Employment Standards TRIBUNAL

Citation: McNeill Fishing Ltd. (Re)
2021 BCEST 38

An appeal

- by -

("McNeill Fishing Ltd.")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

and

An application for suspension

- by –

("McNeill Fishing Ltd")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2020/170

DATE OF DECISION: April 28, 2021

DECISION

SUBMISSIONS

Christopher Harvey, Q.C.	legal counsel for McNeill Fishing Ltd.
Sarah Beth Hutchison	delegate of the Director of Employment Standards

INTRODUCTION

1. McNeill Fishing Ltd. (the "appellant") appeals a Determination issued by Sarah Beth Hutchison, a delegate of the Director of Employment Standards (the "delegate"), on December 4, 2020. By way of the Determination, the delegate awarded David Hanson (the "complainant") $25,322.62 on account of unpaid wages ($23,798.41) and section 88 interest ($1,524.21). Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) against the appellant based on its contravention of section 21 of the *ESA* (unlawful wage deductions). Accordingly, the total amount payable under the Determination is $25,822.62.

2. The delegate also issued her "Reasons for the Determination" (the "delegate's reasons") on December 4, 2020. The Determination was issued following a 3-day hearing before the delegate (September 9, September 13 or 25 – both dates are noted at different places in the delegate's reasons – and November 25, 2019). It is not immediately clear to me why there was a delay of more than one year between the end of the hearing and the issuance of the Determination and the delegate's reasons. This lengthy delay is not appropriate, especially in light of section 2(d) of the *ESA* which states that disputes under the statute should be resolved in a fair and efficient manner. I do not wish this comment to be taken as a criticism of the delegate – there may be a legitimate reason for the delay in issuing a decision – but nevertheless, I am of the view that *ESA* complaints should be heard and decided in a much more expeditious manner than was the case here.

3. This appeal is filed under section 112(1)(a) of the *Employment Standards Act* (the "*ESA*"); the appellant says that the delegate erred in law in issuing the Determination. More particularly, the appellant says that the complainant was not an "employee" as defined in the *ESA* but, rather, was a "co-adventurer" with the appellant. The complainant was the skipper of the appellant's commercial fishing vessel, the FV Megabite, and his compensation was based on a share of the proceeds (after certain deductions were taken into account) of the catch.

4. The appellant and the Director have both filed written submissions regarding this appeal but, although invited to do so, the complainant did not file any submission with the Tribunal.

PRELIMINARY ISSUE(S)

5. There are two preliminary matters that should be briefly addressed.

6. First, the appellant applied for a suspension of the Determination under section 113 of the *ESA* with a proposed $10,000 deposit. This latter amount was deposited into the trust account held by the Director

of Employment Standards. By letter dated January 7, 2020, the Tribunal's Registrar advised the appellant that in light of an undertaking from the Director that the funds would not be disbursed, and that no collection proceedings would be undertaken until the appeal was decided, "the Tribunal does not find it necessary to make an Order on the suspension issue at this time".

7. Second, in its memorandum of argument appended to its Appeal Form, the appellant asserted that the *ESA* "must be construed as not to apply to matters which are within the exclusive legislative authority of [the federal] Parliament". The appellant reproduced the following excerpts from the B.C. Court of Appeal's decision in *Mark Fishing Co. v. United Fishermen & Allied Workers' Union*, 1972 CanLII 1016, 24 D.L.R. (3d) 585 (at pages 612 and 613 D.L.R.):

