IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Ivy Fisheries Ltd., 2006 NSPC 26

Date: 20060614
Docket: 1145495, 1145521, 1145509, 1145543
1145493, 1145517, 1145518, 1145519
1145505, 1145506, 1145507, 1153632
1145525, 1145530, 1145532, 1153640
1153634, 1153635
Registry: Bridgewater

Between:

R

v.

Andrew W. Henneberry, Clark Henneberry, Marcel Henneberry,
Wesley Henneberry, Paul R. Parnell, James P. Ryan, Gregory B. Smith,
Ivy Fisheries Limited
Clark Henneberry, Director, Ivy Fisheries
Marcel Henneberry, Director, Ivy Fisheries
Wesley Henneberry, Director, Ivy Fisheries

Judge:	The Honourable Judge Anne E. Crawford
Heard:	May 25, in Lunenburg, Nova Scotia May 26, in Bridgewater, Nova Scotia
Charges:	33 FA x 5; FGR 22(7) x 7; 13(1)(c) AFR x 2; 14(1)(b) AFR x 3; 14(1)(a) AFR
Written decision:	June 14, 2006, in Bridgewater, Nova Scotia
Counsel:	Gerald Grant, for the Federal Crown David Demirkan & Thomas Hart, for the Defence

By the Court:

[1] This is the sentencing decision in these matters.

Facts

[2] At the sentencing hearing three witnesses were called by the Crown and one by the Defence.

[3] Brian Crockatt, the forensic accounting expert called by the Crown at trial, returned to testify as to the value of the 135 tuna found to have been illegally caught pursuant to the charges on which the various offenders have been found guilty. Mr. Crockatt's summary of those values is reproduced as Schedule "A" to this decision. The total sales value of all 135 fish was $1,196,412.53. On cross-examination he stated that this total sales value did not allow for legitimate business expense deductions; that it was gross revenue, not net profit. However, he stated, gross revenue, before such deductions, is a benefit to the business enterprise concerned, as it provides for payment of the expenses which allow the enterprise to continue carrying on business.

[4] Mr. Crockatt also testified that he had been asked by the Crown to apportion the sales proceeds for the tuna involved in counts 3, 6, 8, 9, 10, 17, 18 and 20 amongst the various offenders. He said that he first determined the percentage of the gross sale proceeds that each individual offender received as remuneration (both captain's share and crew share) for each settlement period and applied that percentage to the value of each tuna involved in each count, to arrive at an apportioned share of sale proceeds which could fairly be attributed to each of the offenders in each count. Ten schedules detailing those calculations were submitted to the court as Exhibit #2 in the sentencing hearing.

[5] John Nielson, an expert in fisheries ecology particularly in regard to large pelagic stock, testified as to the status of the Atlantic bluefin tuna resource and as to Canada's efforts as a member of ICCAT (the International Commission for the Conservation of Atlantic Tunas) to manage the stock. He stated that the goal of ICCAT is to restore the spawning stock level to what was observed in 1975. It presently stands at 13% of that level, despite all efforts to conserve and rebuild.

[6] Mr. Nielson also emphasized the importance to ICCAT of the information obtained from the fishing logs each tuna fisher is required to keep. Canada and ICCAT rely on the data obtained from these logs and dockside monitoring reports to establish estimates of fishing mortality and catch rates. Illegal activities such as discarding or high-grading distort these estimates and lead to inaccurate stock assessments, which in turn can jeopardize the recovery of the resource.

[7] On cross-examination he testified that Canada's share of the Total Allowable Catch under ICCAT is about 20% and that, whereas Canada has one large scale tuna longliner licence capable of going off-shore, Japan has "multiple ten's" of such vessels.

[8] Fisheries Officer Scott Mossman testified as to the value of Department of Fisheries and Oceans resources directed to this investigation from commencement to the initial laying of charges at the end of January, 2002. He calculated this at the hourly rate of $27.77 per hour, based on the annual salary of $53,000 earned by a working level Fishery Officer. For 1626.5 regular time hours and 539 overtime hours in this period, the total cost was $67,619.94, plus operational expenses of more than $17,000.

[9] F/O Mossman also testified that all of the licences involved in these offences, except for the offshore licence 142645, were inactive from 2000 to the present. All have suspension notices listed against them, so that they cannot be transferred pending conclusion of investigation and court cases. They can, however, be fished by the present owner.

