

CANADA / JUDGMENT

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

2021 BCCA 312

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 312 R. v. F.A.S. Seafood Producers Ltd.

COURT OF FOR BRITISH COLUMBIA

Citation:

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

2021 BCCA 312

Date: 20210816

Dockets: CA46776; CA46777

Docket: CA46776

Between:

Regina

Appellant

And

F.A.S. Seafood Producers Ltd.

Respondent

- and -

Docket: CA46777

Between:

Regina

Appellant

And

Darcy Nichols

Respondent

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated March 5, 2020 (sentence) (R. v. F.A.S. Seafood Producers Ltd., 2020 BCSC 317, Prince Rupert Docket 29163).

Counsel for the Appellant

(via videoconference):

R.J. Carrier

J.A. Billingsley

Counsel for the Respondents

(via videoconference):

F.M. Rowan

A.K. Hall

Place and Date of Hearing:

Vancouver, British Columbia

April 1, 2021

Place and Date of Judgment:

Vancouver, British Columbia

August 16, 2021

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Goepel

Summary:

The Crown brings two appeals from orders of a summary conviction appeal judge varying the sentences imposed by a sentencing judge against the two respondents for offences under the Fisheries Act. The respondents F.A.S. Seafood Producers Ltd. (in CA46776) and Darcy Nichols (in CA46777) were convicted of unlawfully fishing in United States waters (count 2). F.A.S. Seafood was also convicted of unlawfully selling fish, in contravention of a seizure order imposed by the Department of Fisheries and Oceans (count 7). The sentencing judge imposed total sentences requiring payments of \$180,000 as against F.A.S. Seafood and \$30,000 as against Mr. Nichols. The sentences were apportioned in part as fines, but primarily as payments pursuant to s. 79.2(f) of the Fisheries Act. The summary conviction appeal judge concluded the s. 79.2(f) orders could not be imposed in the absence of damage to fish, fish habitat, or management of the fishery, and set aside the s. 79.2(f) orders in their entirety. He accordingly increased the fines against both respondents for count 2 but did not increase the fine against F.A.S. Seafood for count 7. The new total sentences were \$35,000 as against F.A.S. Seafood and \$15,000 as against Mr. Nichols. The Crown contends the summary conviction appeal judge erred in his interpretation of s. 79.2(f) and in setting aside the s. 79.2(f) orders, and that the judge's modified sentences are demonstrably unfit in the circumstances.

Held: Appeal CA46776 is allowed in part by setting aside the summary conviction appeal judge's fine against F.A.S. Seafood on count 7 and substituting for it a fine of \$75,000; Appeal CA46777 is dismissed. The application of s. 79.2(f) does not require a finding of damage to fish, fish habitat, or management of a fishery as a precondition. The factors to be considered under s. 79.2(f) are discussed. The summary conviction appeal judge was correct to set aside the s. 79.2(f) orders, as the sentencing judge failed to consider the legislative criteria for such orders. There is no basis to interfere with the summary conviction appeal judge's modified fines for count 2. However, the fine for count 7 imposed on F.A.S. Seafood is demonstrably unfit in the circumstances and must be increased significantly in the interests of deterrence and considering the circumstances of the offence.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] The issue before us is the scale of the financial penalty imposed on the respondents F.A.S. Seafood Producers Ltd. (in CA46776) and Darcy Nichols (in CA46777) for offences under the Fisheries Act, R.S.C. 1985, c. F-14. It comes to us as an appeal of the order of Mr. Justice Grist sitting as a summary conviction appeal judge.
- [2] F.A.S. Seafood, owner of the fishing vessel Ocean Pearl, was convicted, on guilty pleas, of fishing in waters in the exclusive economic zone of the United States of America contrary to s. 65(1) of the Fishery (General) Regulations, SOR/93-53, (count 2) and of unlawful sale of fish ordered seized by the Department of Fisheries and Oceans contrary to s. 33 of the Fisheries Act (count 7), both of which are offences under s. 78 of the Act. Mr. Nichols, master of the Ocean Pearl, also was convicted, on a guilty plea, of fishing in waters in the exclusive economic zone of the United States of America, contrary to s. 65(1) of the Regulations (count

2).

