
CANADA / JUDGMENT

R. v. McKinnell Fishing Ltd.

2016 BCCA 472

COURT

British Columbia Court of Appeal

DECIDED

28 November 2016

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2016 BCCA 472 R. v. McKinnell Fishing Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McKinnell Fishing Ltd.,

2016 BCCA 472

Date: 20161128

Docket: CA43529

Between:

Regina

Respondent

And

McKinnell Fishing Ltd.

Appellant

Corrected Judgment: text was corrected in para. 3 on December 5, 2016

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia,
dated February 26, 2016 (R. v. McKinnell Fishing Ltd., 2016 BCSC 312,

Duncan Registry 34381-2C).

Counsel for the Appellant:

C. Harvey, Q.C., I. Knapp

Counsel for the Respondent:

T. Johnson, T. Gerhart

Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2016

Place and Date of Judgment:

Vancouver, British Columbia

November 28, 2016

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

Summary:

The appellant crabbing company was found guilty of "fishing for" crabs in closed waters, contrary to the Fisheries Act, R.S.C. 1985, c. F-14. It argues that the phrase "fishing for" in s. 2 of the Fisheries Act does not include the act of raising crab traps from the ocean floor and into the vessel, and thus the act of fishing ended the moment the traps were lifted. HELD: appeal dismissed. The summary conviction appeal judge applied the correct definition of "fishing" set out in *Gerring v. The Queen*. The act of raising the traps into the vessel is part of the continuous act of "fishing for" as set out in the Fisheries Act.

Reasons for Judgment of the Honourable Mr. Justice Harris:

- [1] The issue on this appeal involves the definition of "fishing" within the meaning of s. 2 of the Fisheries Act, R.S.C. 1985, c. F-14. The issue arises in the context of crab fishing.
- [2] The appellant was charged based on breaching s. 63 of the Pacific Fishery Regulations, SOR/93-54, which prohibits fishing for a species of shellfish unless it is otherwise permitted. The definition of fishing is found in s. 2 of the Fisheries Act.

- [3] In brief, the appellant was charged, amongst other offences, with fishing for crab in a restricted ("closed") area because the evidence established that it was hauling its traps in a closed area. The offence charged is a strict liability offence. At trial, the appellant contended that it was not "fishing for" crab in the closed area, he was merely taking possession of them there, having "fished for" crab in an open area. Alternatively, if it had committed the *actus reus* of the offence as alleged, the appellant relied on a due diligence defence arguing that the boat had drifted into a closed area in the retrieval process, but that the traps had been laid in an open area.
- [4] The appellant was acquitted in provincial court of fishing for crab in a restricted area on the basis of its due diligence defence, even though the trial judge found that the process of retrieving the traps amounted to fishing for crab in a restricted area. He was convicted of certain other offences, and acquitted of others. Those verdicts are not in issue on this appeal.
- [5] On a summary conviction appeal, the judge rejected the due diligence defence and substituted convictions for fishing in a restricted area.
- [6] On appeal to this Court, the appellant contends that, applying the proper definition of "fishing" within the meaning of s. 2 of the Fisheries Act, it was not fishing for crab within a restricted area. This is the only issue on appeal, since the appellant does not challenge the summary conviction appeal rejection of the due diligence defence.
- [7] The factual circumstances giving rise to this legal issue are straightforward and not in dispute.
- [8] Fishing for crab involves using baited traps which are set on the ocean floor. Crabs are caught when they enter the trap by way of a one-way door. Crabs cannot swim. Once a crab trap is hauled off the ocean floor, crabs inside the trap cannot escape, nor can any crab enter the trap.
- [9] In this case, the working assumption must be that the appellant placed the crab traps on the unrestricted side of the boundary demarcating the restricted and unrestricted areas, although there is no clear evidence that that was so. As the appellant recovered the traps by hauling them up from the ocean floor and taking them into the boat, the boat drifted into the restricted area.
- [10] Fisheries and Oceans Canada monitors crab harvesting by requiring fishers to provide data on where they haul their traps. Traps have electronic tags which are scanned by the fisher when they are hauled to the surface. The tags contain a GPS device which, for practical purposes, records the location of the vessel each time a trap is scanned. Hence, the location of a trap is only recorded when it is brought back to the surface, not when it is set. The location of the trap on the ocean floor is not recorded, so there can be no indisputable record of whether the trap is set on the ocean floor on the unrestricted side of the boundary.

