

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Vanbuskirk, 2000 NSCA 11]

Chipman, Hallett and Pugsley, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN)	Paul B. Adams
)	for the appellant
Appellant)	
)	
- and -)	
)	
CLIFFORD N. VANBUSKIRK)	Gregory M. Warner, Q.C.
)	for the respondent
Respondent)	
)	
)	
)	Appeal heard:
)	November 29, 1999
)	
)	Judgment delivered:
)	January 19, 2000
)	
)	

THE COURT: Appeal and cross-appeal dismissed per reasons for judgment of Hallett, J.A.; Chipman and Pugsley, JJ.A. concurring.

HALLETT J.A.:

[1] This is a Crown appeal from a decision of Justice Boudreau sitting as a summary conviction appeal court. Justice Boudreau allowed an appeal from a decision of Provincial Court Judge Prince who had convicted the respondent fisherman of the charge of failing to comply with a license condition “to provide an accurate hail” of the round weight of fish on board his vessel contrary to s. 22(7) of the **Fishery General Regulations 1993** and as a result committed an offence under s. 78 of the **Fisheries Act**, R.S.C. 1985, c. F-14.

[2] This Court’s jurisdiction is limited to appeals that involve “questions of law alone” (s. 839 of the **Criminal Code**, R.S.C. 1985, c. C-46, as amended).

[3] The respondent was the captain of a vessel “Triple Trouble”. The **Regulations** required that the captain, after he stopped fishing and prior to returning to port, to hail, that is, report by ship to shore radio to a monitoring company, the round weight of various species of fish caught. The respondent did this on June 18th, 1997. Fisheries officers were at dockside to monitor the offloading of the Triple Trouble’s catch. Their job was to weigh the catch. There was a variance between the round weight hailed to the monitors and the actual weight. This resulted in the respondent being charged and subsequently convicted by Judge Prince.

The Act, the Regulations and the Licence Conditions

[4] I will set out the relevant legislative provisions and applicable license conditions as follows. 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.

.....

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

- (a) exercised all due diligence to prevent the commission of the offence; or
- (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

[5] **Regulation 22.(1)** provides:

For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

(a) the species of fish and quantities thereof that are permitted to be taken or transported;

.....

(c) the waters in which fishing is permitted to be carried out;

.....

(h) the type, size and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is permitted to be used;

.....

(l) information that the master of the vessel shall report to the Department from sea, including the method by which, the times at which and the persons to whom the report is to be made;

(m) the location and times at which landing of fish from the vessel is permitted;
(n) verification by an observer of the weight and species of any fish caught and retained;

[6] **Regulation 22.(7)** provides:

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

[7] In short, the fishery is highly regulated. One can only fish with a licence and the licence holder is required to comply with the conditions of the licence.

[8] The licence issued in respect of the fishing vessel “Triple Trouble” contained a number of conditions including Condition 16 which is relevant to these proceedings.

Condition 16 provided as follows:

REPORTING REQUIREMENTS

16 You are required to hail to a DFO approved Catch Reporting/Dockside Monitoring Company at least 3 hours prior to leaving port identifying your intention to begin a fishing trip and stating the log number of the page or pages you intend to use in your **Location Report/Log/Weighout Slip** book.

You are further required to hail from sea a **Trip Summary** of your vessel’s fishing activities at least six hours prior to returning to port. In the **Trip Summary** you are required to report the vessel name; the CFV number; the Captain’s name; your groundfish licence number; the round weight of fish on board your vessel by individual species of cod, haddock, pollock, redfish and flatfish and the combined weight of all other species; the NAFO Division or subdivision where the fish were taken; the date, time (using the 24 hour system) and place where you intend to land your fish. You will be issued a confirmation number by a Dockside Monitoring Company confirming that your hail/trip summary has been received. This number is to be entered on the Location Report/Log/Weighout Slip.

The Trip Summary and hail must be made to a Dockside Monitoring Company certified by the Department of Fisheries and Oceans.

Conditions 19 and 20 are also of some relevance.

