

CANADA / JUDGMENT

R. v. F.A.S. Seafood Producers Ltd.

2020 BCSC 317

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 317 R. v. F.A.S. Seafood Producers Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. F.A.S. Seafood Producers Ltd.,

2020 BCSC 317

Date: 20200305

Docket: 29163

Registry: Prince Rupert

Regina

v.

F.A.S. Seafood Producers Ltd. and

Darcy Nichols

Before: The Honourable Mr. Justice Grist

On appeal from: A decision of the Provincial Court of British Columbia,

dated March 8, 2019 (R. v. F.A.S. Seafood and Darcy Ray Nichols, Prince Rupert Docket 29163)

Reasons for Judgment

Counsel for the Respondent Crown:

A.M. Switzer

Counsel for the Appellants:

F.M. Rowan

Places and Dates of Hearing:

Prince Rupert, B.C.

July 18-19, 2019

Vancouver, B.C.

October 18, 2019

Place and Date of Judgment:

Prince Rupert, B.C.

March 5, 2020

- [1] This sentence appeal references the sentencing provisions under the Fisheries Act, R.S.C. 1985, c. F-14 [Fisheries Act], specifically s. 78(a) and s. 79.2.
- [2] The appellants, F.A.S. Seafood Producers Ltd. ("F.A.S.") and Darcy Nichols ("Mr. Nichols"), entered guilty pleas on October 17, 2018, to Count 2 of the Information before the Provincial Court:

Count 2

F.A.S. Seafood Producers Ltd. and Darcy Ray Nichols, between December 26, 2014, and January 15, 2015, near the City of Prince Rupert, in the Province of British Columbia, did, while on board a fishing vessel that is subject to the jurisdiction of Canada, fish in waters other than Canadian fisheries waters, contrary to section 65(1) of the Fishery (General) Regulations, and did thereby commit an offence pursuant to section 78(a) of the Fisheries Act.

- [3] F.A.S. also entered a guilty plea to Count 7:

Count 7

F.A.S. Seafood Producers Ltd., between January 13, 2015, and February 13, 2015, at or near the City of Prince Rupert, in the Province of British Columbia, did sell fish that was caught in contravention of the Fisheries Act or regulations, contrary to section 33, of the Fisheries Act, and thereby commit an offence pursuant to section 78(a) of the Fisheries Act.

- [4] The sentences imposed by the Provincial Court Judge on March 8, 2019, were as follows:
 - a. In the case of both the appellants, on Count 2, a fine of \$3,000 pursuant to s. 78(a) of the Fisheries Act and an order that each appellant pay \$27,000 pursuant to s. 79.2(f) of the Fisheries Act.
 - b. In the case of F.A.S., on Count 7, a fine of \$15,000 pursuant to s. 78(a) of the Fisheries Act and an order that the appellant pay \$135,000 pursuant to s. 79.2(f) of the Fisheries Act.

- [5] Both orders under s. 79.2(f) were made to potentially benefit the Pacific Salmon Foundation, if the Foundation agreed to accept the payments, notwithstanding that the offences occurred while the appellants were fishing sablefish.

I. COUNT 2 - THE FISHING OFFENCE

- [6] The facts found by the sentencing judge, after three days of hearing following the entry of the guilty pleas, were as follows (at paras. 3-6 and 8-20 of the reasons):
- [3] F.A.S. is the owner of the vessel Ocean Pearl. At the relevant time, Mr. Nichols was the vessel master and directed its activities. It is acknowledged that the vessel engaged in illegal fishing which resulted in the first charge and it is the sale of the fish caught during that illegal fishing which is the subject of a second charge.
- [4] The Ocean Pearl is a large vessel with a crew of 13, including the master. It was engaged in the black cod or sablefish fishery. The particular fishing trip was between December 26, 2014, and January 14, 2015. The total value of the catch was over \$2 million, almost \$2.5 million.
- [5] This trip involved fishing west and northwest of Haida Gwaii. It takes place in deep water on the slope of the continental shelf. In this area, the boundary between the Canadian and U.S. exclusive economic zones, hereinafter referred to as the "EEZ", runs in a roughly east-northeast to west-southwest direction. It is well known and clearly defined by international agreement.
- [6] This vessel fishes for black cod by long line and trap. What occurs is that a long rope has a buoy attached to one end. That is thrown in the water and the line let out. When sufficient line has been let out to be equal to the water depth, plus an amount to ensure that wind and tide should not cause the anchor to lift and move, a heavy anchor is attached to the line and put overboard. The line is manufactured so that it has attachment points called beckets every 25 fathoms.
- ...
- [8] The evidence before me is that in the depth where the Ocean Pearl was fishing on this trip, the practice was to leave a length of line between the buoy and the anchor equal to the depth of water at that location, plus 200 fathoms, rounded up to the next multiple of 25 fathoms where there would be a becket.
- [9] Once the first anchor was attached and thrown overboard, a trap would be attached to the line every 25 fathoms and thrown over as the line was let out until a second anchor was attached. That anchor would be affixed at a location intended to be again at least equal to the depth of the water at the place the vessel then was, plus 200 fathoms from the end of the line. That second anchor would be put overboard and the line let out until a buoy was attached to the second end of the line and placed in the water. I have referred to a buoy, but the evidence is that it might have been several buoys together, but all placed at the end of

the line.

