

ASSESSING DUE DILIGENCE AS A DEFENCE

INTRODUCTION

Section 72(a) of the *Forest and Range Practices Act* (FRPA) provides for the defence of due diligence 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 on next page]

Under this legislation, a determination of contravention cannot be made against a person who establishes to the statutory decision-maker (SDM) that he or she exercised due diligence. In other words, blame will not be placed on a person who took all reasonable care to avoid committing the prohibited act. Even though the alleged contravener, at the opportunity to be heard, may not specifically use the words “due diligence”, all relevant evidence that supports the defence must be considered by the SDM.

The burden is on the alleged contravener to prove on a balance of probabilities that he or she exercised due diligence.

QUANTUM V. LIABILITY

Prior to the FRPA and the transition provisions, SDMs had to consider several due diligence-like factors when determining the size (quantum) of monetary penalty — after they had made their finding of liability. Under the new legislation, these factors (set out in s.117(4)(b) of the Code and section 71(5) of the FRPA) must still be considered in determining quantum, however, a more in-depth due diligence analysis must now be undertaken with respect to liability itself. The focus of this bulletin is on the due diligence analysis as it relates to liability.

It should be noted that although the determination of quantum will continue to be carried out in accordance with the factors set out in sections 117(4)(b) and 71(5), findings made in the context of the liability analysis may understandably also have an impact on the determination of quantum.

†**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 DUE DILIGENCE?

Due diligence refers to the amount of care that a person is required to take in any given situation. For the defence of due diligence to apply, an alleged contravener must have taken all reasonable care to avoid committing the prohibited act.

This involves a consideration of what a reasonable person would have done in the particular circumstances. Each situation must be evaluated in light of its own particular facts.

THE ELEMENTS OF DUE DILIGENCE

Although the law in this area can be somewhat complex, due diligence essentially consists of two basic elements or tests—“reasonable foreseeability” and “reasonable care”.

People can only be expected to take preventive action to avoid harmful events arising from their activities that can be reasonably foreseen. If a harmful event is reasonably foreseeable, then a duty arises to take reasonable care to prevent the event from occurring.

1. REASONABLE FORESEEABILITY

Test: Was the event that caused the contravention reasonably foreseeable?

That is, would a person engaged in the same activity looking at the same situation, taking all reasonable care, have anticipated the contravention?

There are three points to note here.

OBJECTIVE TEST

First, the foreseeability test is not subjective; that is, it does not depend on what the alleged contravener did or did not foresee.

The test is objective. It is based on what a person engaged in the same activity, exercising all reasonable care, would likely have foreseen in those same circumstances.

ALL REASONABLE CARE

Second, foreseeability is based on the standard of what a person engaged in the activity exercising *all reasonable care* would have foreseen.

As foreseeability is concerned with awareness, knowledge and anticipation of hazards or risks, the SDM must determine what a person taking all reasonable care would have done to assess risk in the same situation and what that person’s awareness of risk or potential harm would have been as a result of that assessment.

In determining what a reasonable person would have done to properly assess and become aware of the potential risks, the SDM is essentially undertaking a standard of care analysis, of which more will be said in the Standard of Care section below.

An “adequate assessment of risk” could be as simple as putting one’s mind to the potential for problems to arise, or as formal as conducting studies and preparing written reports. It depends on what would be considered reasonable in the particular circumstances.

For example, if a person exercising all reasonable care would normally hire a qualified professional to evaluate stream bank stability in the area of a proposed stream crossing, then it is from the standpoint of the person with the expert’s report in hand that one would judge foreseeability. Would that person have foreseen the particular event that caused the collapse of the stream bank? If yes, then the event leading to the contravention was reasonably foreseeable. However, if even with an expert’s report in hand the person could not reasonably have anticipated the particular event, then the event was not reasonably foreseeable and a finding of contravention cannot be made against the person.

