

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

HER MAJESTY THE QUEEN

*Appellant*

- and -

NANCY MICHEL

*Respondent*

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Appeal from Sentence

Heard at Yellowknife, NT, on March 3, 2015

Reasons filed: December 11, 2015

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**REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE S.H. SMALLWOOD**

Counsel for the Appellant:

Blair MacPherson  
Public Prosecution Service of Canada

The Respondent:

was self-represented

*R v. Michel*, 2015 NWTSC 66

Date: 2015 12 11

Docket: S-1-CR-2014-000020

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**INTRODUCTION**

[1] The Respondent was convicted of fishing in closed waters on Great Slave Lake contrary to section 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14 (the “*Act*”). She was sentenced to a fine of \$500.00 and the sentencing judge ordered that the sale proceeds of the fish seized by the fisheries officers be applied to the fine.

[2] The Appellant appeals arguing that the sentencing judge erred in law by ordering that the proceeds of the sale of the illegally caught fish be applied to the fine. And that the net fine was too low and does not adequately demonstrate the principles of proportionality and deterrence.

**FACTS**

[3] The facts in this matter are straightforward and brief. On September 21, 2013, the Respondent Nancy Michel was observed fishing on Great Slave Lake in an area that was closed to commercial fishing. When the Respondent arrived at the

fish plant in Hay River, nine tubs of fish were seized by fisheries officers. The seized fish were sold to the fish plant to prevent wastage and the proceeds of the sale of the fish, \$460.74, were sent to the Receiver General of Canada.

[4] The officers also noted that the Respondent's logbook had not been completed accurately on many occasions. The Respondent was charged with three offences pursuant to the *Act*.

[5] On March 18, 2014, the Respondent plead guilty to two offences under the *Act*, for fishing in a closed area and not properly completing her log book. The Respondent had previously been convicted in 2009 for fishing in a closed area and had received a \$150.00 fine and had been warned about fishing in a closed area in July 2013.

[6] The sentencing judge imposed a \$500.00 fine for fishing in a closed area and a \$150.00 fine for not properly completing the log book. The sentencing judge stated:

I decline to order the forfeiture of the proceeds, that is the sum of \$470.74<sup>1</sup>, but I make the order pursuant to Section 73.1(2)(c) that these proceeds be applied in payment of the fine and that it be done immediately.

*Transcript of the Sentencing Hearing*, Page 16, Lines 5-10.

## ANALYSIS

[7] The Appellant argues that the *Act* calls for the mandatory forfeiture of the fish seized from the Respondent and that the failure of the sentencing judge to do so was an error in principle. Furthermore, the sentencing judge also erred in applying the proceeds of the sale of the fish to the fine which was not available under the *Act*.

[8] The standard of review applicable to a sentence appeal is in the absence of an error in principle, a failure to consider relevant factors or undue emphasis on certain factors, or unless the sentence is demonstrably unfit, a trial court's sentencing decision should not be disturbed: *R. v. Shropshire*, [1995] 4 SCR 227.

[9] In considering whether an error of law has been made, the applicable standard of review is one of correctness: *R. v. Lee*, 2010 ABCA 1 at para. 6.

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<sup>1</sup> While the sentencing judge refers to \$470.74, the agreed facts at the sentencing hearing were that the amount of the proceeds of the sale of the fish were \$460.74. Therefore, I have used the agreed upon amount of \$460.74.

[10] The relevant sections of the *Act* are sections 51 , 72 and 73.1:

51. A fishery officer or fishery guardian may seize any fishing vessel, vehicle, fish or other thing that the officer or guardian believes on reasonable grounds was obtained by or used in the commission of an offence under this Act or will afford evidence of an offence under this Act, including any fish that the officer or guardian believes on reasonable grounds

- (a) was caught, killed, processed, transported, purchased, sold or possessed in contravention of this Act or the regulations; or
- (b) has been intermixed with fish referred to in paragraph (a).

72. (1) Where a person is convicted of an offence under this Act, the court may, in addition to any punishment imposed, order that any thing seized under this Act by means of or in relation to which the offence was committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.

(2) Where a person is convicted of an offence under this Act that relates to fish seized pursuant to paragraph 51(a), the court shall, in addition to any punishment imposed, order that the fish, or any proceeds realized from its disposition, be forfeited to Her Majesty.

