BRITISH COLUMBIA

Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 1997-FOR-19

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN:	Arnold and Julie Hengstler	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Toby Vigod — Chair
Annie Booth — Member
David Walkem — Member

DATE OF HEARING: December 1, 1997

PLACE OF HEARING: Victoria, B.C.

APPEARING:
For the Appellant: Arnold and Julie Hengstler
For the Respondent: Jeff Loenen, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal brought by Arnold and Julia Hengstler against the decision of a Review Panel, dated May 23, 1997. The Review Panel rescinded the Determination of the District Manager dated February 4, 1997 that the Hengstlers contravened section 97(2) of the *Forest Practices Code of British Columbia Act* (the "*Code*"), but upheld his Determination that the Hengstlers contravened section 96(1) by harvesting Crown timber without authorization. The Review Panel also upheld the penalty of $2,564.43, assessed pursuant to section 119 of the *Code*.

This appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*.

BACKGROUND

At the end of 1987, Kurt Hengstler and his son Arnold, purchased 160 acres of land on Salt Spring Island from MacMillan Bloedel Ltd., legally described as the Northeast 1/4 of section 44, South Salt Spring Island, Cowichan District. A small lane, referred to as Musgrave Road, cuts across the southwest corner of the Hengstlers' property and later emerges in the northwest corner of the property. The events leading to this appeal take place solely in relation to that portion of the road located in the southwest corner of the lot.

The Hengstlers had their State of Title Certificate printed in February, 1988. No mention of Musgrave Road appears on that Title Certificate.

In the spring of 1988, Kurt Hengstler spoke with the Salt Spring Island Highways Foreman, John Stepaniuk, to discuss maintenance of the sections of Musgrave Road running through his property. According to notes of the conversation taken by Kurt Hengstler, Mr. Stepaniuk said that the Highways Department maintained the road and that the road was not a gazetted road, which meant that it was classified as a "user road." Mr. Hengstler's notes also show that Mr. Stepaniuk stated that the road was not surveyed and that it had no exact width; it was only as wide as the shoulders of the road. Therefore, according to Mr. Stepaniuk, all other land and timber belonged to the property through which the road passed.

In the spring of 1995, the Hengstlers contemplated logging part of their land near Musgrave Road. On March 20, 1995, they attempted to determine if there was a legal easement for the road. A title search was performed, but no reference to Musgrave Road or any easements related to the road appeared on title.

The Hengstlers decided not to log their land in 1995, but considered logging again in the spring of 1996. Kurt Hengstler contacted the Land Title Office in Victoria on April 18, 1996 and asked about the legal status and width of Musgrave Road. Kurt Hengstler testified that an official with the Land Title Office told him that if the road was not on title then it was probably a "section 4" road, which meant that the road was only as wide as its banks. Mr. Hengstler also testified that the official told him that the Ministry of Transportation and Highways (MOTH) would be able to tell him more about the status of the road.

On April 24, the Hengstlers began selective harvesting in the southwest corner of the property. Before harvesting near Musgrave Road, Mr. Hengstler followed the advice of the official with the Land Title Office and contacted MOTH. Kurt Hengstler phoned MOTH twice on May 1, 1996 to determine the width of Musgrave Road. He was initially told to phone back later when the appropriate official could answer his question. On his second call to MOTH, the official could not provide any further information on the status of the section of Musgrave Road running through his property. Mr. Hengstler was told that he should contact the Land Title Office in Victoria for that information.

On May 3, 1996, Kurt Hengstler contacted the Land Title Office again with the same inquiry about the location of Musgrave Road and its width. Mr. Hengstler testified

that the official at the Land Title Office said that "if Highways doesn't know then how are we to know where the road is?" The official told him that the Land Title Office was there to do land title searches and to register land and that they would do a title search for Mr. Hengstler if he paid for one. Mr. Hengstler also stated that the official gave him the same information as last time: if the road was not registered on the land title, then it was probably a "section 4" road (i.e. a "bank to bank" road). After this phone call, Kurt Hengstler's son, Arnold Hengstler, took over the logging operation and became responsible for the conversations with government officials.

Arnold Hengstler phoned the Ministry of Forests (MOF), Duncan Forest District, on May 7, 1996 to discuss the status of Musgrave Road. He spoke with Ron Poets, a MOF Forestry Engineer, and discussed the conditions under which a cutting permit was required. Arnold Hengstler testified that Mr. Poets told him that if the section of Musgrave Road was not on his land title, then it was probably a "section 4" road. Mr. Poets said that a cutting permit would be needed only if there was a legal easement or right-of-way registered on the title of the property. Mr. Poets said that, if it was necessary, Mr. Hengstler should contact Mr. Paul Tatryan of the MOF to discuss a permit.