The foreseeability test is one of reasonableness, objectively measured. People are not superhuman and should not be held to superhuman standards. They are not expected to be able to foresee every *possible* event that could occur. That would be unreasonable. However, if the SDM is of the view that a person standing in the alleged contravener’s shoes taking all reasonable care would have foreseen the event that led to the contravention, then the SDM should be able to comfortably conclude that the event was reasonably foreseeable.

THE PARTICULAR EVENT

The third point that must be understood is that the focus of the foreseeability analysis is on the particular event that caused the contravention. If the particular event was not foreseeable, then the foreseeability test is not met.

The decision of the BC Court of Appeal in *R. v. MacMillan Bloedel* [2002] illustrates this point:

In the *MacMillan Bloedel* case, an underground pipe owned by the company developed an oil leak, resulting in water contamination and an alleged contravention of the federal *Fisheries Act*, for which due diligence is a defence. The leak was caused, not by ordinary corrosion, but by microbiological corrosion on the pipe. This particular type of corrosion was unknown to science at the time of the event, and therefore, was not foreseeable.

The Court of Appeal acknowledged that environmental contamination from the pipe was *generally* foreseeable. However, the Court of Appeal ruled that the focus had to be on the particular event that caused the leak. As the particular cause of the leakage was not reasonably foreseeable, the company could not be expected to have taken preventive action. Consequently the reasonable foreseeability test was not met and MacMillan Bloedel was not held responsible for the contamination.

Chain of events following the particular event

Although the particular event that gives rise to the contravention is the focus of the analysis, it is important to recognise that the *precise* chain or sequence of events that follows the particular event need not be foreseeable in order to meet the test, as long as the initial cause or essential contributing event was foreseeable. People seldom foresee an event exactly as it will unfold in the future. What is important is whether or not they should have foreseen the particular cause or event that gave rise to the contravention.

For example, if it was reasonably foreseeable that a culvert would blow out in the event of heavy rain, and the culvert did blow out in heavy rain, the exact manner in which the culvert failed should not affect the foreseeability assessment, as long as the heavy rain was, in fact, found to be a cause of the blow out, and the heavy rain itself was a reasonably foreseeable event.

To illustrate further, in the *MacMillan Bloedel* case referred to above, a very specific and unforeseeable cause of leakage was identified. However, if the leak had been caused by regular corrosion stemming from the pipes' old age (a reasonably foreseeable event), then to meet the foreseeability test, it would not have been necessary to foresee precisely where or how the pipes would break down. It would be enough to show that regular corrosion and leaks occur in aged pipes of the type that were used, and that the pipes were, in fact, aged.

Where the cause of the contravention cannot be determined

Where the particular event that caused the contravention, for example, the failure of a pipe, cannot be established, a recent Ontario Court of Appeal decision in the case of *R. v. Petro-Canada* [2003], provides some guidance. In that case the court said that where the cause of the contravention is undetermined, the alleged contravener must show that he or she took all reasonable care to avoid *any* foreseeable cause in order to successfully make out the defence of due diligence.

For example, if any one of five reasonably foreseeable factors could have caused a discharge of fuel, the alleged contravener will have to show that he or she took all reasonable care to avoid all of the five factors. On the other hand, if the cause of the failure can be pinpointed, the alleged contravener can limit his or her evidence of foreseeability and reasonable care to the particular cause.

RISING STANDARDS

Standards of foreseeability and care can change over time as information and knowledge grows. After the cause of the corrosion became known in the *MacMillan Bloedel* case, described above, persons responsible for maintaining underground pipes can reasonably be expected to be aware of the dangers associated with microbiological corrosion.

IF THE FORESEEABILITY TEST IS NOT MET

If the SDM concludes that the cause of the contravention was not reasonably foreseeable, it would be unreasonable to expect the person to have taken preventive or precautionary measures to avoid the contravention. In other words, a person cannot be held liable for events that could not reasonably have been predicted through a defensible risk assessment. So, in the absence of reasonable foreseeability, a finding of contravention against a person is not tenable. Again, the burden of proving, on a balance of probabilities, that the cause of the contravention was not reasonably foreseeable is on the person seeking the protection of the defence.

