SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Henneberry*, 2019 NSSC 119

Date: 2019-04-16
Docket: PtH 478023
Registry: Port Hawkesbury

Between:

Her Majesty the Queen
As represented by the Public Prosecution Service of Canada

Appellant

v.

Casey Morgan Henneberry

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Frank C. Edwards
Heard:	March 13, 2019 in Port Hawkesbury, Nova Scotia
Subject:	- *Fisheries Act* - Failure to maintain a true and up to date record of fishing activities and all catch contrary to s. 22(7) of the Fishery (General)Regulations. - Judge's discretion re forfeiture, s. 72(1) *Fisheries Act* - Summary Conviction Appeal Court – Standard of Review
Facts:	The Respondent had failed to record almost 40% of his halibut catch. The illegal portion of his $178,000.00 total catch was valued at just under $70,000.00. A Provincial Court Judge imposed a $30,000.00 penalty thus allowing the Respondent to keep almost $40,000.00 worth of illegal fish. The Crown appealed.
Result:	Appeal allowed and sentence varied. The sentencing judge's decision had no deterrent value and was therefore demonstrably

unfit. A condition of the Respondent's halibut fishing licence required him to record in his log what he caught each day. He failed to do so. That failure must not be considered a mere accounting lapse. A fisher who does not comply with a condition of his/her licence is effectively unlicenced. There is no wiggle room in the conditions: you are either in compliance or you are not. If you are not, as a minimum, the unrecorded portion of your catch is illegal and subject to forfeiture. This vulnerable resource requires strict regulation.

The Respondent had four prior fisheries related convictions. He was a poor candidate for leniency. Sentence varied to impose forfeiture of 13,000 lbs. valued at $69,376.33 in addition to the $10,000.00 fine. Total Penalty: $79,376.33.

Cases Noticed: *R v Lacasse*, 2015 SCC 64

R v H&H Fisheries Limited, 2014 NSPC 61

R v Wilcox, Glace Bay Fisheries et al, 2001 NSCA 45

R v Frampton, 2010 Can LII 4224 (NL PC)

R v Payne, 2014 Can LII 7175 (NS PC)

R v Henneberry, 2009 NSCA 112

R. v Tarkanen and Tarkanen, 2018 BCPC 214

R v McKinnell Fishing Ltd., 2016 BCPC 466

R. v MacKinnon 154 NSR(2d) 217

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Counsel:	Marion V. Fortune-Stone, QC, for the Appellant Stanley W. MacDonald, QC, for the Respondent

INDEX

By the Court:

Introduction and Overview:

[1] The Crown appealed the Respondent's sentence imposed by a Provincial Court Judge. The sentencing judge had ordered partial forfeiture of the Respondent's halibut catch in the amount of $20,000.00 and had imposed a fine of $10,000.00. The Respondent's total catch was valued at $178,000.00. The illegal overage was worth $70,000.00. The Judge's sentence left the Respondent with $40,000.00 worth of halibut to which he was not entitled.

[2] I begin by setting out the facts, the positions of the parties, and the standard of review, taken directly from the Respondent's Factum. I then analyze the arguments made on the Respondent's behalf. I summarize the Judge's decision and conclude with an analysis of it. In the end, I was satisfied that the judge had not properly exercised her discretion under s. 72(1) of the *Fisheries Act* and that her sentence was demonstrably unfit.

FACTS:

[3] The facts are set out in paragraphs 6 – 25 of the Respondent's Factum as follows: (Bold portions added)

History of Proceedings

6. The Respondent, Mr. Henneberry, was captain of the fishing vessel, R & S Venture (the "Vessel"), at all times material to the events underlying this appeal. The Vessel was owned by ALS Fisheries Ltd.[1]

7. The Vessel left port at Sambro on May 23, 2017 to fish commercially for halibut.[2] The estimated return date of the Vessel was May 31, 2017.[3] Mr. Henneberry was fishing under Department of Fisheries and Oceans ("DFO") licence conditions which required, among other things, that he submit daily hails while at-sea to the designated DFO email address and that he maintain an accurate logbook of his fishing activities with a log section completed after each set and at least once a day.[4]

8. While at-sea, Mr. Henneberry telephoned his daily hail information to Andy Henneberry at ALS Fisheries Ltd. who in turn arranged for the daily hails to be submitted to DFO via email in accordance with the licence condition. Unfortunately, the daily hail emails for May 26 to May 30, 2017 were submitted to the incorrect email address. Instead of being addressed to hails65@dfo-mpo.gc.ca, they were inadvertently addressed to hails65@dfo-mpo-gc.ca, with a dash after "mpo" instead of a dot. As a result, DFO did not receive any hails from May 26, 2017 onward.[5]

9. Mr. Henneberry completed his logbook for his fishing activity for May 26 to May 28, recording a total of 10,000 pounds of halibut for those dates.[6] ***(He recorded 1000 lbs, 4000 lbs, 5000 lbs respectively for those dates.)***

10. On May 29, 2017, Mr. Henneberry and his crew had an unusually large catch. ***As Mr. Henneberry's counsel stated in submissions regarding sentencing***: *(Emphasis added)*

> So on this particular day, according to Mr. Henneberry, they caught more halibut than he has ever seen in any catch in the past. So, as he put it, that they were literally up to their knees at times in halibut …
>
> … Mr. Hennberry says that practically every line was full. They're coming in, they're taking them off the line, they're trying to process them as best they can and put them in the hold, ice them. And he's doing his best to try to estimate. But they're extremely variable in size. And so his estimate was

[1] Factum of the Appellant, Tab 1 – Canadian Vessel Inspection Report.
[2] Factum of the Appellant, Tab 1 – Canadian Vessel Inspection Report.
[3] Factum of the Appellant, Tab 1 – Canadian Vessel Inspection Report.
[4] Factum of the Appellant, Tab 2 – Excerpt of Conditions, Conditions 6.3.1 and 6.4.1.
[5] Appeal Book, Tab 6 - Transcript, p 76, lns 6-9, p 81, ln 3 to p 82, ln 18.
[6] Factum of the Appellant, Tab 3 – Fishing Log.