After the conversation with Ron Poets, Arnold Hengstler called Brian Wolfe-Milner, a land surveyor on Salt Spring Island, for another opinion on the section of Musgrave Road at issue. Mr. Hengstler testified that he was advised by Mr. Wolfe-Milner that the road through the Hengstlers' property had never been surveyed and there were no surveyed pins to mark the boundary of the road. Further, Wolfe-Milner advised Mr. Hengstler that, based upon a 1920 survey showing a "proposed road" (Road Survey 1203-1), and the lack of legal easement or right of way, the actual road could be two hundred feet "one way or another".

The final step Mr. Hengstler took to determine the status of the road on the morning of May 7, 1996, was to have another land title search done. He visited the N.R.S. realty office on Salt Spring Island and paid for a title search. Once again, no reference to Musgrave Road appeared on title. Later that afternoon, the Hengstlers logged the trees around the southwest portion of Musgrave Road – primarily along the west side of the road. They subsequently replanted the logged areas.

After receiving complaints about the harvesting activities alongside Musgrave Road, Dan Berard, Field Operations Supervisor with the Duncan Forest District, attended the Hengstlers' property on May 10, 1996 to investigate a potential unauthorized cutting of trees. He made a second visit to the logged site after speaking with the Duncan Forest District Operations Manager, Murray Stech, who told Mr. Berard that Musgrave Road had a 40 foot right-of-way. On this second visit, Mr. Berard "eyeballed" the centre of the Musgrave Road, which is approximately 9 feet wide. He then measured 20 feet (6.1 metres) from either side of the centre to determine how many trees were cut within the 40 foot right-of-way.

Mr. Berard testified that he initially identified 17 trees which could fall within this area, which he numbered 1-17 starting at the north and moving south. For the purposes of calculating stumpage, he deleted #6 and #17 as being greater than 6.1

metres from the centre and #3 as it was an alder. At the hearing, Mr. Berard said that he had identified 4 trees (#4,#7,#10, and #11) in addition to the #3 alder as being located in the fill, which he stated would fall within the definition of "bank to bank", i.e."top of cut to bottom of fill".

On October 31, 1996, Gary Morley, Property Management and Land Survey Co-ordinator, Vancouver Island Region, wrote to Murray Stech regarding the legal status of Musgrave Road. He provided a copy of the title for the Hengstlers' property, noting that the title does not reflect the establishment of Musgrave Road. However, he also provided a copy of a Gazette Notice dated April 17, 1930 and Road Survey 1203-1, which he states "supported the Gazette in establishing Musgrave Road in 1930". Mr. Morley went on to say that, although gazettes establishing roadways have not been noted on many land titles, the effectiveness of the road establishment is "undiminished".

The 1930 Gazette Notice in question states:

MUSGRAVE ROAD

> Notice is hereby given that the following described highway, 40 feet in width, is hereby established:
>
> Commencing at the intersection of the centre line of Isabella Point Road and the easterly boundary of Section 13, Range 1, South Division of Saltspring Island; thence in a general southerly direction to the west boundary of the North-west Quarter of Section 42; thence north-westerly to a point in the North-west Quarter of Section 51; *thence in a general westerly direction to a point in the South-west Quarter of Section 50; thence southerly to a point on the west boundary of the South-east Quarter of Section 44*; thence north-westerly to a point in the South-west Quarter of Section 49; thence ...; and having a total length of 9.4 miles more or less, as shown on a plan on File 2280 in the Provincial Department of Public Works, Victoria, B.C. [emphasis added]
>
> W.A. McKenzie, Acting Minister of Public Works.

Thus, the Gazette Notice establishes a highway "40 feet in width". There is no specific reference in the Gazette to the road passing through the Appellant's lot, which is the north*east* quarter of section 44. The Gazette simply provides a written description of the general route of Musgrave Road "as shown on a plan on File 2280 in the Provincial Department of Public Works." This plan on File 2280 (referred to as the "1930 plan") shows the general, unsurveyed, location of Musgrave Road. The plan shows Musgrave Road passing from section 50 (referred to in the Gazette) through the southwest corner of the northeast quarter of section 44 (the subject site on Hengstlers' property), down to the southeast quarter of section 44 (also referred to in the Gazette). The only survey map for the road is the 1920 survey of a "proposed" road, Road Survey 1203-1 which shows the road in the same general location as shown in the 1930 map.