[10] Libby Henneberry testified for the defence. She is a sister of the three Henneberry brothers involved in Ivy Fisheries Limited and is the secretary in the company office. She testified that she looks after all the paperwork, including doing up the settlements for each trip period and looking after paying all the expenses and the crew.

[11] She testified as to the procedure she follows in doing up each settlement and emphasized that after all expenses, including captain's share and crew share, have been accounted for, there is very little, if anything, left over as net profit. She also testified as to the negative impact this prosecution has had on the company. She said that they have sold two boats and laid off about twenty people.

[12] She also testified that because of the notices of suspension the company was forced to lease other licences to use on its vessels. She clearly did not understand that the company could still have fished those licences, had it chosen to do so.

[13] On cross-examination, confronted with Ivy Fisheries Limited's statement of fishing income and expenses and balance sheet for the year 2000 submitted as part of its 2000 corporate income tax return, she admitted that the "Gross stock" for that year was $5,027,174.13 and that the company showed retained earnings to December 31, 2000 of $2,108,423.36, including that year's net fishing income of $187,575.19. But, she said, she did not understand those figures as they were prepared by the company accountant from the figures she entered in the company's computer accounting program.

Issue

[14] There is one main issue to be decided in regard to each charge: What is the appropriate penalty for the offence, taking into consideration the principles of sentencing, sentencing precedents, the submissions of counsel and the circumstances of each offender.

Principles of Sentencing

[15] Case law makes it clear that the paramount principle of sentencing in a regulatory context such as the *Fisheries Act* is deterrence, both specific and general. *R. v. Grandy and Bell* (1992), 113 N.S.R. (2d) 85 (N.S.Co.Ct.) at p. 88; *R. v. MacKinnon (A.)* (1996), 154 N.S.R. (2d) 217 (N.S.S.C.) at p. 202.

[16] The paramountcy of this principle in the intention of Parliament is also apparent by the large maximum fines ($100,000) which can be imposed under *Fisheries Act* s. 78, by the forfeiture provisions of s. 72, the additional fines provision of s. 79, lease and licence cancellation or suspension provision under s. 79.1 and additional court orders provided for under s. 79.2. From this "menu" of possible sanctions, the court has the responsibility in each case to craft a suitably deterrent sentence, bearing in mind other relevant principles such as proportionality (*Criminal Code*, s. 718.1), parity (*CC* s. 718.2(b)) and totality (*CC* s. 718.2(c)).

Section 79 of the *Fisheries Act*

[17] This section states:

> 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.

[18] The Crown takes the position that such additional fines should be imposed in this case to equal the sales or gross value of the 70 tuna which would not have been caught "but for" the offences committed in counts 3, 4, 6, 7, 8, 9, 18, and 20. These are the most serious charges before the court, involving double fishing, either of two licences concurrently or by an unauthorized operator, while the authorized operator was fishing another licence. On this basis the Crown seeks fines under s. 79 in the total amount of $643,234.82, either apportioned against the company and the individual offenders, or assessed entirely against the company.

[19] The defence argued strongly against the imposition of any penalty under s. 79. Counsel pointed out that this is a discretionary penalty which should not be imposed in this case because there is no precedent for a fine in such an amount against a legal fishing business, especially given the unhealthy state of the fishery in the years since 2000 and the consequent struggles of this company to survive, as outlined in the testimony of Libby Henneberry. It would be creating a forfeiture where none occurred at the time; and it is mere speculation that all of these fish would have been seized at the time even if the offences had been caught at dockside, as Fisheries Officers also exercise discretion as to when and what to seize. If there had been a seizure then, it would not have been as onerous on the company as the value of that fish would never had been taken into income; and the offenders would have known that what they were doing was wrong and had an opportunity not to repeat the offence.

[20] It seems clear that, whatever else the principle of deterrence requires in a particular case, it must begin with depriving the offender of the benefit of his illegal acts. As Judge Freeman (as he then was) put it in *R. v. Ross* [1990] N.S.J. No. 495, 96 N.S.R. (2d) 444 (N.S.Co.Ct.) at para. 18:

> . . . Forfeiture of an illegal catch is not a strong deterrent and may be compared with depriving a thief of his loot.

