Unofficial English Translation of the Judgment of the Court

|  |  |
| --- | --- |
| R. c. Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques | 2021 QCCA 1661 |
| COURT OF APPEAL |
|  |
| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | QUÉBEC |
| No.: | 200-10-003746-208 |
| (655-36-000146-188) (655-73-000162-162) |
|  |
| DATE:  |  November 1, 2021 |
|  |
|  |
| CORAM: | THE HONOURABLE | FRANÇOIS PELLETIER, J.A.GENEVIÈVE COTNAM, J.A.BENOÎT MOORE, J.A. |
|  |
|  |
| HER MAJESTY THE QUEEN |
| APPELLANT – appellant  |
| v. |
|  |
| MINISTÈRE DU DÉVELOPPEMENT DURABLE, DE L’ENVIRONNEMENT ET DE LA  |
| LUTTE CONTRE LES CHANGEMENTS CLIMATIQUES |
| RESPONDENT – respondent |
|  |
|  |
| JUDGMENT |
|  |
|  |

1. The appellant appeals from a judgment rendered on February 10, 2020, by the Honourable Claude Bouchard of the Superior Court, District of Baie-Comeau,[[1]](#footnote-1) dismissing the appeal from a judgment of the Court of Québec[[2]](#footnote-2) acquitting the respondent of the following penal offences:
2. Between May 13, 2015, and November 30, 2015, on Palette Lake and De Pons Lake, in a Nordic ZEC located on the unorganized territory of Lac-au-Brochet in the Haute-Côte-Nord RCM, in violation of section 35(1) of the *Fisheries Act* (R.S.C. (1985), c. F-14) did carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, thereby committing the summary conviction offence set out in s. 40(1)(*b*)(ii)(A) of the *Act*.
3. Between August 27, 2015, and February 2, 2016, in the city of Québec, did fail to provide the material and information as requested by the Minister in accordance with s. 37(1) of the *Fisheries Act* (R.S.C. (1985), c. F-14) within a reasonable time, thereby committing the summary conviction offence set out in s. 40(3)(*a.1*) of the *Act*.[[3]](#footnote-3)
4. This judgment must essentially determine whether the Superior Court judge sitting on appeal erred in his interpretation of ss. 35(1) and 37(1) of the *Fisheries Act* (“*Act*”).[[4]](#footnote-4)