On February 4, 1997, Jerry Kennah, the Duncan Forest District Manager, concluded that the 1930 Gazette Notice established "the 40 foot right-of-way as Musgrave Road". He found that the Hengstlers had cut and removed Crown timber from within the Musgrave Road right-of-way contrary to section 96(1) of the *Code*. Section 96(1) of the *Code* states that a person must not cut, remove, damage or destroy Crown timber unless authorized to do so. He also found that the Hengstlers had done so without properly ascertaining the location of their property boundary contrary to section 97(2) of the *Code* which states: "Before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land." Mr. Kennah assessed a penalty of $2564.43 based on a timber volume of 57m^3.

The Hengstlers applied to have this Determination reviewed under section 127 of the *Code*. In a review decision dated May 23, 1997, the Review Panel found that the Hengstlers' efforts to ascertain the boundary were sufficient to meet the requirement of section 97(2) and rescinded that portion of the determination. However, the Panel upheld Mr. Kennah's determination that section 96(1) had been contravened and upheld the assessed penalty of $2564.43. The Panel stated that, even though the Gazette Notice made no specific reference to the road being within the Hengstlers' property, the evidence from both parties demonstrated that a portion of the road, in fact, intersects with the Hengstlers' property. As there was no dispute that the road crosses the Hengstlers' property, nor that the Gazette Notice "describes the general location of the road (without specific reference)", the Panel found that "the location of Musgrave Road that crosses through the Hengstlers' property has been Gazetted" (p. 12). While the Panel acknowledged that the "exact location" of Musgrave Road was "unclear", it found that:

> the exact location of Musgrave Road within the parcel of land is not significant – what is significant is that a portion of Musgrave Road does pass through the parcel of land, and where is does, it is a 40-foot wide strip of Crown land, 20 feet each side of the centre of the running surface (p. 12).

The Hengstlers appealed the section 96(1) contravention and the quantum of the penalty to the Commission. They maintain that the exact location of Musgrave Road cannot be accurately ascertained based on the Gazette Notice. Furthermore, the Hengstlers argue that various government agencies continually referred them "back to one or another of themselves" to determine the legal status of the road, which they understood from those agencies to be a "bank to bank" road. In essence, the Appellants are claiming that, if they cut trees on Crown land, it was the result of an officially induced error.

In the circumstances of the case, the Hengstlers ask that the contravention and the penalty be rescinded or that the penalty be substantially reduced.

The MOF argues that the penalty should be upheld since a contravention of section 96(1) of the *Code* occurred. The MOF states that the penalty was not to punish the Hengstlers for non-compliance, but was calculated to reflect the stumpage that

would have been payable to the Crown had authorization to harvest been properly obtained.

The Forest Practices Board takes no position on whether a contravention occurred in this case but submits that, if a contravention is found, the penalty assessed may not adequately take into account the efforts made by the Hengstlers to avoid the contravention nor the extent to which the actions of government officials contributed to the contravention.

ISSUES

The main issues to be determined in this appeal are as follows:

1. Did the Ministry properly establish the location of Musgrave Road for the purposes of determining the extent of the unauthorized harvesting and assessing the quantum of penalty?

2. Are the Hengstlers entitled to a defence of officially induced error in the circumstances of the case?

The Panel will address these issues in turn.

DISCUSSION AND ANALYSIS

1. Did the Ministry properly establish the location of Musgrave Road for the purposes of determining the extent of the unauthorized harvesting and assessing the quantum of penalty?

The Hengstlers acknowledge that the 1930 Gazette Notice and the reference to Public Works Plan 2280 establishes Musgrave Road with a 40 foot right-of-way. However, to determine which trees were within the width of this road, the Hengstlers argue that the MOF must first be able to establish the “exact” location of the road and then measure out 20 feet from the road’s centre. This is a problem since the Hengstlers submit that Musgrave Road has never been surveyed and there are no survey pins or right-of-way plans to determine its precise location.

Further, the Hengstlers point out that the Gazette Notice only provides a general description of the road’s location and the maps supporting the Gazette Notice are not accurate. In particular, neither the 1930 map nor the 1920 survey map show the road passing through the *northern* portion of their property whereas, in fact, the road runs through the northwestern corner of their property, approximately 150 feet from the property line. They note that even the Review Panel found that the exact location of Musgrave Road was “unclear”.

At the hearing, the Hengstlers compared four maps showing the location of Musgrave Road: the 1920 Road Survey 1203-1, the 1930 plan on File 2280, an Islands Trust map and a MacMillan Bloedel map. Arnold Hengstler points out that none of the four maps show the road in exactly the same location. He submits that of all the maps, the MacMillan Bloedel map is the most accurate as, unlike the other

maps, it shows the road cutting well inside the northwestern property marker of their property.