> off. But he said that he had never seen anything like that in all the time that he's been fishing.
>
> So they were doing that non-stop during the day and into the night.[7]

11. Mr. Henneberry advises that he attempted to call in his daily hail of 10,000 pounds to Andy Henneberry at the office late on the night of May 29, 2017, however Andy Henneberry was not in the office at the time.[8]

12. Mr. Henneberry advises that he recorded the May 29, 2017 catch of 10,000 pounds in a notebook.[9]

13. Mr. Henneberry kept watch for a portion of the night and then had to go to sleep. Unfortunately, Mr. Henneberry failed to record the catch in his logbook before going to sleep.[10]

14. On May 30, 2017, Fisheries Officers boarded the Vessel for inspection in the early afternoon. Mr. Henneberry was still asleep when they began boarding.[11] He advised the Fisheries Officers that he had "probably 20,000 or so" pounds of halibut in his hold and that he had not yet recorded the previous day's catch in his logbook.[12] **("He said I was going to get it…get to it today after we were closer to home": Appeal Book p. 49)**

15. In the Canadian Vessel Inspection Report, Fisheries Officer Cole made his own estimate of 22,000 pounds in the hold.[13] Similarly, in his hand written notes Fisheries Officer Cole wrote "Catch estimated at 20-25,000 pounds".[14]

16. When the catch in the hold was ultimately offloaded, the estimated round weight of the catch was 33,000 pounds.[15]

17. According to DFO, the total proceeds of the sale of the halibut catch was $178,092.55. The value of the 13,000 pounds difference between the 20,000 pounds **(in the attempted)** hail in and the 33,000 pounds offloaded was $69,376.33.[16]

18. When inspecting the Vessel, the fisheries officers found a green garbage bag containing halibut filets that had been prepared by Mr. Kersey, a member of the crew, without Mr. Henneberry's prior knowledge or permission.[17] Mr. Henneberry had not learned of the existence of the halibut filets until May 30, 2017.[18]

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[7] Appeal Book, Tab 6 – Transcript, p 77, ln 18 to p 79, ln 5.
[8] Appeal Book, Tab 6 – Transcript, p 76, lns 6-19.
[9] Appeal Book, Tab 6 – Transcript, p 85, lns 18-21.
[10] Appeal Book, Tab 6 – Transcript, p 79, lns 4-12.
[11] Appeal Book, Tab 6 – Transcript, p 79, lns 4-12.
[12] Appeal Book, Tab 6 – Transcript, p 49, lns 12-19.
[13] Factum of the Appellant, Tab 1 – Canadian Vessel Inspection Report.
[14] Appeal Book, Tab 6 – Transcript, p 52, lns 8-11.
[15] Appeal Book, Tab 6 – Transcript, p 49, lns 14-17.
[16] Factum of the Appellant, para 16.
[17] Appeal Book, Tab 6 – Transcript, p 27, lns 3-16.
[18] Appeal Book, Tab 6 – Transcript, p 27, lns 12-14.

19. DFO seized the entirety of Mr. Henneberry's catch and charged him with three counts:

> (a) Count 1: Violating ss. 36(2) of the Fishery (General) Regulations by retaining fish fillets that could not be readily identified, the weight could not be readily determined and the size of the fish could not be readily determined;
>
> (b) Count 2: Violating ss. 22(7) of the Fishery (General) Regulations by failing to maintain a true and up-to-date record of his fishing activities and all catch; and
>
> (c) Count 3: Violating ss. 22(7) of the Fishery (General) Regulations by failing to report required information while at sea, through hails using information required in the DFO approved format on a daily basis no later than noon by fax or email.

20. Ultimately, however, Crown Counsel pursued only Count 2 against Mr. Henneberry. With respect to Count 1, Crown Counsel stated to the sentencing Judge that "the Crown is prepared to accept that Mr. Kersey is solely responsible for those fish fillets."[19]

21. Mr. Henneberry pleaded guilty to Count 2, namely that he contravened or failed to comply with a condition of the licence by failing to maintain a true and up-to-date record of his fishing activities and all catch.

22. Counsel additionally agreed that the Crown would be permitted to put before the Court, as an aggravating factor, that the total hail was inaccurate in that it was 20,000 pounds instead of 33,000 pounds.[20]

23. Contrary to paragraphs 12, 14, 33, 76, 77 and 78 of the Factum of the Appellant, there was no agreement that Mr. Henneberry had failed to hail his daily catch to DFO. Mr. Henneberry's reasonable efforts to hail-in daily were not in controversy at the sentencing hearing, beyond the accuracy of the total hail. In fact, the Respondent explained the issue of the typographical error in the email address and made the following submissions with respect to the Crown's position:

> I did raise this with my friend and, fairly, he pointed out … and we sent these documents [the daily hail emails] to Mr. MacMillan two or three weeks ago. And so DFO had the opportunity to look at that. And so, you, they did determine that that was, in fact, what had happened.[21]

24. Crown Counsel raised no issue with this characterization in his reply.[22]

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[19] Appeal Book, Tab 6 – Transcript, p 27, lns 15-16.
[20] Appeal Book, Tab 6 – Transcript, p 46, lns 8-18; p 74, lns 12-14.
[21] Appeal Book, Tab 6 – Transcript, p 81, lns 13-20.
[22] Appeal Book, Tab 6 – Transcript, p 92.