> Under s. 91 of the B.N.A. Act, 1867, the exclusive legislative authority of the Parliament of Canada extends to the class of subjects in head 12, "Sea Coast and Inland Fisheries". A matter included within this class of subjects is the regulation of relations between employers and employees engaged in an industry within the class: see what is sometimes referred to as the *Stevedoring* case…
>
> The *Trade-unions Act* is valid legislation of the Province under head 13 of s. 92 of the B.N.A. Act, 1867, "Property and Civil Rights in the Province". It must, however, be construed as not to apply to matters which are within the exclusive legislative authority of Parliament. Mr. Mullins for the Attorney-General of Canada, in his very helpful argument, conceded that this Act "insofar as it does not necessitate application of the Labour Relations Act, is legislation within provincial legislative jurisdiction in respect of property and civil rights in the Province and is applicable to all persons including those in works and undertakings falling under the legislative jurisdiction of Parliament, including fishing". But he took the position that "the Trade-unions Act, insofar as it necessitates application of the Labour Relations Act, is not applicable to or . . . in respect of persons in works and undertakings under the legislative jurisdiction of Parliament, including fishing". In my opinion this concession and submission were correct, and I so hold.

8. I should note that the Supreme Court of Canada dismissed the union's appeal (*United Fishermen & Allied Workers' Union v. Mark Fishing Co.*, 1973 CanLII 1315, 38 D.L.R. (3d) 316), issuing very brief oral reasons:

> …we are all of the opinion that it is not necessary to decide in this case whether the fishermen employed on the ships in question were employees within the meaning of the Industrial Relations and Disputes Investigation Act. Even on the assumption that such is the case and that employer-employee relations on board fishing vessels are not governed by provincial legislation, but by federal legislation exclusively, we are all of opinion that this would not afford a valid ground of defence against liability based on the concurrent findings of fact of the Courts of British Columbia.

9. In any event, and since the appellant was apparently raising a question regarding whether the *ESA* was constitutionally applicable to the relationship between the parties, by letter dated March 2, 2021, I directed the appellant to advise if it was, in fact, raising a constitutional "division of powers" issue in its appeal and, if so, that it comply with the provisions of section 8 of the *Constitutional Question Act*.

10. On March 4, 2021, the appellant advised that it was not, in fact, arguing that "regulatory power over labour relations in the fishing sector is beyond provincial constitutional competence". The appellant submits:

> … the appellant invites the Tribunal to take into account constitutional principles only insofar as they assist in the central question of construction of the Employment Standards Act…
>
> …The law attacked in this case is rather a law that was found by the decision-maker to be a law regulating the contractual relationship between co-adventurers in a fishing venture, a relationship that has been determined by the courts not to be, at common law, one of employer-employee…
>
> …The [ESA] defines "employee" and "employer" in terms of employees and employers (i.e. employees and employers at common law) and makes no attempt to extend the meaning artificially to co-adventurers in a fishing venture.

REASONS FOR APPEAL

11. The appellant does not attack the delegate's findings of fact, or her calculations regarding the amount determined to be due to the complainant. The sole issue raised by the appellant in this appeal concerns whether the *ESA* governs the parties' relationship. In this regard, the appellant says:

> The issue on appeal is whether the terms of engagement of a master of a fishing vessel are governed by the *Employment Standards Act* or Canadian maritime law…
>
> It is ancient and settled law that the participants in a fishing venture are co-adventurers. The relationship between fishing vessel owner and master is that of co-adventurers, not employer and employee [citing *Mark Fishing Co.*, *supra*] …
>
> It is beyond argument that the relationship between fishing vessel owner and master is, at common law, not that of employer-employee. This is how Revenue Canada approaches it. [citing *Comeau's Sea Foods Limited / Ce 1999-1794 (cpp) v. M.N.R.*, 2001 CanLII 426 (T.C.C.)] …
>
> There is nothing in the *Employment Standards Act* to support a legislative intention to alter the common law with respect to the relationship between fishing vessel owners and masters…
>
> The Delegate, understandably, was unable to find that the wording of the *Act* was sufficiently clear to extend it to fishers in a co-adventurer relationship. She had to resort to the definition of "fisher" in the Regulations to come to that conclusion. However, a regulation cannot extend the scope of a statute.