- [11] The issue on this appeal is whether hauling and retrieving the traps and sorting the crab at the surface or on board falls within the definition of "fishing for" crab for the purpose of the offence. The answer to this question turns principally on whether the definition of "fishing" articulated by the Supreme Court of Canada in *The Ship Frederick Gerring Jr. v. The Queen*, (1897) 27 S.C.R. 271, applies to the statutory definition of fishing found in s. 2 of the Fisheries Act. The test in *Gerring* is the following (at 280-281):

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

- [12] On this approach, fishing includes all of the steps necessary to bring fish into actual possession. It follows that, even though no more crab could enter or leave the trap after the trap was raised off the ocean floor, the processes of retrieving the traps and sorting the crab are integral parts of the operation of fishing. Fishing continues even though no more crab can be caught and none of the captured crabs can escape.

- [13] The appellant contends in this Court, as it did below, that this general definition of fishing does not apply to the statutory definition of fishing in s. 2 of the Fisheries Act. That definition provides:

fishing means fishing for, catching or attempting to catch fish by any method; (pêche).

- [14] The appellant argues that "fishing" in s. 2 is given a precise and restrictive definition that necessarily incorporates the objective of catching fish as an element of the defined activity. It argues that this is clear from each of the three components of the definition. In the first - "fishing for" - the preposition "for" is an important qualifier. "For" is used to indicate the object, aim, or purpose of an action or activity. As I understand the argument, once the trap is raised, whatever crab are in the trap have been caught and a fisher is no longer fishing for crab because crab can no longer be caught. The statutory definition does not prohibit "fishing crab". "Fishing" may have been defined in *Gerring*, but that definition is broader than "fishing for" and the point arose in a different factual and legislative context. Accordingly, the appellant argues, the *Gerring* definition does not apply to the statutory definition. This argument is reinforced by observing that the definition in s. 2 of the Fisheries Act arguably distinguishes "fishing" from, for example, taking possession or being in possession of caught fish. The appellant contends that when the drafters of the Fisheries Act intend to include activities other than the three listed elements of "fishing", they use different terminology such as taking, possessing, loading, handling, transporting, landing or disposing of fish: Fisheries Act, ss. 31(1); see also ss. 33 and 43(1)(c). The appellant argues that, on a proper interpretation of the statutory scheme, taking possession is not "fishing for". Therefore, the appellant was not engaged in the activity of "fishing for" crab when its

boat drifted into the restricted area because that activity, for the purpose of the statutory definition, was completed the moment the traps were lifted from the ocean floor.

[15] This argument was rejected by the trial judge who found the Gerring definition applicable. The summary conviction appeal judge also rejected this argument, stating:

[23] Mr. McKinnell's primary argument in this court, as at trial, was that he was not "fishing" within the meaning of section 2 of the Act and therefore committed no offence. In my view, however, the trial judge's reasoning on this score was unassailable. The legal meaning of "fishing" has been well canvassed in cases going back as far as *The Ship Frederick Gerring Jr. v. The Queen* (1897), 27 SCR 271, and proceeding through more contemporary authorities such as *R. v. Denton* (1991), 1991 CanLII 2537 (NS CA), 105 N.S.R. (2d) 357 (C.A.), a decision, by the way, which is comfortably analogous to the one at bar and whose reasoning I would respectfully adopt.

[24] I agree entirely with the trial judge that the term "fishing for crabs" includes not only setting the traps but retrieving them from the depths and reducing their contents to useful possession on board ship. It follows that Mr. McKinnell was, indeed, fishing illegally at the material times and his primary answer to the charges was founded on a misunderstanding of the law which affords him no defence.

[16] For the reasons that follow, I agree with the conclusions on this issue reached by the trial and summary conviction appeal court judges and would dismiss the appeal.

[17] Gerring is well-established as the leading case on the meaning of "fishing" and the definition of fishing quoted above has been widely applied to the statutory definition in the Fisheries Act: see e.g., *R. v. White*, 2006 NLCA 71; *R. v. Denton*, [1991] N.S.J. No. 148, 105 N.S.R. (2d) 357 (C.A.); *R. v. Saunders*, [1989] N.S.J. No. 407 (C.A.), 94 N.S.R. (2d) 224; *R. v. Dorgan*, 2009 PECA 23; *Canada (Attorney General) v. Chlopek Fish Co.*, [1912] B.C.J. No. 14 (C.A.), 1 D.L.R. 96.

[18] In Gerring, an American ship was found bailing fish from a purse seine in Canadian waters. Fishing by an American vessel in Canadian waters was unlawful. The case proceeded on the basis that the vessel had set and pursed its net outside Canadian waters, so that no fish were or could be caught in Canadian waters. The vessel then drifted into Canadian waters only in the bailing process. The argument was, in part, that the vessel was no longer fishing when it drifted into Canadian waters where it was merely taking on board its own property (the caught fish). This is essentially the same point taken by the appellant.

[19] The Supreme Court of Canada rejected this argument, endorsing the wider definition of fishing quoted above. If this is the definition to be applied to the case at bar, there is no doubt the appellant was fishing in restricted waters. The question remains whether the definition in the Fisheries Act captures a narrower definition of "fishing" in which "fishing for" something is to be distinguished from steps to take possession once the catch is caught and no more can be taken.

