Forest Appeals Commission

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APPEAL NO. 1997-FOR-02

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:	Repap British Columbia Inc.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Toby Vigod — Chair
Gerry Burch — Member
Monty Mosher — Member

DATE OF HEARING: June 9, 1997

PLACE OF HEARING: Victoria, B.C.

APPEARING:
For the Appellant: Peter Voith, Counsel
For the Respondent: Dawn House, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal brought by Repap British Columbia Inc. ("Repap") against an Administrative Review decision dated December 17, 1996. The Review Panel rescinded the Determination of the District Manager of October 8, 1996 that Repap had contravened section 68(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*"), but upheld her Determination that Repap contravened section 67(1). The Review Panel also upheld the penalty assessment of $1000.00 levied against Repap.

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

BACKGROUND

Repap is the holder of Forest Licence A16831 located in the Kispiox Forest District. Cutting Permit 614 was issued to Repap on November 6, 1995 with conditions set out in the letter of approval. Condition 4 states that "all main skid trails, skid bridges, roads and backspar trails must be field located and approved in writing by the Forest Officer prior to construction or use." The approved Logging Plan map identified the location of approved skid trails. Prior to June 7, 1996, Repap provided copies of its Cutting Permit, Silviculture Prescription and Logging Plan associated with Block 11 of Cutting Permit 614 to Ryan Muldoe, Field Supervisor and employee of Totem Land Contracting Ltd. (the "Contractor").

On June 7, 1996, Ryan Muldoe signed a schedule to the Logging Agreement indicating that he understood the requirements of the Logging Plan and other documents associated with the cutblock. Also on June 7, Ryan Muldoe and Repap's Contract Supervisor, Tom Harris, held a pre-logging conference on the site. At that time, they reviewed the requirements of the Logging Plan and site degradation issues.

On September 12, 1996 Tom Harris, Ralph Mitchell (another Repap contract supervisor) and Repap's Area Superintendent, Cam Penfold, met with various personnel from the Contractor, including Ryan Muldoe, and the Contractor's owners. At that meeting, Repap informed the Contractor not to operate west of Landing 2 until Repap could investigate the need for amendments to the Logging Plan to accommodate proposed new skid trail locations.

On September 16, 1996, Ralph Mitchell contacted Robert Bardossy, Compliance and Enforcement Officer with the Ministry of Forests ("MOF") to arrange a meeting in order for Repap to obtain approval for a new designated skid trail on the cutblock. However, on September 18, Mr. Mitchell discovered an unauthorized bladed trail and another unauthorized unbladed trail west of Landing 2 on the cutblock. Repap immediately informed Robert Bardossy and suspended operations early that morning.

After an "Opportunity to be Heard" was provided to Repap on October 2, 1996, the Determination was issued on October 8, 1996. The District Manager found a contravention of sections 67(1)(f) and 68(1) of the *Code* and a penalty of $1000 was levied pursuant to section 117. In addition, pursuant to section 118 of the *Code*, a remediation order was issued and Repap was required to submit a rehabilitation plan to mitigate the site degradation caused by the trail construction. The Determination was appealed and, on December 17, 1996, the Review Panel upheld the finding that Repap had contravened section 67(1)(f), but rescinded the finding that Repap had contravened section 68(1) of the *Code*. The Review Panel also affirmed the penalty levied and the remediation order.

ISSUES

1. Whether the defence of due diligence is available to Repap to avoid liability for a determination made under section 117(2) of the *Code* for a contravention of section 67(1) of the *Code*.

2. Whether the penalty is appropriate in this case.

RELEVANT LEGISLATION

Section 67 of the *Code* is a general directive that timber harvesters must abide by rules and standards set out in the Act, regulations, standards and any operational documents. The relevant portion of the section is reproduced below:

> **General**
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> **67** (1) A person who carries out timber harvesting and related forest practices on
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> (a) Crown forest land
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> (b) Crown range, or
>
> (c) private land that is subject to a tree farm licence or a woodlot licence, must do so in accordance with
>
> (d) this Act, the regulations and standards,
>
> (e) any silviculture prescription, and
>
> (f) any logging plan.

