

Assessing “Reasonable Mistake of Fact” as a Defence

INTRODUCTION

Section 72(a) of the *Forest and Range Practices Act* (FRPA) provides for the defence of “reasonable mistake of fact” to an alleged contravention of the FRPA, its regulations and standards, and to alleged contraventions of the *Forest Practices Code of British Columbia Act* (the Code), the *Forest Act*, the *Range Act* and regulations made under those acts. The FRPA is not in force as of this writing; however, transition provisions that provide for the defence have been in force since December 17, 2002. [† see box below]

Under this legislation, a determination of a contravention cannot be made against an alleged contravener who establishes to the statutory decision-maker (SDM) that he or she reasonably believed in the existence of facts that, if true, would establish that he or she did not contravene the legislation. Even though the alleged contravener at the opportunity to be heard may not specifically use the words “reasonable mistake of fact”, all relevant evidence that is presented by the alleged contravener that supports the defence must be considered by the SDM.

The burden is on the alleged contravener to prove on a balance of probabilities the elements of “reasonable mistake of fact”.

†NOTE: The transition provisions (Bill 75) came into force on December 17, 2002. Bill 75 introduced the defences of due diligence, mistake of fact, and officially induced error for alleged contraventions of the Code only, not for alleged contraventions of the *Forest Act* or the *Range Act*.

Once the FRPA comes into force, these defences will be available for alleged contraventions of all three statutes, pursuant to section 72 of the FRPA.

Note further that in both the transition period and once the FRPA comes into force, these defences are available to persons for contravention determinations made on or after December 17, 2002, even if the alleged contravention occurred *prior to* December 17.

The relevant legislative provisions are reproduced in Appendix A, for convenience. Appendix A also has an authority matrix to help you understand the application of the provisions.

What is a Reasonable Mistake of Fact?

A reasonable mistake of fact is a reasonable mistake about the existence of a circumstance or set of circumstances which, if true, would establish that an alleged contravener did not contravene the law.

Elements of “Reasonable Mistake of Fact”

The defence of “reasonable mistake of fact” will succeed if:

- (a) the mistake was a mistake of fact;
- (b) the mistake was reasonable; and
- (c) had the mistaken fact been true, there would have been no contravention.

What is reasonable is not what the alleged contravener believed to be reasonable. Rather, a reasonable belief is one that a person exercising all reasonable care would likely have held in those same circumstances.

Example Number 1

Section 10 of the Timber Harvesting and Silviculture Practices Regulation prohibits an agreement holder from depositing a volume of slash capable of damaging fish habitat into a fish stream.

In this example, the alleged contravener deposits slash capable of damaging fish habitat into a fish stream.

If the alleged contravener establishes that it reasonably believed the stream was not a fish stream, the defence of mistake of fact would apply.

In support of its defence, the alleged contravener presents evidence that its belief was based on misinformation contained in a biologist’s report. However, the evidence also shows that other information was known to the alleged contravener suggesting the possibility that the stream was fish bearing.

The SDM must then decide whether the alleged contravener’s mistaken belief was reasonable.

To determine reasonableness, the SDM needs to consider the belief that a reasonable person engaged in the same activity would likely have held in those same circumstances. A reasonable person may have suspected the accuracy of the biologist’s report and, foreseeing the potential harm that could result from depositing slash into a fish bearing stream, would not have relied on the report without making further inquiries to confirm the stream’s status. If that were so, the SDM may find, on a balance of probabilities, that the alleged contravener’s mistaken belief was not

reasonable. The result would be that the defence of reasonable mistake of fact would not apply.

Example Number 2

Section 9(1) of the Timber Harvesting and Silviculture Practices Regulation prohibits an agreement holder from falling trees in a Riparian Reserve Zone (RRZ).

In this example a licensee, during the summer, lays out a cut-block adjacent to a known class 2 stream and marks a required RRZ boundary. Subsequently, normal fall water flows combined with in-stream debris causes the channel bank to shift toward the marked RRZ boundary. The change is subtle and not readily detectable under winter conditions. Winter harvesting is conducted in accordance with the marked boundaries. In late spring, a post harvest inspection reveals that harvesting has occurred within the required RRZ.

If the alleged contravener can establish that it reasonably believed the location of the stream channel and the required RRZ had remained the same between the time that the boundary had been established and the time of the harvesting, the defence of reasonable mistake of fact will apply.

Again, to determine reasonableness, the SDM will need to consider the belief that a reasonable person would likely have held in those same circumstances. Factors to consider might include topography, gradient, previous stream channel changes, or whether the stream material was alluvial or solid rock.

It may be that a reasonable person would not have foreseen the channel bank shifting toward the marked RRZ boundary. If so, the SDM may find, on a balance of probabilities, that the person's mistaken belief was reasonable. The result would be that the defence of reasonable mistake of fact applies because, had the channel location not changed, there would have been no contravention.

Distinction between "Mistake of Law" and "Reasonable Mistake of Fact"

When considering evidence of a mistake, an SDM should ensure that the mistaken belief is one of fact and not of law.

If an alleged contravener is unaware of, or wrongly interprets, legislation, the mistake is one of law. A mistake of law is not a defence.

An apparent mistake of law or a mistake about an event involving mixed fact and law may be found to be a mistake of fact. Where an SDM is uncertain about whether the mistake is a matter of law or whether the mistake is a matter of fact, the SDM should seek legal advice to determine the applicability of the defence.