12. The appellant refers to the *Fishing Collective Bargaining Act*, a provincial statute that establishes a collective bargaining regime for commercial fishers and their employers, and which gives the B.C. Labour Relations Board jurisdiction over disputes arising under the statute. The appellant notes that this statutory scheme "indicates an intention by the Legislature to change the common law with respect to the relationship of owner and master of a fishing vessel" and continues:

> However, the definitions from [the *Fishing Collective Bargaining Act*] have no application to the *Employment Standards Act* and they have no counterpart in the *Employment Standards Act*. Accordingly, it cannot be taken that the Legislature intended to change the common law in the *Employment Standards Act*. The *Employment Standards Act* is designed to regulate relations between employers and employees and cannot apply if that was not the relationship subsisting between the appellant and [the complainant]. If that was the Legislature's intention it would have incorporated wording into the [*ESA*] such as that found in the *Fishing Collective Bargaining Act*.

> Common law rights can only be abrogated by clear legislation [citing *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* [2003] 2 SCR 157]. And where those common law rights are part of Canadian maritime law, any provincial legislation touching them must be narrowly construed so as to respect the constitutional division of powers.

13. The appellant seeks the following order:

> The appellant seeks an order allowing the appeal, setting aside the Decision below and ordering the return of the s. 113 deposit to the appellant; alternatively an order that the appeal be allowed and the case remitted to the Delegate to rehear the matter in accordance with the customary law relating to co-adventurers in a fishing venture.

14. The delegate, in reply, says that "it is established law that provincial jurisdiction over property permits the province to regulate aspects of the business of fishing, including labour relations (see *Morton v. British Columbia (Agriculture and Lands)* 2009 BCSC 163, at para. 170)." The definition of a "fisher", set out in section 1(1) of the *Employment Standards Regulation* (the "*Regulation*"), was included in the new *ESA* statutory scheme introduced in 1995. The delegate submits: "The legislature has the authority to, and did, pass into law the inclusion of fishers as a specific type of employee, in the Regulation [and] 'fishers' as defined in the Regulation fall within the legislative protection of the Act as a result." The delegate's submission continues:

> An "employer" under the Act is a person who has direction and control over an employee, or who is responsible directly or indirectly for a person's employment. The Appellant does not dispute the Delegate's findings of fact which led to the characterization of [the complainant] as an employee and McNeill Fishing as an employer.
>
> The Appellant has characterized the relationship between [the complainant] and McNeill Fishing as that of owner and master, and the two together as co-adventurers in a fishing venture.
>
> Although the Appellant does not supply a definition of co-adventurer beyond a reference to ancient and settled law, the Delegate respectfully submits that an analysis of co-adventurer is not necessary, as the jurisdictional question as to which law applies has been answered above. The Determination contains an analysis of whether the arrangement between [the complainant] and McNeill Fishing constituted an employment relationship, the facts of which are not disputed by the Appellant.
>
> [The complainant] did not bring a financial investment to the 'Megabite''s operations and he did not provide his own equipment. He did not decide to whom the catches were sold, or the price at which the catches were sold (Determination, at R6). His contribution to the fishing venture was his labour, for which he was remunerated. This exchange is the fundamental nature of employment.
>
> The Employment Standards legislative scheme encompasses many types of remuneration: hourly, annual, piece rates, commissions and for fishers, a share of a fishing venture. Although the Appellant argues that [the complainant's] remuneration casts him as a co-adventurer, the basis of his remuneration does not alter the facts, whereby [the complainant's] relationship with McNeill Fishing was anchored by McNeill Fishing exerting direction and control over his actions.
>
> As set out in the Determination, [the complainant] was subject to the direction of McNeill Fishing, which both parties confirmed. He was not an independent entity, free of obligation to McNeill Fishing, and he was not operating the 'Megabite' on that basis. Mr. McNeill was clear that he was

> the authority who made the boats move (Determination at R8), the implication being that [the complainant] was subject to Mr. McNeill, and McNeill Fishing's authority…
>
> The Delegate respectfully submits that the Act and Regulation are properly and lawfully enacted legislation which, unless unconstitutional, displaces any common law that would otherwise govern the relationship between a vessel owner and vessel master.
>
> McNeill Fishing exerted control and direction over [the complainant's] labour: labour which he performed at the behest of McNeill Fishing, and for which he was remunerated. As the Appellant points out, there is no dispute on the relevant acts of the determination, and as a result, the Delegate submits that the Determination should stand.