2. STANDARD OF CARE

Test: If the particular event that occurred was reasonably foreseeable by a person exercising all reasonable care, did the alleged contravener exercise all reasonable care to prevent the event from occurring?

This test requires the SDM to determine the kinds of things a person exercising all reasonable care in the same circumstances would have done to prevent the contravention. In other words, the SDM must determine the appropriate standard of care that is applicable to the situation, and then determine whether or not the person met that standard.

The standard of care analysis is essentially the same as the one carried out to assess foreseeability, except that now the focus shifts from what a reasonable person would have done to properly assess and become aware of potential risks, to what a person exercising all reasonable care would have done to prevent the foreseeable harm from occurring.

As with foreseeability, the standard of care test is objective. The issue that must be addressed is what would a person exercising all reasonable care and engaged in the same activity have done if that person had been in the alleged contravener's place? Practices commonly used in the industry by persons operating in similar circumstances (the "industry standard"), often provide a good indication of what the appropriate standard of care is. However no-one can hide behind commonly accepted standards of care, if, in the circumstances, due diligence warrants a higher standard of care.

Whether or not the alleged contravener should have been expected to exceed the industry standard is something the SDM can consider if he or she is persuaded (on the evidence presented) that the industry standard is unreasonably low in the circumstances. Due diligence requires that a person meet a standard of care to which a reasonable person in the same situation

should be held. If the SDM is of the view that an industry standard is reasonable in the circumstances, then the person should not be expected to exceed it.

Being duly diligent does not mean eliminating all risk or eliminating all possibility of anything going wrong. People are not required to meet such a high standard in everyday life, and, accordingly, are not required to meet that standard in order to satisfy the requirements of the due diligence defence. However, a person is required to eliminate what would, in the normal course of business, be considered unacceptable risks.

For example, a licensee who builds a road across a steep hillside could reasonably be expected to foresee the possibility of a landslide resulting from the road construction. If no reasonable alternative route is available, the road needs to be designed to minimize the likelihood of a slide occurring. If a slide results in spite of adequate road design and despite the licensee following the design and taking all reasonable precautions, the licensee cannot be held blameworthy for the slide. The licensee met the required standard of care.

WHAT IS AN APPROPRIATE STANDARD OF CARE?

In many cases, an SDM will need to rely on his or her own forestry and administrative experience and judgment to determine what the appropriate standard of care is in a given situation. An SDM should not, however, adopt a standard based only on what he or she would have done in a given situation; rather, the SDM should consider what a person exercising all reasonable care engaged in that activity would have done in the particular circumstances.

Although each assessment of due diligence must be done on a case-by-case basis, the following two principles will apply in virtually every case:

- The greater the likelihood of a harmful event occurring, generally the higher the standard of care; and
- The greater the potential damage, the greater the degree of care required.

Appendix B elaborates on these principles.

In addition to an SDM's own judgment and evidence of industry standards, written standards that apply to a particular situation can provide helpful guidance in determining the appropriate standard of care. Practices set out in legislation, regulations, licence documents, guidebooks, or operational plans might provide guidance. Specific instructions or practices suggested in government publications, or in references from sources other than government, can also provide guidance on the appropriate standard of care.

SDMs should be sure to base their assessment of both foreseeability and standard of care on the circumstances prevailing at the time actions were taken or should have been taken. SDMs should not base their conclusions on

hindsight. The correct approach is not to say “if I knew then what I know now, I would have ...”, but to say “given what a person exercising all reasonable care would have known at the time, he or she could reasonably have been expected to ...”

HAS THE PERSON MET THE STANDARD OF CARE?