Conclusion

If the elements of a contravention are established by the Crown, the burden of establishing the defence of “reasonable mistake of fact” is on the alleged contravener. The defence will be successful if the alleged contravener reasonably believed in a mistaken circumstance or set of circumstances which, if true, would establish that the person did not contravene the law.

To determine reasonableness of belief, the SDM needs to consider the belief that a reasonable person would likely have held in those same circumstances. The burden of establishing the defence is on the alleged contravener on a balance of probabilities. If an alleged contravener establishes the defence of “reasonable mistake of fact”, that person cannot be found in contravention of the legislation.

The defence of “reasonable mistake of fact” is closely related to the defence of due diligence, in that both require an analysis of reasonable foreseeability and the appropriate standard of care. A more thorough discussion of these concepts is contained in the bulletin “Assessing Due Diligence as a Defence”.

It is recognized that assessing whether the circumstances establish a “reasonable mistake of fact” in individual cases is a new responsibility for SDMs and C&E staff. SDMs and C&E staff should not hesitate to call for assistance when it is considered necessary.

This bulletin does not constitute legal advice. It is offered as guidance only by the Business Solutions Branch and the Compliance & Enforcement Branch for consideration by Ministry of Forests staff.

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APPENDIX A

LEGISLATIVE AUTHORITY

ADMINISTRATIVE CONTRAVENTIONS

Section 119 of the Code was amended by Bill 75 on December 17, 2002, to provide for the defences of due diligence, mistake of fact, and officially induced error for alleged contraventions of the Code. Section 119.1(1) is the legislative authority for these defences during the transition period, prior to the enactment of the FRPA.

119.1 (1) For the purposes of a determination of a senior official under section 117, 118 or 119, no person may be found to have contravened a provision of this Act, the regulations, the standards or an operational plan if the person establishes that

- (a) the person exercised due diligence to prevent the contravention,
- (b) the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
- (c) the person's actions relevant to the provision were the result of an officially induced error.

(2) Subsection (1) does not apply in respect of a determination made under section 117, 118 or 119 before the coming into force of this subsection.

Section 119.1(2) of the transition provisions (directly above) means that these defences are not available on the review or appeal of determinations made before December 17, 2002. There is no similar provision in the FRPA.

Once the FRPA comes into force, the sections below (found in Part 6 of the FRPA) will provide the legislative authority for the making of contravention determinations and the legislative requirement to consider the defences of due diligence, mistake of fact, and officially induced error.

Forest and Range Practises Act

59(1) In this Part, "the Acts" means one or more of this Act, the regulations or the standards or the *Forest Practices Code of British Columbia Act*, the *Forest Act*, the *Range Act* or a regulation made under the *Forest Practices Code of British Columbia Act*, the *Forest Act* or the *Range Act*.

71(1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the Acts.

72 For the purposes of a determination of the minister under section 51 (7), 54 (2), 57 (4), 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the

- (a) person exercised due diligence to prevent the contravention,
- (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
- (c) person's actions relevant to the provision were the result of an officially induced error.

OFFENCES

Bill 75 amended section 157 of the Code by adding the defences of mistake of fact and officially induced error to the already recognized defence of due diligence, for alleged offences under the Code. Section 157.1 is the legislative authority for these defences during the transition period, prior to the enactment of the FRPA.

157.1 Due diligence, mistake of fact and officially induced error are defences to a prosecution under this Act.

Once the FRPA is enacted, the same provision will appear in the FRPA as section 101:

101 Due diligence, mistake of fact and officially induced error are defences to a prosecution under this Act.

Note that although the defences are expressed differently for administrative contraventions and offences, the elements of the defences are the same.

Information regarding legal authorities for the defences is reproduced in a matrix on the next page.

AUTHORITIES FOR APPLICATION OF DEFENCES

THIS MATRIX INDICATES THE SOURCE OF AUTHORITY FOR EACH OF THE DEFENCES DURING TRANSITION AND AFTER ENACTMENT OF THE FRPA IN RELATION TO THE CODE, THE *FOREST ACT* AND THE *RANGE ACT*. NOTE THAT AFTER ENACTMENT OF THE FRPA, THE FRPA REPLACES THE CODE.

ADMINISTRATIVE CONTRAVENTIONS				
		CODE	<i>FOREST ACT</i>	<i>RANGE ACT</i>
During Transition	Due Diligence	s.119.1	Common Law	Common Law
	Mistake of Fact	s.119.1	Common Law	Common Law
	Off. Induced Error	s.119.1	Common Law	Common Law
FRPA				
Once FRPA is enacted	Due Diligence	s.72*	s.72	s.72
	Mistake of Fact	s.72	s.72	s.72
	Off. Induced Error	s.72	s.72	s.72
OFFENCES				
		CODE	<i>FOREST ACT</i>	<i>RANGE ACT</i>
During Transition	Due Diligence	s.157.1	Common Law	Common Law
	Mistake of Fact	s.157.1	Common Law	Common Law
	Off. Induced Error	s.157.1	Common Law	Common Law
FRPA				
Once FRPA is enacted	Due Diligence	s.101	Common Law	Common Law
	Mistake of Fact	s.101	Common Law	Common Law
	Off. Induced Error	s.101	Common Law	Common Law

*Note that section 72 of the FRPA applies to alleged contraventions of the FRPA, its regulations and standards, and to alleged contraventions of the Code, the *Forest Act*, the *Range Act* and the regulations (but not standards) made under those acts.