15. By way of final reply, the appellant says that the delegate has mischaracterized its position, and that there is nothing in the *ESA* that would lead one to conclude that it has extinguished or otherwise replaced the common law regarding the relationship between a fishing vessel owner and a fishing master. The appellant notes that a "fisher" is a person who is *employed* on a vessel engaged in commercial fishing, and submits: "The term 'employed' in this context must be interpreted in light of its common law meaning – which excludes co-adventurers, independent contractors, partners, joint venturers and the like – and in light of any modifications to the common law that are clearly made in the parent statute." In summary, the appellant says that the "principles of statutory construction lead to only one result: the common law rights and obligations that exist between fishing vessel owner and master have been left intact by the *Employment Standards Act* [and] if the Legislature had intended to change the existing common law status of parties to that relationship it could have done so…but so far it has not done so."

FINDINGS AND ANALYSIS

16. The appellant maintains that the relationship between it and the complainant was not an employment relationship but, rather one of "co-adventurers". This latter term does not appear in the *ESA* or in the *Regulation*. It appears that the common law has treated "co-adventurers" as being in a relationship akin to a partnership. The *ESA* does not govern a relationship between individuals that is properly characterized as a "partnership" (see *e.g.*, *Dunn*, BC EST # D466/00 and *Caplin*, BC EST # D531/00). It is, of course, axiomatic that the *ESA* does not apply unless there is an "employment" relationship. This issue, in turn, must be decided in light of certain statutory definitions including the following"

> **"employee"** includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;
>
> **"employer"** includes a person
>
> (a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee;

"wages" includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

(d) money required to be paid in accordance with

(i) a determination, other than costs required to be paid under section 79 (1) (f), or

(ii) a settlement agreement or an order of the tribunal, and

(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include [I have omitted the exclusions since they are not relevant here]

"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

(2) [omitted as not relevant here]

17. A "fisher" is defined in section 1(1) of the *Regulation* as meaning "a person (a) who is employed on a vessel engaged in commercial fishing, and (b) whose remuneration is a share or portion of the proceeds of a fishing venture, but does not include a person employed in aquaculture". As the appellant quite rightly notes, a person cannot be a "fisher" absent an underlying *employment* relationship.

18. The Tribunal has addressed, in many decisions, the distinction between an "independent contractor" (a term, like "co-adventurer", not defined in the *ESA*) and an employee. In a much smaller number of decisions, the Tribunal has examined whether a person is a "partner" or an employee. Further, the Tribunal has issued at least three decisions where an argument was advanced that a person was a "co-adventurer" and thus not covered by the *ESA*. I shall now briefly discuss these decisions.

19. The issue in *Warrior Marine Fishing Company Ltd.*, BC EST # D170/98, was whether a crew member could be properly charged for the loss of a motor as against his share of the catch. The "co-adventurer" issue arose because Warrior Marine argued that section 21 of the *ESA* (unlawful wage deductions) was inapplicable because the crew member "was not an employee but rather a 'co-adventurer' [and that] the federal government does not consider a member of the crew to be an employee and thus [the crew member] is not an employee for the purposes of the [the *ESA*]" (page 3). The Tribunal referred the question of the crew member's status back to the Director (at page 4):

> While [the crew member's] status under federal legislation is not definitive of his status under a provincial scheme such as employment standards, [the appellant] makes a valid point: if [the crew member] is not an employee, section 21 does not protect him from the deduction complained of.

> The above provisions of the *Act* and the *Regulation* cover the situation in this case: the Island Warrior which is a vessel engaged in commercial fishing and [the crew member's] remuneration is a share or portion of the proceeds of a fishing venture. However, it is unclear whether he is "employed" on the Island Warrior or is there in some other capacity. Only if he is an employee is he entitled to the protection offered by section 21. This question cannot be determined here from the facts as set out in the Determination and it was an issue not canvassed by the delegate. Given that [the crew member's status as an employee is critical to the accuracy and correctness of the Determination, I am referring that question back to the Director.