[9] In summary, the respondent was required to report by ship to shore radio to the Monitors the name of his vessel, etc. and the “round weight of fish on board” by individual species of cod, haddock, pollock, red fish and flatfish and the combined weight of all other species. The respondent could not offload the catch unless a Dockside Observer was present. Condition 20 required the respondent to complete the Location Report/Log/ Weighout Slip in accordance with the supplied instructions. The Department of Fisheries provides captains with this log book to be used to record at sea the information he is required to report to the Monitors. The Log contained a section entitled “Instructions for Completing the Location Reporting Log Weighout Slip for Mobile Gear Fisheries”. This document required the captain to enter in his log detailed information respecting the trip including the port, the ship sailed from, the days of the trip, the position of the vessel from time to time, the number of crew, and hours fished. Relevant to this appeal are Instructions 9, C, 17 and 18 which provided as follows:

9) CATCH WEIGHT The captain’s estimate of the amount of fish (pounds, round weight) by species by tow. If other than cod, haddock, pollock, redfish, plaice, yellowtail, or witch; specify the species and the amounts in round weight. For your information the official conversion from gutted head on cod, haddock or pollock to round weight is 1.2 and gutted head off cod, haddock or pollock to round weight is 1.6 [eg. If you have 100 pounds of gutted head on cod, this converts to 120 pounds cod round weight.]

C) TRIP SUMMARY INFORMATION As shown on the bottom of the log and other shaded portions of the document. This information must be

reported from sea prior to landing. Once the hail information is received at the Operations Centre an authorization # will be issued to the vessel and this number must be recorded on the bottom of the weighout slip. Only one trip summary is to be provided per trip.

17) TIME OF LANDING The anticipated time of landing in local time on a 24 hour clock. (e.g. 1320 which would mean twenty minutes past 1 P.M.)

18) LOCATION OF LANDING The port where the vessel offloads its catch. Wharf name describes the actual wharf where the off loading will occur.

[10] It is considered of extreme importance, for the purpose of monitoring the fishery, that the Department of Fisheries have accurate information as to the weight of the fish by species actually landed. Monitoring of fish on board was effected by the requirement for a captain to hail, that is, report his estimate of the round weight of fish on board prior to his landing at a particular wharf he designated so that the Department of Fisheries Officers could be there to weigh the catch. Therefore, the hailing of the estimate of the weight of fish on board does not appear to be of critical importance as there was 100% dockside monitoring for the size of vessel owned by the respondent.

[11] After the respondent's catch was weighed it was found to vary from the round weights he had entered in his log book. He was charged with having failed to make an accurate hail. The weight at the wharf, after the fish are gutted, will always be less than the round weight unless the round weight is incorrectly reported in the log. There is a formula for converting the dressed weight of various species to the round weight.

Judge Prince's Decision

[12] At trial, counsel agreed that the round weight recorded in the log's vessel as compared to the actual dressed weight at the offloading per species was as follows:

Species	Hail Weight	Actual Weight	Difference	Difference as percentage of actual weight	Difference as percentage of Hail
COD	7550	9909	2359	23.8%	21.2%
HADDOCK	800	1040	240	23.0%	30%
POLLOCK	600	752	152	20.2%	25.3%
OTHER	2300	2382	82	20.1%	25.1%
TOTAL	11250	14083	2833	20.1%	25.1%

Note: The percentage of 25.1% in the last column entitled "Difference as a percentage of Hail" opposite "Other" species must be an error. The percentage difference would be less than 5%. However, this is not relevant to the issues we are considering.

[13] As can be seen, the respondent had under reported the round weight of the round fish on board.

[14] At trial, counsel for the respondent argued that there was not a requirement in the **Regulations** to provide an accurate hail. He argued that the respondent was required to provide an estimate as set out in the instructions which I have reproduced and by dictionary definition an estimate is only an approximate calculation.

[15] The trial judge rejected this submission. He chose to follow a decision he had

made in **R. v. Doucette**, where he had stated:

In **R. v. Shawn O'Donnell** June 17th, 1997 Shelburne Provincial Court I held that a "Hail" had to be reasonably accurate in the circumstances of a regime that requires adherence on the basis of strict liability.