The Hengstlers argue that the Review Panel erred in finding that the exact location of Musgrave Road "is not significant". To the contrary, the Hengstlers submit that determining the exact legal location of the road is crucial to assessing the fine. The Hengstlers submit that an adjustment of the road's centre by as little as one foot (1/3 of a metre), could reduce the assessed penalty by approximately 27%. If the road centre was moved only three feet (one metre), they submit that the volume of timber cut on Crown land would be reduced by approximately 51% of the assessed 57m^3 (i.e. 28m^3), thereby reducing the $2564.43 penalty to approximately $1,260. Furthermore, the Hengstlers argue that two of the trees included in the penalty should have been excluded as they were "leaners" (#4 and #9). They submit that the assessed fine should be rescinded or substantially reduced on the grounds that the exact boundary of Musgrave Road is uncertain.

The Hengstlers' argument is premised on there being a "proper" or "exact" location for the road *other than* its existing location. However, no evidence was tendered to the Commission which would suggest there is a "proper" location against which the actual location of the road can be measured. The Gazette Notice simply provides a "meets and bounds" description and refers to the illustration of the road on the 1930 plan. No survey of the road accompanied the Gazette Notice and the Commission notes that, at that time, none was required. Section 8 of the *Highway Act*, R.S.B.C. 1924, c. 103, as amended, stated:

> 8. It shall be lawful for the Minister*, in his absolute discretion*, to make public highways of any width not exceeding sixty six feet, and to vary and alter any existing roads, and to take, either at the time the highway is first made or declared or at any subsequent time, at any point additional land beyond the width of sixty six feet where necessary to secure the efficient construction, maintenance, or use of the highway, *and to declare the same by a notice in the Gazette, setting forth the direction and extent of such highway*; and for purpose, by himself, his agents, servants, and workmen, without any notice to and without any consent on the part of any person owning or occupying the land, or having or claiming any estate, right, title or interest therein, to enter upon, set out, ascertain, and take possession of any private roads and any lands in the Province, and any timber thereon.... [emphasis added].

As counsel for the MOF pointed out, to establish a highway, section 8 of the *Act* simply required the "direction and extent" of the highway to be set out in a gazette. The general direction of Musgrave Road is set out in the 1930 Gazette Notice, as was its "extent", i.e., "9.4 miles more or less as shown on a plan on File 2280". Although the 1930 plan shows the northern portion of the road further west than the actual location of the road, this has little bearing on the issue before us. The harvesting which is the subject matter of this appeal took place in the southern corner of the property and the Commission finds that the plans show that portion of Musgrave Road in the same general vicinity as the actual road.

Nor does it make any difference for the purposes of establishing the road that it was not registered on the Hengstlers' title. The Commission accepts the MOF's submission that the relevant legislation in 1930 did not require gazetted roads to be registered on title. Having said that, the legislation has always been clear that the soil and freehold of a highway is vested in the Crown and that a person takes title to property subject to a highway (see the *Highway Act* and the *Land Title Act*).

The MOF submits that the Gazette provided a general description of Musgrave Road and specifically referred to the 1930 plan on File 2280. The MOF claims that the 1930 plan clearly depicts Musgrave Road passing through the Hengstlers' parcel. It argues that with the combination of the Gazette, the 1930 map, and the actual construction of the road, Musgrave Road is legally established. Therefore, the MOF submits that the Hengstlers took title to their property subject to the 40 foot highway belonging to the Crown. The MOF submits that it was appropriate for Mr. Berard to determine the centre line and legal width from the existing road and that the Hengstlers were given the benefit of any doubt during the measuring. MOF submits that the Ministry's actions in this regard and the penalty assessed is appropriate.

In the circumstances, the Commission is of the view that the best evidence of the road's exact location it the road itself. The Commission accepts that the road was legally established as a highway and the Hengstlers took their land subject to that road. As there are no surveys or plans, it was reasonable for the MOF to conclude that the trees cut within the 40 foot distance from the centre of Musgrave Road constituted Crown timber for the purposes of section 96(1) of the *Code*. Further, Mr. Berard testified that he took detailed notes of the trees cut and the measurements when he attended the property in May, 1996. The Commission accepts his distance and volume calculations as accurate.

2. Are the Hengstlers entitled to a defence of officially induced error in the circumstances of the case?

The Hengstlers submit that the determination and penalty should be rescinded since they expended more than a reasonable effort to determine the boundaries of their property in relation to Musgrave Road. They claim that the government induced error resulted in the cutting of Crown timber and their belief that Musgrave Road was a section 4 "bank to bank" road because it was not registered on their title. The Hengstlers argue that they utilized every venue available to them to determine the status and location of Musgrave Road. However, they submit that they were misled after relying on conversations with government officials at the Land Title Office, MOTH and MOF.