> 25. In fact, Crown counsel acknowledged that 20,000 pounds of halibut had been hailed in[23] and, as the sentencing Judge indicated, this was the Crown's position in determining the difference between the hailed weights and the actual weights.[24]

[4] The Respondent then sets out the parties' respective sentencing positions at the sentencing hearing.

Crown's Position:

> 29. The Crown requested a fine of $10,000 and partial forfeiture of the catch in the amount of a minimum of $70,000, representing the value of the 13,000 pounds off-loaded above what was hailed in.[26] With respect to partial forfeiture, the Crown stated "But, to be frank, the Crown would consider the forfeiture of the entire catch, given that he was entitled to have some of it, to be too punitive."[27] ***(The Crown was obviously referencing the $178,000.00 total catch value.)***
>
> 30. In support of this sentence, the Crown pointed to the following:
>
> (a) The lucrative nature of the halibut fishery;[28]
>
> (b) The June 1, 2017 impact statement by the Senior Regional Fisheries Management Officer respecting the importance of proper reporting to the management of the halibut fishery;[29]
>
> (c) Other fishermen have used tactics to circumvent the quota systems (though Crown Counsel explicitly acknowledged that "we're not coming before this Court with evidence that there was any plan in place by the defendant");[30]
>
> (d) The regulations relating to the commercial fishing industry are difficult to enforce;[31]
>
> (e) The paramount principle of sentencing in the fisheries context is specific and general deterrence;[32]

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[23] Appeal Book, Tab 6 – Transcript, p 63, lns 20-21.
[24] Appeal Book, Tab 6 – Transcript, p 82, lns 14-21. See also Appeal Book, Tab 6 – Transcript, p 66, ln 19 to p 68, ln 12.

[26] Appeal Book, Tab 6 – Transcript, p 72, lns 10- 20.
[27] Appeal Book, Tab 6 – Transcript, p 72, lns 12-14.
[28] Appeal Book, Tab 6 – Transcript, p 54, lns 5-6.
[29] Appeal Book, Tab 6 – Transcript, p 54, ln 7 to p 55, ln 7.
[30] Appeal Book, Tab 6 – Transcript, p 55, ln 18 to p 56, ln 9.
[31] Appeal Book, Tab 6 – Transcript, p 57, lns 6-12.
[32] Appeal Book, Tab 6 – Transcript, p 61, ln 6 to p 63, ln 4.

(f) Mr. Henneberry should not be permitted to retain money from the amount in excess of the 20,000 pounds hailed in;[33] and

(g) Mr. Henneberry had four prior convictions for offences under the Fisheries Act.[34]

Defence Position:

31. Mr. Henneberry's position was that a total penalty in the range of $20,000, including forfeiture in the range of $12,000 to $15,000, would be an appropriate sentence.[35]

32. In support of this position, the Respondent pointed to the following mitigating circumstances:

(a) Mr. Henneberry took responsibility for his actions by pleading guilty and acknowledged that his failure to fill out the logbook was negligent;[36]

(b) The catch at issue was caught according to a valid licence, in the appropriate area and in accordance with the quota;[37]

(c) There is no evidence that Mr. Henneberry had a nefarious purpose or was attempting to circumvent the quota system in any way. In fact, he had recorded the catch in his notebook and had attempted to call in the catch;[38]

(d) Mr. Henneberry's best efforts to make an accurate estimate were impeded by the variation of size, the unprecedented quantity of the May 29 catch and the resulting fatigue. Mr. Henneberry and his two-man crew had caught "an overwhelming amount" of halibut on May 29, 2017 and had been going "non-stop during the day and into the night";[39]

(e) The reasonableness of Mr. Henneberry's estimate of 20,000 pounds was supported by the fact Fisheries Officer Cole estimated the catch at

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[33] Appeal Book, Tab 6 – Transcript, p 69, ln 18 to p 72, ln 8.
[34] Appeal Book, Tab 6 – Transcript, p 74, ln 17 to p 75, ln 12.
[35] Appeal Book, Tab 6 – Transcript, p 89, lns 1-4.
[36] Appeal Book, Tab 6 – Transcript, p 80, lns 19-20; p 90, lns 12-14.
[37] Appeal Book, Tab 6 – Transcript, p 84, ln 20 to p 85, ln 3.
[38] Appeal Book, Tab 6 – Transcript, p 80, lns 4-20; p 85, lns 18-21; p 90, lns 2-15.
[39] Appeal Book, Tab 6 – Transcript, p 78, ln 17 to p 79, ln 12

> 20,000 to 25,000 pounds in his notes and 22,000 pounds in the inspection report;[40]
>
> (f) Forfeiture of the catch would cause the crew to suffer;[41] and
>
> (g) DFO's seizure and sale of the entire 33,000 pound catch meant that Mr. Henneberry lost the opportunity to sell his catch to the US market for US dollars. At the relevant time, the US dollar had a conversion rate of 1.3 as against the Canadian dollar. The resulting loss was approximately $25,000 to $50,000.[42]

[5] The Respondent summarized the Sentencing Decision under appeal in paragraphs 33 – 36. (**I reference the Sentencing Decision again beginning at paragraph 29 below**)

