

**CANADA
PROVINCE OF NOVA SCOTIA**

**Docket Number: 2065092
Registry: Port Hawkesbury**

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Boyd, 2010 NSPC 5

Her Majesty the Queen

Informant

v.

Robert Francis Boyd

Accused

DECISION

Judge: The Honourable Judge Theodore K. Tax

Date Heard: January 12, 2010, Port Hood, Nova Scotia

Final Written Submissions: January 18, 2010 - Defence
January 22, 2010 - Crown

Oral Decision: February 1, 2010, Port Hawkesbury, Nova Scotia

Counsel: Wayne J. MacMillan, Esq. for the Crown
Christopher Boyd, Esq. for the Defence

INTRODUCTION:

[1] The Crown alleges that, on or about May 2, 2009, Mr. Robert Boyd did unlawfully fish for crab in Crab Fishing Area 12, during a closed time contrary to section 52(a) of the *Atlantic Fishery Regulations*, 1985, SOR/86 – 21, and the applicable variation order, thereby committing an offence under section 78 of the *Fisheries Act*, R.S.C. 1985, chapter F – 14.

[2] The Crown's evidence established and the Defence admitted that 39 of Mr. Boyd's crab traps had been placed within a "buffer zone" of one nautical mile in Crab Fishing Area 12 (CFA 12) which area was closed for fishing on May 2, 2009. Defence evidence established that the computerized electronic plotter of their fishing vessel "Second Wind 03" had previously experienced some problems, and just before setting their crab traps, the plotter lost the marks and lines for the "buffer zone." Mr. Mark Boyd, who had been placed in charge of the fishing vessel by Mr. Robert Boyd, then inadvertently entered the wrong coordinates for the "buffer zone" and as a result, they set 39 of their crab traps inside the closed "buffer zone."

[3] The next morning (May 3, 2009), while en route back to CFA 12 to set the final 15 crab traps of their 75 trap licence, Robert Boyd discovered the "mistake" in the electronic chart plotter and realized that 39 traps had been inadvertently placed inside the "buffer zone." Robert Boyd immediately contacted the Department of Fisheries and Oceans ["DFO"] (Canada). The DFO Fishery Officer told Robert Boyd to wait at his current position until she arrived there and gave

him further instructions. The DFO Fishery Officer then instructed Robert Boyd to haul up the traps that had been placed in the “buffer zone,” release the crab found in those traps and move the traps into CFA 12. Mr. Robert Boyd fully complied with the directions of the DFO Officer.

[4] The Crown and Defence both acknowledge that the charge before the court is one of strict liability. The Defence has admitted that the *actus reus* of the offence was established by the Crown, so the question to determine is whether Mr. Robert Boyd established that he exercised all due diligence to prevent the commission of the offence or that he reasonably and honestly believed in the existence of facts that, if true, would render his conduct innocent.

THE FACTS:

[5] The facts of this case are not in dispute.

(A) The Licence Conditions:

[6] Mr. Robert Boyd received a 2009 crab fishing licence on April 29, 2009 and the terms and conditions of that licence allowed him to place 75 crab traps in CFA 12. The conditions of the 2009 fishing licence for snow crab also contained a map with the coordinates of the latitude and longitude identified and lines having been drawn to indicate where there was a delayed season opening for a portion of CFA12 (the “buffer zone”).

[7] On May 1, 2009, a Variation Order No. 2009-032 was issued by the Regional Director General of the Department of Fisheries and Oceans (Canada) which also established the reference points for the “buffer zone” in CFA 12 by North Latitude and West Longitude. That Variation Order closed a one nautical mile area within CFA 12 known as the “12/19 buffer” zone to crab fishing until June 1, 2009. The variation order was broadcast over the Halifax and Sydney Marine Radio Stations at various times on May 1 and 2, 2009 by DFO to alert fishers holding crab licenses of this closed zone. The Marine Radio broadcasts also advised licensed crab fishers that fishing season in the other parts of CFA 12 would open on May 2, 2009 at 18:00 hrs. [ADT].

(B) Robert Boyd Sets his Crab Traps on May 2, 2009:

[8] Both Robert and Mark Boyd are very experienced commercial fishers, who have had individual fishing licenses for snow crab for four years and seven years respectively. They have both held other fishing licences prior to obtaining their own snow crab licences and before that, they each had more than 15 years of fishing experience with their father, Daniel Boyd, who owns 80% of the shares in the company, M.B. Fisheries which actually owns the fishing vessel “Second Wind 03.” Mark and Robert Boyd each own 10% of the shares in the company and are paid a salary to conduct the fishing activities under their individual licences. Proceeds from sale of their catch are retained by the company and net profits are distributed to the shareholders of the company.

[9] In late April, 2009, Robert put his fishing vessel in the water near his home

in Antigonish, Nova Scotia and ran checks of the safety equipment, the engine and the electronic equipment. While Mark and Robert Boyd were en route to Cheticamp for the start of the 2009 crab fishing season in CFA 12, there were problems with their computerized electronic chart plotter. The electronic plotter “froze” and had to be turned off and restarted. Once the computer was restarted, Mark checked to see that the key coordinates that he and Robert had entered into the computer for 2009 fishing season for CFA 12 returned to the screen. Notwithstanding the fact that the information had returned to the screen, upon arrival in Cheticamp, they had a technician service the computer.