The MOF submits that the defence of officially induced error only operates with respect to criminal and quasi-criminal regulatory offences. Although MOF admitted that it was an "open question" whether officially induced error applies to administrative remedies, it argues that there are good reasons why the defence of officially induced error should not apply to administrative remedies under the *Code*.

The MOF submits that the *Code* differentiates between the remedies and processes outlined for regulatory offences under Division 5 and for administrative remedies available under Division 3. It argues that the Legislature established different schemes for the prosecution of regulatory offences under Division 5 and the levying of administrative remedies under Division 3. MOF submits that, in the context of criminal and regulatory offences, officially induced error will operate so as to excuse the conduct of the defendant and to avoid a finding of guilt. However, MOF submits that because the policy rationales for administrative remedies levied under section 119 of the *Code* are to encourage compliance with the *Code* and to compensate the Crown for unauthorized timber cutting, the rationale for allowing a defence of officially induced error carries less weight.

The MOF also argues that officially induced error is very similar in character to the defence of due diligence, which is available for prosecution of *Code* offences, but is not available for administrative remedies (see *MacMillan Bloedel Ltd*. v. *Government of British Columbia* (Forest Appeals Commission Appeal No. 96/05(b), February 19, 1997 (unreported)) and *Canfor* v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-06, October 10, 1997 (unreported)). It submits that administrative penalties are not just an "offence by a different name" and that they do not require a finding that an offence has been committed or a finding of guilt. It argues that the conduct of a person faced with an administrative remedy is not relevant to a finding of whether the *Code* has been contravened, but rather, to an assessment of the quantum of the penalty. In this case, MOF asserts that if the defence of officially induced error did apply, the Hengstlers would not even be required to pay the stumpage that the Crown would have been entitled to had the necessary authorization been obtained.

The Forest Practices Board did not take a position on whether officially induced error is available as a defence to administrative penalties.

The Commission has recently found that officially induced error is available as a defence to administrative penalties under the *Code* (see *Atco Lumber Ltd. v. Government of British Columbia* (Appeal No.97-FOR-04, January 8, 1998)(unreported). It applied the reasoning of Chief Justice Lamer in a recent decision of the Supreme Court of Canada in *R*. v. *Jorgensen*, [1995] 4 S.C.R. 55. In that case, Lamer C.J. outlined the policy rationale underlying officially induced error as follows:

> Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat* (pp.77-78).

In further describing officially induced error, Lamer C.J. clearly distinguishes it from the defence of due diligence:

> Officially induced error is distinct from a defence of due diligence, and there is no reason to confine it to the regulatory offence context, though it is obvious that for certain crimes, such as those involving moral turpitude, the chances of success of such an excuse will be nearly nil (p.78).
>
> ... [D]iligence may be necessary to obtain the advice which grounds an officially induced error. This is so because an accused who seeks to rely on this excuse must have weighed the potential illegality of her actions and made reasonable inquiries. This standard, however, does not convert officially induced error into due diligence (p.76).

The "defence" or "excuse" of officially induced error of law represents an attempt to avoid the unfairness of punishing someone who may be misled by a public official. In *Regina* v. *Cancoil Thermal Corporation and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.), the Court noted that "even in offences of absolute liability, where 'it is not open to the accused to exculpate himself by showing that he was free of fault', there is no reason why other general defences should not be available such as necessity, duress and coercion. The usual defences are available, except the defences of lack of intention" (p. 301).

Although the *Cancoil* and *Jorgensen* cases both involved "offences", the Commission finds that the rationale for the defence of officially induced error is equally applicable to administrative remedies. As the Commission stated in *Atco Lumber*, government officials should not be insulated where clear erroneous legal advice has been given and where the requisite elements of the defence of officially induced error have been made out. This finding is consistent with Chief Justice Lamer's discussion of officially induced error in *Jorgensen,* where he stated, "while knowledge of the law is to be encouraged, it is certainly reasonable for someone to assume he knows the law after consulting a representative of the state acting in a capacity which makes him expert on the particular subject" (p.67). In explaining the rationale for officially induced error, Chief Justice Lamer referred to *R.* v. *MacDougall* (1981), 60.C.C.C. (2d) at 160:

> The law, however, is ever-changing and ideally adapts to meet the changing mores and needs of society. In this day of intense involvement in a complex society by all levels of Government with a corresponding reliance by people on officials of such Government, there is ... a place and need for the defence of officially induced error ...(p.72).