> Sentencing Decision
> 33. The sentencing Judge ordered a fine of $10,000 and partial forfeiture of the catch in the amount of $20,000.[43]
>
> 34. In coming to this decision, the sentencing Judge noted the importance of the principles of general and specific deterrence to sentencing under the Fisheries Act, as well as the importance of proper reporting to the integrity of the fisheries regime.[44] The sentencing Judge stated:
>
> > Fisheries … the fishing industry is only viable when everyone plays by the same rules. You know that, Mr. Henneberry, and you know as a captain the onus is on you to abide by those rules …
> >
> > … I can appreciate the situation you were in, however, it was also avoidable by doing your daily log and that onus was on you and there has to be a significant penalty, as the Crown says, to bring that home to you, the general public, and a big part of that being other fishermen.[45]

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[40] Appeal Book, Tab 6 – Transcript, p 52, lns 8-11; p 79, ln 13 to p 80, ln 3.
[41] Appeal Book, Tab 6 – Transcript, p 88, lns 5-9.
[42] Appeal Book, Tab 6 – Transcript, p 84, lns 2-13.
[43] Appeal Book, Tab 3 – Oral Decision Under Appeal, p 11, lns 7- 9.
[44] Appeal Book, Tab 3 – Oral Decision Under Appeal, p 8, ln 9 to p 10, ln 13.

[45] Appeal Book, Tab 3 – Oral Decision Under Appeal, p 10, ln 21 to p 11, ln 17.

35. During counsel's submissions she stated that "The log is one of the most important things".[46]

36. The sentencing Judge also specifically mentioned that Mr. Henneberry's previous conviction for the same offence was an aggravating factor.[47] Similarly, at the close of counsel's submissions, she stated that "the prior conviction does weigh heavily on me".[48]

Issues

[6] The Notice of Appeal sets out two grounds of appeal against sentence.

1. Whether the sentencing Judge erred in her interpretation and application of the discretionary forfeiture provision as set out in Section 72(1) of the Fisheries Act?

2. Whether the sentencing Judge imposed a sentence that was demonstrably unfit or clearly inadequate given the nature of the offence and the circumstances of the offender?

[7] In paragraphs 38 – 42, the Respondent correctly sets out the applicable standard of review:

PART 4 – STANDARD OF REVIEW FOR EACH ISSUE

38. As is outlined at paragraphs 27 to 29 of the Factum of the Appellant, section 687 (1) of the Criminal Code applies to this appeal. It states:

> 687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> (b) dismiss the appeal.

[46] Appeal Book, Tab 6 – Transcript, p 91, lns 4-5.
[47] Appeal Book, Tab 3 – Oral Decision Under Appeal, p 10, lns 5-8.
[48] Appeal Book, Tab 6 – Transcript, p 94, lns 15-16

39. It is well established that sentencing judges enjoy wide discretion and that their decisions are subject to deference on appeal. The Supreme Court of Canada most recently outlined this standard in *R. v. Suter* as follows:

> It is well established that appellate courts cannot interfere with sentencing decisions lightly … This is because trial judges have "broad discretion to impose the sentence they consider appropriate within the limits established by law" (*Lacasse*, at para. 39).
>
> In *Lacasse*, a majority of this Court held that an appellate court could only interfere with a sentence in one of two situations: (1) where the sentence imposed by the sentencing judge is "demonstrably unfit" (para. 41); or (2) where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, and such an error has an impact on the sentence imposed (para. 44). In both situations, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances.
>
> A sentence that falls outside of a certain sentencing range is not necessarily unfit … [49]

40. In *R. v. Lacasse*, the Supreme Court outlined three reasons for the deference owed to sentencing judges' decisions:

> The reminder given by this Court about showing deference to a trial judge's exercise of discretion is readily understandable. First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed: *R. v. M.* (C.A.), [1996] 1 S.C.R. 500 (S.C.C.), at para. 91. Finally, as Doherty J.A. noted in *R. v. Ramage* (2010), 257 C.C.C. (3d) 261 (Ont. C.A.), the appropriate use of judicial resources is a consideration that must never be overlooked:
>
> > Appellate repetition of the exercise of judicial discretion by the trial judge, without any reason to think that the second effort will improve upon the results of the first, is a misuse of judicial resources. The exercise also delays the final resolution of the criminal process, without any countervailing benefit to the process. (Emphasis Added) [50]

41. Contrary to paragraphs 31 and 32 of the Factum of the Appellant, the advantage of hearing witness testimony is but part of one of the factors underlying

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[49] *R. v. Suter*, 2018 SCC 34 at paras 23-25, Respondent's Authorities, Tab 1
[50] *R. v. Lacasse*, 2015 SCC 64 at para 48, Book of Authorities of the Appellant, Tab 8.

> the deferential standard. The remaining factors apply in the circumstances in this appeal. For example, the sentencing Judge had ample experience dealing with fisheries offences in the community, and specifically the halibut fishery, as is evidenced by the following exchange:
>
> > Mr. MACDONALD: … I'm not sure if Your Honour has ever seen a halibut
> > THE COURT: I have … I know lots of about [sic] halibut, don't I, Mr. MacMillan?
> > MR. MACDONALD: Okay. Good. Good. Yeah.
> > THE COURT: Mr. McMillan and I had quite a halibut trial.[51]
>
> 42. Similarly, in the decision on appeal, the sentence Judge stated: "… I have heard from other fishers over the years about the need for compliance in terms of conditions and conservation of stock and the whole like."[52]

Analysis:

[8] It is useful to start by examining the alleged mitigating circumstances relied upon by the Respondent (Factum paragraph 32 a – g):

[9] The Respondent maintains that his failure to fill out his logbook was [32(a)] due to negligence; [32(c)] that he had no nefarious purpose and was not attempting to circumvent the quota systems; [32(d)] that his best efforts to make an accurate estimate were impeded by the variation in size and unprecedented quantity of the May 29 catch with resulting fatigue.

