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Supreme Court of Canada Releases Judgment on Defence of Officially Induced Error

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In an oral judgment released on January 27, 2017 in the case of *R. v. Bedard*, the Supreme Court of Canada confirmed the elements of the defense of officially induced error, as set out in its 2006 decision in *Lévis (City) v. Tétreault*.

Elements of the Defence

It may be recalled that in *Lévis*, the Supreme Court repeated and adopted the six elements of the defence of officially induced error established by it in its 1995 decision *R. v. Jorgensen*:

(1) that an error of law or of mixed law and fact was made;
(2) that the person who committed the act considered the legal consequences of his or her actions;
(3) that the advice obtained came from an appropriate official;
(4) that the advice was reasonable;
(5) that the advice was erroneous; and
(6) that the person relied on the advice in committing the act.[2]

The Supreme Court's judgment in *Bedard*, therefore, confirms a line of Supreme Court authority concerning this defense which is more than 20 years old.

Use of the Defence by a Government Official

The unusual wrinkle to *Bedard* is that the case concerned an attempt by Quebec wildlife and fisheries peace officers to employ the defence of officially induced error to defend themselves from charges that they criminally assaulted the complainant, an individual whom they were attempting to arrest for violating the *Fisheries Act*. The peace officers were planning to attend at the complainant's home without a warrant to demand that he produce identification, so they could lay charges against him under the *Fisheries Act*. Prior to attending on the home, they sought out the advice of a police officer regarding what they could do if the complainant refused to provide identification. They were told by the police officer that they could arrest him. The peace officers argued, in their defence, that they were officially induced (by the police officer's advice) to arrest the complainant, and in so doing to apply the physical force which formed the basis for their assault charges.

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[2] See *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at para. 26.

However, the police officer's advice did not address the situation the peace officers encountered upon attending at the home. Although they were initially invited into the complainant's home, once they made their demand for identification (which was refused), they were asked to leave the home. At that point, their presence in the home was illegal and their arrest of the complainant (and the physical assault upon him) became illegal. The Quebec Court of Appeal ruled, *inter alia*, that because the police officer's advice did not address this illegal arrest situation, the peace officers failed to establish that they relied upon the police officer's advice in making the arrest.[3]

In upholding the decision of the Quebec Court of Appeal, the Supreme Court first expressed "serious reservations" about whether a government official may avail themselves of the defence in the course of performing his or her duties. Second, the court found that the third and fourth conditions of the defence of officially induced error could not be proven by the peace officers:

> The Chief Justice - The defence of officially induced error of law is intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her.
>
> We have serious reservations about the very possibility of a government official raising the defence of officially induced error of law in relation to the performance of his or her duties.
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> This being said, we all agree that the conditions under which this defence is available are not met here: see *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420. In particular, considered objectively, the third and fourth conditions — that the advice obtained came from an appropriate official and that the advice was reasonable — are not satisfied.

Conclusion

This decision confirms the existing law on the defence of officially induced error.

Of perhaps greater interest, it is also a cautionary decision that warns government officials (including provincial officers, peace officers and even police officers)[4] that, regardless whether this defence may be legally available to them, they would be well-advised to obtain reasonable legal advice from an appropriate official before undertaking regulatory action in respect of which they are legally uncertain or otherwise ignorant.

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[3] *R. c. Bédard*, 2016 QCCA 807 (Quebec Court of Appeal), at para. 21. (http://www.canlii.org/fr/qc/qcca/doc/2016/2016qcca807/2016qcca807.pdf)

[4] It may be noted that even police officers, as "government officials", are subject to all manner of strict liability obligations under their respective police services laws and professional codes of conduct, which laws and codes govern the manner in which they carry out their statutory duties. See, for example, section 79 to 81 of the Ontario *Police Services Act*, R.S.O. 1990, c. P.15.

Only in this way can government officials minimize the risk that their own conduct is illegal,[5] or alternatively maximize the chances that a court may accept their defence of officially induced error.

While the Supreme Court does not specify who the "appropriate official" must be (from whom the "reasonable advice" is sought by government officials), the strong implication of this decision is that government peace officers should be seeking legal advice from government lawyers, and not from fellow peace officers or police officers.

[5] Minimizing the risk of illegality should be important for government officials, not only for criminal and quasi-criminal reasons, as in this case. It should also be important if government officials wish to avoid civil actions for "abuse of public office" and other torts, as well as judicial review proceedings which challenge their decisions based upon principles of administrative law.