

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. McDonald*,  
2011 BCSC 1577

Date: 20111124  
Docket: 25734  
Registry: Vancouver

**Regina**

v.

**Stewart Lawrence McDonald**

Before: The Honourable Madam Justice Ross

On appeal from: Provincial Court of British Columbia, March 24, 2011  
(*R. v. McDonald*, 2011 BCPC 0075, Docket #53015)

Corrected Judgment: The text of this judgment was corrected  
at paragraph 23 where a change was made on February 15, 2013.

## **Reasons for Judgment**

Counsel for the Crown:

Ramona Roberts  
T. Gerhart

The Appellant:

In-Person

Place and Date of Hearing:

Vancouver, B.C.  
September 21, 2011

Place and Date of Judgment:

Vancouver, B.C.  
November 24, 2011

[1] On June 17, 2009, the appellant was fishing commercially for prawns in the waters of Porteau Cove in Howe Sound, British Columbia. Most of Howe Sound was opened for commercial prawn fishing by Variation Order 2009-132. However, Porteau Cove was excluded from the opening. Specifically, the order opened the subarea of Howe Sound containing Porteau Cove, except for the area east of a line between two white boundary signs at the north and south shores of Porteau Cove.

[2] The appellant was charged on or about June 17, 2009 with setting or placing fishing gear in water, along a beach or within a fishery, during a close time, contrary to s. 25(1) and s. 78 of the *Fisheries Act*, R.S.C., 1985, c. F-14 (the “Act”). He was convicted in Provincial Court after a two-day trial on March 24, 2011 (*R. v. McDonald*, 2011 BCPC 0075, Docket #53015).

[3] At trial the appellant argued, *inter alia*, that the order was invalid, at least with respect to Porteau Cove, on the grounds that the *Fisheries Act* and related regulations did not allow the definition of a closure boundary by reference to boundary signs rather than latitudes and longitudes.

[4] The trial judge found that the order was valid, and that the accused had placed or set gear within the closed area at Porteau Cove.

[5] The appellant submitted at trial that the Regional Director-General of the Department of Fisheries and Oceans for the Pacific Region (the “RDG”) lacked the legislative authority to create the Variation Order so as to open the prawn fishery in subarea 28-4 and to continue to close the area east of the two white boundary signs in Porteau Cove. The trial judge concluded at paras. 15 and 29 that:

The Regulation and Variation Order which form the basis of the charge against Mr. McDonald were promulgated by the Regional Director-General pursuant to statutory authority given to that office. I do not find there was any unlawful sub delegation.

....

I therefore reject the submission of counsel for Mr. McDonald that the boundaries of the close area were unlawfully defined as those boundaries were not set by reference to latitude and longitude coordinates which could be determined by a Global Positioning System.

[6] Section 25(1) of the Act provides:

Setting gear during close time

25. (1) Subject to the regulations, no person shall place or set any fishing gear or apparatus in any water, along any beach or within any fishery during a close time.

[7] The power of the Governor-in-Council to make regulations under the Act is set out in s. 43. Sections 43(l) and (m) are the relevant governing sections with respect to the present matter. They provide:

(l) prescribing the powers and duties of persons engaged or employed in the administration or enforcement of this Act and providing for the carrying out of those powers and duties; and

(m) where a close time, fishing quota or limit on the size or weight of fish has been fixed in respect of an area under the regulations, authorizing persons referred to in paragraph (l) to vary the close time, fishing quota or limit in respect of that area or any portion of that area.

[8] A close time was fixed by regulation as contemplated by Section 43(m). Section 63 of the *Pacific Fishery Regulations, 1993 SOR/93-54* (“PFR”) provides:

Close Times

63. No person shall fish for a species of shellfish set out in column I of an item of Schedule VII in the waters set out in column II of that item using a method set out in column III of that item during the close time set out in column IV of that item.

