# R. v. MORNINGSTAR

Ontario District Court, Disalle J., October 15, 1987

Alan R.E. Ryan, for the appellant
Paul Williams, for the respondent

The Crown appealed from an order dismissing a charge against the respondent of unlawfully fishing in a sanctuary area during closed season contrary to s.64 of the Ontario Fishery Regulations, C.R.C. 1978, c. 849 made pursuant to the Fisheries Act, R.S.C. 1970, c.F-14. The Crown argued, inter alia, that the evidence adduced at trial did not support the defence of "officially induced error".

At trial the band chief had testified that: the band had been fishing in the area ever since he could remember; in 1986 a Ministry official told him that the band could fish anywhere within the area allowed by the Robinson-Huron Treaty of September 9, 1850 and that he had conveyed this information to his band members; the official told him the band could fish on the reserve side, which he believed to be within the sanctuary. The Ministry official testified that: he had told the band chief that fishing for personal, as opposed to commercial, use would be allowed in areas outside the sanctuary; he would turn a blind eye to fishing by band members on the reserve side, except when the sanctuary was on; he was aware that band members had been fishing with nets in the sanctuary prior to the first charge being laid on the last day of the 60-day sanctuary period.

**Held: Appeal dismissed; defence of officially induced error made out.**

1. The Ministry official's evidence was contradictory and confusing and in direct conflict with the band chief's testimony. The Justice of the Peace had accepted the chief's testimony and therefore this court was bound by his findings.

2. The band chief reasonably relied on the erroneous advice of the Ministry official responsible for the enforcement of the law and conveyed that advice to the band members. Although the chief was aware of the sanctuary, he believed it would not affect the band's fishing rights. This was a reasonable assumption on the part of the chief, caused by the Ministry official's confused advise as to when and where the fishing regulations would or would not be enforced.

**DISALLE D.C.J.:** This appeal is from the order dismissing the information of Ralph Grant, Conservation Office, Ministry of Natural Resources, against the respondent, made by the Justice of the Peace John Menard at Blind River in Ontario, on the 17th day of February, 1987.

The respondent was charged that on or about the 15th day of May, 1986 at the Township of Cobden in the said District, he did unlawfully fish for fish, in an area described in Schedule XIX during the closed season, contrary to s. 64 of the Ontario Fishery Regulations, C.R.C. 1978, c. 849, made pursuant to the Fisheries Act, R.S.C. 1970, c.F-14 as amended.

Counsel for the appellant submitted that he was relying on three grounds of appeal and they are ad follows:

(1) The learned Justice of the Peace erred in fact and law in finding that the evidence adduced at trial supported the defence of "officially induced error".

(2) The learned Justice of the Peace erred in law in finding that section 64 of the Ontario Fishery Regulations made under the Fisheries Act, R.S.C. 1970, c.F-14 was subject to the treaty rights enjoyed by the Respondent pursuant to the Robinson Treaty of 1850.

(3) The learned Justice of the Peace erred in law in finding that the Constitution Act, 1982 entrenched the Respondent's treaty and aboriginal rights and privileges in relation to fishing in the area prescribed by section 64 of the aforesaid Regulations.

It is agreed by both Crown and defence that the essential elements of the offence were proven at trial, that is that the accused was fishing in a sanctuary area during a closed season.

The trial judge found, however, that in the conservation that took place between Mr. Woodside and Chief Daybutch, Mr. Woodside more or less indicated that the Department would turn a blind eye when the Indians would fish during the closed season. Although the Justice of the Peace did not specifically refer to the defence, his comments indicate that the evidence supported a defence of "officially induced error" or estoppel.

It is further obvious that the Justice of the Peace accepted the evidence of Chief Daybutch.

**The Defence of Estoppel or Officially Induced Error**

The question is: does the evidence support the defence of officially induced error?

In his testimony, Doug Daybutch, Chief of the Mississauga Band of the Ojibways, acknowledged that the accused was a member of the band and that the band has been fishing pickerel and sturgeon from the rapids to the mouth of the Mississauga River, known as the chutes, ever since he could remember.