[21] Section 79 appears to have been enacted by Parliament to ensure that this is accomplished in cases where the maximum fine otherwise available would be insufficient to achieve that goal, including cases where, as here, forfeiture for whatever reason is not available.

[22] In regard to the "unprecedented" amount of the fine sought, it may be unprecedented in amount, but it is not unprecedented in principle; and it is in direct proportion to the sales value of the fish, as established from the offenders' own records.

[23] In my opinion a fine in the amount of the benefit that would otherwise accrue to the offenders as a result of their illegal acts is warranted here.

[24] The defence argued further that, should a penalty under s. 79 be imposed, it should be in the amount, not of the gross sales but only of the net profit after deduction of legitimate business expenses. In so arguing they rely on two recent cases from the Newfoundland and Labrador Court of Appeal, *R. v. Oates*, [2004] N.J. No. 29, 233 Nfld.&P.E.I.R. 138 and *R. v. Meade* [2004] N.J. No. 49, 234 Nfld.&P.E.I.R. 1. In *Meade* the Court of Appeal reduced the fine imposed at trial under s. 79 to allow deduction of expenses; in *Oates* the decision of the Summary Conviction Appeal Court to do the same was upheld on further appeal.

[25] The reason for so doing was expressed by Wells, C.J.N. for the court at para. 19 of the *Oates* decision:

> "Monetary benefits" cannot possibly be equated with "gross product value", whether the activity that produced the benefit is legal or illegal. It defies both plain meaning and logic to suggest that there would be a monetary benefit from an activity if the monetary costs involved exceeded the total value of the product of that activity, again, whether legal or illegal. Similarly, the amount of the monetary benefit, whether legal or illegal, can only be the difference between the product value and the cost incurred in the activity of producing the product. The fact that the activity is illegal does not alter the plain meaning of the words employed by Parliament. The term "monetary benefit" must, therefore, be interpreted as requiring the deduction of expenses incurred in the activity involved in producing it. If such expenses are not deducted, it is not "monetary benefit", it is "product value".

[26] With the greatest respect, on the evidence before me in this case, I must beg to differ with the learned Chief Justice. When questioned on this point by defence, Brian Crockatt, – an accounting expert – clearly stated that gross income is a monetary benefit to any enterprise, whether or not there is a profit after all expenses have been deducted. As he stated, there is a monetary benefit to any enterprise in being able to pay its expenses; without gross income from which to pay expenses no enterprise can stay in business long.

[27] In addition, to narrow the meaning of "monetary benefit" in this context to "net profit" is to overlook the paramount purpose of sentencing in a regulatory context: to deter both the offender and others in his/her position from engaging in the illegal activity. If offenders know that, if caught, they will be deprived of the entire benefit of their illegal catch, and that they will therefore have to pay for the costs associated with their illegal fishing from other sources, the cost-benefit analysis will make illegal fishing much less attractive and they may be less likely to "take a chance" than if they know that even if caught their expenses will be covered.

[28] Lowry, J. in *R. v. Reid* [2001] B.C.J. No. 1886 (S.C.) stated it this way at para.16-17:

> ¶ 16 I conclude then that the trial judge erred in principle in basing his disposition on the accused's conduct being inadvertent, and that he failed to take the importance of general deterrence into account. The conditional discharge that permitted the accused to retain the proceeds of the concluded sale was at odds with the sentences in fisheries prosecutions generally and was not a fit disposition.
>
> ¶ 17 I am unable to find in the circumstances any reason why the accused should be permitted to retain the benefit of the illegal sale of octopus. He concedes that the proceeds of the product that was seized must be forfeited, and I can see no justification for his retaining the proceeds of the octopus he sold and delivered before it was seized. A fine under s. 79 should have been imposed.

[29] Therefore, both on the meaning of the term "monetary benefit" in accounting terms, and on a purposive interpretation of the legislation, I must respectfully decline to follow the decisions in *Meade* and *Oates*, which are not binding upon me and have not been followed in any other province so far as I am able to determine. I conclude that the term "monetary benefits" in s. 79, at least in the case before me, should be equated with the sale price of the tuna.

