Forest Appeals Commission

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APPEAL NO. 1997-FOR-03

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:	Canadian Forest Products Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

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

DATE OF HEARING: April 21, 1997

PLACE OF HEARING: Victoria, B.C.

APPEARING:
For the Appellant: Bradley Armstrong, Counsel
For the Respondent: Karen Tannas, Counsel
Dawn House, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal bought by Canadian Forest Products Ltd. ("Canfor") against the decision of Phil Zacharatos, Ken Long and Carl Erickson (together the "Review Panel") dated December 19, 1996. The Review Panel upheld the determination of Janine Elo (the "Senior Official"), dated October 4, 1996, that Canfor contravened section 96 of the *Forest Practices Code of British Columbia Act* (the "*Code*"). It also upheld the $150.00 penalty levied pursuant to section 117(2) of the *Code*. In addition, the Review Panel recommended that the determination should not contribute to any further determination arising from the application of the Performance Based Harvesting Regulation.

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

GROUNDS OF APPEAL

In its Notice of Appeal, dated January 9, 1997, Canfor identified four grounds of appeal. In its Statement of Points, however, Canfor stated its intention to make submissions only in connection with ground 3 which reads:

> The Designated District Manager and Review Panel erred in their determination that Canadian Forest Products Ltd. was not entitled to the defence of due diligence.

At the hearing before the Commission, Canfor reiterated that this was the only ground of appeal. Canfor did not appeal the quantum of penalty. The Forest Practices Board (the "Board") raised a further issue: in its Statement of Points the Board urged the Commission to recommend that the Ministry of Forests review its *Policy 16.10 - Determinations ("Policy 16.10")* which is described below.

BACKGROUND

The facts are not in dispute. All parties agreed that the facts as set out in the Notice of Determination and in the decision of the Review Panel were accurate. No party sought to introduce evidence at the hearing.

Briefly, the facts are that Canfor hired Styler Brothers Contracting Ltd. (the "Contractor") to mechanically brush immature timber along a portion of existing road and to clear a right-of-way across an existing cutblock. Canfor had "ribboned" the route to be brushed and had provided the Contractor with on-site direction and a map. When the Contractor went to brush the road, it failed to follow the ribbons, missed a turn in the road, and proceeded to brush 200 m of existing road outside the approved road permit area, as well as an area of 0.05 ha of timber on the existing block that Canfor was not entitled to brush. The Contractor admitted that it had made a mistake and was willing to accept responsibility.

In the Notice of Determination, the Senior Official observed that Canfor's staff were not to blame for the *Code* transgression:

> This appears to be a case of operator error that could not have reasonably been prevented. Canfor staff took reasonable precautions in accurately ribboning the intended work and holding prework conferences to brief both the contractor and then the operator who eventually made the error. (p.4)

Neither the Government of British Columbia (the "Province") nor the Board challenged this characterization of the events. As was stated above, no party introduced any evidence at the hearing before the Commission.

Notwithstanding her conclusion that Canfor's staff were not at fault, the Senior Official, guided by *Policy 16.10* on determinations, made a determination against Canfor and not against the Contractor:

> In making the determination, I have considered and felt it appropriate to follow the ministry's policy on determinations. (p.5)

The Review Panel found the Senior Official was acting within her authority when she chose to levy the penalty against Canfor and not the Contractor. The Review Panel found there was no dispute as to the contractual relationship between Canfor and the Contractor and that the extension of "person" in section 117(2) includes both the contractor and contractee.

ISSUES

The issues before the Commission are as follows:

1. Is the defence of due diligence available to Canfor to absolve itself from liability under section 117 of the *Code*?

2. Should the Commission make a finding as to the presence or absence of due diligence?

3. Should the Commission make any recommendations in respect of *Policy 16.10*?

THE LEGISLATIVE PROVISIONS

Section 96 of the *Code* prohibits the cutting of Crown timber without authorization. The relevant portion of the section is reproduced below:

> **Unauthorized timber harvest operations**
>
> **96.** (1) A person must not cut, remove, damage or destroy Crown timber unless authorized to do so
>
> (a) under an agreement under the *Forest Act* or under a provision of the *Forest Act,*
>
> ...
>
> (2) If a person cuts, removes, damages or destroys Crown timber contrary to subsection (1), at the direction of, or on behalf of, another person, that other person also contravenes subsection (1).

