licence issued under the *Aboriginal Communal Fishing Licences Regulations* in which the Minister has authorized the sale of fish or an Excess Salmon to Spawning Requirement Licence issued under the *Pacific Fishery Regulations, 1993*.

[72] Section 18(1) of the *Act* [Licences for lobster pounds] reads:

No person shall maintain a pound or enclosure in which lobsters, legally caught during the open season, are retained for sale during the close season at a place where the pound or enclosure is located, or for export therefrom, except under a licence from the Minister, and no lobsters shall be taken from any such pound or enclosure and disposed of during the close season at the place where it is located, except under a certificate from a fishery officer or fishery guardian, setting out the pound or enclosure from which the lobsters were taken and that they had been legally caught during the open season.

[73] Section 78.5 of the *Act* reads:

In any prosecution for an offence under this Act, where a question arises as to whether a person was issued a licence, the burden is on the person to establish that the licence was issued.

[74] Notably, compliance with the *Act* and all regulations is a condition of every licence – see s. 22(6) of the *Regulations*. “Licence” is not defined in the *Act*.

“Licence” is defined in s. 2 of the *Regulations*: “means any type, kind or category of licence issued under any of the Regulations listed in subsection 3(4) or under these Regulations”. Similarly pursuant to s. 78 of the *Act* contraventions of either the *Act* or the *Regulations* are an offence under the *Act*.

[75] The wording of s. 35(2) of the *Regulations* clearly places a general obligation on a seller and a buyer/receiver of fish to act in an honest, reasonable and duly diligent manner to ensure that the fish in question “was caught and retained under the authority of a licence issued for the purpose of commercial fishing...”.

[76] The *actus reus* component of s. 35(2) is Rockville’s buying of “fish”/lobsters from Kylie & Boys/David Pictou - there is little if any dispute that the Crown could have proved the *actus reus* of the offence beyond a reasonable doubt.

[77] Section 78.6 of the *Act* reads:

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

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

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

[78] Having been found to have bought the fish, had the matter proceeded by way of prosecution under the *Act*, the onus would have been on Rockville to show that it “exercised all due diligence to prevent the commission of the offence; or reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.” Otherwise stated:

Rockville would have to establish on a balance of probabilities that it [Mr. Porter] exercised “all due diligence” to prevent the commission of the offence [which in present circumstances required him to make all diligent inquiries to assure himself to that effect] or “reasonably and honestly believed” that the fish had been lawfully caught at source (in an Area/District that was open) by an authorized fisher, which necessarily means he had to make inquiries in respect of, and consider whether David Pictou/Kylie & Boys had a commercial lobster fishing licence, or had a Provincial Buyers Licence for lobster.²⁴

²⁴ I appreciate that there was no “prosecution” here. However, in Rockville's pleadings, evidence and legal positions, it relies on alleged non-compliance with the legislation by FOs to support its civil claims. Therefore, in this civil proceeding, as well as an examination of the FOs' conduct, and adherence, or not, to the legislation, an examination of Rockville's conduct is also required.

[79] No persuasive credible evidence of such was presented by Rockville at this trial. There was no “due diligence” or reasonable and honest belief that the lobster were lawfully fished.

[80] Moreover, when Rockville was found in possession of those lobsters, fisheries officers only needed *reasonable grounds* to charge Rockville with an offence contrary to s. 35(2) of the *Regulations*.

[81] If charged, at trial, Rockville would have the evidentiary onus to establish that the fish “was caught and retained under the authority of a licence issued for the purpose of commercial fishing...”.

[82] The onus was on Rockville to have honestly and reasonably taken steps to attempt to ensure that the lobsters it bought were caught and otherwise retained (i.e., transferred down the marketing chain to others before Rockville) in compliance with the provisions of the *Act* and its *Regulations*.

[83] In Mr. Porter’s evidence, he stated that he did not confirm with David Pictou, and did not know, from where the lobsters were sourced. He “assumed” that the seller of the lobster [David Pictou/Kylie & Boys] had done any necessary

due diligence regarding the lawfulness of the lobster catch. Later in his testimony he stated: “I assume I can buy from anybody”.²⁵

[84] There is no evidence that, on or before (or after) November 12 and 15, 2019, Mr. Porter asked Mr. Pictou any questions about the origin of the lobsters. I am satisfied that, he did not ask directly or indirectly, and Mr. Pictou did not offer any information in this regard.

[85] I am satisfied that Rockville did not exercise “all due diligence”²⁶ to prevent it being in possession of lobsters; not “caught and retained under the authority of a licence issued for the purpose of commercial fishing”; and not sold to Rockville by someone with a Provincial Buyers’ Licence.

[86] Similarly, I am satisfied that Mr. Porter, acting on behalf of Rockville, did not *honestly* and *reasonably* believe that: the lobsters were “caught and retained under the authority of a licence issued for the purpose of commercial fishing”; and sold to Rockville by someone with a Provincial Buyers’ Licence.

²⁵ He did not clarify further what he meant thereby, however this is consistent with Rockville’s position that it was under no legal obligation to attempt to ensure that the lobster it bought was lawfully caught under the *Act* or its *Regulations* (para. 47 brief).

²⁶ While always mindful that the circumstances in a specific case must govern, it has been held that even getting legal advice may not amount to “all due diligence” as “applying the standard of the reasonable person, passive ignorance may also result from a failure to obtain information from an appropriate source.” [My underlining added] See the court’s comments in *R. v. Croft*, 2006 NLCA 33, at paras. 12-21 and 25-28; nor will simply acting in a manner believed to be consistent with the purpose of the legislation (para. 24).

[87] In saying this I bear in mind that:

1. at para. 14 of his initial affidavit Mr. Porter stated: “The lobsters in question were purchased *during the open season in District 35*. That season opened on October 15, 2019; it is a district where there is an adequate and plentiful supply of lobsters and a competitive commercial market for buying same. Also, on November 11, 2019, Districts 36, 37 and 38 were open for lobster fishing.”
2. that Mr. Porter stated at para. 23: “David Pictou is an Aboriginal and has been active as a buyer and seller of lobster for a number of years with his company Kylie & Boys Fisheries Limited.”
3. Mr. Porter did not say in his affidavit or testimony that on or before November 12 and 15, 2019, he at anytime asked Mr. Pictou: whether he was, during or before November 2019, in possession of a commercial lobster fishing licence or a Provincial Buyers Licence; or on or before November 12 and 15, 2019, from whom Mr. Pictou bought the lobsters/were they lawfully caught and retained.
4. Moreover, Mr. Porter did not even expressly claim that he believed David Pictou or Kylie & Boys had a Provincial Buyer’s Licence or

were licenced commercial fishers based on his past experience with them.

[88] I have already stated that I have serious concerns about Mr. Porter's credibility. Those concerns and the evidence presented lead me to conclude that Mr. Porter's stated beliefs were either not reasonably or honestly, or both, so believed by Mr. Porter.

[89] Mr. Porter's vague references to Mr. Pictou having been "active as a buyer and seller of lobster for a number of years..." are similar to his evidence regarding any due diligence obligation Mr. Porter had regarding the origin of the lobsters – he "assumed" that was done by David Pictou.

[90] I accept the evidence from Senior FO Deveau (affidavit paras. 4-5) and FO Wamback (affidavit paras. 4-6) that neither David Pictou nor Kylie & Boys possessed a commercial fishing licence nor a Nova Scotia Provincial Buyers Licence at the time the lobsters were purchased, nor in previous years. In his testimony, Senior FO Deveau stated that he had been "involved with Mr. Pictou for many years... [and] never known him to have a fishing licence or a Provincial Buyers Licence."

[91] Rockville has the evidentiary burden of proof in this respect on these civil claims. There was no evidence or argument to the effect that Rockville could *not* have subpoenaed to this hearing (or otherwise presented relevant evidence) David Pictou, or Zacharie Thibault (or the person or entity who originally caught the lobsters, as suggested by Rockville’s counsel’s March 10, 2021 letter at Exhibit “G” to the Porter affidavit: “My instructions are that these lobsters were purchased legally from a source who was fishing during an open season (District 35)”) to confirm these factual matters which arguably favour Rockville’s position.

[92] I conclude on a balance of probabilities, that Mr. Porter and Rockville: did *not* act reasonably or “with all due diligence” to “prevent the commission of the offence” and did not honestly and reasonably “believe in the existence of facts that, if true, would render [Rockville’s] conduct innocent”.

3 - I conclude that DFO personnel complied with the *Fisheries Act* provisions

[93] Although Rockville notionally relies in its written pleadings and argument (February 1, 2023, brief at paras. 27 and 41) only on “negligence” and “conversion” claims, the underpinning of those claims is premised upon DFO personnel’s lack of compliance with the legislation or unreasonable exercise(s) of discretion - see in its “Conclusion” at para. 104 of its Brief:

“If the origin of a fish buyer’s property is impugned and DFO is wrong, or not willing to proceed with charges, or a conviction [does not ensue] seized property is to be returned.”