Although Lamer stated that officially induced error "will arise most often in the realm of regulatory offences", he also stated that "there was no reason to confine officially induced error to the regulatory offence context" (p.78). Thus, the Commission finds that the rationale regarding the "complexity of contemporary regulation" and the adaptability of law applies not only to regulatory offence

regimes and the *Criminal Code,* but also to a regulatory regime where the penalties are administrative in nature. The Commission follows its reasoning in *Atco* and concludes that the "defence" or "excuse" of officially induced error is available when administrative remedies are levied under the *Code*.

The next question is whether the defence is made out on the facts of this case.

The specific requirements for officially induced error were set out by Lamer C.J. in *Jorgensen*. The requirements are nicely summarized in the headnote of the case as follows:

> In order for an accused to rely on an officially induced error as an excuse, he must show, after establishing he made an error of law (or of mixed law and fact), that he considered his legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in his actions. When considering the legal consequences of his actions, it is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that his conduct was permissible. The advice came from an appropriate official if that official was one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. If an appropriate official is consulted, the advice obtained will generally be presumed to be reasonable unless it appears on its face to be utterly unreasonable. The advice relied on by the accused must also have been erroneous, but this fact does not need to be demonstrated by the accused. Reliance on the official advice can be shown by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused situation.

Chief Justice Lamer affirmed that the elements of officially induced error are to be proven by the accused on a balance of probabilities (p.82). Once officially induced error of law is successfully raised, it functions as an excuse rather than a full defence. Lamer C.J. explained the appropriate remedy as follows:

> As this excuse does not affect a determination of culpability, it is procedurally similar to entrapment. Both function as excuses rather than justifications in that they concede the wrongfulness of the action but assert that under the circumstances it should not be attributed to the actor (pp.81-82).

Lamer stated that the successful application of an officially induced error of law argument will lead to a judicial stay of proceedings rather than an acquittal. However, in *R.* v*. Wyatt,* [1996] N.S.J. No. 546 (N.S. Prov. Ct.) Judge Crawford noted that Chief Justice Lamer's reasons in *Jorgensen*, although weighty, are *obiter.* Crawford referred to a case comment on *Jorgensen* by Don Stuart, in which he states that the analogy drawn to entrapment is troubling and the remedy of a stay leads to anomalous results. Crawford also noted that none of the Nova Scotia cases referred to by Chief Justice Lamer considered anything other than the result

of a successful raising of officially induced error of law being a complete acquittal. For example, Lamer referred to the Nova Scotia Court of Appeal decision in *R.* v. *MacDougall* (1981), 60 C.C.C. (2d) 137 where the court recognized an officially induced error of law as a "defence" leading to an acquittal. In *Wyatt*, the court also acquitted the accused. This Commission does not have the power to stay proceedings. In a case where officially induced error is made out, the Commission finds that the appropriate remedy is to find that a contravention has not occurred.

In this case, the Hengstlers submit that that they did not knowingly or intentionally cut Crown timber and that they made every effort to determine the legal status and location of Musgrave Road. They submit that despite their diligence, they were misled by government officials. As outlined above, the Hengstlers described how they came to believe that the Musgrave Road was a section 4 "bank to bank" road and not a 40 foot wide highway running through their parcel of land.

The Hengstlers submit that that none of the government officials at the Land Title Office, MOTH or MOF ultimately provided the appropriate information on the legal status of the road. They claim that they were led to believe that the information describing the road as 40 feet wide and as being established by Gazette should have appeared on their title. To support their position further, the Hengstlers refer to the June 3, 1997 letter from Ken Collingwood, MOF Regional Manager, who stated that it was his view "that the Land Title Office was remiss in not placing this right-of-way on the Title Certificate."

In the case before us, it is clear that reliance on the land title to determine whether a road has been gazetted is incorrect. According to Mr. Jacques, Registrar with the Vancouver Island Land Title Office, while some gazetted roads have made it onto the land title registry, there are many that have not. He testified that there is no, and has been no legal requirement for a road to be registered on title when established by notice in the gazette. Mr. Stackhouse, Director of Land Titles, explains in a letter dated July 7, 1997, that the Registrar of land titles has no authority to "unilaterally register a Statutory Right-of-Way as a charge against a title or to accept from a legal description a road established by Gazette notice even when the Registrar has actual notice of the Gazette reference." The Registrar can only register a highway on title upon the application by the Minister of Transportation and Highways. Mr. Stackhouse also states:

> At the present time, to the fullest extent possible in these times of reduced resources, the Land Title Branch, in cooperation with the Ministry of Transportation and Highways, is attempting to process as many applications dealing with old Gazette notices as is possible.