- [10] The traps are circular rings of metal, a bit less than one one-half metres in diameter. Two such rings, the top being slightly smaller, are separated by metal bars and the whole enclosed by netting. In the netting on the side of the trap is one or more funnel-like tunnels of netting. Bait is placed into the trap.
- [11] When on the sea floor, fish enter through the tunnels but are then unable or unlikely to exit by the same way. I am told that while the trap is moving up or down the water column while being placed or retrieved, the tunnels collapse and fish cannot enter or leave.
- [12] The traps are set in the water and allowed to fish for 24 hours or more and then retrieved. The buoy at one end is approached and brought aboard the vessel. The line is then pulled aboard the vessel, which moves along the path of the line on the bottom with the anchors and traps removed as they are brought aboard. The most common practice is to set the line of traps from shallower water to deeper water, and to retrieve in the reverse order. The water depths at which most of the fishing with which I am concerned occurred in depths which ranged from just under 300 fathoms to almost 500 fathoms. These are depths at which it can take even a 400-pound anchor something in the range of 20 minutes or so to sink to the bottom.
- [13] The vessel set several lines of traps. When it retrieves a line of traps, it resets it in an adjacent but not identical location. The effect of this is to slowly move the fishing gear through an area so that no particular location becomes fished out.
- [14] On this voyage, the vessel set traps in several distinct areas to spread its fishing effort. I should note that the catch data does not indicate, as is sometimes the case, that there was an increased catch when the vessel was fishing in or close to an area closed to it, the U.S. EEZ. There was no significant financial incentive to fish as close to the border as possible. The vessel was simply trying to spread its fishing area out -- fishing effort out over the area available to it.
- [15] This is a highly monitored fishery. It takes place well off shore, out of sight of most observers. The vessels which participate in this fishery are required to have equipment aboard which is connected to the hydraulic power equipment of the vessel and records its activity. There are video cameras which record several views of activity on the deck of the vessel while setting or retrieving gear. A global positioning system records the location, direction, and speed of the vessel while engaged in these activities.
- [16] When the vessel returns to port to offload its catch, that offload is monitored by a third party and the catch is confirmed. The hard drive which has recorded all of the information I previously referred to is removed and replaced and taken by a third party where it can be analyzed.

- [17] The vessel also has a system known as AIS, which is a system which, as I understand it, essentially continually broadcasts the location and identity of a large vessel to entities able to receive and interpret the information.
- [18] In the area where this fishing activity took place, there is a well-known ocean current. The North Pacific subpolar gyre is moving the water in a consistent northerly or northwesterly direction. That is the direction from the Canadian EEZ toward the U.S. EEZ. The exact speed and direction of this current varies from place to place and may well vary with depth in the water column. At the surface in this general area, the current is approximately .2 metres per second.
- [19] In this particular instance, Department of Fisheries and Oceans received advice from U.S. authorities that AIS indicated that the vessel Ocean Pearl was making incursions into the U.S. EEZ. Department of Fisheries and Oceans, I will refer to them hereafter as "DFO", subsequently received advice that there were further incursions. DFO determined to investigate when the vessel returned to port.
- [20] The vessel came to deliver its catch at Aero Trading Company Ltd.'s plant at Port Edward, British Columbia, near to Prince Rupert. Because of the size of the catch, the offload took three days. At the beginning of the offload, the hard drive was removed for analysis. Before the offload was complete, DFO had concluded that the vessel had retrieved gear while in U.S. waters. Fishery Officer Norman advised both a representative of Aero Trading and the manager of F.A.S. that DFO would be seizing 10 percent of the catch as they had not yet been able to determine exactly what part of the fishing activity had been illegal.
- [7] The expert evidence called by the defence during the sentencing hearing included the expert's opinion that the circumstances indicated it was most likely that the fish traps were located on the seafloor in Canadian waters when the buoys on either end of the long lines connecting the traps drifted into U.S. waters, on the five occasions the traps were set close to the international boundary. The sentencing judge noted that the Crown was not taking the position that the traps and thus the fish caught, were on the U.S. side of the boundary. He said at para. 28, "The Crown relied on the fact that the vessel was in U.S. waters while retrieving the gear, that that activity is 'fishing', and that constituted the offence"; and at para. 33: "I am, however, prepared to accept that I cannot be satisfied beyond a reasonable doubt that any of the gear was actually in U.S. waters when it was on the sea floor. I accept that all the fish caught, to the extent they have a national identity, were Canadian fish at the time they entered the traps. They were, however, retrieved through U.S. waters."
- [8] The gravamen of the offence is indicated at para. 60 of the sentencing judge's reasons:

[60] The fourth [Terroco] factor to consider is damage/harm, including potential damage or harm. I have previously alluded to the potential harm from this type of behaviour. It could have ramifications for international relations. In this case, it was reported to DFO by U.S. authorities. They were not adamant about prosecution. They were content if the vessel was warned and did not repeat the behaviour. However, repetition could clearly cause friction.

