

# **Forest Practices Code**

## **Advice to Statutory Decision Makers and Their Staff from Compliance & Enforcement Branch**

Number 8

March 06, 2001

### **Officially Induced Error**

The Forest Appeals Commission ("FAC") has determined that officially induced error is available as a defence under the administrative remedies regime of the Forest Practices Code of British Columbia Act (the "Code"), in the same way that it would be available for prosecutions of strict liability offences.

#### **What Is Officially Induced Error?**

Officially induced error of law exists as an exception to the rule that "ignorance of the law is no excuse". It arises in situations where a person makes inquiries of an official regarding the legality of an intended course of action, and relies in good faith on erroneous advice provided by the official. The policy rationale for this exception is that the complexity of contemporary regulation makes it unreasonable to expect a responsible citizen to have a complete knowledge of the law, and it would be unjust for the government to prosecute an individual for a contravention which it had already assured him, through one of its officials, was not a contravention.

The elements of the defence are as follows:

- The defendant must be (or become) mistaken as to the law after inquiry, not merely ignorant of the law.
- The defendant must seek advice from an official, who will usually be a member of a government or a government agency.
- The official must be one who is involved in the administration of the law in question.
- The official must give erroneous advice.
- The erroneous advice must be apparently reasonable.
- The error of law must arise because of the erroneous advice.
- The defendant must be innocently misled by the erroneous advice, that is, he or she must act in good faith and without reason to believe that the advice is indeed erroneous.
- The defendant's error in law must be apparently reasonable.
- The defendant, when seeking the advice of the official, must act in good faith and must take reasonable care to give accurate information to the official whose advice he solicits.

A summary of a recent Supreme Court of Canada decision in *R. v. Jorgenson*, [1995] 4 S.C.R. 55, described it this way:

*"In order for an accused to rely on an officially induced error of law as an excuse, he must show, after establishing he made an error of law (or of mixed law and fact), that he considered his legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in his actions. When considering the legal consequences of his actions, it is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that his conduct was permissible. The advice came from an appropriate official if that official was one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. If an appropriate official is consulted, the advice obtained will generally be presumed to be reasonable unless it appears on its face to be utterly unreasonable. The advice relied on by the accused must also have been erroneous, but this fact does not need to be demonstrated by the accused. Reliance on the official advice can be shown by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation."*

The Ontario Court of Appeal in *R. v. Camcoil Thermal Corporation and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.) stated that:

*"The defence of 'officially induced error' is available as a defence to an alleged violation of a regulatory statute where an accused has 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 on several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave him the advice, and the clarity, definitiveness and reasonableness of the advice given."*

The FAC has decided that the defence of officially induced error applies to the administrative remedies regime under the Code. All elements of the defence must be made out before it can be successful. An officially induced error of law defence will only be successful in the clearest of cases. The onus is on the accused to establish the defence on the balance of probabilities. Where the defence is successfully made, the proper result is that a contravention is considered not to have occurred.

## **The FAC Decisions**

### **Atco**

In *Atco Lumber Ltd. v. Government of British Columbia* (Appeal No. 97-FOR-04, January 8, 1998), the licensee's silviculture prescription ("SP") required retention of Western Larch (Lw) and Western Red Cedar (Cw) trees > 70 cm dbh of approximately 4 trees per hectare. On field visits both prior to and after commencement of harvesting operations, MOF district staff had noted in Harvesting Inspection Reports ("HIR's") that there were no Lw or Cw trees large enough to meet the retention requirements of the SP. A standard form statement in the second HIR indicated that "...operations 'are' being conducted in accordance with conditions of the cutting permit/licence...". The FAC held that the licensee had contravened Code sections 35(1)(b) and 67(1)(e) by harvesting when it knew that the results specified in the SP would not be achieved.