[9] The “Shellfish Close Times” state that prawn fishing in any subarea is closed between January 1 and December 31. Item 13(5) of Schedule VII provides with respect to prawns:

(5) Prawn	Any Subarea	(a) Trap	(a) Jan. 1 to Dec. 31
		(b) Beam trawl net	(b) Jan. 1 to Dec. 31
		(c) Otter trawl net	(c) Jan. 1 to Dec. 31

[10] Section 2(1) of the *PRF* defines “subarea” as follows:

“Subarea” has the same meaning as in section 2 of the *Pacific Fishery Management Area Regulations*; (*sous-secteur*)

[11] Section 2 of the *Pacific Fishery Management Area Regulations, 2007*, SOR/2007-77 (“*PFMAR*”) defines “subarea” as:

1. The following definitions apply in these Regulations.

“management area” or “Area” means a division of Canadian fisheries waters as enumerated and described in Schedule 2 and includes the portion of any stream that flows into that division and that is seaward of the mean high water mark near the mouth of that stream. (*secteur* or *secteur d’exploitation*)

“Subarea” means a subdivision of a management area. (*sous-secteur*)

[12] Schedule 2 of *PFMAR* contains the following definition of Area 28 under the heading “Management Area Boundary Descriptions”:

28(a) Area 28

Those waters of Howe Sound and Burrard Inlet inside a line that begins at.....

49°23.021’N 123°32.166’W [Gower Point]

then following the mainland shoreline to.....

49°15.936’N 123°15.860’W [Point Grey]

then to.....

49°19.823’N 123°15.880’W [Point Atkinson Light]

then to.....

49°20.135’N 123°21.643’W [Point Cowan]

then following the southerly shoreline of Bowen Island to.....

49°20.397’N 123°25.979’W [Cape Roger Curtis]

then to.....

49°20.907’N 123°27.903’W [Worlcombe Island]

then to.....

49°21.500’N 123°29.157’W [Popham Island]

then to the beginning point.

[13] Included as subareas of Area 28 in Schedule 2 is the following definition of Subarea 28-4 (which includes Porteau Cove):

(b) Area 28 is composed of the following subareas:

Subarea 28-4

Those waters of Howe Sound inside a line that

begins at..... 49°35.242'N 123°16.159'W [mainland]  
 then to..... 49°34.787'N 123°13.663'W [south of Furry  
 Creek]  
 then southerly following the 49°31.558'N 123°15.673'W [Brunswick Point]  
 shoreline to.....  
 then to..... 49°30.614'N 123°18.214'W [Irby Point]  
 then following the easterly 49°33.348'N 123°19.415'W [Domett Point]  
 shoreline of Anvil Island to.....  
 then to..... 49°33.251'N 123°21.500'W [east of McNab  
 Creek]  
 then northeasterly following the shoreline to the beginning point.

[14] The Governor-in-Council did by regulation authorize the RDG to vary the close time in respect of that area or any portion of that area. Section 6(1) of the *Fishery (General) Regulations*, SOR/93-53 (“FGR”) provides:

Variation Orders

6. (1) Where a close time, fishing quota or limit on the size or weight of fish is fixed in respect of an area under any of the Regulations listed in subsection 3(4), the Regional Director-General may, by order, vary that close time, fishing quota or limit in respect of that area or any portion of that area.

[15] The area at issue is an area under the regulations listed in s. 3(4)(i) the *Pacific Fishery Regulations*.

[16] The RDG, by order dated June 10, 2009, did make a Variation Order with respect to the close time for prawn fishing.

The Regional Director-General of the Department of Fisheries and Oceans for the Pacific Region, pursuant to subsection 6(1) of the *Fishery (General) Regulations* hereby repeals *Pacific Region Close Time Variation Order, No. 2009-164*, made on June 3, 2009, and makes the annexed Order varying the close times for fishing for coonstripe shrimp, humpback shrimp, northern pink shrimp, pink shrimp, prawn shrimp, and sidestripe shrimp in Areas 11, 13 to 15, 19, 21, 22, 24 to 27, 111, 121 and 123 to 127 and in portions of Areas 12, 16, 17, 18, 20, 23, 28 and 29, by trap, effective at 19:00 h June 12, 2009.