[10] In the particular circumstances of this case, those assertions are simply not credible. Assuming that the hails for May 26 – 28 were accurate, there were 10,000 lbs of halibut aboard the Vessel as of midnight May 28. May 29 was the last day

[51] Appeal Book, Tab 6 – Transcript, p 78, lns 1-9
[52] Appeal Book, Tab 3 – Oral Decision Under Appeal, p 9, lns 4-7

the Respondent caught fish. The evidence is clear that there were 33,000 lbs of halibut on the vessel as of May 30. The Respondent was therefore claiming to have caught 23,000 lbs of halibut on May 29. Yet the Respondent attempted to hail for only 10,000 lbs. He also recorded 10,000 lbs in his personal notebook. Presumably, he would have entered 10,000 lbs in his log if he had gotten around to making the requisite entry in it.

[11] The Respondent is an experienced captain. It is not believable that he would honestly believe he had caught 10,000 lbs when in fact he had caught 23,000 lbs. The hailing system and the log entry requirement are premised on the ability of fishers to make reasonable estimates of their catch. The Respondent would have been very aware that he had caught substantially more than 10,000 lbs of halibut on May 29. His estimate of 10,000 lbs (less than one half of what he actually caught) was a very long way from being reasonable.

[12] As well, the Respondent told the Fisheries Officers on May 30 that he had about 20,000 lbs aboard. For the reasonableness of that estimate he relies upon Fishery Officer Cole's estimate of 20,000 to 25,000 lbs [32(e)]. That argument deserves no weight. As Appellant's Counsel pointed out during the hearing before me, Officer Cole would not be in a position to make an accurate estimate of the size

of the catch. The catch would be iced and packed in pens by the time Officer Cole had peered into the hold.

[13] On the other hand, the Respondent and his crew would be very aware of the carrying capacity of the vessel. When the catch was eventually off loaded, the dressed weight of the catch was 26,699 lbs. But the Respondent knew that the reporting conditions required the recorded amounts to be in whole weights. The Respondent knew that the weight he had to hail and to log was close to 33,000 lbs. (See Appeal Book pp. 49-51).

[14] The Respondent and his crew would also have a first-hand appreciation of the number and size of the halibut as they were put down in the hold and iced. The variation in the size of individual halibut would present no difficulty for experienced fishers. They would have no difficulty estimating the weight of a fifty pound fish or a two hundred pound fish. Variation in the size of the fish affords no excuse for an excessively and transparently low estimate of the amount caught. To repeat, no matter how busy he was, it is inconceivable that the Respondent would catch 23,000 lbs of halibut on May 29 and reasonably estimate that he caught only 10,000 lbs.

[15] The Respondent claims that the May 29 catch was overwhelming, "that they caught more halibut than he has ever seen in any catch in the past." (Appeal Bk. P.77). There is reason to be skeptical about that claim. It does not appear that he

made any such statement to the Fisheries Officers on May 30. At that time, what he did say was, "… I was going to get to it … get to it today after we were closer to home." The Crown made no reference to the alleged overwhelming catch in his submission. It appears to have come up for the first time during the submission of the Respondent's Counsel. (Appeal Bk. Pp. 76-77). Unfortunately, there was no comprehensive agreed statement of facts tendered. That enabled the Respondent through counsel to put forward an excuse that could not be challenged.

[16] The overwhelming catch contention has the appearance of a made-up-after-the-fact story. The Respondent was caught. He could not change what he had hailed for the 26th to the 28th (10,000 lbs). He knew that he had a lot more than 20,000 lbs aboard on May 30. As previously noted, he had caught 33,000 lbs. He had caught almost 40% more than he had estimated. He needed an explanation.

[17] In the absence of an agreed statement of facts and the lack of a challenge by Crown Counsel, the Court would have to give the Respondent the benefit of the doubt on the May 29 huge catch issue. The fact of the huge catch is no excuse for the Respondent's failure to record the May 29 catch in his log. There is no plausible mitigation of the offence charged. The Respondent found time to send the hail late on the 29th. He was not too fatigued to make an entry in his personal notebook. The Respondent took his turn on watch during the night of the 29th – 30th. He had lots of

time to think about the log entry that he knew he was required to make by midnight on the 29th. Yet, by the afternoon of the 30th, the Respondent still had not made the required entry. Considering his background and his prior conviction in 2014, the Respondent's statement to the Fisheries Officers that he was going to make the entry when he got closer to home is astounding. At a minimum, it demonstrates a cavalier and dismissive attitude toward the conditions of his licence.

[18] This is a captain who had been convicted of the very same offence just three years earlier. He had been fined $3,500.00 and forfeited a portion of his catch. It is beyond belief that such a person would forget or be too tired to make a simple but essential log entry. The Respondent, more than most, would know that the log entry was vital to his claim of having a legal halibut catch.

[19] The Respondent argues in paragraph 32(f) that forfeiture of the catch would cause the crew to suffer. In this case, there was only one innocent crew member. The other had pleaded guilty to filleting halibut without the Respondent's knowledge. It is unfortunate that the innocent will suffer a financial loss. That consequence is trumped by the need to rigorously enforce the regulation of the halibut fishery. The Respondent will get to keep almost $100,000.00 worth of his catch. Should he wish to do so, he will have the ability to mitigate the monetary loss of his innocent crew member.

[20] In paragraph 32(g), the Respondent argues that he has already lost $25,000.00 to $50,000.00 by losing the opportunity to sell his catch on the U.S. market (Appeal Bk. p.84). There is no evidence to support this claim. Taken at face value, however, it merits no weight. It was the Respondent's illegal activity that triggered the seizure of his catch. His alleged losses are both speculative and self-inflicted.