The crown cites **R. v. Petten** (1995) 402 A.P.R. 37 (Nfld. S.C.) in support of the definition of estimate they advance. I agree with the approach in **Petten**, *supra* and it accords with my view that the definition of estimate has to be assessed in the context of a regulated activity. As with many terms at law, dictionary definitions, while helpful, must be viewed with caution. For example the term "voluntary" as expressed at law in the context of a statement is not the same as the definition one might find in the dictionary. Similarly, in relation to regulated activities the circumstances of the activity must be viewed as far as what constitutes an "estimate". Surely the "estimate" of a dangerous substance or a thing that has been considered as worthy of significant regulatory scrutiny should call upon the skill of the "estimator" to be at least reasonably accurate in the circumstances.

It is against this back drop that we must consider the case at Bar. I have to consider the variance in the context of this activity. To say that the resource in question is worthy of regulatory scrutiny in my view is an understatement. There can be no natural resource of more importance to our area. Therefore, in my view, there are from a common sense perspective many reasons why there has to be a reasonable degree of precision in these circumstances. Further, from my experience and from a social context perspective, there are many examples of how the estimate of fish aboard a vessel can be made with a very high degree of accuracy even bearing in mind the exigent conditions that may arise from time to time at sea. Some measure the volume of their pens some assess their catch through the use of "tote pans" in both cases I have heard evidence of very accurate assessments. I do not accept that any sector of the resource should be viewed from a perspective that doesn't emphasize attention to preservation and management. Indeed, accuracy and precision within reason is to be fostered not postponed. It is a resource to be protected and any measures in this regard are to be encouraged.

I have considered the data with respect to the accuracy of hails in the gear sector mentioned by Defence counsel and I do not consider that the evidence necessarily indicates a measure of absolute tolerance that I would have to follow. Indeed, the Court is required to deal with the facts before it on the basis of the law and not on the basis of what the exercise of discretion has been in a given regime. I must however determine the issue of estimate on the basis of the facts before me.

[16] Judge Prince then found, with respect to the charge against the respondent, as follows:

The facts in the case before me indicate significant variances in relation to certain of the species reported. I am of the view that these are substantial enough so that the "hail" does not meet the requirement of the licence which governed the Defendant's fishing activities. I am of the view that the estimates provided are not reasonably accurate bearing in mind the nature of the regulated activity. It is in my view inappropriate to consider the dictionary definition in the situation of this activity because it would not make common sense.

[17] The trial judge went on to find:

..... I have also concluded that the issue of 100% monitoring is not an issue that militates against my reasoning. It is my view that the fact of 100% monitoring does not mean that the estimate need not be reasonably accurate in the circumstances.

[18] The trial judge then stated that while the defence of due diligence was not raised:

.....I have considered both branches of s. 78.6 of the Fisheries Act, R.S.C. 1985 c.F-14 in terms of the defences available. In the circumstances I cannot conclude that there was due diligence demonstrated to the necessary degree nor has there been established an honest reasonable but mistaken belief in a set of facts which if true would have rendered the Defendant's conduct innocent. He had in my view, the obligation to follow his licence condition. This was not done.

[19] The trial judge found the Crown had proven the guilt of the accused beyond a reasonable doubt and he convicted the respondent who appealed the finding of guilt to the Supreme Court of Nova Scotia, being the summary conviction appeal court, under the **Criminal Code**.

[20] Judge Prince's decision in **R. v. Doucette**, in which he applied in convicting the respondent, was overturned on appeal and a new trial ordered. On the retrial Judge Crawford acquitted Doucette.

Justice Boudreau's Decision

[21] The learned summary conviction appeal court judge allowed the appeal and ordered a new trial. Justice Boudreau seemed to follow Judge Crawford's decision on the retrial of Doucette. She held that the requirement to hail an estimate implies a degree of latitude. Justice Boudreau seemed to accept Judge Crawford's view that the ordinary meaning of the word "estimate" was to govern in determining if a fisherman had failed to comply with the requirement to hail his estimate of the round weight of fish on board.

