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In the Provincial Court of Newfoundland and Labrador

Judicial Centre of St. John's

Between: Her Majesty the Queen in Right of Canada

And

Michael Perry

Judgment of The Hon. Robert B. Hyslop

Charge: Breach of s. 4(2) **Coastal Fisheries Protection Act**

Docket Number: 01A371

Case heard: October 28, 29, 30, 31, November 1, 4, 5, December 11, 12, 19, 2002

Judgment delivered: January 31, 2003

Appearances: Mr. Scott Beazley and Ms Lauren Chafe for the Crown
Ms Anne M. Fagan for the accused

The Background

In this case Captain Michael Perry is charged with a violation of s. 4(2) of Canada's **Coastal Fisheries Protection Act**, R.S.C. 1985, c. 33.

Michael Perry is a citizen of the United States of America. On September 22, 2001, he was the captain of an American registered vessel named the Mr. B. This vessel was a crab boat and it came to the attention of a routine aerial fisheries patrol.

As a result of the observations and inquiries made by the Fisheries Officer on the day in question, Mr. Perry as captain of the vessel was charged "that he did without authority, on or about the 22nd day of September 2001 while being onboard a foreign fishing vessel, namely the 'Mr. B', in a portion of the continental shelf beyond the limits of Canadian fisheries waters, fish or prepare to fish for a sedentary species of fish", contrary to s. 4(2) of the **Coastal Fisheries Protection Act**, *supra*, in violation of s. 18 of the said act. The Crown chose to proceed by way of summary conviction. This Crown election conferred absolute jurisdiction on this court to try the issue.

The defence argues that the accused should be acquitted on one or all of the following grounds:

1. The Crown has failed to prove beyond a reasonable doubt that the events alleged took place on the continental shelf of Canada;

2. The Crown has failed to prove beyond a reasonable doubt that crab is a sedentary species of fish;

3. The legislation in question is so vague as to give rise to an ambiguity which should be resolved in favour of the accused;

4. The accused acted under a mistaken set of facts engendering reasonably held beliefs which should render his actions innocent;

5. The accused acted with due diligence.

For its part, the Crown argues that it has proven all elements of the *actus reus* beyond a reasonable doubt, and that the legislation is clear and unambiguous. It further alleges that the accused operated under a misapprehension of the law, which does not afford him a defence. Alternatively it is argued by the Crown, that even if the accused could be said to have operated under a misapprehension of fact, he did not in all the circumstances, utilize due diligence to prevent the commission of the offence and should be found guilty as charged. The position of the Crown was that his belief that he could fish in the manner proven was not reasonable.

Both parties agree that the burden of proof is the standard of proof beyond a reasonable doubt. The threshold of proof is extremely high both in a criminal case and a case of this nature involving prosecution of a regulatory offence. The question of defining what is meant by a "reasonable doubt" has been the subject of relatively recent litigation. In terms of the concept of what represents proof beyond a reasonable doubt, the issue was recently canvassed by the Supreme Court of Canada in **R. v. Lifchus**, (1997) 1997 CanLII 319 (SCC), 216 N.R. 215 (S.C.C.). The court offered model instructions for triers of fact on the concept of reasonable doubt at p. 233 in the following terms:

> "The term 'beyond a reasonable doubt' has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or a frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. (Underlining mine.)
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based on the evidence or lack of evidence you are sure that the accused committed the offence you should convict since this demonstrates that you are convinced of his guilt beyond a reasonable doubt."

The Legislation

S.4(2) of the **Coastal Fisheries Protection Act** reads as follows:

"No person being aboard a fishing vessel or being a member of a crew of or attached to or employed on a foreign fishing vessel, shall fish or prepare to fish for a sedentary species of fish in any portion of the continental

shelf of Canada that is beyond the limits of Canadian fisheries waters, unless authorized by this Act or the regulations or any other law of Canada."

This section requires further reference. "Sedentary species" is defined in subsection 4(3) of the same Act as follows:

"For the purposes of subsection (2) 'sedentary species' means any living organism that, at the harvestable stage, either is immobile on or under the seabed or is unable to move except in constant physical contact with the seabed or subsoil."

Further reference must be made to the **Oceans Act**, S.C. 1996, 45 Elizabeth II, c. 31. A number of critical concepts vital to the resolution of these proceedings are defined therein. Sections 4 and 5 define the territorial sea of Canada. I will not reproduce this statutory definition for purposes of this judgment but will add parenthetically that this is what is known colloquially as the "twelve mile limit."

S. 13(1)of the **Oceans Act** defines Canada's exclusive economic zone in the following terms:

> "The exclusive economic zone of Canada consists of an area of the sea beyond and adjacent to the territorial sea of Canada that has as its inner limit the outer limit of the territorial sea of Canada and as its outer limit
>
> (a) subject to paragraph (b), the line every point of which is at a distance of 200 nautical miles from the nearest point of the baselines of the territorial sea of Canada; or
>
> (b) in respect of a portion of the exclusive economic zone of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), lines determined from the geographical coordinates of points so prescribed."

Section 14 of the **Oceans Act** asserts broad Canadian sovereign rights over this area specifically:

> "Canada has
>
> (a) sovereign rights in the exclusive economic zone of Canada for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the exclusive economic zone of Canada, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction in the exclusive economic zone of Canada with regard to
>
> (i) the establishment and use of artificial islands, installations and structures,

(ii) marine scientific research, and

(iii) the protection and preservation of the marine environment; and

(c) other rights and duties in the exclusive economic zone of Canada provided for under international law."

Of critical importance to this case is the definition of "continental shelf" contained in s. 17 of the **Oceans Act**. Eliminating the inapplicable paragraphs of s.17 the court is left with the following definition:

"s.17(1) The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada

(a) subject to paragraphs (b) and (c), to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the outer edge of the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil."

(For purposes of this hearing, paragraphs (b) and (c) are not applicable.)

Canada asserts a much less broad claim to its continental shelf than to the exclusive economic zone, as may be seen in s. 18 of the **Oceans Act** which reads as follows:

"s. 18. Canada has sovereign rights over the continental shelf of Canada for the purpose of exploring it and exploiting the mineral and other non-living resources of the seabed and subsoil of the continental shelf of Canada, together with living organisms belonging to sedentary species, that is to say, organisms that, at the harvestable stage, either are immobile on or under the seabed of the continental shelf of Canada or are unable to move except in constant physical contact with the seabed or the subsoil of the continental shelf of Canada."