II. COUNT 7 - THE SALE OF FISH CAUGHT IN CONTRAVENTION OF THE ACT OR REGULATIONS

[9] The narrative in relation to this count is found at paras. 20-24 of the sentencing judge's reasons:

[20] The vessel came to deliver its catch at Aero Trading Company Ltd.'s plant at Port Edward, British Columbia, near to Prince Rupert. Because of the size of the catch, the offload took three days. At the beginning of the offload, the hard drive was removed for analysis. Before the offload was complete, DFO had concluded that the vessel had retrieved gear while in U.S. waters. Fishery Officer Norman advised both a representative of Aero Trading and the manager of F.A.S. that DFO would be seizing 10 percent of the catch as they had not yet been able to determine exactly what part of the fishing activity had been illegal.

[21] When determining to seize only 10 percent, DFO was being generous to F.A.S. Pursuant to the provisions of the Fisheries Act, a fishery officer may seize illegally caught fish and, where that fish has been mixed with legally caught fish, may seize the whole. Fishery Officer Norman would have been entirely within his rights to have seized the entire delivery. Unfortunately, things went somewhat sideways after this.

[22] F.A.S. was of the view that retrieving gear lawfully set in Canadian waters was not an offence. Fishery Officer Norman communicated to Mr. Hale, the manager of F.A.S., that DFO was getting a legal opinion on this. Fishery Officer Norman communicated to a representative of Aero Trading that 10 percent of the value should be held back and two fish slips issued for the offload, one for 90 percent of the value to F.A.S. and one for 10 percent of the value to DFO.

[23] F.A.S. wanted to be paid for the delivery. The representatives of Aero were having trouble communicating with Fishery Officer Norman. Mr. Hale, the manager of F.A.S., told the Vancouver representative of Aero that F.A.S. wanted to be paid for the full delivery and, if not, Aero would next hear from his lawyer. Mr. Hale gave evidence that he did in fact have his lawyer call Aero to demand full payment. Aero did then make payment for the full delivery to F.A.S. When Fishery Officer Norman returned from a holiday and asked Aero about the seizure, he was advised that the fish had all been shipped to Japan and the money all paid to F.A.S.

- [24] Aero was charged separately on this same information with obstructing a fishery officer by making that payment and not withholding the 10 percent of the value that they had been told was being seized. Aero entered a plea of guilty to that charge and was sentenced in April 2018 to a fine of \$60,000. [\$6,000 fine and an order under s. 79.2(f) for payment of \$54,000, R. v. Aero Trading Co. Ltd., (April 25, 2018) Prince Rupert 29163-1 (BCPC)].
- [10] The defence argued at the sentencing hearing that it sold fish caught in contravention of the Fisheries Act and accompanying regulations, but that this referenced only a small portion of the catch attributable to the sets associated with the buoy lines that had drifted into U.S. waters. This constituted, on the various figures advanced by counsel, between 1.5 and 5% of the total catch.
- [11] In the defence submission at the sentencing hearing, the sale to the wholesaler Aero occurred upon delivery of the fish. The defence argued that the actions taken by F.A.S. to influence Aero to pay F.A.S. (upon resale by Aero to its buyers in Japan) for the full amount of fish, including the 10% the DFO advised Aero to hold back, was a matter arising after the sale and should not have been considered on sentence.
- [12] The sentencing judge's comments on this issue were as follows at paras. 63-66 of his reasons:
- [63] My comments so far have been mainly about the fishing activity. There are separate concerns about the charge of illegal sale. From the Crown's point of view, the pressure to pay for the fish that the fishery officer had said was seized is a serious matter. The defence says that the sale occurred when the fish were delivered. They acknowledge that some of the fish delivered had been caught illegally and accordingly the sale was illegal. However, they take the position that the sale was complete upon delivery and I should not consider the subsequent behaviour. They say that the act of Aero paying out monies for fish that the fishery officer said were seized is a problem for Aero, but not anything that I should hold against F.A.S. They say that the fish were Aero's at the time they were seized, and F.A.S. was entitled to seek payment for what they had delivered.
- [64] I do not accept that. The delivery was not complete when the fishery officer advised all of the parties that DFO was seizing part of it. He was perfectly entitled to seize all of it, had he chosen to do so. If he had done so, F.A.S. would have been entitled to no payment at all. The sale was not complete simply on delivery. In fact, some part of the delivery was actually "sold" to an associated company of F.A.S., F.A.S. Wholesale Seafood Products Ltd. On the evidence before me, that fish was packed in totes by Aero and shipped to Vancouver where it was delivered to the associated company.
- [65] At the time of delivery, the price to be paid by Aero had not been established and would not be established until Aero was able to sell it on to its buyers in Japan. F.A.S. did not expect payment on delivery. They knew how it was supposed to work.