**BACKGROUND:**

1. Repairs to a dam on Polette Lake (“Dam”) that controls the water level on Polette Lake and De Pons Lake (“the Lakes”) located in the Nordic controlled harvesting zone (ZEC) frame this dispute. The Lakes are surrounded by cottages and brook trout (“Fish”) is fished there recreationally.
2. At the relevant time, the respondent, through the Centre d’expertise hydrique du Québec (“CEHQ”), was in charge of managing public dams for the government of Quebec.
3. In 2014, studies showed that the Polette Dam was antiquated and no longer complied with the safety standards in effect. After consultation,[[5]](#footnote-5) the respondent decided to replace the existing Dam with a fixed-crest weir. The respondent considered the project to have minimal and temporary impact on fishery performance. The new Dam would cause the water level to go down by 70 cm, which would reduce the area of the Lakes and expose a riparian strip of about 10 hectares over a total area of 131 hectares. This riparian strip, circling the Lakes, constitutes a preferred zone frequented by the Fish (0-2 m zone). Due to the lower water level, the preferred zone moved to the centre of the Lakes, and the net effect of the emergence will be that the preferred zone will increase by 4.47 hectares (9.83%) compared to the initial area.
4. The recommended solution also allows better water management. The evidence reveals that before the work, the riparian homeowners’ association would create an artificial tidal range by manually lowering the water level by 12 inches in the fall to prevent flooding in the spring. The fixed-crest weir will prevent this artificial tidal range,[[6]](#footnote-6) which poses too great a risk of harming the Fish.
5. Before carrying out the work, the respondent made sure to obtain the required provincial and municipal authorizations, but it did not take any steps with the Minister of Fisheries and Oceans (MFO), even though the Lakes are used for recreational fishing.
6. To fulfill the requirements for obtaining an authorization certificate under s. 22 of the *Environment Quality Act*,[[7]](#footnote-7) Nathalie Fantin, an employee of the respondent and an expert in biology and water analysis in natural and aquatic environments, confirmed Ms. Bessette’s opinion and added that the project would yield other positive consequences, for example by correcting water contamination from riparian septic tanks, creating a natural filtration zone along the riparian strip, and eliminating the annual artificial tidal range.
7. The work to replace the Polette Dam took place from May 12 to November 30, 2015.
8. On August 20, 2015, while the work was ongoing, Simon Trépanier, an expert in biological limnology for the appellant, went on site to assess the impact of the new Dam on the aquatic environment. He noted the existence of areas with good reproduction potential, spawning and feeding grounds, and the presence of substratum suitable for egg deposits. He observed that young fish were found in several of the Lakes’ tributaries.
9. In the following week, he requested the plans and specifications for the Dam. After various exchanges, they were sent on February 5, 2016.
10. He went back to the site on October 8, 2015, when the work was practically done. He noted that the water 70 cm lower, which in his opinion significantly altered the fish habitat. He noted that some spawning grounds were isolated from the Lakes while others had been completely exposed. He estimated that an area of 11.81 hectares had disappeared in the preferred 0-2 metre zone. He concluded that building the Dam resulted in a permanent alteration of the fish habitat causing serious harm to the Fish.
11. This is the context for the complaints filed on September 12, 2016.
12. In August 2017, at the respondent’s request, the private firm AECOM went on site to prepare a report on the fish habitat and its population. The report notes that the water level was 31 cm lower instead of the predicted 70 cm. He added that 4,722 m2 of potential spawning grounds were available and accessible in the lakes and tributaries.

**THE JUDGMENTS**

1. Judgment of the Court of Québec
2. After a four-day trial, the Court of Québec acquitted the respondent.
3. By relying on the testimony and expert evidence, the judge concluded that the zone exposed by the work did in fact contain the Fish habitat.
4. She then performed a detailed interpretation of the notion of “serious harm”, which refers to the concept of “permanent alteration”. She found that the *Act* contains an ambiguity. Her interpretation therefore took into account both the legislative history and the Fisheries Protection Policy Statement (”Statement”) adopted by the MFO in October 2013.[[8]](#footnote-8)
5. She concluded that the interpretation had to consider the legislative objective of mitigating the negative impacts of the work on the productivity of fisheries. She therefore accepted that, among the essential elements of the offence, to prove that the work had caused “serious harm”, the appellant had to show that the permanent alteration to the habitat resulted in a negative impact on the sustainability and productivity of fisheries.
6. She then went on to assess the evidence that had been adduced. She set aside the expert report of Mr. Trépanier, who merely offered his observations on the impact that replacing the Dam would have on the fish habitat while the work was ongoing. She pointed out that the analysis was incomplete and that some conclusions were inaccurate. She accepted the AECOM report, which was consistent with the preliminary expert reports predating the respondent’s work, and described a healthy ecosystem where the Fish appeared to be thriving. By relying on an balance-sheet approach, the judge noted that the ZEC’s table of the number of catches showed an increase in 2017 that had not been seen since 2002.
7. The appellant failed to show beyond any reasonable doubt that the alteration of the fish habitat had an impact on the life processes of fish that compromised the sustainability and productivity of fisheries. The judge therefore acquitted the respondent under s. 35(1) and concluded that, in the circumstances, there was no need to address the count under s. 37(1) of the *Act*.
8. Judgment of the Superior Court
9. On appeal, Claude Bouchard J. identified two issues:

1) Did the trial judge err in law by concluding that it was necessary to establish a negative impact on the sustainability and productivity of fisheries as an essential element of the offence under s. 35(1) of the *Fisheries Act*?