The Events

September 22, 2001 was a fine day. Visibility was excellent, and towards the end of the airborne fisheries patrol, the Mr. B. was sighted in NAFO Area 3LO. NAFO is the term used to designate a group of 23 countries that make up the Northwest Atlantic Fisheries Organization. Area 3L is a designated fishing area. The use of the letter "O" in this case designated the area as "Outside" meaning that the area under surveillance was outside the Canadian 200 mile exclusive economic zone. Provincial Airlines provided the aircrew and aircraft to effect the patrol. It is a

very sophisticated operation involving initially targeting ships by radar, determining their co-ordinates, observing, photographing and videotaping their activities. When an observer wishes to make verbal contact with the ship, communication is made by radio with the bridge and the conversation is recorded. In this case, the presence of the vessel which was not operating with a "NAFO Hail" was seen by Fishery Officer Clayton Simms as somewhat unusual. He conducted close surveillance and reported by telephone what he was seeing to his supervisor Wayne Evans. Specifically, he wanted to find out whether the vessel was operating under any special permit. He noted that the ship was not under steam and noticed actions consistent with fishing and which he took to have been fishing. After his conversation with Mr. Evans, he contacted the vessel on Channel 16, and eventually spoke with the captain. This conversation was recorded and a video and audio tape of the encounter was tendered into evidence. I am satisfied from the totality of the evidence, including the photographs, the video documentation, the conversations with the captain, the observations of the fisheries officer, and the subsequent documentary evidence retrieved from the vessel that on the date and place in question, the Mr. B was engaged in fishing a species known as Chionoecetes opilio, more commonly known as the snow crab.

When the vessel was sighted by the patrol aircraft at 153708 hours (UTC), it was operating at a place bearing coordinates Latitude North 4637.63 and Longitude West 04718.80. I am satisfied that the aircraft had done preflight navigational checks from a fixed and predetermined point and that its navigational reckoning equipment was functioning properly and within the accepted tolerance. In lay terms, the vessel was located some 24.14 nautical miles outside and east of the Canadian exclusive economic zone. Fishery Officer Simms advised the captain that he was fishing on the continental shelf of Canada for a sedentary species and that he could not do so without prior authorization from Canada. The captain explained that he had been given an American permit to fish on the high seas and subsequently produced it to Canadian authorities.

There was some question as to where he could work and some discussion of the Flemish Cap. In the final analysis, Fishery Officer Simms obtained information from Captain Perry as to where his crab lines were, having been given some seven sets of co-ordinates (all of which have been plotted on an exhibit map filed with the court). He directed the captain to pull in all his lines, release any crabs that he might have caught, and bring the vessel to port in St. John's. The captain indicated that he would comply and all indications are that the captain followed every direction he was given. Before the vessel arrived in St. John's, it was intercepted by a Fisheries boarding party. Relevant documentation was seized and two firearms were turned over. The fishery officers effectively took command of the vessel and brought her into port in St. John's. She arrived on September 26. An inspection was performed and the ship was found to have been carrying some 44,820 pounds of processed snow crab sections. This cargo was seized and subsequently sold on bids to a local company for $83,488.90 in American funds.

The captain was given an appearance notice and the matter was brought before the court by the swearing of the information previously described.

The Sedentary Species Issue.

In presenting its case, the Crown called Mr. David Taylor, a research biologist. Mr. Taylor is an expert in the field of snow crab who has done extensive study and research and has written numerous learned articles on this species. From his evidence I am satisfied to conclude that the Chionoecetes opilio or snow crab in question in this case is a sedentary species of fish as contemplated by the relevant legislation. A snow crab must be in constant contact with the seabed when it is in the harvestable stage. Snow crabs cannot exist in the water column except in the larvae stage (when they are non harvestable). They move along the seabed in such a fashion that some part of their body is in constant contact with it. While they are capable of travel, they are in a lay sense relatively "sedentary". In a legal sense they fit all the critera in the definitions provided in the **Oceans Act** and the **Coastal Fisheries Protection Act**. I conclude that The "Mr. B" was fishing a sedentary species before and during the time she was spotted by the Fisheries patrol aircraft on September 22, 2001. I acknowledge that both the accused and his employer seemed to think that crab are not sedentary as they have seen them attempt to jump from storage tanks and crawl up the sides of crab traps to gain entry to the bait. "Sedentary", in the legal sense does not mean that the species is not " mobile." The juridical definition contemplates movement of a specific type.

I also conclude that all such fishing took place outside Canadian fisheries waters. For greater clarity, I find that all fishing done by the "Mr. B" took place outside the Canadian exclusive economic zone as previously described. Mr. Perry told the court that he was careful to stay outside the 200 mile limit.

The Continental Shelf Issue

The exclusive economic zone is relatively easy to discern. It was marked on all the maps tendered in evidence before the court. The question that is more troubling is the interpretation of the definition of the continental shelf and the effect of Canada's claim to it as against the world. It would appear that the attention of the accused was solely focussed on fishing outside the "200 mile limit."

Any claim by the accused or his "owner" that he was unaware of the presence of the continental shelf and the implications flowing from fishing that area reveals a considerable lack of knowledge of geography and international law, or, at the least, a very dated view of international law. In the text **An Introduction to International Law**, (2nd ed.) by S.A. Williams and A. L. C. de Mestral, 1987, Butterworths, the authors provide a concise outline of many of the principles involved in this particular case at pp 220-221:

> "In many parts of the world the bed of the sea, rather than falling steeply at the edge of the continent, slopes very gently over distances ranging from 25 to over 500 miles to the deep seabed. The geological continental shelf is in fact a part of the 'continental margin' which comprises also the 'slope' and the 'rise' all of which in terms of geology, geomorphology and mineral structure resemble the continental land-mass rather than the structures of the deep seabed. Until this century,