Section 117 of the *Code* reads:

> **Division 3–Administrative Remedies**
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> **Penalties**
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> **117** (1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.
>
> (2) If a person's employee, agent or contractor, as that term is defined in section 152 of the *Forest Act*, contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.
>
> (3) If a corporation contravenes this Act, the regulations or the standards, a director or officer of it who authorized, permitted or acquiesced in the contravention also commits the contravention.
>
> (4) Before the senior official levies a penalty under subsection (1) or section 119, he or she
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> (a) must consider any policy established by the minister under section 122, and
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> (b) subject to any policy established by the minister under section 122, may consider the following:
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> (i) previous contraventions of a similar nature by the person;
>
> (ii) the gravity and magnitude of the contravention;
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> (iii) whether the violation was repeated or continuous;
>
> (iv) whether the contravention was deliberate;

(v) any economic benefit derived by the person from the contravention;

(vi) the person's cooperativeness and efforts to correct the contravention;

(vii) any other considerations that the Lieutenant Governor in Council may prescribe.

Remediation orders

118 (1) If a senior official determines that a person who is the holder of an agreement under the *Forest Act* or the *Range Act* has contravened this Act, the regulations, the standards or an operational plan, he or she, in a notice of determination given under subsection (2), may order the person to do work to remedy the contravention

(a) by requiring the holder to carry out a forest practice

(i) that is required by the Act, the regulations, the standards or an operational plan, and

(ii) that the holder has failed to carry out, or

(b) by requiring the holder to repair any damage caused by the contravention to the land on which the forest practice was carried out.

Division 5–Offences and Court Orders

Fines

143 (2) A person who contravenes section 67…commits an offence and is liable on conviction to a fine not exceeding $500 000 or to imprisonment for not more than 2 years or to both.

Employer Liability

157 (1) In a prosecution for an offence under this Act or the regulations it is sufficient proof of the offence to establish that it was committed by the defendant's employee, agent or contractor, as that term is defined in section 158.1 of the *Forest Act.*

(2) It is a defence to a prosecution under subsection (1) if the defendant establishes that they exercised due diligence to prevent the commission of the offence.

(3) This section applies even if the employee, agent or contractor has not been identified or prosecuted for the offence.

DISCUSSION AND ANALYSIS

I. Whether the defence of due diligence is available to Repap to avoid liability for a determination made under section 117(2) of the *Code* for a contravention of section 67(1) of the *Code*.

There is no dispute that there were two unauthorized skid trails constructed by the Contractor contrary to the terms of the approved Logging Plan. However, Repap urged the Commission to find that the defence of due diligence is available to absolve it of liability for a determination under section 117 for a contravention of

section 67(1) of the *Code*. The Appellant further argued that if the defence is available, the Commission should find that it was duly diligent and that the Determination and penalty be rescinded.

This issue was previously addressed by the Commission in *MacMillan Bloedel Ltd.* v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/05(b), February 19, 1997)(unreported), where the Commission held that the defence of due diligence is not available to excuse an individual or company from liability for a administrative penalty under section 117 or section 119 of the *Code* for a contravention of section 96 of the *Code*. This decision was followed by another panel of the Commission in *Canadian Forest Products Ltd.* v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-03, May 26, 1997) (unreported). More recently, the Commission ruled that the defence of due diligence is not available to a determination under section 117 for a contravention of section 67(1) of the *Code*, the very section in question in this appeal. (See *Canadian Forest Products Ltd*. v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-06, October 10, 1997) (unreported)).

The Appellant, in this case, submitted that the Commission should reconsider its previous decisions based on the arguments it has placed before the Commission., The Respondent and the Forest Practices Board argue that due diligence is not a defence to an administrative penalty levied under section 117 and that section 117(2) is unambiguous in making the licence holder responsible for the actions of its contractors. While recognizing that the Commission is not bound by its previous decisions, both the Respondent and the Forest Practices Board urged the Commission to adopt the reasoning in *MacMillan Bloedel* and to find that due diligence is not a defence to administrative penalties levied for contraventions under the *Code*. The Respondent also submitted that if the Commission did find that the defence of due diligence was available, that Repap had not shown that it was duly diligent.