[10] When Robert and Mark left Cheticamp, Nova Scotia on May 2, 2009 to set their traps, both of them were well aware that the one nautical mile “buffer zone” in CFA 12 was temporarily closed until June 1, 2009. From their previous experience in the area, they knew that the ocean floor in CFA 12 close to the “buffer zone” presented ideal crab fishing conditions. Mark and Robert Boyd were also well aware of the importance of setting their traps outside the “buffer zone,” however, they still decided that they would set their traps in close proximity to “buffer zone.” Their plan was to set their traps between 1/3 to 1/2 mile from the edge of the “buffer zone.”

[11] At about 6:00 PM on May 2, 2009, shortly after the start of the 2009 crab fishing season, Robert Boyd left Cheticamp for CFA 12 in order to set 60 of his 75 crab traps. His fishing vessel, the “Second Wind 03” was captained by his brother, Mark Boyd. As a result of how they decided to divide their duties, it was Mark’s responsibility, as the navigator, to determine where they would set the 60 crab

traps that they planned to drop that evening. It was Mark and Robert's practice to only place one line representing the outside edge of the "buffer zone" on their plotter.

[12] About an hour before they reached CFA 12 on May 2, 2009, Mark noticed an error message and that the electronic plotter has "frozen." When Mark restarted the computer, the lines and marks that had previously been inserted to outline the "buffer zone" were not on the screen. Since Mark and Robert had previously saved information about all of their crab fishing operations in their computer files, Mark opened up a file and entered the coordinates for the closed area from that file into the electronic plotter. Mark believed, at the time, that the file he had opened and the data that he entered into the plotter was from a file entitled "crab fishing – 2009." At the time that this computer malfunction occurred, Robert was at the back of the fishing vessel with the two crew members who had been hired to assist him for that trip, getting the crab traps baited and the coils ready to be dropped into the water.

[13] Around 8:30 to 9:00 PM on May 2, 2009, Mark Boyd navigated the fishing vessel into a position which according to the data that he had entered on the electronic plotter was one third of the mile outside the line that he had drawn on the plotter for the edge of the "buffer zone." It was already getting dark when Robert and the two crew members assisting him began to set the 39 traps along that first line. Thereafter, Mark went out another half mile and Robert set the remaining traps along that line. At the time that the traps were set, they were the only fishing vessel from Cheticamp, Nova Scotia in the area, with the 6 or 7 other fishing

vessels in the area being from the Magdalen Islands.

[14] As each crab trap was set, Mark entered a mark on the electronic plotter to establish the position of the trap. There were no further problems with the plotter and it worked well, saving all of the information that Mark had entered into the system. After the traps were set, Mark fixed a course on the electronic plotter and the “Second Wind 03” returned to port at Cheticamp, Nova Scotia around 2:00 AM.

(C)Robert Boyd Realizes a “Major Problem” exists on May 3, 2009:

[15] In the early morning hours of May 3, 2009, Mark and Robert Boyd and their crew loaded the last 15 traps on their fishing vessel and left port for CFA 12 between 7:00 and 8:00 AM. At this time, Robert joined Mark in the cabin and during their conversation, Mark told Robert about the computer freezing and having to be restarted just before the traps were set, during the previous evening. They both decided to check the marks for where their traps had been set and the location of the “buffer zone” on the plotter. Robert entered the coordinates for the “buffer zone” on the electronic plotter and he immediately realized that they had set the first 39 traps inside the buffer zone.

[16] After confirming the coordinates and plotting the “buffer zone” for CFA 12, both Mark and Robert realized that when the computer had “frozen” the previous evening, Mark had probably opened the “wrong file” and inadvertently entered coordinates that did not have “buffer zone” charted for the beginning of the 2009

crab fishing season. When Robert retrieved the “right file,” he knew that they had a “major problem,” which Robert Boyd acknowledged in court and in his statement to DFO, was occasioned by a “stupid mistake.” For his part, Mark Boyd agreed, on cross examination, that when the computer “froze” and the “buffer zone” lines did not come up, he “should have checked” the coordinates to establish the lines. He also acknowledged that it would have only taken one minute to plot the coordinates and draw the “buffer zone” lines.

[17] After realizing what had happened, Robert immediately called DFO and spoke to Fishery Officer, Ms. Elena Rousselle and asked her what he should do in this situation. Fishery Officer Rousselle said she would speak with her supervisor, but in the meantime, she instructed Robert to wait until the CCGS Point Caveau arrived at their location.

[18] The CCGS Point Caveau arrived within 30 to 45 minutes of Robert Boyd’s telephone call. Once the CCGS Point Caveau was alongside, Fishery Officer Rousselle instructed Robert to haul up their gear, to dump the crab that were in the traps and then to move the traps into CFA12. Robert and Mark Boyd were cooperative and fully complied with the directions that had been given by the DFO Fishery Officer. Hauling up their traps, dumping the crab and moving the traps into CFA 12 under the direction of DFO officers took most of the day. Once that work was done, Mark and Robert Boyd were able to set the last 15 traps of their 75 trap allocation.