Therefore, the absence of a reference to the Gazette on one's title has no legal bearing on whether the road has, in fact, been gazetted.

The MOF argues that, if officially induced error is a defence to an administrative remedy, the defence is not made out in this case. First, the MOF submits that the Hengstlers did not exercise all reasonable diligence in attempting to ascertain the legal status of the road. If they had requested a "complete" title search, which

includes a search of the "Miscellaneous Notes", the MOF maintains that the Hengstlers would have found a reference to the Gazette notice. There is a reference in the Miscellaneous Notes to Key Plan (KP) 1311. This Plan has a note on it stating "Musgrave Road 40' wide Gazetted 17th April 1930 page 819". The MOF claims that a proper search would have included the Miscellaneous Notes.

Second, the MOF submits that the advice Kurt Hengstler received from the Land Title Office was not "clear and definitive" advice on the status of Musgrave Road. The MOF asserts that the official only stated that if the road was not on title, then it was "probably" a section 4 road. The MOF submits that Kurt Hengstler followed the Land Title Office advice and spoke with MOTH, but that he did not receive any information on the status of the road. MOF admits that Mr. Hengstler received the "run around," but claims that there was no officially induced error. It also argues that the advice Arnold Hengstler received from Ron Poets (MOF) was ambiguous and that MOF personnel were not in a position to comment on the status of the road. Therefore, it was not reasonable for Arnold Hengstler to rely on what Mr. Poets said about the road. In the absence of any reliable or substantive advice with respect to the legal status of Musgrave Road, the MOF asserts that the Hengstlers did not establish the requisite elements of the officially induced error defence on a balance of probabilities.

The Commission disagrees.

The Commission finds that the Hengstlers met all the elements of the defence and demonstrated on a balance of probabilities that an officially induced error of law occurred. The officially induced error caused the Hengstlers to believe incorrectly that they could log to the banks of the existing section of Musgrave Road running through their parcel of land.

The Commission finds that, in the circumstances of this case, the Hengstlers made an error of law in determining that Musgrave Road was a section 4 "bank to bank" road and not a 40 foot highway. As mentioned above, the Commission finds that the Gazette Notice, dated April 17, 1930, legally established Musgrave Road as a public highway with a width of 40 feet. By determining that the trees that they cut were on their property, and not Crown property, the Hengstlers made an error in law. The Commission has found that the cut trees were within the area established for Musgrave Road and were on Crown land.

Chief Justice Lamer held in *Jorgensen* that the accused must demonstrate reliance on the official advice. Reliance can be shown by proving that "the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation" (p.). The Commission notes that all the instances of advice mentioned above were prior to the logging occurring. The Hengstlers contemplated logging well in advance of doing so and made various inquiries to determine whether there was an easement or right-of-way adjacent to the road. They had two title searches performed, and consulted officials at the Land Title Office, MOTH, and MOF, as well as a land-surveyor, Brian Wolfe-Milner.

In the circumstances of this case, the Commission finds that the Hengstlers relied on the advice they obtained.

The Commission finds that the questions the Hengstlers asked of the various government agencies were specifically tailored to their situation as is evident from the answers the officials gave them about the status of the road. The fact that the Hengstlers did not specifically request the "Miscellaneous Notes" to be printed with their title searches is not determinative in this case. According to Mr. Jacques, Registrar with the Vancouver Island Land Title Office, the Miscellaneous Notes information screen is not part of the actual land title. He stated that it had no official status, and it was for information purposes only.

Further, the Commission notes that even the search obtained by MOTH, the Ministry responsible for highways, failed to include the Miscellaneous Notes. According to the Hengstlers, it wasn't until June 19, 1997, one and one half months after the trees were cut, that a search was produced showing the Miscellaneous Notes. In any event, the Commission finds that there was no reason for the Hengstlers to believe they were not getting all the relevant information on their title.

The Commission acknowledges that the Hengstlers were never directly told by government officials that they could log to the banks of Musgrave Road. Although, as pointed out by counsel for the MOF, the various ministry officials did not say that the road "*was"* a bank to bank if it did not show up on the land title, they only said it was "*probably",* the distinction in the circumstances is minimal. When asked by counsel for MOF why they accepted the information from government officials that did not provide a firm answer, Mr. Hengstler replied that, after contacting the Land Title Office, MOTH and the MOF, there was no one else to contact. Given that the message from the various government officials was consistently that, if the road did not show up on their land title, it was probably a "bank to bank" road, it was reasonable for the Hengstlers to believe that they had their answer.