- [66] The sale did not complete until Aero paid for the fish they kept and sold on, and at the time all of the parties knew that part of that fish was supposed to be seized by DFO. By insisting on payment for the whole, F.A.S. was attempting to and did effectively defeat the seizure.
- [13] The sentencing judge said at para. 66 that the sale did not complete until Aero sold the fish to its buyers in Japan and provided the subsequent sale proceeds to F.A.S. I doubt the sentencing judge's assertion in this regard. In the usual case, the sale would have occurred on delivery of the fish by F.A.S. to Aero: s. 6(4) of the Sale of Goods Act, R.S.B.C. 1996, c. 410. Proceeds of the sale were not determined or payable until the fish were sold in Japan, but property had passed when the catch was delivered.
- [14] The appellant's actions taken to force payment of the whole of the contract price might also have been prosecuted as a separate offence relating to obstructing the fisheries officer who seized 10% of the value of the catch, as in fact was the case in the charge against Aero. However, the fact that F.A.S. was informed of the DFO seizure during the off-loading of the fish and then launched a successful effort to be paid by Aero for the full amount of the catch despite the 10% seizure of value, was so closely connected with the sale, it was appropriate to take these actions into account as an aggravating factor to be considered on sentence for the offence of selling fish caught in contravention of the Fisheries Act.
- [15] The offence of selling illegally caught fish itself would not have been of marked concern here, other than the challenge presented by F.A.S.'s knowing efforts to work around the seizure. The catch was recorded against F.A.S.'s quota. The selling of the fish was not a surreptitious or black market sale of fish caught and not legally taken into account. The fish were not trapped outside of fishing boundaries and the sale occurred while the offloading of the catch was being inspected by the DFO, who at the time were only concerned with the boundary violation.
- [16] As is apparent from this case, the sablefish fishery is closely monitored with sophisticated electronic equipment, and adherence to the Fisheries Act and accompanying regulations is of importance. *R. v. Terroco Industries Limited*, 2005 ABCA 141 [Terroco] is the much recognized authority that sets out five considerations bearing on the sentence to be imposed on breach of an environmental offence (at para. 34):
1. Culpability;
 2. Prior records and past involvement with the authorities;
 3. Acceptance of responsibility;
 4. Damage/harm done; and
 5. Deterrence.
- [17] Here, the sentencing judge highlighted deterrence as the paramount consideration. At paras. 41 to 62 of his reasons, the sentencing judge made his findings relating to the Terroco sentencing considerations in relation to Count 2. At paras. 67 to 73 of his reasons, the

sentencing judge made his findings relating to the Terroco considerations in relation to Count 7. In short, he found the defendants were indifferent as to whether they were fishing in U.S. waters, had been warned in the past in this regard, did not appropriately acknowledge their illegal acts and only entered their guilty pleas at a late stage in the proceedings.

III. STANDARD OF REVIEW

[18] In *R. v. Brown*, 2010 BCCA 225 [Brown], Tysoe J.A. reviewed the standard of review required of a summary conviction appeal judge, in the context of an appeal from a sentence imposed under the Fisheries Act at para. 12:

[12] On an appeal from a summary conviction offence, the summary conviction appeal judge is endowed with the same powers as an appellate court sitting on appeal: ss. 813, 822, 686-687 of the Criminal Code. Accordingly, a summary conviction appeal judge is bound to show deference to the decision of the sentencing judge (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at paras. 14-15), and, "absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit" (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para.90). ...

IV. MONETARY PENALTIES UNDER THE FISHERIES ACT

[19] Section 78 of the Fisheries Act provides:

78 Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of

- (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or
- (b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

[20] Section 79 of the Fisheries Act allows for an additional fine to be imposed, equal to the monetary benefit provided by the illegal fishing. Both sections characterize the monetary penalties as fines.

[21] The Crown proceeded summarily in this matter. The fine for a first offence is not to exceed \$100,000. Section 79 allows the court to impose an additional fine, equal to the amount of monetary benefit accruing to F.A.S. as a result of the illegal fishing and subsequent sale of the fish. Imposition of such a fine was discussed by the sentencing judge but not imposed. The sentencing judge regarded that the imposition of a penalty only equivalent to the profit

from the illegal fish "would be a travesty." Perhaps another reason for not imposing a s. 79 fine was because the fish caught associated with the drifting buoy lines were a minor portion of the catch, and it was difficult to determine the monetary benefit arising from these fish in the context of the expenses of a large vessel with a crew of 13, fishing offshore of Haida Gwaii for a three-week period, during December and January.

[22] Section 79.2 of the Fisheries Act gives the court the power to make orders in addition to punishment imposed under the penalty provisions of s. 78 and s. 79 of the Fisheries Act.

[23] Section 79.2 of the Fisheries Act provides:

79.2 Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:

- (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
- (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
- (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
- (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;
- (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
- (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;
- (g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this section;
- (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and

- (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this Act.

[Emphasis added.]