[19] As Mark and Robert Boyd hauled up their crab traps, the location of each

trap was charted by Capt. Joseph Bray of the CCGS Point Caveau. He testified that all but one of the 39 traps placed by Mark and Robert Boyd were “significantly inside the buffer zone.” Capt. Bray noted that one trap was 1800 feet inside the “buffer zone” with the large majority of the 39 traps being between 800 to 1000 feet inside the buffer zone of CFA 12. Capt. Bray located each of the traps by using electronic charts and plotters which utilize the technology of global positioning satellites (GPS). He said that GPS accuracy is excellent, and that the actual location of a point on the plotter is within 15 m or 50 feet of where it is indicated on the screen.

[20] On May 6, 2009, Robert Boyd made a voluntary statement to Fishery Officer Rousselle in which he provided the same information as he did during his testimony at this trial. The charge before the court was laid in an Information sworn by Officer Rousselle on July 7, 2009.

**GENERAL PRINCIPLES - STRICT LIABILITY & DUE DILIGENCE
DEFENCE:**

[21] Both counsel acknowledge that the charge before the court is a strict liability offence. As such, if the Crown has proved the *actus reus* beyond a reasonable doubt, then a *prima facie* case is established by the Crown, but it is open to the Defence to avoid liability, by proving on a balance of probabilities, that the accused had exercised due diligence.

[22] The classic statement of the principles of law applicable to strict liability

offences and the due diligence defence is found in the Supreme Court of Canada decision in the case of **R. v. Sault Ste. Marie (City)**, [1978] 2 SCR 1299, where Justice Dickson (as he then was) said at p. 1326:

“Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may be properly called offences of strict liability.”
(Emphasis is mine)

[23] In **R. v. Chapin**, [1979] 2 SCR 121, Mr. Justice Dickson provided some further clarification on the due diligence defence. Dickson J. stated at p.134:

“An accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all of the circumstances or, in other words that he was in no way negligent.” (Emphasis is mine)

[24] In section 78.6 of the *Fisheries Act* R.S.C. 1985, c. F-14, Parliament has essentially codified the common-law defence of exercising due diligence. Section 78.6 of the *Fisheries Act* provides that:

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

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

[25] In **R. v. D’Entremont**, 1994 CanLii 4497 (NSSC), Justice Haliburton held that the due diligence defence established in the **Sault Ste. Marie** case and the provisions of section 78.6 of the *Fisheries Act* were “nothing but a recognition and

codification” of the common law defence. At page 4 of his decision, he went on to say that:

“An Accused will be excused and avoid conviction if he can establish by credible evidence that he either exercised “due diligence” to avoid or, alternatively, that he “reasonably and honestly” believed in certain facts.

The two prongs of the defence are not entirely independent but are intermingled. There is a certain onus on the Accused, and he can avoid liability only if he satisfies the Trial Judge as to his honesty or credibility, and then as to the “reasonableness” of his belief.”

ANALYSIS:

Did the Accused Exercise Due Diligence Prior to Setting his Traps on May 2, 2009?

[26] On this point, Defence counsel submitted that it was not Robert Boyd who inadvertently positioned the fishing vessel “Second Wind 03” inside the buffer zone, and that Robert Boyd had acted reasonably in relying on Mark Boyd’s experience as a navigator. While the Information alleged that Robert Boyd had unlawfully fished in CFA 12 during a closed time, the Defence says that it was actually Mark Boyd who decided where to set the traps on May 2, 2009. Defence counsel submits that the Crown either named the wrong individual in the Information or Robert Boyd established a due diligence defence by relying on the more extensive navigational experience of his brother, Mark Boyd. The Defence refers to the decision of **R. v. Smith**, [1996] B.C.J. No. 2367 (BCSC) in support of his submissions on this point and relies upon the provisions of section 78.6 of the *Fisheries Act*.

[27] Having carefully reviewed the decision of Mr. Justice Cowan in **Smith**, *supra*, I have concluded that it can be distinguished from the facts present in this case. In **Smith**, the accused was an owner/operator of the fishing vessel who had hired an experienced deck-hand to assist him in setting gill nets. The deck-hand, for some reason, did not do what the accused had instructed him to do. In this case, however, I find that the facts disclosed that Robert and Mark Boyd operated their individual fishing licenses as a joint venture and that Robert did not instruct Mark on how to perform his duties as the navigator and captain of the “Second Wind 03.” They decided how they would divide their tasks on the fishing vessel, and on May 2, 2009, they decided that Mark would navigate the fishing vessel and that Robert would help the crew set the crab traps.

[28] In addition, I find that this argument being advanced by the Defence does not take into account section 78.3 of the *Fisheries Act* which provides as follows:

“78.3 In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused.”

[29] Section 78.3 of the *Fisheries Act* was interpreted by Rowles J.A. in the case of **R. v. F.A.S Seafood Producers Ltd.**, [2000] B.C.J. No. 1625 (BCCA- in Chambers). In refusing to grant the accused’s application for leave to appeal, Rowles J.A. said at paragraphs 23 and 24:

“23 On its face, section 78.3 of the Act is simply a codification of the common-law rule that a principal is responsible for the actions of his agents, where those actions are within the proper scope of the agency, and

where there is no system or controls in place to prevent the offence from occurring.