[30] If I am wrong in this conclusion as to the meaning of the term, I note that in *Oates* Wells, C.J.N. put the burden on the offender to establish his/her expenses on a balance of probabilities. At para. 33 he states:

> 33 If the only evidence as to the amount of monetary benefit that the Crown has to offer is the product value, then that is the best evidence before the Court as to the monetary benefit derived by the offender. If the offender asserts that such a figure does not represent the monetary benefit then, clearly, the evidentiary burden of making out that assertion will rest with the offender. The offender does so by establishing, by proof on the balance of probabilities, the amount of the expenses that ought to be deducted from product value in order to arrive at the monetary benefit which section 79 authorizes the Court to take from the offender by way of an additional fine. The admissibility of, and weight to be given to, any such evidence is, of course, determined by application of the usual rules. . .

[31] In the present case, the only evidence offered by the defendants as to their expenses was the testimony of Ms. Henneberry as to the expenses she deducted in the trip settlements for the period September 16 to December 16, 2000. On cross-examination it became clear that not all of these expenses related to the tuna fishery. More importantly, the defence put no evidence before the court as to which and what proportion of the expenses could properly be ascribed to the 70 tuna for which the Crown seeks the sale price by way of additional fine(s).

[32] I conclude that the defence has not met the burden of establishing on a balance of probabilities the expenses that ought to be deducted from product value. The best evidence before the Court as to the monetary benefit to the offenders of those 70 tuna is therefore the sale price established by the Crown.

[33] I find that the fine sought by the Crown under s. 79 in the total amount of $643,234.82 is justified. Apportioned as recommended by the Crown expert, Brian Crockatt, it will deprive the offenders of the monetary benefit they acquired as a result of their most serious offences, but leave them with the monetary benefit accruing from the tuna involved in the less serious infractions of the regulations. It is thus an important and necessary first step in achieving the sentencing purpose of general and specific deterrence. To paraphrase Freeman, J., the thieves will have been deprived of their loot.

Section 78 of the *Fisheries Act*

[34] This section reads:

> 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;
>
> (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.

[35] As stated above, the first step in providing an adequately deterrent sentence in this type of case is depriving the offenders of the benefit of their illegal fishing activity. But that in itself cannot provide sufficient deterrence. There must, in addition, be fines and other penalties sufficient to send the message to the specific offenders, to other fishers and to the public at large not only that the stocks will be protected, but that taking the chance of breaching the rules and regulations governing the fishery does not pay.

[36] In assessing fines under section 78 the court must consider "the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, s. 718.1) in order to craft a proportionate sentence.

[37] These are serious charges each involving multiple breaches of licence conditions in a lucrative, but seriously threatened fishery. Taken together they establish a pattern of behaviour which can only be described as a deliberate, concerted effort to catch the maximum number of tuna, regardless of the rules. The offenders here seem to have treated the quota as a target to be met, rather than an upper limit to their fishing activity. It is important that they learn that their fishing licences represent a privilege, not a right, and that in exercising that privilege they are exploiting a resource that belongs to the people of Canada.

[38] The individual degree of responsibility of each offender, as well as the principles of parity and totality will be addressed in dealing with the various charges.

Clark Andrew Henneberry

Count #2: fail to immediately enter confirmation numbers

[39] Mr. Henneberry, as captain of the *Becky H.*, on 10 separate fishing trips, failed to immediately enter confirmation numbers for 32 tuna later sold for a total of $248,607.45.

[40] The Crown did not seek an additional fine under s. 79 for the value of these fish, but the number of trips and fish involved indicate that this was more than mere inadvertence on the part of the offender.

[41] Although, as the defence submitted, these fish were otherwise legally caught and accounted for, the failure to enter confirmation numbers immediately allows for the possibility of discarding and high grading, which has an effect on conservation efforts by decreasing the accuracy of the reports on which Canada and ICCAT depend for setting conservation targets and fishing quotas. It is therefore not the "negligible" offence that the defence attempted to portray.

[42] As to the personal circumstances of Captain Henneberry, his sister Libby Henneberry said that he is still a principal in Ivy Fisheries Limited, that he is married and supports his family, including three daughters, aged 5 to 10 years, by fishing. According to figures taken from Ivy Fisheries Ltd. 2000 payroll, as reported in Exhibit 2, Schedule 2 prepared by accountant Brian Crockatt, Clark Andrew Henneberry earned $74,788.19 from his fishing in that year. That figure does not include any dividends or other income he might have received as a shareholder in Ivy Fisheries Ltd.