- [24] Where a person is convicted of an offence under the Fisheries Act, s. 79.2 provides for various forms of court order that may be made "in addition to any punishment imposed." There are nine subsections authorizing various court orders. These orders can prohibit activities that might amount to a continuation or repetition of the offence, direct the offender to post a bond, complete community service, publish the facts of the offence, or provide a report of subsequent activities to the Minister. The order might direct action to remedy harm or avoid potential harm.
- [25] Two subsections speak to payment of money. Section 79.2(d) contemplates payment of compensation to the Minister "for the cost of any remedial or preventative action taken by ... the Minister as a result of the commission of the offence." Section 79.2(f) provides for payment to Her Majesty "for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat."
- [26] As indicated in the main body of the paragraph, all orders made under s. 79.2, including orders made under s. 79.2(f) are to be made, "having regard to the nature of the offence and the circumstances surrounding its commission." I do not read the section as necessarily specifying a restoration project closely associated to a particular fishery, and flexibility on this score is likely of advantage. However, in looking at the scheme of the section, damage to fish stock, fish habitat, or management of the fishery, appears to be a pre-condition to the imposition of such an order. Further, in my view, a measure of proportionality should be reflected in the payment ordered compared to the damage suffered.
- [27] Here, there was no harm to the fish stock, fish habitat or to the management of the fishery founding an order under s. 79.2(f). The fish taken were part of the available catch and recorded against the quota issued to F.A.S. Fishing outside of fishery openings and non-reporting of fish taken in excess of quotas would clearly challenge proper management of fish stocks and such offences have founded s. 79.2(f) orders to compensate for the detriment to a fishery, but these are not characteristics of this case.
- [28] *R. v. Rio Tinto Alcan Inc.*, 2017 BCSC 1144, leave to appeal ref'd 2017 BCCA 440 [Rio Tinto Alcan], is a case dealing with the imposition of a s. 79.2(f) order. In this case, emergency repairs by Alcan to the hydro connector powered by generators it operates on the Kemano River resulted in the defendant reducing the water flow released by its operation of the diversion supplying the river. The manner in which this was done would either threaten eulachon eggs or salmon fry, depending on the way in which the water flow was managed. Eulachon are an endangered species and the company chose a course of action that was likely to cause little or no damage to the eulachon habitat but which had the prospect of threatening salmon fry. The sentencing judge found that Alcan's actions taken to deal with

the critical situation did not sufficiently include consideration of further preventative measures that may have lessened the danger to the salmon fishery. At para. 56, the Summary Conviction Appeal Court noted the following from the sentencing judge's conclusions at paras. 144 to 146 of his reasons:

- [56] In my view the trial judge's conclusions as reflected in paras. 144 to 146 of his reasons, were firmly based on the evidence and not open to attack on this appeal. Those paras. read:
- [144] In this court's view Ms. Hillier's comments do what you have to do does not operate as *carte blanche* to proceed without taking into account the salmon fishery. A reasonable response would not necessarily include all mitigation methods considered in proposed ramp downs where there is the luxury of time and planning to consider all the implications, but surely due diligence does not absolve the defendant from doing nothing for the salmon fishery when at minimum lines of inquiry were available to determine if something could have been done.
- [145] The fact that the eulachon fishery was prioritized, quite appropriately, does not relieve the defendant of its reasonable responsibilities to the salmon fishery in that context. Neither of the two identified salmon fishery mitigation measures available, if implemented, would appear to negatively affect the eulachon fishery. Inquiries about implementation may have led to delay in determining availability or implementation and that could have been included in the overall risk analysis.
- [146] The problem for the defendant here is that it did not appear to turn its "mind" to these options and made no inquiries about the possibility of placing salvage crews on the river or discussions or demands to have the connector repair work done even partially in darkness. [Emphasis in original.]
- [29] As a result of these findings, the company was convicted and sentenced to a fine of \$75,000 and ordered to pay \$125,000 to Her Majesty in Right of Canada under s. 79.2(f) of the Fisheries Act. In dealing with the sentence appeal, the Summary Conviction Appeal Court noted the following features of the sentencing judge's decision:
- [60] At para. 18 of his reasons for sentencing the trial judge wrote:
- There is no quantification of damage aside from the anecdotal observations of the fishing guide, Walter Feitz. In fact there has been material put before me that the fish populations as measured and known to be affected by the ramp-down were not significantly altered after the event. I conclude there is little evidence of impact on specific fishery populations in the Kemano River as a result of this ramp-down.
- [61] At paras. 24 and 25 of his reasons for sentencing the trial judge wrote:
- [24] This is not a high culpability case. It is one where the defendant, in focusing on its duties under the eulachon protocol to one species of fish failed to adequately consider or modify its activity in consideration of another species of fish with conflicting needs, the salmonids.

[25] However, had the defendant failed to act on the information by BC Hydro about an imminent failure of the connector, and failure occurred, the defendant would have found itself in a potentially indefensible position regarding its responsibilities to the environment and those relying on the power supply. The defendant was virtually compelled to act, and in short order. In doing so, it did not fully consider mitigating steps for the salmonids, and for that they are culpable.

[62] At para. 33 of his reasons for sentencing under the heading "Deterrence" the trial judge wrote:

The defendant in these circumstances does not present here as callously disregarding its responsibility to the environment in which it operates. There has been what appears to be a working relationship between the defendant and the Department of Fisheries and Oceans as demonstrated in the evidence of this matter, specifically the personnel represented in Joy Hillier for the Department of Fisheries and Oceans, and Justus Benckhuysen at that time.

