IGNORANCE OF THE LAW IS NO EXCUSE - OR IS IT: THE DEFENCE OF OFFICIALLY INDUCED ERROR

It has always been a fundamental principle of the law of Canada that "ignorance of the law is no excuse". However in recognition of the enormous increase in the number of laws that have been created since this principle was first enunciated, an exception to this rule was enunciated by a minority concurring decision of a judge of the Supreme Court of Canada in the 1995 case of *R. v. Jorgensen*.[1] In this case, Chief Justice Antonio Lamer proposed an exception to the rule called "officially induced error". In doing so, he reasoned that "[w]hile knowledge of the law is to be encouraged, it is certainly reasonable for someone to have assumed he knows the law after consulting a representative of the state acting in a capacity which makes him [an] expert of that particular subject.[2] After reviewing the commentary of legal scholars, American court cases and some lower level Canadian court cases, the Chief Justice set out six elements to be established by an accused person in order to establish a defence or excuse of officially induced error. These elements are as follows:

1. The accused made an error of law or an error of mixed law and fact[3];
2. The accused considered the legal consequences of his or her actions before committing the prohibited act;
3. The accused obtained advice from an appropriate official, such as a government official involved in the administration of the law in question;
4. The advice received was on its face reasonable;
5. The advice received was erroneous; and
6. The accused relied upon the erroneous advice in committing the prohibited act.

Under Justice Lamer's proposed test, if all six elements were clearly established, the accused would be excused from committing the offence in spite of its wrongfulness and a judicial stay of proceedings would be entered.

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[1] (1995) 129 D.L.R. (4th) 510 (S.C.C.).
[2] *Jorgenson*, p. 517.
[3] If the error is only an error of fact and the accused has made a reasonable and honest mistake of fact, he or she will have defence under s. 78.6(b) of the *Fisheries Act*.

Up until recently, the validity of this proposed test was uncertain because this test was not adopted by the other eight Supreme Court judges who were part of the panel in *R. v. Jorgensen.* However despite this uncertainty, a number of lower court decisions have followed it. In the context of fisheries prosecutions (other than pollution cases), the writer is aware of four cases where the defence was advanced, only one of which was successful.

Unsuccessful Attempts to Assert a Defence of Officially Induced Error

The first attempt to assert a defence of officially induced error predated the case of *R. v. Jorgensen.* In the 1988 case of *R. v. Gant*[4], a sea urchin harvester claimed a D.F.O. officer had led him to believe that it was okay start fishing at the beginning of the sea urchin fishing season without a "Z" licence tab so long as the application form had been submitted to the Department of Fisheries ("D.F.O."). After being charged with failing to have a "Z" tab on board while fishing, the accused fish harvester testified that he had instructed his lawyer to file the necessary application form and had assumed that he had done so. Based upon this evidence, the trial judge, who was sympathetic to the fish harvester not wanting to sit on the beach while his application form was being processed, acquitted the accused. However upon the case being appealed by D.F.O., the appeal court set aside the acquittal on the grounds that there was no evidence that the fisheries officers ever actually advised the accused that he could fish without his "Z" tab. An assumption by the accused based upon previous failures to enforce the law was not enough to excuse the accused from fishing without his licence tabs.

Another unsuccessful attempt to utilize the defence is the 1999 case of *R. v. Derry*[5]. This case involved a master and vessel owner who were both charged with exceeding the amount of catch provided by their halibut quota after they failed to properly process the papers necessary to transfer a second quota to their vessel. Since the amount by which

[4] (22 July 1988) No. 13192 (B.C. Co. Ct.). This case actually predated the SCC decision in *R. v. Jorgensen.*
[5] [1999] B.C.J. NO. 1474 (B.C.S.C.)

they had exceeded their quota did not exceed ten per cent, the master and vessel owner attempted to rely upon a representation in the management plan that stated the quota could be exceeded by up to ten per cent, which would then be deducted from the vessel's quota in the following year. The court rejected this defence because there was no explicit representation by an official that the vessel could over-fish its quota without a sanction. Apparently the court reasoned that the management plan's suggested sanction of reducing the vessel's quota in the following year did not prevent the court from imposing an alternative sanction by way of the penalty provisions of the *Fisheries Act*. It appears that court was also influence by the fact that the real cause of the overage was the sloppy processing of the attempted transfer of the second quota and not any reliance upon the 10 per cent overage rule.

A more recent example of a failed attempt to utilize the officially induced error defence is the case of *R. v. Rideout*.[6] This case involved a Nova Scotia crab harvester who was charged with contravening a condition of his licence that only allowed him to fish in sub-area 23d, which was one of several sub areas of area 23. At trial it was established that the accused was fishing outside sub-area 23d based upon a mistaken but honest belief that he was inside the sub-area. At issue in the case was the application of the due diligence and/or officially induced error defence.