[94] At paras. 9-10 of its Reply Brief, Rockville states:

[Rockville’s] proposed interpretation of the relevant *Fisheries Act* provisions... is consistent with the scheme of the *Fisheries Act* which safeguards the interests of suspects... through a general prohibition against disposal of seized items before the close of proceedings. It is also consistent with jurisprudence emphasizing the need to protect the interests of a suspect or accused in *Fisheries Act* proceedings, until culpability is determined. Among the cases which would support [Rockville’s] interpretation of the *Fisheries Act* is ... *R. v. Mood*, 1999 NSCA 55 [para. 24] ... The argument rejected by the Court of Appeal is ultimately DFO’s argument in this proceeding. DFO says a fishery officer can use his or her discretion to seize fish without any exigent reason and have it forfeited without any supervision from the courts. That is not what Parliament intended.

[My underlining added]

[95] Rockville’s core complaint is that the lobsters should not have been seized, and even if lawfully seized and in Canada’s custody, should not have been released into the ocean, but rather been sold and the proceeds held in trust.

[96] In my opinion, in the present circumstances, the reasons in *Mood, supra*, do not provide persuasive support for Rockville’s argument, which is to the effect that a fishery officer generally cannot use their discretion to seize fish without any exigent reason, and have it forfeited without any supervision from the courts.

[97] At issue in *Mood, supra*, were ss. 72(1) [Forfeiture of things] and 72(2) [Forfeiture of fish] of the *Act*, which read:

(1) Where a person is convicted of an offence under this *Act*, the court may... order that anything seized ... be forfeited ...; and

(2) where a person is convicted of an offence under this *Act*, that relates to fish seized ... the court shall, ... order that the fish, or any proceeds realized from its disposition, be forfeited

[98] Justice Freeman stated for the court:

19 The correct interpretation does not detract from enforcement efforts. If fish are caught in the circumstances of flagrancy that makes it just they should be forfeited, even though they are not a necessary element of the offences under the *Fisheries Act* for which a person is convicted, the court has discretion to order them seized as a ‘thing’ under section 72(1). Both sections 72(1) and 72(2) can result in the forfeiture of fish. Forfeiture is mandatory under section 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 section 51 are merely incidental to, or connected with the offences, the court is not bound by statute to order them forfeited, but it has discretion to order forfeiture under, if the circumstances warrant it.

20 This is made clear by an examination of the structure of sections 72(1) and 72(2) which, while superficially similar, are very different.

[99] In contrast, at issue before me are FOs’ actions taken pursuant to ss. 70(3)

[Perishables], 72(4) [Forfeiture where ownership not ascertainable at the time of seizure] and 73.2 [Release of seized fish] - each of which do *not* require a person to be charged, much less convicted. Sections 70(3) and 73.2 are intended to address situations of “seized” fish, where timely action by fisheries officers is required, arising out of concerns regarding the perishability of the fish in question.

[100] While Rockville specifically argued that:

“...section 70(3) does not apply for the simple reason that the lobster in question was not perishable ... secure in Rockville’s salt-water holding pound. The lobster only became

potentially perishable when seized and removed by DFO. This is distinct from an illegal catch seized on a wharf, or at sea, where the fish may otherwise die if not immediately released. The lobster in this case could have easily been kept alive at Rockville's facility or another appropriate facility or sold with the proceeds held in trust pending the outcome of DFO's investigation – particularly since it was ready for shipment and resale at the time of seizure." (para. 55);

the unique circumstances of each individual case before a court will dictate whether such prerequisites have been met.

[101] Firstly, I recognize that although no objection was taken, and there was no formal "expert" evidence presented in this regard, conclusory factual statements were casually made by the witnesses, and inferences could be drawn, regarding the lobster being "perishable".²⁷ However, what is significant is not the moment of imminent death of a live lobster, but rather, once taken from its natural environment, that it is subject to ongoing deterioration (see also the reasons in *Ulybel, supra*, at para. 38: "the rationale for excepting seized perishables from the application of these principles is obvious: the quality and value of perishables will deteriorate in storage...").

[102] I bear in mind that the lobsters in question here, were long enough out of their natural environment after being caught, to allow them thereafter to also be sold to David Pictou/Kylie & Boys, and then to Rockville. Moreover, Rockville's

²⁷ See also Mr. Porter's affidavit at para. 21: "Because the lobster is perishable, I assumed that DFO would ... sell the lobsters ...". [My underlining added]

argument [“This is distinct from an illegal catch seized on a wharf, or at sea, where the *fish* may otherwise die if not immediately released” – my italicization added] is focused on the moment of imminent death, and does not draw a distinction between live fish and live lobster. Lobsters while caught offshore, can in proper circumstances remain alive long enough to be placed in land-based lobster pounds. Rockville’s arguments suggest that lobster seized, on a wharf by to the sea, or at sea, is “perishable”, however lobster in land-based saltwater holding tanks is not “perishable”. This is a false dichotomy.

[103] I am satisfied that on November 15, 2019, in the specific circumstances here, all the seized lobster was “perishable” as contemplated by s. 70(3) of the *Act*.

[104] **Section 49** of the *Act* [Powers of Fishery Officers and Fishery Guardians – Inspection] reads in part:²⁸

Inspection

49 (1) Subject to subsection (2), for the purpose of ensuring compliance with this Act and the regulations, a fishery officer or fishery guardian may enter and inspect any place, including any premises, vessel or vehicle, in which the officer or guardian believes on reasonable grounds there is any work or undertaking or any fish or other thing in respect of which this Act or the regulations apply and may

- (a) open any container that the officer or guardian believes on reasonable grounds contains any fish or other thing in respect of which this Act or the regulations apply;
- (b) examine any fish or other thing that the officer or guardian finds and take samples of it;

²⁸ See *R. v. Wilcox*, 2001 NSCA 45, (2001), 192 N.S.R. (2d) 159, per Cromwell JA (as he then was).

- (c) conduct any tests or analyses and take any measurements; and
- (d) require any person to produce for examination or copying any records, books of account or other documents that the officer or guardian believes on reasonable grounds contain information that is relevant to the administration of this Act or the regulations.

Operation of data processing systems and copying equipment

(1.1) In carrying out an inspection of a place under subsection (1), a fishery officer or fishery guardian may,

- (a) use or cause to be used any data processing system at the place to examine any data contained in or available to the data processing system;
- (b) reproduce any record or cause it to be reproduced from the data in the form of a print-out or other intelligible output and remove the print-out or other output for examination or copying; and
- (c) use or cause to be used any copying equipment at the place to make copies of any record, book of account or other document.

Duty to assist

(1.2) The owner or person in charge of a place that is inspected by a fishery officer or fishery guardian under subsection (1) and every person found in the place shall

- (a) give the officer or guardian all reasonable assistance to enable the officer or guardian to carry out the inspection and exercise any power conferred by this section; and
- (b) provide the officer or guardian with any information relevant to the administration of this Act or the regulations that the officer or guardian may reasonably require.

[105] **Section 51** of the *Act* [Seizure of fishing vessel, etc.] reads in part:

A fishery officer or fishery guardian may seize any... 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

- (a) was caught,... transported, purchased, sold or possessed in contravention of this Act or the regulations;...

[My underlining added]

[106] I am satisfied that Senior FO Deveau had reasonable grounds to seize the lobsters.²⁹ His conduct and reasons for the decisions he made and the actions he took on November 15, 2019, were statutorily authorized, reasonable, and not negligent.

[107] Senior FO Deveau knew from speaking to Mr. Porter (who had a legal duty to assist DFO officers and truthfully answer questions regarding matters under the *Act*), and from the provision of receipts by David Pictou to FOs on November 15, 2019, that Rockville had received 3,500 pounds and 11,500 pounds of live lobster on November 12 and November 15, 2019, from David Pictou's company Kylie & Boys. Senior FO Deveau was at that time personally aware, and had on November 15, 2019:

advised Wentworth Porter, that neither Kylie & Boys nor David Pictou possessed a commercial fishing licence issued by DFO nor a Nova Scotia Provincial Buyer's Licence. As such, I advised that they cannot sell fish commercially. I explained to Wentworth Porter that there was no evidence to support that the lobsters he purchased from David Pictou or

²⁹ Regarding what are "*reasonable and probable grounds*" (which threshold bears almost indistinguishable similarity to "reasonable grounds") as presently contained in s. 495 of the *Criminal Code* - see *R. v. Storrey*, [1990] 1 SCR 241, albeit in the context of an arrest, where the Supreme Court of Canada elaborated at pp. 250-251 that: "'reasonable and probable grounds to believe' that a person has committed an offence, require an honest subjective belief that there is a factual basis for the state action contemplated *and* that the belief itself is also objectively 'reasonable' in the circumstances". The Supreme Court emphasized that police "need not demonstrate anything more than reasonable and probable grounds. Specifically, they are not required to establish a *prima facie* case for conviction before making the arrest." In the context of a warrantless arrest, "reasonable grounds" are also considered at para. 70 by Jamal J. for the Majority in *R. v. Beaver*, 2022 SCC 54.