[43] I note that in two cases involving the similar charge of failing to hail immediately fines of $3000 were imposed in regard to 2 tuna and 1 tuna respectively. *R. v. David Dixon* (unrep.) 1999, NSPCt. Case #856283, Prince, J.P.C.; *R. v. John Nickerson* (unrep.) 1999, NSPCt. Case #864880, Kimball, J.P.C.

[44] Given all of the circumstances in this case, including the number of trips and tuna involved, the defence suggestion of a $500 fine is risible. A fine in the range suggested by the Crown, in the amount of $7500 is appropriate and will be levied.

Wesley Clark Henneberry

Count #3: fail to return incidental catch

Count #4: use tuna licence concurrently with shark licence

[45] The offender, as captain of the *I.V.Y.* fishing under the authority of a shark licence contravened a condition of the licence requiring him to immediately return 11 bluefin tuna to the water. These tuna were sold for a total value of $85,652.15, of which the offender's apportioned value as calculated by Brian Crockatt is $1010.28. A second condition of the shark licence prohibited him from fishing any other large pelagic licence concurrently with the shark licence. The offender breached this condition by fishing his bluefin tuna licence at the same time, reporting the catch of those eleven tuna on that licence.

[46] These counts taken together are two of the more serious offences before the court. They represent an illegal attempt to maximize profit by fishing two licences at once, when that was prohibited by conditions of the shark licence. Under the shark licence he had a duty not to fish for tuna and to return any tuna by-catch to the water immediately. Instead the offender kept and killed the tuna, thereby creating a considerable benefit for himself and his company.

[47] Wesley Henneberry has three children, two of whom are now also fishing with Ivy Fisheries Limited. I therefore assume that only one of his children at most is dependent upon him for support. According to Brian Crockatt's figures derived from Ivy Fisheries Payroll documents, this offender earned $133, 415.13 from fishing with Ivy Fisheries Limited in 2000. He also remains a principal in Ivy Fisheries Limited.

[48] The defence argued that these offences had no effect on conservation as all the tuna caught were reported, and that there was no attempt to conceal what was being done as the offender hailed out on both licences. This ignores the fact that if the offender had properly fished the shark licence those eleven tuna would either not have been caught or would have been returned to the sea alive, giving them a chance at continued life and reproduction. It also ignores the fact that the onus is not on the dockside monitors but on the licence holder to know and abide by the conditions of each licence. Wesley Henneberry, in the opinion of the court, either was extremely negligent in not reading his licence conditions or deliberately disregarded them. In either case he is solely responsible for these serious offences.

[49] I was referred to no similar sentencing cases by either side; but the defence suggests $5000 in total for the two offences, and the Crown suggests fines in the range

of $10,000 to $15,000 on each, plus an additional fine under s. 79 to deprive the offender of his apportioned benefit in the amount of $1,010.28.

[50] As indicated above, the s. 79 fine as requested by the Crown will be imposed.

[51] Under s. 78, given the close association of the two offences and the principal of totality, fines of $8,000 each will be imposed, plus, in regard to Count 3, the additional fine under s. 79 in the amount of $1010.28.

Count # 5: fail to hail immediately

[52] Wesley Henneberry, as captain of the *I.V.Y.,* on 3 separate fishing trips, failed to hail to a dockside monitor immediately after catching and tagging 16 tuna later sold for a total of $169,693.16.

[53] The Crown did not seek an additional fine under s. 79 for the value of these fish, but the number of trips and fish involved indicate that this was more than mere inadvertence on the part of the offender.

[54] This offence is similar to Count #2 in its providing an opportunity for discarding and high-grading, although as the defence points out this licence condition has since been changed to allow for once-a-day hails, at least under some circumstances. However, the need for deterrence in regard to breach of licence conditions in general remains.

[55] Given all of the circumstances, I find that a fine in the same amount as that imposed under Count #2 is appropriate: $7500.