- [3] The sentencing judge imposed sentences on each of F.A.S. Seafood and Mr. Nichols requiring payment of \$30,000 for unlawful fishing, allocated as a fine of \$3,000 and a payment order of \$27,000 imposed under s. 79.2(f) of the Act. On the offence of unlawful sale of fish, the judge imposed a sentence of \$150,000 on F.A.S. Seafood allocated as a fine of \$15,000 and a payment order of \$135,000 imposed under s. 79.2(f) of the Act. The sentencing judge directed payment of the s. 79.2(f) assessments be made to the Pacific Salmon Foundation or, if that Foundation was unwilling to accept and make use of the funds, to the Department of Fisheries and Oceans in the Northwest area for protection, preservation, and conservation of the fisheries.
- [4] On sentence appeals by F.A.S. Seafood and Mr. Nichols, the summary conviction appeal judge allowed the sentence appeals, struck the payment orders imposed under s. 79.2(f), and increased the fines for unlawful fishing to \$20,000 as against F.A.S. Seafood, and \$15,000 as against Mr. Nichols. He did not modify the fine of \$15,000 for unlawful sale as against F.A.S. Seafood.
- [5] Leave to appeal has been granted to the Crown to appeal from the orders of the summary conviction appeal judge on the following two grounds:
1. The summary conviction appeal judge erred in law in finding that damage to fish stock, fish habitat, or management of the fishery was a precondition to the imposition of a payment order under s. 79.2(f) of the Fisheries Act; and
 2. The summary conviction appeal judge erred in law in varying the fines and cancelling the payment orders, thereby imposing a sentence that was unfit in all the circumstances.
- [6] The parties agree that the two questions posed are questions of law that require us to apply a standard of correctness.
- [7] The Crown submits that the summary conviction appeal judge erred on both grounds and asks us to restore the original sentences imposed by the sentencing judge. F.A.S. Seafood and Mr. Nichols say that neither error is established and urge us to resist interfering with the sentences now in effect.

The Fisheries Act

- [8] The Fisheries Act establishes a comprehensive regulatory regime for fishing in waters under the jurisdiction of Canada, including the establishment of offences and penalties for commission of offences. In *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, Justice Iacobucci referred to process under the Act as quasi-criminal. The following provisions bear on the issues raised in this appeal:

2.1 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.

...

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.

...

79 Where a person is convicted of an offence under this Act and the court is satisfied that as a result of committing the offence the person acquired monetary benefits or monetary benefits accrued to the person, the court may, notwithstanding the maximum amount of any fine that may otherwise be imposed under this Act, order the person to pay an additional fine in an amount equal to the court's finding of the amount of those monetary benefits.

...

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

- (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;

79.4 (1) Where the court makes an order under section 79.2 or 79.3 directing a person to pay an amount of money as compensation or for any other purpose, the amount and any interest payable on that amount constitute a debt due to Her Majesty and may be recovered as such in any court of competent jurisdiction.

83 Except as otherwise provided in this Act, all penalties and forfeitures incurred under this Act or any of the regulations are recoverable and enforceable by summary proceedings taken under the provisions of the Criminal Code relating to summary convictions.

The Circumstances of the Offences

- [9] The sentencing judge described the circumstances of the offences in detail. The vessel and its crew, including the vessel master Mr. Nichols, were engaged in the black cod (sablefish) fishery from late December 2014 to early January 2015, fishing west and northwest of Haida Gwaii, British Columbia. The boundary in this area between the Canadian and United States exclusive economic zones (referred to by the judge as EEZ's), defined by international agreement, runs roughly east-northeast to west-southwest. The judge found the boundary was well known.
- [10] Fishing for black cod is by long line and trap, described by the judge thus:
- [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.

...

- [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.
- [11] The Canadian authorities received advice from United States authorities that the Ocean Pearl was making incursions into American waters.
- [12] When the Ocean Pearl hailed-in at Port Edward, near Prince Rupert, British Columbia, it started to offload its catch to its buyer, Aero Trading Company Ltd. The value of the catch from the trip was nearly \$2.5 million. Before offloading was complete, the Department of Fisheries and Oceans concluded from the on-board monitoring equipment carried by the Ocean Pearl that the vessel had retrieved gear used in five sets while in American waters. Such activity is within the definition of "fishing". An officer of the Department of Fisheries and Oceans advised the manager of F.A.S. Seafood that the Department was seizing 10 percent of the catch. It also advised Aero to hold back 10 percent of the value of the catch by issuing two fish slips, one for 90 percent to F.A.S. Seafood and one for 10 percent to the Department of Fisheries and Oceans. On the urging of F.A.S. Seafood, Aero made full payment to F.A.S. Seafood, frustrating the seizure and leading to the charge against F.A.S. Seafood of unlawfully selling fish. Aero also was charged with unlawfully purchasing fish. It pleaded guilty and was fined \$60,000.

