

Board Bulletin, Volume 1**Due Diligence and Mistake of Fact** *(Revised October 2010)*

This Bulletin describes the defences of due diligence and mistake of fact under the Forest and Range Practices Act and the Wildfire Act. This is an updated version of a bulletin that first appeared in May 2003 and was revised in August 2006.

What is due diligence?

Due diligence means taking all reasonable care. In the context of forest practices, due diligence means that those who carry out logging, road-building and other activities in British Columbia's public forests must take all reasonable care to follow forest practices legislation.

The *Forest and Range Practices Act* (FRPA) is largely enforced through administrative penalties and remediation orders, rather than prosecutions. These penalties and orders are handed down by the minister, not by the courts. Instead of a judge deciding that an offence has been committed and imposing a fine, a government official (delegated by the minister) determines that there has been a contravention—that the law has not been followed—and issues an administrative penalty.

For the purposes of administrative penalties, a person (this could be a forest company or an individual) is considered not to have contravened the legislation if the person establishes that they exercised due diligence to prevent the contravention. This is set out in s. 72 of FRPA.

If a person has done something that is prohibited by forest practices legislation—such as cutting down trees that should have been left standing next to a fish stream—the person may establish the defence of due diligence by proving that either:

- they reasonably believed in a mistaken set of facts that, if true, would establish that their actions were innocent; or
- they took all reasonable steps to avoid the event.

(Supreme Court of Canada in R. v. Sault Ste. Marie)

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Reasonable belief in a mistaken set of facts

Section 72(b) of FRPA describes mistake of fact as where a person “reasonably believed in the existence of facts that if true would establish that the person did not contravene” the legislation. What does this mean? One example could be in connection with fish streams. For example, the regulations under FRPA require forest companies to make sure that their activities don’t have a “material adverse effect”¹ on fish passage in a fish stream.

Suppose, then, that a forest company is doing some work near a stream. Based on the information they have, the company and its staff believe that the stream in question is not a fish stream. They install a culvert. Later in the year, however, it turns out that there are fish in the stream and that the culvert is blocking fish passage.

The company’s belief that the stream was not a fish stream would be a mistake of fact. If the stream had been a non-fish stream, the company’s conduct would have been innocent. Therefore the company will not be found to have contravened FRPA as long as the company’s belief was reasonable.

Whether or not a belief in a mistaken set of facts is reasonable depends on a number of factors. A person is expected to make reasonable efforts to discover the facts. If, on the one hand, the company based its conclusions about the status of the stream on one of its employees saying, “I was up there last week and I didn’t see any fish”, that would probably not constitute reasonable efforts. On the other hand, if the company had retained a reputable fish biologist to study the stream and the biologist had reported that it was not a fish stream, this would likely be considered reasonable.

Reasonable steps to avoid the contravention

Section 72(a) of FRPA provides a defence where a person “exercised due diligence to prevent the contravention”. This means that the person has taken reasonable steps to avoid the contravention, or to make sure that the legislation was followed. In determining whether a person took all reasonable care, the law considers what a reasonable person would have done in the circumstances. This may include many considerations such as:

- the likelihood of the event occurring—the more likely the event, the more care is expected;
- the seriousness of the damage that could result—the more serious the damage, the more care is expected;
- whether the person acted according to general industry practice and practices set out in guidebooks, professional manuals and relevant industry-related publications, licences, permits, plans, and other legislation;

¹ For discussion of the phrase “material adverse effect” see MOFR Bulletin: CEPS Bulletin #40

- whether the person used preventative systems such as environmental management systems, training programs, internal and external audits, risk assessments and contingency plans designed to prevent the particular event;
- whether alternative solutions were reasonably available to prevent the occurrence of the event;
- the promptness of the party's response to the problem, and efforts to mitigate;
- whether consultants or experts were retained when the necessary expertise was lacking internally;
- the company's responsiveness to suggestions of regulatory officials; and
- the degree to which the person had control over the actions that led to the event.

For example, the defence of taking reasonable steps to prevent a contravention was considered in a Forest Appeals Commission decision in 2009. The appeal concerned a landslide that happened in 2007, below a recently constructed section of road. The Commission found that the company had failed to prevent drainage water from being directed onto a potentially unstable slope, as required by the Forest Road Regulation. However, the Commission concluded that the company had exercised the necessary due diligence. The finding was based on the following considerations:

- The registered professional forester and the person in charge of road building made decisions that reasonable professionals with appropriate expertise would have made in the situation;
- The company acted consistently with the regulation by directing drainage to the swale, a natural feature;
- The care taken by the company exceeded the expected standard of care;
- There was no reasonable alternatives;
- It was reasonable to assess the likelihood of harm as low, since instability of the nearby slope was unknown;
- The slide was unforeseen and beyond the company's control

Implications of the due diligence defence

The due diligence defence encourages forest companies and others to adopt measures to prevent contraventions and demonstrate that they have exercised due diligence. This could have a positive effect on forest stewardship.

On the other hand, the due diligence defence enables forest companies to pass responsibility on to the individuals who actually do the work on the ground. This is because it is the due diligence of the company that counts, not the due diligence of the company's employees. That means that if a company has a reasonable environmental management system in place and can demonstrate that the system is followed and that the company monitors activities, the company may be able to demonstrate due diligence, if the contravention resulted from an employee not following the environmental management system.

For this reason, the due diligence defence could potentially lead to an increase in situations where environmental damage is either not repaired or is repaired at government expense. Once a company establishes due diligence, they are no longer legally responsible to pay a compensatory penalty to the government or to remediate the damage.

The government could take enforcement action against the contractor, sub-contractor or employee who caused the contravention, and sometimes it does. However, in many cases, small contractors and individuals can't afford to pay a significant penalty, and cannot be ordered to remediate because they are not licensees, so the government is left with the problem to fix.

It is also important to note that many FRPA regulations apply to licensees only. For example, a licensee must ensure that logging activities don't cause a significant landslide. However, this requirement does not apply to contractors or individuals. This means that a landslide could be caused by logging operations and, if the licensee exercised due diligence, there would be no-one legally responsible under FRPA.

Final Message

All those who work in forestry operations need to be aware of the due diligence defence. Paying attention to things like best practices and standard operating procedures, and maintaining training will not only help to ensure that forest practices are carried out to a high standard but will also help to provide a legal defence if something does go wrong.

Relevant links

Forest Practices Board Reviews and Appeals - <http://www.fpb.gov.bc.ca/ra.htm>

Forest and Range Practices Act - <http://www.for.gov.bc.ca/code/>

Forest Appeals Commission Decisions - <http://www.fac.gov.bc.ca/facdec.htm>