Count # 6 permit an unauthorized person to fish his licence

[56] The offender Wesley Henneberry allowed Gregory Burton Smith and James Phillip Ryan to use the *I.V.Y.* and his tuna licence No. 109441 to fish for tuna while he was fishing at the same time as captain of the *Ivy Rose*. Four such trips were made by the two illegal captains and 28 bluefin tuna were caught for a total sales value of $226,130.40, of which the offender's apportioned share is $2,688.03.

[57] This is the second type of "double fishing" involved in this case; and it is significant that this offender has been found guilty of both types. In my opinion, this offence is the most serious committed by this offender, both for its consequences for conservation and for the fact that he involved two other fishers in this wrong-doing.

There can be no question as to the deliberate nature of this offence. It was obviously a conscious decision to double the fishing effort of Ivy Fisheries Limited.

[58] The Crown seeks a fine under s. 78 in the range of $25,000 to $30,000 plus an additional fine under s. 79 in the amount of $2688.03, the offender's apportioned share of the proceeds of sale. The defence suggested that the penalty of $2000 assessed in *R. v. Mood*, [1999] N.S.J. No. 59 (C.A.) be increased to $2500 here.

[59] A comparison of the facts in *R. v. Mood* with the facts in the present case reveals the inadequacy of the defence position. Mr. Mood was an alcoholic fisherman who, on one occasion for one day when he was too sick to go to sea, allowed his crew to go to sea without him to haul the lobster traps they had set with him four days before in order to avoid breaching another regulation which required set traps to be hauled regularly. In those circumstances, a fine of $2000 was levied.

[60] In the present case the defendant allowed four trips to be made under two different captains, not because he was ill, but because he was fishing at the same time as captain on another vessel.

[61] In *Mood* the catch was worth $6000, as opposed to over $200,000.00 in the present case. If one were to assess fines simply on the basis of the value of the illegal catch, a fine in the order of $75,000 would be warranted here. I find that, given that there will be orders depriving the offenders of the value of the illegal catch, a fine in the amount of $25,000 will be sufficient, plus an additional fine under s. 79 in the amount of $2688.03, as requested by the Crown.

Marcel Steven Henneberry

Count #7: fail to hail immediately

[62] The offender, as captain of the *Ivy Rose*, on 2 separate fishing trips, failed to hail to a dockside monitor immediately after catching and tagging 23 tuna later sold for a total of $248,798.41.

[63] I am not aware of Marcel Henneberry's personal circumstances other than that he has five children and a girlfriend and, according to Schedule 2 of Exhibit 2, his gross income from Ivy Fisheries Ltd in 2000 was $86,568.58.

[64] This is the same type of offence as Count 5 and the same penalty is appropriate: $7500.

Count #8: permit an unauthorized person to fish his licence

[65] The same offender allowed Paul Raymond Parnell to use the *All of Us* and his tuna licence No. 109436 to fish for tuna while he was fishing at the same time as captain of the *Ivy Rose*. Four such trips were made by the illegal captain and 11 bluefin tuna were caught for a total sales value of $73,163.51, of which the offender's apportioned share is $862.97.

[66] This is the same offence as Count #6, and the same comments apply. I find that the same s. 78 fine is appropriate here in the amount of $25,000, plus a section 79 fine in the amount of $862.97, the offender's apportioned share of the sales price of the fish.

Count #9: fish while a temporary replacement permit was in place

[67] The offender, as captain of the *Ivy Rose*, caught 24 tuna on three trips while, pursuant to the terms of a temporary replacement permit issued for his licence 109436 and the *All of Us*, he was not permitted to fish at all. The 24 tuna were sold for $258,288.76, of which the offender's apportioned share is $4053.66.

[68] This is another type of double fishing and is equally serious in its conservation consequences. Whether or not quota was exceeded, and whether or not another captain could have taken the offender's place, the fact is that he chose to fish when he was not allowed to do so and thereby made a valuable catch of 24 tuna which might otherwise have remained as breeding stock.

[69] The same s. 78 fine as for Count 6 in the amount of $25,000 is appropriate here, as well as the additional fine under s. 79 in the amount of $4053.66, the offender's portion of the proceeds of sale of the 24 tuna.

Paul Raymond Parnell

Count #12: fail to immediately enter confirmation numbers

[70] Mr. Parnell, as captain of the *All of Us*, fishing under the authority of a temporary replacement permit issued to Marcel Henneberry for his licence No. 109436 on 3 separate fishing trips, failed to immediately enter confirmation numbers for 17 tuna later sold for a total of $134,877.10.