20. The delegate conducted a further investigation and prepared a reporting in which he concluded that the crew member was a Warrior Marine "employee". The delegate's report was provided to the parties for their comment, but no party filed any response. In a letter decision issued on December 17, 1998 (BC EST # D579/98), the Tribunal concluded:

> I have considered the comprehensive submission made by the Director's delegate and I find no basis to alter his conclusion that [the crew member] was an employee of Warrior Marine. The Director's delegate interviewed Captain M.H. Gillis, [the crew member], a senior economist at the Federal Department of Fisheries and the Executive Director of Government Relations for the Fisheries Council of B.C. He also considered the definition of a "fisher" under the *Act* and the various common law tests to determine whether a person is an employee. He found, based on the foregoing, that [the crew member] was an employee of Warrior Marine. His conclusion was not challenged by Warrior Marine. Therefore, in accordance with Tribunal Decision BC EST#D170/98, the deduction made by Warrior Marine is prohibited by the *Act*. The appeal is dismissed.

21. In *Wishinski*, BC EST # D321/98, the appellant argued that the complainant was not his employee; rather he maintained that he and the complainant were "co-adventurers" in a commercial fishing enterprise. Mr. Wishinski owned and operated a commercial fishing vessel and the complainant was hired as his deckhand who was paid on a "share of catch" basis – the precise terms of their agreement was in dispute. The Tribunal held that the complainant was an employee and that the appellant was his employer, noting that the latter's compensation based on share of the catch was a form of "wages". The Tribunal held, at page 4:

> It is clear to me that [the complainant] is an employee and it is equally clear that Wishinski is his employer. He claims that he is himself a fisher and employee, not an employer. It may well be that as skipper of a fishing vessel he might, for the purposes of some legislation, be considered an employee or at least a dependent contractor, but for the purpose of the *Employment Standards Act*, it is clear to me that Wishinski is the employer. It is he that hired the deckhand and was at all times responsible for [the complainant's] employment. The only agreement on pay is between [the complainant] and Wishinski. It is Wishinski that has paid [the complainant] for work. And as skipper of the vessel, Wishinski clearly had control and direction over the deckhand's work.

22. The appellant in *Hanson*, BC EST # D040/06, may be the same person as the complainant in this appeal. Mr. Hanson operated a commercial fishing vessel, the "Bold Venture", and the issue before the Tribunal was whether Mr. Hanson was the "employer" of a crew member. Mr. Hanson alleged that the crew member was a "self-employed fisher or a 'co-adventurer' on the vessel" (page 5). The Tribunal rejected this argument, holding as follows (at page 8):

> In determining whether the *Employment Standards Act* applies, I must look to the definitions contained within that statute. Other considerations, such as the fact that Aero Trading issued Mr. Jones' ROE and T- 4F, and federal government considerations, are of marginal relevance to this consideration. I also find the *Mark Fishing Co. Ltd et. al.* decision of the BCCA cited by Mr. Eidsvik of little relevance. It was decided in 1972, well before the *Act* came into force, and dealt primarily with issues involving trade union rights.
>
> The facts clearly show that Mr. Jones was employed on the Bold Venture, and that the Bold Venture was engaged in commercial fishing. It is also clear that his remuneration was a share of the proceeds.
>
> Therefore, the *Act* applies, and I find that the delegate did not err in her conclusion on this issue.

23. The foregoing review demonstrates that the Tribunal has consistently – albeit there have only been three decisions – held that persons in essentially identical circumstances to the present complainant were employees for purposes of the *ESA*. There is no constitutional issue here – the sole question before me is whether the complainant met the statutory definition of "employee". Whether the complainant was also a "fisher" as defined in the *Regulation* is not particularly relevant *in this appeal*, since it does not concern statutory benefits to which fishers are not entitled by reason of section 37 of the *Regulatio*n (although, it should also be noted that the delegate determined that the complainant was a "fisher", and thus not entitled to any section 63 compensation for length of service – the complainant did not appeal this finding).