24 The clause “unless the accused establishes that the offence was committed without the knowledge or consent of the accused” imports the reasonable care or “due diligence” defence to the liability of the principal for its agent.”

[30] I find that section 78.3 of the *Fisheries Act* is applicable in the facts and circumstances of this case. The evidence clearly disclosed that Robert Boyd consented to Mark Boyd navigating the fishing vessel “Second Wind 03” on the evening of May 2, 2009 and that, at that time, Mark Boyd’s actions were within the proper scope of the agency. Since they were engaged in this crab fishing activity as a joint venture, I find that they determined how they would share their workload. I find that Mark Boyd performed his duties on the evening of May 2, 2009 with the full knowledge and consent of Robert Boyd.

[31] Moreover, I conclude that Robert cannot now shield himself from responsibility by saying that Mark Boyd did something without his knowledge or consent. Mark performed the duties that he and Robert had agreed that he would perform that day, although Mark inadvertently made a “stupid mistake” by opening and entering the coordinates for the “buffer zone” from the “wrong file” after the electronic plotter “froze” and had to be restarted.

[32] Defence counsel maintained that Robert Boyd had a system in place to ensure compliance with the provisions of his crab fishing licence. Counsel submitted that Robert and Mark Boyd relied on the electronic plotter system which utilized GPS data, and although they had problems with their computer, they did run checks from time to time. Moreover, once they had the electronic plotter

serviced in Cheticamp just before leaving to set their traps, counsel maintained that neither Mark nor Robert Boyd had any reason to doubt the accuracy of the electronic plotter.

[33] I am not able to agree with these submissions being advanced by Defence counsel. Based upon the evidence at trial, while the computer had some temporary problems, I find that the “mistake” mentioned by both Robert and Mark Boyd was not due to a malfunction in the GPS technology or a computer hardware or software problem. I find that the GPS system worked well at all times and displayed the actual position of the “Second Wind 03” on the waters of CFA 12. The evidence was clear and I find that the “mistake” was caused by Mark Boyd negligently entering the “wrong file” coordinates for the CFA 12 “buffer zone” into the electronic plotter after the system “froze” about an hour before they set their first crab traps.

[34] Moreover, after the computer was restarted and the “buffer zone” line did not re-appear, I find that, given the problems that had previously been encountered with the electronic plotter, it would have been reasonable and prudent for Mark to have checked the coordinates on the screen against the coordinates contained in Robert Boyd’s fishing licence and the variation order. On cross examination, Mark Boyd acknowledged that he “should have checked” the licence conditions for the “buffer zone” coordinates in view of the problems that they had recently experienced with the plotter. I find that this evidence demonstrates that Robert Boyd did not have any backup system or controls in place to prevent the “mistake” made by Mark Boyd from occurring.

[35] I also find that the evidence clearly established that Robert and Mark Boyd both knew the importance of complying with the variation order. Mark Boyd acknowledged that it would have only taken him one minute to manually plot the four coordinates for the CFA 12 “buffer zone” and then draw the lines to actually verify the location of the “buffer zone.” This is further evidence, in my view, of the fact that Robert Boyd did not have any backup system or controls in place to ensure that the crab traps were set in CFA 12 and not in the closed “buffer zone.” The fact that Robert and Mark Boyd had decided to set their crab traps in close proximity to the CFA 12 “buffer zone” line, leads me to conclude that they had already planned to leave very little margin for error and that a reasonable precaution prior to setting their traps, would be to take steps to verify their location and the coordinates for the “buffer zone” line. This was not done.

[36] For all of the foregoing reasons, I conclude that Robert Boyd did not establish the necessary “due diligence” or reasonable care referred by Rowles J.A. in the **F.A.S. Seafood Producers Ltd.**, *supra*, to come within the exception to the common-law rule that the principal is responsible for the actions of his agents. I find that Mark Boyd was operating as the captain and navigator of the “Second Wind 03” with the full knowledge and consent of his brother, Robert Boyd. As such, I conclude that Robert Boyd, as the principal, is responsible for the actions of his agents or employees pursuant to section 78.3 of the *Fisheries Act*. From this evidence, I also find that Mark and Robert Boyd did not take all reasonable steps prior to setting their traps in the closed area.

Did the Accused Operate under a Reasonably and Honestly Held Mistaken Belief

of Facts Prior to Setting his Traps on May 2, 2009?

[37] In his closing submissions, Defence counsel also referred to the second part of the “due diligence” defence contained in section 78.6(b) of the *Fisheries Act* which provides that no person shall be convicted of an offence under the *Act* if that person establishes that they “reasonably and honestly believed in the existence of facts that, if true, would render the person’s conduct innocent.” Counsel cited the case of **R. v. Harris**, 1997 CanLii 990 (NSCA) as an authority in support of this submission.

