

CASE NO.**VOL. NO.****PAGE**

Her Majesty the Queen

v.

John James Gillis

986149

Sydney, N.S.

Ross, J.P.C.

Cite as: R. v. Gillis, 2001NSPC 11

TRIAL HELD: February 19, 2001**DECISION DELIVERED:** May 8, 2001**WRITTEN RELEASE OF ORAL:** May 16, 2001**SUBJECT:** Fisheries Act - Fishing during a weekly close time - whether there was inadequate promulgation of close order - officially induced error - 11(2) Statutory Instruments Act**SUMMARY:** The accused was charged with fishing for gaspereau during a weekly close time. The license condition attached and signed by Mr. Gillis and an official of DFO was relied upon by the defendant.**ISSUE:** 1) Whether the Crown has proved compliance with the Statutory Instruments Act;
2) Whether the defence of officially induced error is available to the defendant.**RESULT:** Judicial Stay of Proceedings. The Crown failed to prove compliance with the Statutory Instruments Act. The defence proved officially induced error.

<p>This Information does not form part of the court's judgement. Quotes must be from the judgement, not this cover sheet. The full court judgement consists of 10 pages.</p>

INTRODUCTION

[1] Mr. John James Gillis is charged with fishing for gaspereau during a weekly close time contrary to s. 79(a) of the Fisheries Act of Canada. The evidence discloses the existence of a valid closure order and the commission of the *actus reus* of the offence. Where such is the case the issue most often is whether the defendant has established due diligence. While the present case may admit to such an analysis, Defence has argued the case from a different perspective. Rather than examining the defendant's actions, or his apprehension of the facts, I will consider whether the Crown is disentitled to a conviction for either of two reasons - firstly, inadequate promulgation of the regulation, or secondly, officially induced error. Both are rooted in the misleading wording of a license condition issued to Mr. Gillis.

OUT ON THE MIRA

[2] Mr. John James Gillis is sixty-nine (69) years old. He lives on the shores of the Mira River. After a serious head injury in 1968 he retired from regular paid employment. Since he has raised hens and cut some pulp. He is also a part-time gaspereau fisherman. He says the gaspereau are not as plentiful as they used to be.

[3] He was tending his net from a small boat in the early morning of May 30th, 2000 when noted by Fisheries Officers. They approached him as he arrived back at the shore beside his house. At their request he retrieved his fishing license and conditions of license. This being a Tuesday, in the middle of a weekly close time of Monday to Wednesday, the Fishery Officers, apprehending a violation, seized his vessel and the six (6) gaspereau in it, and later charged him with the instant offence.

[4] I find that Mr. Gillis was unaware of the weekly close time then in effect and had a *bona fide* belief that he was fishing lawfully. While *mens rea* is not an element of the offence, this may still be of some significance in the analysis which follows.

The Regulatory Regime and Licensing Process

[5] As in many branches of the fishery, regulations enacted pursuant to the Fisheries Act define the time when gaspereau fishing may be conducted in certain defined areas. These periods stand as a sort of default regime in the absence of any Variation Orders which the Regional Director-General might issue. In particular, the Maritime Provinces Fishery Regulations define a weekly close time of Friday to Sunday for the area from Halifax to Cape North on Cape Breton Island. However, by Variation Order 1999-060, in force May 26th, 1999, the weekly close time for fishing gaspereau in the Mira River, Cape Breton County was varied to Monday to Wednesday.

[6] Subsequent to the foregoing variation, Mr. Gillis renewed his gaspereau license. He did so by attending at the Department of Fisheries office in Sydney, where he was issued, on March 21st, 2000, a license to fish gaspereau with a set gill net. This license was expressly subject to a condition, issued to Mr. Gillis at the same time and place by the same licensing authority. The condition reads, in part:

“Subject to any variation orders that may be issued these license conditions are valid during the period beginning March 21/00 and ending December 31st, 2000.”

The March date was inserted by the DFO official and corresponds to the date of issuance of the license. At the nub of this case is the grammatical meaning of the opening clause of this condition. I am called upon to consider whether it undermines the foundation, built upon the concept of natural justice and the statutory requirement of notice, which must exist before a conviction can be entered. I will also consider whether it is something around which a defence of officially induced error crystalizes.

[7] When the Regional Director-General issues a Variation Order (of which a closure order is one type) it acts under s. 6 of the Fishery (General) Regulations. These regulations require that notice of the variation be given to persons likely to be affected by one or more of various methods. These include broadcast over a commercial or marine radio station, posting the notice in the area affected, transmission by electronic means, oral notice by a Fishery Officer, and publication in a newspaper circulated in the vicinity. It is the last and only the last of these means which were chosen to promulgate Variation Order 1999-060. One advertisement appeared in each of the Halifax Chronicle Herald and Cape Breton Post newspapers on May 29th, 1999. There was publication as well in a French-language newspaper. Though Mr. Gillis is bilingual, his other language, besides English, is Gaelic.

