INFO bulletin

Forest Practices Board

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Board Bulletin, Volume 1 - Due diligence

The Forest Practices Code was amended in December 2002 as a transitional step toward implementing the new *Forest and Range Practices Act.* One change introduced the due diligence defence in administrative proceedings. This bulletin describes the legal context and implications of the new approach to due diligence, and identifies some unresolved questions concerning its application.

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 avoid breaking forest practices regulations.

The Forest Practices Code is largely enforced through administrative penalties and remediation orders, rather than prosecutions. These penalties and orders are handed down by government officials, not by the courts. Instead of a judge deciding that an offence has been committed and imposing a fine, a government official determines that there has been a contravention and levies an administrative penalty.

When the Forest Practices Code came into effect in 1995, it specifically provided that due diligence would be a defence to any prosecutions – but it did not specifically state whether due diligence was a defence to an administrative finding of contravention. The Forest Appeals Commission, in a series of decisions, ruled that due diligence was not a defence to an administrative finding of contravention, but could be considered as a factor in determining the appropriate penalty. Because these Forest Appeals Commission decisions were not appealed, there has been no definitive court ruling. However, the new legislation makes it clear that due diligence is now a defence to an administrative determination.

The due diligence defence is set out in section 119.1 of the *Forest Practices Code of British Columbia Act* and section 72 of the *Forest and Range Practices Act*, which is not yet in force. These sections say that, for the purposes of administrative remedies, a person may not be found to have contravened the legislation if the person establishes that they exercised due diligence to prevent the contravention.

Where it is established in an enforcement proceeding that a person's actions caused an event 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.

Mistake of fact might be established, for example, by proving that the person relied on a stream classification carried out by an expert but containing incorrect information, if it was reasonable to do so in the circumstances.

In determining whether a person took all reasonable care to avoid an event, the law considers what a reasonable person would have done in the circumstances. This may include considerations such as:

- the likelihood of the event occurring – the more likely the event, the more care would be expected. Conversely, if an event is not reasonably foreseeable, the person would not be expected to take measures to prevent it;
- the seriousness of the damage that could result – the more serious the damage, the more care would be 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;
- 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;
- 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.

Issues in applying the due diligence defence

With this substantive change in approach to administrative penalties, some aspects of interpretation will need to be resolved through the Forest Appeals Commission and possibly even the BC Supreme Court. The Board intends to participate in administrative appeals involving the due diligence defence in order to contribute to precedents that will establish the appropriate standard of behaviour that constitutes due diligence.

In cases where due diligence is used as a defence, the Board will argue for a high standard of stewardship from anyone seeking to rely on this defence.

The due diligence defence could encourage 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.

An issue that remains to be clarified, however, is where responsibility for remediation lies when there is a contravention – perhaps causing environmental damage – and the licensee establishes due diligence. Who will remedy the contravention or pay a penalty to compensate?

One possibility would be for the government to levy a penalty against the contractor, professional consultant or employee who caused the contravention. However, in many cases, individual professionals and small contractors will not be able to afford penalties large enough to fix any environmental damage. The result could be that the government will be left with the problem to fix.

The due diligence defence could also make enforcement more difficult, more expensive and more uncertain, because the hearing to decide whether there has been a contravention must consider the due diligence measures taken by the party. That can be time-consuming and could reduce the number of enforcement actions by government, because government officials might have to overlook contraventions if enforcement is not seen to be cost-effective.

New legislation

A number of questions remain about the due diligence defence as new forest practices legislation is

implemented over the next few years. Will the due diligence defence promote forest stewardship by forest companies? Will there be an increase in the number of contraventions causing environmental damage that are not remediated, because the responsible party can't afford a penalty large enough to remediate? If so, will the government carry out the remediation?

The Forest Practices Board will be watching carefully as questions of due diligence arise in audits, investigations and administrative appeals. In addition to appealing administrative decisions as public interest warrants, the Board will report publicly what it finds regarding the due diligence defence.

By way of example ...

In 1997, a forest company raised the due diligence defence in an appeal to the Forest Appeals Commission. The Commission confirmed its previous decisions, that due diligence was not legally available as a defence to an administrative finding of Code contravention. Now that the due diligence defence is set out in the statute, the circumstances of that particular case provide an interesting illustration.

The forest company hired a contractor to log a cutblock under its forest licence. There was a creek running through the cutblock. The operational plan called for leaving a 20-metre reserve zone, in which there would be no logging, and an additional 20-metre riparian management zone in which roughly half the trees would be left in a feathered configuration.

Before the contractor started logging, the forest company's logging supervisor met with the contractor and its logging foreman and reviewed the plans and site maps. Copies were given to the contractor. It was intended that only one of the contractor's three feller/buncher operators would work near the stream. That operator was briefed by the contractor about the streamside logging prescription.

The trees that were to be cut in the management zone were marked and an MOF official approved commencement of logging. The company's logging supervisor inspected the site, along with the contractor's foreman, and arranged to supervise the logging in the riparian management zone beginning at 9:00 a.m. two days later.

However, the following day, a feller/buncher operator employed by a subcontractor cut 10 trees in the reserve zone and clearcut a small section of the riparian management zone. This operator had not been briefed on the streamside logging prescription, and according to the contractor, the operator had been instructed not to log in the management zone. The operator apparently accepted responsibility for the error.

This was not a serious contravention, but it illustrates how the due diligence defence may be applied in practice. The company was held responsible despite their efforts to ensure everyone understood what was to happen. Had the company been able to use the defence of due diligence, the operator might have been held responsible instead.

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/dec_all.htm