The evidence was that the conditions of the licence of the accused only described a portion of sub-area 23d making it necessary for the accused to either obtain a copy of the regulation or contact D.F.O. in order to obtain the co-ordinates of the boundaries of the entire area 23. Although the licence conditions suggested contacting a fisheries officer if any clarification was required, the accused did not do so. After an interesting discussion of the overlapping nature of the defences of due diligence and officially induced error, the court refused to apply a defence of officially induced error or due diligence. Although the reasons for judgement are not very analytical in terms of the test set out in *R. v. Jorgensen,* in emphasizing the failure of the accused to seek advice regarding the boundaries of area 23, other than what was contained in the licence conditions, it appears that the court was focussing on the failure of the accused to establish that he considered

[6] 2003 NSPC 5 (N.S. Prov. Ct.).

the legal consequences of his act based upon advice received from an official. It also appears that he did not establish that the advice was erroneous.

Successful Application of the Defence of Officially Induced Error

The defence of officially induced error was successfully applied in the fisheries context in the 1996 Nova Scotia case of *R. v. Wyatt*[7]. This case involved a fish harvester who was charged with fishing for groundfish in an area that had been closed due to a high proportion of small fish in the area. At trial the accused gave evidence that in his experience such closures were usually for 30-day periods, followed by a limited test fishery. If the results of the test fishery established that the size of the fish in the area had increased sufficiently, the area would usually be re-opened. Accordingly, approximately 30 days after the closure, the accused asked the president and owner of a fish company, who was familiar with the local area and local fisheries officers, to phone D.F.O. and find out if the area had opened. The company president made a phone call in the presence of the accused and advised him that the area was open. Unbeknown to the accused, the company president had phoned a catch monitoring group rather than D.F.O. and had been advised that the area was open for fishing.

At trial, the accused relied upon both a due diligence defence of mistake of fact under s. 78.6 of the *Fisheries Act* and a defence of officially induced error. With respect to the due diligence defence, the court rejected the mistake of fact defence on the basis that "[h]is diligence was in regard to finding out if a prohibition existed. His mistake was not one of fact, but one of law; and such a mistake, as every schoolchild knows . . . is not an excuse or defence".[8] With respect to the defence of officially induced error, the court relied upon the test set out by Chief Justice Lamer in *R. v. Jorgenson* and discussed several aspects of the test. With respect to the accused's reliance upon the president of a fishing company, the court held this reliance to be reasonable given the fact that the fish harvester was not in waters that he was familiar with and the fact the company president had superior local

[7] [1996] N.S.J. NO. 546 (N.S. Prov. Ct.).
[8] Paragraph 20.

knowledge. With respect to the reliance of the company president on the advice of a catch monitoring group as opposed to D.F.O., the court also found this to be reasonable given the fact that D.F.O. was "devolving increasing levels of responsibility to such agencies, and in which government offices are increasingly unavailable locally . . .".[9] The court also appears to have relied upon testimony from the company president that "it is no longer the Department of Fisheries who tells fisherman if 'we' are open or closed; it is Catch Monitoring".[10] With respect to reasonableness of the advice that the accused received, given the previous experience of the accused with respect to these types of closures re-opening after 30 days, the court found the advice to be reasonable.

OFFICIALLY INDUCED ERROR DEFENCE AFFIRMED BY SUPREME COURT OF CANADA

On April 13, 2006, a unanimous panel of seven Supreme Court of Canada judges in the case of in the case of *Levis (City) v. Tetreault*[11] affirmed the defence of officially induced error as set out by Chief Justice Lamer in *R. v. Jorgensen.* In doing so, the panel said that in proving the six elements set out in *Jorgensen,* it is necessary for the accused to establish the reasonableness of not only the advise received, but also of the reliance on the advice. This will be assessed objectively from the perspective of a reasonable person in a situation similar to that of the accused. In assessing this evidence "[v]arious factors will be taken into consideration . . . including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information, or opinion"[12]

CONCLUSION

Given the highly regulated nature of the fishing industry, it is comforting to see a unanimous decision of the Supreme Court of Canada affirming the officially induced

[9] Paragraph 26.
[10] Paragraph 10. At present, the writer does not believe this is the practice on the west coast.
[11] 2006 SCC 12.
[12] Paragraph 27.

error defence. Although it has not been applied extensively to date in the fisheries context, with its recent affirmation it is likely that it will become more firmly established in the future. Although it was once accepted based upon advice received from someone other than a D.F.O. official, this should be regarded as an exceptional circumstance. In looking at what is objectively reasonable, in most cases the courts would expect fish harvesters to seek advice from the D.F.O. official who is administering the law in question. Having that advice in writing would of course, be most beneficial.

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***Postscript (14 Feb 08)*: See also *Canada v. Shiner* 2007 NLCA 18 (failure to enforce Seal Fishery) (digested herein)**