The Reasons on Sentencing

- [13] In his reasons for sentence, the judge accepted that all fish that were the subject of the charges were in Canadian waters when they entered the traps, but were retrieved through American waters.
- [14] F.A.S. Seafood and Mr. Nichols advocated for a minimum fine equal to the amount received on the sale of the fish in the five sets. The Crown sought a penalty of \$30,000 against Mr. Nichols and in the order of \$200,000 against F.A.S. Seafood.

- [15] It was germane to sentencing that Mr. Nichols had been issued a warning letter in September 2011 in similar circumstances and had been sent a warning letter to like effect in August 2013, which he denied receiving. The sentencing judge found that in 2009 the founder and principal owner of F.A.S. Seafood had engaged in behaviour similar to this incident while operating the Ocean Pearl, and had been warned by the Department of Fisheries and Oceans against such activity.
- [16] In imposing the original penalties the sentencing judge considered, in respect of the unlawful fishing conviction:
1. F.A.S. Seafood and Mr. Nichols did not set out consciously to do an act they knew was illegal, but also gave "no thought ... to the legality of their acts". They knew the effects of the current in the area, where the border was, and that they were moving into American waters but did not consider whether they were permitted to do so;
 2. F.A.S. Seafood and Mr. Nichols had received prior warnings;
 3. The delay of F.A.S. Seafood and Mr. Nichols in entering guilty pleas only at the edge of trial eroded most of the mitigating effect of their guilty pleas;
 4. F.A.S. Seafood and Mr. Nichols did "not seem to think that they really did anything wrong";
 5. The offences raised the potential of negative ramifications for international relations and "repetition could clearly cause friction"; and
 6. The principle of deterrence required that the industry must not see the penalty "as merely a licence fee for illegal behaviour".
- [17] F.A.S. Seafood contended that the judge should consider, in sentencing, that the sale of fish had completed when the 10 percent seizure was made. The judge rejected this view of the evidence and said "[b]y insisting on payment for the whole, F.A.S. was attempting to and did effectively defeat the seizure". He said, "I find them to be as culpable as it is possible to be". He commented on their refusal "to acknowledge the wrongness of their behaviour", and spoke of the significant harm that can be occasioned by such behaviour. He spoke of the need for deterrence.
- [18] In determining the scale of the sentences, the sentencing judge said:
- [81] ... to impose a penalty which was only equivalent to the profit from the illegal fish would be a travesty. The reality is that neither of these defendants is entitled to much in the way of sympathy.
- [82] Mr. Nichols was warned twice for this same type of behaviour. He did not modify his behaviour. Until conviction was almost certain, he did not acknowledge that there was anything wrong in his actions.

- [83] F.A.S. was warned about this behaviour. [It] did not take sufficient steps to ensure that [its] employees complied with the law. ...
- [84] There is no doubt that if anyone had asked Mr. Nichols what he was doing as he hauled his traps in U.S. waters, he would have acknowledged that he was fishing for black cod.
- [85] I see no real mitigating factors for either defendant in this matter. They chose to act as they did without giving any real consideration to the legality of their actions. This was after warnings directed to these specific actions. When caught out, F.A.S. did not want to acknowledge the illegality. They disputed the right to seize the catch and took specific actions to frustrate the seizure. This conduct cannot be tolerated and a message has to be sent to both the defendants and the industry that it will not be.
- [86] For Aero, who were comparatively innocent in this act, I imposed a penalty of \$60,000. Clearly for the primary actor, something significantly more is appropriate.
- [19] The sentencing judge did not discuss the criteria for a s. 79.2(f) order, and said only:
- [88] ... In each case, the monies payable pursuant to s. 79.2(f) should be payable to a specific payee and I will hear you on how that would be worded or to whom it should be payable.
- [20] Counsel for Mr. Nichols and F.A.S. Seafood suggested that the recipient of the s. 79.2(f) payments be the Pacific Salmon Foundation because the black cod fisheries management and conservation was already fully funded. Without opposing the suggestion, Crown counsel questioned whether the Foundation should be sent money without having first been contacted. The judge ordered monies payable under s. 79.2(f) to be sent to the Foundation and, failing its acceptance of them, to be paid to the Department of Fisheries and Oceans, as I have described. Victim surcharges were added in proportion to the fines imposed.
- [21] F.A.S. Seafood and Mr. Nichols appealed the sentences.