> jurisdiction over the seabed was a matter of small concern, except for occasional examples of exclusive claims for pearl and sponge fishing and under-sea coal and tin-mining close to land. It was thus possible to regard the seabed as *res nullius*, subject to first appropriation, or *res communis* available for the use of all states and peoples just as the high seas were.
>
> However, as states became aware of the rich hydrocarbon resources of the continental shelf in the mid-1930s and offshore oil exploration became a reality, the choice was essentially either the extension of coastal state jurisdiction or international regulation. Starting with the United Kingdom-Venezuelan agreement delimiting the seabed of the Gulf of Paria in 1942, and the Argentine Decree of January 24,1944, followed by the 'Truman Proclamation' of September 28, 1945, a host of states began to claim jurisdiction over the continental shelf during the 1940s and 1950s. This rapidly developing and virtually uncontested state practice led to a consideration of the subject by the International Law Commission and the conclusion of the Convention on the Continental Shelf at Geneva in 1958. Canada, which has one of the most extensive continental margins in the world, made no specific declaration concerning the continental shelf but rapidly adopted the same legal position as the United Kingdom and the United States. Parliament adopted the **Oil and Gas Production and Conservation Act**, regulating hydrocarbon exploitation in 1967 and the Government of Canada ratified the Geneva Convention in 1970."

(This passage must now be read in the context of Canada's explicit legislative statement to the world as contained in the **Oceans Act** *supra*., since the legislation was proclaimed after the publication of this text.)

To assist the court in this rather technical area, Mr. David Gray was qualified as an expert witness in the areas of cartography, geodesy, hydrography, and in the determination of maritime limits and boundaries. The court, after extensive hearing and argument allowed him to offer opinion evidence as a technical expert on the calculation or computation of the extent of Canada's continental shelf including maritime boundaries in accordance with generally accepted principles both within and outside the exclusive economic zone.

I was most impressed with this witness. He displayed a thorough level of technical expertise and background knowledge in the areas in which he was qualified to give expert evidence. His testimony helped the court understand how scientific and geodesic principles were translated by the drafters of the legislation in the manner in which it appears in the **Oceans Act** with respect to the juridical definition of the continental shelf. Since he was an adviser to the Nova Scotia and Newfoundland Offshore Arbitration Tribunal, he was familiar with of all the competing theories and assertions made by various parties to the continental shelf. He was also able to illustrate them on a chart which was tendered in evidence. Interestingly enough, each of the separate assertions to the limits of the continental margin uses a slightly different methodology in calculating its maximum extent at the outer edge.

It is not insignificant that, whatever one may say about different methodologies involved in calculating the maximum outer limit of the shelf, the presence of the "Mr. B" and its gear was located well within areas universally accepted by every interest group as an integral area of the continental shelf. The coordinates of the vessel, or the areas where the gear had been reported set by the captain are not in areas where there is the slightest dispute as to what constitutes the outer limit of the continental shelf. The continental shelf itself may not be charted, but depths appear on the maritime charts, and any competent mariner would have a general idea of the topography of the area below the keel by looking at the contour lines on his chart. In particular, it would appear obvious that a fishing captain would not deploy gear to catch bottom dwelling species if he could not be somewhat certain that his gear would extend to those depths.

The most problematic area of approaching the question of the extent of the continental shelf is the rather specific terminology that is employed. Some concepts seem to mean different things to different people. For example, the continental shelf has a juridical definition already quoted from s. 17 of the **Oceans Act**. According to a hydrographer, a continental shelf is a zone adjacent to a continent extending from the low water line to a depth at which there is usually a marked increase of slope to a greater depth. Mr. Gray noted that the waters of the continental shelf in eastern North America are usually, (but not exclusively), less than 200 metres deep.

In geological terms there is a "continental shelf break" which is a point at which the relatively flat continental shelf starts dropping off into deeper water. This break is often at or near 200 metres or 100 fathoms, but globally the break can be noted in water as shallow as 50 metres or as deep as 300 metres. (A fathom is a measure of depth equal to six feet.)

Another term which is used and can be found in the legislation is the "continental slope". A hydrographer would say that this is the declivity (or downward slope) from the outer edge of the continental shelf into greater depth. Globally, this downward slope averages a declivity of 7% or 130 metres (70 fathoms) per nautical mile. Mr. Gray noted that the gradient of slope along the Grand Banks is 10% or 100 fathoms (185 metres) per nautical mile. (At the coordinates where the Mr. B was recorded by the Fisheries patrol on September 22, the depth of water below the keel would have been about 165 fathoms. This is an area where the declivity or downward slope is about 80 fathoms in 5.5 nautical miles. Translated into metric measurement, this is a declivity 146 metres in 10,186 metres for a gradient of 1.44%). This fits into the definition of the "slope" of a continental shelf as given to the court.

Geologists use two definitions for the "foot of the slope". One definition would have it mean the intersection of slope projected downwards until it meets the projection of the deep ocean floor projected back towards the continent. (Off the east coast of Canada, that projected foot of the slope is found at about the 4000 metre depth.)

The second definition would see the foot of the slope defined as the intersection of the continental slope and the continental "rise". This would occur generally at a depth of about 2500 metres. The continental rise is a gentle rise with a generally smooth surface approaching

the foot of the slope. The continental rise has a much lesser gradient than does the continental slope and is assymptotic to the deep ocean floor, that is to say, that the two features gradually come together. Mr. Gray suggested that the rise is that portion of the ocean floor from around 2,500 metres in depth to about the 4,000 metre depth where one encounters the deep ocean floor.

The "continental margin", according to Mr. Gray, comprises the submerged land mass of a coastal state and consists of the seabed and subsoil of the geological shelf, the geological slope, and the geological rise and does not include the deep ocean floor, the ocean ridges, or the subsoil thereof. Mr. Gray largely drew this concept from the United Nations Convention on the Law of the Sea, and observed that the Canadian legislation uses much of the terminology found in that particular document. Canada has signed, but not yet ratified that Convention.

A helpful diagram illustrating these points may be found at p. 680 of the text **International Law Chiefly as Applied and Interpreted in Canada**, Fifth Edition Hugh M. Kindred et al. 1993, Emond Montgomery Publications Ltd, Toronto. In the diagram the following annotation appears:

> "Note: In some areas, the continental shelf, slope or rise may extend beyond the 200 mile exclusive economic zone."

