Does Wrong Advice from Government Officials Excuse Environmental Violations?

It depends, in part, on whether it was reasonable to rely on the bad advice.

Because environmental regulations are so complex, it's not uncommon for companies to ask government officials to explain exactly what a particular regulation requires. This is particularly true when the company is getting set to undertake construction or other projects that might require prior authorization. But what if you rely on an official advice that proves to be wrong and get charged with a violation as a result' Does your reliance on what the official said get you off the hook' **Answer:** It might. The good news is that courts recognize 'officially induced error' as a defence in an environmental law prosecution. The bad news is that the defence is hard to prove. Here are 2 venerable cases illustrating how the defence works. While both come from Ontario, the same basic principles apply in all jurisdictions.

Officially Induced Error Defence Fails

Situation

A hog farming company applies for a permit to build 2 barns and a liquid manure storage tank. The chief building official of the Township grants the permits. After visiting the construction site, officials from the local Conservation Authority conclude that the construction is taking place in a protected wetland without a permit in violation of the Ontario *Conservation Authorities Act* (Act). So, they issue a stop-work order. The company is also charged with violating the Act. The company claims that it relied on the issuance of the building permit as meaning that the construction complied with **all** applicable laws, including environmental laws.

Ruling

The Ontario Court of Appeal rejects the company's 'officially induced error' defence.

Explanation

A defendant must prove 5 things to establish the defence:

1. It considered the legal consequences of its actions;
2. It got legal advice from an appropriate official;
3. The advice was wrong;
4. It relied on the advice; and
5. It was reasonable to rely on the advice.

In this case, the Court found that the company didn't provide any evidence to prove reliance under element 4. On the contrary, the circumstances contradicted the company's reliance argument. After all, the Court explained, the company wasn't looking for permission 'to build a backyard deck.' It wanted to build a liquid manure facility in a rural area that was clearly a wetlands. So, the company's argument that it relied on the building permit as representing a go-ahead on environmental matters wasn't believable.

1. *v. Cranbrook Swine Inc.,* [2003] O.J. No. 1433

Officially Induced Error Defence Succeeds

Situation

Conservation officers charge a member of the Mississauga Band with fishing in a sanctuary area of the Mississauga River during a closed season. The accused doesn't deny fishing illegally. But during the trial, the Chief of the Band claims that a local supervisor with what was then called the Ministry of Natural Resources told him that the Band could fish at any time without being charged as long as they stayed within parts of the River that were covered by a treaty from 1850. The Chief passed along the information to members of the Band. The accused claims he wasn't guilty of illegal fishing because he was relying on the official's advice.

Ruling

The Ontario District Court rules that the defence is valid and dismisses the charge.

Explanation

The Conservation officer admitted that he had talked to the Chief about the enforcement of fishing restrictions on the River. He also admitted that he told the Chief that the Ministry had overlooked fishing by the Band during the closed season in the past and probably would again. But the officer claimed that he said that he was referring to fishing in parts of the River outside the sanctuary area. Still, the Court said that the accused had met the requirements of the 'officially induced error' defence. 'It is clear that [the official] was clothed with the power to enforce' the law and that the 'Chief relied on his opinion that the Band could fish in the Treaty

area,’ the Court explained.

1. *v. Morningstar*, [1987] O.J. No. 1576

What the EPS Program Is All About

To get a grasp on the EPS Program, you need to go back to 2016 when Ottawa published what’s called the Federal Benchmark establishing a carbon pollution pricing system for 2018 to 2022 composed of 2 elements:

- A fuel charge; and
- An output-based pricing system (OBPS) for large industry.

The rule: The Federal Benchmark would apply in all provinces and territories except for in jurisdictions that enacted their own carbon pricing system meeting Federal Benchmark standards. Ontario was among the jurisdictions to adopt its own system, the EPS Program, which was created in July 2019, and applies to Ontario facilities:

- That reported Greenhouse Gas (GHG) emissions of 50,000 tonnes carbon dioxide equivalent or more to the MECP for any year since 2014; and
- Whose primary industrial activity one listed in listed in Schedule 2 of the *GHG Emissions Performance Standards*

In August 2021, the federal government published the updated Federal Benchmark for 2023 to 2030. Key changes included increasing the minimum national price on carbon pollution for price-based systems to $65 per tonne of CO2 equivalent in 2023, followed by annual $15 per year increases that will bring the minimum price to $170 in 2030 (the minimum carbon pollution price in cap-and-trade systems is translated into an equivalent emissions cap).

The updated Federal Benchmark also directs the provinces and territories to implement a recognized carbon pollution pricing

system (either an explicit price-based system or cap-and-trade system) for the 2023’2030 period, while mandating new minimum criteria and tests for assessments, depending upon the system implemented.

The Proposed EPS Program Changes

The proposed EPS Program changes are designed to bring Ontario into line with the updated Federal Benchmark so that the province can continue to run its own system rather than follow the federal OBPS from 2023 to 2030. Pricing under the EPS Program will align with the Federal Benchmark minimum carbon pollution pricing rules. The changes would also add the following sectors to the Schedule 2 of the EPS Regulations that the Federal Benchmark assesses as posing carbon risks:

NAICS Code NAICS Industry Group Description

High Risk	
3114	Fruit and vegetable preserving and specialty food manufacturing
3116	Meat product manufacturing
3121	Beverage manufacturing
3222	Converted paper product manufacturing
3261	Plastic product manufacturing
3262	Rubber product manufacturing
3321	Forging and stamping
3326	Spring and wire product manufacturing
3327	Machine shops, turned product, and screw, nut, and bolt manufacturing
3336	Engine, turbine and power transmission equipment manufacturing

High Risk	
3339	Other general-purpose machinery manufacturing
3363	Motor vehicle parts manufacturing
3364	Aerospace product and parts manufacturing
3372	Office furniture (including fixtures) manufacturing
3399	Other miscellaneous manufacturing
Medium Risk	
3115	Dairy product manufacturing

Other key EPS Program changes include:

- Allowing facilities that expect to emit 10,000 tonnes or more of CO2 equivalent within the 3 years following a retrofit or expansion to apply to register under the EPS Program;
- A new process enabling Ontario businesses to stop being covered under the Program under certain circumstances;
- Replacement of energy-based standards with alternate performance-based standards;
- Increases to the annual emissions reduction requirements, in combination with the strengthened performance standard for generating electricity using fossil fuels, to ensure compliance with the updated Federal Benchmark; and
- Application of a decline rate of 2.4% in 2023 from the stringency factors in 2022 and 1.5% per year from 2024’2030 and implementation of the stringency factors for both fixed process and non-fixed process emissions.