

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Davidson*, 2022 NSPC 14

Date: 20220414

Docket: 8510140, 8510141

Registry: Kentville

Between:

Her Majesty the Queen

v.

Darren Edwin Davidson

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	March 3, 2022, in Kentville, Nova Scotia
Decision	April 14, 2022
Charge:	s. 4(1) <i>Maritime Provinces Fisheries Regulations</i> , SOR/93-55 and s. 33 <i>Fisheries Act</i> , offences contrary to s. 78 of the <i>Fisheries Act</i> , R.S.C. 1985, c. F-14
Counsel:	Michael Taylor, for the Crown Darren Davidson, self represented

By the Court:

Introduction:

[1] Regulatory matters are not about moral blameworthiness. Rather, they are about compliance with a regulatory regime that, in some cases, affords some citizens benefits not widely available to the general public. This case is about the rules that govern access to a fishery resource that is finite, benefits from prudent DFO management, and is fairly valuable.

[2] Mr. Davidson was not in possession of a licence at the time he was fishing and, as a result, was charged with fishing for or catching and retaining any fish, to wit: gaspereau, contrary to s. 4(1) of the *Maritime Provinces Fisheries Regulations*, thereby committing an offence under s. 78 of the *Fisheries Act*, R.S.C. 1985, c. F-14, and also possessing fish: to wit gaspereau, caught in contravention of s. 4(1) of the *Maritime Provinces Fisheries Regulations*, contrary to s. 33 of the *Fisheries Act*, thereby committing an offence under s. 78 of the *Fisheries Act*.

[3] The Crown proceeded summarily, and called a single witness. Mr. Davidson testified in his own defence.

Issue:

[4] The only issue is whether Mr. Davidson's actions constitute the offences.

Decision:

[5] The Crown has proven the case and Mr. Davidson has not successfully established an available defence. The Crown invited conviction on the first court.

The Evidence and Findings of Fact:

[6] The majority of the evidence at trial was uncontroverted and generally accepted by Mr. Davidson. On May 6, 2021, federal Fishery Officer Curry attended at the Gaspereau River to inspect square net fishers of gaspereau. The nets, three metres by three meters, are attached to poles and rest on the bottom of the river. The fisher watches for jumping fish, pulls the pole, and secures the fish

in the net. Fishing is complete when the gaspereau are scooped from the net and placed in large fish tubs.

[7] Officer Curry observed Mr. Davidson take gaspereau from a square net and place the fish into a tub. That tub contained approximately 3,500 pounds of fish.

[8] Prior to this particular inspection, Officer Curry had met Mr. Davidson once before in February 2021 and, having earlier reviewed all the DFO issued gaspereau licences for the province, Officer Curry concluded Mr. Davidson had not been in possession of a valid licence for the 2020 season. The officer issued a verbal warning.

[9] Not surprisingly at the May inspection, Officer Curry asked Mr. Davidson to produce his gaspereau fishing licence and Personal Fisher Registration Card (PFRC). Mr. Davidson told the officer his printer was broken, and he could not provide either document.

[10] It is worth noting a PFRC and a fishing licence are two completely different regulatory documents. The PFRC authorizes a person to fish while a licence authorizes fishing of a certain species of fish in a certain body of water.

[11] Using his cellphone, Officer Curry accessed the DFO portal in an effort to locate any material relevant to Mr. Davidson. The search confirmed Mr. Davidson held a valid PFRC, but a commercial gaspereau licence had not been issued to him since 2018.

[12] As a result, Officer Curry seized the catch and arrested Mr. Davidson for fishing gaspereau without a licence. Charter rights were read, Mr. Davidson indicated his understanding, and declined to speak to counsel. What Mr. Davidson did not, however, understand was why he was not in compliance with the regulatory regime.

[13] Officer Curry explained to Mr. Davidson, and also during his testimony, that commercial fishers fishing under a gaspereau licence must, pursuant to a licence condition, record their daily catches in a logbook and submit those logs to a Dockside Monitoring Company (DMC) at the end of each season. The DMC then uses the information contained in the logbook to obtain fish population estimates. Failure to comply with this end of season condition of licence results in DFO not issuing a subsequent licence to an otherwise eligible fisher. Officer Curry asked

Mr. Davidson if he had complied with that particular condition of licence by submitting the logbook. Mr. Davidson advised he had done so.