A composite chart prepared by Mr. Gray, (to which reference has already been made), was the subject of much debate during this proceeding. The witness plotted several outer limits of the continental shelf that had been historically postulated by various interested parties. Because of differing geological interpretations and the point of view of each of the different interest groups, there is, as I have said, remarkably little unanimity on the outer limits of the continental margin. However, all the proposed limits charted by Mr. Gray extend well to the east of the Flemish Cap. The accused was located fishing well to the west of the Flemish Cap in an area which has been termed the western slope of the Flemish Pass.

In my opinion, s.17(1) of the **Oceans Act** establishes the operative definition of the "continental shelf" as the seabed and subsoil of the submarine areas of Canada which extend beyond the territorial sea and which form the natural prolongation of the land territory of Canada. All that s. 17(1)(a) purports to do is place an outer limit on that claim relating to the outer edge of the continental margin (where the deep ocean floor begins). This outer edge is designed by the legislation to be determined in accord with international law in a manner which is advantageous to Canada and which would allow the maximum claim, excluding the deep ocean floor.

Defence Counsel urged me to consider international law to determine the extent of the continental shelf. I am convinced that this exercise is only necessary if I were forced to consider whether the accused was fishing at or near the boundary of what is known in law as the continental shelf. From a review of the charts in question, the accused was nowhere near the outer limit claimed by Canada, but a mere 24.14 miles east of and outside of the exclusive

economic zone. I will certainly consider international law (extraneous to the juridical definition provided in the **Oceans Act**) to determine the existence of the continental shelf and the nature of Canada's claim upon it.

There is some merit in considering the United Nations Convention on the Law of the Sea (UNCLOS), since a perusal of it places the Canadian legislation in perspective. It is evident that the Canadian drafting was done is such a way so as to be consonant with the U.N. Convention and to ensure that Canada was not claiming any more than what is allowed in International Law. I have reproduced the relevant portions below.

"Part VI

Continental Shelf
Article 76

Definition of the continental shelf

1. The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental shelf does not extend up to that distance.

2. ...

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf of the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

Other provisions of this article require states which have ratified the convention to delineate outer limits by connecting fixed points defined by coordinates of latitude and longitude and to deposit charts and coordinates with the Secretary General of the United Nations. Canada has not met these requirements since it has not ratified the convention, but in my view, nothing prevents this nation from drawing on the Convention as a source of international law in the preparation and drafting of its own legislation. Clearly the Parliament of Canada did no more in the enactment of the **Oceans Act** than assert the same claim to the continental shelf that is provided for in the mainstream of international law.

In **Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland** (1984) 1984 CanLII 132 (SCC), 5 D.L.R. (4th) 385 (S.C.C.) at p. 395, the Supreme Court of Canada provided an excellent historical narrative of the development of the law in this area:

"There has developed in international law a carefully constructed regime respecting the continental shelf. International law was forced to take note of the

continental shelf when, in the middle of the century, the technology was developed to exploit offshore resources. A consensus developed that the exploitation should be under the control of the coastal State. The 1958 Geneva Convention was drafted so as to do no more than was necessary to achieve this result. Thus the Convention does not grant 'sovereignty' over the continental shelf but rather 'sovereign rights to explore and exploit'. These limited rights co-exist with the rights of other nations to make use of the seabed for submarine cables and pipelines (art. 4) and do not affect the status of the superjacent waters and airspace (art. 3). They stand in marked contrast to the full sovereignty (saving only other nations' right of innocent passage) which International Law accords to coastal States over their territorial sea.

In the **North Sea Continental Shelf Cases** [1969] I.C.J. Rep. 3 the International Court of Justice, at p. 29 referred to the notion of appurtenance:

> '... the right of the coastal State to its continental shelf areas is based on the sovereignty of the land domain of which the shelf area is the natural prolongation into and under the sea'

Continental shelf rights arise as an extension of the coastal State's sovereignty, but it is an extension in the form of something less than full sovereignty. The court referred to the 'title' in the continental shelf (p. 31) and said the shelf may be 'deemed' to be part of the coastal State's territory in a certain sense (p.31). But in the ordinary meaning of the term, the continental shelf is not part of a coastal State's territory. The coastal state cannot 'own' the continental shelf as it can 'own' its land territory. The regulation by international law of the uses to which the continental shelf may be put is simply too extensive to consider the shelf to be part of the State's territory. International law concedes dominion to the State in its land territory subject to certain definite restrictions. By contrast in the continental shelf the limited rights that international law accords are the sum total of the coastal State's rights."(Underlining mine)

The court goes on to note that early attempts by some coastal States to claim the continental shelf were not recognized by international law, and that, based on the 1958 Convention, the United Kingdom **Continental Shelf Act, 1964** (U.K. c.29) did not purport to extend the territory of that country.

The court added at p. 396 of the **Newfoundland Offshore Reference** case supra:

> "At international law, then, the continental shelf off Newfoundland is outside the territory of the nation state of Canada. Since as a matter of municipal law, neither Canada nor Newfoundland purports to claim anything more than international law recognizes, we are here concerned with an area outside the boundaries outside of either Newfoundland or Canada. In other words we are concerned with extra-territorial rights."

It is evident from these passages that even prior to UNCLOS in 1982, there were well defined rights and claims which were asserted by coastal States and were recognized and given life in international law with respect to continental shelf areas. This is particularly so with respect to exploitation and exploration. To say that no international law applies to Canada's continental shelf since it has not ratified UNCLOS would not be accurate. In fact, I have concluded that Canada has claimed no more rights than it would or could be afforded under current international law. All that remains is for Canada to clarify the outer limit of the continental margin - an area not in contention here since the accused in this particular case was in my view, indisputably well to the west of any area that could remotely be considered to be "marginal".

Interestingly enough (as mentioned earlier), it is the Government of the United States of America which was the trailblazer of modern international trends in the definition of the continental shelf. The Supreme Court of Canada recognizes this in the **Newfoundland Offshore Reference Case**, *supra* at p. 412:

> "More in keeping with the international approach to the continental shelf was the claim of the United States by the Truman Proclamation, dated September 28, 1945, which, omitting the preamble, reads as follows:
>
> > 'NOW THEREFORE, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf.
> >
> > Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another state, or is shared with an adjacent state, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.'
>
> In the **North Sea Continental Cases**, *supra*, the International Court of Justice confirmed that the Truman Proclamation was the starting point of the positive law on the subject."

See also **International Law Chiefly as Interpreted and Applied in Canada**, *supra.*, at pp. 679-681.

