A case to follow

The future of Canadian inshore fisheries policy hinges on an upcoming court case

An obscure contractual dispute between two fishermen could soon have a major impact on access rights to Atlantic Canada's $1.4 bn inshore fishery. The case, scheduled to go to court in December, will clarify whether private agreements can subvert public policy in the fishery.

At stake are two key measures put in place more than 25 years ago to keep inshore fishing licences in the hands of working fishermen and prohibit the concentration of fishing licences and the vertical integration of fishing and fish processing operations in the inshore fishery.

Canada adopted the two measures, known as the 'owner-operator' and 'fleet-separation' policies, after extension of its fisheries jurisdiction to 200 nautical miles in 1977. Prior to 1977, European and Soviet bloc offshore fishing fleets and a domestic inshore fleet exploited the enormous marine fishery wealth along Canada's Atlantic continental shelf.

After 1977, government policy encouraged industrial fishing by offshore trawlers owned and operated by Canadian fish processing corporations to replace the foreign distant-water fleets. Government planners saw the existing seasonal inshore fleet as a socioeconomic liability with low labour productivity, low-income levels and a chronic over supply of labour. It was thought that the new industrial fleet would soon generate year-round employment opportunities through backward and forward linkages to absorb some of the underemployed inshore fishermen.

The rush towards industrial fishing alarmed Canada's independent inshore fishermen who feared that the highly capitalized processing companies would soon extend the industrial model into their traditional inshore fisheries. To allay these fears, the government divided the fisheries access pie in two. The processing companies, with their offshore trawlers, were given rights to more than half of the valuable groundfish allocations, while the rest of the groundfish was reserved for the inshore fleet of independent owner-operators.

In addition, inshore fleets were given almost exclusive access to fisheries that, at the time, were considered less valuable: species like lobster, crab, herring, scallops, mackerel, and so on.

Two government policies—the fleet-separation and owner-operator policies—established a firewall between the offshore corporate fleet and the independent inshore fleet. The fleet-separation policy prohibited corporations from acquiring licences for vessels less than 65 ft (19.8 m) LOA (length overall), essentially 'separating' the harvesting from the processing, and making vertical integration illegal in the inshore fishery. The owner-operator policy further strengthened the independent nature of the inshore fleet by stipulating that licences for species fished from vessels less than 65 ft must be fished personally by the licence-holder, that is, the individual must be on board at all times directing the fishing operations, unless otherwise temporarily exempted for health reasons, for example.

Greater competition

By blocking vertical integration in the inshore fishery, the fleet-separation policy stimulated competition amongst fish buyers for inshore products, while the owner-operator policy meant that the economic benefits derived from fishing remained in the hands of the individuals

who fish, the captains and crewmembers of the inshore fleets.

By 1992, the government's offshore fisheries strategy was in shambles. Overfishing by the industrial fleet, combined with inadequate management controls, obliterated the once plentiful groundfish stocks, and the government declared a moratorium on most groundfish species, which is still in effect today. Ironically, the productivity and economic value of the inshore fishery improved steadily during the same period.

The marketing of live lobster to the US and Europe increased the incomes of inshore fishermen, who also intensified their fishing efforts with improvements in gear and technology. At the same time, the previously marginal snow crab fishery emerged as a multi-million dollar industry, serving the lucrative Japanese market and benefiting from a sharp fall in landings of Alaskan king crab. The abundance and range of the East Coast snow crab also improved with diminished groundfish predation and a favourable shift in water temperature.

With both of these species firmly under the control of owner-operator fleets, the economic profile of the Atlantic inshore fishery improved consistently throughout the 1990s to the point where it now represents 99 per cent of the harvesting employment and 75 per cent of the landed value of the Atlantic fishery.

The owner-operator and fleet-separation policies effectively blocked concentration of ownership of licences and ensured that the economic benefits of the inshore fishery were widely distributed throughout hundreds of small coastal communities in the five eastern Provinces (Québec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland), providing good incomes and seasonal jobs in areas of high unemployment.

The greatly increased economic value of the inshore fishery, however, did not go unnoticed by processors and other investors. With the assistance of lawyers well versed in property law, they have opened a legal breach in the protective policy wall.