[14] Continuing to troubleshoot, Officer Curry asked Mr. Davidson if he had also submitted the required processing fee to the DMC. (It is worth noting that DMCs are contracted to provide service to fishers at their own expense in aid of DFO's management of fisheries.) Mr. Davidson acknowledged receiving a bill from the DMC and told Officer Curry the payment may not have been sent in, but "the cheque is in the mail."

[15] The officer offered to contact the DMC on Mr. Davidson's behalf and the company confirmed receipt of Mr. Davidson's logbooks, but not the required processing fee.

[16] Officer Curry told Mr. Davidson to make the payment to the DMC now and he would assist in getting the licence issued. Within a few hours the fee was paid, the officer confirmed same with the DMC, and DFO issued a licence to Mr. Davidson that provided lawful authority to fish gaspereau from May 6, 2021, at 11:37 am onward.

[17] At trial, the Crown relied on an Affidavit from DFO Licensing to establish Mr. Davidson was not the holder of a gaspereau licence until that fee was paid on May 6, 2021, at 11:37 am. The affidavit is admissible as a business record of DFO pursuant to s. 30 of the *Canada Evidence Act* R.S.C 1985.

[18] Mr. Davidson testified that during the inspection he showed the officer two DFO-issued receipts for payment of his PFRC and also the gaspereau licence fee. As such, he could not understand why DFO accepted the payment for the licence, provided a receipt, yet did not issue the licence. He acknowledged that he had not attempted to print out a licence document and did not understand that he needed to have a copy of the fishing licence on hand while fishing.

[19] On cross examination Officer Curry addressed both issues. He explained that while Mr. Davidson may not need a copy of the applicable licence on hand while fishing, he certainly needed to possess a valid licence to engage in the fishery. While Mr. Davidson had paid the DFO licencing fee to obtain a gaspereau licence, that did not mean DFO had actually issued one to him. Rather, compliance with the prior year condition to submit logbooks to the DMC, and pay the DMC's processing fee, was a necessary precursor to DFO issuing licences for subsequent

fishing season. This despite DFO being in receipt of Mr. Davidson's licence renewal fee.

[20] Clearly there are many steps involved in complying with this highly regulated fishery.

The Law:

[21] The Court found it useful to review the regulatory legislation relevant to the matter. The *Fishery (General) Regulations* SOR 93/53 definition section provides that 'document' means 'a licence, the fishers registration card, or vessel registration card, that grant a legal privilege to engage in fishing or any other activity related to fishing and fisheries'.

[22] 'Licence' is in turn defined as 'any type, kind or category of licence issued under any of the Regulations listed in s. 3(4) of these Regulations'.

[23] Section 3(4) of the Regulations apply to the *Atlantic Fishery Regulations, 1985, SOR/86-21*, the *Maritime Provinces Fisheries Regulations, SOR/93-56*, and others that are not relevant to this matter before the Court.

[24] Section 8 of the *Fishery (General) Regulations* says, 'the Minister may require an applicant for a document to submit such information in addition to that included in the application as may reasonably be regarded as relevant'.

[25] Section 10 discusses expired documents, 'unless otherwise specified in a document, a document expires where it is issued for a calendar year, on December 31st of the year for which it is issued; or where it is issued for a fiscal year, on March 31 of the year for which it is issued'.

[26] Section 11 is also relevant:

Carrying and Producing Licences, Registration Cards and Certificates

Every holder of a licence, a fisher's registration card or a provincial or territorial fisher's certificate shall carry it at all times while engaged in any activity to which it is relates and shall produce it on the demand of a fishery officer...

[27] It would appear, the Fishery Officer was incorrect with respect to the need to carry the licence. The law is clear, there is such a requirement.

[28] The Court was initially concerned about the finite list of conditions that can be included in a licence, mentioned at section 22 of the *F(G)R*, set out from (a) through to (z.1), described as imposed “for the proper management and control of the fisheries and the conservation and protection of the fish”. Did it authorize requiring a fisher to pay a DMC processing fee? However, the issue in this case is ultimately not the validity of the requirement, but whether Mr. Davidson possessed a licence at the relevant time.

[29] These are strict liability offences. The Crown need only prove that Mr. Davidson fished for gaspereau without a licence and that he possessed gaspereau caught in contravention. The contravention is possessing the fish caught without the legal authority of licence.