[63] At para. 38 under the heading "specific deterrence" the trial judge wrote:

In the court's view this is not as significant as this defendant has engaged actively to implement protocols, both short and long-term, to address the needs of species in the Kemano River.

[64] At para. 40 of his reasons for sentencing the trial judge wrote:

Overall, this ramp-down, and how it was conducted, was probably the best choice of bad choices while failing to address one of the impacts in implementing it. This is not an offender that has chronically ignored or failed to follow warnings to the best of my knowledge

[65] The trial judge gave no reasons specifically addressed to the obligation he imposed on RTA to pay \$125,000 to the Crown.

[30] In striking the s. 79.2(f) order, the Summary Conviction Appeal Court judge commented at paras. 68 and 69:

[68] The difficulty I encounter on this sentence appeal when seeking to defer to the reasons of the sentencing judge on the question of the payment to the Crown of \$125,000 is that nowhere in those reasons does the sentencing judge weigh the factors relevant to that payment. The sentencing judge observed that he was somewhat persuaded by the notion that "ability to pay is not a significant challenge" for RTA and later in his reasons commented that "overall this is a matter where a very prosperous defendant, a corporation, has been granted the right to divert fresh water from one water system to another on the BC coast for electrical generation purposes". It appears that the trial judge's decision to require the \$125,000 payment to the Crown was influenced by his view that RTA is "prosperous". The means of RTA to pay \$125,000 ought not to have been considered.

- [69] Once the sentencing judge found RTA was faced with an emergency which it attempted to manage, however inadequately, but damage to the fish and fish habitat of the Kemano River was slight, and the offences charged were of a low order of culpability, there was no basis on the authorities to require a payment to the Crown beyond the fines imposed. The sentence appeal must be allowed and the obligation to pay the Crown \$125,000 set aside. [Emphasis added.]
- [31] It seems clear that in his analysis, the Summary Conviction Appeal Court judge viewed the ability to pay alone as insufficient to prompt a s. 79.2(f) payment. Other relevant factors were required. Similarly, in this case, there is no discussion of relevant factors in setting the order.
- [32] What other factors would be relevant to imposing the payment? The section provides a court considering a s. 79.2(f) order should have, "regard to the nature of the offence and the circumstances surrounding its commission," and the objective of the s. 79.2(f) order to promote "the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat." Some nexus between the nature of the offence and the objective of the payment order appears to be a requirement. Otherwise the payment would seem to be a completely gratuitous use of the payment section.
- [33] I find support for this conclusion in *R. v. Gwaii Wood Products Ltd.*, 2017 BCPC 6 [Gwaii Wood Products], a case in which the defendants unlawfully carried on logging on District Lot 413 (DL413), resulting in serious alteration, destruction or disruption of a productive salmon rearing riparian system on Haida Gwaii. At paras. 92-94, the sentencing judge characterized the purpose of s. 79.2(f):
- [92] What the Crown is seeking is an order under section 79.2 (f) of the Act requiring the payment of money for the purpose of providing management, control, conservation, and protection of fish habitat on Haida Gwaii. Such a payment is meant to assist in the rehabilitation and amelioration of damage done to fish habitats similar to that visited by the Defendants on DL413.
- [93] The Crown submits that the reasoning in *Henneberry and H & H Fisheries* concerning section 79, which has been followed by courts in British Columbia, should also be applied to section 79.2 (f). With respect, such reasoning is flawed. The purpose of the two sections are quite different; section 79 is meant to punish and section 79.2 (f) is meant to be rehabilitative by having a defendant contribute to the restoration of habitat similar to what it damaged. [Emphasis added.]
- [94] Therefore, although significant orders will be made for each of the Defendants to pay an amount contemplated by section 79.2 (f), they will not be based on the "monetary benefits" they each received as provided for by section 79.
- [34] Further, in *R. v. Pasco Seafood Enterprises Inc.*, 2019 BCPC 228, the Court agreed with the conclusion in *Gwaii Wood Products* that s. 79.2(f) is rehabilitative in nature:

- [100] That characterization in Gwaii of the provision as rehabilitative is consistent with the legislation's reference to such an order being part of a probation order, (see: s. 79.3.) It is also consistent with the notion that a s. 79.2 order would be in addition to any punishment imposed, as set out in the section. From that language, I am led to conclude that the safer course is for me to make a punishment order under s. 78.
- [35] Here, in respect of the fishing offence, the delict was in not taking care to have the buoy lines and buoys, as was predictable, drift into U.S. waters, raising the prospect of a strain on international relations. The second offence, sale of the illegally caught fish, was a consequent matter determined by the boundary violation, albeit aggravated by the frustration of the seizure. Again, the nature and circumstances of the offences did not challenge fish stock, fish habitat, or the management of fisheries; and accordingly, having regard for the "nature of the offence and the circumstances of its commission," on both counts, I can find no principled basis for the s. 79.2(f) orders and they will be set aside. These orders impacted on the fines imposed and I next turn to whether in the context of fines imposed in similar circumstances, the fines were demonstrably unfit.
- [36] I pause to note that the Crown has argued that the appellants had input into the imposition of the s. 79.2(f) orders, and accordingly the s. 79.2(f) orders should not be struck. The Crown emphasizes that the proposed beneficiary of the payment, the Pacific Salmon Foundation was, in fact, proposed by the appellants. While the appellants did provide this input, it was in the context of the Court discussing the total monetary payment to be imposed by way of fines and s. 79.2(f) orders. The appellants' submissions were for a conditional discharge, but alternatively, if there was to be a monetary payment ordered, the appellants explained they would prefer the payment go to the Pacific Salmon Foundation, rather than be paid as a fine to the Crown or left as monies paid to the Crown to be used for some other fisheries related purpose. There were no habitat or fish stock enhancement projects likely to be proposed for the sablefish industry. These are fish that are located offshore and management of the fishery is confined to the reciprocal setting of quotas with the United States, recording the catch, and inspecting the delivery of the fish. The cost of the official oversight is, as acknowledged by the Crown, borne by the industry. Accordingly, were s. 79.2(f) orders appropriate, it would likely require enhancement of some other fishery. The parties conferred on the particulars of the 79.2(f) orders but after it was clear that significant monetary orders were going to be imposed. In this context, I cannot find consent or acquiescence in the imposition of the 79.2(f) orders, orders that in any event have to be justified by relevant factors drawn from the circumstances.
- [37] I will now address the impact of striking the s. 79.2(f) orders and whether this subsequently makes the fines against the appellants demonstrably unfit.
- [38] Rio Tinto Alcan was appealed further by both Alcan and the Crown: *R. v. Rio Tinto Alcan Inc.*, 2017 BCCA 440. Both Alcan's and the Crown's applications for leave to appeal were dismissed in Chambers. The Crown's application for leave to appeal was advanced on multiple grounds, one of which was to challenge the Summary Conviction Court of Appeal's

striking of the s. 79.2(f) order, without considering reassessment of the fine. The Court of Appeal dismissed the Crown's application for leave to appeal to argue reassessment of the fines upon the striking of the s. 79.2(f) order because the Crown had taken no action during the summary conviction appeal to advance that issue.

- [39] In *Brown*, the Court recognized that the cost of remediating fish habitat under a restoration order pursuant to s. 79.2(b) of the Fisheries Act, may be taken into account in assessing the fine to be imposed. Similarly, where there is no such order, the monetary penalty may be greater.
- [40] In this case, I discussed with counsel whether the Court should look again at the fines imposed if the s. 79.2(f) orders were struck. It was accepted by both parties that this should be undertaken. It seems clear, in this case, that the sentencing judge imposed a much lighter monetary penalty by way of fine than he would otherwise have imposed if not for the s. 79.2(f) orders. The fines imposed with respect to the fishing offence, for example, were in the sum of \$3,000 for each appellant, which was not in accord with the sentencing judge's comments relating to his stated objective of deterrence.
- [41] In dealing with a sentence on the basis of a fine alone, I think it inappropriate to simply include the amount of the s. 79.2(f) orders in the fines. As said in *Gwaii Wood Products*, the fine sections of the Fisheries Act and the rehabilitative order are used for quite different purposes. The proper approach, if the fine is demonstratively unfit in the absence of the s. 79.2(f) order, is to reassess the fine to better accord with the authorities.

V. SENTENCING AUTHORITIES

- [42] Fishing is a highly regulated resource industry. Offences under the Fisheries Act are as varied as the many requirements the Act and accompanying regulations impose on fishers. Many charges are founded on improper compliance, with sloppy or ill-informed actions leading to breaches of the legislation. Some charges are based upon actions taken to profit from the contravention of measures taken to conserve endangered resources.
- [43] In each case, specific and general deterrence are the predominant sentencing objectives. Participants in the industry need to pay attention and strictly observe the requirements imposed by the Fisheries Act and accompanying regulations. Those that act to profit from knowing breaches, need to have their profits stripped and their conduct should generally attract more stringent penalties.
- [44] Cases cited that involved boundary breaches or fishing in closed or restricted areas include:
1. *R. v. Noringseth*, 2016 BCPC 183 [Noringseth];
 2. *R. v. Perry*, [2003] N.J. No. 27 (Nfld. P.C.) [Perry];
 3. *R. v. Steer* (11 December 2013), Masset 6090-1 (B.C.P.C.) [Steer];