Applying the juridical definition with which I must work, it is evident to me that the drafters of the legislation did not intend to assert a claim to the deep ocean floor, but that they did wish to assert a claim to the slope or the downward gradient of the continental shelf and the rise as was

described to the court. As previously stated, Section 17 of the **Oceans Act** contemplates a national claim to the inclusion of the "maximum extent" of the continental shelf, "the outer edge of the continental margin being the submerged prolongation of the land mass of Canada ...".

A NAFO high seas fishing permit of the type tendered in evidence would allow a fishing vessel to exploit the waters outside the exclusive economic zone and over the seabed of the continental shelf. In my view it would not extend rights to exploit anything other than superjacent waters over the seabed on a continental shelf. Fishing for the species in question involves an exploitation of the seabed since snow crabs are sedentary creatures. Admittedly, this type of fishing would amount to a rather superficial exploitation of the seabed, but an exploitation it is, since it is a harvesting of bottom dwelling creatures and outside the range of permissible activities in that area without prior approval of the coastal state, in this case Canada.

Can it be said that a country may lay claim to a virtually limitless prolongation of its submerged landmass? The answer is a definite "No." The UN Convention on the Law of the Sea would permit a contiguous state to claim to a maximum of 350 miles from the territorial sea baseline or 100 nautical miles from the 2500 metre isobath (depth contour), whichever is the greater. Notwithstanding Canada's failure to date, to ratify the UNCLOS, it would appear to me that the Parliament of Canada has adopted an aggressive and proactive "stewardship" approach to the protection of the marine environment surrounding Canada as is evident in the preamble to the **Oceans Act**, supra.

I might at this juncture add that I accept without reservations, the characteristics of the continental shelf as they were described to the court by Mr. Gray. I find as a fact that the Mr. B. was fishing on the western slope of the Flemish Pass which is a unique feature of the continental shelf of Canada. I also find that the captain of the vessel was well equipped with charts which showed him depths, and hence, the topography of the ocean bottom. He knew or as captain, should have been well aware of the nature of the land he was sailing over. I also find that he did not make any inquiry of any person as to the nature of the continental shelf, its scope, extent or the claims exerted by the coastal State to which it appertained. A substantial body of international law has developed with respect to the exploitation of the continental shelf and Mr. Perry appears not to have been concerned about it. This goes to the question of due diligence. Not once in his evidence or in the evidence of Mr. Miller did this court hear that any inquiries had been made as to the existence of the continental shelf and any coastal State claims upon it, notwithstanding the "carefully constructed regime" referred to by the Supreme Court of Canada in the **Newfoundland Offshore Reference** case supra. in reference to the development of this body of law in and before 1984 when that case was argued.

In its cross examination of Captain Perry, the Crown produced the January 2001version of the "Notice to Mariners", an American publication, which noted Canada's claim to the Continental Margin. Captain Perry recognized the publication in question but testified that he did not see or read this notice. In fact, Mr. Gray testified that he was aware of similar notice

having been given by the same publication in 1990. Captain Perry is familiar with this publication by virtue of his occupation, and he has regular access to it.

In view of all these observations, it is my opinion that the Crown has satisfied this court beyond any reasonable doubt, (particularly on the evidence that was given by Mr. Gray), that the accused was fishing on the continental shelf of Canada as it is defined by the **Oceans Act** *supra.*, and as that concept is understood in international law.

Clarity of the legislation.

I agree with defence counsel that the **Coastal Fisheries Protection Act** is penal legislation and that any ambiguity with respect to its interpretation should be resolved in favour of an accused person. Admittedly, the legislative scheme requires one to refer to another act in order to ascertain the meaning of "continental shelf", but it is my view that Canada has given fair and full notice to the world of its claim, the reasons for its claim, as well as the restrictions on its claim to the continental shelf. It has set out a clear, comprehensible and workable definition of a "sedentary species". This legislation is available to the world, especially in this age of computers. I see no ambiguity or confusion inherent in this legislative scheme that should present a problem to either a trier of law and fact or a fisher in ascertaining the state of the law in this respect.

Mistake of fact - mistake of law - due diligence?

This case will not revolve around the legitimacy of Canada's claim to the seabed of the continental shelf outside the 200 mile Exclusive Economic Zone (although such legitimacy appears well recognized in international law.). Mr. Perry volunteered in testimony, (without having been directly asked), that if he had known that Canada had asserted those claims, he never would have attempted fishing in the area in question. I accept his assertion on this point. It indicates to me that neither he nor he his employer deliberately set out on their own or at the behest of their government to challenge Canada's claim to the continental shelf.

The Mr. B. was described as a "crab catcher." At the time these charges were laid, the vessel was owned by South Atlantic Fisheries LLC. (Limited Liability Company). The principal of that company and manager of the vessel was one Francis Miller, a resident of the State of Washington in the United States of America. The ship, which was American flagged, was designed to both catch and process crab. Mr. Miller was an experienced mariner in his own right and had owned and managed numerous vessels. He has fished off the coast of Alaska, the Marshall Islands, in Russia and off the coast of Hawaii as well as in the south Atlantic. He was, until these charges arose, completely unfamiliar with fishing off the Canadian coast in the North Atlantic.

The Mr. B. had been operating out of Newport News in Virginia in August of 2001. The crab season was closing as of August 17th, and some Japanese buyers were interested in purchasing more product. The options were limited. Since the Virginia fishery was closing, the vessel would either have to return home or find other sources for crab. According to Mr. Miller, the buyers suggested that the ship go to the Flemish Cap and obtain crab. Mr. Miller had never heard of this area and claims he was encouraged to learn from his customers that a Scandinavian ship (presumably Danish) was at that particular time, preparing to embark on such a trip. Mr. Miller did not make further inquiries about this assertion. Nor was any contact made with any owner of such a vessel.

Mr. Miller used a search engine on his computer and keyed in the words "Flemish Cap." The search revealed that this area was in NAFO jurisdiction. Mr. Miller then downloaded the background information on NAFO that was later presented to court and marked as an exhibit. This information provided very sketchy (and dated - - - 1997) information about NAFO. He then telephoned NAFO headquarters in Dartmouth, Nova Scotia and engaged in a four minute conversation. He does not know with whom he spoke. He cannot say whether he spoke with a high level or low level employee and, of course we do not know just what the employee was asked. According to Mr. Miller, the NAFO employee told Mr. Miller that NAFO did not regulate crab outside the 200 mile Canadian Economic Zone. As far as NAFO was concerned, no permits were required. It was suggested that Mr. Miller check the requirements of the United States.