The Reasons on Summary Conviction Appeal

- [22] The summary conviction appeal judge allowed the sentence appeal by eliminating the payments imposed under s. 79.2(f), and increasing the fines imposed on the unlawful fishing counts. The financial sentences in summary are described in this chart:

Initial Sentence (BCPC)

New Sentence (BCSC)

F.A.S. Seafood

Unlawful fishing

Unlawful sale

fine: \$ 3,000

79.2(f): \$27,000

\$30,000

fine: \$15,000

79.2(f): \$135,000

\$150,000

Total: \$180,000

fine: \$20,000

79.2(f): \$ 0.00

\$20,000

fine: \$15,000

79.2(f): \$ 0.00

\$15,000

Total: \$35,000

Mr. Nichols

Unlawful fishing

fine: \$3,000

79.2(f): \$27,000

Total: \$30,000

fine: \$15,000

79.2(f): \$ 0.00

Total: \$15,000

[23] The summary conviction appeal judge explained his view that s. 79.2(f) was not available to the sentencing judge in the circumstances:

[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.
- [24] The summary conviction appeal judge then referred to *R. v. Rio Tinto Alcan Inc.*, 2017 BCSC 1144, leave to appeal ref'd 2017 BCCA 440. In *Rio Tinto* the offender's actions, reducing water flow to a river and so endangering eulachon eggs and salmon fry, were found on appeal to the Supreme Court of British Columbia not to support a s. 79.2(f) order, absent identification of factors supporting such an order. The summary conviction appeal judge here said:
- [31] It seems clear that in his analysis, the Summary Conviction Appeal Court judge [in *Rio Tinto*] 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.
- [25] The summary conviction appeal judge then went on to discuss *R. v. Gwaii Wood Products Ltd.*, 2017 BCPC 6, and *R. v. Pasco Seafood Enterprises Inc.*, 2019 BCPC 228, both cases that concluded s. 79.2(f) is rehabilitative in character, and said:

- [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.
- [26] Turning to the fitness of the fines, the summary conviction appeal judge found that the amount of the fines was influenced by the imposition of the s. 79.2(f) orders, and observed that the fines were for different purposes than the s. 79.2(f) orders. After reviewing fines assessed in unlawful fishing cases, the summary conviction appeal judge concluded:
- [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.

Discussion

1. Section 79.2(f)

a) The Payee

[27] I will begin my discussion of the interpretation of s. 79.2(f) by addressing, first, the named payee of the s. 79.2(f) payment. The sentencing judge directed payment of the s. 79.2(f) monies to the Pacific Salmon Foundation. I understand the Foundation to be a privately incorporated charity; it is not named in the Act. Alternatively, the summary conviction appeal judge directed the monies be paid to a particular government department (the Department of Fisheries and Oceans) for use in a specified geographic area for a specific purpose.

[28] Without any criticism of the Pacific Salmon Foundation, not present at the sentencing hearing and (by the record) without knowledge of the proposal to direct s. 79.2(f) payments to it, I respectfully conclude that it was outside the court's jurisdiction to direct monies to be paid under s. 79.2(f) other than to Her Majesty. In that exercise it also was not open to the court to direct the department of government that should receive the funds or the particular use to which they should be put.

[29] Section 79.2(f) directs that the person assessed under s. 79.2(f) must make payment to "Her Majesty". Section 79.4, in referring to an order for payment under s. 79.2 as "a debt due to her Majesty", underscores this identity of the payee. Payments made to Her Majesty pursuant to penal or regulatory schemes in respect to which the Government of Canada has instituted the enforcement proceedings are generally made to the Receiver General for Canada. Where payments are made to the Receiver General for Canada, they become public money and are administered in public accounts pursuant to the Financial Administration Act, R.S.C. 1985, c. F-11. The Receiver General is required to report the public accounts each fiscal year to Parliament.