Kylie & Boys came from an authorized commercial buyer or seller.... I advised him that he was under investigation for purchasing lobsters from a non-commercial source.³⁰

[108] Moreover, Senior FO Deveau states that (para. 7):

On November 15, 2019, the FOs seized the lobsters, crates and paperwork relating to the purchase of these lobsters. The FOs further explained to Wentworth Porter that as the lobsters were perishable they would be released into the ocean.

[My underlining added]

[109] Unless otherwise noted, where the evidence of Senior FO Deveau is in conflict with that of Mr. Porter, I accept the evidence of Senior FO Deveau.³¹

[110] Mr. Porter's evidence was presented in a manner that suggests he was either tailoring his evidence to Rockville's advantage, or was careless, or forgetful. For example, in his affidavit sworn May 31, 2022, he stated:

³⁰ In his evidence, Mr. Porter did not expressly dispute Senior FO Deveau's evidence regarding the status of David Pictou or Kylie & Boys.

³¹ I recognize that in examining the issue of DFO's statutory compliance, I must keep in mind that whether Senior FO Deveau had "reasonable grounds" to seize and dispose of the lobsters on November 15, 2019, I should be focused on his state of knowledge at that time. Nevertheless, bearing in mind, the principles at paragraph 42 in *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205, specifically regarding negligence; and the constituent aspects of the claimed torts otherwise, subsequently available evidence can also be relevant; for example: a) the suggestion that if David Pictou had a right to commercially fish lobster, it *could have been* through a lease with the Acadia First Nation, which FO Wamback investigated - however, he discovered that that Band's lobster would thus be sourced in LFA (Area/District) 34 - and the Area 34 season did not start until November 26, 2019; b) further confirmation that neither David Pictou nor his company Kylie & Boys then or earlier, had "... been issued a personal or commercial licence to fish by DFO" (para. 6 Wamback affidavit); nor had they been registered "as a person who holds a fish buyer's licence..." or "registered as having a designated buyer appointment issued under the authority of the [Provincial *Fisheries and Coastal Resources Act*] Act and the regulations" (Exhibit "B" Deveau affidavit).

(para. 21) At no point did the Fisheries Officers tell me (or any employee of Rockville) what they intended to do with the seized lobster... Because the lobster was perishable, I assumed that DFO would follow its Act and regulations, sell the lobsters and hold the proceeds in trust pending the outcome of DFO's investigation... ;

(para. 37) Prior to early 2022, we had no information about the status of the seized property. We did not know whether DFO had sold or otherwise disposed of the lobster. We had no information regarding the outcome of the status of DFO's investigation, and Rockville had not been prosecuted or even charged....³²

(para. 39) On January 21, 2022, Rockville filed this Application. I was not aware that DFO had released the seized lobster into the ocean until I reviewed the Attorney General's Notice of Contest filed in response to this Application.

[111] Yet after seeing FO Deveau's affidavit in response, Mr. Porter equivocally stated in his rebuttal affidavit:

At paragraph 7, Mr. Deveau says that I was told that the lobsters would be returned to the water. *I do not recall* him telling me this and *I do not believe* it is accurate.

[112] In his cross-examination Mr. Porter testified that he did not recall Senior FO Deveau saying that the lobsters would be released into the water but allowed, "it is possible" that he did so.

[113] I infer that Mr. Porter was the source of information that permitted his counsel to draft his pleadings filed January 21, 2022, and that in the normal course

³² Rockville formally retained counsel in **February 2021** (para. 25 affidavit); and Rockville stated in its brief at paragraph 24: "After the seizure Rockville made attempts to find out what happened to the lobster, crates and paperwork. Between February 18, 2021, and December 6, 2021, Rockville's legal counsel wrote DFO five times requesting information about the status of the seized property in proceedings against Rockville. DFO failed to provide any explanation whatsoever." An examination of the letters sent reveals that Rockville made no express request to be informed about whether the lobster had been sold, and if so at what price. I find this evidence to be more consistent with Senior FO Deveau's statements that he expressly informed Mr. Porter on November 15, 2019, that the lobsters would be released back into the ocean.

Mr. Porter would have received a copy of the pleadings not long thereafter. No amendment was sought, and no express explanation provided in Mr. Porter's affidavit sworn May 31, 2022, for why Rockville was initially seeking in its pleadings such a large sum (i.e. \$169,500 – which appears to be based upon 15,000 pounds of lobster at \$11.30 per pound) for the purchase market value of the lobsters it alleges were seized by DFO on November 15, 2019.

[114] However, his evidence suggests Rockville was claiming for the loss of only 5,606 pounds of the 15,000 pounds of lobster delivered on November 12 and 15, 2019 (para. 38 affidavit).

[115] In his initial affidavit (para. 20) he states:

The officers then seized all of the crates in storage in my pound. They state 44 crates. I believe it was more.

[116] In his November 23, 2022 rebuttal affidavit, Mr. Porter states (para. 7):

With respect to paragraph 8 [of Clark Deveau's June 28, 2022, affidavit - "On November 15, 2019, pursuant to section 70(3) of the *Fisheries Act*, the lobsters, which were seized from the Applicant, were released off the Sandford Wharf, in Yarmouth County, Nova Scotia."]

The lobsters were caught and landed in District 35. District 35 had been open and active for several weeks for commercial fishing and Rockville and other buyers had been buying since the opening.

[117] In his initial affidavit at para. 14, Mr. Porter had already stated:

The lobsters in question were purchased during the open season in District 35. That season opened on October 15, 2019; it is a district where there is an adequate and plentiful supply of lobsters and a competitive commercial market for buying same. Also, on November 11, 2019, District 36, 37 and 38 were open for lobster fishing.

[118] Rockville's counsel's March 10, 2021 letter, Exhibit "G" to the Porter affidavit, states: "My instructions are that these lobsters were purchased legally from a source who was fishing during an open season (District 35)."

[119] His evidence that the lobsters Rockville purchased were "caught and landed in District 35" is hearsay evidence from Mr. Porter and should never have been placed into the affidavit since he has no personal knowledge of it. Even if he had heard it from another source, he has to name the source and circumstances for it to be assigned any weight in appropriate circumstances. Yet, his words suggest that he knows the lobsters were "caught and landed in District 35", and therefore begs the questions, of how does he know this, and why is there no evidence by whom the lobsters were caught?

[120] His own evidence (in his affidavit and testimony in court) made no admissible reference whatsoever to the origin of the lobsters seized by DFO on November 15, 2019.

[121] In cross-examination - (although he had a significant period of time after November 15, 2019, to reflect on and investigate those issues and, I infer, ongoing

access to and knowledge about individuals working in the fishery in that area, specifically including David Pictou and Zacharie Thibault) he maintained that he still did not know (where and) by whom the lobsters were caught.

[122] I bear in mind that UTT Lobster/Zacharie Thibault (from whom David Pictou claimed he received the lobster) had not had a commercial fishing licence since 2015, up to and including after November 20, 2019 (para. 9 Wamback affidavit).

[123] I understand that Rockville/Mr. Porter may not have an express legal obligation to assist DFO in its efforts to ascertain the origins of where, and by whom, the lobster were caught. On the other hand, Rockville has the civil burden to prove its case. Given the accumulation of inconsistent and otherwise not credible evidence on the issues, I seriously question Mr. Porter's overall credibility regarding material matters in issue. In assessing credibility in this case, I keep in mind our Court of Appeal's statements in *Geophysical Service Inc. v. Sable Mary Seismic Inc.*, 2012 NSCA 33, per Beveridge JA:

75 Here the trial judge was well aware of the law with respect to the assessment of credibility. He referred to *Faryna v. Chorny*, (1951), [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C. C.A.), where O'Halloran J.A. said:

'11 The credibility of interested witness[es], particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably

subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...

[124] DFO personnel including Senior FO Deveau only became aware on May 6, 2020, that David Pictou had corrected his statement that he received all the lobsters from “UTP Fisheries”, to saying that he received them from “UTT Lobster Ltd.” (para. 8 Wamback affidavit). FO Wamback stated in his affidavit (para. 9):

From my previous investigations and other files, I knew that in 2019, Zacharie Thibault and UTT Lobster Ltd. had not been issued a commercial licence to fish. I reviewed DFO’s Fishery Officer Intranet Portal.