[8] The foregoing notification, though minimal, is likely not unreasonable in and of itself. Defence has argued that given the small number of gaspereau license holders (166) in this area, a copy of the Variation Order could easily have been mailed out at little cost. However, if done at the time of issuance, such would reach only current license holders and miss any subsequent entrants into the fishery. While it is theoretically possible that copies of subsisting variation orders accompany the licensing documentation issued to an applicant, this too may present practical difficulties to the department. In many types of fishery Variation Orders are issued frequently, adjusting and fine tuning closures, quotas, etc. as the catch is landed through the year. Gaspereau fishers, on the other hand, are a relatively small and widely dispersed group of persons. There is no defined fleet of ships carrying VHF radios. There are no particular ports or fish plants where fishermen aggregate. It is a fishery with no particular locus nor focus. These characteristics lead one to think that posting, or oral notice, may not be particularly efficacious. That being said, while newspaper advertising alone may suffice, the reasonableness or adequacy of the notice here (being the advertisements alluded to above) cannot be viewed in isolation from the license condition given to Mr. Gillis when he was issued his license.

[9] In attempting to prosecute this offence, the Crown must contend not only with the requirements set out in the Fisheries Act and Regulations enacted thereunder, but also with the Statutory Instruments Act. For reasons I will elaborate on later, this Act

applies to the Variation Order here in question. Had the Variation Order been published in the Canada Gazette, this would be deemed sufficient promulgation of the regulation, though in practical terms it is unlikely that many gaspereau fishermen read the Canada Gazette. For obvious reasons, Variation Orders are exempted from the requirement of being published in the Canada Gazette. However, where such exemption is granted s. 11(2) of the Act stipulates that:

“No regulation is invalid by reason only that it was not published in the Canada Gazette but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the Canada Gazette unless:

(a) the regulation was exempted from the application of subsection (1) pursuant to paragraph 20(c), or the regulation expressly provides that it shall apply according to its terms before it is published in the Canada Gazette; and

(b) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.”

I interpret this onus to be upon the Crown on a balance of probabilities.

[10] I note here that Mr. Gillis was one of 166 gaspereau licensees in this management zone. He was one of a readily - defined class of persons, i.e. “Those likely to be affected”. A consideration of the forms used in his case, and the insertion of the date in a space provided, leads to the inference that as a class, generally, the gaspereau licensees were given this same license condition at the time of application.

THE LICENSE CONDITION

[11] As a back drop to a consideration of the wording of the license condition issued to Mr. Gillis, I note again that the Variation Order setting the weekly close time of Monday to Wednesday, and forming the foundation for the instant charge against Mr. Gillis, was issued and came into force on May 26th, 1999.

[12] The license pursuant to which Mr. Gillis was fishing on May 30, 2000, was applied for and issued on March 21st, 2000. The license specifies the species of fish which he is allowed to catch, the type of gear permitted, and further stipulates that “license valid only in accordance with attached conditions”. The one condition attached was entitled “2000 Gaspereau License Conditions”. It is dated February 24th, 2000. It begins with insertion of the license number issued to Mr. Gillis, and states, under the heading “Fishing Seasons”

“1. Subject to any Variation Orders that may be issued these license conditions are valid during the period beginning _____ and ending December 31st, 2000.”

The official issuing the document inserted the date "March 21st/00" in the blank space. This license condition served as both notice and advice to persons issued a gaspereau license in the year 2000.

[13] A simple grammatical analysis of the foregoing condition discloses that the statement which begins with the words "These license conditions..." is modified by the clause "subject to any Variation Orders that may be issued...". Not only do the words "may be issued" connote a future event, the entire clause modifies a statement which pertains to the period March 21st, 2000 to December 31st, 2000. The plain meaning of the condition is that the conditions are subject to Variation Orders issued between the same dates. The attention of the license holder is drawn to that period of time. He or she is effectively told to be alert to any Variation or Closure Orders issued subsequent to March 21st, 2000. By implication, any Variation Orders issued prior to that date do not seem to matter. On the evidence, the official did not draw Mr. Gillis' attention to the particular Variation Order issued May 26th, 1999, nor was he directed in any general sense to check for the existence of any previously-issued orders which might still be in force during the period that the license conditions were valid.

[14] The actual intent of the Department might have been better served by wording such as: "subject to any variation orders which may have been issued or may in future be issued" or "it is the responsibility of the license holder to check for and comply with any variation orders presently in effect, and likewise any variation orders which may be issued in future."

INADEQUATE PROMULGATION

[15] The alleged illegality here stems from the fact that Mr. Gillis was fishing gaspereau in the Mira River on a Tuesday, in the middle of a weekly close time which was set out in variation order 1999-060 as being 0800 Monday to 0800 Wednesday. A first and basic determination which must be made is whether this variation order is a "regulation" or "statutory instrument" under the Statutory Instruments Act. Section 2 of that Act appears to establish the equivalency of a "regulation" and a "statutory instrument", at least for present purposes.