Once the SDM has determined the appropriate standard of care, he or she must determine whether or not the person met the standard. Factors to consider in assessing whether or not the standard of care was met may include, but are not necessarily limited to:

- Whether a risk analysis, to a standard commensurate with the circumstances, was undertaken by the person prior to engaging in the activity;
- Whether the person engaged the necessary experts at the appropriate times;
- The kinds of measures or systems the person took or had in place to prevent the contravention from occurring;
- The level of training provided to field crews by the person;
- Whether the field crew was provided with operational plans covering the activity;
- Whether the supervising staff was properly trained and sufficiently experienced to supervise the activity;
- Whether the supervising staff and field staff were briefed, before operations were undertaken, on the nature of the activities and the risks involved;
- Whether the person had a monitoring and inspection policy in place and the extent to which it was followed (the cost of inspection relative to the values at risk, opportunity for inspection, the relative expertise of the parties involved, likelihood of the harm, and the potential magnitude of the harm all define the kind of monitoring and inspections reasonable care warrants);
- The extent to which the training and monitoring efforts were crystallized in policies;
- Whether the person had a contingency plan in place to prevent or minimize the harm in the event of a contravention;
- Whether the contingency plan was adequate in all the circumstances; and
- Whether the contingency plan was put into practice when the alleged contravention occurred.

SOME EXAMPLES

The following are examples of the factors one might consider in assessing whether or not a licensee has met the standard of care in two particular types of situations. They are suggestions only—not templates to be mechanically applied. As stressed previously, the determination of due diligence must be assessed based on the circumstances of each case. These examples do suggest, however, that many of the basic considerations used to assess due diligence in the forests context are applicable across different types of forestry activities.

EXAMPLE ONE

ASSESSMENT OF DUE DILIGENCE WITH RESPECT TO UNAUTHORIZED HARVESTING

1. Did the person train all of its employees and contractors on the requirements of the applicable legislation?
2. Did the person retain experienced, reputable and qualified contractors or advisors?
3. Did the person have a process to track legislative changes, and to immediately inform all appropriate employees or contractors of the changes?
4. Did the person have procedures in place to ensure that, if the employee or contractor came upon any previously unidentified resource feature, or there was confusion of any kind, the employee/contractor would immediately shut down the activity, contact the person and not continue the activity until all confusion was resolved?
5. Did the person communicate its procedures to all workers and adhere to those procedures?
6. Had the person adequately marked the falling boundaries, riparian management zones, wildlife tree patches etc. considering all the circumstances?
7. Were the marked boundaries and the operational plan maps consistent, with any necessary changes being:
 - noted on the map;
 - amended in the field with old boundary marking being painted out and old flagging removed?
8. Did the person or the person's representative walk the boundaries with the fallers, or with the contractor, and have in place some quality assurance measures to ensure that the contractor then walked the boundaries with the fallers?

9. Did the person ensure that any new employees were fully briefed on the legal requirements and, if appropriate, the boundaries of the cutblock?
10. Did the person have a monitoring plan in place to ensure that each cutblock was inspected, to a frequency consistent with the risk levels of the activities being undertaken?
11. Did the person conduct inspections consistent with its monitoring plans?
12. Did the person's employees or contractor shut down the activity immediately when it was discovered to be unauthorized?

EXAMPLE TWO

ASSESSMENT OF DUE DILIGENCE WITH RESPECT TO ROAD CONSTRUCTION

1. Did the person train all of its employees and contractors on the requirements of the applicable legislation?
2. Did the person retain experienced, reputable and qualified contractors?
3. Did the person have a process to track legislative changes, and to immediately inform all appropriate employees or contractors of the changes?
4. Did the person have procedures in place to ensure the legal requirements for each road would be communicated to each worker, and were those procedures followed?
5. Was the person who designed the road qualified to do so?
6. Was the road location and design adequate in all the circumstances of this particular situation?
7. Were the appropriate terrain stability field assessments conducted?
8. Was the road built in accordance with the design standards?
9. Were the road centreline and right-of-way boundaries properly flagged? Was previously used or confusing flagging and marking removed?
10. Were the various phases of the road construction kept reasonably concurrent with each other in the circumstances, particularly with respect to drainage structures?