Zacharie Thibault had not had a valid fishing licence issued to him by DFO since 2015. On June 10, 2020, I contacted Philip Starr, [sic] agent for UTT Lobster Ltd. requesting the documents related to all lobster bought sold and/or held by UTT Lobster and Zacharie Thibault on November 12, 2019, and November 15, 2019, be disclosed.

On June 19, 2020, Mr. Starr [sic] advised he was unable to reach his client... On October 22, 2020, I contacted the RCMP to see if they had any new leads on Mr. Thibault’s address. They advised that they did not. By January 8, 2021, FOs obtained an address for Mr. Thibault. They attended that address on January 25, 2021... they also went to two other addresses and could not locate him.... On June 3, 2021, FO’s finally located Mr. Thibault.

They issued an Information Return for documents related to all lobster bought, sold and/or held by UTT Lobster Ltd. and Zacharie Thibault on November 12, 2019, and November 15, 2019, pursuant to section 61 of the *Fisheries Act*... On July 8, 2021, Fisheries Officers spoke to Mr. Thibault, and he said he would provide the requested documents... It was my understanding that in order to charge someone [with offences contrary to section 35(2) of the *Fishery General Regulations*] ... I had to have evidence that showed the origins of the lobster, that the lobster originated through an unlawful catch.

Mr. Thibault and UTT did not provide DFO with any documents of where they bought the lobster.

Consequently, DFO could not determine whether David Pictou, Kylie & Boys, Zacharie Thibault and UTT Lobster Ltd. had the lawful authority to possess the lobster in question. By January 20, 2022, DFO could still not determine the origin of the lobsters that were seized from Rockville Carriers Limited.

Because Mr. Thibault failed to provide documents that would establish the location the lobsters were harvested from, DFO could not continue their investigation to determine if the lobster had been caught under the authority of a licence issued for the purpose of commercial fishing.

After consulting with the Crown, it was decided that charges would not be laid [against the Applicant Rockville]. (para. 20)

[My underlining added]

[125] I understand Mr. Porter's evidence to be that, neither at any time before DFO officers arrived on November 15, 2019, or thereafter, had he made any direct inquiries of any nature of David Pictou, about the origins of the lobsters (did they come to David Pictou from a licenced Provincial Buyer, or commercial fisher who had caught the lobsters?), preceding David Pictou's receipt thereof and delivery to Rockville on November 12 and 15, 2019.

[126] While testifying, Mr. Porter volunteered that he "grew up with" David Pictou, who he believes is an Aboriginal person with an association to the Acadia First Nation in Nova Scotia.

[127] Rockville has been aware, since *at least* the filing on June 29, 2022, of FO Wamback's affidavit, that David Pictou likely received the lobsters from UTT Lobster Ltd., not UTP Fisheries Ltd. [and it would be unexpected if Mr. Pictou

could not have told Mr. Porter much earlier than June 29, 2022, had he been asked, and that he did tell him, if asked, that it was UTT Lobster Ltd. from whom he received the lobsters].

[128] I infer that Rockville could easily have discovered that likely Zacharie Thibault is UTT Lobster's owner, and that he would have been able to further confirm the origin of the lobsters UTT Lobster sold to David Pictou, who then sold them to Rockville.

[129] There is no credible evidence that Mr. Porter ever personally (or indirectly via legal counsel for example) meaningfully attempted to, or did, speak to or contact in any fashion Zacharie Thibault, or anyone else associated with UTT Lobster Ltd who would be expected to be knowledgeable about these issues.

[130] If Mr. Porter genuinely believed he had an excellent potential source of evidence to demonstrate that the lobsters he bought were from a lawful source, it is odd that he did not follow up this lead, and present such evidence at the hearing of *Rockville's Application*.³³

³³ I keep in mind that FOs made repeated unsuccessful attempts over a long period of time (including through UTT Lobster Inc.'s recognized agent Philip Star, K.C. [whose last name is misspelled in the affidavit as "Starr"]) to speak to Mr. Thibault about the suggestion that his company provided the lobsters to David Pictou.

[131] **Section 70** of the *Act* [under the overall heading - “Disposition of seized things”, and the specific heading - “Custody of seized things”], reads:

(1) A fishery officer or fishery guardian who seizes any fish or other thing under this Act may retain custody of it or deliver it into the custody of any person the officer or guardian considers appropriate.

...

Perishables

(3) A fishery officer or fishery guardian who has custody of any fish or other perishable thing seized under this Act may dispose of it in any manner the officer or guardian considers appropriate and any proceeds realized from its disposition shall be paid to the Receiver General.

[My underlining added]

[132] I am satisfied that Senior FO Deveau effectively had custody of the lobsters, that his conduct and reasons were legally justified, he reasonably considered them “perishable”, and it was appropriate to dispose of them by returning them to the ocean. I am further satisfied that:

1. neither s. 70(3), nor any other applicable provisions of the *Act* or the *Regulations* obligated him/the Crown to sell the lobsters (and maintain the proceeds for the benefit of Rockville) instead of releasing them back to the ocean;³⁴

³⁴ See for example, *Gladstone v. Canada (Attorney General)*, [2005] 1 SCR 325; 2005 SCC 21, which reiterates that the *Act* is a “complete code”, and the consequences to parties may at times be harsh.

2. the lobsters were “perishable”, including at the time Senior FO Deveau decided to have them released back to the ocean.

[133] While not a basis for the statutory interpretation of this subsection, as a matter of evidence however, Senior FO Deveau stated that:

the FOs further explained to Wentworth Porter that the as the lobsters were perishable they would be released into the ocean” (para. 7 affidavit);

and Mr. Porter himself, having the opportunity to reflect before he swore his affidavit, stated that the lobsters were “perishable” (para. 21 of his affidavit):

... Because the lobster was perishable, I assumed that DFO would follow its Act and Regulations, sell the lobsters and hold the proceeds in trust pending the outcome of DFO’s investigation.

[My underlining added]

[134] The title [“Perishables”] and wording of s. 70(3) evince Parliament’s clear intention to consider “any fish” as being “perishable”: “...of any fish or other perishable things seized under this Act.” Furthermore, as the Supreme Court of Canada stated in *Ulybel, supra*, at para. 38:

In general, there is no authority under the Act to dispose of seized property before the close of proceedings. Thus, the scheme of the *Fisheries Act* properly reflects the presumption of innocence and the related principle that the property of an accused should be preserved until culpability is finally determined. The rationale for excepting seized perishables from the application of these principles is obvious: the quality and value of perishables will deteriorate in storage, hence it is in the interest of an accused that the *Fisheries Act* allow for the timely disposition of seized perishables. (see s. 70(3))

[My underlining added]

[135] I find as matter of fact in these circumstances, that at the relevant times on November 15, 2019, the lobsters were “perishable”, as that term is used in the *Act*.

[136] **Section 72** of the *Act* reads:

Forfeiture of things

(1) Where a person is convicted of an offence under this Act, the court may... order that anything seized... or any proceeds realized from its disposition be forfeited to Her Majesty.

Forfeiture of fish

(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, ... order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

Forfeiture of fish – other cases

(3) If a person is charged with an offence under this Act that relates to fish seized under paragraph 51(a) and the person is acquitted or discharged absolutely or conditionally, or the court orders a stay of the proceedings but it is proved that the fish was ... possessed, sold, purchased, traded, bartered,... in contravention of this Act or the regulations, the court may order that the fish, or any proceeds realized from its disposition, be forfeited to her Majesty.

Forfeiture where ownership not ascertainable

(4) Where the ownership of any fish or other thing seized under this Act cannot be ascertained at the time of the seizure, the fish or thing is thereupon forfeited to Her Majesty.

[My underlining added]

[137] Notably, in each of the other subsections of s. 72, a court has the discretionary or mandatory authority to order forfeiture against identified parties: “a person... convicted of an offence”; “a person... charged with an offence...”

acquitted or discharged absolutely or conditionally or the court orders a stay of proceedings... but it is proved that the fish was... possessed, sold, purchased, traded, bartered... in contravention of this Act or the regulations...”.

[138] By contrast, s. 72(4) does not effect forfeiture by court order, but rather arises by virtue of statutory operation.

[139] I adopt Justice Nadon’s reasons in *George Denton, supra*:

76 In my view, forfeiture will occur if the seizing officers are unable, by reasonable means, to find out who owns the property which they have seized or intend to seize. Here, when the seizure was effected, the fishery officers were in a position to find out who owned the fish. The subsection does not require that the officers know the name of the owner, but that ownership be ascertainable...

...

79 ... In my view, forfeiture does not occur because the seizing officer so decides, rather it only occurs if, according to the terms of the Act, the officer is unable to ascertain ownership at the time of the seizure. ...

[My underlining added]

[140] Thus the question is: at the time of seizure was Senior FO Deveau *unable* to ascertain who owned the fish?