The Commission finds that the Hengstlers obtained this advice from appropriate government officials. In *Jorgensen*, the Chief Justice stated that the official whose advice is followed must be "one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question" (p.79). In this case the Commission finds that the Hengstlers made all reasonable enquiries. They obtained similar advice from the various agencies and officials who generally encouraged reliance on the land title. In the circumstances, it is the cumulative effect of their responses that elevates the Hengstlers interpretation and reliance to reliance that is reasonable.

The Commission notes that the MOTH officials, whom Kurt Hengstler contacted in 1996, were especially appropriate since MOTH is responsible for administering the laws governing highways. Kurt Hengstler's explanation of his second conversation with the Land Title Office, where the official said "if Highways (i.e. MOTH) doesn't know, then how are we to know where the road is?", reinforces the reasonableness of his belief that MOTH was the appropriate government bureau to contact. Moreover, Ken Jacques from the Vancouver Island Land Title Office stated that he

would refer someone to MOTH if they were seeking information on a road on their lot, and it did not appear on the land title. Furthermore, the Director of Land Titles, Stephen Stackhouse, explained in his July 7, 1997 letter to Ken Collingwood that the Hengstlers should have contacted MOTH, "who should have been in a position to advise them respecting the Gazette notice" (p. 2). However, according to the evidence in this case, the Commission finds that MOTH did not provide any specific advice to Kurt Hengstler except a suggestion to inquire at the Land Title Office.

In *Jorgensen*, Chief Justice Lamer held that "if an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable" (p.80). The Commission finds that the advice – "if the road was not on the title, then it is probably a section 4 'bank to bank' road" – was not unreasonable on its face.

In sum, the Commission determines that on a balance of probabilities, the Hengstlers demonstrated all the elements of an officially induced error of law in relation to their belief that the road was a section 4 "bank to bank" road and not a gazetted road. The Commission notes that the Review Panel also stated that "there may have been a measure of 'officially induced error'.

There is one issue remaining. Mr. Berard testified that, in his notes made in May 1996, he had identified 5 trees (#3,#4,#7,#10, and #11) as being located in the fill area which he said would be considered to be in the "bank to bank" portion of the road. One of those trees was an alder (#3) and was not counted in the calculation of stumpage. As noted above, Arnold Hengstler challenged the inclusion of #4 as he said that it was a 'leaner' hanging over a bank that was ready to fall over and that he had removed it.

Section 4 of the *Highway Act* reads as follows:

Certain roads are public highways

> 4. (1) Where public money has been expended on a travelled road that has not before then been established by notice in the Gazette or otherwise dedicated to public use by a plan deposited in the land title office for the district in which the road is situated, that travelled road is deemed and is declared to be a public highway.

The Review Panel, in its decision, indicated that it had confirmed with MOTH staff that if a road is not gazetted or otherwise dedicated to public use by a plan deposited in the land title, then the road is, according to MOTH policy, classified as a "bank to bank" road. No policy was filed in evidence before the Commission, however, Mr. Berard testified that it was his understanding that "bank to bank" meant from "top of cut to bottom of fill." Although Kurt Hengstler testified that officials from the Land Title Office told him that if the road was not on title then it was probably a "section 4" road, which meant that the road was "only as wide as its banks", it does not appear from the evidence, that any of the Hengstlers made further inquires as to what this meant. The Commission finds that, in this case, the defence of officially induced error does not apply to the cutting of any trees within the "bank to bank" portion of the road.

However, based on the evidence before it, the Commission is not in a position to either determine the exact number of trees or to calculate the volume of timber from those trees that were cut in that area. For that reason, the Commission pursuant to section 138(1) of the *Code* is referring the matter back to the District Manager with directions.

DECISION

The Commission finds that an officially induced error of law occurred which led to the reliance by the Hengstlers that the portion of Musgrave road that cuts through their property was a section 4, “bank to bank” road, rather than a gazetted road. However, the defence does not apply to any trees that were cut within the “bank to bank” portion of the road. The Commission, therefore, refers the matter back to the District Manager to determine whether trees #4,#7,#10 and #11 fell within the “bank to bank” portion of the road and, if so, to determine the volume of timber cut and to assess a penalty based on the stumpage rate of $44.99/$m^3$, the rate used in the initial determination and Review Panel decision. In order to make his deterimination, the Commission directs the District Manager to consult with MOTH officials to determine the parameters of a “section 4” road.

The appeal is allowed in part.

Toby Vigod, Chair
Forest Appeals Commission

February 24, 1998