[30] We do have legislative schemes, vetted by Parliament in the enactment process, that expressly allow or require payments in respect of environmental protection to be directed to a special fund or a named person. For example, the Antarctic Environmental Protection Act, S.C. 2003, c. 20, s. 68.1(1) provides that "[a]ll fines received by the Receiver General in respect of the commission of an offence under [the] Act are to be credited to the

Environmental Damages Fund, an account in the accounts of Canada". Section 68.1(2) of that statute allows the court to "recommend to the Minister that all or a portion of the fine be paid to a person or an organization specified by the court" for an appropriate purpose.

- [31] Similar provisions are present in the Fisheries Act in ss. 40(6) and 40(7). These provisions require fines for specific listed offences to be credited to the same Environmental Damages Fund for specified purposes beneficial to fish or fish habitat (s. 40(6)), and allow the court to recommend payment be made to a specified person or organization (s. 40(7)). Notably, the two offences in this case are not included in the list of offences to which ss. 40(6) and 40(7) apply, although including them would be within Parliament's easy capability.
- [32] At the hearing of the appeal, the Crown said it is common practice for the order to be made payable to Her Majesty, with an agreed recommendation as to the ultimate recipient of the monies. Whether this is reflected in the formal order of payment in this case I cannot say. If so, it would not accord with the reasons of the sentencing judge, and is contrary to the Record of Proceedings before us which says:

Order Made

Details:

Order made that pursuant to section 79.2(f) the amount of \$135,000 be payable to the Pacific Salmon Foundation and if they are unwilling or unable to accept the funds then it shall be payable to the Department of Fisheries and Oceans in the Northwest area by the 30th of September, 2019.

- [33] With respect, payment to other than Her Majesty would be contrary to the clear wording of the Act and would raise the opportunity of unseemly impropriety. This is, I repeat, not an issue of the worthiness of the party contemplated to receive the monies. In my view, a practice of private persons, Crown counsel, and the courts, acting outside legislative authority, directing payment of public monies to the benefit of other private persons who are beyond the rigours of public accountability, is simply contrary to basic tenets of parliamentary democracy.
- [34] For similar reasons, I also conclude that it is beyond the authority of the court to direct money to a particular department, or use, absent legislative authority allowing the practice within the bounds of the legislation. Nor does either offence in this case come within the power provided by s. 40(7) of the Act to recommend a particular recipient.

b) Interpretation of s. 79.2(f)

- [35] I turn now to the interpretation of s. 79.2(f), set organizationally in the midst of provisions dealing with offences and punishment. For convenience, I repeat the key provisions of the Act:

2.1 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.

And

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

- (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;

[36] The interpretation of a statutory provision follows a well-established approach, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26. This approach was applied in *Ulybel* in the context of the forfeiture provisions (mainly s. 72) of the Fisheries Act. In *Ulybel*, Justice Iacobucci for the court observed at para. 31 that "it is natural to begin by considering the grammatical and ordinary meaning of words" in the section at issue. While the forfeiture provisions are not engaged in this proceeding - the seizure was thwarted, avoiding the Act's forfeiture scheme and accounting for the charge of unlawful sale - the approach to the Act applied in *Ulybel* applies here.

[37] The interpretation issue before us centres on the statement by the summary conviction appeal judge in his para. 26, that "damage to fish stock, fish habitat, or management of the fishery, appears to be a precondition to the imposition of an order" under s. 79.2(f), and on that understanding, the striking of the s. 79.2(f) payment orders.

[38] The Crown says that the language of s. 79.2 as a whole does not support a precondition of damage for a s. 79.2(f) order. Neither the phrase "nature of the offence and the circumstances of the offence" found in the opening language of s. 79.2, nor the phrase "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" found in s. 79.2(f) lead to such a conclusion, in the Crown's submission. Instead, says the Crown, a fair, large, and liberal interpretation of the provisions (Interpretation Act, R.S.C. 1985, c. I-21, s. 12) reveals that the purpose of s. 79.2(f) is only to promote the conservation and management of fisheries as a sustainable public resource for all persons. Unpeeling the language, it says the term "promoting" used in s. 79.2(f) is forward looking in nature to regulatory measures intended to prevent future harm, a purpose that is opposite to restoration or compensation to mend damage already done. The Crown says that the summary conviction appeal judge's approach is unduly narrow and contrary to the remedial approach applied by this court in *R. v. Abbott*, 2008 BCCA 198.