Over the last decade, fish processing companies, successful inshore fishermen and investors from outside the fishery have been using a loophole in the fisheries regulations to gain control over, and accumulate, valuable inshore fishing licences in clear violation of public policy.

Complex processes

The legal aspects of the process are quite complex. A fishing licence is not property in Canada. It is a privilege granted annually at the absolute discretion of the Minister of Fisheries. Although

transferring a fishing licence is technically illegal, it happens all the time through a government-sanctioned process called the issuance of a 'replacement licence'.

The government initiated this process with the introduction of limited-entry licensing in the 1970s and 1980s to facilitate the transfer of inshore licences between retiring captains (licence-holders) and younger fishermen—most often, family members.

The typical process is that an inshore licence-holder wishing to retire works out an agreement with an 'eligible' fisherman for that person to take over the fishing enterprise as a new entrant. The retiring licence-holder receives a payment from the new entrant, then asks the Department of Fisheries and Oceans (DFO) to issue him/her a replacement licence. While these transactions are commonly referred to as 'licence purchases', in strictly legal terms, no sale has taken place because a fishing licence cannot be sold.

The process of issuing replacement licences to facilitate inter-generational transfers of licences has become an accepted practice in the inshore fishery, and normally would not be a problem, since government policy states that the replacement licence can only be issued to an 'eligible' fisherman.

However, ineligible parties (fish processing companies, inshore fishermen who already hold licences and other investors) have been subverting the process and gaining control over inshore licences. They do so by entering into 'trust agreements' with the legal titleholder to transfer the 'beneficial use' of the licence.

These trust agreements are essentially contracts that separate the 'use' of the licence from its legal 'title'. In this way, the transaction is not illegal, in strictly legal terms, because the legal title has not been transferred, only the use. But, in reality, the use is everything. Whoever controls the use of the licence, controls the money that can be made from the licence through fishing.

A typical transfer transaction occurs as follows. A processor or other investor approaches a licensed fisherman nearing retirement age and offers to 'purchase' the 'use' of his or her fishing licence. A trust agreement is drawn up between the two parties whereby they agree that the fisherman will legally transfer to the purchaser the 'beneficial use' of the fishing licence, and that the fisherman will ask the DFO to issue a replacement licence to an eligible person designated by the purchaser. Usually, the eligible person is a longstanding crewmember of the retiring fisherman, who, in turn, also signs an agreement to transfer the 'beneficial use' of the licence to the purchaser.

The new titleholder, however, does not enter the fishery as an independent owner-operator but rather as an employee fishing for a share of the catch or for wages. The profits from the inshore fishing enterprise get siphoned off to those who control the use of the licence—the holders of the trust agreement.

The consequences of this can be quite dramatic. On Canada's Pacific coast, where the fleet-separation and owner-operator policies were never adopted, control over fishing licences has fallen largely to investors who, in turn, lease the licences to working fishermen. In recent years, the costs of licence leasing have eaten up to 70 per cent of the landed value in some Pacific coast fisheries.

By creating the legal fiction of a 'beneficial use' in a licence, ineligible parties have been gaining surreptitious control over the Atlantic inshore fishery at an alarming rate.

Because of the private nature of the agreements, it is difficult to know for certain how extensive the practice is. However, it is commonly believed that four small but economically significant inshore fleets in Nova Scotia (mobile groundfish, scallop, herring and bluefin tuna) are now all under processor control. Some of these same interests and other powerful investors are now moving to buy up control over licences in the valuable inshore lobster and crab fisheries throughout Atlantic Canada.

Old decision

They are encouraged, in part, by a court decision several years ago that upheld a trust agreement contract and forced a

licence-holder to comply with its provisions. The existing jurisprudence, therefore, favours investors intent on gaining control over inshore licences.

But this may soon change. The existing precedent was established in a case without any arguments presented on the agreement's impact on fisheries policy by the government of Canada or any other party.

The Canadian Council of Professional Fish Harvesters (CCPFH), the national federation of owner-operator fishermen's organizations, has received legal opinion that a different result could be obtained if the DFO were to defend its policy before the courts. That now appears to be about to happen.

The DFO will be called to testify in a new case that has been winding its way through the legal process and is about to come to trial in December in New Brunswick. The case involves a crab licence fished under a trust agreement, one of five discovered by a DFO Gulf region investigation initiated at the request of the province of New Brunswick.

The DFO's Gulf region, historically sympathetic to the owner-operator fishery, ruled that by surrendering the 'beneficial use' of their licences, the licence-holders were no longer the heads of their enterprises and were thus violating the owner-operator policy. (One licence-holder was also found to be violating the fleet-separation policy because the trust agreement was clearly held by a processing company.)

The original licences were cancelled, new temporary licences were issued and the licence-holders were given a deadline to sever the trust agreements or risk losing their licences permanently. Two of the cases were settled to the satisfaction of the DFO.

The three others are still pending, one of which is scheduled to go to trial in December. In this case, the lawyers for the holder of the trust agreement are arguing that the existing jurisprudence supports their client and that the titleholder must fulfill the terms of the contract, including requesting that the DFO transfer the licence to their client, which the Gulf region has indicated that it will refuse to do.

The case, if it does make it to trial—there is always the possibility of the parties settling out of court up until the last minute—will be the first test of the strength of government policy and the government's resolve to defend it.

Interestingly, the CCPFH has been granted intervener status in the case and has hired a well-known university jurist to defend the government's policies in court. The situation is rather unusual since it is the national fishermen's organization initiating the defence of public policy, and not the government. The CCPFH, however, took the lead in defending the public policy when the government was initially slow to respond.

Beginning in 2000, the CCPFH presented the DFO and successive Ministers of Fisheries with a detailed legal analysis of the threat trust agreements posed to the fleet-separation and owner-operator policies, along with the legal remedies needed to give the policies the force of law. The DFO's initial position was that trust agreements were civil arrangements between parties and difficult for the government to monitor. The whole question was referred to a major review of its Atlantic fisheries policy launched by the DFO.

The policy review team (all DFO officials) initially attempted to sidestep the trust agreement issue by asserting that the fleet-separation and owner-operator policies were fully in effect.

However, they also proposed that the different inshore fleets be allowed 'flexibility' in the application of the policies. This proposal was widely interpreted as a way to allow those fleets already under processor control to opt out of the policies.

Flexibility proposal

The strong reaction by fishermen's organizations to the flexibility proposal and their continued focus on the trust agreement problem led the government to produce a discussion paper and to hold special public consultations seeking broad

stakeholder input on how to deal with the problem.

In the discussion paper, released in December 2003, the DFO clearly recognized, for the first time, that trust agreements violate public policy. The document states:

> 'Trust agreements' that purport to transfer the beneficial use of a licence, although they have not been considered as illegal by courts, contravene the owner-operator and fleet-separation policies and the Core fisher designation since they allow a corporation, third party or entity other than the licence-holder to control a licence in the inshore fleet. (*Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries: A Discussion Document*, DFO, 2003)

The DFO has yet to announce how it intends to deal with the problem. The public consultations, however, revealed the deep cleavage that exists within the industry around public policy. Independent fishermen's organizations, provincial governments and coastal community organizations were almost unanimous in calling for a strengthening of the fleet-separation and owner-operator policies. On the other hand, fish processing companies and spokespeople for the fleets they control called for the elimination of the policies and the free movement of capital into the inshore fishery.

There is some urgency to deal with the problem. The majority of licence-holders in the inshore fleet are nearing retirement age and most will transfer their licences to new entrants over the next 10 years. Unless the legal loopholes in the public policy are eliminated, control over these licences and an annual landed value of Can$1.4 bn in wild inshore fishery products will end up in the hands of non-fishermen.

Enormous stakes

The stakes are enormous in terms of how the wealth generated by access to this public resource is distributed. A carefully crafted and successful public policy

designed to keep this wealth in the hands of working fishermen residing in small coastal communities could very rapidly be turned into an empty shell.

Those interested in the links between fisheries policy and the sustainable socioeconomic development of coastal communities should follow the evolution of this case closely.

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