[141] The evidence is clear - Rockville and Kylie & Boys agreed to a contract of sale for lobsters (which included, delivery of the lobsters to Rockville’s Town Point, Yarmouth County, Nova Scotia, lobster pound. The lobsters were delivered

on two different dates as agreed, and Mr. Porter was provided receipts for payment of both deliveries.

[142] The evidence does not suggest there was a material dispute about the *prima facie* “ownership” of the lobsters. Rockville claimed to have paid for them, and David Pictou confirmed that he had sold them to Rockville (and receipts were produced to confirm the sales on November 12 and 15, 2019).

[143] Nevertheless, in the specific circumstances of this case, I conclude that Senior FO Deveau honestly and reasonably believed that he was “unable to ascertain” who owned the lobsters.

[144] He had, at the least, reasonable grounds to believe that the lobsters had *not* been legally purchased, and therefore that they were *not* legally in the custody of Rockville, and also had not been legally in the custody of Kylie & Boys.³⁵

³⁵ On November 15, 2019, while he had custody of the seized lobsters and before them being returned to the ocean, he knew that neither David Pictou nor Kylie & Boys had a commercial fishing licence for lobster, nor did they have a Provincial Buyer’s Licence; and that the person Mr. Pictou claimed to have received the lobsters from (UTP Fisheries), did not exist. Although not raised by the parties, and therefore I will not rely on this perspective in the case, arguably in the circumstances the contract between Rockville and Kylie & Boys was void (not capable of giving rise to property rights) by virtue of the general principle that a contract cannot arise out of an illegal act (*ex maleficio non oritur contractus*) as referenced in *Morin v Anger*, [1931] 1 D.L.R. 827, or (*ex turpi causa non oritur actio*); *Moore Stephens v. Stone Rolls Limited*, [2009] UKHL 39, (at para. 26) - the *ex turpi* policy, as applied to contractual obligation, holds that: “(1) [a] court will *not* enforce a *contract* which is expressly or impliedly forbidden by statute *or* that is entered into with the intention of committing an illegal act [*and*] (2) [a] court will *not* assist a claimant to recover a benefit from his own wrongdoing ... [t]his extends to claims for compensation or an indemnity in respect of the adverse consequences of the wrongdoing”; it applies to bar a defence to a claim raised by a company whose “sole and directing mind” was the wrongdoer); and *Tran v Kerr*, 2014 ABCA 350, at para. 29.

[145] Although Senior FO Deveau honestly and reasonably believed he was “unable, by reasonable means, to find out who owns the property which they have seized...”,³⁶ based on the evidence presented, I conclude that there was no material dispute about the *prima facie* “ownership” of the lobsters as contemplated by s. 72(4) of the *Act*.

³⁶ I infer that on November 15, 2019, while at Rockville’s premises, FO Deveau was of the opinion that if neither Rockville nor Kylie & Boys could reasonably be concluded to be the “lawful” owners of the lobster, then he could conclude ownership of the lobster at the time of seizure, “cannot be ascertained”. I could find no jurisprudence regarding similar circumstances but see the reasons in *George Denton, supra*, per Nadon J, as he then was, regarding the meaning of “ascertainable” (paras. 75-76) and what time interval is encompassed by the words “at the time of seizure” – interpreted as “at about the time of the seizure” (para. 77). [Justice MacKay who decided *Longmire* which follows, cited with approval Justice Nadon’s reasons in *George Denton* two years later in *Pacific Shipyards Ltd. v. Canada (Board of Steamship Inspection)*, (1995) 106 F.T.R. 6 (TD), at para. 64: “Dictionary definitions of the word “ascertained” were helpfully reviewed by counsel. I accept that, for purposes of interpretation of s. 15 of the Regulations, the word should have the meaning ascribed to the same word as used in s-s. 58(6) of the *Fisheries Act*, R.S.C. 1970, c. F-14, by my colleague Mr. Justice Nadon in *Denton (George) & Associates Ltd. and Gregory Morrell v. Canada (1993)*, 69 F.T.R. 270 at 284. The word was there used in much the same context as in s. 15 of the Tonnage Regulations for s-s. 58(6) of the *Fisheries Act* provides “... where the ownership of any fishing gear ... cannot, at the time of seizure, be ascertained by the fishery officer ...”. In that case Nadon J. said, “according to Webster’s Dictionary, the word “ascertain” is synonymous to ‘find out, discover, determine, detect, discern, learn’. A similar meaning is apt for the word as used in s. 15 of the Tonnage Regulations”]; and *Longmire, supra*, per MacKay J., adopting a restrictive interpretation- paras. 14-17- of “at the time of seizure”; and *R&K Construction Ltd. v Canada*, 2000, CanLii 28415 (NLSC) per Easton J., wherein the Justice noted, in that distinguishable set of circumstances (para. 26): “While it may be true that there was some confusion about the ownership of these products, it appears that at least initially the officers had concluded that they belonged to Carino Co. Limited... despite the confusion there was a considerable body of evidence which would indicate that [R&K Construction Ltd.] had some indicia of title to the products. The receipts themselves indicate [R&K construction Ltd....]. The prudent course of conduct would have been for the officers to have given themselves some time to sort out the question of ownership... I feel there was an unusual rush to forfeiture and sale.” (para. 28). [My underlining and bolding added]

[146] I proceed on the premise that s. 72(4) does not apply to the circumstances in the present case.³⁷ Therefore, there could be no forfeiture to Her Majesty pursuant to s. 72(4) of the *Act*.³⁸

[147] However, Senior FO Deveau could also have relied upon s. 73.2 of the *Act* as authority to release the lobsters back into the ocean:

Release of seized fish

73.2 Notwithstanding anything in sections 70 to 73.1, a fishery officer or fishery guardian who seizes any fish under this Act may, at the time of the seizure, return to the water any fish that the officer or guardian believes to be alive.

[My underlining added]

³⁷ In *Bignell v. Canada (Attorney General)*, 2022 NSSC 71, Mr. Norman, co-counsel in the present case, argued that ss. 51, 70, and/or 71 of the *Act* violate s. 8 of the *Canadian Charter of Rights and Freedoms*, and are therefore unconstitutional. Justice Denise Boudreau was required to examine those sections of the *Act*. She upheld the constitutionality of the sections. Therein, she cites Judge Brian Williston’s decision in *R. v. Leahy*, 2004 NSPC 62, and his consideration of s. 71 of the *Act* [Detention of seized things] and the admissibility thereunder of documents. Judge Williston cited from the reasons in *Ulybel, supra*, at pages 886-887: “... In this appeal, we are particularly concerned with the scheme of that part of the *Fisheries Act* falling under the heading “Disposition of seized things”. ... Except in respect of perishables (s. 70(3)), there is no authority to dispose of or forfeit property before conviction and the close of proceedings under the *Fisheries Act*. ... It makes sense that the *Fisheries Act* would deal exhaustively with property seized under the *Fisheries Act* given the special nature of the kinds of property at issue: fish, fishing vessels, and equipment.” [My underlining added]; see *Gladstone, supra*.

³⁸ This conclusion is consistent with the time made available to potential claimants in the “other than fish” forfeited property referenced in s. 75 and the postponement of “Disposal of forfeited things” wording in s. 73(2) of the *Act*: “Subject to sections 75 to 77, any fish or other thing forfeited to Her Majesty under subsection 72(4) shall be disposed of after the expiration of 30 days from the day of forfeiture, as the Minister directs.”

[148] This section is premised upon the “fish” being “alive”. At the time of seizure, the lobsters were alive, although they were in holding tanks where they could remain alive.³⁹

[149] Mr. Porter stated in his affidavit at para. 21: “... Because the lobster was perishable, I assumed the DFO would follow its Act and regulations, sell the lobsters...”.⁴⁰ Rockville’s argument relies upon the reasons in *Longmire, supra*, and specifically paras. 14-17:⁴¹

³⁹ In interpreting the *Act* and its *Regulations*, I rely upon the court’s reasons in *Ulybel, supra*, at paras. 28-53, which remain consistent with more recent jurisprudence.

⁴⁰ I infer that he saw them leaving the premises with the 44 crates of lobster. His testimony tends to confirm that, on November 15, 2019, Senior FO Deveau did not tell him that they would be *selling* the lobsters; and Mr. Porter did not specifically ask Senior FO Deveau, or any other DFO personnel present, what they were going to do with the lobsters. His not asking, is consistent with him already having been told that they would be released back into the ocean.