Section 117 of the *Code* reads:

> **Penalties**
>
> **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

(a) must consider any policy established by the minister under section 122, and
(b) subject to any policy established by the minister under section 122, may consider the following:
(i) previous contraventions of a similar nature by the person;
(ii) the gravity and magnitude of the contravention;
(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.

(5) The senior official who levies a penalty against a person under this section, section 118 (4) or (5) or 119 must give a notice of determination to the person setting out all of the following:

(a) the nature of the contravention;
(b) the amount of the penalty;
(c) the date by which the penalty must be paid;
(d) the person's right to a review and appeal including the title and address of the review official to whom a request for a review may be made.

(6) For the purposes of subsection (1), the Lieutenant Governor in Council may prescribe penalties that vary according to

(a) the area of land,
(b) the volume of timber,
(c) the number of trees, or
(d) the number of livestock

affected by the contravention.

ANALYSIS

1. Is the defence of due diligence available to Canfor to absolve itself from liability under section 117 of the *Code*?

This issue was previously addressed by the Commission in *MacMillan Bloedel Ltd.* v. *Government of B.C.* (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 penalty under section 117 or section 119 of the *Code*. Both *MacMillan Bloedel* and the instant case involve contraventions of section 96(1) of the *Code*.

Counsel for Canfor submitted that section 117 should be interpreted to include the defence of due diligence. However, Canfor presented the Commission with no substantive argument in support of this position. In his submissions, Canfor's counsel stated that the Commission's decision in *MacMillan Bloedel* is "likely to be determinative" of this case and that he did not intend to re-argue the *MacMillan Bloedel* case before the Commission. He indicated that "that argument would be made in another place."

The Province and the Board made submissions in support of the decision in *MacMillan Bloedel*. The Province, in its written submissions, distinguished quasi-criminal regulatory offences from administrative penalties. The former, argues the Province, attract the defence of due diligence while the latter do not. The *Code* specifically provides for a defence of due diligence (section 157) when the Province proceeds by way of prosecution rather than by way of administrative penalty. The Province argues, and the Commission agrees, that this evinces an intention on the part of the Legislature that levies under section 117 shall not be defensible by proof of due diligence. If the Legislature had intended due diligence to be available as a defence for administrative proceedings, it would have expressly provided for such a defence.

The Province submits that administrative penalties under the *Code* are designed to compensate the Crown for damages to Crown timber and to encourage compliance with the *Code*; they are not designed to punish wrongs to society. Further, under section 84 of the *Forest Act,* stumpage is only payable if it is required under an agreement entered into under that *Act*. There is no payment of stumpage where timber has been harvested without authority. Therefore, the Province argued that if the defence of due diligence were allowed, a person could profit from the sale of timber without payment of stumpage.

The Board offered a number of policy reasons why section 117 should not be interpreted to provide for the defence of due diligence. The Board fears the defence of due diligence would lead to longer, costlier and more legalistic proceedings which, in turn, would lead to less enforcement generally. That Board stresses that Crown forests are a public resource, and those who are privileged to profit from that resource should be forced to pay for damage caused to it, rather than shifting the burden to the public. In this regard, the Board characterizes absolute liability administrative penalties as a tool to protect public property and compensate the public for damage to public resources.

The Panel is not bound by the decision in *MacMillan Bloedel*, but is entitled to follow it. In the absence of any argument as to why the Commission should conclude

otherwise, the Commission finds that section 117 of the *Code* does not provide for a defence of due diligence for the reasons set out in *MacMillan Bloedel.*

2. Should the Commission make a finding as to the presence or absence of due diligence?

Canfor submitted in its Statement of Points that it "established that it acted with due diligence and accordingly, should not be found liable." The Commission has found that the defence of due diligence is not available to absolve Canfor from liability under section 117 of the *Code.* In any event, Canfor introduced no evidence at the hearing to support the proposition that it acted with due diligence. As a result, the Province urged the Commission not to make a finding as to the presence or absence of due diligence. Canfor argued that because the Senior Official concluded Canfor had taken "reasonable precautions" (a conclusion which was not questioned by the Review Panel or by any party to this appeal), the Commission could assume the test for due diligence had been met by Canfor.

