

SENTENCING FOR VIOLATIONS OF THE FISHERIES ACT by Brad Caldwell

2005

PART II – FORFEITURE OF FISH AND GEAR

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Part one of this article (*Fisherman Life* - January 2005) briefly outlined a number of the specific provisions contained in the *Fisheries Act* that Canadian courts can apply when sentencing persons convicted of *Fisheries Act* offences. Of those provisions, the one that arises most frequently is s. 72 of the *Act*, which grants the courts the power to order forfeiture of items seized by the Department of Fisheries and Oceans (“DFO”). This article will review that power.

Since the forfeiture provisions generally apply to items seized under the *Fisheries Act*, the starting point for any review of these forfeiture provisions must start with s. 51 of the *Act*. Under this section, a fisheries officer may seize any fishing vessel, vehicle, fish or other thing that the officer believes on reasonable grounds was obtained by or used in the commission of an offence or will afford evidence of an offence. In practise, the items most commonly seized in the context of commercial fisheries are fishing vessels and/or their catch. With respect to catch, it is quite common for fisheries officers to seize the entire catch of a vessel if it is suspected of fishing illegally. Since the catch is perishable, it is usually sold pursuant to s. 70(3) of the *Act* and the proceeds of sale are held by the Receiver General of Canada pending final disposition by the court.

With respect to seizure of fishing vessels, in most cases arising out of commercial fisheries on the west coast, commercial vessels are not seized from fishermen who commit first offences. However, for second or third offences, vessel seizures are not uncommon, particular if the second or third offence occurred in the not too distant past. If so, a fisherman can lose the remainder of the fishing season if the Crown chooses not to co-operate in allowing the vessel to be released upon the posting of bail. Seizures of vessels, motor vehicles and snowmobiles are quite common for poaching type offences, such as the seizure of snow mobiles from persons illegally ice fishing.

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In addition to any other punishment imposed by the court (such as fines), s. 72(1) of the *Fisheries Act* gives the court discretion to order forfeiture of anything seized under the *Act*. In the west coast commercial fisheries, forfeitures of fishing boats are quite rare because the courts are reluctant to take away a person's source of livelihood. There is one case involving a crab fishing vessel caught fishing in U.S. waters in Boundary Bay, which DFO likes to cite as an authority. However, this case is not a particularly good authority for the Crown because the forfeiture was done voluntarily in lieu of a fine that ordinarily would have been approximately \$20,000 (the approximate value of the vessel). Most forfeitures of boats and equipment involve poaching offences such as the case of *R. v. S.* (2002 BCCA 56 (B.C.C.A.)). This case involved the poaching of 4,100 abalone weighing 750 pounds with a value of \$18,750 at a time when there had been a coast wide moratorium on the harvesting of abalone for approximately eight years. One of the accused plead guilty and was sentenced on a joint submission to a fine of \$7,000 and ordered to pay \$5,000 compensation and to forfeit his diving gear. Upon conviction of the second accused, the court imposed a fine of \$7,000 and granted an order for forfeiture of, amongst other things, a tug and barge valued at \$70,000.

Whether or not a court should take into consideration the amount of any fines already imposed when deciding whether or not to order forfeiture is not entirely clear. At least one older east coast case indicates that forfeiture is not to be considered as part of the sentence (*R. v. Smith*, [1978] N.J. No. 10). On the other hand, more recent east coast cases take the opposite approach (*R. v. Gould* [1998] N.J. 318 (Nfld. S.C.); *R. v. Weir* (12 January 2000) N.J. No. 4 (Nfld. S.C.)). In British Columbia, in *R. v. S.* (referred to above), the British Columbia Court of Appeal felt it could order forfeiture of a tugboat and barge because they were owned by a company owned by the father of one of the offenders, rather than the offender himself. The court also appears to have endorsed a test set out in *Thomas, Principles of Sentencing*. In the quote cited from *Thomas*, the text book says, “[t]hese cases may justify the view that where the property is specifically adapted for the commission of the offence, or **has no other use to the offender**, it may be confiscated without regard to the totality of the other sentence . . .” In the peculiar

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facts of *R. v. S.*, the tug boat had no other use to the offender because he did not own the logging company which owned the boats. However, in the more usual case of a commercial fisherman, the boat would have another use to the offender, namely earning his or her living through commercial fishing.

Unlike s. 72(1) which gives a discretionary power to order forfeiture of any seized items, s. 72(2) provides that “[w]here a person is convicted of an offence under this Act that relates to fish” there will be mandatory forfeiture of such fish. Since the application of these mandatory forfeiture provisions can at times be quite harsh, the courts on the east coast have restricted the application of s. 72(2) to “catching offences, such as taking or keeping fish of the wrong species or the wrong quantity or in the wrong place at the wrong time with the wrong gear [where the catching of fish is a necessary element of the offence], rather than licensing offences such as the present one which govern who can own and operate fishing boats” (*R. v. Mood*, (1999) 174 N.S.R. (2d) 292 (N.S.C.A.)). This line of cases has also been applied in British Columbia in the unreported case of *R. v. Haines* (2 Feb. 04) (Prince Rupert Registry).

Section 72(3) of the *Fisheries Act* allows for forfeiture of fish even where the alleged offender is acquitted of the charges against him if, “it is proved that the fish was caught in contravention of this Act . . .”. An example of this might be where a gillnet fisherman with a mechanical breakdown beyond his control, drifts over a boundary with his net out into a closed area. A court might acquit him based upon a due diligence defence, but order forfeiture of the proceeds of sale of the fish he caught. In this type of situation, east coast cases have allowed fishermen to keep a proportion of the proceeds of sale to help offset the expenses they incurred in catching the fish (see: *R. v. Oates* 2004 NLCA 6 (Nfld. & Lab. C.A.)). In some circumstances where only part of the seized catch was caught in contravention of the *Act*, the courts have “allowed the fisherman to retain the proceeds in respect of that portion of the catch which would have been caught had the proper net size been used” (see: *R. v. Sewid* (1988), 30 B.C.L.R. (2d) as cited by

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approval in *R. v. Reid* 2001 BCSC 1307 and *R. v. Paul* [2003] N.S.J. No. 295, 2003 NSSC 164).

As can be seen from the foregoing discussion, if one is convicted of committing an offence under the *Fisheries Act*, the courts have the power to order forfeiture of any seized vessels or catch, but whether they will do so depends on the particular circumstances. Moreover, even if one is acquitted in circumstances where fish were caught in contravention of the *Act*, the courts have the power to order either complete or partial forfeiture of the seized catch.

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