⁴¹ Although the wording of the present s. 73.2 is identical to that of s. 73(4) in force at the time *Longmire, supra*, was decided, the structure of the surrounding provisions has been changed since then. Moreover, the reasons of Justice MacKay at para. 10 involved distinguishable circumstances, including that the fisher was ultimately acquitted of the offences (para. 5): “... There was no serious dispute that the boat and its catch were declared seized by fishery officers from the patrol vessel who boarded the boat while at sea in the Bay of Fundy and then ordered the plaintiff to sail under escort to Digby...”. Nevertheless, he commented generally at para. 22: “In the context of these provisions, subsection 73(4) [the present section 73.2 of the *Act*] seems quite extraordinary... The purpose of that subsection must surely be conservation and preservation, not merely of a species in general terms but of the fish actually found live in possession of one who is considered to have committed an offence under the Act or regulations. Otherwise, there would have been no need to specify that return to the water of fish believed to be alive is to be done at the time of seizure.”; and at para. 23: “Sections 71 to 77 of the Act reflect the long tradition in our legal system... that seizure by the Crown and disposal of the property of a citizen without compensation has not been accepted or recognized by the courts, unless Parliament in its wisdom expressly provides for that. Here Parliament has expressly so provided under section 77 so that where fish have been returned to the water in accord with subsection 73(4) a person may not obtain a declaration of interest in the fish... which precludes any claim to recover under subsection 73(3) for any live fish returned to the water at the time of seizure, even if there be no conviction for an offence. (para. 24) In my view a strict construction of subsection 73(4) is appropriate.”. I believe the jurisprudential weight of his reasons to prefer “a strict construction” of s. 73.2 has been significantly diminished by the later reasons in *Ulybel, supra* (para. 24): “... The principal object of the Fisheries Act has been found by a number of appellate courts to be that as summarized by the Nova Scotia Court of Appeal in... Savory... ‘The Act

14 The plaintiff's claim ultimately depends upon the interpretation and the application to the circumstances of this case of subsection 73 (4) of the Act... I am however persuaded that there is merit to the plaintiff's second objection, that the fishery officer did not act within the authority vested under subsection 73 (4) since the scallops were not returned to the water at the time of the seizure, as that subsection expressly provides. Here the plaintiff was advised at sea by fishery officers from the patrol vessel that his boat and its catch were under seizure. He was not ordered at that time to return scallops in the shell to the water... halfway to Digby under escort he was ordered to slow or to stop and then directed by fishery officers... to return scallops in the shell to the water, but when he protested... the direction was not then insisted upon... Only after arrival at the wharf, was he ordered again... to return the shell scallops to the water, some three hours or more after his boat and its catch had been under seizure...

...

17 My conclusion is based upon a strict interpretation of the words of subsection 73 (4). ...

...

21 These provisions and the process established by them, reflect the concern of Parliament to balance the general public interest in conservation of fisheries, an underlying purpose of the *Act*, and the interest of the individual from whom goods are seized or anyone else interested in the equipment and the catch where those have been forfeited to the Crown. **Thus, when it appears to a fishery officer that fishing is unlawful, or some other violation of the *Act* and regulations has occurred, he may exercise the extraordinary discretion to seize a boat, its gear and fish caught but he then has the responsibility to maintain goods seized in custody, unless they are perishable, and to return them, or if perishable and sold, to see to the return of their proceeds, if there is no conviction and no order of forfeiture.** Seizure in itself does not vest in the Crown any interest in the goods seized, except where the officer cannot determine the owner at the time goods are seized. In all other cases there is no forfeiture to the Crown without a court order following a conviction. And as we have seen, even after forfeiture, a person other than one convicted or from whom the goods are seized, may apply to a court for an order concerning an interest claimed in the goods forfeited.

22 The processes provided in ss. 71 to 77 demonstrate concern for the interests of those who have a claim to goods that are seized. **In the context of these provisions, s-s. 73(4) seems quite extraordinary in authorizing a fishery officer to require disposal of live fish, once they are seized, by returning them to the water, at the time of seizure, even though at that stage there is no determination that the person from whom they are seized has committed an offence. The purpose of that subsection must surely be**

and the Regulations have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the Act and the regulations is to properly manage and control the commercial fishery." [My underlining added]

conservation and preservation, not merely of a species in general terms but of the fish actually found live in possession of one who is considered to have committed an offence under the *Act* or regulations. Otherwise there would have been no need to specify that return to the water of fish believed to be alive is to be done at the time of seizure.

23 Sections 71 to 77 of the *Act* reflect the long tradition in our legal system, sometimes said to be traceable through the Bill of Rights of 1688 and the Petition of Rights of 1627 in England, to Magna Charta, that seizure by the Crown and disposal of the property of a citizen without compensation has not been accepted or recognized by the courts, unless Parliament in its wisdom expressly provides for that. Here Parliament has expressly so provided under section 77 so that where fish have been returned to the water in accord with s-s. 73(4) a person may not obtain a declaration of interest in the fish. Similarly, an exemption from any claim to fish returned to the water in accord with s-s. 73(4) is affected by the opening words of the subsection, "Notwithstanding anything in this section or sections 71 and 72...", which preclude any claim to recover under s-s. 73(3) for any live fish returned to the water at the time of seizure, even if there be no conviction for an offence.

24 In my view a strict construction of s-s. 73(4) is appropriate in view of the purpose of the provision as I construe it, and in view of the extraordinary discretion it vests in a fishery officer to seize and dispose of property of a citizen, i.e., fish believed to be alive, before any conviction for an offence charged and without compensation.

25 In this case, the boat and its catch were under seizure from the time fishery officers boarded the boat at sea, and only three hours later were the shell scallops definitively ordered to be returned to the water. They were so returned but at a time more than three hours after seizure was affected. In these circumstances, since they were returned to the water not at the time of seizure, but somewhat later, the fishery officer was not acting in accord with s-s. 73(4). The requirement of returning the scallops to the water was not authorized under that provision. The plaintiff, not convicted of any offence that resulted in the seizure, is entitled to return of the goods, fish, seized, including the shell scallops, and the proceeds of sale of the scallop meat, pursuant to s-s. 73(3). Since the shell scallops cannot be returned, in my view he is entitled to their value, here not disputed, in the amount of \$3,744.00 Otherwise, by action of the Crown's officers, he would be deprived of property without compensation, in circumstances not expressly provided by Parliament.

26 It was urged for the defendant that there was no tort or wrong committed by the fishery officers, in light of the discretion vested in them, unless it is established, which it is not, that they acted in bad faith. That defence is based on the assumption they acted within their discretion under the statute, which I find is not the case. **In the result, by seizure and disposal of the plaintiff's property, the scallops in the shell, in circumstances not authorized by Parliament, their action resulted in the wrong or tort of conversion, for which the plaintiff is entitled to recover the full value of the scallops in the shell.**

(See *Rasmussen and S/LF Bordoyarvik v. Canada (Minister of Fisheries and*

Oceans) (1988), 24 F.T.R. 86 (F.C.T.D.), per Muldoon J. at 93-94 and 96). **Only in circumstances where return of live fish to the water is done at the time of seizure is the act authorized by Parliament, and not a wrong.** for which, in any other circumstances, the person from whom the seizure is made would be entitled to recover the fish or their value.

27 **In case my interpretation of s-s. 73(4) should not ultimately be upheld, I turn to the second basis on which the plaintiff urged he was here entitled to recover the value of the scallops** returned to the sea after they were seized. It is said that **even if the officer here acted within the discretion authorized by legislation, in the manner of that exercise he owed a duty to the plaintiff to act fairly.** Reliance was placed upon *Regina v. McRae* (1980), 54 C.C.C. (2d) 521 (B.C. S.C.) where Wallace J. found that what is now s-s. 71(3), authorizing sale of seized goods which are perishable "for such price as that person [i.e. the one having custody of seized goods] may determine", did not delegate unrestricted discretion, but rather the duty of fairness owed by the seizing officer would require every reasonable effort to obtain as close to the market price as possible. ... The plaintiff urges that the same general principle, applying the duty of fairness, should be extended to this case.

28 **I am not persuaded that the fishery officer, if he was acting within discretion authorized by s-s. 73(4), can be said to have breached a duty of fairness owed to the plaintiff. There is no evidence the officer acted in bad faith....**

...

Conclusion

32 In the result, for the reasons outlined, **I find that the plaintiff is entitled to recover the value of shell scallops seized and later returned to the water on order of a fishery officer who was not acting within the authority delegated by s-s. 73(4) of the Act.** There is no dispute as to the value of those scallops, which I fix at \$3,744.00.

[My bolding added]

[150] In *Longmire, supra*, the circumstances are distinguishable. The scallops were caught at sea while fishing in a closed area by the same vessel which then was ordered to dispose of them three hours later after steaming back to port under escort. The skipper refused the order to return them to the sea, while at sea. Justice

MacKay’s factual finding that they were not returned to the water “at the time of seizure” could be seen as reasonable in those circumstances. In any event, I am not bound by his factual findings.

[151] Here, Rockville was a reseller of lobsters (not a fisher, and not “at sea”) and was in possession of the lobsters by virtue of a land-based pound, from the time the officers arrived on the scene until, at Rockville’s premises, the lobsters were readied for transport and release to the ocean.

[152] Due to the pound’s features, the lobsters *could* remain alive therein for an unspecified duration (no evidence was specifically presented about *how long* they could survive in the pound after November 15, 2019).

