

Due Diligence Under the FRPA: Keeping It Real

PRIOR TO THE GOVERNMENT'S IMPLEMENTATION of its Forestry Revitalization Plan, the issue of due diligence was particularly controversial in the context of the vicarious liability provisions of the Forest Practices Code of British Columbia Act (the Code). Under the Code, vicarious liability meant that if a contractor committed a contravention of the Code, then so did the licensee who employed that contractor. The licensee was, therefore, subject to administrative penalties on account of its contractor's noncompliance. But is the same true under the *Forest and Range Practices Act* (FRPA)?

The legal doctrine of 'strict' liability would usually allow a party to avoid liability for its contractor's noncompliance with a regulatory statute if that party proved that there was nothing more it could reasonably have done to prevent the contravention—that it was duly diligent. However, early in the Code's history, the Forest Appeals Commission (the Commission) determined that due diligence did not apply to administrative penalties under the Code. The reason was simple: the Code did not expressly provide for it. So, no matter how hard a licensee tried to ensure that its contractor complied with the Code, or however unforeseeable a particular contravention, the licensee nevertheless remained vicariously liable for its contractor's noncompliance. The law refers to this as 'absolute' liability.

The Code's vicarious liability provisions survived the sweeping reforms of the government's Forestry Revitalization Plan. However, due diligence found its way into Section 72(a) of FRPA. While a licensee remained vicariously liable and subject to administrative penalties on account of its contractor's noncompliance, FRPA now allowed the licensee to avoid liability if it could demonstrate that it acted with due diligence to prevent the contravention.

The question then became: would the Commission apply the case law that had developed around the concept of due diligence in other contexts, or would it apply a standard that was unique to FRPA? More specifically, would the Commission set the

diligence bar so high that a licensee's vicarious liability effectively remained absolute?

While we are still in the early days of FRPA, the Commission has clearly signaled where it intends to go with due diligence. In *Weyerhaeuser v. Government of British Columbia et al* (Appeal No.2004-FOR-0005(b)), the Commission was urged to apply a special standard of due diligence given the 'results based' approach of FRPA: "[the] cases where licensees can establish due diligence should be very rare."

Nevertheless, the Commission understood that the legislature would not have included a defense of 'due diligence' in FRPA had it also not intended to adopt the law that had developed around that defense:

The legislature has codified the due diligence defense, and it should be applied in its natural and ordinary sense as defined by the case law ...so as not to impose a higher standard tantamount to 'absolute liability.'

In its *Weyerhaeuser* decision, the Commission adopted the leading authorities in BC on due diligence. Subsequently, the Commission again affirmed the applicability of these authorities in *Kalesnikoff Lumber Co. Ltd. v. Government of British Columbia et al* (Appeal Nos. 2003-FOR-005(b) and 2003-FOR-006(b)).

So, the due diligence defense applicable to administrative penalties under FRPA is something real. But this is not to say that a licensee's vicarious liability under FRPA will never stick. To the contrary, those in the *Weyerhaeuser* appeal who suggested that due diligence should only apply on 'very rare' occasions will have their way: due diligence is, and always has been, a difficult defense to establish. The Commission's pronouncements to date confirm that simply going through the motions is not good enough. Before the Commission negates a licensee's vicarious liability under FRPA on the basis of due diligence, the Commission will want solid evidence that the licensee was active and alert in its efforts to prevent contraventions of FRPA. That said, due diligence will now negate a licensee's vicarious liability if, in reality, there was nothing more the licensee reasonably could have done to prevent a contravention.

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