In its defence the licensee argued, among other things, that since the MOF had not instructed it to cease operations on either of the two field visits, any contraventions of sections 35(1)(b) and 67(1)(e) were a result of an officially induced error. The MOF argued that officially induced error is not a defence against administrative penalties, and that even if it is, the licensee in this case hadn't satisfied the requirements for the defence.

The FAC agreed with the licensee that officially induced error is available as a defence for administrative remedies, but it agreed with the MOF that an officially induced error of law argument can only be successful in the clearest of cases, and that since in this case MOF staff had pointed out in both HIR's that the retention specifications would be difficult to achieve, there was no erroneous advice given. Thus at least one of the elements of the defence had not been satisfied.

## **Hengstler**

In *Hengstler v. Government of British Columbia* (Appeal No. 97-FOR-19, February 24, 1998) the appellants had done some logging on their privately owned property on Saltspring Island. A small public road (Musgrave Road) cut through the southwest corner of their property, and prior to logging the appellants conducted a title search of their property to find that no reference to Musgrave Road or any easements related to the road appeared on title. Additionally, the appellants contacted officials at each of the Ministry of Transportation and Highways ("MOTH"), the MOF, and the Land Title Office ("LTO") at least twice and conferred with a local B.C. Land Surveyor.

Officials at all three government agencies advised the appellants that if the road did not appear on their property title, it was "probably" a section 4 road, meaning that the Crown owned only the "bank to bank" portion of the road, that is from top of cut to toe of fill on either side of the centre line. The MOF official advised that a Licence to Cut would be needed only if there was a legal easement or right-of-way registered on the title of the property. The Land Surveyor said that, based upon a 1920 survey showing a "proposed road", and the lack of legal easement or right of way, the actual road could be two hundred feet "one way or another".

After the appellants logged their property adjacent to Musgrave Road, a complaint from the public led the MOF to do additional research. The additional research determined that Musgrave Road had been gazetted as a public road "40 feet in width" on April 17, 1930. The Highway Act at that time had allowed for establishment of public highways by publishing a Gazette notice with a metes and bounds description - no formal survey was required and no notation was required to be made on title. As a result, the MOF made a site inspection and identified 17 trees that had been cut and removed within the 40-foot public road right-of-way as measured from the centre line of the road.

The District Manager determined that the appellants had contravened Sections 96(1) and 97(2) of the Code, and assessed an administrative penalty of \$2,564.43. A subsequent Review Panel found that the appellant's efforts to ascertain the boundary were sufficient to meet the requirement of section 97(2) and rescinded that portion of the determination. However, the Panel upheld the DM's determination that section 96(1) had been contravened and upheld the assessed penalty.

On appeal, the FAC found that the appellants had satisfied all the elements of the defence of officially induced error. The appellants had made an error of law in deciding that Musgrave Road was a section 4 road rather than a highway with a width of 40 feet. The appellants had sought advice from responsible government officials who were involved in the administration of the law in question, and had relied on erroneous advice. Reliance was shown by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the officials were specifically tailored to the accused's situation. Even though the advice from the government officials did not provide a firm answer, the message from the various officials was consistently that, if the road did not show up on their land title, it was probably a section 4 "bank to bank" road, and it was reasonable for the appellants to believe that they had their answer. The appellants had consulted all relevant government authorities, and the advice was not unreasonable on its face.

The FAC found that the officially induced error of law defence did not extend to the 4 trees that were cut within the "bank to bank" portion of Musgrave Road and sent the matter back to the DM to determine the volume of timber cut and to assess a penalty based on the stumpage rate used in the initial determination. No provision was made by the FAC for recovery by the Crown of any compensation for the 13 trees which were removed from outside the "bank to bank" area but within the 40 foot right-of-way.