- [20] With respect, I cannot give effect to the appellant's argument. The purpose of the Fisheries Act and its regulations is properly to manage and conserve the commercial fishery. As such they should be given a liberal interpretation. In my view, the distinction argued for between "fishing" and "fishing for" so as to exclude those steps taken after trapping the crab, but which fall within the Gerring definition, fails to respect the purpose of fisheries regulation. I see no material difference between "fishing" and "fishing for", and in my view, the acts of taking possession of trapped crab remain part of fishing for crab within the definition in the Fisheries Act. In short, there are no material differences between the Act's definition of fishing and the Gerring definition.
- [21] Indeed, courts throughout Canada have consistently applied the Gerring definition of fishing to the Fisheries Act in factual circumstances similar to the ones at bar. I will refer only to some cases by way of illustration. In *R. v. White*, the Newfoundland and Labrador Supreme Court (Court of Appeal) considered the application of the Gerring definition to the statutory definition of fishing under the Fisheries Act. After noting numerous cases in which the definition had been so applied, the Court said:
- [16] Fishing, as was underscored in *Gerring* and in the many cases which have followed it, is comprised not of a single act but of many discrete ones. Among those many acts is included, to use the language of Sedgewick J., "taking [fish] out of the water and obtaining manual custody of them"; which is precisely what Mr. White did in the instant case. That he was or was not the owner of the net, or a coventurer with the person who did own it, is irrelevant. What is relevant is that "fishing" in s. 2 of the Act be interpreted in context and in harmony with its scheme. The Act has as its overarching object and purpose the regulation and preservation of all fish stocks, not the least of which is the atlantic salmon.
- [17] Regulation and preservation can only be achieved by giving "fishing" the large and liberal construction that Sedgewick J. in *Gerring* had the foresight to give it more than one hundred years ago.
- [22] The same result was reached by the Nova Scotia Supreme Court Appeal Division in *R. v. Denton*, a case factually indistinguishable from the current case. There, a scallop fisher completed the catching operation in an open (unrestricted) area. As he brought his catch to the surface, at which point no more scallops could be caught, he drifted into closed (restricted) water where he brought his catch on board. The Court applied the Gerring definition to s. 2 of the Fisheries Act. It relied on the earlier decision of the same court in *R. v. Saunders* which similarly applied the Gerring decision:

The vessel was well equipped with navigation aids. The appellant, the captain, knew where he was. The defence was that he was not fishing inside the boundary because the scallops had been caught outside of it.

However, he was fishing within the meaning of that word as determined in this Court in *R. v. Frederick W. Saunders*, S.C.C. No. 02129 (December 21, 1989, unreported). In that case Macdonald, J.A., adopted the meaning stated by Mr. Justice Sedgewick in *The Ship Frederick Gerring Jr. v. R.*, [1987] 27 S.C.R., 271:

"...The question is whether this vessel was 'fishing' when, for two hours or more, her crew were baling (sic), or scooping out, by means of a dip-net, from the area of water surrounded by the seine, the one hundred and thirty barrels (more or less) of mackerel which they finally secured. The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what 'fishing' according to the ordinary acceptance of the word, means, and that, I think, is the meaning which we must give to the word in the statutes and treaty."

[23] It is useful to refer to only one more case. In *R. v. Dorgan*, the Prince Edward Island Court of Appeal described *Gerring* as "the seminal case clarifying what constitutes 'fishing' within the meaning of s. 2 of the Fisheries Act"; see para. 19.

[24] It is evident that it is well-established by authority in other provinces that s. 2 of the Fisheries Act incorporates the *Gerring* definition of fishing. I agree with the reasoning and the results of those decisions. Having regard to principles of statutory interpretation and plain language, I see no substantive difference between "fishing" and "fishing for" something. All that adding the word "for" to fishing does is identify the object of the fishing activity. It assists in distinguishing the goal as being fishing for salmon or herring or crab, but adding the preposition "for" does not limit the scope of activities constituting fishing. In short, one is still fishing for crab when bringing a trap to the surface, even though no more crab could then be caught.

[25] Even if it were reasonably open to reach a different result and carve out an exception to the regulatory regime for British Columbia, I see no sound reason to do so. The federal government's regulation of fisheries is a matter of national interest, and the Fisheries Act applies to all waters within federal jurisdiction, wherever they may be. In my view, the national interest further points to an interpretation that supports a harmonious, integrated, coherent, and uniform scheme of regulation, not a fragmented one.

[26] In my view, the summary conviction appeal judge did not err in adopting the *Gerring* definition of fishing in interpreting s. 2 of the Fisheries Act. I agree with the extensive jurisprudence discussed above adopting the *Gerring* definition.

[27] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Bennett"

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