[38] In the **Harris** case, the accused had established a “system,” which the Nova Scotia Court of Appeal described as being “obviously not a perfect method” for estimating the weight of the haddock catch and the by-catch. However, the trial judge accepted that “system” was reasonable in the circumstances and that the accused had instructed a crew member on the “system” which had always worked in the past. Although the accused had exceeded his quota for haddock, the trial judge found that the accused had established a due diligence defence under section 78.6 of the *Fisheries Act* because the haddock overrun was not due to the inaccuracy of the accused’s “system”, but rather, the failure of the crew member, on whom the accused relied, to carry out his instructions. The Court of Appeal ruled that the issue of whether the accused had acted reasonably was a question of fact for the trial judge and that the Summary Conviction Appeal Court judge had erred in law in concluding otherwise in the face of supporting evidence which had been believed by the trial judge.

[39] I have reviewed the **Harris** case, and I have concluded that it can be distinguished from the facts of this case. As I indicated above, I found that Mark and Robert Boyd relied on the electronic plotter system and GPS technology. There is no evidence of any other “system” having been put in place by Mark and Robert Boyd, nor any specific instruction having been provided by Robert to Mark Boyd. In fact, Robert Boyd acknowledged that Mark Boyd had more experience as a captain and with navigation, so he left it to him to determine the locations where they would set their crab traps. I have found that the “mistake” made in this case was not due to a computer malfunction or a problem with the GPS system, but rather, it was due to Mark Boyd’s error in entering the “wrong file” data into the plotter.

[40] While I agree with Defence counsel that it seems clear from the evidence at trial that Mark Boyd honestly held the belief that the “Second Wind 03” was outside of the CFA 12 “buffer zone” when the traps were set on May 2, 2009, then the issue for the Court to determine is the reasonableness of his belief.

[41] In his submissions, Defence counsel referred to **R. v. D’Entremont**, [1994] CanLii 4497 (NSSC), where Haliburton J. held that the two prongs of the section 78.6 *Fisheries Act* defence are “intermingled” and the accused can only avoid liability if the trial judge is satisfied as to the honesty or credibility and then the “reasonableness” of his belief. In the **D’Entremont** case, the trial judge accepted that the accused believed and relied on his Loran navigation equipment and that he also adopted a method to ensure that he was fishing in an area where he was entitled to fish. Moreover, the trial judge also found that the accused was using the

Loran system for the first time, that no reason had been advanced why the accused should not have assumed the accuracy of the machine, and that there had been no occurrence or incident to raise any question in his mind as to its accuracy. Defence counsel submitted that Robert Boyd had a system in place which relied on the accuracy of the plotter and that there was no reason to doubt the accuracy of the plotter as support for the reasonableness of Mark Boyd's belief.

[42] In his submissions, Crown counsel referred to **R. v. Kinghorne**, [2003] N.B.J. No. 358 (NBQB) at para. 60 and **R. v. Raymond**, 2006 NBPC 27 (CanLii) at paras. 29-31, which applied the criteria used by Haliburton J. in **R. v. D'Entremont** (1989), 93 N.S.R. (2nd) 245 (NSSC) to articulate the "intermingled" relationship between the two prongs of the "due diligence" defence. Mr. Justice Haliburton stated as follows at page 255:

"It is clear that the defence depends upon the accused satisfying the court on a balance of probabilities of at least three criteria:

1. He made a mistake of fact;
2. That the state of facts upon which he relied would, if valid, have rendered him innocent; and
3. That the holding of his belief resulted from circumstances which did not, in any way, arise from his own negligence.

He (the accused) cannot satisfy those criteria, or successfully exculpate himself by reliance on employees or others associated with him, except if he can establish that he had put in place a methodology of compliance and taken reasonable steps to ensure the effective operation of the method."

[43] The Crown also cited the case of **R. v. Rideout**, [2003] N.S.J. No. 100 (NSPC) in support of their submissions that Robert Boyd did not establish a due

diligence defence, and even if he had a genuine and honest mistaken belief that he was setting his traps in a permitted area, it could not be said that the mistaken belief was reasonable. In the **Rideout** case, Ross J. of this Court held that, although the description of the authorized fishing area was not as clear as it could be, Mr. Rideout was still responsible for taking reasonable steps to ascertain the boundaries of the open fishing area. The Court concluded that Mr. Rideout did not establish that he took all reasonable steps to avoid the commission of the offence because it would have been reasonable and prudent for him to have contacted DFO, as he had done in the previous year, to make sure of the boundaries for the authorized fishing area. While Mr. Rideout may have had a genuine mistaken belief that he was fishing in an authorized area, the Court concluded that the mistaken belief was not reasonable, and therefore the due diligence defence had not been established.

[44] In the present case, I find that while Mark Boyd relied on the navigation equipment, however, the error was not in the navigation equipment but rather in the information that he negligently loaded into the system. I have already found that it would have been reasonable and prudent for him to have checked the location of the “buffer zone” on the plotter against with the coordinates of the “buffer zone” as contained in Robert Boyd’s licence. I find that it was clearly negligent for Mark Boyd to have downloaded the “wrong file” information relating to the “buffer zone.” I also find that it was negligent for him not to take the few seconds it would have taken to ensure that the line on the screen was the proper boundary line. In these circumstances, having regard to the third criterion mentioned by Haliburton J. in **D’Entremont**, *supra*, I find that Mark and Robert Boyd’s mistaken belief arises wholly from Mark Boyd’s negligence.