Mr. Miller contacted his own lawyer, one Jeffrey Pike, in Washington D.C. , pursuant to this suggestion. Mr. Pike advised Mr. Miller to obtain a high seas permit from the American authorities and facilitated its acquisition. Mr. Pike was not called as a witness in these proceedings, and again, I cannot be certain of exactly what he had been asked, and what underlying assumptions were made by Mr. Miller in seeking his legal advice. According to Mr. Miller the conversation was premised on the understanding that the conversation was about NAFO, an organization with which Mr. Pike asserted familiarity. In any event, Mr. Miller felt he had secured all he needed to begin fishing off the Flemish Cap. He had contacted his captain, who in turn, spoke with his crew, and agreement was made to embark on this venture.

Crown Counsel urged upon me that the owner and the captain asked "narrow" questions about the crab fishery outside the 200 mile limit. I believe that this assertion is borne out by the totality of the evidence. Neither the evidence of Mr. Miller nor that of Mr. Perry allowed me to infer or conclude that they asked searching or detailed questions. In fact, I conclude that, apart from NAFO jurisdiction or regulatory control, they did not focus any questioning whatsoever on the international law aspect of Canada's control over the crab stocks on the continental shelf. They asked no questions of any other ship owner, no official of either their own government, nor of the Canadian Government. Indeed, they did not even approach a Canadian crab fisher in order to acquire any information whatsoever about the crab fishery. It is small wonder then, that when confronted by Fishery Officer Simms, the accused responded that he was engaged in an

"experimental" fishery for opilio. He was literally "experimenting" with no point of reference to any proven fishery technique in the area.

Captain Perry had provisioned his ship in Virginia, and then he sailed to Portland, Maine. In Portland, he rented a vehicle and drove to Gloucester, Massachusetts, where he obtained the High Seas Permit from the American National Marine Service. He obtained the document from a receptionist, checked it briefly in the automobile, and headed back to his vessel. His evidence was unequivocal on the point that the permit consisted of only one sheet of paper with no attachments. He had never before received a High Seas Permit. I am satisfied that he did check to see that the permit was drafted for his vessel, but that he did not read it closely. The reason I say this is that the permit itself draws one to the inescapable conclusion that it is granted subject to some restrictions, and it specifically makes mention of attachments. It seems to me to be passing strange that any vessel, in today's world of regulation and restrictions on and of the fishery would be given a carte blanche to exploit any particular species to an unlimited degree and without any restriction, hindrance, quota, limits, or control. On the face of it, the captain suggests that this is what is conveyed by the permit. One could only imagine what would happen to world fish stocks if all fleets in the world were allowed to exploit what is admittedly a profitable and moneymaking product in this manner. I believe that this notion was readily conceded by Mr. Miller who told Crown Counsel in cross examination that in the early days of his fishing experience, it was largely an "open" fishery. He also recognized that in modern times, this concept has greatly changed.

In fact, the permit does not permit limitless exploitation of any and all species wheresoever situate. A proper reading of the permit states its authorization at the very outset in the following terms:

> "This permit authorizes the named vessel to fish on the high seas in accordance with the provisions of the act, with regulations at 50 CFR part 300, and with provisions of international living marine resources agreements, as specified in the attachment to this permit."
> (Underlining mine)

I might add parenthetically that the captain was paid by way of share for his fishing endeavours. Mr. Perry's share as captain was 5%. This was a commercially driven enterprise and the facts that I find and the inferences that I draw as trier of fact are made in part, with this knowledge. There was, as might be expected, a financial incentive for the captain, owner, and crew to prosecute this fishery.

I admit to some confusion as to what in these circumstances admits of an error of law and/or of fact. If the ship proceeded to fish on the basis of a mistaken fact that others were doing so, and that the facts made known to them by unnamed NAFO officials were such that they thought there was no regulation in effect for crab, allowing them to exploit the resource at will, then I

will acknowledge that they may plead the defence of mistake of fact and that they may plead due diligence.

There is also binding authority which would suggest that in a situation where there is a possibility of imprisonment facing an accused person upon conviction, the defence of due diligence must always be open to him in order to comply with s. 7 of the **Canadian Charter of Rights and Freedoms**. (See **Reference Re s.92 of the Motor Vehicle Act** (1985) 1985 CanLII 81 (SCC), 23 C.C.C. (3d) 289 (S.C.C.)) In this case, the penalty by way of summary conviction prescribed in s. 18 of the **Coastal Fisheries Protection Act** is a maximum fine of $150,000.00. In default of payment, there is a possibility, in accord with a statutory formula, of a period of imprisonment, thereby permitting the due diligence defence to be raised, notwithstanding the strong assertion of the Crown that the accused should be afforded no defence since he made a mistake of law.

The result is that I will entertain the defences he raises and allow him to assert the defence of due diligence.

The seminal case in this respect is **R. v. Sault Ste. Marie** (1978) 40 C.C.C. (2d) 453 (S.C.C.) at pp. 373-374. Chief Justice Dickson categorized offences in the following way:

> "1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. 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 properly be called offences of strict liability. Mr. Justice Estey so referred to them in **Hickey's** case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault."

This categorization was subsequently upheld as meeting the requirements of the **Canadian Charter of Rights and Freedoms** which was enacted in 1982. (See **R. v. Wholesale Travel Group Inc.** (1991) 1991 CanLII 39 (SCC), 67 C.C.C. (3d) 193 (S.C.C.).