[21] As well, Respondent's counsel made the following submission at page 86 of the transcript:

> And the other thing that's important to know, Your Honour, and I think my friend would acknowledge this, is that at the dockside when the fish were unloaded, there's always a dockside monitor, and so the amount of fish over the hail would have been known. So, in other words, it's not a situation where you think you're going to arrive at the dock and so-called get away with it because the dockside monitor is going to count up the fish. And they count every offload, as I understand it.

[22] This argument can be dismissed out of hand. I agree with the Crown's submission that dockside monitoring is not fool proof. It is very susceptible to being circumvented. Dockside monitoring does not address the many opportunities to cheat between the time the fish are caught and the time when the dockside monitor gets to see them. Off-loading to another vessel, or landing briefly in an unmonitored location are two examples of possible bypassing of the monitor.

[23] The lucrative nature of the industry is an attractive incentive to risk breach of licence conditions, such as under reporting and failing to accurately record and hail-in catch weights. That in turn allows for opportunity to dispose of the illegal portion

of the catch away from the prying eyes of the monitor. The Crown's position set out in paragraphs 68-72 of its factum is instructive:

> 68. & 69. *R. v. H&H Fisheries Limited,* 2014 NSPC 61 brings home the fallibility of the dockside monitoring program. In that case, the Court considered facts that demonstrated the ability of commercial halibut fishers to circumvent dockside monitoring measures and quota allowances. On a total of 67 occasions, the company purchased and possessed quantities of halibut landed by four licensed commercial ground fishers which were not offloaded and verified in the presence of a DFO designated "Dockside Monitor" nor recorded and reported to DFO in the commercial fishers' log as was required by the fishers' *Commercial Groundfish License Conditions*.
>
> > [16] In each instance, some of the commercial ground fishers' halibut catch was offloaded and verified by the DFO designated "*Dockside Monitor*" as required by the License Conditions. That portion of the commercial ground fishers' halibut catch was properly recorded in the "*Fixed Gear Monitoring Document"* and then reported to DFO. The properly reported halibut catch was then sold to H & H Fisheries Limited, which had a representative present at the time of the off-load by the commercial fisher, and that representative of H & H Fisheries Limited also "signed off" on the accuracy of the halibut catch reported to DFO in the same "*Fixed Gear Monitoring Document".*
> >
> > [17] However, as a result of DFO's investigation, it was also determined and the evidence established that, in each of the 67 transactions which contravened the *Fisheries Act* and Regulations, the four licensed ground fishers who were involved in this investigation also offloaded and sold an additional quantity of halibut, which had not been offloaded in the presence of or verified by the DFO designated "*Dockside Monitor*' nor recorded by the applicable "*Commercial Groundfish License Conditions*". ….. (See also: para 54 recap)

> 70. The sentencing judge provided valuable insight into the ingenuity and lengths to which commercial fishers and purchasers will go to pursue their personal financial goals to the detriment of present and future fisheries and the generations to come. The decision contains a compendium of fisheries cases which all echo the important message of deterrence. (*H&H Fisheries Limited*, paras 40-42)
>
> 71. *H&H Fisheries Limited* is but one case that demonstrates the limited weight that should be attached to an argument for leniency based on a 100% monitoring program in a quota based commercial fishery. It also highlights the need for general deterrence.
>
> 72. Unfortunately no program designed to protect the fishery is immune from those who choose, deliberately or negligently, to breach the privileges that a fishery license grants. (See also: *R. v. Wilcox, Glace Bay Fisheries et al.*, 2001 NSCA 45 (CanLII); *R. v. Frampton*, 2010 CanLII 4224 (NL PC); *R. v. Payne*, 2014 CanLII 7175 (NL PC); *R. v. Henneberry (sub nom Ivy Fisheries)*, 2009 NSCA 112 (CanLII))

[24] In paragraph 32(a), Counsel makes the following submission: "Mr. Henneberry took responsibility for his actions by pleading guilty and acknowledged that his failure to fill out the logbook was negligent." I have already outlined the specious nature of the Respondent's negligence claim. His acceptance of responsibility is therefore very diluted. Accordingly, his guilty plea is worthy of some consideration but not much.

[25] At the sentencing hearing, the Respondent argued that his failure to make the logbook entry was "… essentially an accounting type breach" (Appeal Bk. p.84, line 18). With respect, that is a mischaracterization of the offence charged.

[26] The Respondent pleaded guilty to failing "… to comply with a condition of his licence to fish halibut, to wit, did fail to maintain a true and up to date record of his fishing activities and all catch…". That is not a mere administrative or accounting detail. It is a "condition" of his licence. Failure to comply with that condition means that any halibut caught and not recorded were illegally caught.

[27] For the reasons I have already outlined, the Respondent's failure to make the required logbook entry was a flagrant breach of a fundamental condition of his licence. He knew what he had to do and when he had to do it. It was not oversight or forgetfulness; his stated intention was to do it when he "… got closer to home."

[28] Accordingly, I completely agree with the Appellant's submissions in paragraphs 58 to 63 of its brief:

> 58. The breach of license condition, based on all the facts on the record, was more than a minor or technical breach. To say that he was fishing legally is mistaken. As captain, he failed to comply with the only authority that permitted him to engage in the halibut fishery.
>
> 59. In *R. v. Tarkanen and Tarkanen*, 2018 BCPC 214 the sentencing court was dealing with breaches of a crab fishing license including failure to report catches. The judge recognized the importance for accurate records assessing impacts to

conservation and sustainable use (para. 16). After a detailed review of the facts and law, he stated:

> [77] Failure to provide or delay in providing harvest logs or fish slips should not be considered a mere technical or administrative offence. The data provided by these documents is crucial to the ability of DFO to properly manage the fisheries for the benefit of all Canadians.