[153] I do not believe that consequent to s. 73.2, Parliament intended to preclude the return to the sea of unlawfully caught/bought or sold live lobster preserved in pounds, merely because they were not seized at sea.⁴²

[154] Moreover, Parliament intended significant deference be given to DFO personnel relying on s. 73.2 of the *Act*. This is borne out by two observations:

⁴² I say this bearing in mind that the underlying objectives of the legislation prominently include the conservation of lobsters, which would be effected by their return to the ocean – namely by permitting the opportunity for those lobsters to reproduce, and they and their offspring to be available for further commercial fishing.

1. generally speaking a broad interpretation is to be preferred in relation to the *Act's* provisions, namely, the one that best serves the primary objectives of the legislation (regulation and management of the fishery with a view to species conservation); and
2. the section provides very broad discretion to DFO personnel, which should be respected, absent bad faith (which has not even been argued, much less established by Rockville).

[155] In spite of Justice MacKay's suggestion in 1993 that a restrictive interpretation of s. 73.2 is appropriate, at para. 24 in *Ulybel*, 2001 SCC 56, the Supreme Court favourably cited our Court of Appeal in *Savory*, *supra*, giving general direction as follows:

The Act and the Regulations have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the Act and the Regulations is to properly manage and control the commercial fishery.

[My underlining added]

[156] Justice MacKay relied upon the following principle in support of his conclusion that a restrictive interpretation should govern the present s. 73.2 of the *Act*:

23 Sections 71 to 77 of the Act reflect the long tradition in our legal system, sometimes said to be traceable through the Bill of Rights of 1688 and the Petition of Rights of 1627 in

England, to Magna Charta, that seizure by the Crown and disposal of the property of a citizen without compensation has not been accepted or recognized by the courts, unless Parliament in its wisdom expressly provides for that. Here Parliament has expressly so provided under section 77 so that where fish have been returned to the water in accord with s-s. 73(4) a person may not obtain a declaration of interest in the fish. Similarly, an exemption from any claim to fish returned to the water in accord with s-s. 73(4) is affected by the opening words of the subsection, "Notwithstanding anything in this section or sections 71 and 72...", which preclude any claim to recover under s-s. 73(3) for any live fish returned to the water at the time of seizure, even if there be no conviction for an offence.

[My underlining added]

[157] The wording of s. 73.2 of the *Act* expressly permits a very broad discretion:

a fishery officer... who seizes any fish under this Act may, at the time of the seizure, return to the water any fish that the officer... believes to be alive;

[158] Section 77 of the *Act* provides that there are no appeal rights in relation to "any fish that have been returned to the water pursuant to section 73.2".

[159] I am satisfied that the Fisheries Officers acted in good faith, were statutorily authorized to "return to the water" the lobsters that were alive, and that this was done "at the time of seizure".

[160] Regarding the concern referenced in the jurisprudence and arguments made herein about lack of "compensation" for Rockville, the evidence I accepted at the hearing leads me to conclude that Rockville has not shown more likely than not, that it was in lawful possession of the lobsters-whether because they were not shown to be lawfully caught or because they were not sold to Rockville by

someone with a Provincial Buyer's licence.⁴³ Moreover, Rockville/Mr. Porter was confronted with this unlawful possession allegation on November 15, 2019, before DFO personnel took any action – and he was unable to counter Senior FO Deveau's conclusions.⁴⁴

[161] On November 15, 2019, Senior FO Deveau was diligent. Among other things, he dispatched three officers to speak in person with David Pictou, before he came to the decision to return the lobster to the ocean.

[162] I accept his following evidence as honestly given and reliable (from his affidavit):

On November 15, 2019, FOs Ryan Currie, Simon Robichau and Jesse Rispoli met with David Pictou to inquire about records provided by [Rockville] indicating that a company owned by David Pictou sold lobsters to [Rockville]. **They requested paperwork to confirm where he purchased the lobsters. David Pictou provided paperwork that showed his company, Kylie & Boys purchased the lobsters from UTP Fisheries Ltd. on November 12, 2019, and November 15, 2019.** FOs determined that **UTP Fisheries Ltd. did not exist. In this case, DFO could not ascertain that the lobsters came from a legal source** as David Pictou, Kylie & Boys and UTP Fisheries Ltd. did not have a [Province of Nova Scotia] commercial licence to buy or sell fish.

The FOs seized the purchase slips from David Pictou. ...

On November 15, 2019, the FOs seized the lobsters, crates, and paperwork relating to the purchase of these lobsters. The FOs further explained to Wentworth Porter that as the lobsters were perishable, they would be released into the ocean. A fishery officer

⁴³ Arguably, Rockville could have sued Kylie & Boys for not lawfully selling it the lobsters.

⁴⁴ Although in a different context (in relation to the "taking" of real property), the reasons in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, (e.g., paras. 17-22) provide the Supreme Court of Canada's most recent perspective on the generic concerns raised by Rockville.

who has custody of any fish or other perishable thing seized pursuant to the *Fisheries Act* may dispose of it in any manner the Fishery Officer considers appropriate pursuant to section 70(3) of the *Fisheries Act*.

...

On November 15, 2019, pursuant to section 70(3) of the *Fisheries Act*, the lobsters, which were seized from [Rockville] were released off the Sandford Wharf, in Yarmouth County, Nova Scotia. The lobster crates were stored at the Tusket Detachment.

[My bolding added]

[163] While Senior FO Deveau did not expressly rely upon s. 73.2 of the *Act* at the time of his decision to release the lobsters back into the ocean, by notionally relying on the authority of ss. 70(3) and 72(4), and based upon my factual findings herein that he honestly and reasonably believed he could rely on each of those subsections, and that I found he in good faith relied on those sections, Canada is therefore entitled in these circumstances to argue, and rely upon, s. 73.2 as authority for his release of the lobsters back to the water.⁴⁵

[164] Therefore, I am satisfied that s. 73.2 also provides a basis for the lobsters having been released back to the water.

⁴⁵ Rockville did not take any objection to Canada relying on s. 73.2 for the actions of DFO personnel on November 15, 2019.

E - A Summary of my conclusions regarding the causes of action pleaded

[165] In simple terms, Rockville, which was not charged with any *Fisheries Act* offences, paid David Pictou/Kylie & Boys for the lobsters, yet it received no money for the lobsters the FOs released back to the ocean– which Mr. Porter says it could have received had they instead been resold by Rockville for \$12.75 a pound (para. 16 Porter affidavit) **or** by Canada reselling them after it had seized them.

[166] In relation to each of its civil claims I conclude as follows:⁴⁶

1. **abuse of public office** (which is more properly characterized as misfeasance in public office - *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 32)

[167] Rockville has not established on a balance of probabilities that there was deliberate unlawful conduct in the exercise of public functions *and* an awareness that the conduct was unlawful.

⁴⁶ Although the original pleadings filed January 21, 2022, referenced claims of *detinue*, restitution and unjust enrichment, they were not expressly pursued in written or oral argument by either the Applicant or Respondent. The Crown also acknowledged it was no longer relying upon or arguing there was an applicable limitation period issue. Hence, I have not addressed these issues. I will say that I would have rejected on the evidence the claims for *detinue*, restitution and unjust enrichment in relation to the lobsters. I add here that equitable claims are also subject to Rockville coming to the court with “clean hands”, which I find is not the case here – see Justice Ann Smith’s decision in *Clark v. Ewing*, 2023 NSSC 174, at paras. 148-149.

[168] This claim has not been proved.

2. **conversion of private property** (the lobsters and crates)

[169] As Justice Bodurtha stated in *Fraser v. 3102602 NS Ltd.*, 2020 NSSC 187:

[78] In *Fraser v. 3102602 Nova Scotia Ltd.*, 2015 NSSC 207, at para. 27, the Court sets out the essential requirements for conversion:

27...the essential features of the tort of conversion to be: (i) a wrongful act; (ii) involving a chattel; (iii) consisting of handling, disposing or destruction of the chattel; (iv) with the intention or effect of denying or negating the title of another to such chattel...

[79] For the tort of conversion, liability can attach to the Defendant where the theft was a direct and intentional interference with the property of the Plaintiff and the Plaintiff will be ordinarily entitled to the full value of the chattel as well as any profits lost as a result of the conversion (see *Musgrave v. Basin View Village*, [1998] N.S.J. No. 35, at para 71).