[16] It seems to be common ground between Crown and Defence that Variation Orders are exempted from publication in the Canada Gazette pursuant to section 20(c). Thus, the lack of publication in the Canada Gazette is no bar to a conviction. However, it appears to be a pre-condition to a conviction for a contravention of a Variation Order that the Crown prove that at the date of the alleged contravention reasonable steps had been taken to bring the Variation Order to the notice of those persons likely to be affected by it.

[17] While the Crown has argued that Variation Orders are not statutory instruments/regulations, citing R. v. Saulnier (1989) 90 N.S.R. (2d) 77 (Co. Ct.) it appears that any binding effect this ruling may have had has been superceded by the ruling of the Federal Court of Canada in Spinney v. Canada [2000] F.C.J. No. 266

(Q.L.). This decision of the Federal Court, Trial Division, sitting in Halifax, Nova Scotia referred to various authorities, including the Federal Court of Appeal decision in Gulf Trollers v. Canada [1987] 2 F.C. 93 and Western Pulp v. Roxburg (1990) 122 N.R. 156. In Spinney the Court stated, at paragraph 54

“Variation Orders are statutory instruments issued pursuant to the Fishery (General) Regulations. They are used by the fishery department to close the fishing period, change fishing quota as well as limit the fish size or weight. They may be issued on a short period of time. Often, the Variation Order is broadcasted to notify vessels who may already have left for sea. They affect all fishermen and create general rules of conduct in respect of fishing. Thus this Court had held previously that Variation Orders are regulatory.”

The decision of the B.C. Court of Appeal in R. v. Michael [1988] B.C.J. No. 1043 (Q.L.) C.J. No. 1043 (Q.L.) is also persuasive. There the Court stated, invoking s. 11(2) of the Statutory Instruments Act:

“No one can be convicted of an offence under the varied quota set out in the Variation Order... unless ‘it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.’”

[18] Where a Variation Order has been issued, the *Fisheries (General) Regulations* require that notice of the variation be given to affected persons by one or more of various methods, one being publication of the notice in a newspaper that is circulated in the vicinity of the area affected by the regulations (s. 6(1) and s. 7(1)(b) of said regulations). As noted above, there appears to be at least minimum compliance with this notice requirement by virtue of the publication of the Variation Order 1999-060 in the Halifax Herald and the Cape Breton Post newspapers on May 29, 1999. While compliance with the *Fisheries (General) Regulations* may be relevant to determining whether “reasonable steps” have been taken under s. 11(2)(b) of the Statutory Instruments Act, such compliance is not, in and of itself, determinative of this point. To reiterate, while the Department of Fisheries and Oceans, when it issued Variation Order 1999-060, complied with s. 7(1) of the *Fisheries (General) Regulations* the question remains whether, because of s. 11(2) of the Statutory Instruments Act, a conviction can be entered for this particular offence given the advice contained in the license condition issued to the defendant in March of the following year. The variation order may, in a sense, be valid. Whether a conviction can lie is a different matter. In my view, the combined effect of the newspaper ads and the wording of the license condition is one of confusion and contradiction. The steps taken to bring the purport of the variation order to the attention of the gaspereau fishers were not reasonable. Section 11(2) of the said Act was not complied with.

OFFICIALLY INDUCED ERROR

[19] Officially induced error is an exception to the principle that mistake or ignorance of the law is no defence. It may be found where a person, wanting to know

their legal position, seeks advice from an appropriate official which is shown to be erroneous. The constituent elements of this defence are set out in the well known decision of the Supreme Court of Canada in R. v. Jorgensen, [SCJ No. 95] (Q.L.) [20] In applying for his gaspereau license, Mr. Gillis sought to establish his legal position. In attending at the Department of Fisheries office in Sydney and speaking with Ms. Langille, whose duties included issuing licenses to the public, he consulted an appropriate official. The licence condition was signed by both Mr. Gillis and Ms. Langille. The license and attached condition which were issued to him, upon payment of a fee, constituted reasonable advice upon which he might reasonably rely. In reliance on this advice he fished on the Tuesday in question. The instant charges witness that the enforcement branch of DFO were policing the fishery in accordance with the May 26th, 1999 Variation Order, yet the license application process and documentation issued to Mr. Gillis suggest otherwise. I have dealt earlier with what I consider to be the clear meaning of the license condition and import that analysis here. In the result this appears to be one of those clear cases where the elements of officially induced error have been proven. In reaching this conclusion I have been mindful of the fact that Mr. Gillis was convicted some years ago of fishing after the close of the season. Despite this, I did not detect any wilful blindness, or lack of diligence, or other *mala fides* in his actions here.

DISPOSITION

[21] The crown has failed to prove compliance with section 11(2) of the Statutory Instruments Act.

The defence has proved officially induced error.

The appropriate remedy, on either conclusion, is a judicial stay of proceedings, which is hereby entered.

Dated at Sydney, Cape Breton, Nova Scotia, this 8th day of May 2001.

JUDGE AP ROSS
A PROVINCIAL COURT JUDGE