[71] This offence is similar to that in Count #2; and my comments in regard to that offence apply here.

[72] As to the personal circumstances of this offender, he is an employee of Ivy Fisheries Limited. Libby Henneberry said that, although he still works for the company, he is thinking of going out West to look for work, as he is no longer making enough money fishing. He is married with one daughter. According to figures taken from Ivy Fisheries Ltd. 2000 payroll, as reported in Exhibit 2, Schedule 2, he earned $88,676.66 from his fishing in that year.

[73] Given all of the circumstances in this case, including the number of trips and tuna involved, once again the defence suggestion of a $500 fine is completely inadequate. The same fine as that imposed in Count #2 in the amount of $7500 is appropriate and will be levied here as well.

Gregory Burton Smith

Count #18: fish without authorization

[74] This count is the converse of Count #6. Gregory Burton Smith, as captain of the *I.V.Y.*, fishing without authorization on 3 separate fishing trips, caught 23 tuna later sold for a total of $225,241.40, with the offender's apportioned share being $2,688.03.

[75] This offender is also an employee of Ivy Fisheries Limited and, as such, perhaps bears less responsibility for this offence than does Wesley Henneberry, the licence holder and a principal of the company; nevertheless my comments under count #6 are apposite here as well. Mr. Smith had a duty to be aware of all the licence conditions and should have known, if he did not, that he had no authority to fish under that licence.

[76] He is divorced with three children and in 2000 his earnings were entered on the payroll as $62,019.01.

[77] The Crown suggests a fine in the ten to fifteen thousand dollar range; the defence, $2500 to $3000.

[78] Taking into account all of the circumstances, including the seriousness of the offence and the somewhat lesser degree of responsibility of the offender, which is reflected in the Crown's suggested range, I find that a fine in the amount of $10,000 is appropriate, plus the additional fine of $2688.03 representing the offender's apportioned share of the sale proceeds.

Count #19: fish without a fisher's registration card

[79] This is perhaps the least serious of all the offences before the court. It is also the only offence on which Crown and defence recommendations are in substantial agreement. Defence suggested $500; Crown, $500 to $1000. I will impose a fine of $500.

James Phillip Ryan

Count #20: fish without authorization

[80] This count, like Count # 18, is the converse of Count #6. James Phillip Ryan, as captain of the *I.V.Y.*, fishing without authorization on a single fishing trip, caught 1 tuna later sold for $889.00, with the offender's apportioned share being $11.59.

[81] This offender is also an employee of Ivy Fisheries Limited and, as such, bears less responsibility for this offence than does Wesley Henneberry, the licence holder and a principal of the company; nevertheless my comments under count #6 are apposite here as well. Like Mr. Smith, the offender here also had a duty to be aware of all the licence conditions and should have known, if he did not, that he had no authority to fish under that licence.

[82] He has three children and a girlfriend; and in 2000 his earnings were entered on the payroll as $93,407.01.

[83] The Crown suggests a fine in the ten to fifteen thousand dollar range; the defence, $2500.

[84] Taking into account all of the circumstances, including the seriousness of the offence, the lesser degree of responsibility of the offender and the lesser value of fish involved, I find that a fine in the amount of $5,000 is appropriate, plus the additional fine of $11.59, representing the offender's apportioned share of the sale proceeds.

Ivy Fisheries Limited and Directors Clark, Wesley and Marcel Henneberry

Count #10: sell illegally caught fish

[85] The company offender sold all of the illegally caught fish involved in these charges and, as directors of the company, Clark, Wesley and Marcel Henneberry all participated in these sales and received a share of the sale proceeds as outlined above.

[86] Against the corporate offender, the Crown seeks a fine under s. 78 of the *Act* in the $20,000 to $25,000 range, a 12 month suspension of fishing licence #142645, and

an additional fine under s. 79 of the *Act* in the amount of $625,909.15, the corporate offender's share of the proceeds of sale of the 70 tuna involved in the most serious charges before the Court.