60. Similarly, in *R. v. McKinnell Fishing Ltd*., 2016 BCPC 466 (CanLII), the court was considering breaches of a commercial crab license including failure to hail and maintain complete and accurate harvest logs.

> [44] The value of this resource to British Columbians, coupled with the decline in the crab harvest, serves to underscore the importance of resource management. *There may have been a time in the distant past when a mind of a practical bent might have wondered about the futility of the finer points of fisheries laws. In the present day, there is no room for such complacency. In a world in which resource sustainability is strained, not just by demand but by the environment itself, the value of regulatory compliance cannot be overstated.*
>
> [45] As the Crown notes in its submissions, the nature of the crab fishery is such that catch is the only indication of abundance. This fact mandates that the crab fishery occur in a highly regulated environment, and it is only when everyone complies with the regulations and licencing requirements that we can ensure a sustainable fishery for the benefit and enjoyment of all and that includes the defendant herein.
>
> [46] *Seen in this light, while the defendant's transgressions may, to, have seemed innocuous, they clearly are not. The failure to comply with its licence and regulations has the potential to contribute to a failure of this fishery, particularly if all fishers were of the same view.* It is for this reason, clearly, that virtually all of the case law before me in this sentencing emphasizes the importance of the sentencing objectives of specific and general deterrence in regard to these regulatory offences.
>
> *(Emphasis added)*

61. During the respondent's sentencing hearing, a DFO impact statement was tendered by the Crown. It described halibut as an "extremely valuable species for ground fish license holders". (Appellant's factum: tab 5 - Fisheries and Oceans Canada Impact Statement)

62. The statement considered the depletion of the halibut fishery from overfishing, the effect of non-compliance with license conditions and the rebuilding of the stock through careful conservation measures including quota limits to reduce mortality and protect the long term viability of the stock and the industry.

> …..
>
> Unreported catch of Atlantic Halibut will lead to a higher total fishing mortality than is believed to be sustainable, undermining the Harvest Strategy which has allowed the stock to rebuild. Under-reported catch leads to overfishing and increases the risk to this stock for the long term.
>
> Illegal retention of fish, misreporting, and failure to report catch have major consequences for the sustainability of fish stocks, the integrity of the management and monitoring systems, and the economics of the fishery. Ultimately, honest licence holders suffer negative financial consequences through lower quotas, more conservative by-catch limits, and higher costs of doing business. All Canadians pay higher management, enforcement, and legal costs for the damage done to a common property resource and to the marine ecosystem. It is also important to note that when licence holders have been successful at circumventing the rules and there are little consequences to their actions, other licence holders observe the outcomes. If illegal fishing practices go unchecked, the potential for other licence holders to advance in this direction increases, placing the stock and ecosystem at a higher risk.
>
> Additionally, misreporting impacts the processes used to establish catch limits and the management regime which ensures those limits are respected.
> ……
>
> 63. In keeping with the comments in *McKinnell Fishing Ltd*., accurate catch records are the only indicator in the commercial halibut fishery of the species abundance (or not) and affect the setting of quota allocations to support sustainability. The DFO impact statement that was before the sentencing Judge in this matter stressed that point.

The Sentencing Judge's Decision

[29] After hearing the submissions of Counsel, the Judge took a half-hour break. She then delivered an oral decision beginning with the following summary of the core facts:

> The facts here are that Mr. Henneberry, you, when the Fisheries Officer boarded your vessel on May 30th at about noon time, had not entered any information for your catch from May 29th in your logbook. It's my understanding that you were the captain of this vessel and you were, at this time I think it was noon, you were

> halfway through the next day, so to speak, without any entry. It has been determined that your overture catch was some 13,000 pounds of halibut.

[30] The Judge continued with reference to appropriate caselaw [eg. *R. v MacKinnon* 154 NSR (2d) 217] and the need for specific and general deterrence. She also quoted the DFO impact letter followed by an acknowledgement of the respective positions of the parties. She noted the fact that the offence was one of strict liability. Her Honour continued:

> There has been a plea of guilty. Mr. Henneberry was subject to these licence conditions. Such conditions are not grey and they are clear on their face, including the need to keep that accurate and timely log daily. (Appeal Bk. p.82).

[31] The Judge then noted the Respondent's 2014 conviction. During submissions, she had remarked that it weighed heavily on her. The Judge continued:

> Determining the appropriate sentence in this type of case and this one in particular, given the values involved here, is no easy task. The Court has to weigh the need for specific and general deterrence with the factual underpinnings of this case as it relates to these particular set of facts and this offender.

[32] Her Honor concluded:

> … We're not talking about penalties here or sentencing for anything other than the failure to report in your daily log but you understand that all the conditions of your licence, at the end of the day, falls on you.
>
> In the case of Mr. Henneberry that is before the Court, I am ordering the forfeiture of the catch in the amount of $20,000 and a fine, with no costs, kind of silly, of $10,000 so that is, I believe, weighing all of the requirements here in sentencing, the need for deterrence, specific and general, the situation you found yourself in that day with this payload of fish really. I can appreciate the situation you were in, however, it was also avoidable by doing your daily log and that onus was on you

> and there has to be a significant penalty, as the Crown says, to bring that home to you, the general public, and a big part of that being other fishermen.

Conclusion:

[33] As I noted earlier, Respondent's Counsel has set out the appropriate Standard of Review. I am very aware that sentencing judges have a wide discretion and that their decisions are entitled to appropriate deference. Here the sentencing judge did not hear evidence but heard submissions from Counsel. In that sense she was in no better position than I am to analyze and assess the presented facts.