[45] While I accept that on May 2, 2009, Robert and Mark Boyd had an honestly held belief that the “Second Wind 03” was outside the “12/19 buffer zone,” having regard to all the circumstances, I find that the basis for the “honest belief” arose solely from Mark Boyd’s negligence. Moreover, I find that Robert Boyd did not put in place a methodology to ensure compliance with the licence conditions, nor did he take all reasonable steps to ensure the effective operation of that method. In view of these findings relating to the facts and circumstances at the time that the traps were set, I cannot conclude that the mistaken belief of a state of facts was “reasonably” held as Robert Boyd did not take all reasonable steps prior to setting 39 of his crab traps in the closed area of the CFA 12 “buffer zone.” I find that this prong of the due diligence defence has not been established on a balance of probabilities prior to the time when the 39 crab traps were set on May 2, 2009.

Did the Accused Establish a “Due Diligence” Defence in all the Circumstances of this Case?

[46] While I have determined that Robert Boyd did not establish a due diligence defence on a balance of probabilities prior to setting 39 of his crab traps in the closed CFA 12 “buffer zone,” after a review of cases provided by counsel, my own research and the particular and unique facts of this case, I have concluded that further examination of all the circumstances of this case is required. In particular, I conclude that the question of whether Robert Boyd has established a due diligence defence must be determined by examining not only to the facts and circumstances of May 2, 2009 before he set 39 of his crab traps inside the “buffer zone,” but must also take into account all of Robert Boyd’s actions on May 3, 2009 after he realized that 39 crab traps had inadvertently been set inside the “buffer zone” by

“mistake” during the previous evening.

[47] I have concluded that there is a significant factual distinction between this case and the others to which I have been referred which merits further examination. The key factual distinction in this case is that prior to actually taking any crab on board his fishing vessel and returning to the wharf to sell the catch, Robert Boyd realized that there had been a “mistake.” At that point, I find that he stopped his fishing vessel, immediately called DFO officials to report the “problem” and to determine what steps he could take to remedy the situation. As a result of that call, I find that Robert Boyd stopped his fishing trip and then he waited for DFO Fishery Officers to communicate their directions to him. Once those directions were communicated by DFO, I find that Robert Boyd fully complied with those directions by hauling up the 39 traps located inside the closed “12/19 buffer zone,” releasing all crab found in those traps and then moving those traps into CFA 12.

[48] The evidence established that, with DFO Fishery Officers monitoring Robert Boyd’s activities, it took him most of May 3, 2009 to fully comply with the DFO’s directions. As a result of Robert Boyd fully complying with the directions of DFO Fishery Officers, I find that he did not actually take any crab on board his fishing vessel, that all crab found in the 39 crab traps located inside the “buffer zone” were released and that he did not bring any crab back to the wharf for sale. From those findings, I conclude that there was no harm done to the conservation or protection of the crab stock in the closed “12/19 buffer zone” on May 2-3, 2009. Furthermore, with no catch to bring back to the wharf for sale on May 3, 2009, I also conclude that Robert Boyd did not realize any sale proceeds or revenue from this fishing trip, nor were there any crab actually caught that might be subject to a forfeiture

order.

[49] In this case, the charge before the court is that, on or about May 2, 2009, Robert Boyd “did unlawfully fish for crab in Crab Fishing Area 12, during a closed time, contrary to section 52(a) of the *Atlantic Fishery Regulations*, and applicable Variation Order, thereby committing an offence under section 78 of the *Fisheries Act*.” Given the factual circumstances of this case, and in particular, the fact that Robert Boyd stopped his fishing trip on May 3, 2009 before he took aboard any crab from the 39 traps placed inside the “buffer zone,” there could be a question as to whether he did, in fact and in law, “unlawfully fish” for crab in a closed area of CFA 12.

[50] On this point, looking at the definition sections of the *Act* and *Regulations*, I note that in section 2 of the *Fisheries Act*, the word “fishing” means “fishing for, catching or attempting to catch fish by any method.” In section 2 of the *Atlantic Fishery Regulations*, the phrase “fishing trip” means “a voyage that commences at the time a fishing vessel leaves port to engage in fishing and terminates at the time the fish caught during that period are offloaded.”

[51] Despite those definitions, for over 100 years, there have been numerous cases before the courts to determine whether, in fact and in law, a defendant was “fishing” at all material times to the charge in question. The classic definition of “fishing” is contained in **The Ship Frederick Gerring Jr. v. The Queen**, [1897] CarswellNat 36 (SCC) where Mr. Justice Sedgewick speaking for the majority of the Supreme Court of Canada held at paragraph 11:

“The act of fishing is a pursuit consisting, not of a single but of many acts according to the nature of the fishing. It is not the isolated act alone either of surrounding the fish by the net, or by taking them out of the water and obtaining manual custody of them. It is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession. That, at least, is the idea of what “fishing” according to the common acceptance of the word, means, and that, I think, is the meaning which we must give to the word in the statute and treaty.”