11. Did the person have procedures in place to ensure that, if the right-of-way fallers or road crew came upon any previously unidentified resource feature, or there was confusion of any kind, the crew would immediately shut down the activity, contact the person and not continue the activity until all confusion was resolved?
12. Did the person communicate its procedures to all workers and adhere to those procedures?
13. Had the person adequately marked the centreline and staked the cut and fill slopes if required?
14. Was the marked location consistent with the road plans and profiles, with any necessary changes being marked on the documents and in the field?
15. Did the person or the person's representative walk the road location with the fallers and the road foreman?
16. Did the person have a monitoring plan in place to ensure that each road was inspected to a frequency consistent with the risk levels of the activities being undertaken and with weather events?
17. Did the person conduct inspections consistent with its monitoring plans and with weather events?
18. Did the person have a contingency plan in place in the event of slide, erosion or sedimentation hazards?
19. Did the person have emergency materials on site or nearby, for example straw bales, filter cloth etc.?
20. Was the construction activity shut down immediately when it became apparent that a contravention or unacceptable environmental damage was imminent or actually occurring?
21. Were steps taken immediately to mitigate any slide, erosion or sedimentation hazard?

CONCLUSION

The key to assessing due diligence is "What was reasonable considering all the circumstances?" As one judge put it:

"Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt, and continuing action. To demand more would, in my view, move a strict liability [standard] dangerously close to one of absolute liability."

It is recognized that assessing due diligence in individual cases may represent a new and difficult challenge to SDMs and C&E staff. Each case will present its own unique challenges and a full appreciation of the defence can only be acquired over time after grappling with its application in a number of cases. SDMs and C&E staff should not hesitate to call for assistance where necessary.

Note: This bulletin does not constitute legal advice. It is offered as guidance only by the Business Solutions and Compliance & Enforcement Branches for consideration by SDMs and C&E 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 FRPA coming into force.

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 FRPA coming into force.

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

Once the FRPA is in force, 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 THE FRPA COMES INTO FORCE, IN RELATION TO THE CODE, THE *FOREST ACT* AND THE *RANGE ACT*. NOTE THAT AFTER THE FRPA COMES INTO FORCE, IT 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 in force	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 in force	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 their regulations but to not their standards.

‡ All three defences will be available in upcoming amendments to the *Forest Act* and *Range Act*.

APPENDIX B

TWO GENERAL PRINCIPLES

Although assessments of due diligence must be done on a case-by-case basis, two general principles apply in virtually every case:

1. The greater the likelihood of a harmful event occurring, generally the higher the duty of care.

This just makes sense. If harm is very likely, then more must be done to prevent it. Assessment of the likelihood of a harmful event occurring is based on what might reasonably be predicted through a risk analysis done by a person knowledgeable in the operational practices involved.

Factors that may affect the likelihood of a harmful event occurring include, but are not limited to:

- the nature of the activity;
- the inherent risks in the activity or in the machinery or materials used;
- the size of the operation;
- the remoteness of the site;
- the seasonal or climatic conditions;
- the terrain;
- the past performance or experience of the operator; and
- the nature or sensitivity of the environment.

2. The greater the potential damage, the greater the degree of care required.

This also makes good sense. If the potential harm is very great, then more must be done to prevent it. Factors to consider in assessing the magnitude of harm include, but are not limited to:

- the potential for personal injury or death;
- the presence of an important value or resource - for example a fish stream or a rare or endangered species;
- the potential for property damage or economic loss;
- the long-term effects of the damage; and
- whether the damage can be repaired or mitigated.
- the nature or sensitivity of the environment.