

## Ignorance of the Law Is No Excuse

(...But What About Ignorance of the Facts?)

**THE INCLUSION OF A 'MISTAKE OF FACT' DEFENSE** in s-s.72(b) of the *Forest and Range Practices Act* (FRPA) went comparatively unnoticed relative to the defense of due diligence. Mistake of fact protects a person who otherwise contravened the Acts if the "person reasonably believed in the existence of facts that if true would establish that the person did not contravene" the Acts.

The specific inclusion of a mistake of fact defense in FRPA is curious given that it is already part of due diligence. In its famous decision of *R. v. Sault Ste. Marie*, the Supreme Court of Canada clearly enunciated two branches of due diligence:

*The defense will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act of omission innocent, or if he took all reasonable steps to avoid the particular event. [underline added]*

In BC, our Court of Appeal has subsequently echoed these comments. Accordingly, the specific inclusion of a mistake of fact defense in FRPA appears, at best, redundant. At worse, it creates confusion: if the law on due diligence already excuses contraventions that result from mistakes of fact, what more did the Legislature intend to add with a specific reference a mistake of fact defense? The Legislature is presumed not to intend redundancies. Yet, if the specific reference to mistake of fact is said not to add anything to the existing law on due diligence, then its inclusion appears wholly redundant.

Assuming the express inclusion of a mistake of fact defense was merely "for sake of certainty," what does it mean? Specifically, does it provide an incentive for operators to remain ignorant – should it become known as the 'Sergeant Schulz defense?'

Not at all – in fact, it protects those operators who exercise 'diligence' to ascertain the facts associated with their operations. This is why it is part of the due diligence defense in the first place. The key is the reasonableness of the mistaken belief. An operator cannot simply claim that it did not have knowledge of the facts that led to a contravention if a reasonable person in the same position would have known of those facts.

For example, if an operator declines to obtain a professional assessment with respect to an operation that would typically require one, and a contravention results, that operator is unlikely to succeed with a mistake of fact defense on the basis that it did not have the necessary factual knowledge from a professional assessment. That operator would not have demonstrated sufficient diligence to take advantage of the defense.

The Forest Appeals Commission briefly considered the mistake of fact defense in the case of *O'Brien v. Government of British Columbia* (Appeal No. 2005-FOR-14(a)). The case involved riparian management zones (RMZ) under a silviculture prescription that called for 100% basal area retention. These reserves were identified on both the silviculture plan maps and the Exhibit 'A' map attached to the TSL document. Moreover, the reserves were specifically discussed between the licensee and the Ministry of Forests and Range at a pre-work meeting. Nevertheless, the reserves were clearcut.

The appellant claimed that the RMZ boundaries were not adequately ribboned and, therefore, that he did not know the location of the reserves once in the field. The Commission concluded that a reasonable operator, under the circumstances, would not have believed that there were no RMZs to protect in the block. The Commission found that the appellant was "an experienced licensee and should reasonably have known" that there were RMZs that required protection. Accordingly, the mistake of fact defense did not allow the appellant to simply stick his head in the sand and claim that he did not know there were RMZs in the field. A reasonable operator under the same circumstances would have exercised further diligence to obtain further facts about the RMZs. 🐾

*Jeff Waatainen is an adjunct professor of law at UBC, 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.*



**WESTHAVEN FORESTRY LAW**  
*Big City Advice, Small Town Prices*

**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