24. The delegate, at pages R11 – R12, specifically turned her mind to whether the complainant was an "employee" as defined in the *ESA*. The delegate determined – and these factual findings are not challenged in this appeal – that the complainant "had no ability to independently decide where or what the Megabite would fish". In other words, he was subject to the direction and control of the appellant. The complainant's compensation (or "wage") – based on a share of the catch – while contingent on factors perhaps outside his control, nonetheless, was a form of "commission" payable for "work" and was related to "production or efficiency". The delegate also noted that the catch would be sold to a buyer who "pays the crew (including the Complainant) directly based on instructions provided by [the appellant]" (page R2).

25. Further, the evidence before the delegate showed that the complainant "did not put any of his own money in the Megabite or its operations, did not provide his own fishing equipment, and had no say in deciding to whom the catches were sold, or for what price" (page R6). The complainant did not own any of the fishing licenses – these were either owned by First Nations bands, the appellant, the appellant's principal in his personal capacity, or by the latter in trust for the appellant (pages R8 – R9). The appellant's accountant "received instructions from [the appellant] for calculating [the complainant's] shares" (page R9). "[The appellant] would prepare the [share] breakdown for the crew and [the buyer] would make payments to the crew according to those figures" (page 10).

26. In my view, the evidence overwhelmingly showed that the complainant was an employee, subject to the direction and control of the appellant which, in turn, owned or controlled all of the essential assets of the business.

27. Insofar as the appellant's submission that the Canada Revenue Agency does not consider fishers to be "employees" is concerned, I would only observe that CRA's interpretation and application of the federal *Income Tax Act* is not determinative of the complainant's status under the provincial *ESA*. Finally, even if one accepts that, historically, our courts accepted that fishers were "co-adventurers", I am not persuaded that historical precedent can overrule the clear language of the present-day *ESA*.

28. The appellant relies on *Mark Fishing*, *supra*, to support its position that the complainant was not an employee under the *ESA* but, rather, a "co-adventurer". But this decision did not concern the scope of employment standards legislation and, in my view, has little, if any, relevance insofar as the relationship between the parties in this case is concerned. *Mark Fishing* was a civil claim for damages brought against a union (the union was not certified to represent the crew members in question) flowing from an illegal "hot cargo" declaration. The claim succeeded and about $110,000 in damages (about $.75 million in today's currency) was awarded. This judgment was appealed to the B.C. Court of Appeal; three judges heard and decided the appeal issuing three separate judgments, all dismissing the appeal but for somewhat different reasons.

29. Chief Justice Davey held that the crew members *were* employees (page 591 D.L.R.), subject to provincial jurisdiction, but that whether the crew members were provincially- or federally-regulated, they were nonetheless liable for damages suffered due to their participation in an illegal act. Justice Maclean was of the view the crew members were *not* employees and his decision rested almost entirely on the fact that the crew members were liable in debt for losses incurred on a particular trip (see page 625 D.L.R.: "To me this appears to be inconsistent with the relationship of master and servant and consistent with the relationship of co-adventurers"). Nevertheless, Justice Maclean's view was *obiter dicta* (at page 600 D.L.R.): "…I think that the learned trial Judge was correct in his finding that there was no master and servant relationship. However, I do not regard this as a crucial issue as in my view, the judgment can be upheld, either on the basis that the fishermen were co-adventurers or that they were employees." Finally, Justice Robertson also held that whether the crew members were employees, or co-adventurers, they were liable for the vessel owners' damages. Justice Robertson was persuaded that the crew members were employees by reason of their absolute liability for losses that might be incurred as a result of a financially unsuccessful fishing trip (page 625 D.L.R.). Justice Robertson concluded that the crew members were in a partnership relationship with the vessel owners (page 628 D.L.R.: "Now, looking at the arrangement here between the owners and the fishermen I can see nothing to displace the '*prima facie* evidence of an intention to carry on business in partnership'; and I think that it results in a relationship that was not that of employers and employees.")