- [39] Looking more broadly to the Act as a whole, the Crown contends it establishes a framework and minimum standard of conduct for the proper management and control of fisheries and fish habitat. The predominant sentencing principles for the fisheries industry, it says, are deterrence and protection of the industry, both concepts that support flexibility in the imposition of a monetary obligation. The Crown observes that the circumstances of the vast and varied waters of the fishery makes proof of damage difficult, showing that this is not a criteria for a s. 79.2(f) order, but rather that the vastness of the nation's waters and potential for flouting of the laws supports reading s. 79.2(f) as intending to create another monetary penalty to support effective deterrence of offenders.
- [40] Last, the Crown says the summary conviction appeal judge failed to consider s. 79.2 as a whole. Section 79.2(b), it observes, explicitly requires harm or the possibility of harm to engage that section, whereas s. 79.2(f) does not. Had Parliament intended a precondition of damage for remediation, it would have said so, says the Crown.
- [41] F.A.S. Seafood and Mr. Nichols urge us to conclude that the summary conviction appeal judge was correct in looking for something beyond the means of the parties as a rationale for an order under s. 79.2(f), and that on the authority of *R. v. Terroco Industries Limited*, 2005 ABCA 141, damage and harm done is a proper consideration. They observe that the only harm or damage identified by the sentencing judge was potential damage to international relations, a consideration not contemplated by s. 79.2(f). They say the sentencing judge made the order without considering the nature and circumstances of the offence and gave no explanation as to how the order under s. 79.2(f) promoted the proper management and control of fish or fish habitat, purposes identified in s. 79.2(f). The result, they say, was circumvention of the principles of proportionality and parity applicable to the imposition of punishment.
- [42] F.A.S. Seafood and Mr. Nichols support the approach applied by Mr. Justice Affleck in *Rio Tinto*, in which he identified as relevant factors: damage to fish; damage to fish habitat; more than a low degree of culpability; and consideration of sentence totality. They rely also on *Pasco* wherein Judge Smith declined to make an order under s. 79.2(f) notwithstanding her conclusion that actual harm was done by illegal removal of 30,000 fish from the waters of Johnstone Strait, without a licence, prior to the opening of the waters for commercial fishing. They observe that no cases have been advanced in which an order has been made under s. 79.2(f) without regard to the nature and circumstances of the offences and say that the sentencing judge's approach resulted in excessive penalties far greater than penalties in similar cases.

- [43] In my view, the application of s. 79.2(f) does not require the judge to find that damage has been caused to the fishery or fish by the offences, although a finding of such damage could support an order under s. 79.2(f) by assisting in remediation of damage; properly interpreted, s. 79.2(f) does not establish a prerequisite to the section's use that damage actually has been caused to fish, fish habitat, or management of a fishery. I arrive at this conclusion for several reasons.
- [44] First, s. 79.2(f) speaks to the purpose to which the monies are intended to be put by the government but does not limit the circumstances in which a payment may be required.
- [45] Second, in respect to a causative link between the order and commission of the offence, s. 79.2(f) contrasts with other provisions for orders under s. 79.2. For example, s. 79.2(b), which allows for an order "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", ties directly to the consequences of the offence. Likewise s. 79.2(d) ties directly to consequences in providing for a compensation order for the cost of "remedial or preventive action as a result of the commission of the offence". Such linkage is absent from s. 79.2(f). In a similar vein, a fine pursuant to s. 79 is limited to the quantum of the monetary benefits accrued through the commission of the offence.
- [46] The presumption of consistent expression suggests that, had the legislature intended to tie an order under s. 79.2(f) to the results or consequences of the offence, it would have done so explicitly, as it did elsewhere in the legislative scheme. See R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 217.
- [47] Third, if, as the summary conviction appeal judge appears to have believed, a damage precondition was required by the relationship of the opening language of s. 79.2 to the wording of subsection (f), every subsection that follows those opening words would attract a similar requirement tied to the consequences of the offence. Several subsections of s. 79.2, however, do not appear to accord with such an approach. For example, under s. 79.2(i) the court may order that the person comply with other conditions the court considers appropriate to secure the person's good conduct or prevent future offences. This appears to be unrelated to the existence of damage.
- [48] I agree with the Crown that Abbott provides some guidance in this respect. In Abbott, Madam Justice Kirkpatrick concluded the imposition of an order for the removal of an unlawfully installed sewage system, pursuant to what was then s. 104.1 of the Health Act, R.S.B.C. 1996, c. 179, did not require proof of actual harm to the environment. The introductory language of s. 104.1 of the Health Act was substantially similar to s. 79.2 of the Fisheries Act, including reference to "having regard to the nature of the offence and the circumstances surrounding its commission". Justice Kirkpatrick referred to the objective of the Health Act, which was the protection of public health, and found the legislature intended to confer broad sentencing powers on the courts that were not limited by