Dickson C.J.C. added more flesh to the bones of strict liability offences in **R. v. Chapin** (1979), 1979 CanLII 33 (SCC), 45 C.C.C. (2d) 333 at p. 344, when he considered the nature of charges under the **Migratory Bird Regulations** and stated:

> "An accused may absolve himself on proof that he took all the care that a reasonable man might have been expected to take in all the circumstances or, in

other words, that he was in no way negligent." (Underlining mine)

I think the state of law today in Canada from the foregoing authorities, is that in order to establish a defence based on mistake of fact, the mistaken belief must be both honest and reasonable. See **Regulatory Offences in Canada** by John Swaigen, Carswell 1992 at pp. 80-81:

> "In strict liability offences, however, a defendant must show that the mistake of fact is not only an honest one, but is also based on reasonable grounds. To rely on a defence of reasonable mistake of fact, the accused cannot simply assert that he or she was unaware of the facts. If the violation is a foreseeable result of his or her activities, the accused must usually show that he/she actually put his/her mind to the problem, attempted to ascertain the true nature of the situation, and made all reasonable inquiries to that end.
>
> In this respect, there is an active, as well as a passive, aspect to the defence, mistake of fact involves establishing due diligence. To show that a mistake of fact was reasonable, the accused must establish that he or she took all reasonable steps and made all reasonable inquiries to find out the correct information. As several courts have said, mistake of fact and due diligence are closely related, if not the same, since both come down to the question of whether the accused exercised all reasonable care.
>
> A perfunctory inquiry is not sufficient." (Underlining mine)

In **R. v. Tavares** (1996) 144 Nfld. & P.E.I. Rep. 154,(NLCA) the Newfoundland Court of Appeal visited this issue and in paragraph 28 therein, quoted favourably the words of Professor Elaine Hughes when the court said the following:

> "The distinguishing factor between the mistake of fact defence in a *mens rea* situation as opposed to that in a strict liability context has been neatly set forth by Professor Elaine Hughes in an article in the Journal of Environmental Law and Practice (1992) when she stated:
>
> > 'The operation of the mistake of fact defence in a strict liability context must be carefully distinguished from its operation in a *mens rea* context. In the usual case of a *mens rea* offence, an accused may use the defence if he or she *honestly* believed in a mistaken set of facts. If honestly made, the mistake need not be reasonable, as long as there is some evidence that gives a "sense of reality" to the defence. The defence operates as a simple denial of *mens rea*.
> >
> > However in the strict liability context, the defendant's mistake must not only be honest, but (using an objective standard) must also be reasonable. To state the test another way, to establish the lack of fault the accused must establish that he or she was honestly mistaken on reasonable grounds, i.e. that a reasonable person in the same situation would have made the same (non negligent) factual mistake.'

> She makes the point as well that 'in general, the courts seem to require a very high standard of care.' However it must be borne in mind that the proof required is not proof beyond a reasonable doubt, but rather on a balance of probabilities."

This "very high standard of care" referred to by Professor Hughes is not related to the burden of the accused in raising the defence but to the conduct which he pleads in order to render his actions innocent. In a strict liability situation, once the Crown has proven the *actus reus* beyond a reasonable doubt, the accused, on a balance of probabilities, must establish that his conduct was reasonable i.e. non negligent in the circumstances. In my opinion, all that is needed here is for the accused to establish a reasonable course of conduct. To place the bar so high as to make the threshold a very high duty of care might have the effect of eviscerating the principles painstakingly established by Chief Justice Dickson in **Sault Ste. Marie** *supra*. I will not hold the accused to any higher duty of care than would be expected of any reasonable person similarly situated, in all the circumstances. The mistake must be both honest and reasonable in all the circumstances. For the reasons that follow, I conclude that the mistake, however honest on the part of the captain, was not reasonable when one considers the totality of the circumstances.

I wish to make one further note on the question of due diligence. In **R. v. Alexander** (1999) 171 Nfld. & P.E.I. Rep. (Nfld. C.A.) 74 at p. 81 (paragraph 18), Green J.A. (as he then was) states:

> "The defence of due diligence requires the acts of diligence to relate to the external elements of the specific offence that is charged. The accused must establish on a balance of probabilities that he or she took reasonable steps to avoid committing the statutorily-barred activity. It is not sufficient simply to act reasonably in the abstract or to take care in a general sense."

I find that the prerequisites contemplated by Mr. Justice Green which allow the accused to plead this defence are present in the facts of this case.

The owner is not charged here with any offence. What is important is what was in the mind of the captain at the relevant time. The captain had worked for the owner for a considerable period of time and he testified that Mr. Miller had never led him astray in the past. Mr. Miller confirmed this in his own testimony. I am satisfied that the past good conduct and *bona fides* of Mr. Miller had the effect of easing the captain's mind to some extent. On the other hand, the captain and the owner were in frequent contact, and at the end of the day, the captain cannot blame the owner for passing him incomplete information in view of his position of command and responsibility. The fact is that Captain Perry himself saw fit on his own initiative to telephone NAFO officials in Dartmouth, Nova Scotia. I am satisfied from the proven facts, that the accused had a very perfunctory conversation which lasted about three minutes about the crab fishery. This conversation was narrow in scope and did not include questions about the

"carefully constructed regime" relating to the state of international law with respect to claims on the continental shelf.

How then does the conduct of the captain conform to what would be reasonably expected in the circumstances? The troubling aspect of this case is that, as defence counsel has strenuously argued, this is not a case where the captain did absolutely nothing to avoid the commission of the offence. Something was done, (in consultation with the owner), and these efforts must be weighed against what was reasonable in all the circumstances.

Efforts by the owner to ensure that the vessel and its captain were in compliance with all relevant statutory restrictions to fish crab on the Canadian Continental shelf.

1. Computer search for "Flemish Cap" and perusal of dated computer generated information about NAFO.

2. A four minute conversation with an unidentified employee of indeterminate authority at NAFO in Dartmouth Nova Scotia.

3. Receipt of information from a buyer that some ship was preparing to fish crab off the Flemish Cap with no further inquiry as to restrictions and/ or the feasibility of prosecuting a fishery in that area.

4. The purchase of marine charts that showed the depth of the ocean bottom (and hence the likelihood of finding crab) - no apparent research into the crab fishery, or any cost/ benefit analysis.

5. Contact with a lawyer in Washington, D.C. to obtain permits with no indication that the query went beyond the question of NAFO jurisdiction.

6. Completion of an application form to obtain a High Seas Permit from the American Government. (The owner supplied very basic information about the size, number, name and type of the vessel but at no time neither he nor the captain told any authorities anywhere in the world, (including American authorities), anything about the species and quantity or location of product that the vessel was about to catch.

