

## Ignorance of the Law Is No Excuse, Part II

(...But What About an Officially Induced Error?)

**UNLIKE 'DUE DILIGENCE' AND 'MISTAKE OF FACT,' THE GOVERNMENT'S** decision to codify 'officially induced error' as a defence in s.72 of the *Forest and Range Practices Act* (FRPA) did not result in a substantive change to the law. Long before the government specifically included it in the legislation, the Forest Appeals Commission accepted that "government officials should not be insulated where clear erroneous legal advice has been given ..." (*Atco Lumber Ltd. v. Government of British Columbia*, Appeal No. 1997-FOR-04).

Officially induced error excuses a person who has otherwise contravened a statute if the contravention resulted from erroneous legal advice received from a regulatory official who should have known better. It's an exception to the rule that "ignorance of the law is no excuse." Technically, it's an 'excuse' rather than a 'defence' although, other than in the most legally arcane sense, this is a distinction without a difference.

The concept has come before the commission on numerous occasions (perhaps due to the natural tendency of people to blame others for their problems) but, so far at least, it usually does not succeed. Typically, the appellant will not adequately address the technical requirements of the defence, but will merely assert that some misunderstanding between itself and the ministry led to the contravention and leave it at that.

To succeed, an appellant must satisfy each requirement of the defence. Specifically, an appellant must present evidence to establish that it:

- made a legal error;
- considered its legal position before it made the error;
- consulted with the appropriate official regarding its legal position;
- obtained reasonable legal advice from the official; and,
- acted on the basis of the advice.

What is often missing is sufficient evidence of a connection between the alleged 'advice' and the specific act that led to the contravention.

In contrast, the commission's decision in *Arnold and Julie Hengstler v. Government of British Columbia* (Appeal No. 1997-FOR-19) provides a successful illustration of the defence. In this case, the appellants planned to harvest timber from their private land. A public road crossed their property, and the appellants understood that the legal status of the road would determine how close they could harvest to the road. If the road was established as a user-road under Section 4 of the *Highways Act*, then the Crown would own the road from 'bank-to-bank'; however, if the road was established by a legal easement or right-of-way, then the Crown might own considerably more than the bank-to-bank width.

No mention of the road appeared on the appellant's Title Certificate.

The appellants presented evidence to demonstrate that they had clearly sought advice with respect to this issue and were referred back and forth among three appropriate government agencies: the Land Titles Office, the Ministry of Highways, and the then Ministry of Forests. The evidence also demonstrated that the consistent advice the appellants received from these agencies was that if the road did not appear on the title then it was probably a 'Section 4' bank-to-bank road. The appellants further established that they began harvesting on the basis of this advice.

Subsequently, the then Ministry of Forests discovered that a Gazette Notice had established the road with a 40-foot right-of-way. The bank-to-bank width of the road was only about 20 feet. As a result, the appellants had harvested timber within that right-of-way and the ministry, therefore, imposed an administrative penalty against the appellants on account of the trespass. However, the commission nevertheless excused the contravention. The appellants were able to establish that they had contemplated this very issue well in advance of logging, had asked specifically tailored questions of the appropriate government agencies and had acted on the basis of the consistent, reasonable advice they had received from those agencies. Consequently, the commission held that the contravention was the result of an officially induced error. 🌲

*Jeff Waatainen is an adjunct professor of law at UBC, who has practised law in the forest sector for over a decade and currently works as a sole practitioner out of his own firm of Westhaven Forestry Law in Nanaimo.*



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*Big City Advice, Small Town Price*

**Jeff Waatainen**  
BARRISTER & SOLICITOR

Phone: 250.758.9485  
Cell: 250.618.5776  
Facsimile: 250.758.9486  
Email: jeff@bcforestrylaw.com  
Website: www.bcforestrylaw.com

5359 Bayshore Drive, Nanaimo BC, V9V 1R4