demonstrable harm but also permitted orders that would avoid harm that may result from the commission of an offence. The objectives of the Fisheries Act, as described in s. 2.1, are similarly protective in nature and are not limited to the ambit of remedying actual harm.

- [49] I conclude that there is nothing in the language, scheme, or purpose of the Act that demands proof of damage from the offences before s. 79.2(f) can be engaged.
- [50] On the other hand, a sentencing judge does not have free reign to impose any payment under s. 79.2(f) - a payment order cannot be arbitrary.
- [51] The introductory language of s. 79.2 indicates that any order under that section is "in addition to any punishment imposed". None of the subsections following characterize a s. 79.2 order as a "fine" or "punishment", as do s. 78(a) and s. 79. From these features I conclude that the primary character of an order under s. 79.2 is not "punishment", and that any punishment should be determined first so that an order under s. 79.2 is "in addition to" such punishment. In saying this, I recognize that from the payor's perspective, the payment order is a penalty or sanction arising from the offences committed, and the totality of the monetary requirements must be considered: the distinction I have drawn is more to reinforce the primacy of the fine as the form of punishment.
- [52] In other words, a payment ordered under s. 79.2(f) is, properly considered, a topping. I would venture to say that in most cases the amount ordered to be paid under s. 79.2(f) generally will not exceed the fine. It appears from the authorities with which we have been provided that the section is rarely used and this, and Aero's case, stand out in the scale of payment required under s. 79.2(f) when compared to the fines imposed under s. 78.
- [53] We have been referred to Terroco as a leading authority in sentencing for environmental offences. The Crown contends that the sentencing judge appropriately gave primacy to deterrence, as directed by Terroco.
- [54] In *R. v. Brown*, 2010 BCCA 225, a Fisheries Act case, Mr. Justice Tysoe accepted Terroco as a leading authority and concluded that the various orders for monetary payments available under the Act - whether fines, a "restoration order" under s. 79.2(b), or an order under s. 79.2(f) - should be considered cumulatively. The object, he said at para. 17, is to fashion a total "monetary penalty that is proportionate to the gravity of the offence and the degree of responsibility of the offender and that will serve as an appropriate deterrent to potential offenders". Justice Tysoe considered that the sentencing judge in that case, having declined to make a restoration order, had erred by failing to give sufficient weight to the principles of denunciation and deterrence in fashioning the total monetary penalty, including through s. 79.2(f). *Brown* confirms that the sentencing principles codified in the Criminal Code, including proportionality (s. 718.1) and parity (s. 718.2(b)) are important factors in assessing the payment that can be ordered under s. 79.2(f) of the Fisheries Act, and that deterrence is a significant consideration in crafting the punishment portion of a sentence under the Act. It does not address, however, the criteria for imposing an order under s. 79.2(f).

