

Canada

Frustrating private agreements

The Canadian court battle over owner-operator policy has resulted in a significant ruling

Defenders of Canada's inshore fisheries policies got a major boost in April when a court decided that the Department of Fisheries and Oceans (DFO) could effectively frustrate private agreements designed to undermine its policies.

The case, reported in the December 2004 issue of *SAMUDRA Report*, involves two fishermen who had entered into a private contract or trust agreement to transfer the right to use a fishing licence that one of the parties was not eligible to hold.

In recent years, these private agreements have become increasingly widespread as fish processors, wealthy inshore fishermen and other investors attempt to purchase licences from retiring inshore fishermen, particularly in the lucrative crab and lobster fisheries. The agreements often contravene two important government policies designed to keep fishing licences in the hands of individual working fishermen in coastal communities.

The *owner-operator* policy states that licences for species fished from vessels of less than 19.8 m LOA (length overall) will only be issued to individual, independent fishermen who must fish the licence personally.

Moreover, a qualified individual can only hold one licence per species, that is, while an individual can hold a portfolio of inshore licences (crab, lobster, scallops, mackerel), he or she can only hold one licence per species. The *fleet separation* policy states that corporations, in particular fish-processing companies, cannot hold inshore licences, making it impossible for them to vertically integrate fish-harvesting and fish-processing operations in fisheries like lobster and

crab. With the collapse of the groundfish resource and the increasing values for shellfish species, these inshore licences have become more and more valuable and sought after. Over the last 10 years, ineligible investors have been using trust agreements to accumulate these licences and, by the same token, turn the licence holders into their employees.

For years, the DFO ignored the problem, claiming it was powerless to act in private agreements. As the practice became more and more blatant, fishermen's organizations, especially the Canadian Council of Professional Fish Harvesters (CCPFH), the national organization representing independent owner-operators, pressured the federal government to enforce its policies.

In 2002, the DFO's Gulf region finally acted in the case of five snow crab licences found to be tainted by trust agreements. The DFO suspended the licences and ordered the licence-holders to extricate themselves from the agreements. In one of these cases, the holder of the trust agreement decided to ignore the government's action and asked the courts to enforce the agreement.

After several years of legal wrangling, the case finally came to trial. Lawyers for the plaintiff, the holder of the trust agreement, called a series of witnesses, including the lawyer who crafted the trust agreement, a former provincial cabinet Minister turned lobbyist and a lower-level DFO official, all of whom downplayed the importance and even the existence of the government's owner-operator policy.

Defence counter

The defence countered with testimony from the DFO official responsible for fisheries management decisions in the Gulf Region, who explained in detail the

nature of the government's policies and how it had applied them in this case.

The CCPFH, which received intervener status in the case, also presented a brief to the court that strongly supported the government's policies and actions.

Citing an abundance of case law, CCPFH's lawyer argued that Canada's Fisheries Law grants the Minister of Fisheries absolute discretion in the granting of fishing licences and that the Minister has the right to adopt policies to guide his discretion and the right to delegate his officials to apply these policies.

On 11 April 2005, the judge ruled that the contract could not be completed because the DFO exercised its ministerial discretion in such a way that the transfer of the fishing licence became impossible. In legal terms, the judge ruled that the contract was 'frustrated'. Unfortunately, the judge did not offer an opinion on the validity of the DFO's actions by stating that he did not have the jurisdiction to rule on this question.

The ruling, however, is very significant because a court has now determined that private trust agreements involving fishing licences can be made inexecutable by the DFO actions. This supports the position of the CCPFH. For the last six years, CCPFH has been urging the government to use its

power to thwart agreements purposely designed to circumvent public policy.

The court ruling increases the pressure on the Minister of Fisheries to act, since it is now clearly within his power to protect the integrity of the public policy and the inshore licensing system. The Minister has appointed an official to report on what measures would be required to solidify the policy framework and committed himself to protect the policy. The report is expected in early June.

What remains to be seen is how the Department will deal with violators of the policy, especially those fleets in the province of Nova Scotia, which, although they remain nominally owner-operator, have come completely under processor control through the use of trust agreements. Meanwhile, the legal battle between the two fishermen to clarify the strength of the government's fisheries policy will drag on as the plaintiff has decided to appeal the judge's decision. 📌

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