1. This Order may be cited as *Pacific Region Close Time Variation Order, No. 2009—186*.

Variation

2. The close times for fishing for coonstripe shrimp, humpback shrimp, northern pink shrimp, pink shrimp, prawn shrimp and sidestripe shrimp, in the

area described in the Schedule hereto, by trap, a fixed by section 63 of the *Pacific Fishery Regulations*, 1993 and set out in column IV of paragraphs 13(1) (a), 13(2) (a), 13(3) (a), 13(4) (a), 13(5) (a) and 13(6) (a) of Schedule VII thereto, are hereby varied to: April 1 to 19:00 h June 12.

[17] Schedule VII provided in part:

10. Subarea 28-4, **except** that portion east of a line from the white fishing boundary sign located at the south shore of Porteau Cove to the white fishing boundary sign located on the north shore of Porteau Cove. [Porteau Cove]

[18] It was the Crown's position that the Variation Order in question is a lawful exercise of delegated authority. The Crown submitted that it was open to the RDG to define the closed area at Porteau Cove by reference to boundary signs because there was no statutory requirement to use any specific method for defining the boundaries of areas or portions of area so opened.

[19] The appellant submitted the Governor-in-Council has retained the power to define the area and subareas in which fishing rights may be exercised and, in particular, has retained the power to determine the method of area delineation. Only the times for fishing in such areas and subareas, or portions thereof, may be changed by the RDG. The RDG was only empowered to act within the scheme of areas established by the regulations. The appellant submitted that the Governor-in-Council made the conscious decision to define such areas by geographic coordinates so that the citizen has the benefit of certainty in the areas in which public fishing rights may be exercised. No power to vary the style adopted by the Governor-in-Council for delineation of the geographic areas is subdelegated to the RDG. The appellant submitted that a regulatory scheme which aims at precision cannot be transformed by the RDG into a scheme that the Governor-in-Council has recognized to be fraught with difficulty and imprecision and has expressly repealed.

[20] The appellant accepted for the purpose of this appeal that the RDG may vary the close time in respect of a portion of a subarea. However, the appellant argued that there is no basis for an inference that the Governor-in-Council intended to authorize the RDG to do so by boundaries and markers when such a system had

been repealed by the Governor-in-Council itself. The appellant submitted that there is no basis for an inference that the Governor-in-Council authorized the RDG to perpetuate the very mischief that the Governor-in-Council took steps to cure, after long consideration and consultation, in 2007.

[21] It is the case that the areas and subareas in the *PFMAR* are defined by geographic coordinates. However, the authority delegated to the RDG is not to make a variation order with respect to any area or subarea, but with respect to any area “or any portion of that area”. I agree with the submission of the Crown that there is no method prescribed in the legislation for defining the boundaries of such portions of areas.

[22] The *PFMAR*, in which area and subarea boundaries are defined, does not prescribe any method of defining boundaries of portions of areas in Variation Orders. The only reference to the method of defining boundaries is specific to areas and subareas, and is found in the Regulatory Impact Analysis Statement, published with the *PFMAR*. This statement acknowledges that the boundaries of management areas and subareas were redefined in the 2007 regulation, using reference to geographical coordinates rather than physical features of the areas, and that this was considered to be preferable.

[23] The Regulatory Impact Analysis Statement is not law. Such statements may be one source of evidence of Parliament’s intention, where interpretation of the wording of a regulation is the issue. However, as stated in the Regulatory Impact Analysis Statement itself, such statements do not form part of the regulation, see *Regulatory Impact Analysis Statement, 2007, SOR/2007-77; 2007-05-02 Canada Gazette Part II, Vol. 141, No. 9, p. 632; Bristol-Myers Squibb Co. v. Canada (Attorney General), 2005 SCC 26 at paras. 46, 156-158.*

[24] In the present case, interpretation of the wording of the order, or regulations which authorize it, is not in issue. There is no reference in the *Fisheries Act* or any regulations to a prescribed method of describing the boundaries or areas, subareas

or openings. Therefore I cannot accede to the appellant's submission that the RDG did not have the authority to define the boundary of the opening in the manner done.

[25] In the result, I have concluded that the decision of the learned trial judge was correct. The appeal is dismissed.

"Ross J."