[52] Based upon the definition of “fishing” from the Supreme Court of Canada in **The Ship Frederick Gerring Jr.** *supra*, Freeman J. Co. Ct. J. (as he then was) held in the case of **R. v. Newell**, 1988 Carswell NS 332 at paragraph 29 that “it does not appear to have been the intention of the Supreme Court of Canada in that case to extend the meaning of ‘actual and certain possession’ beyond taking the fish aboard the fishing boat.”

[53] In the case of **R. v. Skinner**, 1997 Carswell Nfld 277, the Newfoundland Court of Appeal reviewed the **Newell** case and their decision turned on the definition of the word “fishing” or the verb “to fish.” In **Skinner**, *supra*, the Newfoundland Court of Appeal said at paragraph 16 that “in other words, without that final step [that is, the taking of the fish on board the fishing vessel] it cannot be said that the process of ‘fishing’ is complete in fact or in law.” In the **Skinner** case, again at paragraphs 16 and 19, after reviewing decisions where other courts have determined whether the accused person was “fishing” in fact and in law, the Newfoundland Court of Appeal concluded that the act of fishing is not complete until the fish are caught and removed from their natural habitat and landed.

[54] In this case, Defence counsel agreed that the Crown had established a *prima*

facie case, as it was clear that Robert and Mark Boyd had baited and inadvertently set their traps inside the CFA 12 “buffer zone” on May 2, 2009 and had, at the very least, attempted to catch fish.

[55] However, by virtue of Robert Boyd’s self-report to the DFO Fishery Officers, stopping his “fishing trip” and then fully complying with the directions provided by those Fishery Officers, a question may remain as to whether Robert Boyd did, in fact and in law, unlawfully “fish” since no crab were actually removed from their natural habitat and taken aboard the “Second Wind 03.”

[56] Faced with similar questions to the ones before this court, Mr. Justice Freeman in **Newell**, *supra*, said at paragraph 26:

“The important public policy underlying the conservation and protection of the fishery demands that fisheries enactments and rules receive the amplitude of construction required by the *Interpretation Act* for remedial laws. Yet as a penal statute, as the *Fisheries Act* undoubtedly is in its present aspect, it must be narrowly interpreted against the state and in favor of the individual. That conflict is just one of the difficulties that confront those who attempt to enforce, comply with and interpret Canadian fisheries law as it now exists. Much turns on whether enforcement measures can be seen to be fair and reasonable.” (Emphasis is mine)

[57] I share the view articulated by Freeman J. in the **Newell** case that enforcement measures should be seen as being “fair and reasonable,” and that the important public policy underlying the *Fisheries Act* is the conservation and protection of the fishery. However, subsequent cases have clearly overruled Justice Freeman’s comment that remedial legislation such as the *Fisheries Act* should be narrowly interpreted against the state and in favour of the individual in a penal context.

[58] For example, in the case of **R. v. Savory**, [1992] N.S.J. No. 3 (NSCA), the majority of the Nova Scotia Court of Appeal determined that it was not an essential element of the offence before the Court for the Crown to prove where the fish had been caught, since the evidence proved beyond a reasonable doubt that the Accused had violated a condition of his licence. However, in dealing with the question of whether to give regulatory legislation a narrow or a liberal interpretation, the majority held that the proper interpretation for the word “fishing” in subsection 33(2) of the *Atlantic Fishery Regulations*, should be as follows, at page 4:

“The Act and the Regulations have been passed for the purpose of regulating the fishery; regulatory legislation should be given a liberal interpretation. A major objective of the Act and Regulations is to properly manage and control the commercial fishery.”

[59] A widely accepted and often-quoted opinion on the interpretation of remedial or public welfare legislation is found in Driedger, *On the Construction of Statutes*, 3rd edition (Butterworth’s: 1994). Mr. Driedger observes that courts should give an “appropriate interpretation” to remedial legislation such as the *Fisheries Act*, and he states at page 131:

“There is only one rule in modern interpretation, namely courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation as well as external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and © its acceptability, that is, the outcome is reasonable and just.”

(Emphasis is Mine)

[60] Mr. Justice Freeman also noted in **Newell** *supra* that the promotion of the legislative purpose of the *Fisheries Act* was the conservation and protection of the fishery. I agree that the licences to fish allocations of quota are determined by DFO in accordance with the principles of conservation and protection of the fishery, and I also find that the penal aspects of the legislation serve to promote compliance with the regulatory framework. While DFO has Fishery Officers, as well as onboard or dockside monitors, to ensure and enforce compliance with the *Fisheries Act*, its *Regulations* and the licence allocations of individual fishers, the attainment of the legislative purposes also relies heavily on voluntary compliance. The potential sanctions contained in the *Fisheries Act* serve as a specific and general deterrent to those who are found guilty of contravening provisions of the legislation or their licence conditions, and as Robert Boyd testified, those sanctions are well-known in the commercial fishery.

[61] In this case, on morning of May 3, 2009, once Robert Boyd realized that a “stupid mistake” had been made during the previous evening when they set 60 of their 75 trap quota, I find that it is quite clear from all of his actions that he wished to rectify what he had described as a “major problem” before any crab were taken out of the water and landed in his boat. In fact, by calling DFO to obtain their advice and directions on how to rectify the situation, I find that Robert Boyd had clearly taken reasonable steps to avoid committing the statutorily-barred activity, that is, the catching and landing of crab from a closed fishing area. I find that he acted prudently and reasonably in immediately contacting DFO Fishery Officers before taking any crab out of the 39 traps that had inadvertently been set in the

“12/19 buffer zone.”