<u>Efforts by the captain to avoid the commission of the offence.</u>

1. Conversation with the owner as considered above.

2. Consultation with his crew

3. Obtaining of the High Seas Permit following conversation with the owner in the circumstances described.

4. A brief (3 minute) telephone conversation with an unidentified NAFO official in Dartmouth, Nova Scotia.

5. Purchase of charts showing the proposed fishing areas.

As I have stated, this is not a case where the captain can escape his responsibility. Nor did I sense that he was trying to do so. I will confess to having some sympathy for his situation, since I thought he was honest in his demeanour and he presented himself to the court as a person with a high degree of integrity who very much enjoyed his job. I have already noted that he was candid and forthright with all the Canadian officials with whom he came into contact, and unhesitatingly complied with their directions and orders. He behaved professionally and courteously throughout the events described, and in a way that reflects credit on him personally, and on his company.

I have said that the captain's ability to rely on the mistake of fact defence falls short because his belief was not reasonable. Nor in all the circumstances was his pursuit of the fishing activity in these waters. Why do I say this?

1. This was the first time the captain had fished in this area. Accordingly, special care should have been taken in all the circumstances. It was not.

(a) No thorough computer search of the fishery area in question was conducted or requested by the captain.

(b) Brief perfunctory and narrow queries were made of unidentified NAFO officials in a three minute telephone conversation.

(c) The High Seas Permit was not carefully examined as to attachments that were supposed to be appended to it.

(d) No queries were made or caused to be made of either the Canadian or American governments by the captain.

(e) The captain made no queries of any sort about the commercial availability of crab in the proposed fishing area from any other fishers or fish processors.

(f) The captain made no effort to contact any of the supposed fleets or owners who were reportedly setting out to fish in the Flemish Cap area.

(g) The captain seemed to be unaware of the "continental shelf" in the North Atlantic notwithstanding the fact that he had purchased charts showing relatively shallow waters before the drop off to the deep ocean floor.

(h) The captain made no effort to familiarize himself with the "carefully constructed" regime of international law that related to coastal State claims upon the continental shelf - at least to the point where he should have asked the appropriate questions.

(i) The captain was unaware of the Canadian claim to the continental margin which had been published in the American Notice to Mariners as recently as January 2001 and as early as 1990.

In the totality, I find that the belief of the captain that he could fish without limits or restriction in the waters where he was located by the surveillance aircraft was unreasonable. It may well be that he placed reliance on his owner and his past practices in other fisheries in other parts of the world, but his lack of prudent questioning of NAFO, local fishers and processors, and his disregard for a well established body of international law, and his egregious omission of failing to read the relevant portion of the Notice to Mariners published by his own country, all lead me to the conclusion that his actions cannot be justified as reasonable in all the circumstances.

One would think that when one is involved in such an expensive and costly endeavour as sending, staffing, and provisioning a vessel to an unknown and unfamiliar area, one would make certain inquiries to offer a clue as to the financial feasibility of such an undertaking. Otherwise, the whole exercise might well amount to buying a very expensive pig in a poke. I find it difficult to accept that an experienced owner and captain would embark on such an errand without much more preliminary inquiry, research and care. Neither man was familiar with the fishery or the geography. All they were operating on was second or third hand information that some unidentified ship might be going there.

Summary

One might suggest that it is a relatively simple thing for the trier of fact to be a "Monday morning quarterback", but it is my view that the trip northward required more preparation and attention to detail than was evidenced by the captain of this vessel. Perhaps he was lulled into a false sense of security because of past practices in international waters off the Pacific Coast where he was more experienced. Mr. Gray indicated that the geological structures (and particularly the continental shelf) on the East Coast were considerably different from the features of the Pacific Coast of Canada. Yet Captain Perry was armed with charts which gave him a good mariner's view of the ocean bottom. He knew or ought to have known that he was fishing on a submerged prolongation of the North American landmass. He should have been aware of the Canadian claim to the continental margin published in the Notice to Mariners, and he should have at least checked with Canadian authorities, before venturing out in the manner he did.

Surely a competent mariner involved in a large scale international and commercial fishery such as was described to the court in these proceedings would be familiar with the framework of the United Nations Law of the Sea Convention and should be aware that various nations lay claim to areas of their continental shelf. In this case, the captain might even have been well advised to compare his own nation's claim to the Canadian claim. Had he done so, he might have been obliged to have asked certain questions which were not asked.

This court learned from the evidence that the vessel was in contact with the Canadian Coast Guard as it entered Canadian waters. (There was also a subsequent contact involving an emergency locater device that had sounded because it had been jarred loose.) No questions of any sort were posed by the captain to the Canadian Coast Guard about any restrictions on its proposed activities. Instead, the ship's company proceeded blithely on its way with regard to nothing but its own intentions to secure a profitable voyage.

It is my view, that in its totality, this rather simplistic, superficial research coupled with perfunctory questioning, and a failure to read about or investigate the coastal State's claim to the continental shelf in public notices directed at and to mariners, demonstrates the degree of negligence that supplies the level of culpability required to ground a finding of guilt for a regulatory offence such as this. It may be that this negligence (or recklessness) was combined with wishful thinking. I am reluctant to categorize the conduct as wilful blindness since that imputes a level of dishonesty that I have not found in this matter. It is my view that an endeavour such as this one, was worthy of more foresight and preparation that was evidenced in the testimony before me, especially when the captain and the owner both knew that they were engaged in a highly regulated industry. Accordingly, the accused has not established on a balance of probabilities that he took reasonable care to avoid the commission of the offence. His defences both of mistake of fact and due diligence cannot succeed in the circumstances.

I am not suggesting that the accused is a "fish pirate" or that he is some sort of "environmental bandit". The evidence does not support that type of assertion. He simply pursued a course of action for which he did not make the necessary preliminary preparation. He did not ask the necessary questions and proceeded into unfamiliar territory on the basis of past assumptions that he should not have relied upon. There were enough warning flags in the Notice to Mariners and in international law that should have prompted him to have made broad and searching inquiries and to have acted accordingly. This he did not do. Whatever mitigating circumstances I have found are more appropriately considered in the question of determining a fit sentence.

Accordingly he will be found guilty as charged.

I wish to thank both counsel for their capable arguments and submissions. I will now hear submissions on the question of sentence.

Counsel: Mr. Scott Beazley and Ms Lauren Chafe for the Crown

Ms Anne Fagan for the accused

January 31, 2003