73.1 (1) Subject to subsection (2), any fish or other thing seized under this Act, or any proceeds realized from its disposition, that are not forfeited to Her Majesty under section 72 shall, on the final conclusion of the proceedings relating to the fish or thing, be delivered to the person from whom the fish or thing was seized.

(2) Subject to subsection 72(4), where a person is convicted of an offence relating to any fish or other thing seized under this Act and the court imposes a fine but does not order forfeiture;

- (a) the fish or thing may be detained until the fine is paid;
- (b) it may be sold under execution in satisfaction of the fine; or
- (c) any proceeds realized from its disposition may be applied in payment of the fine.

[11] Pursuant to section 51, fisheries officers can seize fish that they believe on reasonable grounds were obtained by the commission of an offence under the *Act*. Forfeiture is discretionary under section 72(1) where a person is convicted of an offence under the *Act* and any thing has been seized which is in relation to the offence committed. Forfeiture of the fish seized or proceeds realized from its disposition is mandatory under s. 72(2) when the offence is in relation to the fish

that were seized and where the fish were an essential element of the offence: *R. v. Mood*, 1999 CanLII 2373 (NSCA) at p. 5-6; *R. v. Morash*, 1994 CanLII 4120 (NSCA).

[12] Section 73.1(2) allows a sentencing judge to apply the proceeds realized from the sale of fish to a fine only in situations where forfeiture is not ordered.

[13] In the sentencing submissions of the Crown, the Crown sought forfeiture of the value of the fish pursuant to section 72 of the *Act* and a fine of \$500.00 for the fishing in closed waters offence. Counsel for the Respondent requested that the catch not be forfeited, that the proceeds from the sale of the fish be returned to the Respondent and a fine in the range of \$100.00 to \$200.00 for both infractions be imposed.

[14] The sentencing judge inquired regarding her discretion with respect to the forfeiture. Counsel for the Crown referred the sentencing judge to section 72 of the *Act* and submitted that because the proceeds were a result of the infraction that it would not be permissible to have the fish or the proceeds of the sale returned to the Respondent.

[15] The matter was then adjourned to later that day. When court resumed, the sentencing judge asked counsel about section 73.1(2) and whether the proceeds of the disposition of the fish could be applied to the payment of a fine.

[16] Counsel for the Respondent advised that the Respondent wished to “net something out of the catch” but that if the Court was going to impose a fine equal to the catch, then it would be her alternative position that the proceeds of the sale of the catch equal the value of the fine.

[17] Counsel for the Crown made submissions opposing the application of the proceeds of the disposition to the fine, arguing that it would not be consistent with the objectives of the *Act*, and would not deter the Respondent or others from contravening the *Act* in the future.

[18] The sentencing judge found that it was not appropriate to return the money from the sale of the fish to the Respondent. She then went on to state:

On the other hand, I note that I have the option to not order the forfeiture of that money but to order that it actually be applied to the payment of the fine.

*Transcript of the Sentencing Hearing, Page 15, Lines 13-16*

[19] The sentencing judge then imposed a fine of \$500.00, declined to order the forfeiture of the proceeds of the sale of the fish and ordered that the proceeds be applied to the fine pursuant to section 73.1(2) of the *Act*.

[20] With respect, section 73.1(2) of the *Act* was not available to the sentencing judge in these circumstances. The fisheries officers seized the fish which were caught through the Respondent's contravention of the *Act*. The Respondent was convicted of fishing in waters that had been closed to commercial fishing. The facts that were admitted at the sentencing hearing established that the Respondent had caught the fish in waters that were closed to fishing. Therefore, the fish seized were an essential element of the offence to which the Respondent plead guilty and section 72(2) of the *Act* was applicable. In that circumstance, the forfeiture of the fish was mandatory.

[21] Therefore, the sentence appeal is allowed and the sentence is hereby varied so that the proceeds of the sale of the fish, \$460.74, are forfeited to Her Majesty the Queen. The fines imposed on count 1 and 2 are otherwise reasonable in the circumstances and I see no reason to interfere with the amounts imposed by the sentencing judge.

S.H. Smallwood  
J.S.C.

Dated at Yellowknife, NT, this  
11<sup>th</sup> day of December 2015

Counsel for the Appellant: Blair MacPherson  
Public Prosecution Service of Canada

The Respondent: was self-represented

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