[62] As mentioned previously, section 78.6 of the *Fisheries Act* provides that a defendant will not be convicted of the charge under the *Act* if they establish that they “exercised all due diligence to prevent the commission of the offence.” The term “due diligence” is not defined in the *Fisheries Act*, but according to Dickson J. in **Sault Ste. Marie**, *supra*, the defence is available if the defendant “took all reasonable steps to avoid the particular event.” The test is an objective one and involves an assessment of what a reasonable person would have done in similar circumstances. The defendant must establish this defence on a balance of probabilities.

[63] Looking at all of the circumstances of this case, on the morning of May 3, 2009 Robert Boyd faced a moral dilemma - the choice of either self-reporting and speaking with DFO Fishery Officers in order to rectify the “mistake” that had been made during the previous evening and before any crab had actually been caught and taken on board his fishing vessel or doing nothing, landing the crab that were in the 39 traps within the closed “buffer zone” and hoping that his actions in catching and landing the crab from the closed area would go undetected by DFO Fishery Officers. In choosing to self-report, Robert Boyd clearly demonstrated that he was prepared to take all reasonable steps to avoid committing the statutorily-barred activity.

[64] Furthermore, by his decisive and timely actions in correcting their “mistake” before the act of “fishing” was completed by releasing the crab and then moving

the 39 traps into CFA 12, Robert Boyd demonstrated that he had made all reasonable efforts to avoid causing any harm to the conservation or protection of the crab stocks in the “12/19 buffer zone.” I find that Robert Boyd did, in fact, take all the care that a reasonable person might have been expected to take in all of the circumstances of this case.

[65] In objectively assessing whether what Robert Boyd did in this case is what a reasonable person would do in all of the circumstances of a similar case, courts at all levels across this country have consistently said that reasonable care and due diligence does not require perfection, nor some “superhuman effort” on the defendant’s part. The determination of whether a defendant has exercised due diligence is a question of fact to be determined by the trial judge. The key factual question is not whether the defendant has exercised some care, but rather, whether the degree of care exercised was sufficient to meet the objective standard which a reasonable person might have been expected to take in all of the circumstances. To demand more, would in my view, move a strict liability offence dangerously close to one of absolute liability.

CONCLUSION:

[66] For all of the foregoing reasons, I find that the Crown has established its *prima facie* case by proving the *actus reus*, that is, that Robert Boyd set 39 crab traps on May 2, 2009 in the closed “buffer zone” of CFA 12. However, I also find that Robert Boyd established, on a balance of probabilities, that he exercised due diligence in all of the circumstances of this case by taking all reasonable and

prudent actions after discovering the inadvertent setting of the traps in the closed “buffer zone,” but before the act of “fishing” had been completed.

[67] On the particular facts of this case, through Robert Boyd’s decisive and timely actions in calling DFO Fishery Officers at the earliest available opportunity, and then under DFO’s specific direction and observation, by releasing the crab that were found in the 39 traps in the closed “buffer zone” and then moving those traps into CFA 12, I find that he rectified any attempted or temporary contravention of the *Regulations*. In so doing, I conclude that Robert Boyd’s actions did, in fact and in law, establish his due diligence in avoiding to commit the statutorily-barred activity before any harm had been occasioned to crab stocks in the closed “12/19 buffer zone.” Moreover, I find that Robert Boyd’s actions also show that he took all the steps that a reasonable person would have taken in similar circumstances to avoid the statutorily-barred activity and to comply with all of the conservation and protection measures for crab stocks contained in the *Fisheries Act*, its *Regulations* or his licence conditions. No crab were removed from their natural habitat and landed, and no crab were brought back to the Cheticamp, Nova Scotia wharf on May 2-3, 2009 for sale. Finally, there are no crab that might be subject to any forfeiture by the Crown.

[68] In reaching my conclusion, I have considered all of the facts and circumstances of this case as well as the meaning of the phrase “did unlawfully fish” in its total context, having regard to the purpose of the legislation, promotion of that legislative purpose and the consequences of possible interpretations. I have concluded, to use the words of Mr. Driedger in his book “*On the Construction of*

Statutes” that an “appropriate interpretation” for the phrase “did unlawfully fish” required the act of fishing to be completed by Robert Boyd actually removing the crab from their natural habitat and then landing them on his boat. Until the crab were taken out of their natural habitat and landed on his fishing vessel for subsequent sale, I find that Robert Boyd could, and in fact, did demonstrate that he exercised due diligence by taking all of the steps that a reasonable person would have taken in similar circumstances to avoid the contravening the statutorily-barred activity.

[69] I conclude that Robert Boyd should be acquitted of the charge before the court and in so doing, I find that this outcome not only promotes all of the legislative purposes of the *Fisheries Act* and its *Regulations*, but at the same time, it provides the only result that is “reasonable and just” in all of the circumstances of the case.

[70] I hereby acquit Robert Boyd of the charge before the Court and I order accordingly.