In the spring of 1986, Chief Daybutch had discussions with one Stanley Woodside, a supervisor with the Ontario Ministry of Natural Resources in Blind River, Ontario, in order to avoid the problems the band always had with the Ministry with regards to their rights to fish. Chief Daybutch claimed that he was told the band could fish anywhere within the area allowed by the Robinson-Huron Treaty of September 9, 1850, and that there was no discussion that the band was not allowed to fish in the sanctuary area. Chief Daybutch claimed he informed the band members that they were allowed to fish within the Robinson-Huron Treaty area. Chief Daybutch further claimed that when he heard that the accused was charged, he was surprised. Chief Daybutch was further told that if people fished on the reserve side they would not be bothered, but of they fished on the other side of the river they would get charged. Chief Daybutch stated he believed that the reserve side was within the sanctuary.

Mr. Stanley Woodside acknowledged his discussion with Chief Daybutch and stated he met with him to discuss the problem of enforcement of the sanctuary area. Mr. Woodside stated he indicated to Chief Daybutch where the sanctuary was and that there had been instances in the past the Ministry had overlooked in terms of Indian fishing activity involving snagging at the base of the chutes, as well as other activity. Mr. Woodside claimed that al long as that sort of fishing was directed at personal use, as opposed to commercial fishing for sale, that it would be allowed. However, Mr. Woodside claimed he was referring to other than the sanctuary area and that the regulation would be enforced in the sanctuary area.

In a telephone call made by Chief Daybutch on the day the charges were laid, Chief Daybutch indicated to Evan Simpson the acting District Manager, that the Ministry was going to allow fishing at that time. Mr. Woodside got on the phone and stated fishing would not be allowed in the sanctuary.

In cross-examination, Mr. Woodside agreed that he told Chief Daybutch that there were some federal laws that were not going to be enforced against band members, and that the Ministry would act according to the leniency policy it had issued at the time. This was a policy whereby the officers investigate every infraction and then it is decided higher up in the Ministry whether charges are to be laid.

Mr. Woodside stated he told Chief Daybutch that he would turn a blind eye to fishing by band members with nets in the river on the reserve side, except when the sanctuary was on. The sanctuary was on for 60 days and the first charge was laid on the last day of the sanctuary, although Mr. Woodside acknowledged they were aware the band members were fishing with nets in the sanctuary before that time.

The Court of Appeal in R. v. Cancoil Thermal Corporation and Parkinson, 27 C.C.C. (3d) at 295 recognized the availability of the defence of "officially induced error".

Lacourciere J.A. at page 303 stated the principle as follows:

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused had reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was

> reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

It is clear that Mr. Woodside was clothed with the powers to enforce compliance with the Ontario Fishery Regulations. It is also clear that Chief Daybutch relied on the opinion of Mr. Woodside and believed the band could fish in the Robinson-Huron Treaty area and, although he was aware of the sanctuary, it did not affect the band's fishing rights. Chief Daybutch believed that the reserve side of the river was in the sanctuary area and he conveyed his beliefs to the members of the band.

Mr. Woodside's evidence is contradictory and very confusing. Although he claimed he made it clear that the sanctuary was not to be fished, he did state he would turn a blind eye to fishing on the reserve side. Further, Mr. Woodside explained the leniency policy which needed a higher Ministry official to decide whether to charge band members. Mr. Woodside was also concerned about public compliance and would allow fishing on the reserve side because it was not as obvious to the general public. Finally, Mr. Woodside admitted he was aware of the band fishing in the area but nothing was done until the 59th day of a 60-day sanctuary period.

The evidence of both Chief Daybutch and Mr. Woodside is in direct conflict. The Justice of the Peace obviously accepted the testimony of Chief Daybutch. I am bound by such findings.

The testimony of Chief Daybutch indicates that he reasonably relied on the erroneous advice of the Ministry official responsible for the enforcement of the law and conveyed it to the rest of the band members. Although Chief Daybutch knew there was a sanctuary area, he believed it would not affect the fishing rights of the band. This was a reasonable assumption on his part, caused by Mr. Woodside's confused advice as to when or where the Ministry would and would not enforce federal laws.

I therefore find that the defence of "officially induced error" has been made out by the respondent and the appeal will be dismissed on this ground.

Having so found, I find that it is not necessary for me to adjudicate on the other constitutional issues.