30. On further appeal to the Supreme Court of Canada, the court specifically refused to endorse the B.C. Court of Appeal's suggestion (which was not the *ratio decidendi* of the decision) that the crew members were partners, not employees (page 316 D.L.R.):

> …we are all of the opinion that it is not necessary to decide in this case whether the fishermen employed on the ships in question were employees within the meaning of the *Industrial Relations and Disputes Investigation Act*. Even on the assumption that such is the case and that employer-employee relations on board fishing vessels are not governed by provincial legislation, but by federal legislation exclusively, we are all of opinion that this would not afford a valid ground of defence against liability based on the concurrent findings of fact of the Courts of British Columbia.

31. Thus, neither the B.C. Court of Appeal nor the Supreme Court of Canada affirmatively decided that the crew members were *not* employees, even if it could be said that at least two of the three judges in the B.C. Court of Appeal were inclined to that view. The latter two justices' decisions appeared to hinge on a very specific fact – not present in the case at hand – namely, that the crew members (like partners) were liable for business losses.

32. I wish to briefly comment on another decision the appellant referred to in its submissions. The appellant says that the Supreme Court of Canada's decision in *United Fishermen and Allied Workers' Union et al. v. British Columbia Provincial Council*, [1978] 2 S.C.R. 97, supports its arguments on appeal. I do not see how this decision is relevant here. First, as in *Mark Fishing* but not in this case, the evidence before the court was that crew members were personally liable for losses incurred on a given trip: "…if there is a loss on a fishing trip, the fishing trip is then referred to as a 'hole' trip, the loss on which is charged to the owner and crew in the same ratio as the owner and crew share the "net stock" proceeds" (page 106). Second, this was not a case about whether crew members were employees for purposes of provincial employment standards legislation. The Federal Court of Appeal's decision turned *solely* on constitutional jurisdictional grounds – *i.e.*, the federal labour relations board had no jurisdiction to entertain an application for certification concerning crew members. The Supreme Court of Canada sidestepped the constitutional question simply holding, based on an interpretation of the *Canada Labour Code*, that the statute "does not bring fishing crew members and fish processors into an employee-employer relationship so as to authorize the Canada Labour Board to entertain applications for certification in respect of such fishermen and the respondent processors."

33. As discussed above and based on the essentially uncontested facts before the delegate, I am entirely satisfied that the complainant was an "employee" for purposes of the *ESA*. Further, I reject the appellant's position that the complainant would not be an employee at common law. A person is an employee at common law based on an assessment of the factors the Supreme Court of Canada identified in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 at para. 47:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

34. The evidence in this case was that the business was owned and operated by the appellant. All of the essential business assets were either owned, or controlled by, the appellant. The appellant controlled the complainant's activities to a significant degree. While there was some financial risk assumed by the appellant (but only in the sense that he could earn a good deal of money, or not very much at all, depending on the size of the catch), he was not responsible for business losses and, in my view, his variable compensation was like that of a commissioned salesperson. He was not, in any realistic sense, a "partner" in the appellant's enterprise.

35. To summarize, I am not satisfied that the delegate erred in law in determining that the complainant was an "employee" as defined in the *ESA*. Further, and although it is not necessary to decide this point, I do

not accept the appellant's submission that the complainant would be characterized as a co-adventurer, rather than an employee, at common law. In my view, the common law has evolved, and I consider the complainant would today (although perhaps not 50 years ago) be characterized as an employee under the most recent precedent from the Supreme Court of Canada. Finally, and although I am not technically bound by prior Tribunal appeal decisions, I see no reason whatsoever to depart from the position the Tribunal has espoused in several cases, namely, that "fishers" such as the complainant are "employees" under the *ESA*.

ORDER

36. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the total amount of $25,822.62, together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal