

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Pope & Talbot v. British Columbia***,  
2009 BCSC 1715

Date: 20091214  
Docket: S076442  
Registry: Vancouver

Between:

**Pope & Talbot Ltd.**

Appellant

And

**Her Majesty the Queen in Right of the Province of British Columbia and Forest  
Appeals Commission**

Respondent

And

**Forest Practices Board**

Intervenor

Before: The Honourable Madam Justice Fisher

On appeal from the decision of the Forest Appeals Commission, September 4, 2007

## **Reasons for Judgment**

Counsel for the Appellant:

S. R. Wells

Counsel for the Province of British Columbia:

A. K. Fraser

Counsel for the Forest Appeals Commission

M. G. Underhill

Counsel for the Forest Practices Board

J. Pennington

Place and Date of Hearing:

Vancouver, B.C.  
November 2 and 3, 2009

Place and Date of Judgment:

Vancouver, B.C.  
December 14, 2009

[1] This is an appeal from a decision of the Forest Appeals Commission concerning the defence of due diligence to a strict liability offence under the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

**Background**

[2] Pope & Talbot (P&T) was a licensee under Tree Farm Licence 23 (TFL 23), which granted cutting rights to land in the Arrow Boundary Forest District. Logging was carried out by a subcontractor, Mountain Meadow Contracting Ltd., who in turn retained a falling subcontractor, Gregory Kheller, to cut the trees. The falling subcontractor clear cut an area in the cut block that was to be selectively logged. This contravened the silviculture prescription (SP) and s. 67(1) of the former *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159. Section 67(1) required a person who carries out timber harvesting on Crown forest land to do so in accordance with “any operational plan”.

[3] The essential facts are not in dispute.

[4] P&T, as the holder of TFL 23, is responsible for all forestry operations in the licence area. P&T governed the conduct of the operations under an Environmental Management System (EMS).

[5] The SP for the approved cut block identified harvesting as clear-cut “with reserves,” with the objective of leaving a specified volume of “leave trees” to accommodate heli-skiing in the area. On November 13, 2003, P&T held a “pre-work” meeting on site with its harvesting superintendent, the logging contractor and Mr. Kheller, in accordance with the EMS. A second pre-work meeting was to take place at the contractor’s call after “guy-line” clearing had been done. The guy-line clearing was an access area where no reserves were required.

[6] This second pre-work meeting did not take place. Mr. Kheller began work on the cut block on November 17. On November 24, P&T’s logging supervisor inspected the block and discovered that Mr. Kheller had clear-cut an area without leaving any reserves. Mr. Kheller later admitted that he made a mistake in continuing

to clear-cut after clearing the guy-line area and without thinking about the reserve tree prescription.

[7] On May 2, 2005, the District Manager found that P&T, the contractor and the falling subcontractor contravened s. 67(1) and levied a penalty of \$1,000, 60% to P&T and 40% to the contractor. There is no dispute that the clear cutting in the block in question contravened an approved operational plan and s. 67(1).

[8] P&T appealed the Manager's decision to the Forest Appeals Commission on the basis that it was duly diligent and the error was entirely the responsibility of the contractor and sub-contractor. It argued that the contravention was committed by a subcontractor who ignored the operational plan and acted contrary to express instructions. Since these actions were not reasonably foreseeable, P&T took reasonable steps to avoid the contravention. The Commission rejected P&T's argument, determined that P&T was not duly diligent, and dismissed the appeal.

[9] P&T now appeals to this court under s. 141 of the *Forest Practices Code*, which permits a party to appeal a decision of the Commission "on a question of law or jurisdiction".

**Due diligence**

[10] The common law defence of due diligence has been incorporated into s. 72 of the *Forest and Range Practices Act*:

72 For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the

- (a) person exercised due diligence to prevent the contravention,
- (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
- (c) person's actions relevant to the provision were the result of an officially induced error.

[11] The Commission has interpreted this statutory defence in accordance with common law principles, following *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, and *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510. Its leading decision on the application of the defence under the *Forest and Range Practices Act* is

*Weyerhaeuser v. The Government of British Columbia* (Decision No. 2004-FOR-005(b), January 17, 2006). The Commission has applied the interpretation in *Weyerhaeuser* in subsequent decisions, including the decision in this case.

[12] *Sault Ste. Marie* established “strict liability offences” as offences where the doing of the prohibited act *prima facie* imports the offence but the accused may avoid liability by proving that he took all reasonable care. At p. 1326, Dickson J. (as he then was) set out the defence of due diligence as follows:

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

[13] In *MacMillan Bloedel*, a majority of the B.C. Court of Appeal concluded that the company had established the defence of due diligence on the basis of a mistaken set of facts. The court described the defence, as set out in the above passage from *Sault Ste. Marie*, as having two alternative branches:

[47] ... The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the “particular event”.

### **The Commission’s decision**

[14] In this case, the Commission applied a test for establishing the defence of due diligence as set out in *Weyerhaeuser*, as follows:

... the Panel must ask itself:

- (1) whether the event was reasonably foreseeable; and
- (2) if so, did [the company] take all reasonable care to establish a defence of due diligence.

[15] With respect to the first branch of this test, the Commission found that it was reasonably foreseeable that there could be difficulties recognizing the boundaries between the areas to be clear-cut and the areas to be selectively cut in the cut block. It also found that there is “always a risk that harvesting may deviate from operational plans and, in this case, that risk was higher than usual because the cut block had an extremely complicated SP.” It specifically rejected P&T’s argument that it could not

have foreseen that Mr. Kheller would not follow the verbal instruction to clear only the guy-line areas. It concluded that “[s]uch an outcome was foreseeable and could have been prevented with greater effort to mark the limits of the guy-line clearances.”

[16] With respect to the second branch of this test, the Commission said this:

In the context of a licensee who engages a contractor whose acts or omissions result in a contravention, the test applied by the Supreme Court of Canada in *R. v. City of Sault Ste. Marie* requires the licensee to demonstrate that:

- (a) the act took place without the licensee’s direction or approval; and
- (b) the licensee exercised all reasonable care by taking all reasonable steps to ensure that the contravention did not occur.

[17] It is not clear if the Commission found that the act took place without P&T’s direction or approval. It acknowledged that P&T followed its EMS procedures for a pre-work meeting with the contractor and sub-contractor, that Mr. Kheller was instructed on the falling requirements for the block and that P&T did not know that the second pre-work meeting did not take place. It then found that P&T relied on its contractor to schedule the second pre-work meeting and to ensure that the sub-contractor followed the SP.

[18] It is clear, however, that the Commission found that P&T did not take all reasonable steps to ensure that the contravention did not occur. While it found no “no observable lapse from the EMS, as designed”, it concluded that the EMS was inadequate. It found that P&T should have paid more attention to marking reserve areas or leave trees and gave too much discretion to its logging supervisory staff, the contractor and the sub-contractor in deciding how to implement the leave tree requirements of the SP. In giving the contractor the responsibility to make these decisions without any clearance area boundary layout or leave tree markings, P&T “set up the circumstances which led to the contravention”. The Commission concluded that the collective efforts of P&T were deficient.

**The issues**

[19] P&T appeals on the basis of what it submits are the following errors of law:

1. The Commission did not apply the correct test of foreseeability in considering P&T's due diligence defence.
2. The Commission found facts not in evidence, failed to consider relevant facts and took irrelevant facts into account in finding that P&T failed to take all reasonable steps to prevent the contravention.
3. The Commission breached the rules of procedural fairness by failing to give P&T an opportunity to be heard on the question of whether marking the guy-line clearance boundaries was appropriate in the circumstances.

[20] Both the Crown and the Commission do not take issue with this characterization of the issues, but submit that when the issues are properly analyzed, P&T's true grounds of appeal constitute errors of mixed fact and law, which are not properly the subject of appeal under s. 141.

### **The standard of review**

#### **Positions of the parties**

[21] In its written argument, the Crown submitted that this appeal does not raise any question on the standard of review because the legislation defines the correct approach to the appeal. At the hearing, Mr. Fraser conceded that the standard of review was relevant, but suggested that the appeal provision defined that standard as one of correctness.

[22] P&T submitted that the appropriate standard of review in this case is correctness, the most significant factors being the scope of the appeal provision and the nature of the alleged errors of law, which relate to the interpretation and application of the common law defence of due diligence. Mr. Wells argued that the proper interpretation of the common law defence to strict liability offences in administrative proceedings is of importance to the legal system as a whole and outside the specialized expertise of the Commission. He also argued that errors of law based on the improper consideration of evidence are not related to the expertise

of the tribunal. Therefore, no deference should be given to the Commission's decision.

[23] The Commission takes the position that the appropriate standard of review is reasonableness, considering that the common law defence has been codified in the legislation and the tribunal is assumed to have expertise in its application.

Mr. Underhill submitted that the recent jurisprudence, as established in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, accords deference to the decisions of tribunals on questions of law that involve interpreting provisions in the statutory scheme under which they operate. He also submitted that the limited right of appeal in s. 141, on questions of law or jurisdiction, suggests that some deference may be appropriate.

### **The standard of review analysis**

[24] An analysis of the standard of review addresses the extent to which this Court extends deference to the decision of the Commission that is under appeal.<sup>1</sup>

[25] Traditionally, the standard of review analysis developed for judicial review of decisions of administrative tribunals and there was a difference between judicial review and appellate review. In *Bell Canada v. C.R.T.C.*, [1989] 1 S.C.R. 1722, the Court held that a decision which was protected by a privative clause was entitled to "a non-discretionary form of deference" because the legislator intended it to be "final and conclusive". On the other hand, a decision which was subject to appeal was not entitled to deference, unless it was about a matter within the tribunal's area of expertise. In *Bell Canada*, the Court said at p. 26:

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.

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<sup>1</sup> In this case, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, does not apply; thus the standard of review must be determined under the common law.

[26] This principle was reiterated in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. It was in *Southam* that the Court developed the reasonableness *simpliciter* standard, in an effort to address the level of deference to be accorded in an appeal from the decision of a specialized tribunal on a question of law that was within the tribunal's area of expertise.

[27] The line between judicial review and statutory appeal was removed in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, where Chief Justice McLachlin said this for the Court:

[21] The term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal.

[28] However, a statutory right of appeal is a factor that suggests a "more searching standard of review": *Southam* at para. 46, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 30, *Dr. Q* at para. 27. More recently, in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, Binnie J. stated it this way:

[55] A privative clause is an important indicator of legislative intent. While privative clauses deter judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms.

[29] In *Dunsmuir*, the Supreme Court of Canada altered the standard of review analysis by eliminating the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" and establishing a framework for determining whether the applicable standard in any given case is correctness or reasonableness.

[30] The standard of reasonableness contemplates the possibility of more than one reasonable conclusion. The majority of the Court in *Dunsmuir* explained this at para. 47:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] Binnie J., for the majority, expanded on the reasonableness standard in *Khosa*:

[59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[32] The standard of correctness is not deferential. The reviewing court undertakes its own analysis in order to determine if the decision was correct. At para. 50 of *Dunsmuir*:

[50] ... The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

[33] Correctness is to be applied where the question is one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” because such questions require uniform and consistent answers: *Dunsmuir* at para. 60.

[34] There is a two-stage process to determine which standard applies. The first stage is to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to the particular category of question. At para. 54 of *Dunsmuir*:

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes

closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review. [Emphasis added.]

[35] Only where the first stage inquiry proves to be unfruitful is the Court to proceed to the second stage analysis of the factors to identify the proper standard of review: *Dunsmuir* at para. 62. These factors include: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal; (3) the nature of the question; and (4) the expertise of the tribunal.

### **Applying the standard of review analysis**

#### **1. Existing jurisprudence**

[36] Existing jurisprudence has not, in my view, determined in a satisfactory manner the degree of deference to be accorded to the Commission in respect of a question about the interpretation of the defence of due diligence, or an error of law based on improper considerations of evidence.

[37] Deference was accorded to a decision of the Commission as to whether there had been a contravention of a regulation in *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (S.C.). Bauman J. (as he then was) relied on the jurisprudence of *Pezim*, *Southam* and *Bell Canada* and determined that the question was one at the core of the Commission's expertise.

[38] More recently, deference was not accorded to the Commission in *Canadian Forest Products Ltd. v. British Columbia*, 2009 BCSC 1040. The decision there involved the interpretation of provisions of the *Forest Act* relating to the assessment of stumpage rates and whether a redetermination could be applied retroactively.

Groves J. concluded that the question of law did not directly engage the specialized expertise of the Commission.

[39] No other decisions were cited regarding the standard of review for questions similar to those in this case.

## **2. Analysis of the factors**

### **(a) Absence of a privative clause**

[40] There is no privative clause protecting the decisions of the Commission from judicial review. Rather, there is an express right of appeal on questions of law or jurisdiction. Questions of general law, outside the ambit of a tribunal's expertise, are generally reviewed on a correctness standard. In my view, this right of appeal suggests a "more searching standard of review". Clearly, the legislature did not intend to deter judicial intervention in respect of questions of law or jurisdiction.

### **(b) Purpose of the tribunal**

[41] It is apparent that the Commission's primary purpose is to hear appeals from determinations by forestry officials regarding contraventions of forestry practice. The Commission, which was established and has been continued under the *Forest Practices Code*, has the authority to confirm, vary or rescind the determination, or to refer the matter back to the person who made the determination for reconsideration, with or without directions.

[42] In addition to its appeal function, the Commission has a statutory mandate to annually evaluate the manner in which reviews and appeals function, and to make recommendations about amendments to the legislation.

[43] The purpose of the tribunal is necessarily connected to its expertise.

### **(c) Nature of the question**

[44] In my view, the nature of the primary question in this case is a significant factor that points towards a correctness standard.

[45] The Commission relied on case law which defined the common law defence of due diligence, and applied a test determined by the Commission itself in *Weyerhaeuser*. In *Weyerhaeuser*, the Commission interpreted the statutory due diligence defence as applying “in its natural and ordinary sense as defined by the case law”. In other words, it considered the defence of due diligence as set out in s. 72 to be the same as the common law defence. Thus the interpretation of the defence of due diligence is a question of general law that is important to the legal system and outside the Commission’s specialized area of expertise.

[46] While the secondary question is somewhat different, I agree with Mr. Wells that an error of law based on finding facts not in evidence, taking irrelevant facts into account, or failing to consider relevant facts, is not generally related to the expertise of the tribunal. A tribunal that assesses evidence in such a manner, resulting in an error of principle, should not generally be accorded deference. However, short of this kind of legal error, the manner in which a specialized tribunal assesses the evidence before it should be reviewed on a standard of reasonableness. In this case, there is no right of appeal for such issues, as they involve questions of mixed fact and law.

**(d) *Expertise of the tribunal***

[47] It is apparent that the Commission is a specialized tribunal in respect of the interpretation and application of various parts of the *Forest and Range Practices Act* and other specified legislation in relation to forestry practices. Questions of law within this expertise should be accorded deference.

[48] In addition to the authorities referred to at the hearing, counsel for the Commission provided me with a series of Commission decisions in which the defence of due diligence was addressed. With one exception, Commission panels have applied the due diligence test set out in *Weyerhaeuser*: see *A&A Fibre Ltd. v. Government of British Columbia* (Decision No. 2005-FOR-008(a), April 24, 2007); *O’Brien v. Government of British Columbia* (Decision No. 2005-FOR-014(a), January 12, 2007); *Hegel v. Government of British Columbia* (Decision No. 2005-FOR-009(a), October 12, 2007); appeal dismissed 2009 BCSC 863, leave to appeal to C.A. dismissed 2009 BCCA 527; *Miller v. Government of British Columbia* (Decision

No. 2005-FOR-016(a), December 14, 2007). One decision adopted the interpretation of the common law defence in *MacMillan Bloedel Ltd.: Kalesnikoff Lumber Co. Ltd. v. Government of British Columbia* (Decision No. 2003-FOR-005(b) and 2003-FOR-006(b), August 2, 2006).