### **Other FAC Cases**

In *Fab-Co Forest Products (1989) Ltd. v. Government of British Columbia* (Appeal No. 97-FOR-33, August 27, 1998) a Small Business Forest Enterprise Program SP had been prepared by the MOF. The licensee had exceeded the soil disturbance limits even though they had followed the SP with respect to the nature and timing of the harvesting activity. In the circumstances of this case, where the

licensee did not have silviculture expertise and the MOF had been aware of the site specific factors that increased the risk of soil damage but had not passed that information on to the licensee, the Commission held that the licensee could rely on the defence of officially induced error. For more details on this case see the Compliance and Enforcement Branch bulletin titled "Forest Appeals Commission's Decision Regarding Small Business Silviculture Prescriptions - Fab-Co Forest Products (1989) Ltd.", dated December 4, 1998.

The FAC has also considered several unsuccessful claims for this defence that were not supported by sufficient evidence:

- a licensee claimed that MOF staff had verbally authorized the licensee to delay submitting a SP amendment - J.S. Jones Holdings Ltd. v. Government of British Columbia (Appeal No. 97-FOR-32, September 28, 1998). The licensee also sought to establish the officially induced error defence on the grounds that the MOF had demonstrated a historical pattern of non-enforcement of regeneration delay deadlines.
- a licensee had purportedly received verbal authorization to exceed the maximum volume stated in his timber sale licence document - Dean Foisey v. Government of British Columbia (Appeal No. 97-FOR-35, June 30, 1998).

Note that in the latter two cases, the defence of officially induced error was rejected by the FAC because of insufficient evidence. Such claims may be upheld in future cases dealing with similar issues, depending on the specific facts.

## **Conclusions and Recommendations**

The FAC has decided that, in circumstances where sufficient evidence exists to prove each of the necessary elements, officially induced error is available as a defence or excuse under the Code's administrative remedies regime, in the same way that it is available for regulatory offences. Similar reasoning would likely extend the availability of the defence to contraventions of the Forest Act and the Range Act. The onus is on the person who is suspected of the offence or contravention to prove that the defence is applicable in his or her specific case. Generally, the decision as to whether there was officially induced error will be made by the statutory decision maker, review panel or FAC where it has been raised as a defence, rather than by the forest officer or forest official. Where the defence is successfully made, the result is that a contravention is considered not to have occurred.

Many MOF staff members are in a role which might require that certain types of advice be given to those outside of government. However, staff should exercise caution and only provide advice when it is within their field of expertise and when it is appropriate to do so. When advising a party who might reasonably rely on his or her advice, MOF staff should ensure that they have all the necessary facts and that their response is in accordance with the relevant statutory provisions. Staff should also be sure to make the party aware of any assumptions upon which the advice is based, and of any qualifications or conditions that may affect or alter their advice.

Note that the FAC has ventured into new territory by extending the "officially induced error" excuse to administrative remedies. This has apparently not been done before in Canada. FAC decisions are not considered binding on the courts, the FAC, Code review panels, or statutory decision makers. However, based on the policy rationale behind the development of the defence of officially induced error, the MOF should assume that the courts would follow the same reasoning as the FAC and conduct business accordingly. In the right circumstances, however, the Ministry may appeal a future application of officially induced error by the FAC. It is also possible even in cases where officially induced error has been successfully raised as a defence, that the Crown may be entitled to recover compensation for the value of timber which was harvested by mistake. We would ask any district which is involved in a determination, review, or appeal in which officially induced error is raised as a defence to notify Compliance & Enforcement Branch.

Note: Please note that this bulletin does not constitute legal advice, but is provided by Compliance & Enforcement Branch, Ministry of Forests, as non-binding operational or policy advice for consideration by statutory decision makers. It may have to be revised based on future Commission and court decisions. Also, statutory decision makers are reminded that the determination as to whether a defence has been made out in any particular case is ultimately up to them, and that specific circumstances must always be considered.

## **Contact**

For any questions regarding this bulletin, please contact the following:

Dan Graham, Compliance & Enforcement Branch at [Dan.Graham@gems7.gov.bc.ca](mailto:Dan.Graham@gems7.gov.bc.ca)