[34] I am mindful that this is an experienced and capable judge who has dealt with many fisheries cases. I must conclude that the sentence under appeal is "demonstrably unfit" before I can vary it. The Appellant therefore shoulders a very heavy burden.

[35] With great respect for the Provincial Court Judge, I am satisfied that the Crown has discharged that burden. I am satisfied that the Learned Judge properly instructed herself on the applicable law and, in particular, on the need for both specific and general deterrence in such cases. I am not satisfied that she adequately applied those principles to the factual situation presented to her.

[36] Specifically, she appears to have minimized the significance of the Respondent's failure to make the required logbook entry. I recognize that she did

comment during submissions that "… the log is one of the most important things" (Appeal Bk. p.91). However, that comment seems to be somewhat offset by the following remark in her decision: "We're not talking about penalties here or sentencing for anything other than the failure to report in your daily log …" (Appeal Bk. p.101).

[37] To be fair, the sentencing judge may merely have been making it clear that she was not sentencing the Respondent for his failure to hail despite his reasonable efforts to do so. That count had been dropped by the Crown subject to the agreement that it could be considered as an aggravating factor insofar as it was inaccurate (20,000 lbs instead of 33,000 lbs).

[38] An overview of the decision, however, leaves the impression that the judge accepted the accounting error/simple negligence argument advanced on the Respondent's behalf. Near the end of her decision, she remarked "… the situation you found yourself in that day with this payload of fish really. I can appreciate the situation you were in …" (Appeal Bk. p.101). I have already outlined why the Court should have been very reluctant to give any credence to the accounting error/negligence argument.

[39] In his submission to the sentencing judge, Respondent's Counsel had argued:

> "So I submit there's nothing illegal about the catch… if they had fished them illegally, is they had caught them illegally, I submit there would be a much stronger case for a much stronger penalty. These were not caught illegally. These were not properly accounted for."

[40] That is an argument that invites a strong rebuttal. As I noted earlier, the catch is not legal unless it is properly recorded. The recording requirement is a fundamental condition of the licence to catch halibut. Any halibut caught but not "properly accounted for" are illegally caught. It is an illegal catch. Fishers have to understand that the Court will not treat the failure to make a log entry as a mere lapse in accounting.

[41] The foregoing deserves extended emphasis. A fisher who does not comply with the conditions of his/her licence is effectively unlicenced. He/she is not fishing legally. There is no wiggle room in the conditions; you are either in compliance or you are not. If you are not, as a minimum, the unrecorded portion of your catch is illegal and subject to forfeiture.

[42] As well, the Judge appears to have acknowledged only one of the Respondent's four previous convictions. They had been particularized by the Crown:

> (i) 2010 failure to hail out (fine $2,500); (ii) 2014 -possession of 24 undersized halibut (fine $12,000); (iii) failure to complete the log book ($3,000); (iv) using cod as bait ($3,500);
>
> In 2014, he already had been given the benefit of a partial forfeiture order for seized catch in the amount of $22,217.25. (Crown's Factum para. 83 p. 22)

[43] Respondent's Counsel argued that in 2014 the partial forfeiture pertained to the seized undersized halibut. There was no such aggravating factor here. With respect, that argument is of no assistance to the Respondent, he had now failed to record almost 40 percent of his halibut catch (33,000 lbs with 13,000 lbs under reported). The total value of the catch was $178,092.35. Of that amount, the Crown had sought forfeiture of only the unrecorded amount, the 13,000 lbs or $69,376.33.

[44] The Learned Judge did not give reasons why she further reduced the partial forfeiture which the Crown had sought. The Crown had acknowledged that discretionary forfeiture pursuant to Section 72(1) of the Fisheries Act was applicable to the Respondent's catch. Section 72(1) reads:

> 72. (1) Where a person is convicted of an offence under this Act, the court **may**, in addition to any punishment imposed, **order that anything 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. (Emphasis added)

[45] The sentencing judge was well aware that the Crown was seeking forfeiture only of the amount the Respondent had not recorded. She did not articulate any rationale for reducing that amount by $50,000. It is therefore difficult to discern the basis upon which she exercised her discretion.

[46] It is worth remembering that when the Fisheries Officers boarded his vessel on May 30, the Respondent was showing only 10,000 lbs recorded in his log. The

Crown could have taken the position that at that point the excess catch was 23,000 lbs and requested forfeiture accordingly. Instead, the Crown quite fairly agreed to use the total amount in the attempted hail, 20,000 lbs, and sought forfeiture of 13,000 lbs or $69,376.33. The Respondent had therefore already realized a significant benefit. There is nothing on the record of this proceeding to justify a further reduction of the partial forfeiture.

[47] Given the Respondent's record and the circumstances of this offence, he was not a worthy candidate for any leniency. The sentencing Judge levied a total penalty of $30,000.00 ($10,000.00 fine plus $20,000.00 forfeiture). He was thus able to keep almost $40,000.00 for fish he was not entitled to have. To paraphrase Crown counsel, the Respondent got to keep over half the "loot".

[48] With great respect, there is no deterrence, specific or general, in that sentence. As such, the Judge's sentence is demonstrably unfit. It sends the wrong message to both the Respondent and others involved in a lucrative but threatened fishery. The sentence tacitly discounts the importance of conservation and protection of the halibut fishery. The sentence rewarded the conduct of a repeat offender to the detriment of honest fishers. As the Appellant argued:

> 90. The constellation of aggravating circumstances called for a strong judicial message of general and specific deterrence through forfeiture of the entire proceeds from the under reported catch ($69,376.33).

[49] I agree. Accordingly, I would vary the sentence and order forfeiture of $69,376.33 of the $178,000 total catch, in addition to the $10,000.00 fine.

Edwards, J.