[49] As the Supreme Court of Canada indicated in *Dunsmuir*, deference may be warranted where the tribunal has developed particular expertise in the application of a general common law rule in relation to a specific statutory context. However, it is my view that the Commission has not developed expertise in the application of the common law defence of due diligence, as most of its decisions have relied on one interpretation of this defence.

### **Conclusion**

[50] Given these factors, I have concluded that correctness is the appropriate standard of review on the question of the Commission's interpretation of the common law defence of due diligence, as well as on the question of whether it considered the evidence in such a manner as to constitute an error of law.

### **Procedural fairness**

[51] The third issue raises questions about procedural fairness in the sense of P&T's right to answer the case against it. A consideration of this issue is not based on whether the tribunal's decision was either correct or reasonable. A breach of procedural fairness that results in a lack of due process may result in the tribunal's decision being set aside or having the matter remitted back.

### **1. Did the Commission apply the correct test of foreseeability in considering P&T's due diligence defence?**

#### **Positions of the parties**

[52] P&T's position is that the defence of due diligence requires the tribunal to first determine whether the particular event that occurred was reasonably foreseeable, and it is only to assess whether all reasonable care was taken if the event was, in fact, reasonably foreseeable.

[53] Mr. Wells submitted that the Commission considered these issues in the context of a contravention generally, rather than a particular event. He says that this approach was incorrect because the Commission was obliged to consider the particular event in this case and identify how it was reasonably foreseeable. He characterized the “particular event” as the fact that Mr. Kheller disobeyed the instructions given. He says that this was not foreseeable. Relying on *MacMillan Bloedel* and its application in *Weyerhaeuser*, he submitted that the Commission should not have proceeded to assess whether P&T took all reasonable steps because it could not have done so to prevent the occurrence of an unforeseeable event.

[54] The Crown submitted that this case was properly decided on the second branch of the due diligence test and there was no mistake of fact as in *MacMillan Bloedel*. Mr. Fraser submitted that the “particular event” here is the specific hazard that resulted in the contravention – i.e. the cutting of trees contrary to the SP. He says that the real question was not whether the particular event was foreseeable, but whether P&T collectively took reasonable steps in hiring and supervising contractors and ensuring that they understood the logging plan.

[55] The Forest Practices Board made submissions on this issue only. Mr. Pennington submitted that the *Weyerhaeuser* case was wrongly decided because it stated the wrong test, and this has confused the subsequent application of the defence of due diligence as exemplified in this appeal. He made three points: (1) the “particular event” does not mean a contractor’s disregard of instructions, but rather the particular contravention in issue, or the *actus reus* of the offence; (2) foreseeability of the particular circumstances leading to the contravention is relevant to the question of whether all reasonable care was taken, but it does not pre-empt that enquiry; and (3) whether or not the actions of the faller were reasonably foreseeable is a question of fact, not law, and is not an issue that can be appealed under s. 141.

**Analysis**

[56] It is my view that the Commission did not wrongly apply a test of foreseeability in considering P&T's defence of due diligence in this case. However, it is also my view that the formulation of the test in *Weyerhaeuser*, on which P&T relies, does not accurately reflect the common law or s. 72, and its reiteration in this case (and perhaps others) has caused some confusion. I agree with the submissions of the Forest Practices Board on this issue.

**(a) The Weyerhaeuser decision**

[57] It is necessary to consider the *Weyerhaeuser* decision at some length because P&T's main position is that the Commission in this case ought to have addressed foreseeability on the same basis as the majority panel in *Weyerhaeuser*.

[58] There are, in my opinion, two substantive errors in the *Weyerhaeuser* decision.

**(i) Two branches of the due diligence defence: mistake of fact and reasonable care**

[59] The first error is that the majority panel incorrectly defined the first branch of the defence of due diligence as reasonable foreseeability rather than mistake of fact. It then conflated its interpretation of the two branches of the due diligence defence into s. 72(a) of the *Forest and Range Practices Act*. Purporting to apply *MacMillan Bloedel*, it set out the test for due diligence under s. 72(a) as:

- (1) whether the event was reasonably foreseeable; and
- (2) if so, did [the company] take all reasonable care to establish a defence of due diligence. [Emphasis added.]

[60] The panel found that *Weyerhaeuser* had

... made out a due diligence defence under section 72(a) of the *Act*, under the first branch of the test set out in the case law. [Emphasis added]

[61] This requires reasonable foreseeability of the event as a condition precedent to a consideration of reasonable care. In my view, this is an incorrect interpretation of *MacMillan Bloedel*.

[62] The majority of the Court of Appeal in *MacMillan Bloedel* set out the two branches of the due diligence defence as (1) where an accused's conduct is "innocent" as a result of a mistake of fact; and (2) if there is no mistake of fact, where an accused has taken all reasonable steps to avoid the particular event. The first branch of this defence is found in s. 72(b), the second branch in s. 72(a), and each is provided as an alternative. I will repeat these sections here for clarity:

... no person may be found to have contravened a provision of the Acts if the person establishes that the

- (a) person exercised due diligence to prevent the contravention, [or]
- (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision ...

[63] Neither *Sault Ste. Marie* nor *MacMillan Bloedel* require reasonable foreseeability of the circumstances giving rise to the contravention before reasonable care is considered within the second branch of the defence. Moreover, s. 72(a) contains no such requirement. In *MacMillian Bloedel*, Smith J.A. simply described the first branch (mistake of fact) as applying "where the accused can establish that he did not know and could not reasonably have known of the existence of the hazard".

[64] *MacMillan Bloedel* involved the defence of due diligence in respect of a charge of unlawfully depositing a deleterious substance in water frequented by fish, contrary to the federal *Fisheries Act*. It was common ground that the company committed the *actus reus* of the offence and that it occurred because of fuel leakage from pipes at its facility. The pipes were found to have deteriorated as a result of an unforeseeable microbiological process. The trial judge had convicted the company despite this finding and after considering the second branch of the defence. Smith J.A., for the majority in the Court of Appeal, held that the trial judge ought to have dismissed the charge on the basis that the company had brought itself within the first branch of the due diligence defence, mistake of fact. He also held that the trial judge erred further in embarking upon a consideration of the second branch because it is an alternative available where an accused cannot bring himself within the first branch.

[65] In *Weyerhaeuser*, mistake of fact was not in issue. There, the company's supervisors had instructed its contractor to walk the cut block with the falling subcontractor before beginning his work. The contractor did not do this, but instead reviewed the map with the faller. The faller apparently misread his location on the map and cut some trees in the wrong direction and outside the block boundary. The majority panel found that it was not reasonably foreseeable that the contractor would disregard clear instructions and the faller would misread the map and start cutting on the wrong side of the block. On this basis, the Commission did not assess whether the company took all reasonable steps to avoid the contravention and concluded that the defence of due diligence under s. 72(a) had been established. Section 72(b) was not considered.

[66] According to *Sault Ste. Marie* and *MacMillan Bloedel*, the only condition precedent to a consideration of whether an accused took all reasonable care is that he cannot bring himself within the first branch, mistake of fact, which renders his conduct innocent. This does not mean, however, that foreseeability is not a relevant consideration in assessing reasonable care: see, for example, *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674 (C.A) at 683. However, requiring foreseeability as a condition precedent to assessing reasonable care is incorrect, as it may pre-empt a proper legal analysis of the due diligence defence.

[67] Closely related to this is the focus of the foreseeability analysis, which is to be considered in the context of the "particular event".

(ii) *The "particular event"*

[68] The second error with the interpretation of the due diligence defence in *Weyerhaeuser* is the majority's apparent conclusion that due diligence was established under s. 72(a) where the company could not reasonably foresee the *circumstances that gave rise to the contravention*. Although the majority stated that it must first determine whether "the contravention" was reasonably foreseeable, it proceeded to characterize this as the contractor's act of ignoring a specific direction and the faller's confusion about his location in the block, rather than the contravention itself.

[69] In my view, this is an incorrect interpretation of what is referred to in *Sault Ste. Marie* as the “particular event”. *Sault Ste. Marie* makes it clear that the “particular event” is the contravention itself, not the circumstances that gave rise to it, as shown in these passages:

In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with evidence of due diligence. (p. 1325)

Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused’s direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. (p. 1331) [Emphasis added.]

[70] In *MacMillan Bloedel*, the Court also described the “particular event” as the *actus reus* of the offence:

[53] In this case, that event [the particular event giving rise to the charge] was the discharge of a deleterious substance into Crabapple Creek on May 16, 1997.

[71] In other words, the particular event in *Weyerhaeuser* was the unauthorized harvesting of trees, not the contractor’s act of ignoring instructions or the faller’s confusion.

[72] Whether conduct is “innocent” under the first branch of the common law defence, or whether all reasonable steps were taken under the second branch, must be considered in the context of the “particular event”: *MacMillan Bloedel*, para. 48. The same focus applies in a foreseeability analysis: *MacMillan Bloedel*, para. 53. Accordingly, the proper inquiry under the second branch of the due diligence defence, as codified in s. 72(a), is whether the company took reasonable care to avoid the contravention (there the unauthorized cutting of the trees). Instead, the majority in *Weyerhaeuser* embarked on an inquiry as to the circumstances that led to the contravention, expressed as follows at p. 27:

.. what led to the contravention in this case was a decision by one person to disregard clear instructions, and then the operator’s confusion about where he was on the cut block and his failure to get out of his machine to confirm his location before he started cutting.

[73] This led the panel to consider whether these *circumstances* were reasonably foreseeable. The majority found that Weyerhaeuser's employee had no way of foreseeing that the contractor would ignore his specific direction and that the operator would misread the map. This was the wrong inquiry, because it should have determined whether the unauthorized harvesting was reasonably foreseeable. This conclusion pre-empted a proper analysis of reasonable care.

[74] Mr. Wells submitted that in this case, the Commission turned its mind to the wrong question and asked whether it was generally foreseeable that Mr. Kheller would have accidentally cut beyond the boundary of the guy-line access area rather than to the specific circumstances that led to the contravention.

[75] I agree with Mr. Wells to this extent. The focus of a foreseeability analysis is not whether unauthorized harvesting was "generally foreseeable", but rather on the "occurrence of the particular event giving rise to the charge" or the *actus reus* of the contravention in issue: see *MacMillan Bloedel* at paras. 44 and 53. However, as I have already explained, this does not mean that the focus of the inquiry is on the specific circumstances giving rise to the contravention. The focus must be on the contravention itself. In this regard, I note that there is no requirement for an accused to prove precisely how the "particular event" occurred: see *R. v. Emil K. Fishing*, 2008 BCCA 490 at para. 22 and *R. v. Petro-Canada* (2003), 171 C.C.C. (3d) 354 (Ont.C.A.) at paras. 19-20. However, as the court noted in *Petro-Canada*, in a case where the accused can do this, "it may be able to narrow the range of preventative steps that it must show to establish that it took all reasonable care."

**(b) The Commission's application of the test of foreseeability**

[76] This case, like *Weyerhaeuser*, did not involve mistake of fact, but only the due diligence defence in s. 72(a). Although the Commission first considered whether the event was reasonably foreseeable, as set out in *Weyerhaeuser*, it found that it was reasonable foreseeable. It did so on the following basis:

The Panel finds that it was reasonably foreseeable that there could be difficulties with recognizing the boundaries between the areas to be cleared and the areas to be selectively cut in the cut bloc. In that regard, the Panel finds that there is always a risk that harvesting may deviate from operational

plans and, in this case, that risk was higher than usual because the cut block had an extremely complicated SP. (p. 11)

[77] According to P&T, this passage shows that the Commission considered this issue in the context of a contravention generally, or a hypothetical event, rather than the particular event. Mr. Wells submitted that the Commission was obliged to consider the particular events in this case, identify how they were reasonably foreseeable and determine if they arose because the cut block was complex. In other words, the Commission should have considered whether Mr. Kheller's conduct, as disclosed in the evidence, was reasonably foreseeable.

[78] Mr. Fraser, for the Crown, pointed out that in this case, there was no evidence before the Commission as to what precisely happened because P&T did not call Mr. Kheller as a witness. This is why the panel was left with evidence only of a general nature.

[79] While the Commission's reasons on this point are not very clear, I cannot accept Mr. Well's argument that it only considered foreseeability in the context of a contravention generally. It specifically rejected P&T's argument that it could not have foreseen that Mr. Kheller would not follow the verbal instruction to clear only the guy-line areas and concluded that this outcome was foreseeable. It appears that the Commission considered foreseeability in the context of the particular contravention, as reflected in these passages at p. 13-14:

In giving the contractor the responsibility to decide on the limits of the guy-line clearance areas and to select leave trees beyond these limits, without the benefit of clearance area boundary layout or leave tree markings, set up circumstances which led to the contravention. The Panel finds that the collective efforts of P&T through its EMS, their layout of the harvesting area, and their supervision of the contractor, were deficient.

That this event was reasonably foreseeable, and that more could have been done to prevent its occurrence, is clear to the Panel. ...

[80] P&T submitted further that there is "good support in the case law that Mr. Kheller's conduct was of an order not reasonably foreseeable." In addition to *Weyerhaeuser*, Mr. Wells referred me to *R. v. Columbia Bitulithic Ltd.* [1991] B.C.J. No. 2153 (S.C.) and *R. v. Pacifica Papers Ltd.* 2002 BCPC 265, where the companies were not found liable for acts of others that were not foreseeable.

[81] This submission does not address a question of law alone, but a question of mixed fact and law. Provided the defence of due diligence is properly interpreted, it is a question of fact, and of applying facts to the law, as to whether a company has taken all reasonable steps to avoid the contravention in issue. This assessment may include consideration of a contractor's behaviour and the foreseeability of the contravention itself.

[82] Moreover, these cases are distinguishable from the case at bar.

[83] In *Columbia Bitulithic Ltd.*, the company was acquitted of charges under the *Waste Management Act* and the *Fisheries Act* in respect of acts of a third party, who had caused a spill of toxic chemicals into a fish-bearing stream. Columbia had purchased a chemical that it used for road surfacing. The vendor hired an independent trucking company to deliver the chemical to Columbia. Columbia's representative advised the trucker to deliver the chemical to a storage tank at a specified location. The trucker found the storage tank at a temporary location markedly different from that in the instructions, next to a stream and in an obviously hazardous situation. Instead of seeking further directions, the trucker began filling the tank where he found it and without checking to see if it was secure in its position. Before he was finished, the tank tipped over and into the creek, spilling the chemical contents.

[84] The issues were (1) whether there was any causal connection between the acts of the company and the chemical spill, and (2) if so, whether the company had used due diligence. The company was acquitted on the first issue because the court was not able to find sufficient nexus between the wrongful act of the trucker and Columbia. In this context, the judge on appeal expressed the view that "Columbia should not be held to anticipate an independent trucking Company would ignore its instructions on where it was to find the storage tank and to fill it at a different location without making inquiries." The defence of due diligence was not addressed at all.

[85] In *Pacifica Papers*, the company was also charged with offences under the *Fisheries Act*. The charges resulted from the actions of the employee of a company

that contracted with Pacifica to dig an excavation pit. In doing so, Pacifica required the contractor to pump water on to the top of a pile of hog fuel so that the water could be absorbed. The contractor's employee moved the discharge hose, causing water to be pumped into the roadway and some entered a nearby creek.

[86] The court found that Pacifica was not responsible for depositing the deleterious substance because the contractor's employees were acting on a "whim of their own" and Pacifica's representatives could not have reasonably foreseen that they would divert the water on to the roadway, contrary to their clear instructions. For this and other reasons that are not relevant here, the court found that the Crown had not proven beyond a reasonable doubt, all of the elements of the *actus reus* of the offence. Despite this finding, the court went on to consider the defence of due diligence. Saunders, P.C.J. concluded that Pacifica was duly diligent because it had a proper system in place to prevent environmental harm, it took reasonable steps to ensure that the contractor was reputable, and it gave clear instructions about where the water was to be pumped. He found that the behaviour of the contractor's employees could not have been reasonably anticipated by Pacifica's representatives, who could not have reasonably foreseen the risk of the incident occurring.

[87] *Pacifica Papers* demonstrates that whether a contractor's behaviour could have been reasonably anticipated is relevant to whether the contravention was foreseeable, and this in turn is a factor that may be considered when assessing whether an accused has taken all reasonable steps to avoid the "particular event".

**(c) Conclusion**

[88] P&T's position relies on the correctness of the Commission's existing jurisprudence, as established in *Weyerhaeuser*, interpreting the common law defence of due diligence as codified in s. 72 of the *Forest and Range Practices Act*. It is my opinion that this jurisprudence is an incorrect interpretation of the defence of due diligence, for the reasons I have set out above. While the Commission addressed foreseeability as a first inquiry under the defence of due diligence, following *Weyerhaeuser*, it did so by focussing, correctly, on the foreseeability of the

contravention that occurred in this case. Given this, the Commission's finding that the contravention was reasonably foreseeable is a question of mixed fact and law, which is not a matter that can be the subject of this appeal.

[89] Accordingly, I cannot accede to P&T's argument that the Commission did not apply the correct test of foreseeability in considering its due diligence defence.

**2. Did the Commission find facts not in evidence, fail to consider relevant facts or take irrelevant facts into account in finding that P&T failed to take all reasonable steps to prevent the contravention?**

**Positions of the parties**

[90] Mr. Wells submitted that there were numerous deficiencies in the findings of the Commission when it considered whether P&T took all reasonable steps to prevent the contravention, and that these amount to errors of law. The alleged deficiencies relate in large part to findings that P&T should have made greater efforts to mark the limits of the guy-line clearance area. P&T says that there was no evidence that it was appropriate to do this or that the failure to do so contributed to Mr. Kheller's error.

[91] The Crown's position is that the facts found by the Commission were all supported by some evidence and P&T's complaint is not a question of law but one of mixed fact and law. Mr. Fraser submitted that the court is not entitled to interfere with the Commission's findings unless there has been a misdirection in applying the law to the primary facts which have been found.

**Analysis**

[92] There is no dispute between P&T and the Crown that an error of law is made if there is no evidence to support a finding of a material fact, if irrelevant evidence is considered or relevant evidence is not considered, or if there is a misdirection in applying the law to the primary or essential facts.

[93] In this case, there was no misdirection on the law on the issue of reasonable care, as it was applied to the facts. The Commission asked itself the right question:

The determination of whether a licensee is duly diligent depends on the circumstances of the case. Whether a licensee took “all reasonable steps” must be considered in the specific context of the “particular event” which comprised the contravention in question ... (p. 7)

[94] It then proceeded to assess the evidence. It found that while P&T’s staff implemented the EMS properly, the EMS was inadequate, primarily because it left too much discretion to its logging supervisory staff, contractors and subcontractors, in deciding how to implement the leave tree requirements of the SP. It also left too much discretion to its harvesting supervisor in deciding what was to be addressed in the pre-work meeting, what was to be documented, and what directions could be given orally. While the Commission accepted that there were safety reasons for not pre-marking individual leave trees, it found that flagging the limits of the guy-line clearances would have been prudent under the SP, which was complex. It also found that the failure to flag these clearances contributed to Mr. Kheller’s mistake.

[95] The Commission was clearly of the view that more could have been done to prevent the unauthorized harvesting. It found that “P&T’s standard operating procedures relied on a faller to decide on the location of the boundary between a clear cut area (the guy-line clearance area) and a selective harvesting (thinning) area”. It placed the blame on P&T’s operating procedures, which relied only on verbal instructions and did not require any appropriate markings to be placed in the field.

[96] P&T submitted that there was no evidence to support the Commission’s findings that it was prudent or appropriate to pre-mark leave trees or to flag the guy-line clearance boundaries, or that the failure to do either of these things contributed to Mr. Kheller’s error. Moreover, it says that any inference that these omissions contributed to Mr. Kheller’s error was contradicted by the evidence and in any event there was no evidence to support any finding as to how Mr. Kheller may have been confused about where the guy-line clearance area ended.

[97] In my opinion, there was evidence to support the Commission’s findings. The essence of its decision was a concern about complete reliance on only verbal

instruction and too much discretion given to supervisors, contractors or sub-contractors. There was evidence that Mr. Kheller was instructed on the falling requirements for the cut block at the pre-work meeting and that the SP, the logging plan and maps were given to the contractor. The contractor was instructed to schedule a second pre-work meeting after the guy-line clearance area had been cut, but this did not take place, unknown to P&T. After cutting the guy-line clearance area, Mr. Kheller tried to contact P&T's harvesting supervisor, without success. He proceeded to cut into the block without any documentation and forgot about the leave tree requirement. P&T could not explain why Mr. Kheller clear cut an area that was to be selectively logged.

[98] Without a direct explanation as to the basis for Mr. Kheller's mistake, the Commission could only draw inferences from the evidence that was before it. In concluding that the failure to flag the clearances contributed to the mistake, it drew the inference that had there been some kind of flags or marks in the field showing at least the boundaries of the guy-line clearance area, Mr. Kheller may not have forgotten about the leave tree requirement. It is also important to note that P&T had the onus of proving, on a balance of probabilities, that it exercised all reasonable care to prevent the unauthorized harvesting that occurred. In the absence of evidence from Mr. Kheller, it was not able to narrow the scope of the inquiry into what constituted reasonable care in the circumstances.

[99] P&T also submitted that the Commission's conclusion that P&T's failure to pre-mark leave trees fell short of all reasonable care was contrary to its own finding that it was reasonable not to pre-mark individual leave trees because of falling safety issues. While this may be inconsistent, this was not a major aspect of the Commission's decision and in any event, such an inconsistency does not in itself constitute an error of law.

[100] Accordingly, I have concluded that the Commission did not err in law in finding on the evidence that was before it that P&T did not take all reasonable steps to prevent the contravention.

3. **Did the Commission breach the rules of procedural fairness by failing to give P&T an opportunity to be heard on the question of whether marking the guy-line clearance boundaries was appropriate in the circumstances?**

[101] Again, both P&T and the Crown agree that a failure to observe the rules of procedural fairness is an error of law.

[102] The Commission concluded that the unauthorized harvesting could have been prevented with greater effort to mark the limits of the guy-line clearances. Mr. Wells says that the appropriateness of flagging the guy-line clearance boundaries was not an issue raised by the parties at the hearing before the Commission. None of the witnesses were asked about this. He says that P&T had no notice of this issue and no opportunity to be heard in respect of it by adducing evidence and making submissions on its relevance. This, he argued, was a breach of the common law principle of *audi alteram partem*.

[103] Mr. Wells relied on *Amacon Property Management Services Inc. v. Dutt*, 2008 BCSC 880, where Slade J. remitted a matter back to a *Residential Tenancy Act* arbitrator who interpreted the law and applied the facts to an issue that neither party had raised or argued. The arbitrator had raised the issue of negligence without giving the parties notice that he was considering the issue and giving them an opportunity to make submissions.

[104] In my view, the circumstances of this case are quite different from those in *Amacon*. There, the issue raised by the arbitrator involved principles of the law of negligence and interpretations of the evidence very different from those involved with the issues that had been argued. In this case, the issue raised by the Commission involved no principles of law. There was evidence that there were no markings on the boundaries of the guy-line clearance area or on leave trees and that P&T's EMS did not require such marking. And as I indicated above, the inference it drew from the evidence was that had there been some kind of markings in the field showing at least the boundaries of the guy-line clearance area, Mr. Kheller may not have forgotten about the leave tree requirement. The Commission simply found that

“clear marking of reserve areas and/or leave trees is something that a reasonable licensee would have paid more attention to”.

[105] Having said that, it is apparent that the significance of this factual issue was not raised by the Commission with the parties and P&T did not have an opportunity to either present more evidence or address the matter in submissions. While it would have been prudent for the Commission to question the parties about this issue, I do not consider its failure to do so to constitute a breach of the rules of procedural fairness in the circumstances here, particularly given the overall basis of the Commission’s decision. This is not a case where P&T did not have an opportunity to respond to all of the evidence and submissions that were made (see, for example, *C.E.P. Union of Canada v. Power Engineers et al*, 2001 BCCA 743).

### **Conclusion**

[106] The common law defence of due diligence, which has been incorporated into s. 72 of the *Forest and Range Practices Act*, allows a person who has been accused of a contravention to avoid liability by proving either:

- (1) that he reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent (reflected in s. 72(b)), or
- (2) that he exercised due diligence by taking all reasonable steps to avoid the contravention (reflected in s. 72(a)).

The foreseeability of the contravention which occurred in a particular case is a relevant consideration under both branches of the defence.

[107] Although the Commission relied on the interpretation of the defence of due diligence as set out in *Weyerhaeuser*, it correctly considered the issue of foreseeability in its application of the due diligence defence in s. 72(a).

[108] The Commission did not commit any error of law in finding that P&T failed to take all reasonable steps to prevent the contravention, as this finding was supported by relevant evidence, and any inconsistencies in its findings do not constitute errors of law.

[109] The Commission's failure to give P&T an opportunity to address the issue of marking boundaries was not a breach of the rules of procedural fairness, given the nature of this issue in relation to the overall basis of its decision.

[110] Accordingly, the appeal is dismissed.

[111] No party other than P&T sought costs, but no submissions were made at the hearing. The parties may have leave to make submissions on costs if they cannot otherwise agree.

Fisher J.