4. R. v. Martynuik, 2015 BCPC 412 [Martynuik]; and
 5. R. v. Schafhauser, 2017 BCSC 2287 [Schafhauser].
- [45] Noringseth was a case of a large Canadian vessel illegally fishing for sablefish in U.S. waters. Count 1 related to a 10-day excursion. Count 2 concerned a later three-week trip. On both of these occasions, the vessel strayed significantly into U.S. waters; 2 to 9 kilometres in respect of Count 1, up to 25 kilometres in respect of Count 2.
- [46] It was difficult to account for fish caught in U.S. waters because the required fishing records were not kept, but it seems clear that a substantial percentage of the catch consisted of fish taken from U.S. waters. The estimated amount of sablefish caught illegally during the two trips was valued at just over one million dollars.
- [47] The vessel entered U.S. waters as a result of the captain failing to take reasonable measures to acquaint himself with the international boundary. The fines imposed were \$5,000 with respect to Count 1 and \$10,000 with respect to Count 2. Two further counts dealing with failing to keep records resulted in \$2,500 fines in each case.
- [48] In Steer, the crab vessel operated by the defendant took early advantage of a lucrative fishery by setting traps before the area was opened for fishing. A \$20,000 fine was imposed following receipt of a joint submission.
- [49] Martynuik was a case involving fishing for halibut in rockfish conservation areas. The vessel operator was charged with various counts and was sentenced on Counts 7, 8, 9, 10, 13, and 14. Count 7 related to six incursions into rockfish conservation areas in September 2010. Count 8 related to four incursions into rockfish conservation areas in October of that year. The total value of the fish taken was \$9,700. The fines on Count 7 and Count 8 were \$3,500 in each case. Counts 9 and 10 related to selling the illegally caught fish. A fine of \$3,500 was imposed with respect to each count. Lastly, a fine of \$1,000 was imposed on each of Counts 13 and 14, charged for failure to record the catch. The sentencing judge remarked that he had lessened the fines to take into account the principle of totality.
- [50] Perry is a case from the East Coast relating to a U.S. vessel that illegally took crab off of Newfoundland. The offence occurred because the defendant did not effectively determine where he was fishing, although he had the means of doing so. He was detected through aerial surveillance of an area vulnerable to illegal fishing. The accused's actions were characterized as not innocent but not "of nefarious design." The fine imposed was \$25,000.
- [51] Schafhauser was a case involving two counts that the accused ultimately pled guilty to. The first, related to a lie told to a fisheries officer that he did not have his fishing gear in the water prior to a salmon opening. The second offence followed when the accused failed to stop fishing when he met his quota, resulting in an overage of 70 fish.

- [52] The penalty imposed and found to be fit on summary conviction appeal was a fine of \$500 on each count and a s. 79.2(f) order requiring a payment of \$4,500 on each count. The accused had a previous violation dealt with by a \$6,000 fine.
- [53] The fines imposed in the above cases involving fishing beyond boundaries or in areas that were restricted, or not open, when the offence was committed range from \$7,000 to \$25,000. Martynuik and Schafhauser attracted smaller fines, but perhaps this is because the offences committed were by fishers involved in smaller operations, as opposed to larger vessels engaged in more lucrative ventures.
- [54] There were cases cited by the parties from the East Coast involving tuna and halibut fisheries that involved more extensive criminal ventures to set up what amounted to black-market enterprises to illegally profit from these highly regulated fisheries. The fines imposed in these cases, in aggregate, exceeded the range I have described; however, I view these as demonstrating a significantly higher level of criminality than the cases I have considered.
- [55] I think it clear, as said above, that the fines of \$3,000 on Count 2 against each appellant, viewed in isolation, are demonstrably unfit. For the reasons I have given, this is not an appropriate case for s. 79.2(f) orders, nor do I view it appropriate to simply increase the fine to the total imposed by the sentencing judge. In my view, an appropriate penalty within the range I have identified would be a fine of \$20,000 against F.A.S.
- [56] The fine imposed on the vessel master, Mr. Nichols, should in my view be a measure less than was imposed upon the company that owned the vessel and participated in the proceeds of the catch in a greater measure. Accordingly, I would increase the fine imposed in Mr. Nichols' case from \$3,000 to \$15,000.
- [57] Dealing with Count 7, again, the elements of the offence of the sale of illegally caught fish were met once the subsequent sale occurred. The sale of the fish itself was not, as referred to by the sentencing judge in Perry, "of a nefarious design." However, what followed by way of participation in the frustration of the seizure, as found by the sentencing judge, was culpable and a significant aggravating feature of the offence.
- [58] Aero, the wholesaler, was charged with obstructing a fisheries officer for not withholding and ultimately remitting the seized value to F.A.S. The fine imposed by the same sentencing judge as in this case was \$6,000, but accompanied by a s. 79.2(f) order in the sum of \$54,000. In light of my decision in this case, I view the imposition of the s. 79.2(f) order against Aero as being suspect. Here, the fine portion of the sentence imposed on F.A.S. was \$15,000. Although this is more than was imposed as a fine alone, upon the principal offender Aero, the aggravating circumstances here are significant and I am not convinced that in all of the circumstances the fine here is demonstrably unfit, notwithstanding it exceeds the Aero fine.

VI. SUMMARY

[59] Count 3: the fine imposed on F.A.S. should be increased from \$3,000 to \$20,000. The fine imposed on the vessel master, Mr. Nichols, should similarly be increased from \$3,000 to \$15,000. The s. 79.2(f) orders will be struck.

[60] Count 7: the fine imposed on F.A.S. of \$15,000, will not be varied. The s. 79.2(f) order will be struck.

"W.G. Grist J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/03/2020BCSC0317.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-f-a-s-seafood-producers-ltd-2020>

Prepared on 24 October 2026 · Esheria