2) Did the trial judge err in law by inferring that it was necessary to establish a negative impact on the sustainability and productivity of fisheries as an essential element of the offence under s. 37(1) of the *Fisheries Act*, according to the appellant, or before carrying out the work that was likely to cause serious harm to fish, according to the respondent?[[9]](#footnote-9)

1. After recalling the standard of intervention on appeal from an acquittal, the judge concluded that the trial judge was justified in questioning the interpretation that should be given to the terms “permanent alteration” and “serious harm”.
2. Like the trial judge, he accepted that the work caused a permanent alteration of the fish habitat. He found, however, that she had erred in choosing the balance-sheet approach and focusing on the impact on the sustainability and productivity of fisheries to determine whether the alterations were likely to cause serious harm to the Fish.
3. Despite the error he identified, the judge concluded, like the trial judge, that the appellant had not proved that the habitat alteration caused serious harm to the Fish because [translation] “its preferred 0-2 metre zone within the habitat ... has not disappeared but instead been moved toward the centre of the lakes”.[[10]](#footnote-10)
4. In light of this conclusion, the judge did not rule on the second ground of appeal concerning s. 37(1) of the *Act*. He added, however, that even though some time passed between the date of the request and the date on which the plans and specifications were sent, Mr. Trépanier had a chance to consult and photograph them during his visit of August 20, 2015.

**GROUNDS OF APPEAL**

1. The appellant raises essentially the same grounds of appeal before the Court. It proposes the following questions:

On the first count:

1. Did the Superior Court judge erroneously interpret the notion of serious harm in connection with the offence under s. 35(1) of the *Act*?

On the second count:

1. Did the Superior Court judge erroneously interpret the applicable legal framework to establish the essential elements of the offence under s. 37(1) of the *Act*?
2. Did the Superior Court judge err in law by substituting his opinion for that of the trial judge with respect to the facts adduced, despite the absence of a palpable and overriding error?

**ANALYSIS:**

1. **Did the Superior Court judge erroneously interpret the notion of serious harm in connection with the offence under s. 35(1) of the *Act*?**
2. Section 839 *Cr. C*. limits the right to appeal to grounds that involve a question of law alone.
3. Moreover, as the Superior Court judge recalled, the intervention threshold after an acquittal is particularly high. This is all the more true at the second level of appeal. The appellant must convince the Court that the verdict would have been different, had it not been for the alleged error of law by the Superior Court judge.[[11]](#footnote-11)
4. Moreover, the trial judge’s findings of fact cannot be reassessed, even if they appear unreasonable.[[12]](#footnote-12)
5. These principles must guide the Court’s analysis.
6. Overview of the legislative context:
7. The relevant provisions of the *Act* have often been amended since 2012.[[13]](#footnote-13) At the time of the alleged offence, in 2015, the relevant provisions stated:

|  |  |
| --- | --- |
| **Purposes**6.1 The purpose of section 6, and of the provisions set out in that section, is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.**Factors** 6 Before recommending to the Governor in Council that a regulation be made in respect of section 35 or under paragraph 37(3)(c) or 43(1)(i.01) or subsection 43(5), and before exercising any power under subsection 20(2) or (3) or 21(1), paragraph 35(2)(b) or (c) or subsection 35(3), or under subsection 37(2) with regard to an offence under subsection 40(1) or with regard to harm to fish, the Minister shall consider the following factors: (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries; (b) fisheries management objectives; (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and (d) the public interest.**Definitions**2 (1) In this Act,*fish habitat* means spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes; (*habitat*)**Serious harm to fish** (2) For the purposes of this *Act*, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat.**Serious harm to fish** 35 (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.**Exception** (2) A person may carry on a work, undertaking or activity without contravening subsection (1) if ...(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister; … | **Disculpation** 6.1 L’objet de l’article 6 et des dispositions qui y sont visées est d’assurer la durabilité et la productivité continue des pêches commerciale, récréative et autochtone.**Facteurs**6 Avant de recommander au gouverneur en conseil de prendre des règlements pour l’application de l’article 35 ou en vertu des alinéas 37(3)c) ou 43(1)i.01) ou du paragraphe 43(5) ou avant d’exercer un pouvoir visé aux paragraphes 20(2) ou (3) ou 21(1), aux alinéas 35(2)b) ou c) ou au paragraphe 35(3), ou au paragraphe 37(2) à l’égard d’une infraction au paragraphe 35(1) ou des dommages aux poissons, le ministre doit tenir compte des facteurs suivants : a) l’importance du poisson visé pour la productivité continue des pêches commerciale, récréative et autochtone; b) les objectifs en matière de gestion des pêches; c) l’existence de mesures et de normes visant à éviter, à réduire ou à contrebalancer les dommages sérieux à tout poisson visé par une pêche commerciale, récréative ou autochtone, ou à tout poisson dont dépend une telle pêche;d) l’intérêt public.**Définitions**2 (1) Les définitions qui suivent s’appliquent à la présente loi.*habitat* S’agissant du poisson, toute aire dont dépend, directement ou indirectement, sa survie, notamment les frayères, les aires d’alevinage, de croissance ou d’alimentation et les routes migratoires. *(fish habitat)***Dommages sérieux aux poissons** (2) Pour l’application de la présente loi, la mort de tout poisson ou la modification permanente ou la destruction de son habitat sont considérées comme des dommages sérieux.**Dommages sérieux aux poissons** 35 (1) Il est interdit d’exploiter un ouvrage ou une entreprise ou d’exercer une activité entraînant des dommages sérieux à tout poisson visé par une pêche commerciale, récréative ou autochtone, ou à tout poisson dont dépend une telle pêche.**Exception** (2) Il est permis d’exploiter un ouvrage ou une entreprise ou d’exercer une activité sans contrevenir au paragraphe (1) dans les cas suivants : …b) l’exploitation de l’ouvrage ou de l’entreprise ou l’exercice de l’activité est autorisé par le ministre et est conforme aux conditions que celui-ci établit; … |

1. The previous version provided that:

|  |  |
| --- | --- |
| **Purposes**2.1. [Repealed, R.S., 1985, c. 35 (1st Supp.), s. 6]**Definitions** 34. (1) For the purposes of sections 35 to 43,“**fish habitat**” means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes; (*habitat du poisson*)**Harmful alteration, etc., of fish habitat** 35. (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration or disruption, or the destruction, of fish habitat.**Alteration, etc., authorized** (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act. | **Disculpation**2.1 [Abrogé, L.R. (1985), ch. 35 (1er suppl.), art. 6]**Définitions** 34. (1) Les définitions qui suivent s’appliquent aux articles 35 à 43.***« habitat du poisson »*** Frayères, aires d’alevinage, de croissance et d’alimentation et routes migratoires dont dépend, directement ou indirectement, la survie des poissons.**Protection de l’habitat des poissons et prévention de la pollution** 35. (1) Il est interdit d’exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l’habitat du poisson.**Exception**(2) Le paragraphe (1) ne s’applique pas aux personnes qui détériorent, détruisent ou perturbent l’habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements pris par le gouverneur en conseil en application de la présente loi. |

1. The current wording states:

|  |  |
| --- | --- |
| **Purpose of Act****2.1** The purpose of this Act is to provide a framework for**(a)** the proper management and control of fisheries; and **(b)** the conservation and protection of fish and fish habitat, including by preventing pollution.**Definitions** **2 (1)** In this Act,**fish habitat** means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas;  (*habitat*)**Harmful alteration, disruption or destruction of fish habitat** **35 (1)** No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat.**Exception** **(2)** A person may carry on a work, undertaking or activity without contravening subsection (1) if…**(b)** the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;… | **Objet de la loi** **2.1** La présente loi vise à encadrer : **a)** la gestion et la surveillance judicieuses des pêches; **b)** la conservation et la protection du poisson et de son habitat, notamment par la prévention de la pollution.**Définitions** **2 (1)** Les définitions qui suivent s’appliquent à la présente loi.**habitat** Les eaux où vit le poisson et toute aire dont dépend, directement ou indirectement, sa survie, notamment les frayères, les aires d’alevinage, de croissance ou d’alimentation et les routes migratoires. (*fish habitat*)**Détérioration, destruction ou perturbation de l’habitat** **35. (1)** Il est interdit d’exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l’habitat du poisson. **Exception** **(2)** Il est permis d’exploiter un ouvrage ou une entreprise ou d’exercer une activité sans contrevenir au paragraphe (1) dans les cas suivants : …**b)** l’exploitation de l’ouvrage ou de l’entreprise ou l’exercice de l’activité est autorisé par le ministre et est conforme aux conditions que celui-ci établit;… |

1. The version of s. 35(1) of the *Act* in effect at the time of the alleged offence is the only one that refers to the concept of “serious harm”. The previous and current versions refer only to the notions of “alteration, disruption or destruction of fish habitat” without establishing a connection with the state of the Fish. This observation limits the impact of this judgment.
2. **Serious harm to fish**
3. Section 35 of the *Act* prohibits any person from carrying on any work, undertaking or activity resulting in serious harm to the Fish.
4. The notion of fish habitat extends to the areas the fish depend on for their survival. These include spawning grounds, nurseries, and rearing and food supply areas.
5. Everyone agrees that the work to rebuild the Polette Dam had an impact on the 0-2 meter zone that is part of the fish habitat.
6. The dispute between the parties turns on the definition of “serious harm”. The appellant argues that from the moment it establishes that the work caused a permanent alteration of the fish habitat, it has met its burden. It need not prove the consequences of the alteration on the Fish.
7. The respondent, for its part, suggests that there is no serious harm insofar as the evidence accepted by the trial judge shows that, despite an alteration to one section of the habitat located on the perimeter, the preferred zone was moved toward the centre of the Lakes and even enlarged. The situation of the Fish is therefore improved by the work that was carried out. This conclusion is based not only on the projections made by the respondent’s experts before the work was carried out, but also on the subsequent observations of AECOM.
8. The appellant does not seriously contest the fact that the Fish do not appear to have suffered from the alteration of their habitat. It considers, however, that it is not required to prove a negative impact on the Fish. Under s. 35(1) of the *Act*, its burden is limited to establishing (i) that the respondent carried on work, an undertaking, or an activity, (ii) that resulted in serious harm (iii) to fish that are part of a commercial, recreational, or Aboriginal fishery.
9. The scope of the expression “serious harm” is at the heart of the debate. These words must be interpreted by taking into consideration the legislative framework of the *Act*, which aims to protect the productivity and sustainability of fisheries. From this perspective, the *Act* subjects any person wanting to carry on work likely to cause serious harm to the Fish to an authorization scheme when the activity is not one of the exceptions under s. 35(2) of the *Act*. The failure to obtain such an authorization, when required, may give rise to a penal complaint.[[14]](#footnote-14)
10. Section 35(1) of the *Act*, as worded at the time, applies largely to any activity causing serious harm to the Fish. This expression is not defined in the *Act*, but s. 2(2) describes situations that are considered to be serious harm. It is the case where the work causes the death of fish or results in any permanent alteration or destruction of its habitat. In accordance with the legislative objectives, the notion of habitat includes “any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes”.[[15]](#footnote-15)
11. The issue is therefore whether the work carried out by the respondent was likely to permanently alter the fish habitat and, if so, whether an authorization by the MFO was required.
12. The *Act* does not specify what constitutes a “permanent alteration to ... fish habitat”. In the circumstances, the trial judge correctly referred to the definition in the Statement. That administrative document provides the guidance owners and entrepreneurs need to comply with the *Act*, by shedding light on the circumstances that justify an authorization from the MFO before any work is begun.
13. According to the Statement, a permanent alteration to fish habitat is one that is “of a spatial scale, duration or intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes”.
14. The Statement also provides that, at the authorization stage, the MFO may consider the factors listed under s. 6.1 of the *Act*. It must examine the project and fix the conditions for authorization, taking into consideration the impacts to Fish and fish habitat, the expected duration of the impacts, the geographic scale of the impacts, the availability and condition of nearby fish habitat for the Fish in the zone affected by the project, and the proposed avoidance and mitigation measures being considered to limit the impacts on the Fish. The aim of the authorization is to allow some form of control over measures suggested by the promoter to reduce the impact of the project on the Fish and on fisheries.
15. The Superior Court judge erred in concluding that the permanent alteration of the fish habitat did not cause serious harm attributable to the permanent alteration, which did nothing more than move the fish habitat, to which the Fish still have access, toward the middle of the Lakes.[[16]](#footnote-16)
16. Under the *Act*, as soon as the work caused a permanent alteration to the fish habitat, there was serious harm and an authorization was required. It is not necessary to determine whether the permanent alteration (which itself constitutes serious harm under the *Act*) caused serious harm. It should be kept in mind that the mission of the *Act* is preventative.
17. Thus, if the appellant proves beyond a reasonable doubt that the work carried out by the respondent permanently altered the Fish habitat, it has met its burden of proving the *actus reus*, that is, the existence of serious harm to the Fish.
18. Is that the case here? The construction of the Polette Dam clearly exposed certain land zones that were part of the fish habitat. The question is therefore whether the evidence grounds a conclusion that it is on a geographic scale that reduces or limits the ability of the Fish to use their habitat to carry out their life processes.
19. All parties admit that the new Dam exposed significant portions of the Lakes over an expanse of 10 hectares. This represents an area of 100,000 m2 that harboured spawning grounds, among other things. This emergence is permanent and the evidence establishes that the Fish no longer have access to certain tributaries. It is therefore difficult not to conclude that the work limits or diminishes the capacity of the Fish to use the habitat to carry out one or more life processes. The appellant objectively proved that the work permanently altered the fish habitat and therefore met its burden of establishing the existence of serious harm to the fish. It did not have to prove that there would be an impact on fishing or, as the Superior Court suggests, that the habitat was harmed or degraded. The respondent should therefore have sought the MFO’s authorization before beginning its work.
20. The respondent argues, in the alternative, that it has proved its due diligence and that it should be acquitted of the alleged offence. Having concluded that there is no evidence of serious harm to the Fish, the judges of the Court of Québec and the Superior Court did not deal with this defence.
21. Section 78.6 of the *Act* provides:

|  |  |
| --- | --- |
| **Due diligence defence****78.6** No person shall be convicted of an offence under this Act if the person establishes that the person(a) exercised all due diligence to prevent the commission of the offence; or(b) reasonably and honestly believed in the existence of facts that, if true, would render the person’s conduct innocent. | **Disculpation****78.6** Nul ne peut être déclaré coupable d’une infraction à la présente loi s’il établit :a) soit qu’il a pris les mesures nécessaires pour l’empêcher;b) soit qu’il croyait raisonnablement et en toute honnêteté à l’existence de faits qui, avérés, l’innocenteraient. |

1. The appellant does not address this issue, and the respondent made only brief remarks on this subject in its factum. In the absence of reasons from the trial judge, it appears appropriate to order a new hearing to decide this issue in light of the principles established in this judgment recognizing the existence of serious harm to fish, the evidence relevant to the consideration of the defence of due diligence, and the parties’ submissions.
2. The same conclusion applies to the alleged offence under s. 37 of the *Act*, which allows the Minister to request the necessary documents to authorize, if appropriate, an exception to the general prohibition on causing serious harm to fish.
3. In light of her conclusion that there was no serious harm to the Fish, the trial judge did not rule on the alleged offence under s. 37(1) of the *Act*. The appellant is of the view that the requested documents were not submitted in a timely fashion, whereas the respondent argues that the appellant’s representative had possession of the documents because he took the time to photograph them during his visit on August 20, 2015. The respondent attributes its lateness in following up on the written request from the appellant to the impossibility of communicating with its author despite many attempts. This factual evidence, which requires that the explanations offered by the various stakeholders be assessed, was also not evaluated in the trial judgment. It therefore appears appropriate for this question to also be decided in a new hearing.

**FOR THESE REASONS, THE COURT:**

1. **ALLOWS** the appeal;
2. **QUASHES** the judgment rendered on February 10, 2020, by the Honourable Claude Bouchard J. in file number 655-36-000146-188;
3. **QUASHES** the judgment of acquittal rendered on July 18, 2018, and corrected on August 6, 2018, by the Presiding Justice of the Peace Julie Dionne of the Court of Québec in file number 655-73-000162-162;
4. **ORDERS** a new hearing to be held as soon as practicable.

|  |
| --- |
|  |
|  |  |
|  | FRANÇOIS PELLETIER, J.A. |
|  |  |
|  |  |
|  | GENEVIÈVE COTNAM, J.A. |
|  |  |
|  |  |
|  | BENOÎT MOORE, J.A. |
|  |
|  |
| Mtre Donald Barnabé |
| PUBLIC PROSECUTION SERVICE OF CANADA |
| For the appellant |
|  |
| Mtre Gabrielle Ferland-Gagnon |
| LAVOIE, ROUSSEAU |
| For the respondent |
|  |
| Date of hearing: | March 24, 2021 |

1. *R. c. Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques*, 2020 QCCS 747 [judgment under appeal]. [↑](#footnote-ref-1)
2. *R. c. Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC)*, 2018 QCCQ 5714 [trial judgment]. [↑](#footnote-ref-2)
3. Indictment, September 12, 2016, A.B. at 60. [↑](#footnote-ref-3)
4. R.S.C. 1985, c. F-14. [↑](#footnote-ref-4)
5. With Marjolaine Bessette, coordinator with the Ministère des Forêts, de la Faune et des Parcs and expert in biology with a specialization in water environments. [↑](#footnote-ref-5)
6. Tidal ranges generally describe the variation in water levels between low tide and high tide. The term can also mean the variation in water levels in a lake that does not have tides when, as in this case, the level is artificially managed by a dam. [↑](#footnote-ref-6)
7. *Environment Quality Act*, CQLR, c. Q-2. [↑](#footnote-ref-7)
8. Exhibit P-22, Fisheries Protection Policy Statement, October 2013, A.B. at 185–209. [↑](#footnote-ref-8)
9. Judgment *a quo* at para. 20. [↑](#footnote-ref-9)
10. Judgment *a quo* at para. 50. See also judgment *a quo* at paras. 53-55. [↑](#footnote-ref-10)
11. *R. c. Boudreault*, 2017 QCCA 581 at para. 2; *R. v. Sutton*, [2000] 2 S.C.R. 595 at para. 2; *R. v. Graveline*, [2006] 1 S.C.R. 609. [↑](#footnote-ref-11)
12. *R. v. Boudreault*, [2012] 3 S.C.R. 157 at para. 15. [↑](#footnote-ref-12)
13. For a summary, see the Tableau récapitulatif : Historique de la Loi sur les pêches, R.B., vol 1 at 23–26. [↑](#footnote-ref-13)
14. Section 40 of the *Act*. [↑](#footnote-ref-14)
15. Section 2(1) of the *Act*. [↑](#footnote-ref-15)
16. Judgment *a quo* at para. 50. [↑](#footnote-ref-16)