The Appeal to this Court

[22] The Crown asserts that Justice Boudreau erred in finding that the trial judge wrongly rejected certain statistical evidence that had been prepared by the Department of Fisheries that had been tendered by the respondent to show that the variance between the round weight of fish as estimated by the respondent and the actual weight of the respondent's catch was in line with the variances in the fleet catches for the year 1997. Secondly, the Crown asserts that Justice Boudreau erred in finding that Judge Prince applied the wrong test in determining whether the respondent had exercised due diligence.

[23] In order to properly deal with the issues that arise on this appeal from Justice Boudreau's decision, it is necessary to first consider the trial judge's decision. In his

reasons for judgment which I have set out, the learned trial judge stated in discussing the variance:

In my view there are from a common sense perspective many reasons why there has to be a reasonable degree of precision in these circumstances. (my emphasis)

And further in dealing with the variance between the round weight hailed and the actual weight he stated:

I am of the view that the estimates provided are not reasonably accurate bearing in mind the nature of the regulated activity. It is in my view inappropriate to consider the dictionary definition in the situation of this activity because it would not make common sense. (my emphasis)

Opinion

[24] The learned trial judge erred in rejecting the ordinary meaning of the word “estimate” as it appeared in the instructions from the Department of Fisheries to captains for the purpose of preparing the log. The respondent was required by his license to hail (report) his estimate of the round weight of fish on board as entered in the log book. There is no valid reason not to apply the ordinary meaning of the word “estimate”. In the Concise Oxford Dictionary, 7th edition, “estimate” is stated to mean “an approximate judgment” (of an amount, etc.). The word “accurate” means “careful, precise.” The concept of reasonable accuracy or precision in reporting the weight of round fish hailed is the antithesis of an estimate. Even considering the context in which the word “estimate” is used in the Instructions to Captains one is led to the conclusion that there should not be a departure from the ordinary meaning of the word. This must be so because the fish caught would be weighed by scale by observers (in this case

Fisheries Officers), when the vessel landed its catch. Accordingly, the instructions from the Department merely required that the captain make an estimate of the round weight; that is an approximate calculation.

[25] Therefore, the trial judge's requirement that the weight of round fish hailed be reasonably accurate flew in the face of the license conditions and was a misinterpretation of the license conditions by the trial judge. There was no evidence before the trial judge as to why an element of accuracy or precision in the weight of round fish hailed was necessary to achieve the objectives of the **Fisheries Act** and the **Regulations**, particularly in view of the requirement for 100% monitoring by dockside weighing of the catch. The estimate had to be reasonable.

[26] As noted by Judge Crawford on the retrial of Doucette, it was not until 1998, a year after the charges against the respondent were laid, that the word "accurate" first appeared in the relevant license conditions for this sector of the fishery.

[27] Judge Prince erred in law as he misinterpreted the requirement of the license to hail an estimate. Therefore, it is unnecessary to deal with the evidentiary issue, although the statistical evidence does appear relevant to the issues in the case and that evidence was accepted by Judge Crawford on the retrial of Doucette. Nor is it necessary to deal with the second issue raised by the appellant as it does not appear to me from a reading of Justice Boudreau's decision that he made a finding that Judge

Prince applied the wrong test in determining whether the respondent had exercised due diligence.

[28] Justice Boudreau did not err in allowing the appeal and setting aside the conviction.

Cross-appeal

[29] The respondent cross-appeals, asserting that Justice Boudreau ought to have entered an acquittal. This Court cannot assess the reliability of the statistical evidence which was rejected by the trial judge and which appears to have been accepted by Judge Crawford in **Doucette**. Secondly, if the estimate made by the respondent was not reasonable, there is a paucity of evidence on the record with respect to the due diligence issue. As a result, this Court cannot assess whether that defence should succeed.

Summary

[30] The respondent was required to make a reasonable estimate of the weight of the round fish on board. He was required to enter this estimate in the log and report the round weight as entered by ship to shore radio to the monitors. The respondent was charged with failing to make an accurate hail. The trial judge erred in law in failing to apply the ordinary meaning of the word “estimate” in considering the charge against the respondent. Justice Boudreau did not err in ordering a new trial. I would dismiss the appeal and the cross-appeal.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.