[30] The Court considered all of the evidence, and while there is sympathy for Mr. Davidson’s position with respect to not being clear on the rules with respect to whether he was required to carry a licence on his person while fishing, the regulations require he do so. The evidence was also clear that had he attempted to do so by printing a copy of licence, he would have quickly determined that he could not do so because one had not been issued.

[31] While the Court also has sympathy for Mr. Davidson’s confusion, it is very important in regulatory matters that judges remind themselves, while perfectly acceptable to be sympathetic to a particular situation, that does not mean the Court can find that the Crown has not proven the case where it has done so. The Crown proves its case on admissible evidence and considers any available defences.

[32] Mr. Davidson was entitled to establish a due diligence defence. Section 78.6 of the *Fisheries Act* codifies the defence as follows:

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.

1991, c. 1, s. 24

[33] The Court cannot find on the evidence that Mr. Davidson avails himself of the defence. He was not duly diligent to avoid the commission of the offences. The Court reaches this conclusion because the evidence was clear that Fishery Officer Curry spoke with Mr. Davidson a few months prior and warned him that he did possess a licence. So, at that point, despite Mr. Davidson's testimony about the history of how things may have been done in the area when the now closed local DFO office was open and fishers attended there to pay for and obtain licences, the conversation between Officer Curry and Mr. Davidson ended that situation and Mr. Davidson should have understood that while things may have stood some other way in the past, that was no longer the case. As such, he could not be said to have exercised due diligence to prevent the commission of the offence.

[34] Since 2018, Mr. Davidson had not possessed a gaspereau licence, and DFO did not take enforcement action with respect to the subsequent fishing seasons. Instead, after the conversation with Mr. Davidson in May 2021, DFO chose to undertake inspections for the upcoming season. Mr. Davidson might choose to look at it this way, with logbooks having been filed, DFO was quite fair in not taking enforcement action for previous years, and only doing so on a go forward basis. Combined with the legal requirement to possess a licence while fishing, and ignorance of the law not being an excuse, the Court does not find a foundation for the due diligence defence. Ignorance of the law is also addressed under the guise of officially induced error.

[35] Officially induced error has been described as a 'defence' or excuse, and Mr. Davidson's evidence suggests it should be considered by the Court. In *R. v. Jorgenson* [1995] 4 S.C.R. 55, the Court concluded officially induced error operates as an exception to the rule that ignorance of the law is not an excuse (para 25) Mr. Davidson testified about past practices however he did not identify a DFO official who sanctioned his current actions or understandings. *Levis (City) v. Tetreault* 2006 SCC 12, set out a six-part test that a defendant raising this excuse must meet. There is no need to set out those six steps here, because the matter can be succinctly addressed with regard, once again to Officer Curry's evidence, which I accept as reliable and credible. His warning served to interrupt any potential for the defence or excuse and had the effect of advising Mr. Davidson that he had to get his regulatory house in order and ensure that he was fishing pursuant to a valid licence. There was, ultimately, no evidence of an 'appropriate official' who said Mr. Davidson could do otherwise.

[36] Much could be said on the facts of this case about DFO processes and what they might do to avoid such situations in future when a licence is not re-issued due to nonpayment of the DMC fee. In a perfect world a letter might have gone out to remind that non payment would result in a new licence not issuing despite receipt of the renewal fee. Or it makes good business sense to accept the registration fee for the licence renewal with the expectation the DMC processing fee would soon be paid. Once that occurred, as the evidence in this case established, a very quick process, handled within a few hours, could secure issuance of a licence. It is not, however, the role of the Court to instruct regulatory agencies.

[37] Finally, as said previously this is a strict liability offence. Its proof does not require Mr. Davidson to possess any ill intent. It does not require Mr. Davidson to have done something deliberately and on purpose. It does not suggest that Mr. Davidson was trying to undermine the regulatory regime. He is simply required to inform himself and strictly comply with the regulatory regime. That was not done in the circumstances and, as a result, the Court finds the Crown has established all the elements of the offences beyond a reasonable doubt and Mr. Davidson has not established a defence to the charges.

[38] The Crown seeks conviction on only the first count and such a conviction will register. The Crown will stay the second count.

[39] Judgement accordingly.

van der Hoek J.