The Appellant, first of all, argues that this case is not about whether due diligence is available as a defence to administrative penalty regimes generally, but whether due diligence is available as a defence in this regime, having regard to the structure of the *Code*. The Respondent and Forest Practices Board agree with this proposition and submit that the structure of the Code sets out very clearly two distinct routes that may be followed for compliance and enforcement of the legislation. Division 3 deals with “Administrative Remedies” while Division 5 addresses “Offences and Court Orders.” Part 6 of the Code provides that a contravention of section 67 may lead both to a prosecution under Division 5, section 143(2), as well as an administrative proceeding authorized under Division 3, sections 117-124. Vicarious liability provisions are found in both Division 3 and Division 5. What is noteworthy is that section 157, in the context of prosecutions, expressly states that it is a defence to the offence if the defendant establishes that it exercised due diligence to prevent the commission of the offence. Section 117 does not provide for a due diligence defence to an administrative penalty. The Respondent and Forest Practices Board argue that if the Legislature had intended due diligence to be a defence to a section 117 determination, it would have specifically stated that it was a defence as it did in section 157. They urge the Commission to follow its decision in *MacMillan Bloedel.*

The Appellant submits that the concept of absolute liability is abhorrent to any reasonable notion of fairness. It cites the decision of the Supreme Court of Canada in *R.* v. *Sault Ste. Marie (City)* (1978), 85 D.L.R. (3d) 161, which recognized, for the first time, a category of strict liability offences which would allow an accused to avoid liability by proving that he took all reasonable care. The court in that case stated that "There is a generally held revulsion against punishment of the morally innocent." The Appellant says that as long as section 117(2) is interpreted in a manner that does not allow a defence of due diligence, it cannot be stated that there is "fair enforcement" of the *Code.*

The Forest Practices Board argues that the decision in *Sault Ste. Marie* is not a precedent for the proposition that due diligence should be available as a defence to an administrative penalty. It argued that *Sault Ste. Marie* was about offences, which involve charges brought by crown counsel, hearings in front of judges, the "opprobrium of conviction" and the potential for jail. Here, there is no conviction, no offence, no prosecution by crown counsel and no possibility of the Appellant going to jail. The Forest Practices Board argued that in *Sault Ste. Marie* the Court stated that one must look at the overall regulatory pattern and the precise language used in the particular statute to determine if an offence involves absolute or strict liability. Here, we are not dealing with offences at all. The Forest Practices Board says the legislation is quite precise in that it clearly provides under section 157(2) for the defence of due diligence in relation to contraventions brought as offences, but that section 117, dealing with administrative penalties, does not provide for the defence. The Respondent agrees and argues that the objectives and intent of the legislation must be looked at and that section 117(2) must be looked at in the context of the entire *Code* which provides for both administrative remedies as well as offences.

The Forest Practices Board also argues that since the decision in *Sault Ste. Marie*, governments have had 20 years of experience in trying to protect the environment and that they have moved away from the old paradigm of regulatory offences to a new regime of administrative penalties and orders where due diligence is not a defence. The Forest Practices Board argues that the *Code* specifically creates a system of administrative remedies, administered by administrative officials, because the route of going through criminal courts was becoming too legalistic and very few prosecutions were being carried out.

The Appellant submits that it is extraordinary to have two different regimes with two different results, that is, in the case of a contravention pursued as an offence, a defence of due diligence is available, while in the case of a contravention pursued under the administrative penalty route under section 117(2), absolute liability applies.

The Appellant argues that as a contravention of section 67(1)(f) of the *Code* potentially gives rise to both criminal and administrative consequences, and that as a defence of due diligence is provided under section 157(2) for a licencee who faces a prosecution under section 143(2) on account of its vicarious liability for the actions of his or her contractors, that it should be able to avoid vicarious liability for an administrative penalty if it can demonstrate that it exercised due diligence and took reasonable measures to prevent the contravention.

The Appellant relies on the British Columbia Court of Appeal decision in *Twilight Zone Cabaret* v. *British Columbia (General Manager (Liquor Control and Licensing Branch))* (1995), 5 B.C.L.R. (3d) 280 to support its position. In that case, the legislation allowed the General Manager to take administrative action to cancel or restrict liquor licences for "failure to comply" with the Act. It had been alleged that the Twilight Zone Cabaret had failed to comply with section 35 (supplying liquor to minors). The Court held that an administrative action could not be taken unless there was a breach of section 35, read in its entirety, which included a statutory defence of properly examining and acting on the authenticity of the alleged minor's identification.

The Forest Practices Board argues that the *Twilight Zone* case did not stand for the general proposition claimed by the Appellant, and that the Court of Appeal specifically limited its findings to the "particular provisions of section 35 and 37 of the *Liquor Control and Licensing Act*" (p.284). It argued that the Court specifically avoided the general question of whether the defence of due diligence was applicable in administrative proceedings, saying such consideration was unnecessary because the case turned on the specific provisions of section 35 "which prevent it from being a failure to comply with the requirements of the Act if the specific excuse terms of the sections themselves are made out." The Forest Practices Board submits that all the Court did in *Twilight Zone* was read the prohibited conduct as being to "allow minors in without properly checking identification" and to find, on the facts of that case, that the prohibited conduct had not occurred.

The argument made by Repap was also raised in an appeal by MacMillan Bloedel, and was rejected by the Panel of the Commission hearing that appeal. This Panel adopts the reasoning in *MacMillan Bloedel*, (Appeal No. 96/05(b), February 19, 1997) and finds that *Twilight Zone* turned on the specific provisions of the legislation before it. Further, the Commission finds that it is perfectly acceptable to have different standards of proof and different defences available for the commission of an offence and an administrative sanction arising out of the same set of facts or actions (see, *Gordon Capital Corp.* v. *Ontario* (*Securities Commission*) (1991), 1 Admin. L.R.(2d) 199 (Ont.Div. Ct.) and detailed discussion by the Commission in *MacMillan Bloedel*, *supra*, and *Canfor* (Appeal No. 97-FOR-06, October 19, 1997).

2. Whether the penalty is appropriate in this case.

The Appellant submits that the penalty should be rescinded on the basis that, if the District Manager had properly taken due diligence into account, he would not have levied a penalty in the circumstances. The Appellant argues that it did everything it could possibly do to prevent the contravention and it specifically refers to a statement by the District Manager that "it is apparent that Repap demonstrated due diligence in carrying out prework meetings and communicating instructions to the area contract supervisor and the contract foreman."

The Appellant submits that while due diligence does require that it supervise its contractors to the extent necessary to ensure the effective operating procedures that it had put in place, it does not require a licensee to maintain "constant" supervision of its independent contractors.

The Respondent argues that Repap has not exercised all reasonable care by establishing a proper system to prevent unauthorized bladed trails contrary to its logging plan nor by taking reasonable steps to ensure the effective implementation and operation of that system.

In determining the quantum of penalty, the legislature has set out the factors that "may" be considered in section 117(4)(b) of the *Code.* The Respondent submits that the District Manager properly considered all relevant considerations set out in section 117(4) before he imposed a penalty of $1000.00. It notes that the *Administrative Remedies Regulation* under the *Code* provides for a maximum penalty of $50,000 for a contravention of section 67(1).

The Commission has found that evidence of whether reasonable care was taken is relevant in assessing the quantum of penalty. In *MacMillan Bloedel*, (Appeal 96/05(c), September 4, 1997) (unreported), evidence of reasonable care was considered under section 117(4)(b)(iv)- "whether the contravention was deliberate".

The Commission finds that both the District Manager and Review Panel properly considered the factors set out in section 117 of the *Code*. While the District Manager noted that the Appellant had demonstrated due diligence in carrying out prework meetings and communicating instructions to the area contract supervisor and the contract foreman, the District Manager also noted that "significant site disturbance occurred during the unauthorized construction." The penalty assessed and upheld by the Review Panel of $1000.00 was far short of the maximum allowable penalty of $50,000. The Commission finds that all the factors were properly weighed and that the penalty was not unreasonable. There is no reason to alter the penalty assessed.

DECISION

The Commission, pursuant to section 138 of the *Code*, upholds the decision of the Review Panel to find Repap in contravention of section 67(1) of the *Code*. The penalty levied of $1000.00 is also upheld. The appeal is dismissed.

Toby Vigod, Chair
Forest Appeals Commission

January 9, 1998