- [55] In Pasco, Judge L.P. Smith declined to make an order under s. 79.2(f) where the order, rather than being "in addition to any punishment imposed", "would be a very significant component of that monetary punishment". That is the circumstance before us.
- [56] How does this all apply to this case? There is broad discretion provided the sentencing judge by s. 79.2(f). In my view, at a minimum, there must be some identification of the purpose of an order under s. 79.2(f), and the reason such a payment should be ordered in addition to independently assessed punishment. I agree with the summary conviction appeal judge in his para. 32, that: "Some nexus between the nature of the offence and the objective of the payment order appears to be a requirement." There should be a thread of connection between the particular offence in question and the order. Thus, for example, an offence in northern waters involving black cod would not support a payment for the purpose of repairing oyster beds off Vancouver Island. Yet the offence need not have caused actual damage to fish, fish habitat, or the management of the fishery, and there must be some identifiable prospect that an additional payment under s. 79.2(f) will promote the purposes of the subsection and the Act in relation to the offence. It should not become the main order, and it cannot be directed to a private organization or earmarked for a particular use by the government. It must, in Justice Tysoe's words, "be proportionate to the gravity of the offence and the degree of responsibility of the offender" and "serve as an appropriate deterrent to potential offenders".
- [57] Further, a payment under s. 79.2(f) must be proportionate to the offender's ability to pay after considering all fines or forfeitures imposed, and must be reasonable in amount. It is not a blank cheque, and because it is only engaged on commission of an offence, it involves in some fashion an aspect of culpability and promotion of deterrence and denunciation.
- [58] Applying these principles, which I have stated somewhat differently than the summary conviction appeal judge to the case before us, I consider that the summary conviction appeal judge was correct in concluding that the sentencing judge erred by failing to consider the legislative criteria for the s. 79.2(f) orders. I consider, also, that the sentencing judge failed to determine first an appropriate punishment, and then to consider whether any additional payment was warranted in the circumstances.
- [59] Considering these matters, and the absence of any rationale provided by the sentencing judge for imposing the orders under s. 79.2(f), I consider the s. 79.2(f) orders cannot stand as they were imposed by the sentencing judge, and further that there is no basis in the record for us to fill in the gaps. The summary conviction appeal judge set the s. 79.2(f) orders aside in their entirety. I agree with that determination.

2. The Fitness of Sentence

- [60] The summary conviction appeal judge revisited the fines upon setting aside the s. 79.2(f) orders. I agree he was right to do so. The Crown says, however, that the judge erred in reducing the overall sentence, thereby imposing a sentence that was unfit in all the circumstances.
- [61] I will observe at the outset that the sentencing judge imposed the greatest cumulative penalty on F.A.S. Seafood for unlawful sale of fish. Again, in my view, he was right to do so. As the sentencing judge recognized, the Department of Fisheries and Oceans could have seized the entire catch, but seized only 10 percent. Yet that seizure was frustrated when Aero paid F.A.S. Seafood for the entire catch. Had 10 percent of the sale proceeds been withheld as directed, forfeiture proceedings under s. 72 could have been pursued, with an amount of nearly \$250,000 in issue.
- [62] The Crown has not pursued punishment for that offence by way of a fine under s. 79. We are left, then, with the simple punishment of a fine under s. 78.
- [63] The judge increased the fines for unlawful fishing from \$3,000 to \$20,000 and \$15,000 respectively against F.A.S. Seafood and Mr. Nichols. Although the Crown contests the amounts assessed in respect of those offences, we have been pointed to no authority that would demonstrate that the sentence now in effect for this unlawful fishing is demonstrably unfit. I would not alter the sentences imposed for those offences (count 2).
- [64] I am of a different view with respect to the offence of unlawful sale of fish. As a consequence of the order of the summary conviction appeal judge, the only amount payable by F.A.S. Seafood in respect of that offence is a fine of \$15,000, notwithstanding the sentencing judge's characterization of F.A.S. Seafood as "as culpable as it is possible to be", and the likely entwinement of the sentencing judge's imposition of the fine and payment order under s. 79.2(f).
- [65] I consider that the sentence of a \$15,000 fine for the unlawful sale by F.A.S. Seafood is demonstrably unfit. The total sentence assessed against Aero as the buyer of the fish was \$60,000 (although broken into two pieces). F.A.S. Seafood has egregiously flaunted the authority of the officers of the Department of Fisheries and Oceans by commission of the offence; satisfaction of the seizure order, evaded by commission of the offence, would have engaged issues of another scale entirely.
- [66] The offence is serious and the sentencing judge found F.A.S. Seafood's responsibility to be high. These were assets of significant value at stake and, in the scale of the value of the catch and the thwarted seizure order, the fine must be increased significantly in the interests of deterrence. In these circumstances and consistent with the sentencing judge's views on relative culpability expressed in his para. 86, I consider that a fine of \$75,000 should be imposed on F.A.S. Seafood for the offence of unlawful sale of fish (count 7).

Conclusion

[67] I would allow the appeal of the Crown in appeal CA46776 to the limited extent of setting aside the fine ordered on summary conviction appeal in respect of count 7, and substituting for it a fine under s. 78(a) of \$75,000. I would dismiss appeal CA46777.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Goepel"

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