[87] The defence argues that there is no need for a large fine against Ivy Fisheries or its directors because all of the fish involved have been "fined" under the individual charges and there is no evidence here of a master mind directing these infractions. Counsel emphasized again that this is just a family business which has already suffered the adverse consequences of a prolonged prosecution and its attendant publicity. Defence suggests $10,000 against the company and minimal fines of $1000 against each director.

[88] I agree with the defence that, although catching fish illegally and selling them once caught are two distinct delicts, there is, for sentencing purposes, a degree of overlap between Count #10 and the other offences here, particularly in regard to the directors, who each committed one or more of the fishing offences. The principle of totality assumes a special significance in assigning appropriate fines under s. 78 to this count.

[89] I disagree, however, with the suggestion that there is no evidence of planning or co-ordination here. When one looks at the totality of these offences, it is apparent that there was a co-ordinated effort to maximize profits from the tuna fishery, even if that meant breaking the rules and regulations. For that reason I find it appropriate to impose a significant fine on the company over and above depriving it of the portion of the monetary benefits derived from the most serious of these offences. The fine against the company under s. 78 will be in the amount of $25,000.

[90] In regard to the individual directors, bearing in mind the principle of totality and the degree of overlap between this count as against the company and as against each individual director as well as the lesser degree of overlap of this "selling"count with the various "fishing" counts against them, I find that fines of $10,000 against each director are sufficient.

[91] I have previously dealt with the issue of the section 79 fine and will simply reiterate here that it is entirely appropriate to deprive the offenders of their ill-gotten gains. The fine under that section in the amount requested of $625,909.15 will be imposed.

[92] Dealing with the Crown's request for a one-year suspension of fishing licence #142645, I note that it is an enterprise allocation licence for tuna unspecified and is the

only one of the licences involved in these offences which has been in active use by the company every year to the present. Like all of the licences involved, since the laying of these charges it has been "frozen" as to transfers by the issuance of a Suspension Pending notice. Although the registered owner of this licence is 10474 (Nfld) Limited, it has apparently been leased by the defendant company for some considerable period of time.

[93] Suspension of a fishing licence involved in the offence is one of the sentencing options available to achieve the paramount principle of deterrence under the *Fisheries Act*. I find that, in the overall context here, suspension of this licence for the period requested is warranted and it will be ordered.

Andrew William Henneberry

Count #17: sell illegally caught fish

[94] This offender was employed by Ivy Fisheries Limited to perform various services for the company such as receiving and relaying hail-ins and confirmation numbers, and arranging for landings and sales of the tuna involved in these offences. In this capacity, he participated in all of the illegal sales.

[95] I find that, although he participated in the sales by arranging them and by receiving a portion of the proceeds in the form of "finder's fees", he had little if any control or actual knowledge of the commission of the fishing offences. His role was therefore less blameworthy than that of the other participants in the selling offence.

[96] According to Libby Henneberry this offender has a wife and a daughter and is presently adopting a second daughter. During the period of these offences he or his company was paid a total of $18,610.23 in "finder's fees" in regard to these sales.

[97] Given the circumstances, including his lesser role, I find that the principles of sentencing will be satisfied here by a s. 78 fine in the amount of $5000 and a fine under s. 79 in the amount of $6,011.12, representing his apportioned share of the proceeds of sale of the aforementioned 70 tuna.

Conclusion

[98] In conclusion and in summary, the following fines and sanctions are imposed in this case:

Clark Andrew Henneberry	Count 2	$ 7,500	
	Count 10	$10,000	
Wesley Clark Henneberry	Count 3	$ 8,000 +	$1010.28
	Count 4	$,8000	
	Count 5	$ 7,500	
	Count 6	$25,000 +	$2688.03
	Count 10	$10,000	
Marcel Steven Henneberry	Count 7	$ 7,500	
	Count 8	$25,000 +	$ 862.97
	Count 9	$25,000 +	$4053.66
	Count 10	$10,000	
Paul Raymond Parnell	Count 12	$ 7,500	
Gregory Burton Smith	Count 18	$10,000 +	$2688.03
	Count 19	$ 500	
James Phillip Ryan	Count 20	$ 5,000 +	$ 11.59
Ivy Fisheries Limited	Count 10	$25,000 +	$625,909.15 + licence suspension
Andrew William Henneberry	Count 17	$5,000 +	$ 6,011.12