[80] Lastly, the British Columbia Court of Appeal in *Insurance Corp. of British Columbia v. Atwal*, 2012 BCCA 12, at para. 25 discusses how it does not matter if the conversion was committed innocently because it is a strict liability tort:

25 Conversion is a strict liability tort and as such, it is not a defence to a claim for conversion that the wrongful act (the interference with the owner's right of possession and/or title) was committed innocently: *Boma Manufacturing Ltd.* at para. 31. Liability for conversion does not require proof that the tortfeasor knew, for example, that the property was stolen. Both a purchaser and a vendor of stolen goods may be liable in conversion regardless of the state of their knowledge: *Nilsson Bros. Inc. v. McNamara Estate*, 1992 ABCA 42 (CanLII), [1992] 3 W.W.R. 761 (Alta. C.A.). **The plaintiff need only establish that the act, which was wrongful in its effect of interfering with the rights of the legitimate owner, was done deliberately or intentionally:** *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81, [2002] 4 S.C.R. 312 (S.C.C.) at para. 8.

[170] Rockville has not established on a balance of probabilities that there was a

“wrongful act”. Rockville has not satisfied me that the FOs did not act, with

statutory authority, lawfully, reasonably and in good faith, vis-à-vis their reasons for, and conduct associated with, returning the lobsters to the ocean.

[171] This claim has not been proved.

3 negligent investigation

[172] As I stated in *Howe v Rees*, 2022 NSSC 230, (presently under appeal):

115 The essential elements of the tort of negligent [police] investigation were described by the court in *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41. In summary, the court concluded:

A prima facie duty of care is owed if the relationship between two persons is sufficiently proximate that it is reasonably foreseeable that the actions of one may directly affect the other. In the relationship between the police and a particular suspect being investigated, the **requirement of reasonable foreseeability** is clearly made out and poses no barrier **to finding a duty of care**; clearly negligent police investigation of a suspect may cause harm to the suspect.

Other considerations in the proximity analysis include the close and direct relationship between the police and a suspect identified for investigation, and the suspect's critical personal interest in the conduct of an investigation.

The interests at stake support a finding of a proximate relationship giving rise to a prima facie duty of care, and other torts do not provide an adequate remedy for negligent police acts.

The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest.

Moreover, a duty of care by police officers to suspects under investigation is consistent with the values and spirit underlying the *Charter*. The relationship between a police officer and a particular suspect is close enough to support a *prima facie* duty of care.

This duty is not negated by any compelling policy reasons. The quasi-judicial nature of police duties does not require officers to make judgments as to legal guilt or

innocence, or to evaluate evidence according to legal standards. The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. Police are not unlike other professionals who exercise discretion in their work, but who are subject to a duty of care in tort. Recognizing such a duty of care does not raise the standard required of the police from reasonable and probable grounds to some higher standard; nor would it have a chilling effect on policy by causing police officers to take an unduly defensive approach to the investigation of criminal activity. The record does not support the conclusion that there would be a flood of litigation against the police if a duty of care were recognized. Finally, there are safeguards against the possibility that investigated persons who were acquitted of a crime, but who were in fact guilty, might recover against an officer for negligent investigation.

The appropriate standard of care for the tort of negligent investigation is that of the reasonable police officer in like circumstances. This provides a flexible overarching standard that covers all aspects of investigatory police work and is reinforced by the nature and importance of police investigations. The standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. **The particular conduct required is informed by the stage of the investigation and applicable legal considerations. Police officers may make minor errors or errors in judgment without breaching the standard of care.**

[My bolding added]

116 Justice Beveridge, on behalf of the court in *R. v. Gardner and Fraser*, 2021 NSCA 52, succinctly described the duty, albeit in the context of a criminal prosecution:

6 The common law imposes a duty on everyone to use the care of a reasonably prudent individual where a failure to do so will foreseeably cause harm to another. If that duty is breached and harm results, the person harmed can sue to be put back in the same position, as far as money damages can, as they were before the harm.

[173] I will also add the following from the court in *Hill* which can be generally juxtaposed onto cases involving FOs:

49 ... **Police are concerned primarily with gathering and evaluating evidence.** Prosecutors are concerned mainly with whether the evidence the police have gathered will support a conviction at law. The fact-based investigative character of the police task distances it from a judicial or quasi-judicial role.

50 The possibility of holding police civilly liable for negligent investigation does not require them to make judgments as to legal guilt or innocence before proceeding against a suspect. **Police are required to weigh evidence to some extent in the course of an investigation:** *Chartier v. Quebec (Attorney General)*, [1979] 2 S.C.R. 474 (S.C.C.). **But they are not required to evaluate evidence according to legal standards or to make legal judgments.** That is the task of prosecutors, defence attorneys and judges. **This distinction is properly reflected in the standard of care imposed, once a duty is recognized. The standard of care required to meet the duty is not that of a reasonable lawyer or judge, but that of a reasonable *police officer*.** Where the police investigate a suspect reasonably, but lawyers, judges or prosecutors act unreasonably in the course of determining his legal guilt or innocence, then the police officer will have met the standard of care and cannot be held liable either for failing to perform the job of a lawyer, judge or prosecutor, or for the unreasonable conduct of other actors in the criminal justice system.

...

54 **Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably.** This is in the public interest.

[174] I agree with Rockville's statements at paras. 13 and 18 of its February 16, 2023, brief:

While statutory compliance may be evidence that a party met the applicable standard of care, it is in no way determinative. ... Just as a breach of statute is not conclusive evidence of negligence, statutory compliance is not conclusive evidence of reasonableness.

[175] Presuming that a duty of care exists, I am not satisfied on a balance of probabilities that Rockville has established that there was a breach of the standard of care in these circumstances. The conduct of the FOs amply met the standards expected of a reasonable FO.

[176] This claim has not been proved.

4 **the claim for aggravated and punitive damages**

[177] While these claims were not developed in a written or oral argument, I am nevertheless satisfied they must fail because of my conclusions that the FOs' investigation was undertaken in good faith throughout, and that their conduct was neither negligent, unlawful, nor unreasonable.

[178] The FOs' conduct was professional and respectful.

[179] I rely on Justice Bodurtha's helpful summary in *Fraser v. 3102602 NS Ltd.*, 2020 NSSC 187:

87 An award of punitive damages is **only justified in exceptional cases** when the defendant's conduct requires punishment. This Court in *Von Maltzahn v. Koppernaes*, 2018 NSSC 192 (N.S. S.C.), discussed when punitive damages should be awarded at paras. 57-58:

57 Punitive Damages are awarded to deter a defendant from committing torts in the future and as punishment. They are granted when a plaintiff proves the defendant's conduct was "...so malicious, oppressive and high-handed that it offends the court's sense of decency." (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.) at para.199) and is a "...marked departure from ordinary standards of decent behaviour" (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.) at para. 36.)

58 In *Whiten* (supra) **the Supreme Court of Canada set out a number of factors the court should consider.** The award is to be proportionate to the blameworthy conduct, the vulnerability of the plaintiff, the harm or potential harm directed toward the plaintiff, the advantage wrongfully gained by the defendant, the need for deterrence, and the other penalties assessed against the defendant because of his or her misconduct.

[180] I am not satisfied on a balance of probabilities that vis-à-vis Rockville and Mr. Porter, the conduct of the FOs on November 15, 2019, was malicious, oppressive or high-handed; or negligent, unlawful or unreasonable.

[181] In my view, on the evidence, it was reasonable for the FOs not to arrange for sale of the lobsters, and not to allow Rockville to continue to have custody of the lobsters.⁴⁷

[182] Moreover, it was reasonable to not have the lobsters delivered into the “custody” of some other person. No evidence was presented that such a person who would have been agreeable to Senior FO Deveau or his superiors, and was able and willing to take custody of the lobsters, was reasonably and readily available.

[183] In the circumstances here, where I have found it was reasonable not to allow Rockville to continue to have custody of the lobsters, and there was no readily available salt-water tank alternative for keeping custody of them, the lobsters had to be moved, and it was a reasonable decision that they should be moved out of Rockville’s premises as soon as possible.

⁴⁷ I earlier explained in Footnote 3 why I considered the notion of selling the unlawfully caught lobster as inappropriate, especially where they could be returned to the ocean.

[184] Although no evidence was presented about the length of time they can survive outside of their watery environment, I infer that the Senior FO Deveau (and FOs in attendance that day) are somewhat knowledgeable about lobsters and would be aware and take into account that factor in making that decision on November 15, 2019.

[185] I am satisfied that once lobsters are moved out of their natural watery habitat, they start to become “perishable”, and remain so until they die.

[186] Section 70(3) of the *Act* gives discretion to a fishery officer to “dispose of [the lobster] in any manner the officer or guardian considers appropriate”; and s. 73.2 gives discretion to “at the time of the seizure, return to the water any [lobster] that the officer ... believes to be alive”. It was reasonable for Senior FO Deveau to act in a manner that kept them alive, and for him to conclude that it was in the interests of conservation and otherwise appropriate that they be returned to the ocean.

[187] I dismiss each of Rockville’s claims.

[188] I direct both parties, if unable to agree on costs, to file their written portions thereon (to a maximum of 10 pages) within 20 days of the release of this decision.

Rosinski, J.