

# In the Privy Council

No. of 1934.

## ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANCO.

BETWEEN  
MARITIME NATIONAL FISH LIMITED

*(Defendant) Appellant*

AND

OCEAN TRAWLERS LIMITED

*(Plaintiff) Respondent*

## RECORD OF PROCEEDINGS

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# In the Privy Council.

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ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA  
EN BANCO.

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BETWEEN

MARITIME NATIONAL FISH LIMITED

*(Defendant) Appellant*

AND

OCEAN TRAWLERS LIMITED

*(Plaintiff) Respondent*

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## RECORD OF PROCEEDINGS

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No. 1

### Statement of Claim

*In the  
Supreme  
Court of  
Nova Scotia.*

The Plaintiff's claim is against the Defendant for money due from the Defendant for the hire of the ship "St. Cuthbert" chartered by the Plaintiff on hire to the Defendant under an agreement date on or about the 6th day of July, 1932.

No. 1  
Statement  
of Claim.  
19th June,  
1923.

Particulars:

To monthly charter fee payable for month ending May 25th, 1933—\$590.97.  
PLACE OF TRIAL, Halifax, N. S.

10 DATED at Halifax, N. S., the 19th day of June, 1933.

L. A. LOVETT,  
of 35 Bedford Row,  
Halifax, N. S.,  
*Plaintiff's Solicitor.*

Defence

No. 2  
Defence,  
7th November,  
1933.

1. The Defendant admits that it entered into the Agreement referred to in the Statement of Claim herein under the circumstances hereinafter set forth, but the Defendant denies that it is indebted to the Plaintiff in the sum of \$590.97 under or by virtue of the said Agreement or otherwise howsoever, and says that by reason of the matters and things hereinafter set forth the total amount due from the Defendant to the Plaintiff is the sum of \$98.50 which amount the Defendant brings into Court with this Defence and says that the same is sufficient to fully pay and satisfy the Plaintiff's claim 10 herein.

2. As to the whole of the Statement of Claim herein the Defendant says:—

(a) That by Charter Party dated the 25th day of October, 1928, made between the Plaintiff herein as Owner and The National Fish Company, Limited, a body corporate, as Charterer, the Plaintiff chartered to the said The National Fish Company, Limited the Steam Trawler "St. Cuthbert" in the said Charter Party described for the period and upon the terms, conditions and covenants in the said Charter Party fully set forth, and the Defendant craves leave on the trial of this action to refer to the said Charter 20 Party.

(b) At the time of entering into the said Charter Party the said The National Fish Company, Limited was engaged generally in the fish business and for the purpose of its said business was engaged in fishing with steam or beam trawlers, all of which was well known to the Plaintiff.

(c) At the time the said Charter Party was entered into the said Steam Trawler "St. Cuthbert" had been purchased by the Plaintiff for the express purpose of being chartered by the Plaintiff to the said The National Fish Company, Limited to be used by the said Company as a steam or beam trawler in the carrying on of the said business of the said The National Fish Com- 30 pany Limited.

(d) It was one of the express conditions contained in the said Charter Party that the said Steam Trawler "St. Cuthbert" should be employed in the fishing industry only, and it was well known to both the parties to the said Charter Party that the said "St. Cuthbert" could be used in the fishing industry only as a steam or beam trawler.

(e) Prior to the 6th day of July, A. D. 1932 the Plaintiff herein was duly incorporated and acquired all the assets and undertaking of the said The National Fish Company, Limited including the said Charter Party, which Charter Party was duly assigned by the said The National Fish 40 Company, Limited, to the Defendant herein by Assignment in writing containing apt words in that behalf.

(f) By Agreement in writing consisting of a letter dated the 6th day of July, 1932, from the Defendant to the Plaintiff and the Plaintiff's reply thereto dated the 8th day of July, 1932, the said Charter Party was renewed for the period of one year from the 25th day of October, 1932, subject only to the following changes, viz:—

(i) That the hire of the said Vessel should be reduced by twenty-five per cent (25%) making the monthly payment for hire \$590.97.

(ii) An amendment to Clause 9 of the said Charter Party relative to the exercise by the Defendant of the exercise of the option to purchase the said Steam Trawler "St. Cuthbert."

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 2  
Defence,  
7th Novem-  
ber, 1933.  
—continued.

(g) At the time of the entering into of the said Agreement represented by the said two letters of 6th and 8th of July, 1932, respectively it was well known to both Plaintiff and Defendant herein that the purpose for which the said "St. Cuthbert" was to be used was as a steam or beam trawler and further that the said "St. Cuthbert" could not be employed in the fishing industry carried on by the Defendant except as such steam or beam trawler, and further that the only trawl or trawls that could be used by the said "St. Cuthbert" in the said fishing industry were "otter" trawls or trawls of a similar nature.

(h) The Honourable The Minister of Fisheries for the Dominion of Canada, as he lawfully might under the provision of Section 69 (a) of The Fisheries Act being Chapter 73 of the Revised Statutes of Canada 1927 as amended by Chapter 42 of the Statutes of Canada for the year 1929, failed or refused to issue a License under the provisions of the said Act to the said "St. Cuthbert" or the Owners thereof to enable the said "St. Cuthbert" to be used or employed as a trawler in the fishing industry from and after the 30th day of April, A. D. 1933 whereupon it became unlawful from the said 30th day of April, A. D. 1933 for the said "St. Cuthbert" to be used or employed as a trawler in the said fishing industry and whereupon it also became unlawful for the Defendant to use or employ the said "St. Cuthbert" in the said fishing industry and it has ever since been unlawful for the said "St. Cuthbert" to be employed or engaged in the fishing industry or for the Defendant to so employ her.

(i) By reason of the matters and things hereinbefore set forth there was on and from the said 30th day of April, A. D. 1933 complete frustration of the adventure represented and covered by the said Charter Party and by the subsequent Agreement represented by the letters of July 6th and July 8th, 1932 respectively, and from and after the said 30th day of April, A. D. 1933 the Defendant was and is discharged from all liability under the said Charter Party and under the said Agreement.

3. As to the whole Statement of Claim herein the Defendant repeats the preceding paragraphs of this pleading and says that after the entering into of the Contract sued on herein, through no fault, act or omission on the part of the Defendant, but by operation of law, the said Contract became impossible of performance on and after the 30th day of April, 1933 and thereupon the Defendant was and is wholly relieved and discharged from the said Contract and all the covenants and agreements therein contained and in particular is wholly relieved and discharged from all obligation to pay the charter fee or money in and by the said Contract stipulated for.

*In the  
Supreme  
Court of  
Nova Scotia.*

DATED AND DELIVERED at Halifax, N. S., this 7th day of November, A. D. 1933.

C. B. SMITH,  
*Defendant's Solicitor.*

No. 2  
Defence,  
7th November, 1933.  
—continued.

To:  
L. A. LOVETT, ESQ., K.C.,  
*Plaintiff's Solicitor.*

RECEIVED from the Defendant's Solicitor the sum of \$98.50 paid into Court with this Defence.

HALIFAX, N. S., November 7th, A.D., 1933. 10  
(Sgd.) REGINALD V. HARRIS,  
*Prothonotary.*

No. 3  
Reply,  
20th November, 1933.

No. 3  
Reply

1. As to the whole of the Defence the plaintiff says that the same is bad in law and is no answer to the Statement of Claim herein and the plaintiff raises this objection as a point of law to be disposed of by the Judge who tries this cause.

2. Alternatively, as to the whole of the Defence and each of the allegations contained therein the plaintiff says: 20

(a) It joins issue thereon.

(b) That the Minister of Fisheries might fail or refuse to issue the license referred to in Paragraph 2 (h) of the Defence herein was, or ought to have been, in the contemplation of the parties hereto when the agreement referred to in the Statement of Claim herein was made.

(c) The failure or refusal of the Minister of Fisheries to issue the said license was caused by the defendant and defendant ought not now to be permitted to rely on such failure or refusal as a defence to this action.

(d) Prior to the 1st day of April, 1933, the defendant applied to the Minister of Fisheries, or to the proper authorities for a renewal of the "St. Cuthbert's" license for a further year from the 30th day of April, 1933, but subsequent to the said 1st day of April, 1933 and before the said 30th day of April, 1933 the defendant withdrew its said application for renewal license and ought not now to be permitted to rely on the fact that a license was not issued to the "St. Cuthbert" or her owners as a defence to this action.

(e) The defendant neglected or failed to apply to the Minister of Fisheries, or to the proper authorities, for renewal of the "St. Cuthbert's" license for the year beginning the 30th day of April, 1933 and ought not now to be permitted to rely on the fact that such license has not been issued as a defence to this action. 40

DATED Halifax, N. S., this 20th day of November, 1933.

L. A. LOVETT, of  
35 Bedford Row, Halifax, N. S.,  
*Plaintiff's Solicitor.*

To:  
C. B. SMITH, ESQ., K.C.,  
*Defendant's Solicitor.*

## No. 4

## Minutes of Evidence

*In the  
Supreme  
Court of  
Nova Scotia.*

HALIFAX, TUESDAY, DECEMBER 5, 1933. 10 a. m. Plaintiffs' Evidence.

W. C. MACDONALD, K.C., for the plaintiff.

C. B. SMITH, K.C., for the defendant.

MR. MACDONALD tenders:

Charter Party, dated 25th October, 1928. E/1.

Agreement, dated 6th December, 1928. E/2.

10 Letter, Maritime National Fish, Ltd., to Ocean Trawlers, Ltd., dated July 6th, 1932. E/3.

MR. SMITH: I am admitting the original charter party, and the amendment of December 6th, 1932; and I will give you the original reply to the letter of July 6th, 1932, which will keep the record complete. (E/4).

I will admit that the charter money was paid only up until the 25th April. The charter money was payable monthly from the 25th October, 1928, and paid on the 25th of each month; I am prepared to admit at the time of the issuing of the writ no charter money had been paid from the 25th April; but with our defence we paid in ninety odd dollars as payment for the remainder of the month of April. We claim frustration of the contract  
20 as of the 1st May.

PLAINTIFF RESTS.

No 4  
Documentary Evidence Admitted.

## No. 5

## Evidence of Harold G. Connor

Defendants' Evidence.

HAROLD G. CONNOR, being called and duly sworn, testified as follows:

No. 5  
Harold G. Connor,  
Examination.

Examined by MR. SMITH.

Q. You are vice-president and general manager of the Maritime Fish?

A. I am.

30 Q. And have been since when?—A. Since April since the incorporation of the Maritime National, and before that vice-president and general manager of the National Fish since April, 1929.

Q. What is the business of the Maritime Fish?—A. Producers and wholesale distributors of fish; sea fish.

Q. And that was the business of the National Fish before the organization of the Maritime?—A. Exactly the same.

Q. That business is carried on from the port of Halifax?—A. Yes.

Q. And elsewhere on the—?—A. Yes.

Q. Where else in Nova Scotia?—A. At present at Digby.

Q. The fishing operations are solely carried on through Nova Scotia ports?—A. Right.



*In the  
Supreme  
Court of  
Nova Scotia.*  
—  
Defendants'  
Evidence.  
—  
No 5  
Harold G.  
Connor,  
Examination.  
—continued.

Q. And were so as long as you have been connected with the companies?—A. Yes, that is right.

Q. In the conduct of that business is it necessary to use beam or steam trawlers so-called?—A. We consider it necessary.

Q. Why do you consider it necessary in the conduct of the business to employ steam trawlers, briefly?—A. To provide continuity and regularity of supply; to keep the markets supplied with fish.

Q. During the years 1929 to March or April, 1933, you employed in that business a number of steam trawlers?—A. Yes.

Q. How many?—A. Five.

Q. Including the ST. CUTHBERT?—A. Yes.

Q. And from 1929 down to the end of April, 1933, all five trawlers were licensed under The Fisheries Act to fish with an otter or trawl of a similar nature?—A. Yes.

Q. In 1933 did you make application for the granting of a license to the ST. CUTHBERT?—A. Yes.

Q. Did you furnish to the deputy minister a declaration showing the necessity of a license being issued as required by the regulations?—A. Yes.

Q. And did you send to the deputy minister the fee of \$500 prescribed by the regulations?—A. Yes.

Q. I shew you a letter dated March 11, 1933, addressed by you as vice-president and general manager of the National Fish to the Deputy Minister of Fisheries, together with a copy of a declaration purporting to be made by you? (E/A, E/B & E/C). Are those copies of the letter, and application and declaration made by you in connection with the trawler RAYON D'OR?—A. Yes.

Q. Was a similar application, and similar letter written by you in connection with the ST. CUTHBERT?—A. Yes.

Q. On that date?—A. Yes.

Q. I understand you made five applications all alike and only kept one 30 file copy?—A. Yes.

Q. And that is from the file copy?—A. That is right.

Q. I shew you letter marked E/C purporting to be a letter from the Deputy Minister of Fisheries—is that a copy of the letter received?—A. Yes.

Q. At a later date did you receive a letter from the Deputy Minister of Fisheries with regard to these applications under date April 5, 1933 (E/D)?—A. Yes.

Q. E/E is a copy of your reply dated April 10, 1933, to the Deputy Minister?—A. Yes.

Q. E/F, dated April 24, 1933, from the Deputy Minister—you duly received that in the ordinary course of mail?—A. Yes.

Q. Do you know the ST. CUTHBERT pretty well?—A. Yes.

Q. Know her equipment and know her capabilities as a fishing vessel?

A. I would say so.

Q. What sort of trawl is she fitted with?—A. Otter.

Q. I suppose you would rather leave that to somebody else to describe—or can you tell us what it is?—A. Well, an otter trawl is a large cone shaped net with a large opening at the mouth, kept open by what is called or

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20

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known as the otter boards; perhaps if you want a clearer definition of what an otter trawl is I would suggest that Captain Hanson give it.

Q. The manner in which it operates, can you explain that?—A. A cone shaped net with the mouth kept open by otter boards— A. It is pulled on the bottom of the ocean by two wires strung from the trawler, and then when the net is full of fish they pull it up.

Q. Is the ST. CUTHBERT particularly adapted and built for the use of this otter trawler?—A. Yes.

Q. Is it commercially possible to use the ST. CUTHBERT in the fishing industry as carried on by your company unless she is licensed as a trawler?—A. It is absolutely impossible.

Q. There is no purpose for which you could use her?—A. There is absolutely none that I know of.

Q. When you were called upon to select or nominate the three trawlers for which licenses would be issued for the fiscal year 1933, did you have any communication—on or about that time did you have any communication with Mr. Saunders the president of the plaintiff company, in regard to the issuing of the license?—A. I don't recollect having any communication or conversation at all.

20 A. You are not prepared to say you didn't have some conversation?—

A. No, I would not even say that.

#### CROSS-EXAMINATION.

Cross-Examined by MR. MACDONALD.

Q. Can you tell me when the Maritime National acquired the assets of the National Fish Company?—A. I can't recollect the date off hand, but I could easily furnish that information.

Q. Can you give me the year?—A. Could I ask the secretary of our company, Mr. Laing, if he remembers the date?

MR. SMITH: I am putting him on.

30 (Witness). Roughly about two years ago.

Q. At all events, you came here in April, 1929?—A. Yes.

Q. You had not been with the National Fish Company before that?—

A. No.

Q. At that time you were operating the five trawlers?—A. In April, 1929, as far as I recollect we were operating five trawlers.

Q. RAYON D'OR, VENOSTA, VIERNOE, LEMBERG and ST. CUTHBERT?—A. Yes.

40 A. I think you told my learned friend with the exception of the ST. CUTHBERT the National Fish owned the shares in each of the other companies?—A. They were owned by wholly owned subsidiaries; I would not say the National Fish owned them all; some were owned by—the shares were owned by other companies.

Q. A separate company was in each instance formed to own each of the individual trawlers?—A. That is right.

Q. But there was only two of them under charter, the RAYON D'OR and ST. CUTHBERT?—A. That is right; the VIERNOE was under charter for a while, after we bought her.

*In the  
Supreme  
Court of  
Nova Scotia.*

Defendants'  
Evidence.

No. 5

Harold G.  
Connor,  
Examination.  
—continued.

Cross-  
examination.

*In the  
Supreme  
Court of  
Nova Scotia.*

Defendants'  
Evidence.

No. 5  
Harold G.  
Connor,  
Cross-  
examination.  
—continued.

Q. Did you get licenses in the year 1929 for these vessels?—A. In the year 1929 we had licenses to operate the five up until April, 1929, when we were only permitted to operate three.

Q.—April this year?—A. I beg your pardon—April of this year; that is right.

Q. You had licenses every year up to that for the whole five of them?—

A. Yes.

Q. Do you remember if the applications for each of these years were made separately, or would one application go in for the five?—A. Each one separately.

Q. Throughout those years? Take the year 1932, applications were sent in that year for each of these five trawlers?—A. Yes.

Q. And license fees paid, \$500 each?—A. Yes.

Q. Were those applications in 1932 sent in by the Maritime National?  
A. I really can't recollect whether they were sent in by the National Fish Company or in the name of the Maritime National; I could easily give you all the information by referring to my file—it is not here.

Q. If it is necessary I can get you to look at the file; at all events the Maritime National Fish Company represents the same interests that constituted the National Fish?—A. Absolutely.

MR. SMITH:

We are not questioning that in the slightest degree; I think I told you before the action started there would be no question about that.

Q. What has become of the National Fish Company?—A. It is still in existence and still operating.

Q.—But it owns all the shares in the Maritime?—A. No. The Maritime controls and owns all the companies we have, but we still operate under the name of the National Fish Company and the Maritime Fish Corporation separately or individually.

MR. SMITH: The Maritime National is now the operating company for the National so far as these trawlers are concerned.

WITNESS: That is right.

MR. SMITH: And the Maritime National has taken the place of the National; we make no dispute about that.

Q. I think you were an officer of the National as you have been of the Maritime?—A. Vice-president of both; up until the time of the incorporation of the Maritime National I was vice-president of the National Fish Company.

Q. The fish business of the Maritime National is carried on in Halifax and Digby? Port Hawkesbury, Canso?—A. We formerly carried on at Canso and Hawkesbury but not at the present time; not today.

Q. And in Montreal, too?—A. Montreal is only the executive office.

Q. Through the subsidiaries you would carry on in Montreal—the Maritime Fish Corporation are there?—A. They have an office there.

Q. And either directly or through subsidiaries you would be carrying on business extensively in places outside Nova Scotia I take it?—A. We carry on business all over the country.

Q. In the United States, too?—A. Yes.

Q. It is part of a large organization, the Atlantic Coast Fisheries, I take it?—A. Yes, they are our associated companies.

Q. I think you told my learned friend when you became interested in this company in April, 1929, that there were no restrictions with respect to the operation of trawlers such as now?—A. As far as I recollect there were no restrictions at that time.

*In the  
Supreme  
Court of  
Nova Scotia.*

Q. Was the agitation on here against trawlers at that time?—A. There has been an agitation against trawlers for many years.

*Defendants'  
Evidence.*

Q. Do you remember if the Royal Commission's findings were made before or after April?—A. Before.

*No. 5*

Q. And after these findings were made there was a great deal of pro-  
10 paganda in the press from time to time?—A. Yes.

*Harold G.*

Q. Arguments for the trawler, and against?—A. Yes.

*Connor,  
Cross-  
examination.*

Q. And then there was the 1929 legislation that my learned friend mentioned, placing restrictions on trawlers and providing for a pretty steep tax on the fish actually caught?—A. Yes.

*—continued.*

A. And the National Fish Company took exception to the validity of that tax?—A. Yes.

Q. And they fought it out in the courts and won out?—A. That is right.

Q. To complete—I think it was in the month of March, 1931, the  
20 Exchequer Court decided in favour of the National Fish, and in the month of August, 1931, an appeal to the Supreme Court of Canada was abandoned.—A. I don't remember the exact dates.

Q. Do you remember that after the appeal was dropped some new regulations came out providing for a license fee of \$500?—A. Yes.

Q. That was on the strength of the Order-in-Council of the 14th August, 1931—I will read that.—A. Yes.

Q. In pursuance of the suggestion made in this Order-in-Council you did apply—that is the National Fish or Maritime National—did apply for a license in the year 1932, and got it?—A. Yes.

30 Q. And paid \$500?—A. Yes.

Q. The owners of the ST. CUTHBERT had nothing to do with that application?—A. No.

Q. And meantime, between the year 1929, when the findings of the Royal Commission were announced, and the year 1932, the agitation for and against the trawler continued in Halifax pretty much?—A. Yes.

Q. And naturally this was something your company would be very keenly interested in?—A. Yes.

Q. I think you told my learned friend that steam trawlers are necessary to ensure regularity of the supply of fish for your business?—A. We  
40 have always considered them absolutely necessary.

Q. And naturally you kept advised from time to time of these regulations and the law relating to trawlers?—A. Yes.

Q. In Canada?—A. Yes.

Q. I think you advised Mr. Saunders that you didn't intend to renew the charter at the end of this last year—some time in the year—early part of this year, you advised him you didn't intend to renew the charter?—

A. Yes.

LETTER, January 27, 1933, Maritime National Fish Co.; to B. P. Saunders marked E/5.

*In the  
Supreme  
Court of  
Nova Scotia.*

Defendants'  
Evidence.

No. 5  
Harold G.  
Connor,  
Cross-  
examination.  
—continued.

Q. On one occasion I think the suggestion was made by Mr. Saunders to you that you might release the ST. CUTHBERT from the obligations of the charter and allow the owners to take her back?—A. That would be several years ago; I remember receiving a letter from Mr. Saunders, it seems to me about two years ago, asking us if they were able to sell the boat would we be able to release her.

Q. At that time you were not prepared to consider that?—A. We gave no definite answer; we told him to let us know, when he could sell her and we would give him an answer then.

Q. There were three licenses issued this year, VENOSTA, RAYON 10 D'OR and LEMBERG?—A. Yes.

Q. Are those three trawlers operating now?—A. Yes, to full capacity.

Q. And they have been right straight along?—A. Yes, outside the time required for refitting.

Q. Has the VIERNOE been operating at all?—A. No, she has no license.

Q. And you have not made use of her?—A. She is tied up at Mill Cove and stripped.

Q. She has been tied up ever since? A. Ever since we stripped her and towed her to Mill Cove; she has been lying there ever since. 20

Q. Do you know if any other trawlers operate in Nova Scotia today?—A. There are no other trawlers operating in Nova Scotia today except the three we are operating.

Q. The Leonard Fisheries never operated the LEMBERG?—A. No; they applied for a license and received it, but the company is in liquidation as you probably know, and it has been sold.

Q. Have you ever used trawlers in the fishing of halibut?—A. I understand—not to my actual experience.

Q. Not since you have been here?—A. No. An experiment was made some years ago by the late Mr. Arthur Boutilier. 30

Q. Have you ever used trawlers as carriers of fish?—A. Only on one occasion in my lifetime in connection with the fish business do I remember it being used for a carrier; we took a cargo of salmon to Boston and it arrived in an unsatisfactory condition.

Q. In your time you never made continuous use of trawlers carrying fish?—A. Not as cargo carriers.

Q. What about collecting fish—ever made use of them?—A. No.

Q. I am told that trawlers could serve a good many purposes; that one here has been used for laying cable—was that before your time?—A. They might be employed in business other than the fish business—they 40 were used in mine sweeping very largely in the war.

Q. In the fish business they would have to be employed as trawlers, or in the fishing of halibut, or carrying fish?—A. Yes; I don't know of any use they could be put to except beam trawling in our business profitably.

Q. You don't see how you could make profitable use of this trawler? A. No, the proof being, if we could we would use the one over in Dartmouth.

Q. Of course, there are a good many vessels laid up in these days that are not engaged in the trawler fishery.

Re-Examined by MR. SMITH.

*In the  
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Q. To replace the VIERNOE and ST. CUTHBERT, the two trawlers that didn't get licenses, I understand you have to employ some fishing vessels?—A. We had to employ six.

Defendants'  
Evidence.

Q. Commonly known as Lunenburgers?—A. Yes.

Q. Auxiliary?—A. With Auxiliary power.

No. 5  
Harold G.  
Connor,  
Re-exami-  
nation.

Q. And you say it is or is not commercially possible to use the trawler ST. CUTHBERT in the fishing business other than as a trawler?—A. We don't know of any use we could put her to except for the purpose for which she was built and for which we formerly used her.

Q. How about operating charges to use her as a collecting vessel or as a carrier?—A. It is out of the question; I have had no experience in operating a trawler to catch halibut, but I understand it would be unprofitable.

BY THE COURT:

Q. Would you be allowed to use her to fish halibut?

MR. SMITH: I assume if the trawl were taken away; the Act says any vessel using an otter or trawl of a similar nature—I presume if the gear was removed she might be used.

20 BY MR. SMITH:

Q. You told my learned friend the company did business in the United States what is the extent of the business in the United States—selling fish?—

A. Yes.

Q. Your operations are wholly carried on in Canada?—A. Yes.

Q. Except you sell fish in the States?—A. Yes.

Q. Through the company with which you are associated?—A. Absolutely—independent of them, on our own resources.

Q. Your sales in the United States are for your own account?—A. Absolutely.

30 Q. And not through Atlantic Coast Fisheries?—A. We have made sales through them but we are operating this business entirely on its own bottom.

HIS LORDSHIP: You are saying that the fishing business is wholly in Canada?

MR. SMITH: Yes, our only operations in the United States are selling Canadian caught fish in the States.

Re-Cross-Examined by MR. MACDONALD.

Re-cross-  
examination.

Q. It is all one business though? The Atlantic Coast Fisheries control all these other companies, Maritime, National, and their own companies?

40 A. I would say that they control the majority of shares in all these Canadian companies.

Q. Don't they own all the shares in the Maritime and National?—

A. Yes, they do as a matter of fact?

MR. SMITH: Outside directors shares.

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No. 5  
Harold G.  
Connor,  
Re-Cross-  
examination.  
—continued.

(Witness continues)—but we own shares in their company.

Q. Did you ever get a license for the VIERNOE this year?—A. I think we had a license in the first instance—subject to checking up my file.

Q. And then that was transferred to the VENOSTA? A. Yes.

Q. After the license was issued?—A. Yes.

Q. There is no difficulty about that—you can transfer the license from one trawler to the other?—A. I don't know.

Q. They did it in this case?—A. Yes.

Q. This year?—A. Yes.

MR. SMITH: I wish to put in certain evidence admitted by my learned friend—correspondence passing between the plaintiff company and the Minister regarding the issuing of a license to the ST. CUTHBERT.

E/G, Letter, April 3, 1933, Mr. Saunders to Deputy Minister.

E/H, Letter, April 11, 1933, Deputy Minister to Mr. Saunders.

E/I, Letter, April 15, 1933, Mr. Saunders to Deputy Minister.

E/J, Letter, April 24, 1933, Deputy Minister to Ocean Trawlers.

E/K, Letter, April 27, 1933, Mr. Saunders to Deputy Minister.

I also wish to tender Hansard, April 4, 1933, which gives the statement of the Acting Minister, which is referred to in the correspondence, and which appears to be printed by the Acting King's Printer. (Marked E/L). 20

AND THEN THE WITNESS WITHDREW.

No. 6  
H. V. Darrell  
Laing,  
Examination.

No. 6

### Evidence of H. V. Darrell Laing

H. V. DARRELL LAING, being called and duly sworn, testified as follows:

Examined by MR. SMITH.

Q. You are the secretary of the defendant company?—A. Yes.

Q. Do you remember when the Maritime National Fish Co. was organized?—A. On or about 9th December, 1931.

Q. And prior to that you were secretary of the National Fish?—

A. Yes. 30

Q. You were also I think the son-in-law of the late Arthur Boutilier who in his lifetime was president of the National Fish?—A. Yes.

Q. Prior to entering into the charter party of October 25th, 1928, covering the ST. CUTHBERT, were you present at directors meetings of the National Fish Company at which Mr. B. P. Saunders was present as director?—A. Yes.

Q. Mr. Saunders at that period was a director of National Fish?—

A. He was.

Q. Did you at directors meetings or at any other meetings between Mr. Boutilier and Mr. Saunders—were you present at discussions with regard to purchase and charter of the ST. CUTHBERT?—A. Yes. 40

Q. From your knowledge gained at these meetings and conferences what do you say as to the purpose for which the ST. CUTHBERT was purchased?—A. It was definitely purchased to operate as a steam trawler out of the port of Halifax. *In the Supreme Court of Nova Scotia.*

Q. On her own account?—A. Under charter to the National Fish. Defendants' Evidence.

Q. And you say the plaintiff company was organized to purchase the ST. CUTHBERT and charter her to the National Fish?—A. I do.

Q. Mr. Saunders I understand was and is the president of that company?—A. Yes. No. 6  
H. V. Darrell  
Laing,  
Examination.

10 Q. He was one of the organizers?—A. Correct.

Q. Was he conversant with the business then being carried on by National Fish?—A. Decidedly so. —continued.

Q. And was a director of National Fish?—A. Yes.

Q. And had been some time?—A. Yes, prior to my joining the company.

Q. How long have you been connected with the fishing industry?—A. Since early in the spring of 1925.

Q. From your knowledge of that business gained over those years will you say whether or not it is commercially possible to operate the ST. CUTHBERT in the business of the defendants company other than as a steam trawler?—A. I would say definitely it was not possible—commercially possible to operate her in any other way.

Q. Some reference was made in the evidence of Mr. Connor as to using a trawler for halibut; have the National Fish some experience in that?—A. To its sorrow.

Q. The trawler GOOD HOPE and one of the other trawlers were equipped with long lines and sent up to the Labrador to fish for halibut and the venture left very much to be desired from a financial point of view.

Q. Was the adventure successful or not?—A. No.

30 Q. Was it a money losing proposition?—A. It was.

Q. What was the reason?—A. Chiefly because they didn't catch enough fish.

Q. What about operating costs?—A. They were high.

Q. I shew you copies of two letters, both dated May 1, 1933:

E/M, Letter, May 1, 1933, Maritime National to Ocean Trawlers.

E/N, Letter, May 1, 1933, Maritime National to McInnes, Lovett & MacDonald.

Also:

E/O, Letter, April 29, 1933, Maritime National to Ocean Trawlers.

40 E/P, Letter, April 29, 1933, McInnes, Lovett & MacDonald to Maritime National.

Cross-Examined by MR. MACDONALD.

Cross-Examination

Q. When was it the GOOD HOPE went out on this venture?—A. The first year would probably be about 1924, and the last year 1925.

Q. They were out for halibut?—A. Yes.

Q. And it turned out a poor venture?—A. Unfortunately.

Q. Was that the only trawler that undertook it?—A. One of the others was used at the same time, I think the VENOSTA—I would not be sure.



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No. 6

H. V. Darrell the  
Laing,  
Cross-  
examination.  
—continued.

Q. Are you a director of the Maritime National?—A. No.

Q. That company—are you secretary?—A. Yes.

Q. That company was incorporated December 9th, 1931?—A. I would not say it was incorporated, it began operations.

Q. So that would be the company that applied for the licenses in 1932?

A. I presume so.

MR. SMITH: I don't think there is any question about that; it was the Maritime National in 1932.

Q. That is the form upon which the license is granted? (E/6)—A.

Yes, I would say so.

Q. That is the form that is filled out for one of these licenses; I think you yourself had, or took an active part in the trawler dispute?—A. Yes.

Q. I recollect seeing some letters of yours in the Halifax papers in which you pointed out the advantages of trawlers and how necessary they were?—A. It is possible.

Q. There has never been a time since the Royal Commission's report in 1929 up to the Order-in-Council of 1931, when the question as to whether or not the trawler was to be abolished was not an important one for your company?—A. It has always been important to the company, the continued existence of trawlers.

Q. There was a great drive to abolish them completely?—A. At one time.

Q. In 1930 I suppose principally?—A. Chiefly in 1929 and 1930.

Q. And naturally you kept yourselves informed of this movement?—

A. Yes.

Q. And as to the legislation and regulations that were passed?—

A. Right.

Q. I take it that the application in 1932 and 1933 would have been prepared by you for the applicant in each case?—A. They were.

Q. I suppose you have always known that the issuing of a license was in the discretion of the Minister at any time; that has been so, has it not, for some reasons—I thought that amendment to The Fisheries Act was in 1929?—A. Yes.

Q. I see that the letter of July 6, 1932, confirming the terms of the renewal of the charter party was written by you on behalf of the Maritime National Company?—A. Yes.

Q. And at that time, in July, 1932, the charter was only renewed by your company on terms which meant a reduction by 25% of the monthly fee payable?—A. Correct, that to take effect on October 25, 1932.

Q. When you wrote this letter of July 6, 1932, stating that the conversations between yourselves and Mr. Saunders were confirmed, you inserted in this new agreement, this charter party, all the terms you considered necessary at that time to make your new contract, I take it?—A. Yes.

Q. Knowing that the Minister of Fisheries could in his absolute discretion at any time refuse you the right to get a license for this trawler, why didn't you insert that term in this agreement made in July, 1932?—A. I would answer that by saying at that time there were five trawlers licensed for our company and one for the other; the trawler case had just been

decided and it was hoped by all concerned in the trawler industry that the matter was settled once for all and there would be no further curtailment and no tax. At that time there was no undue trawler agitation.

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Q. You had previously fought the trawler tax?—A. Yes.

Q. And you were aware also of the new licensing regulations?—A. We were operating under them. Defendants' Evidence.

Q. After you got your license in 1932, your attention was called to the provisions of this Chapter 42 of the statutes of 1929.—A. I would not say our attention was particularly called to it, but we naturally read over the 10 license. No. 6 H. V. Darrell Laing, Cross-

Q. That is one of the subjects mentioned in this license, that the at- tention of the licensee is called to the provisions of chapter 42, 1929. examination. —continued.

MR. SMITH: That is an old form of license; E/6 is under the regula- tions which were declared *ultra vires* and they issued a new form.

Q. How long have the new licenses been in effect?

MR. SMITH: August 14, 1931, Order-in-Council, new regulations.

Q. I take it then you thought the agitation had died down in the month of July, 1932?—A. We hoped that it had.

Q. And for that reason you thought you were safe in not having—

20 MR. SMITH: I don't think even in cross-examination that is a fair question that he thought he was safe in not guarding against it; they were not drawing a charter party, they are making some changes in a charter party, and it is not a fair statement to say we thought it was safe not to put an express provision in the contract in regard to the licenses.

MR. MACDONALD: I thought my learned friend would have to shew this could not have been in contemplation of the parties at the time.

MR. SMITH: It all depends on what you mean by contemplation.

Q. For that reason you thought the agitation had died down, you thought you were quite safe in not having a term incorporated in the agree- 30 ment providing if at any time the license was refused for the trawler the charter party would come to an end?—A. I would not say so; I don't think the matter was even adverted to in the minds—

Q. Did I understand you to say a few moments ago you thought the agitation had died down at this time?—A. Yes.

Q. Possibly it was a matter that you had forgotten about this term at the time, or had forgotten about the necessity of getting the license?—A. I would not say so.

Q. At all events, you will agree it was a matter that could very well have been incorporated in the contract at that time?—A. As events have 40 turned out.

Q. And particularly in view of the fact there was a reduction at that time of the charter moneys?—A. I don't think that had anything to do with it; I think the reduction was solely caused by economic upheaval.

Q. But it was a variation from the terms of the original charter party?—A. Naturally it was a variation of the terms.

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examination.  
—continued.

Q. In which the question as to renewal came up flatly for consideration by both sides; I suppose this is also so, that if at that time some reference were made in a contract of the necessity of these trawler licenses it is quite possible the owners of that trawler could have got that license?—A. I don't understand you.

Q. In view of what happened afterwards, it is quite likely that if the owners of the trawler set out in the year 1932 to try and get a license for that trawler, in the year 1933, if they were not under charter to you, they could very likely have got it—you agree to that?—A. No, I don't know.

Q. You know a license was given to the LOUBYRNE?—A. Yes. 10

Q. And you know that three licenses were given to your company?—

A. Yes.

Q. And you know that the Minister of Fisheries announced in the House of Commons on the 4th April, 1933, that they were going to give five licenses—four in all—you know that?—A. Yes.

Q. And that he stated then—in this announcement—that five of the licenses previously granted were for trawlers previously operated by Maritime National, and one to Leonard Fisheries, and in consideration of all the facts if the Maritime had three they could reasonably assure steadiness of supply. I am suggesting to you if the owners of the ST. CUTHBERT had 20 asked for a license before this announcement was made and before the policy of the Department was announced, they would very likely have got the license?—A. I don't know; but I will say that we made application in due course for the trawler ST. CUTHBERT.

Q. But you didn't persist in that application when you were asked to nominate?—A. Until we were definitely told three licenses would be granted, and forced to nominate three.

Q. And you nominated three, included in which three was not the ST. CUTHBERT?—A. Right.

Q. And if the owners of this vessel went after a license a few weeks or 30 months before that they would have got it?—A. I don't know.

Q. You don't know as to that? But you can appreciate the hazard of their position, being under charter party to you? Which charter party had six further months to go, when by reason of not getting this license—it seems a very unfair position they should be in—does it not?

MR. SMITH: I don't think it is quite fair to assail this witness.

MR. MACDONALD: I withdraw the question.

#### RE-EXAMINATION

Re-  
Examination

Re-Examined by MR. SMITH.

Q. E/Q is a form of license: E/6, which my learned friend shewed 40 you was I think the form issued under the original regulations—I shew you exhibit E/Q? A. This is the form that was operated on in the last two years; and this one E/6 before that; that was my error.

Q. E/Q is the one under the new regulations of August 14, 1931?—

A. Yes, subsequent to the trawler tax.

Q. Was it you who negotiated with Mr. Saunders on behalf of Ocean Trawlers modifications of the charter party in July, 1932?—A. I was present at the negotiations, with Mr. Connor.

Q. Was the question of license, granting of a license, or any matter regarding licenses, discussed at any of the conferences in regard to the change?—A. No.

Q. Or is it mentioned at all in the correspondence?—A. No.

AND THEN THE WITNESS WITHDREW.

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No. 6  
H. V. Darrell  
Laing,  
Re-  
examination.  
—continued.

## No. 7

### Evidence of Hans Hanson

HANS HANSON, being called and duly sworn, testified as follows:

Examined by MR. SMITH.

10 Q. You are master of the steam trawler RAYON D'OR?—A. Yes.

Q. Employed either directly or indirectly by Maritime National?—  
A. Yes.

Q. And you have been in the employ of Maritime National, and National, for a number of years?—A. Yes.

Q. For how long?—A. Since 1919.

Q. And during that period your activities have been in connection with trawler operations, steam trawlers?—A. Yes.

Q. I suppose you are conversant with the general fishing industry as carried on by defendant company?—A. Yes.

20 Q. And with the trawler business as carried on as part of that industry?—A. Yes.

Q. You know the ST. CUTHBERT?—A. Yes.

Q. Is she fitted with an otter trawl?—A. Yes.

Q. Can you describe just what an otter trawl is—you made a design, please produce it.—A. Yes, I have it with me. (Book containing sketch produced) It is a net with a wide mouth—

HIS LORDSHIP: I don't think that need be put in.

Q. The ST. CUTHBERT, you say it is fitted with an otter trawl?—

A. Yes.

30 Q. Is she designed for carrying on fishing operations other than as a steam trawler?—A. Well, no, not very well.

Q. Would it be commercially possible from your knowledge of the fishing business, and particularly the business of the defendant company—could the ST. CUTHBERT be commercially employed in the fishing business other than as a steam trawler?—A. Absolutely not.

Q. Some reference was made to halibut fishing; have you had some experience with that fishing in a steam trawler in 1929?—A. Not myself, but the National had two trawlers engaged in it, trying out, but it was a failure, as far as money matters.

40 Q. The fishing for halibut with trawlers was a failure?—A. Yes.

Q. The company lost?—A. Lost considerable money.

Q. How much?—A. I could not tell; I heard one boat lost up to 20,000.

No. 7  
Hans  
Hanson,  
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Q. You don't know the exact figures?—A. No; Leonard Fisheries also tried it out, but it was also a failure.

Q. You know that from your own experience?—A. Yes.

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Evidence.

### CROSS-EXAMINATION

Cross-Examined by MR. MACDONALD.

No. 7  
Hans  
Hanson,  
Examination.  
—continued.

Q. Do you know whether the National Fish in your time built a vessel for the purpose of carrying fish to the United States?—A. Yes.

Q. Where is she now?—A. Laid up.

Q. That never worked very successfully?—A. No.

Q. This trawler can be used for carrying fish?—A. She could carry 10 fish but it would not be a paying proposition.

Cross-  
examination.

Q. Some use could be made of her in that way, if you had fish to carry?—A. I doubt it; she does not hold enough for carrying purposes.

Q. How many years ago since trawlers have tried halibut fishing?—

A. The last year as far as I know was 1925.

Q. What was happening last spring in the way of taking fish into England—did Captain Myhre take some fish in a trawler to England?—

A. Yes.

Q. He fished on the banks with his trawler and took the fish into England?—A. Yes. 20

Q. How many trips did he make?—A. One.

Q. Know how much they paid for the ST. CUTHBERT?—A. I heard they paid around 49,000.

MR. SMITH: It can easily be figured; under the original charter party the yearly rent was 20% of the cost, and 590 the amount sued for in this action is 20% of the original cost, less 25%.

(MR. SAUNDERS: \$47,000).

Q. When you speak of commercial impossibility you mean it is almost impossible to make any money by operating the trawler in that way?—A. Yes, that is what I mean; it would be a loss, I think; anything 30 outside otter trawling.

Q. It is hard enough to make money in the fishing business in these days even with trawlers, with schooners or any kind of vessel?—A. Yes, any kind.

Q. All these things you take into consideration when you say it would be most impracticable to operate a vessel of this type in halibut fishing or carrying?—A. It could never be done with a profit at any time.

AND THEN THE WITNESS WITHDREW.

MR. MACDONALD tenders Orders-in-Council, marked E/8, E/9 and E/10. 40

MR. SMITH: I have no objection. E/8 was declared *ultra vires*.

R. ECCLES,  
Official Reporter.

## Exhibits

No. 8

## Exhibit E/1

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 8  
Exhibit E/1  
Agreement  
for Charter,  
October  
25th, 1928.

Halifax, Nova Scotia,  
October 25th, 1928.

IT IS THIS DAY MUTUALLY AGREED

BETWEEN OCEAN TRAWLERS LIMITED, a body corporate,  
Owner of the steam trawler called the "St. Cuthbert," built 1916, 311  
tons, 137 feet long, 23 feet width, 12 feet depth, Class 100 A in Lloyds.

10 AND THE NATIONAL FISH COMPANY, LIMITED, a body  
corporate Charterer.

WITNESSETH THAT the said Owner agrees to let and the said Char-  
terer agrees to hire the said steam trawler for the term of twelve calendar  
months to commence when the said steam trawler is ready to sail from  
Grimsby, England, thenceforth fully to be completed and after the ex-  
piration of twelve calendar months for a further priod of twelve calendar  
months and from year to year thereafter until one of the parties hereto shall  
give to the other party three calendar months notice to terminate this Char-  
ter such notice to be effective only at the end of one of the years of the  
20 Charter hereby agreed upon.

THAT the said steam trawler shall be placed at the disposal of the  
Charterer at Grimsby, England, and shall be tight, staunch and strong,  
and in every way fitted for the service, and with a full complement of  
officers, seamen, engineers and firemen for a vessel of her tonnage and class.

THAT the said steam trawler shall be employed in the fishing industry  
only and that this Charter be upon the following conditions:—

(1). That the Charterer shall provide and pay for all the provisions  
and wages of the Captain, officers, engineers, seamen, firemen, and crew;  
shall pay for the insurance of the vessel up to the amount of the cost thereof  
30 to the Owner, which amount shall be furnished by the Owner to the Char-  
terer within one week after the execution of this Charter Party also for all  
engine room stores, and for all operating expenses; and the Charterer shall  
further maintain the said Trawler in a thoroughly efficient state in hull and  
machinery for and during the service.

(2). That the Charterer shall provide and pay for all coal port changes  
pilotage agencies commissions and all other charges whatsoever.

(3). That the Charterer shall pay for the use and hire of the said  
Trawler annually twenty per centum of the cost to the Owner of the said  
steam trawler including not only the purchase price thereof but all travelling  
40 and agency expenses and the cost of incorporating and organizing the Owner  
and the cost of equipping and making the said Trawler ready for delivery  
in accordance with the terms of this Charter.

The amount of the said cost shall be furnished by the Owner to the  
Charterer within two calendar months after the execution of this Charter  
Party. Payment of the said hire to be made in Halifax, Nova Scotia,  
monthly, in advance, by Charterer's acceptance at thirty days date, and in  
default of such payment, the Owner shall have the faculty of withdrawing

*In the  
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No. 8  
Exhibit E/1  
Agreement  
for Charter,  
October  
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—continued.

the said Steamer from the service of the Charterer without prejudice to any claim, if the Owner, may otherwise have on the Charterer in pursuance of this Charter, any payment for part of a month to be calculated at thirty days to the month.

(4). That the cargo or cargoes may be laden or discharged in any dock or at any wharf or place that the Charterer or its agents may direct provided that the said Trawler can always be safely afloat.

(5). That the Captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with the ship's crew and boats. 10

(6). That the Captain who must be approved by the owner shall be under the orders and direction of the Charterer as regards employment agency and other arrangements and the Charterer hereby agrees to indemnify the Owner from all consequences and liabilities that may arise from the Captain signing bills of lading or doing any other act matter or thing whatsoever.

(7). That the Master shall be furnished from time to time by the Charterer with all requisite instructions and sailing directions and shall keep a full and direct log of all voyages which shall be patent to the Charterer and to the Owner or its Agent. 20

(8). That the Charterer shall indemnify the Owner against all damage which may be recovered against the Owners in all actions, claims, suits and demands which may at any time be brought arise or be incurred during the continuance of this Charter against the said steam trawler or the Owner by reason of any act, matter or thing arising out of the operation by the Charterer of the said steam trawler or during the continuance of this Charter.

(9). That the Charterer shall have the option at any time after the expiration of one year from the commencement of the said hiring to purchase the said trawler for the price thereof to the Owner as hereinbefore defined plus fifteen per centum in addition thereto. 30

(10). That the Charterer shall pay for all Wireless messages sent and received by the said vessel.

(11). That should the vessel be lost hire paid in advance if any and not earned shall be returned to the Charterer.

(12). That should any dispute arise between the Owner and Charterer the matter in dispute shall be referred to three persons at Halifax, Nova Scotia, one to be appointed by each of the parties hereto and the third by the two so chosen and their decision or that of any two of them shall be final binding and for the purpose of enforcing any such Award this Agreement and such award shall be made a Rule of Court. 40

(13). That the Owner shall have a lien upon all cargoes and all freights and sub-freights for any amounts due under this Charter, and the Charterer shall have a Lien on the said Trawler for all moneys paid in advance and not earned.

(14). That all derelicts and salvages shall be for Owners and Charterers equally.

(15). That should the Charterer at any time become bankrupt or make an assignment for the benefit of creditors or subject to the terms of the Winding Up Act go into liquidation, the Owner may terminate this Charter and take possession of the said steam trawler and in such event not only the 50

current month's hire, but the succeeding month's hire also shall be forth- with due and payable by the Charterer to the Owner.

(16). That upon completion of the term of this Charter or upon the determination thereof from any cause whatsoever other than the loss of said Trawler the said Trawler shall be delivered or deliverable to the Owner at the Charterers sole expense at Halifax, Nova Scotia.

IN WITNESS WHEREOF the parties hereto have hereunto affixed their corporate seals by the hands of their duly authorized officers the day and year first above written.

*In the  
Supreme  
Court of  
Nova Scotia.*  
No. 8  
Exhibit E/1  
Agreement  
for Charter,  
October  
25th, 1928.  
—continued.

10 SIGNED, SEALED AND DELIVERED  
in the presence of

•(Seal)

(Sgd.) OCEAN TRAWLERS  
LIMITED

BERNARD P. SAUNDERS,  
*President.*

J. DOUGLAS VAIR, *Secy-Treas.*

(Sgd.) GEO. O. BOUTILIER  
H. O. PRYOR

THE NATIONAL FISH  
COMPANY, LIMITED.

(Sgd.) THOS. NOTTING,  
*Pres. and Gen. Mgr.*

(Seal)

(Sgd.) H. V. D. LAING,  
*Secretary.*

20

No. 9

“E/2”

No. 9  
Exhibit E/2  
Agreement  
re Charter,  
December  
6th, 1928.

MEMORANDUM OF AGREEMENT made the sixth day of Dec-ember, 1928.

BETWEEN The National Fish Company, Limited, a body corporate having its head office at Halifax aforesaid of the one Part and the Ocean Trawlers Limited, a body corporate having its head office at Halifax aforesaid, of the Other Part.

30 WHEREAS by Charter Party bearing date the twenty-fifth day of October, 1928, the said Ocean Trawlers Limited did charter unto the said National Fish Company, Limited, the trawler “ST. CUTHBERT” upon the terms stated in said Charter Party, and amongst other things it was provided that during the term of the said Charter Party or any extension thereof the said National Fish Company Limited, should have an option or right to purchase the said trawler “ST. CUTHBERT” for the price in the said Charter Party mentioned.

40 NOW THIS AGREEMENT WITNESSETH that for and in consideration of the premises and the sum of one dollar of lawful money of Canada to the said National Fish Company in hand well and truly paid by the said Ocean Trawlers Limited at or before the ensealing and delivery of THESE PRESENTS the receipt whereof is hereby acknowledged the



*In the  
Supreme  
Court of  
Nova Scotia.*

No. 9  
Exhibit E/2  
Agreement  
re Charter,  
December  
6th, 1928  
—continued.

said National Fish Company, Limited hath and by THESE PRESENTS doth covenant, promise and agree to and with the said Ocean Trawlers Limited its successors and assigns that it the said National Fish Company Limited shall not at any time except with the consent of said Ocean Trawlers Limited purchase any steam trawler excepting the "GOOD HOPE" and "VIERNOE", unless and until the said National Fish Company Limited exercises the said option herein before mentioned and purchases the said steam trawler "ST. CUTHBERT" upon the terms set forth in the said Charter Party or upon such other terms as may be agreed upon.

IN WITNESS WHEREOF the parties hereto have hereunto their 10 hands and seals subscribed and affixed the day and year first hereinbefore written.

SIGNED, SEALED AND DELIVERED THE NATIONAL FISH COMPANY, LIMITED  
in the presence of

(Sgd.) GEO. O. BOUTILIER  
H. O. PRYOR

(Sgd.) THOS. NOTTING,  
Pres. and Gen. Mgr.

(Sgd.) H. V. D. LAING,  
Secretary.

(Sgd.) OCEAN TRAWLERS  
LIMITED. (Seal)  
BERNARD P. SAUNDERS,  
President.  
J. DOUGLAS VAIR,  
Secy.-Treas. 20

No. 10  
Exhibit E/8  
Extracts  
from Order  
in-Council,  
October  
30th, 1929.

No. 10

"E/8"

Extracts from Order in Council

October 30th, 1929

30

The Minister, in the light of his investigations, and with the advice of the Deputy Minister of Fisheries, recommends, under the authority of Section 69A of the Fisheries Act, which section was established by 19-20, George V., Chapter 42, that a license to any fishing vessel which uses an otter or other trawl of a similar nature, will not be granted except under the following conditions:—

1. That such vessel was built in Canada and is now operating under temporary license or was built in Canada subsequent to November 1st, 1929.

Provided, however, that existing fishing vessels, other than Cana-40 dian built, which use otter or other trawls of a similar nature, and in respect of which temporary licenses are now in force, shall be eligible for license but only during the period ending April 1st, 1932.

2. On and after April 1st, 1930, a license fee at the rate of one cent per pound, shall be payable by the owner or operator of any such fishing vessel that was not built in Canada, and, at the rate of two-thirds of a cent per pound, shall be payable by the owner or operator of any such fishing vessel that was built in Canada, under regulations approved by the Minister of Marine and Fisheries, on all cod, haddock and halibut that are caught and landed on the Atlantic coast of Canada by any such fishing vessel.

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 10  
Exhibit E/8  
Extracts  
from Order  
in-Council,  
October  
30th, 1929.  
—continued.

The Committee concur in the foregoing recommendation and submit  
10 the same for approval.

(Sgd.) E. J. LEMAIRE,  
*Clerk of the Privy Council.*

---

No. 11

“E/10”

Extract from the Canada Gazette of Saturday

August 29, 1931

CANADA

DEPARTMENT OF FISHERIES

NOTICE.

No. 11  
Exhibit E/10  
Extracts  
from the  
Canada  
Gazette,  
August 29th,  
1931.

20 By Order-in-Council of the 14th day of August, 1931, P. C. 1917, and under the authority of Section 46 of the Fisheries Act, Chapter 73 of the Revised Statutes, the regulations specifying the conditions under which a fishing vessel using an otter or other trawl of a similar nature might be licensed, which were adopted by Order-in-Council of October 30, 1929 (P. C. 2196), and amended by Order-in-Council of January 7, 1930 (P. C. 39), were rescinded and the following regulations substituted therefor:—

1. A license for a fishing vessel using an otter or other trawl of a similar nature, other than a small dragger operated by inshore fishermen, will not be granted, except under the following conditions:

30 (a) That the applicant for such licence shall furnish the Minister of Fisheries with evidence that will satisfy the said Minister, that he cannot obtain an adequate supply of suitable fish to enable him properly to conduct and develop his business from the hook and line fishermen and that if the licence is granted, the extent of his purchase of fresh fish from the said fishermen will not be adversely affected.

(b) That there shall be painted on both bows and on both quarters of such fishing vessel the number of the licence under which it is operating. This number shall be painted in white on a black ground and each figure shall not be less than eighteen inches in length and two  
40 and a half inches in breadth.

(c) The fee on such licence shall be Five Hundred Dollars and the amount thereof shall accompany the application.

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 11  
Exhibit E/10  
Extracts  
from The  
Canada  
Gazette,  
August  
29th, 1931.  
—continued.

2. A licence for a small dragger operated by inshore fishermen will not be granted, except under the following conditions:

(a) That the applicant shall furnish the Minister of Fisheries with evidence that will satisfy the said Minister that the operation of such dragger will not interfere with other methods of inshore fishing.

(b) That there shall be painted on both bows of such fishing vessel the number of the licence under which it is operating. This number shall be painted in white on a black ground and each figure shall not be less than six inches in length and one-half inch in breadth.

(c) The fee on such licence shall be five dollars, and the amount 10 thereof shall accompany the application.

WM. A. FOUND,  
*Deputy Minister.*

Ottawa, 20th August, 1931.

No. 12  
Exhibit E/3  
Letter from  
Defendant  
Co. to  
President  
of Plaintiff  
Company,  
July 6th,  
1932.

No. 12

“E/3”

MARITIME-NATIONAL FISH, LTD.

July 6, 1932.

Mr. B. P. Saunders, *President*,  
Ocean Trawlers Limited,  
c/o Messrs. Saunders & Duffus,  
149 Hollis Street,  
Halifax, N. S.

20

Dear Mr. Saunders:

We hereby confirm conversation between yourself and our Mr. Connor and Mr. Laing to the effect that we will renew the charter at present existing between your company and ours in *re* Steam Trawler “St. Cuthbert” for one year from the 25th October, 1932, subject to the following changes, namely:

1. The charter fee to be reduced by 25%, making the monthly fee 30 payable—\$590.97.
2. It is agreed that Clause 9 of the charter be and is hereby amended in that in the event of our ever giving you notice on or before the 25th July in any one year of our intention not to renew the charter, that we shall on or before the 25th day of July in the same year give you further notice as to our intention to exercise the option to purchase or not.

We would appreciate if you would confirm these understandings in writing.

We remain,

Sincerely yours,  
MARITIME-NATIONAL FISH, LIMITED  
H. V. D. LAING,  
*Secretary.*

40

HVDL:NMCK.

25

No. 13

"E/4"

*In the  
Supreme  
Court of  
Nova Scotia.*

Halifax, N. S., July 8th, 1932.

Mr. H. D. V. Laing,  
Maritime-National Fish, Limited,  
Halifax, N. S.

No. 13  
Exhibit E/4  
Letter from  
The Plain-  
tiff Co. to  
Secretary of  
Defendant  
Co., July  
8th, 1932.

Dear Sir:

I am in receipt of your favor of the 6th instant renewing the Charter on the steam trawler "St. Cuthbert", subject to a reduction in the Charter fees of 25% and an amendment to Clause 9 in the Charter. This is perfectly satisfactory and agreement to us.

Yours truly,

OCEAN TRAWLERS LTD.  
Per, BERNARD P. SAUNDERS, *President.*

BPS:FG.

No. 14

"E/5"

No. 14  
Exhibit E/5  
Letter from  
The Defend-  
ant Co. to  
B. P.  
Saunders,  
Jan. 27th,  
1933.

COPY.

MARITIME-NATIONAL FISH COMPANY, LIMITED

January 27, 1933.

Mr. B. P. Saunders,  
20 c/o Messrs. Saunders & Duffus,  
Hollis Street,  
Halifax, N. S.

Daer Sir:

We hereby give notice that we will not renew the charter of the Steam Trawler "ST. CUTHBERT" at the expiration of the present term.

We are giving this notice now so that you may have as much time as possible to seek a new charterer or purchaser.

If you can relieve us of the obligation before the expiration of the present term, we would appreciate it.

30

We remain,

Sincerely yours,

MARITIME-NATIONAL FISH, LIMITED.

H. V. D. LAING,

*Secretary.*

HVDL:NMCK.  
JO'C

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 15

"E/A"

Halifax, N. S., March 11, 1933.

No. 15  
Exhibit E/A  
Letter from  
Defendant  
Co. to  
Deputy  
Minister of  
Fisheries,  
March  
11th, 1933.

The Honourable, The Deputy Minister of Fisheries,  
Department of Fisheries,  
Ottawa, Ontario.

Dear Sir:

Maritime-National Fish Limited, a body corporate, incorporated under the laws of the Dominion of Canada, hereby makes application for a license in respect of the fishing vessel "RAYON D'OR", being a fishing vessel using an otter or other trawl of a similar nature.

This application is made under the provisions of Section 46 of the Fisheries Act and of Order-in-Council P. C. 1917, dated August 14, 1931.

The particulars regarding the said fishing vessel are as follows:

Length	140	
Breadth	24.1	
Gross Tonnage	342.00	
Net Tonnage	145.00	
Horse Power	68	I. H. P.
When and Where Built	England, 1912	

20

The said vessel is owned by Golden Ray Fishing Company, Limited, and is operated under charter party by the said Maritime-National Fish, Limited.

Submitted herewith is the Statutory Declaration of Harold G. Connor, Vice-President and General Manager of the said Company, as evidence that the said Company cannot obtain an adequate supply of suitable fish to enable the applicant properly to conduct and develop its business from the hook and line fishermen and that if the license is granted the extension of the applicant's purchase of fresh fish from the said fishermen will not be adversely affected.

30

Reference is also made in the Statutory Declaration to the fact that two valuable by-product industries, namely, the manufacture of white fish meal and the manufacture of medicinal cod liver oil, cannot be prosecuted without the operation of the trawlers.

The fee of Five Hundred Dollars (\$500.00) provided for in said P. C. 1917 accompanies this application.

DATED at Halifax, N. S., this eleventh day of March, 1933.

Very truly yours,

MARITIME-NATIONAL FISH, LIMITED

H. G. CONNOR,  
*Vice-President and General Manager.*

40

HGC:NMCK  
Enclosure

No. 16

"E/B"

*In the  
Supreme  
Court of  
Nova Scotia.*

IN THE MATTER Of Order-in-Council P. C. 1917 and of Section 46 of the Fisheries Act, being Chapter 73 of the Revised Statutes of Canada, 1927

No. 16  
Exhibit E/B  
Affidavit of  
Harold G.  
Connor,  
March  
11th, 1933.

and

IN THE MATTER Of the Application of Maritime National Fish Limited, for a license thereunder in respect of the Trawler.

I, Harold G. Connor, of Halifax, in the Province of Nova Scotia,  
10 Manufacturer, do solemnly declare as follows:

1. That I am Vice-President and General Manager of Maritime National Fish, Limited, the applicant, and that I have personal knowledge of the matters herein declared.

2. That the said Maritime-National Fish, Limited, was incorporated in or about the year 1929 and has since that date continuously carried on the business of producing and distributing fresh fish throughout Canada and in portions of the United States of America.

3. That I verily believe that the business of the said Company is capable of great expansion particularly through sales of fresh fish in the United  
20 States of America.

4. That the successful operation of the said business depends primarily on a continuous supply of fish steadily maintained throughout the year and flexible enough to permit of rapid regulation to meet market demand.

5. That I am not aware of any method of obtaining such a supply save by employing fishing vessels equipped with otter or other similar trawl.

6. That I verily believe that existing markets demand a larger proportion of haddock as compared with codfish that has in the past been obtained by the hook-and-line fishermen and I further verily believe that in any substantial increase in the business of the Company the proportion of  
30 haddock required will increase and that this demand will be incapable of being filled save by the employment of vessels equipped with otter or other similar trawl.

7. That I verily believe that the use of vessels equipped with otter or other similar trawl is essential to the conduct of the business of the Company and to any increase or expansion thereof.

8. That I verily believe that use of fishing vessels equipped with an otter or other similar trawl is essential for the prosecution of the manufacture of white fish meal, which latter is a well established by-product industry carried on at Halifax by Messrs. Festerfat Limited a subsidiary of  
40 the said Maritime-National Fish, Limited and which subsidiary expends annually in the acquiring of raw material and the process of its manufacture a sum of approximately two hundred thousand dollars.

9. That I verily believe that the use of fishing vessels equipped with an otter or other similar trawl is essential for the prosecution of the manufacture of medicinal cod liver oil, which later industry by virtue of the

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 16.  
Exhibit E/B  
Affidavit of  
H. G.  
Connor,  
March  
11th, 1933.  
—continued.

development of special steam rendering apparatus operated at sea on board the said fishing vessels equipped with an otter or other similar trawl is thereby enabled to produce an absolutely fresh oil which analysis has shown to be superior to any other medicinal oil now being produced and which industry, although begun only early in 1933, has shown conclusive proof of its ultimate success and expansion to very considerable proportions with an estimated annual expenditure of approximately \$400,000.00.

10. That if the license applied for is granted the extension of the purchase of fresh fish from the hook-and-line fishermen will not be adversely affected but the said Maritime-National Fish, Limited, will so far as is 10 economically possible continue to make purchases from the hook-and-line fishermen in quantities increasable as the volume of business increases.

DECLARED at Halifax in the Province of Nova Scotia this 11th day of March, 1933, before me,

.....  
*A Notary Public in and for the Province  
of Nova Scotia.*

No. 17  
Exhibit E/C  
Letter from  
Deputy  
Minister  
Dept. of  
Fisheries to  
H. G.  
Connor.  
March 18th  
1933

Address reply to  
Deputy Minister  
and quote No. 716-33-2

Sir:

I am to acknowledge your applications supported by declarations and the necessary fee, for renewal of the trawler licenses for the trawlers your company has been operating during the present fiscal year.

These applications will be dealt with at the earliest possible moment,—  
I expect before the end of next week. 30

I am, Sir,

Your obedient servant,

WM. A. FOUND,  
*Deputy Minister,  
Department of Fisheries.*

H. G. CONNOR, ESQ.,  
*Vice-President and General Manager,*  
Maritime-National Fish Limited,  
Halifax, N. S.

No. 17

“E/C”

20

Ottawa, March 18th, 1933.

No. 18

"E/G"

April 3rd, 3

*In the  
Supreme  
Court of  
Nova Scotia.*

COPY.

To the Minister of Marine &amp; Fisheries

Dear Sir:

I wired you this morning as follows:

"We ask consideration for the Trawler St. Cuthbert wholly owned in Halifax by twenty shareholders and that our License be issued."

10 This is the only boat that is owned in Halifax and the only boat owned by the Ocean Trawlers. She has been fishing for some years and we think consideration should be given to her owing to the fact that she is Canadian owned and should receive a License.

Trusting that you will favourably consider our request, we remain

Yours truly,

BPS.FG.

No. 18  
Exhibit E/G  
Letter from  
B. P. Saunders to the  
Minister of  
Marine &  
Fisheries,  
April 3rd,  
1933.

No. 19

"E/L"

DOMINION OF CANADA  
HOUSE OF COMMONS DEBATES

TUESDAY, APRIL 4, 1933

EXTRACT

TRAWLER LICENSES

No. 19  
Exhibit E/L  
Extract from  
House of  
Commons  
Debate,  
April 4th,  
1933.

On the orders of the day:

HON. ALFRED DURALNEAU (Acting Minister of Fisheries): With respect to the licensing of steam trawlers, Mr. Speaker, it may be of interest to recall the conditions under which steam trawling was begun in this country. Some years ago those who were engaged in the marketing of fish found that steadiness of supply was essential in order to increase the demand, and 30 at that time there was no assurance of such steadiness of supply, particularly in the winter season. Hence in 1910 steam trawling was initiated with one vessel. With the development of the demand for fresh fish the number was increased to two in 1912 and in the following year to five.

During the war the demand grew rapidly, and probably the number of trawlers would have been increased more rapidly than it was had they been available. The largest number operated in the war period was eight in 1918. In 1926 the number had increased to eleven, and since then it has declined.



In the  
Supreme  
Court of  
Nova Scotia.

No. 19  
Exhibit E/L  
Extracts  
from House  
of Com-  
mons De-  
bates, April  
4th, 1933.  
—continued.

Following consideration of the majority and minority reports of the Atlantic Fisheries Commission of 1927-28, legislation for the better control of trawlers was adopted in 1929. The main provisions of this legislation were:

- (a) All trawlers must be licensed.
- (b) All trawlers should be registered in Canada and owned by Canadian companies or persons.
- (c) That trawler fishing should not be allowed within twelve miles of the shore.
- (d) That the minister may determine the number of trawlers to be licensed.
- (e) That regulations might be made by order-in-council prescribing the evidence to be submitted with applications for licences fixing the conditions under which licences should be issued and making any other provisions respecting licences.

By order-in-council of October 30, 1929, regulations were adopted under the authority of the new legislation. These regulations provided for the licensing of trawlers and for a fee of one cent per pound on all cod, haddock and halibut that were landed by foreign built trawlers and two-thirds of a cent a pound on all such fish that were landed by Canadian built trawlers, excepting on fish landed during the months of January, February and March each year, when no fee would be charged.

One of the trawler operating companies failed to pay the licence fee, and action was taken in the exchequer court to compel payment. This resulted in a decision of that court of the 9th of March, 1931, that the regulations were *ultra vires*. After further consideration of the matter new regulations were adopted by order-in-council of August 14, 1931. These provided for a licence fee of \$500 for each trawler and that the applicant must furnish the minister with evidence that would satisfy him that the applicant could not obtain an adequate supply of suitable fish to enable him properly to conduct and develop his business from the hook and line fishermen, and that the granting of the licence would not adversely affect the extent to which fish would be purchased from the hook and line fishermen.

Following the submission of applications, which were accompanied by the necessary evidence supported by declarations, licences for six trawlers were granted for the fiscal year 1932-33. Five of these were for trawlers operated by the Maritime-National Company and one by the Leonard Fisheries.

Fishermen's organizations and boards of trade have strongly urged that no trawlers be licensed for the present fiscal year. On the other hand, the Halifax Board of Trade and the Mayor of Halifax have urged very strongly the renewal of all the existing licences. Applications for renewal of the five licences held by the Maritime-National Company have been made, and the Leonard Fisheries has intimated that it intends to apply for a renewal of its licence.

At this point it may be interesting to note that the decline in the trawler catch in recent years has kept pace with the decline in the hook and line catch. In Nova Scotia alone the hook and line catch of the kinds of fish landed by trawlers was 150,200,977 pounds. The trawler catch that

year was 31,365,423 pounds. Last year the Nova Scotia catch of these fish by the hook and line fishermen was 108,645,871 pounds, while the catch by the steam trawlers was 22,956,729 pounds, or a decrease of practically 27 per cent in each case.

*In the  
Supreme  
Court of  
Nova Scotia.*

It is also contended that the trawler operators are amongst the largest purchasers of fish from the hook and line fishermen, and the former maintain that it is only possible for them to continue to make such large purchases from the hook and line fishermen because of having the trawlers so that they can keep continuously in the market. It is also contended that the 10 main landings by the trawlers are during the six winter months when hook and line fishing is reduced to a minimum, and during a portion of which no licence fee was charged on the trawler landings under the previous regulations.

No. 19  
Exhibit E/L  
Extract from  
House of  
Commons  
Debates,  
April 4th,  
1933.

—continued.

It also may be of value to note that all other countries are allowing trawlers to operate. Out of European ports about 5,000 of these vessels are operating yearly. Out of United States ports there are usually over 300. These latter vessels as well as a large number from France and sometimes from other European countries, fish on the Banks adjacent to our coasts, so that even if our trawlers were withdrawn it would decrease the 20 amount of trawling on these Banks by a very small proportion only.

After consideration of all the facts it is thought that if the Maritime-National had three trawlers instead of five operating they could reasonably assure the steadiness of supply as well as the proportion of haddock needed. Hence it has been decided that for the present year that company will be allowed three trawlers and the Leonard Fisheries one, as before. There are no other applicants. This will involve a reduction in number of 33 1/3 per cent. This reduction will be put into effect from the first of May, thus giving one month to the company to enable it to fill certain contracts into which it has entered.

30

No. 20

"E/D"

Office of the Deputy Minister of Fisheries

April 5, 1933.

No. 20  
Exhibit E/D  
Letter from  
Deputy  
Minister of  
Fisheries to  
Defendant  
Company,  
April 5th,  
1933.

Dear Sir:

As you will have learned before this reaches you, the Acting Minister announced in the House of Commons yesterday that it had been decided that the number of licenses for steam trawlers to your Company would be reduced for the present year from 5 to 3, but that to enable your Company to discharge any obligations into which it may have entered, this reduction 40 would not be made effective until the 1st of May.

Please be good enough to advise the Department immediately as to which 3 trawlers of the 5, for which you applied for renewal licenses, you desire that such licenses should be issued.

*In the  
Supreme  
Court of  
Nova Scotia.*

Instructions are being given to return the license fee that has already been forwarded by you for two of the trawlers. This will reach you in a few days.

Yours truly,

No. 20  
Exhibit E/D  
Letter from  
Deputy  
Minister of  
Fisheries to  
Defendant  
Company,  
April 5th,  
1933.  
—continued.

H. G. Connor, Esq.,  
*Vice-President and General Manager,*  
Maritime-National Fish Limited,  
Halifax, N. S.

(Sgd.) WM. A. FOUND,  
*Deputy Minister.*

10

No. 21  
Exhibit E/E  
Letter from  
Defendant  
Company to  
Deputy  
Minister of  
Fisheries,  
April  
10th, 1933.

No. 21

“E/E”

MARITIME-NATIONAL FISH COMPANY, LIMITED

April 10, 1933.

W. A. Found, Esq.,  
Deputy Minister of Fisheries,  
Department of Fisheries,  
Ottawa, Ontario.

Dear Mr. Found:

With reference to your communication of April 5th *re* Trawler Licenses, 20 may licenses be granted to the under-mentioned trawlers, namely:

Rayon D'or  
Lemberg  
Venosta

Particulars concerning these vessels and the necessary declarations have already been sent to the Department.

We remain,

Yours sincerely,

MARITIME-NATIONAL FISH, LTD.

(Sgd.) H. G. CONNOR, 30  
*Vice-Pres. and Gen. Mgr.*

HGC/JO'C

No. 22

"E/H"

*In the  
Supreme  
Court of  
Nova Scotia.*

Address reply to  
Deputy Minister  
and quote  
No. 716-33-2.

CANADA

DEPARTMENT OF FISHERIES

Ottawa, April 11th, 1933.

No. 22  
Exhibit E/H  
Letter from  
Deputy  
Minister of  
Fisheries to  
President of  
Plaintiff Co.,  
April  
11th, 1933.

Sir:

10 I wish to acknowledge your telegram and letter of the 3rd instant, in which you explain that your company owns the steam trawler "St. Cuthbert," and you request that a license for it should be renewed.

This vessel operated under charter to the Maritime-National Company last year, and as you know, it has been decided that the number of trawlers that may operate for this company during the present year is to be limited to three. The final application of the company since this decision was made known has not yet been received, but you have no doubt taken the matter up with the company. Following its reply the question will be further considered.

20

I am, Sir,

Your obedient servant,

(Sgd.) WM. A. FOUND.

WM. A. FOUND,  
*Deputy Minister.*

Bernard Saunders, Esq.,  
*President,*

Ocean Trawlers, Ltd.,  
Halifax, N. S.

No. 23

"E/I"

No. 23  
Exhibit E/I  
Letter from  
President of  
Plaintiff  
Company to  
Deputy  
Minister of  
Marine,  
April 15th,  
1933.

30

April 15th, 3

Mr. Wm. A. Found,  
Deputy Minister of Marine,  
OTTAWA.

Dear Sir:

I am in receipt of your favor of the 11th instant and did not know that the trawlers to be operated by the Maritime National were to be limited to three. The Maritime National have notified our company that it is not their intention to renew the Charter and therefore it will be necessary if we 40 can obtain a license, to operate the "St. Cuthbert" in some other manner.

*In the  
Supreme  
Court of  
Nova Scotia.*

We are enclosing you a cheque for \$500 as we presume, the Maritime National will withdraw their cheque and their order for the "St. Cuthbert" license.

No. 23  
Exhibit E/I  
Letter from  
President of  
Plaintiff  
Company to  
Deputy  
Minister of  
Marine,  
April 15th,  
1933

Now, the Maritime National is an American owned company owned in the United States, practically all the stock being held there, whereas in the case of the Ocean Trawlers the whole of the stock is owned in Halifax and is a Canadian owned company and we should in fairness receive the license for the St. Cuthbert. We gather from your letter that a license is being issued to the Leonard Fisheries for the Steamer "Loubyrne" and in all fairness a license should be issued to the Trawler "St. Cuthbert" or to the Ocean Trawlers for the operation of a trawler. There are some twenty shareholders in the City of Halifax.

—Continued.

I might also mention for your information that the North Atlantic Fisheries have been obliged to close down their plant on account of the National holding a lease on a portion of their premises and not using their freezing. Should we receive a license for the "St. Cuthbert" it is quite possible that we could use the North Atlantic Fisheries again, of which, the writer is president and open this as an additional source of employment in the City of Halifax.

Trusting this application will receive favourable consideration as it should, we remain,

Yours truly,

BPS/FG

No. 24  
Exhibit E/F  
Letter from  
Deputy  
Minister of  
Fisheries to  
H. G. Connor  
April 24th  
1933

No. 24

E/F

Copy sent Mr. Brittain with letter of April 27 from H. G. C.

DEPARTMENT OF FISHERIES,  
CANADA.

716-33-2

OFFICE OF THE DEPUTY MINISTER  
OF FISHERIES,  
OTTAWA.

30

April 24, 1933.

Dear Mr. Connor:

Adverting to your letter of the 10th instant, I now enclose the following steam trawler licenses for the present fiscal year:—

No. 8 for the "Rayon D'or" owned by the Golden Ray Fishing Co., Ltd.

No. 9 for the "Lemberg" owned by the Lemberg, Ltd.

No. 10 for the "Venosta" owned by the Venosta, Ltd.

The names of the captains have not been inserted as we are not sure whether the same captains are employed as were licensed last year, but as this is not a vital point in the issue of the license you are authorized to fill in

the name of the captain in each instance. You will also please immediately advise the Department of the name of the captain of each vessel so that its record may be properly completed.

*In the  
Supreme  
Court of  
Nova Scotia.*

Yours truly,

(Enclosure)

(Sgd.) WM. A. FOUND.

WM. A. FOUND,  
*Deputy Minister.*

No. 24  
Exhibit E/F  
Letter from  
Deputy  
Minister of  
Fisheries to  
H. G. Connor  
—Continued.

H. G. Connor, Esq.,  
*Vice-President and General Manager,*

10 Maritime-National Fish Limited,  
Halifax, N. S.

No. 25

“E/J”

DEPARTMENT OF FISHERIES

716-33-2

Ottawa, April 24, 1933.

Gentlemen:

I beg to revert to your letter of the 15th instant and to previous correspondence, in which you apply for a renewal of the license to the steam trawler “St. Cuthbert.”

No. 25  
Exhibit E/J  
Letter from  
Deputy  
Minister of  
Fisheries to  
Plaintiff  
Company,  
April 24th,  
1933.

20 As you will no doubt have observed from the Press, it was announced by the Acting Minister in the House of Commons on the 4th instant that for the present fiscal year there would be but four steam trawler licenses granted, one of which would be for Leonard Fisheries Limited and three for the Maritime-National. The latter company after being advised of your application requests licenses for the “Rayon D’or,” “Lemberg” and “Venosta,” and in the circumstances licenses have been issued accordingly so that it will not be possible to favorably consider your application.

I am, Gentlemen,

Your obedient servant,

(Sgd.) WM. A. FOUND.

30

WM. A. FOUND,  
*Deputy Minister.*

Ocean Trawlers, Limited,  
147 Hollis Street,  
Halifax, N. S.

*In the  
Supreme  
Court of  
Nova Scotia.* COPY

No. 26  
"E/K"

April 27th, 3

No. 26  
Exhibit E/K  
Letter from  
B. P. Saun-  
ders to  
Deputy  
Minister of  
Fisheries,  
April 27th,  
1933.

Mr. W. A. Found,  
Department of Fisheries,  
OTTAWA.

*Referring to your No. 716-33-2.*

Dear Sir:

We beg to acknowledge the receipt of your favor of the 24th instant<sup>10</sup> regarding the St. Cuthbert.

We did not at all understand that the Minister had advised the House of Commons that one license would be granted the Leonard Fisheries and three to the Maritime-National. We understood that he simply advised the House that four steam trawler licenses would be granted and it is certainly most unfair and improper that three licenses should be granted an American owned company, the Maritime-National, at the expense of a Canadian, Halifax owned company. To have granted them two trawlers would have been somewhat reasonable. Why they should be granted three we are wholly unable to understand.<sup>20</sup>

Yours truly,

BPS/FG.

No. 27  
Exhibit E/O  
Letter from  
Defendant  
Co. to  
Plaintiff Co.,  
April 29th,  
1933.

No. 27  
"E/O"

MARITIME-NATIONAL FISH LIMITED  
HALIFAX, N. S.

April 29, 1933.

Ocean Trawlers, Limited,  
B. P. Saunders, Esq., President,  
c/o Messrs. Saunders & Duffus,  
Halifax, N. S.

30

Gentlemen:

In view of the action of the Dominion Government in reducing the number of Trawlers' Licenses, it will be impossible for us to employ the Trawler Saint Cuthbert after the thirtieth April, 1933. The charter-party will, therefore, be cancelled as of that date, and in furtherance thereof we are cancelling all insurance on this vessel as from the above date.

We remain,

Sincerely yours,

MARITIME-NATIONAL FISH, LTD.

(Sgd.) H. G. CONNOR, 40  
Vice-Pres. & Gen. Mgr.

HGC/JO'C.

No. 28

"E/P"

*Saint Cuthbert*

29th April, 1933.

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 28

Exhibit E/P

Letter from

Plaintiffs'

Solicitors to

Defendant

Co., April

29th, 1933.

Dear Sirs:

Ocean Trawlers Limited have consulted us with respect to your letter to them of April 29th, in which you state that the charter party of the above mentioned 'vessel' will be cancelled as of April 30th and that you are also cancelling the insurance on the vessel as of the same date. Our clients do not agree to the cancellation of their charter, nor to the cancellation of the insurance and they dispute your right to do either notwithstanding the action of the Dominion Government in reducing the number of Trawler Licenses.

We are instructed by Ocean Trawlers Limited to advise you that they require you to continue the present insurance on the "Saint Cuthbert" and to perform all the other terms of your charter party, and that in the event of your failing to do so they will hold you responsible for all damages occasioned by your breach.

Yours very truly,

20

Maritime National Fish Ltd.,

Halifax, N. S.

WCM:H

No. 29

"E/M"

MARITIME-NATIONAL FISH LIMITED

May 1, 1933.

No. 29

Exhibit E/M

Letter from

Defendant.

Co. to

Plaintiff Co.,

May 1st,

1933.

The Ocean Trawlers, Limited,

Mr. B. P. Saunders, Pres.,

30 c/o Messrs. Saunders &amp; Duffus,

Hollis St., Halifax, N. S.

Dear Sirs:

Please take notice that as the charter party existing between your Company and ourselves is now cancelled; that the trawler "St. Cuthbert" which forms the subject matter of this charter, is now lying at Roche's wharf and is available for redelivery to you forthwith.

We would be pleased to have you accept redelivery at once.

We remain,

Sincerely yours,

40

MARITIME-NATIONAL FISH, LIMITED,

H. V. D. LAING,

*Secretary.*

HVDL:NMCK

c/mtl. ahb



In the  
Supreme  
Court of  
Nova Scotia.

COPY

MARITIME-NATIONAL FISH LIMITED

May 1, 1933.

No. 30  
Exhibit E/N  
Letter from  
Defendant  
Co. to  
Plaintiffs'  
Solicitors,  
May 1st,  
1933.

Messrs. McInnes, Lovett & MacDonald,  
Bedford Row,  
Halifax, N. S.  
ATTN.: MR. W. C. MACDONALD, K.C.  
RE: "ST. CUTHBERT"

10

Dear Sir:

We duly acknowledge receipt of your letter of April 29th.  
In view of this communication we will keep the requisite amount of insurance in effect on this vessel, always without admitting any liability whatsoever and without prejudice to our rights.  
We hereby notify you that as this charter is now cancelled, we have today sent a notice of redelivery to the owners of the said "St. Cuthbert" advising them that the vessel is available for redelivery forthwith.

We remain,  
Sincerely yours,  
MARITIME-NATIONAL FISH, LIMITED,  
H. V. D. LAING,  
*Secretary.*

20

HVDL/NMcK  
c/mtl-ahb

No. 31  
Exhibit E/Q  
Form of  
Licence  
November  
9th, 1933.

For District Supervisor.

CANADA  
DEPARTMENT OF FISHERIES  
DOMINION OF CANADA

LICENCE TO A CAPTAIN OF A CANADIAN FISHING VESSEL  
USING AN OTTER OR OTHER TRAWL OF A SIMILAR NATURE  
193

30

The herein named.....  
Master of the Canadian Fishing Vessel.....  
of.....tons register,....  
owned by.....  
of .....  
which vessel uses an otter or other trawl of a similar nature in fishing, on  
payment of the sum of FIVE HUNDRED DOLLARS, the receipt of

which is hereby acknowledged, is hereby licensed to engage in fishing from a Canadian port or ports with an otter or other trawl of a similar nature, until and including March 31st, 193. ....

*In the  
Supreme  
Court of  
Nova Scotia.*

This license is issued subject to the following conditions:—

1. That there shall be painted on both bows and on both quarters of the fishing vessel named herein the number of this licence. This number shall be painted in white on a black ground and each figure shall not be less than eighteen inches in length and two and a half inches in breadth.
2. That this licence shall be subject to cancellation at any time if the operations carried on by or in connection with the vessel named herein are not in conformity with law.
3. That this licence is not transferable.
4. That the holder of this licence is required to have it with him when engaged in fishing.

No. 31  
Exhibit E/Q  
Form of  
Licence  
November  
9th, 1933.  
—Continued

WM. A. FOUND,  
*Deputy Minister of Fisheries.*

Countersigned and dated at Ottawa, Canada, this.....  
.....day of.....193.....

*Issuing Officer.*

20 CANCELLED  
By (Sgd.) WM. J. G. CASEY. Date, Nov. 9/33.

**No. 32**

**Decision of Mr. Justice Doull**

No. 32  
Decision of  
Mr. Justice  
Doull,  
December  
22nd, 1933.

30 DOULL, J. The main facts in this case are not in dispute. Plaintiff company was organized in 1928 for the purpose of acquiring a steam trawler. When the company was formed a number of Halifax men took the necessary shares and the understanding among them as well as with the management of the National Fish Company, which for the purposes of this action is considered identical with the defendant, was that the trawler when purchased would be chartered to the National Fish Company. It was purchased and was chartered to the defendant and was described as a steam trawler and it was expressed as a condition in the charter party that it should be used only in the fish business. The charter was renewable from year to year and subject to cancellation by a three months notice effective at the end of any year of the charter.

40 In July, 1932, the charter was renewed by a letter, with some changes; and it was cancelled by notice in January, 1933, effective in October, 1933; and if it has not been cancelled by operation of law it would have been determined by such notice in October, 1933.

The rental under the charter party was payable monthly and the claim in this action is for the rent for the month of May, 1933.

The defence is that the venture which was the basis of the contract was frustrated under circumstances which are set out in the pleadings and which were proven at the trial. The facts are briefly as follows:

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 32  
Decision of  
Mr. Justice  
Doull,  
December  
22nd, 1933.  
—continued.

In the year 1928 there were in Canada no restrictions on the use of trawlers. The agitation for the abolition of such vessels on behalf of shore fishermen was however at its height, and a Royal Commission had been appointed by the Dominion Government and had made certain findings. It is quite clear that the parties might very well have considered some restriction or prohibition of trawlers as being within the possibilities of the future. In 1929, The Fisheries Act, Chapter 73 of the Revised Statutes of Canada, was amended by Chapter 42 of the Acts of 1929, which added Clause 69A, which is in part—

69A (1) Every person shall be guilty of an offence and shall incur a 10 penalty of not less than one hundred dollars and not more than two thousand dollars recoverable with costs upon summary conviction who at any time except under licence from the Minister (of Fisheries)—

(a) with intent to fish or cause any other person to fish with a vessel that uses an "otter" or other trawl of a similar nature for catching fish in the sea leaves or departs from any port or place in Canada for the purpose of such fishing.

(4) The Minister may determine the number of such vessels which may be eligible to be licenced.

This Act gave the Minister of Fisheries power not only to regulate and 20 licence but to limit the number of trawlers operating out of Canadian ports.

No action followed the granting of these powers until the present year. In the early part of this year the defendant company made its usual application for the granting of licences to the five trawlers which it was operating (including the one which is the subject of this action) and it was informed that licences would be granted to only four trawlers on the Atlantic coast and that only three licences would be granted to trawlers operated by the defendant. This was the final word, and it was found impossible to obtain licences for more than three. Defendant preferred to licence three trawlers 30 other than the one in question, because they owned the others directly or indirectly and did not own this one. The plaintiff itself tried to get the trawler licenced either to continue with the defendant or to compete with it, but it was unsuccessful.

I find as a fact that the defendant could not use this trawler commercially otherwise than as a trawler and if they continued liable to keep her, they had no alternative but to lay her up or to lay up one of their own boats in its stead.

On this state of facts the defendant argues that under the authorities there has occurred such a frustration of the undertaking as relieves the defendant from further performance.

The law on the subject of frustration is described in the latest edition of ANSON on CONTRACTS as having been "rapidly developed of late years and may be still in the making."

It will be necessary to examine the development of this branch of the law in order that we may state the principles which apply to this case.

While there were some earlier cases which laid down the rules that—

(a) If the perishing of the very thing about which the parties are contracting (e. g. a music hall) makes performance impossible the

parties are excused from performance. *TAYLOR v. CALDWELL*, 3 B. & S. 826.

(b) Where a change in the law of the land makes the continued performance impossible the parties are excused: e. g. where the legislature passes an Act permitting expropriation of the land which is the subject of the contract. *BAILY v. DESCRESPIGNY*, L. R. 4 Q. B. 150.

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 32  
Decision of  
Mr. Justice  
Doull,  
December  
22nd, 1933.  
—continued.

No broad principles were laid down until the time of the coronation of King Edward VII where some cases arose out of the hiring of suitable places for seeing the procession, which procession was cancelled on account of the King's illness.

The leading case is *KRELL v. HENRY* (1903) 2 K. B. 740.

The following quotation from Vaughan Williams, L. J., shews how the law was being developed:

"I do not think that the principle is limited to cases in which the vent causing the impossibility of performance is the destruction or non-existence of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain not necessarily from the terms of the contract but if required from necessary inferences drawn from surrounding circumstances recognized by both contracting parties what is the substance of the contract and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

Vaughan Williams however lays down certain principles which I will enumerate and to which consideration must later be given as it is probable that they have been modified by following cases,—see Page 751:

"In each case one must ask oneself first, what, having regard to all the circumstances was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative I think both parties are discharged from further performance."

The case of *HERNE BAY v. HUTTON* decided by the same court in the same year, but prior to the *KRELL* case, shews the limits which at that time at any rate were supposed to be put upon the doctrine.

A steamer belonging to the plaintiff had been chartered by the defendant to take a party to see the Royal Naval Review at Spithead and for a day's cruise around the fleet. The review was cancelled, but it was held that the contract was not cancelled by frustration because "The happening of the naval review was not contemplated by both parties as the basis and foundation of this contract" see Page 689.

That the circumstances which are such foundation and which changes are such as might very well have been considered by the parties is illustrated by a case in the same volume, *ELLIOT v. CRUTCHLEY*, L. R. 2 K. B. (1903) 476, in which case the parties had made some agreement as to what would happen if the review were cancelled before expense were incurred.

It is fairly clear that these circumstances which are the foundation of the contract are not necessarily such as could not be very well regarded as matters subject to change. The illness of the King and the cancellation of

*In the  
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Court of  
Nova Scotia.*

No. 32  
Decision of  
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—continued.

the review were alike happenings which a man might consider as quite possible; the question is, what is the foundation of the contract, the basis upon which the parties are assumed to be contracting, which is so essential to it, that the failure of it dissolves the contract.

In *BANK LINE v. CAPEL*, 1919 A. C. (H. L.) 435, a case of some difficulty arose and one which has features which are necessarily to be considered in the present case.

The appellants owned a steamship called the *QUITO*, which they agreed to let to the respondents for a term of twelve months from date of delivery. The steamship was not to be delivered before the 1st of April, 1915, and 10 should she not be delivered by April 30th, appellants were to have the option of cancelling the charter: "That should it be proved that the steamer through unforeseen circumstances cannot be delivered by the cancelling date, appellants if required shall within forty-eight hours after receiving notice thereof declare whether they will cancel or will take delivery of the steamer." Charterers to have the option of cancelling the charter-party should the steamer be commandeered by government during this charter. The ship was requisitioned by the government before the charter began, to wit on May 11th when she was in dry dock preparatory to entering on this service. An effort was made by both parties to release her but it was un-20 successful.

On August 11th respondents agreed to sell the ship to a third party, provided they could get her released. They found that they could get her released by substituting another ship which they did and she was released. There seems little doubt that she could have been released at any time if appellants had substituted another ship.

Under these circumstances all the members of the House of Lords except one, found that there was a frustration in fact. The Lord Chancellor said the doctrine that "a contract may be put to an end by a vital change of circumstances has been repeatedly discussed and most recently in the case 30 of *METROPOLITAN WATER BOARD v. DICK KERR & Co.*, in which a great number of cases were reviewed." The fact that this particular ship might have been released by the substitution of another does not appear to have influenced any member of the court. The vital fact was that she had been requisitioned and that was such a vital change in circumstances as discharged the contract.

*METROPOLITAN WATER BOARD v. DICK KERR & CO.*, which was referred to and approved in the last mentioned case is reported in 1918 A. C. (H. L.) 119. It is a case where the defendant was a contractor to construct a reservoir to be completed over a period of six years or possibly 40 more, beginning in July, 1914. A considerable part of the work had been done by 1916 when a notice was given by the Minister of Munitions under the Defence of the Realm Act, requiring the contractor to cease work on the contract and they did cease accordingly. There was a provision for extending the time but the House of Lords held that that provision was not applicable in such a case of a stoppage by law of indefinite duration which entirely changed the nature of the undertaking. It was accordingly held that the effect of the notice was to put an end to the contract. The reason that it was put an end to was that the new conditions placed upon the parties by the law were such as to make the undertaking a new contract.

*In the  
Supreme  
Court of  
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—continued.

In the opinion of Lord Dunedin we have some illuminating remarks in reference to The TAMPLIN case, 1916, 2 A. C. 397, where it was held that a requisition of a ship did not cancel the charter: "I return to Tamplin's case to show that the views of the majority (for obviously I need not deal with those of the minority) were based upon circumstances which find no proper analogy in the circumstances here. In the first place the person who wanted the contract declared at an end was the owner. The charterer notwithstanding what had happened was content to go on paying the hire and to refrain during the period while the government were in possession of the ship from demanding any services from the owners. Under the contracts as Lord Parker put it, "The owners are not concerned in the charterers doing any specific thing beyond the payment of freight as it becomes due." That payment the charterers as I have already said, were ready to make. The reason, no doubt, was that they had already got or thought they would get from the government a larger sum of money than they had to pay to the owners. So that one view that I think ran through the opinions of the majority was this, No one was hurt by the continuance of the charter, and if the government relinquished the ship, there was no reason why the charter should not be effective for the remaining period of its duration which might be considerable. But suppose the facts had been slightly different. Suppose the government had taken the ship and had said they would pay nothing—a proceeding within their powers—and then suppose that the owner had sued the charterer for the hire during the period while the government kept the ship. What then? I may be wrong but it seems to me it would have fallen within the lines of HORLOCK v. BEAL, 1916, 1 A. C. 486."

It is apparent that the party who seeks to set aside must be the party who is damaged (hurt as Lord Dunedin puts it). No doubt the man who hired the window to look at the coronation procession could still have insisted on paying his money and using the space. It is the fact that the circumstances which were the vital basis of the contract have changed which enables him to treat the contract at an end.

If we bear in mind the necessity for the plaintiff being "hurt" and so seriously hurt that the whole circumstances of his contract have disappeared we may be able to understand two cases which are cited on behalf of the plaintiff and which I find difficult to reconcile with some of the cases to which I have referred.

I may observe in passing that I understood counsel for the plaintiff to argue that if there were a difference between the decisions in the House of Lords and the decisions in the Appeal Court, I should follow the decisions of the Appeal Court, citing as his authority TRUMBLE v. HILL, L. R. 5 A. C. 342. This case is not authority for any such proposition. It is of course authority for the proposition that the Court of Appeal in England should be followed by a colonial court in construing a statute which is similar to an English statute.

The first case cited by the plaintiff is WALTON HARVEY LIMITED v. WALKER, 1931, 1 Ch. D. 274. In this case plaintiff had obtained from defendant the right to erect on premises of which defendant was lessee, an electric sign, the right was for a period of seven years with an option for renewal for five years. Under compulsory powers the Municipal Corpora-

*In the  
Supreme  
Court of  
Nova Scotia.*

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Decision of  
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22nd, 1933.  
—continued.

tion took possession of the premises and tore down the building and removed the sign. Compensation was paid to the defendant and part of the compensation was for the loss of rent under the agreement with the plaintiff. The suit was for damages for breach of agreement. It was held that the agreement was not put to an end by the exercise of these compulsory powers and the reasoning was that the courts will not imply for parties bargains that they would never have made for themselves. And business men would not have agreed to a term that the licence to put up the sign was until such time as the land may be expropriated and the defendant will get compensation for his loss from the city but plaintiff will get nothing at all. The 10 implied term of cancellation must be something that would probably have been the bargain to be made by reasonable men if they had been dealing in the agreement with the events which happened.

A further case cited by the plaintiff and illustrating the same thing is GRIMSDICK v. SWEETMAN, (1909) 2 K. B. 740. The plaintiff was the owner of premises known as the Seymour Inn. It was demised to defendant in 1895 for a term of 25 years. It was a house and bakehouse but it was principally valuable because it was what was called an "ante 1869" beer shop. But in 1904 the law changed and the licence became subject to cancellation and was finally cancelled. The Licencing Act under which 20 the cancellation took place provided for compensation to the parties and the plaintiff received £155 as owner and the defendant £100 as tenant. In this action claiming rent, the county court judge took the view that the case was governed by KRELL v. HENRY. The Court of Appeal however held otherwise. The reasons for the judgment are various. It was however apparently held by all the judges that this was a case where if a very important part of the defendant's business had been taken away, *nevertheless he had been compensated for that taking*, and that being so, the lease went on the same as before except that he could sell no beer.

We see therefore that following Lord Dunedin's dictum we have a 30 class of cases where there would apparently have been a determination of the contract, but that the law having made compensation for the changed conditions, the complaining party is presumed not to be hurt and his compensation for the change is simply what the statute allows him.

Is it possible to obtain from the cases a set of principles which we can apply in the case before the court?

These principles seem to be—

(1) A change in the statute law of our own country by which those conditions which are the basis of the contract are fundamentally changed may so affect the contract the parties will be no longer bound to continue 40 its performance. *BANK LINE v. CAPEL.*

(2) This frustration may arise in the course of the contract as well as prior to its commencement. *METROPOLITAN WATER BOARD v DICK KERR & CO.*

(3) The contract is avoided only on the complaint of the party who is damaged and if in spite of the changed condition one party is uninjured he can not complain if the other party wishes to continue. Lord Dunedin in the Bank Line case explaining the Tamplin case.

(4) The special statute which makes the change in the law is itself instructive as to the result on such contracts and when an expropriating law makes compensation to the parties, this may be the only remedy which they have. GRIMSDICK v. SWEETMAN (1909) 2 K. B. 740 and this is probably the explanation of WALTER HARVEY v. WALKER 1931, 1 Ch. D. 274. See also LEAKE on CONTRACTS.

*In the  
Supreme  
Court of  
Nova Scotia.*

No. 32  
Decision of  
Mr. Justice  
Doull,  
December  
22nd, 1933.

In the present case we have—a change in the law (including the regulations) which in my opinion completely changed the basis on which the parties were contracting which was that the chartered vessel could be employed as a steam trawler. It is true that the parties might have contracted about it if they had so desired and we must not make for the parties a contract which they would not as reasonable men have made for themselves if they had been dealing with the possibility of such a change. I think however, that it is not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease.

There is a difficulty arising from the face that the defendant could have laid up another boat instead of this one, but following the Bank Line case I do not think that it was bound to do so.

On the whole, in my opinion the defendant made out its defence under the authorities and is entitled to have the action dismissed with costs.

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No. 33

Order for Judgment

No. 33  
Order for  
Judgment  
January  
19th, 1933.

THIS ACTION having come on for trial at Halifax before His Lordship Mr. Justice Doull without a Jury on the 5th day of December, A. D. 1933, and the learned Trial Judge after hearing the evidence adduced and what was alleged by Counsel having been pleased to reserve his Decision herein, and subsequently, to wit on or about the 22nd day of December, A. D. 1933, having been pleased to file his Decision herein dismissing this action with costs;

NOW UPON MOTION:

IT IS ORDERED that the Plaintiff do take nothing by its said action but that the same be and it is hereby dismissed with costs to be taxed.

AND IT IS FURTHER ORDERED that Judgment be entered herein for the Defendant against the Plaintiff for such costs when taxed.

DATED at Halifax, N. S., this 19th day of January, A. D. 1934.

BY THE COURT.

REGINALD V. HARRIS,  
*Prothonotary.*



*In the  
Supreme  
Court of  
Nova Scotia.*

No. 34

## Notice of Appeal

No. 34  
Notice of  
Appeal to  
the Supreme  
Court of  
Nova Scotia  
*en Banco*,  
January  
22nd, 1934.

TAKE NOTICE that the plaintiff intends to appeal and does hereby appeal to the Supreme Court of Nova Scotia sitting *en banc* from the judgment or decision of His Lordship Mr. Justice Doull, made herein on the 5th day of December, 1933, and from the Order for Judgment made thereon dated the 19th day of January, 1934, in favour of the defendant.

AND FURTHER TAKE NOTICE that an application will be made to the said Court sitting *en banc* at the County Court House, in the City of Halifax, on Tuesday, the 13th day of March, 1934, at ten o'clock in the forenoon, or so soon thereafter as counsel on behalf of the plaintiff can be heard, for an order reversing, rescinding and setting aside the said judgment or decision and the said Order made thereon with costs, and that judgment be entered for the plaintiff for the amount claimed by it herein with costs. The whole of the said judgment or decision and order is hereby complained of and appealed from.

DATED Halifax, N. S., the 22nd day of January, 1934.

L. A. LOVETT, of  
35 Bedford Row, Halifax, N. S.  
*Solicitor for the Plaintiff.* 20

To the above named Defendant,  
or its Solicitor.

No. 35  
Reasons for  
Judgment.

No. 35

## Reasons for Judgment of The Supreme Court of Nova Scotia

Opinion of  
Ross J.,  
June 2nd,  
1934.

## OPINION OF ROSS J.

ROSS J.: In my opinion this is not a case where the defendant can invoke the doctrine of frustration. With deference I cannot agree with the learned trial judge, when he says that there was a change in the law that completely altered the basis on which the parties contracted. It is true that there was a change in the law, subsequent to the date when the original charter party was entered into, but when the contract of renewal was completed in July, 1932, the legislation of 1929 and the Order-in-Council made thereunder were before the Defendant. Although the officers of the Defendant Company were particularly well informed on the subject, the only changes suggested by them when renewing the charter party in 1932, was a reduction in the charter fee and an amendment to Clause 9, both of which were agreed to by Plaintiff. They knew, when the "St. Cuthbert" was first chartered, all about the agitation current, to prohibit trawlers, yet in spite of that, and the subsequent legislation and regula- 40

tions, they renewed the charter party without any protecting clause in the agreement. It is a case where, in my opinion, on a consideration of all the circumstances, the Defendant took its chances, and I am not sure that there may not have existed, at the time, sufficient reason why the Defendant might have considered it good business to renew the charter and take its chances on getting a license.

*In the  
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No. 35  
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Opinion of  
Ross J.,  
June 2nd,  
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—continued.

Authorities point out that the application of the principle depends upon the circumstances of each particular case. Lord Finlay in *Larrinaga cv. Societe France Americaine*, 39 Times Law Reports 316, doubts whether the doctrine should have been extended to the case of *Krell v. Henry*, 1903, 2 K. B. 740, and that criticisms cannot fail to find support among those lawyers who think that the lessee in the *Krell* case took the chance of the happening of the event, in expectation of which, the contract was made.

I have still another difficulty in applying the principle here.

*Chitty on Contracts*, 18th Edit. p. 829, dealing with the subject, says:

“It is a logical consequence of the principle stated above, that the discharge of a contract on the ground that its performance has been frustrated occurs automatically upon the happening of the events which frustrate it, and does not depend upon any repudiation or other act of volition on the part of either of the contractors.”

He cites *Herji Mulji et al v. Choeng Yue* (1926) A. C. 497.

What was the event in this case that automatically discharged the contract? Not, I suggest, the legislation of 1929, nor the Order-in-Council of August 14th, 1931, nor yet the letter of the Deputy Minister to the Defendant dated April 5th, 1933, in which the latter was advised that the number of licenses for its steam trawlers would be reduced for that year from five to three. If there was any frustration it must have been by the deliberate act of the Defendant in selecting the three trawlers for which the Defendant desired licenses to be issued. The learned trial judge states that:

“It is not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease.”

I say again with deference, and I am bound to say also with some diffidence, as the question is by no means free from difficulty, that there was no law prohibiting the operation of the “*St. Cuthbert*.” There was a law, well known to Defendant when the charter was renewed in 1932 that she could not operate without a license. We are told that the case of the *Bank Line v. Capel*, 1919, A. C. (H. L.) 435 meets the difficulty I have raised. I do not think so. In that case there was an event which automatically discharged the contract, and that was the requisitioning of the ship by the government. In my opinion it mattered not what happened before, in the way of giving the shipowner the privilege of indicating his preference as to the ship to be requisitioned, or what happened afterwards when the ship was released and another substituted. The important fact to keep in mind is the requisitioning by the government; and it was on the happening of that event that the contract was automatically discharged.

I think the appeal should be allowed and judgment entered for the Plaintiff with costs in both courts.

*In the  
Supreme  
Court of  
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Reasons for  
Judgment.

Opinion of  
Hall J.,  
June 2nd,  
1934.

**Opinion of Hall J.  
Concurred in by Graham J. and Carroll J.**

HALL J.: The Defendant Company was organized in December, 1931, and acquired and operated the business formerly carried on by two companies—Maritime Fish Corporation, Limited, and National Fish Company, Limited.

This action arises upon a charter party made by the Plaintiff, "Owner", of the steam trawler ST. CUTHBERT, and National Fish Company, Limited, as charterer, on October 25th, 1928, "for the term of twelve calendar months to commence when the said steam trawler is ready to sail from Grimsby, England, thenceforth fully to be completed and after the expiration of twelve calendar months for a further period of twelve calendar months and from year to year thereafter until one of the parties hereto shall give to the other party three calendar months notice to terminate this Charter such notice to be effective only at the end of one of the years of the Charter hereby agreed upon."

It is difficult to know the circumstances that induced this charter. No oral evidence was given on behalf of the Plaintiff and the only witnesses examined in the case were the general manager and the secretary of the Defendant, and Captain Hansen, who had been in the employ of Defendant or one of its subsidiaries for fifteen years as captain of a steam trawler.

Mr. Laing, the secretary, says that prior to making the charter he was present at directors meetings of The National Fish Company (of which he was a director) when the purchase of the ST. CUTHBERT was discussed and Mr. Saunders, another director, undertook to and did organize a company (the Plaintiff) to purchase the ST. CUTHBERT and charter her to The National Fish Company. The original charter party contained the following, among other, provisions:

"That the said steam trawler shall be employed in the fishing industry only and that this Charter be upon the following conditions:

(1) That the charterer shall provide and pay for all the provisions and wages of the captain, officers, engineers, seamen, firemen and crew; shall pay for the insurance of the vessel up to the amount of the cost thereof to the owner, which amount shall be furnished by the owner to the charterer within one week after the execution of this charter party also for all engine room stores, and for all operating expenses; and the charterer shall further maintain the said trawler in a thoroughly efficient state in hull and machinery for and during the service.

(2) That the charterer shall provide and pay for all coal port charges pilotage agencies commissions and all other charges whatsoever.

(3) That the charterer shall pay for the use and hire of the said trawler annually twenty per centum of the cost to the owner of the said steam trawler including not only the purchase price thereof but all travelling and agency expenses and the cost of incorporating and organizing the owner and the cost of equipping and making the said trawler ready for delivery in accordance with the terms of this charter.

The amount of the said cost shall be furnished by the owner to the charterer within two calendar months after the execution of this charter party."

The terms of this Charter shew the unusual relationship between the parties. Laing says the ST. CUTHBERT cost \$49,000. Apparently director Saunders financed the purchase for the purpose of providing another trawler for The National Fish Company. There is no evidence as to the latter's ability to have financed the purchase.

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Opinion of  
Hall J.,

June 2nd,  
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—continued.

The Charter also contained the following option:

10 "That the charterer shall have the option at any time after the expiration of one year from the commencement of the said hiring to purchase the said trawler for the price thereof to the owner as hereinbefore defined plus fifteen per centum in addition thereto."

On December 6th, 1928, the Charter was amended and the rights of the owner further protected by the following provision:

20 "The said National Fish Company Limited shall not at any time except with the consent of said Ocean Trawlers Limited purchase any steam trawler excepting the GOOD HOPE and VIERNOE, unless and until the said National Fish Company Limited exercises the said option hereinbefore mentioned and purchases the said steam trawler ST. CUTHBERT upon the terms set forth in the said Charter party or upon such other terms as may be agreed upon."

The learned trial judge finds:

30 "In the year 1928 there were in Canada no restrictions on the use of trawlers. The agitation for the abolition of such vessels on behalf of shore fishermen was however at its height, and a Royal Commission had been appointed by the Dominion Government and had made certain findings. It is quite clear that the parties might very well have considered some restriction or prohibition of trawlers as being within the possibilities of the future. In 1929, The Fisheries Act, Chapter 73 of the Revised Statutes of Canada, was amended by Chapter 42 of the Acts of 1929, which added Clause 69A, which is in part—

69A (1) Every person shall be guilty of an offence and shall incur a penalty of not less than one hundred dollars and not more than two thousand dollars recoverable with costs upon summary conviction who at any time except under licence from the Minister (of Fisheries)—

40 (a) with intent to fish or cause any other person to fish with a vessel that uses an "otter" or other trawl of a similar nature for catching fish in the sea leaves or departs from any port or place in Canada for the purpose of such fishing.

(4) The Minister may determine the number of such vessels which may be eligible to be licenced.

"This Act gave the Minister of Fisheries power not only to regulate and licence but to limit the number of trawlers operating out of Canadian ports."

On October 30th, 1929, the following Order-in-Council (P. C. 2196) was approved by His Excellency the Governor General:

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—continued.

“The Minister, in the light of his investigations, and with the advice of the Deputy Minister of Fisheries, recommends, under the authority of Section 69A of The Fisheries Act, which section was established by 19-20, George V., Chapter 42, that a license to any fishing vessel which uses an otter or other trawl of a similar nature, will not be granted except under the following conditions:

1. That such vessel was built in Canada and is now operating under temporary license or was built in Canada subsequent to November 1st, 1929.

Provided, however, that existing fishing vessels, other than Canadian built, which use otter or other trawls of a similar nature, and in respect of which temporary licenses are now in force, shall be eligible for license but only during the period ending April 1st, 1932.

2. On and after April 1st, 1930, a license fee at the rate of one cent per pound, shall be payable by the owner or operator of any such fishing vessel that was not built in Canada, and, at the rate of two-thirds of a cent per pound, shall be payable by the owner or operator of any such fishing vessel that was built in Canada, under regulations approved by the Minister of Marine and Fisheries, on all cod, haddock and halibut that are caught and landed on the Atlantic coast of Canada by any such fishing vessel. The Committee concur in the foregoing recommendation and submit the same for approval.

(Sgd.) E. J. LEMAIRE,  
Clerk of the Privy Council.

The National Fish Company, Limited, refused to recognize the validity of the above Order-in-Council and continued to operate trawlers not built in Canada (including the ST. CUTHBERT) without paying fees and action was brought by the Crown to recover the amount representing the license fee on one trawler for a three months period. It is stated in the judgment (1931 C. L. R. Ex. at p. 85) that the license fee payable by National Fish Company, Limited, under P. C. 2196 would be between \$130,000.00 and \$150,000.00 yearly. It was held that the regulations (P. C. 2196) made under the provisions of Sections 46 and 69A of The Fisheries Act were *ab initio* null and void and *ultra vires*. This judgment was delivered March 9th, 1931. On August 29th, 1931, a new Order-in-Council (P. C. 1917) was approved rescinding P. C. 2196 and substituting therefor the following regulations:

“1. A license for a fishing vessel using an otter or other trawl of a similar nature, other than a small dragger operated by inshore fishermen, will not be granted, except under the following conditions: 40

(a) That the applicant for such license shall furnish the Minister of Fisheries with evidence that will satisfy the said Minister, that he cannot obtain an adequate supply of suitable fish to enable him properly to conduct and develop his business from the hook and line fishermen, and that if the license is granted, the extent of his purchase of fresh fish from the said fishermen will not be adversely affected.

(b) That there shall be painted on both bows and on both quarters of such fishing vessel the number of the licence under which it is

operating. This number shall be painted in white on a black ground and each figure shall not be less than eighteen inches in length and two and a half inches in breadth.

(c) The fee on such licence shall be five hundred dollars and the amount thereof shall accompany the application."

On July 6th, 1932, the Defendant addressed the following letter to the President of the Plaintiff Company:

MARITIME NATIONAL FISH, LTD.

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July 6, 1932. —*continued.*

10

Mr. B. P. Saunders, *President*,  
Ocean Trawlers, Limited,  
c/o Messrs. Saunders & Duffus,  
149 Hollis Street,  
Halifax, N. S.

Dear Mr. Saunders,

We hereby confirm conversation between yourself and our Mr. Connor and Mr. Laing to the effect that we will renew the Charter at present existing between your company and ours in *re* steam trawler ST. CUTHBERT for  
20 one year from the 25th October, 1932, subject to the following changes, namely:

1. The charter fee to be reduced by 25%, making the monthly fee payable, \$590.97.

2. It is agreed that Clause 9 of the Charter be and is hereby amended in that in the event of our ever giving you notice on or before the 25th July in any one year of our intention not to renew the Charter, that we shall on or before the 25th day of July in the same year give you further notice as to our intention to exercise the option to purchase or not.

We would appreciate if you would confirm these understandings in  
30 writing.

We remain,

Sincerely yours,

MARITIME NATIONAL FISH, LIMITED,

H. V. D. LAING,

*Secretary.*

On July 8th, 1931, the Plaintiff wrote acknowledging receipt and agreed to renew the Charter on the amended terms.

From August 29th, 1932 until April 30th, 1933, the Defendant had operated five trawlers, viz: RAYON D'OR, VENOSTA, VIERNOE,  
40 LEMBERG and ST. CUTHBERT, under licenses, and had paid the license fees.

On January 27th, 1933, the Defendant sent Plaintiff notice of cancellation. (Ex. E/5).

## MARITIME NATIONAL FISH COMPANY, LIMITED

January 27, 1933

*In the  
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Court of  
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No. 35  
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Judgment.

Opinion of  
Hall J.,  
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—continued.

Mr. B. P. Saunders,  
c/o Messrs. Saunders & Duffus,  
Hollis Street,  
Halifax, N. S.

Dear Sir:

We hereby give notice that we will not renew the Charter of the steam trawler ST. CUTHBERT at the expiration of the present term.

We are giving this notice now so that you may have as much time as 10 possible to seek a new charterer or purchaser.

If you can relieve us of the obligation before the expiration of the present term, we would appreciate it.

We remain,

Sincerely yours,

MARITIME NATIONAL FISH, LIMITED

H. V. D. LAING,  
*Secretary.*

This notice would terminate the Charter on October 25th, 1933.

On March 11th, 1933, the Defendant reapplied under the provisions of 20 Section 48 of The Fisheries Act and of Order-in-Council, P. C. 1917, for a license for each of said trawlers and accompanied each application with the fee of \$500.00. On March 18th, 1933, the Deputy Minister of Fisheries acknowledged receipt of the applications "supported by declarations and the necessary fees" and said they would be dealt with at the earliest possible moment.

Nothing further transpired until April 4th, 1933, when the Acting Minister of Fisheries made a statement in the House of Commons (Ex. E/L, Hansard, 3945-6).

He reviewed the history of steam trawling in Canada and cited the 30 legislation of 1929 enacted subsequent to the consideration of the reports of the Atlantic Fisheries Commission 1927-1928, the Order-in-Council, P. C. 2196, and the litigation arising therefrom, and proceeds:

"Following the submission of applications, which were accompanied by the necessary evidence supported by declarations, licences for six trawlers were granted for the fiscal year 1932-33. Five of these were for trawlers operated by the Maritime-National Company and one by the Leonard Fisheries.

Fishermen's organizations and boards of trade have strongly urged that no trawlers be licensed for the present fiscal year. On the other hand, the 40 Halifax Board of Trade and the Mayor of Halifax have urged very strongly the renewal of all the existing licenses. Applications for renewal of the five licences held by the Maritime-National Company have been made, and the Leonard Fisheries has intimated that it intends to apply for a renewal of its licence.

“After consideration of all the facts it is thought that if the Maritime-National had three trawlers instead of five operating they could reasonably assure the steadiness of supply as well as the proportion of haddock needed. Hence it has been decided that for the present year that company will be allowed three trawlers and the Leonard Fisheries one, as before. There are no other applicants. This will involve a reduction in number of 33 1/3 per cent. This reduction will be put into effect from the first of May, thus giving one month to the company to enable it to fill certain contracts into which it has entered.”

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Opinion of  
Hall J.,  
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—continued.

10 On the following day the Deputy Minister wrote the Defendant Company (Ex. E/D):

Office of the Deputy Minister of Fisheries,  
April 5, 1933.

Dear Sir:

As you will have learned before this reaches you, the Acting Minister announced in the House of Commons yesterday that it had been decided that the number of licenses for steam trawlers to your company would be reduced for the present year from 5 to 3, but that to enable your company to discharge any obligations into which it may have entered, this reduction would not be made effective until the 1st of May.

20 Please be good enough to advise the Department immediately as to which 3 trawlers of the 5, for which you applied for renewal licenses, you desire that such licenses should be issued.

Instructions are being given to return the license fee that has already been forwarded by you for two of the trawlers. This will reach you in a few days.

Yours truly,

(Sgd.) WM. A. FOUND,  
*Deputy Minister.*

H. G. Connor, Esq.,  
30 *Vice-President and General Manager,*  
Maritime-National Fish Limited,  
Halifax, N. S.

To this the Defendant replied: (Ex. E/E).

MARITIME-NATIONAL FISH COMPANY, LIMITED

April 10, 1933.

W. A. Found, Esq.,  
*Deputy Minister of Fisheries,*  
Department of Fisheries,  
OTTAWA, Ontario.

40 Dear Mr. Found:

With reference to your communication of April 5th *re* trawler licenses, may licenses be granted to the undermentioned trawlers, namely:

RAYON D'OR  
LEMBERG  
VENOSTA



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—continued.

Particulars concerning these vessels and the necessary declarations have already been sent to the Department.

We remain,

Yours sincerely,

MARITIME NATIONAL FISH, LTD.

(Sgd.) H. G. CONNOR,  
*Vice-Pres. and Gen. Mgr.*

On April 24th, 1933, the Deputy Minister replied: (Ex. E/F).

Office of the Deputy Minister of Fisheries,  
Ottawa, April 24, 1933. 10

716-33-2.

Dear Mr. Connor:

Adverting to your letter of the 10th instant, I now enclose the following steam trawler licenses for the present fiscal year:

No. 8 for the "RAYON D'OR" owned by the Golden Ray Fishing Co., Ltd.

No. 9 for the "LEMBERG" owned by the Lemberg, Ltd.

No. 10 for the "VENOSTA" owned by the Venosta, Ltd.

The names of the captains have not been inserted as we are not sure whether the same captains are employed as were licensed last year, but as this is not a vital point in the issue of the license you are authorized to fill in the name of the captain in each instance. You will also please immediately advise the Department of the name of the captain of each vessel so that its record may be properly completed.

Yours truly,

(Sgd.) WM. A. FOUND,  
*Deputy Minister.*

H. G. Connor, Esq.,  
*Vice-President and General Manager,*  
Maritime-National Fish, Ltd.,  
Halifax, N. S.

30

Subsequently the Defendant gave Plaintiff notice of cancellation: (E/O).

MARITIME NATIONAL FISH LIMITED

Halifax, N. S., April 29, 1933.

Ocean Trawlers, Ltd.,  
B. P. Saunders, Esq., *President,*  
c/o Messrs. Saunders & Duffus,  
Halifax, N. S.

Gentlemen:

In view of the action of the Dominion Government in reducing the number of trawlers' licenses, it will be impossible for us to employ the traw-

40

ler ST. CUTHBERT after the thirtieth April, 1933. The charter-party will, therefore, be cancelled as of that date, and in furtherance thereof we are cancelling all insurance on this vessel as from the above date.

We remain,

Sincerely yours,

MARITIME-NATIONAL FISH, LTD.

(Sgd.) H. G. CONNOR,  
Vice-Pres. and Gen. Mgr.

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10 On the same day the Plaintiff by its Solicitor advised the Defendant by letter (Ex. E/P) that it would not agree to cancellation of the Charter and in event of Defendant's failure to perform its terms the Plaintiff would hold Defendant responsible for all damages occasioned by the breach.

It would serve no useful purpose to recapitulate the many cases marking the development of the doctrine of frustration of contracts. Lord Haldane in *Bank Line v. Capel* (1919 A. C. at 447) lays down the principle that "whether frustration has taken place is always a question which depends on the circumstances to which the principle is to be applied, rather than upon abstract considerations."

20 Lord Sumner in *Hirji Mulji v. Cheong Yue*, 1926 A. C. at 507, thus describes the conditions to which the principle of frustration applies:

"An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract."

The same noble Lord, in the *Bank Line* case, at P. 452 says:

30 "It is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed such conduct might give the other party the option to treat the contract as repudiated."

The following facts seem indisputable:

40 At the date of the original Charter (October 25, 1928) no licenses were required for trawlers operating from Canadian ports. The Atlantic Fisheries Commission, 1927-28, had inquired into the vexed question of steam trawlers operations and following their reports, legislation for the better control of trawlers was enacted. Under that amendment all trawlers must be licensed and *the Minister might determine the number of trawlers eligible to be licensed*. From year to year thereafter, the Defendant obtained licenses for and continued to operate the ST. CUTHBERT under the Charter. New regulations were adopted on August 14th, 1931 (P. C. 1917) fixing the license fee at \$500.00. The Defendant paid the fee and operated the ST. CUTHBERT in 1931 and 1932.

On the 6th July, 1932, the original Charter party was amended and the rental reduced. In effect this was a new contract to become effective on October 25th, 1932. It was made by both parties with full knowledge

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that the trawler could not operate without an annual license obtainable only upon payment of \$500.00 fee, and that the Minister could limit the number to be issued. May I say here, with the greatest deference, that the learned trial judge apparently assumed this change in the statute law was subsequent to the making of the contract, whereas in fact the contract upon which action is brought was made after three years notice of the change in statute law. Both parties had adopted the license requirement when they entered into the new contract and possibly this was considered in fixing the reduced rental. Obviously the license requirement is not the change of condition which founds the claim of frustration.

In March, 1933, the Defendant forwarded the requisite fees and applied for licenses for five trawlers including the ST. CUTHBERT. On April 4th, 1933, the Minister announced his decision that only three licenses would be issued to Defendant and it was called upon to nominate "as to which 3 trawlers of the 5, for which you applied for renewal licenses, you desire that such licenses should be issued." The Defendant nominated three trawlers other than the ST. CUTHBERT and licenses were issued to its nominees.

The whole correspondence makes it clear that the Department was ready and willing to issue licenses to any three of the five trawlers for which the Defendant had made application. Although it does not appear elsewhere in the record, Mr. Connor, General Manager of Defendant Company, says that in 1933 a license issued to one of the trawlers was transferred to another—apparently without difficulty. There is no doubt one could have been obtained for the ST. CUTHBERT as readily as for any of the others if the Defendant had so wished.

It is urged for the Defendant that the circumstances indicate the parties contracted upon the basis that the number of trawlers to be licensed would not be limited or reduced, but before the contract was fully performed the number was reduced without fault of the parties, and therefore the contract is discharged.

This argument would have had more force if the original contract had been for a term of years not determined when the number of licenses were reduced, but we are considering a contract made on July 6th and coming in force on October 25th, 1932. In view of all the circumstances then existing, I am unable to believe that the possibility of such reduction was not contemplated by the parties to the renewed contract.

Lord Sumner in the Bank Line case quotes with approval these words of Lawrence, J., in the Scottish Navigation Company's case, (1917) 1 K. B. at 249:

"No such condition should be implied when it is possible to hold that reasonable men could have contemplated the circumstances as they exist and yet have entered into the bargain expressed in the document."

I am not prepared to say that the new contract was not made after full contemplation of the trend of trawler regulation and the realization of a likelihood of reduction in the number of trawlers to be licensed. Probably the Defendant was prepared to take its chances and insisted upon a lower rental as an offset to any loss consequent upon such reduction. It is in evidence that the Defendant is a part of a very large organization—

the Atlantic Coast Fisheries, Limited—carrying on business both in Canada and the United States. They are business men, keenly alive to matters affecting the fish trade, and to hold that such reduction was not contemplated seems contrary to reason and the knowledge of human affairs.

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Court of  
Nova Scotia.*

If it is admitted that the ST. CUTHBERT would have been licensed in 1933 if nominated by the Defendant, and I think no other conclusion is tenable, the impossibility of obtaining licenses for some other trawlers should not affect the contract in issue. This was an independent Charter of a single vessel. It was not chartered as one of a fleet nor was it a condition of the contract that the Defendant should be able to operate more than three trawlers. It would be quite as apt to urge that the parties had not in contemplation at the time of making the contract a possible violent fluctuation in the price of fish and therefore that a later unprecedented drop in the market would bring about frustration of the contract. The event not contemplated that leads to frustration must be "a common object, not merely the advantage that one party or the other might have gained from the contract," and this common object must be germane to the contract. Neither condition prevails here.

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Mr. Connor states that only the RAYON D'OR and ST. CUTHBERT were under charter. The three other trawlers were free agents. This fact throws light on the Defendant's conduct. The ordinary course for the Defendant would be to perform its contracts with the two chartered trawlers and engage only one of the three free lances. But the others were owned by companies subsidiary to the Defendant and it was to the individual advantage of the Defendant to save itself from loss at the expense of the Plaintiff.

I am convinced that there has been no "frustration" in the legal sense of the term but the alleged frustration was self-induced by the Defendant and amounted to straight repudiation of the contract.

This appeal should be allowed.

### No. 36

#### Rule or Order of The Supreme Court of Nova Scotia en banc

Present: The Honourable Mr. Justice Graham.  
The Honourable Mr. Justice Carroll.  
The Honourable Mr. Justice Hall.  
The Honourable Mr. Justice Ross.

(L.S.)

This appeal, being an appeal from the judgment or decision of the Honourable Mr. Justice Doull herein and from the Order for Judgment made thereon and dated the 19th day of January, 1934, having come on for hearing before the Supreme Court of Nova Scotia *en banc* at the March 1934 Sittings of the said Court,

No. 36  
Rule or  
Order of the  
Supreme  
Court of  
Nova Scotia  
*en banc*  
Allowing  
Appeal,  
June 9th,  
1934.

NOW UPON HEARING READ the Notice of Appeal herein, together with the case on appeal and the other documents on file herein and upon hearing what was alleged as well by counsel for the Defendant (Re-

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Court of  
Nova Scotia.*

No. 36  
Rule or  
Order of the  
Supreme  
Court of  
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*en banc*  
Allowing  
Appeal,  
June 9th,  
1934.

—continued.

spondent) as for the Plaintiff (Appellant), and the said Court having been pleased to reserve its decision and having on the 2nd day of June, 1934 delivered judgment allowing the appeal of the Plaintiff (Appellant) herein with costs,

NOW UPON HEARING Counsel for the Plaintiff (Appellant) and for the Defendant (Respondent) and upon motion of Counsel for the Plaintiff (Appellant),

IT IS ORDERED that the said appeal be allowed and that the said decision or judgment of Mr. Justice Doull and the Order for Judgment based thereon be and the same are hereby rescinded. 10

AND IT IS FURTHER ORDERED that the Plaintiff (Appellant) recover against the Defendant (Respondent) the sum of \$590.97, together with the costs of the trial and of this appeal to be taxed.

AND IT IS FURTHER ORDERED that the Plaintiff (Appellant) be at liberty and leave is hereby given it to enter judgment against the Defendant (Respondent) for the said sum of \$590.97, together with the costs of the trial and of this appeal when so taxed.

DATED at Halifax, N. S., June 9th, 1934.

BY THE COURT,

(Sgd.) REGINALD V. HARRIS, 20  
*Prothonotary.*

### No. 37

No. 37  
Reasons for  
Granting  
Leave to  
Appeal to  
His Majesty  
in Council.

### Reasons for Granting Leave to Appeal to His Majesty in Council

OPINION OF CHISHOLM C.J., CONCURRED IN BY MELLISH,  
GRAHAM, CARROLL, HALL AND ROSS, J.J.

Opinion of  
Chisholm  
C.J.

CHISHOLM, C.J.: This is an application for leave as of right to appeal to His Majesty-in-Council from the decision of the Court *en banco* allowing the Plaintiff's appeal from the decision of Mr. Justice Doull in favour of the Defendant and for directions in connection with the proposed appeal. 30

The action was brought to recover the sum of \$590.97, being one month's hire of the ship "ST. CUTHBERT" which was chartered by the Plaintiff to the Defendant for use, as a trawler in the fishing industry. The defence set up was the frustration of the adventure covered by the charter party by the action of the Minister of Marine and Fisheries for the Dominion of Canada in refusing a license to enable the ship to be so employed. Without such license she could not legally be used or employed as a trawler.

The trial judge gave effect to the defence of frustration and dismissed the action; but on appeal it was decided that that defence should not prevail and that plaintiff was entitled to recover the amount sued for, namely one month's hire.

The hire for the remaining six months is now claimed to be due at the rate of \$590.97 a month.

The rule under which the application is made is Rule 2 of the Rules regulating appeals to His Majesty-in-Council from the Province of Nova Scotia, made July 5th, 1911, and it is as follows:

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“2. Subject to the provisions of these Rules, an appeal shall lie,

10 (a) As of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards.”

Opinion of  
Chisholm  
C.J.

—continued.

The applicant’s contention is that the appeal involves the question of liability for the remaining six months hire; and that there is therefore an appeal as of right. The defendant disputes this and claims that the only amount involved is the amount of the judgment recovered for one month’s hire; and that being less than £500 sterling there is no appeal as of right.

20 As already stated the Defendant pleaded the complete frustration of the adventure covered by the charter party and the discharge of the Defendant from all liability thereunder; the Plaintiff joined issue on that defence. That was the substantial issue between the parties; and as the matter now stands it is determined in Plaintiff’s favour. When the Plaintiff makes claim for the hire for the remaining six months, the Defendant cannot successfully set up the defence of the frustration, because while the final judgment of the court stands the issue of frustration is *res judicata*. It therefore seems to me that the action involves a civil right amounting to and of the value of £500 sterling and upwards, namely, the quest on of liability for the hire of the ship for the period of six months.

Leave will be given accordingly and the terms fixed as mentioned on the argument.

30

No. 38

Order Granting Conditional Leave to Appeal to His Majesty in Council

No. 38  
Order  
Granting  
Conditional  
Leave to  
Appeal to  
His Majesty  
in Council,  
June 16th,  
1934.

Present: The Honourable The Chief Justice of Nova Scotia.  
The Honourable Mr. Justice Mellish.  
The Honourable Mr. Justice Graham.  
The Honourable Mr. Justice Carroll.  
The Honourable Mr. Justice Ross.  
The Honourable Mr. Justice Hall.

(L.S.)

40 UPON hearing read the Notice of Motion herein dated the 5th day of June, A. D. 1934, and the Affidavit of Frank M. Covert sworn herein the 5th day of June, A. D. 1934 filed herein, and the other papers and proceedings on file herein, and upon hearing Mr. C. B. Smith, K.C., on behalf of

*In the  
Supreme  
Court of  
Nova Scotia.*

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Order  
Granting  
Conditional  
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His Majesty  
in Council,  
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1934.  
—continued.

the Defendant-Respondent, and Mr. W. C. Macdonald, K.C., on behalf of the Plaintiff-Appellant, and it being alleged on behalf of the said Defendant-Respondent that it is dissatisfied with and aggrieved by the Judgment given on appeal herein; and it appearing to this Honourable Court that this is a proper case in which to grant leave to appeal to His Majesty-in-Council:

THIS COURT DOTH ORDER that upon due performance by Maritime-National Fish Limited, the above named Defendant-Respondent, of the conditions hereinafter mentioned and subject to the final Order of this Court upon the due performance thereof, leave to appeal to His Majesty-in-Council from the Judgment filed or given herein on the 2nd day of June, A. D. 1934, and the Order granted thereon and dated the 9th day of June, A. D. 1934, be and the same is hereby granted to the said Maritime-National Fish Limited, the above named Defendant-Respondent;

AND THIS COURT DOTH FURTHER ORDER that the said Maritime-National Fish Limited do, within forty days from the date hereof, enter into good and sufficient security to the satisfaction of this Court in the sum of Five Hundred Pounds (£500) Sterling for the due prosecution of the said appeal, and the payment of all such costs as may become payable to Ocean Trawlers Limited, the Respondent in the said appeal, in the event of Maritime-National Fish Limited, the Appellant in the said appeal, not obtaining an Order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Appellant in said appeal to pay the Respondent's costs of the appeal;

AND THIS COURT DOTH FURTHER ORDER that upon Maritime-National Fish Limited entering into the security aforesaid, execution of the Judgment entered or to be entered herein in favour of Ocean Trawlers Limited in accordance with the Decision of this Honourable Court *en banco* be suspended pending the final determination of the proposed appeal to His Majesty-in-Council.

DATED at Halifax, N. S., this 16th day of June, A. D. 1934.

BY THE COURT,

(Sgd.) REGINALD V. HARRIS,  
*Prothonotary.*

No. 39  
Bond of  
Employers  
Liability  
Assurance  
Corporation,  
Ltd., On  
Appeal of  
the Defend-  
ant to His  
Majesty in  
Council,  
June 27th,  
1934.

No. 39

**Bond of Employers Liability Assurance Corporation, Limited, on  
Appeal of Maritime-National Fish Limited**

KNOW ALL MEN BY THESE PRESENTS that we THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED, of London, England, a body corporate authorized to carry on and carrying on business in the Province of Nova Scotia, are held and firmly bound unto OCEAN TRAWLERS LIMITED a body corporate organized and existing under the Laws of the Province of Nova Scotia, in the sum of Five Hundred

Pounds Sterling (£500) to be paid to the said Ocean Trawlers Limited, its successors and assigns, for which payment to be made we bind ourselves in the whole, our successors and assigns, by These Presents.....

*In the  
Supreme  
Court of  
Nova Scotia.*

SEALED with our seal and dated this 27th day of June, A. D. 1934....

WHEREAS a certain action is now pending in the Supreme Court of Nova Scotia *en banco* in which the said Ocean Trawlers Limited is Plaintiff and Maritime-National Fish Limited, a body corporate carrying on business in the Province of Nova Scotia, is Defendant.....

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Bond of  
Employers  
Liability  
Assurance  
Corporation,  
Ltd., On  
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the Defend-  
ant to His  
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June 27th,  
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AND WHEREAS the said action came on for trial before Mr. Justice Doull, one of the Judges of the Supreme Court of Nova Scotia, who after trial dismissed the said action and on the 19th day of January, A. D. 1934 did grant an Order for Judgment dismissing the said action with costs....

AND WHEREAS the said Ocean Trawlers Limited being dissatisfied with the said Decision and Order of the said Mr. Justice Doull appealed therefrom to the Supreme Court of Nova Scotia *en banco*.....

AND WHEREAS the said Supreme Court of Nova Scotia *en banco* allowed the said appeal and by its Decree dated the 9th day of June, A. D. 1934 did amongst other things order that the said appeal be allowed and that said Ocean Trawlers Limited should recover Judgment against said Maritime-National Fish Limited in the sum of \$590.97 together with the costs of the trial and of the said appeal to be taxed.....

*—continued.*

AND WHEREAS the said Maritime-National Fish Limited being dissatisfied with the said Decision and Decree of the Supreme Court of Nova Scotia *en banco* duly applied by motion to the said Supreme Court of Nova Scotia *en banco* for leave to appeal from the said Judgment and Decree of the said Supreme Court of Nova Scotia *en banco* to His Majesty-in-Council, and upon the hearing of the said motion the said Supreme Court of Nova Scotia *en banco* gave leave to said Maritime-National Fish Limited to appeal to His Majesty-in-Council on the condition that said Maritime-National Fish Limited should enter into good and sufficient security to the satisfaction of the said Court in the sum of Five Hundred Pounds Sterling (£500) for the due prosecution of said appeal and the payment of all such costs as might become payable to Ocean Trawlers Limited in the event of Maritime-National Fish Limited not obtaining an Order granting it final leave to appeal or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Appellant in said appeal to pay the Respondent's costs of the appeal.....

AND WHEREAS the said The Employers' Liability Assurance Corporation Limited, at the request of said Maritime-National Fish Limited, have agreed to enter into the above written obligation for the purposes aforesaid .....

NOW THE CONDITION OF THIS OBLIGATION is such that if the said Maritime-National Fish Limited shall duly prosecute its said appeal and pay all such costs as may become payable to Ocean Trawlers Limited in the event of said Maritime-National Fish Limited not obtaining an Order granting it final leave to appeal, or if the said appeal be dismissed for non-prosecution, or if His Majesty-in-Council order said Maritime-



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Court of  
Nova Scotia.*

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Bond of  
Employers  
Liability  
Assurance  
Corporation,  
Ltd., On  
Appeal of  
the Defend-  
ant to His  
Majesty in  
Council,  
June 27th,  
1934.  
—continued.

National Fish Limited to pay the Respondent's costs of the said appeal (as the case may be) then the said obligation shall be void; otherwise it shall be and remain in full force and effect.

IN WITNESS WHEREOF the said The Employers' Liability Assurance Corporation Limited has hereunto affixed its corporate seal and has caused These Presents to be executed in its name and on its behalf by its proper officers thereunto duly authorized.

SIGNED, SEALED AND DELIVERED  
in the presence of:

(Sgd.) H. R. McCAUGHIN

(Sgd.) THE EMPLOYERS 10  
LIABILITY ASSURANCE  
CORPORATION,  
LIMITED.  
(Sgd.) C. E. HUBLEY,  
*Attorney-in-Fact.*  
(L.S.)

CANADA }  
PROVINCE OF NOVA SCOTIA }  
COUNTY OF HALIFAX }

I, H. R. McCaughin, of the City of Halifax, in the County of Halifax 20  
on the Province of Nova Scotia, Insurance Broker, make oath and say:—

1. That I was personally present and did see the annexed and fore-  
going Bond duly signed, sealed and executed by The Employers' Liability  
Assurance Corporation Limited, the party thereto.
2. That the said Bond was so executed at the said City of Halifax.
3. That I know the officer who executed the said Bond to be the proper  
officer in that behalf of the said The Employers' Liability Assurance Cor-  
poration Limited.
4. That I am subscribing witness to the said Bond.

SWORN before me at the City of Hali-  
fax, in the County of Halifax, in the Pro-  
vince of Nova Scotia, this 27th day of  
June, A. D. 1934.

(Sgd.) T. F. TOBIN  
*A Barrister of the Supreme Court of Nova  
Scotia.*

(Sgd.) H. R. McCAUGHIN

## Order Granting Final Leave to Appeal to His Majesty in Council

*In the  
Supreme  
Court of  
Nova Scotia.*

Present: The Honourable The Chief Justice of Nova Scotia.  
The Honourable Mr. Justice Mellish.  
The Honourable Mr. Justice Graham.  
The Honourable Mr. Justice Carroll.  
The Honourable Mr. Justice Ross.  
The Honourable Mr. Justice Hall.

No. 40  
Order  
Granting  
Final Leave  
to Appeal to  
His Majesty  
in Council,  
June 30th,  
1934.

(L.S.)

10 UPON hearing read the Order granting conditional leave to appeal herein and the Bond hereinafter referred to, and upon hearing Mr. C. B. Smith, K.C., on behalf of the above named Defendant-Respondent, and Mr. W. C. Macdonald, K.C., on behalf of the above named Plaintiff-Appellant;

AND UPON MOTION:

IT IS ORDERED AND DECLARED that a certain Bond in the sum of Five Hundred Pounds Sterling dated and filed herein the 27th day of June, A. D. 1934 in which The Employers' Liability Assurance Corporation Limited is Obligor and the above named Ocean Trawlers Limited is  
20 Obligee as security for the due prosecution of the appeal of said Maritime-National Fish Limited to His Majesty-in-Council and the payment of all such costs as may become payable to Ocean Trawlers Limited, the Respondent in said appeal, in the event of Maritime-National Fish Limited, the Appellant in said appeal, not obtaining an Order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty-in-Council ordering the Appellant in said appeal to pay the Respondent's costs of appeal (as the case may be) be and the same is hereby approved and allowed as good and sufficient security.

AND IT IS FURTHER ORDERED that final leave to appeal to  
30 His Majesty-in-Council from the Decision of the Supreme Court of Nova Scotia *en banco* given herein on the 2nd day of June, A. D. 1934 and from the Order granted thereon and dated the 9th day of June, A. D. 1934 be and the same is hereby granted to said Maritime-National Fish Limited.

DATED at Halifax, N. S., this 30th day of June, A. D. 1934.

BY THE COURT,

(Sgd.) REGINALD V. HARRIS  
Prothonotary.

## No. 41

*In the  
Supreme  
Court of  
Nova Scotia.*

**List of Documents Omitted to be Printed**

No. 41  
List of  
Documents  
Omitted to  
be Printed.  
August  
25th, 1934.

- (a) Exhibit E/6—Form of License; omitted because it is obsolete and was replaced by license form E/Q.
  - (b) Exhibit E/L—House of Commons Debates—because all relevant portions of it are abstracted and printed.
  - (c) Exhibit E/9—Because it is irrelevant.
-