The Commission was provided with no argument and no authority on what constitutes due diligence. "Due diligence" is a term of art and what constitutes due diligence in one setting may not constitute due diligence in another. Findings of due diligence are grounded in a broad review of the circumstances in combination with nuanced legal analysis. The Commission agrees with the Province's submission that the Senior Official's determination that Canfor took "reasonable precautions" does not equate to a finding at law that due diligence exists. Her determination on this point did not involve the sort of analysis required to conclude whether or not due diligence did exist. The "reasonable precautions" taken by Canfor were accounted for when the Senior Official made her determination as to quantum after considering the factors in section 117(4)(b).

In *MacMillan Bloedel* the Commission explained the role of this section as follows:

> The Commission notes that, pursuant to section 117(4)(b), the senior official may consider a number of factors before levying a penalty under section 117(1) or section 119. These include whether the contravention was deliberate and the person's cooperativeness and efforts to correct the contravention. There are no minimum penalties under the *Code* and there is considerable discretion as to the quantum of penalty based on the factors set out in section 117(4)(b). The Commission finds that section 117(4)(b) provides for some due diligence-like factors in assessing the quantum of the penalty. These factors do not appear in the Offences section of the *Code*, where the due diligence defence is found. The Commission finds while the person's behaviour may become relevant in regard to the quantum of an administrative penalty imposed, these factors do not apply in addressing the question of whether a contravention has occurred in the first place and whether any penalty should be assessed. This can again be contrasted to the Offences section of the *Code*, where due diligence is a defence to a finding of a violation of the *Code*. (p.16, emphasis in original)

Both the Senior Official and the Review Panel rejected the defence of due diligence but did consider the factors set out in section 117(4)(b) in coming to their decisions regarding the quantum of penalty.

The Commission cannot accede to Canfor's submission that it accept, with no further evidence, analysis or argument, that a defence of due diligence has been made out in this case. Therefore, the Commission makes no finding as to whether or not Canfor made out a defence of due diligence.

3. Should the Commission make any recommendations in respect of Ministry of Forests *Policy 16.10*?

The Forest Practices Board urged the Commission to recommend that the Ministry of Forests review *Policy 16.10*. The policy is too lengthy to be reproduced in its entirety; only excerpts vital to this discussion appear below. The stated purpose of *Policy 16.10* is:

> To ensure that determinations are made in a fair and equitable manner, with due regard to the rules of administrative law.

The section titled "Making a Determination" includes the following passages:

> Where an incident involves a licensee, it is normally the licensee that is responsible for the activity, and therefore should be penalized, rather than individuals working for that licensee. Where an incident involves a private land owner, it is normally the land owner that is responsible for the activity, and therefore should be penalized rather than individuals working for that private land owner.
>
> It is recognized that occasionally certain individuals wilfully or recklessly fail to comply with the legislation. The option to penalize individuals for wilful or reckless non-compliance exists, but restraint should be exercised in penalizing those who do not have the primary responsibility to ensure that *Code* requirements are met.

The Board is concerned that there are instances in which the interests of justice will best be served by having a determination made against a contractor or sub-contractor but that such a determination will not be made due to the wording of *Policy 16.10*. The Board cites the instant case as an example. In this case, the Contractor admitted responsibility for the *Code* contravention but a determination was made only against the licensee, Canfor. The Board submits that the failure to make a determination against a contractor in a case where the contractor admits fault is an injustice which may undermine the public's confidence in the forest practices regime.

The Province submitted that *Policy 16.10* is sound and that the Contractor in this case may still be subject to a determination. In addition, it argued that the Board had the option to request a review of a failure to make a determination under section 128 of the *Code*, which it did not do in this case.

In the circumstances, the Commission finds it unnecessary to comment on *Policy 16.10*. The Board is free to pursue this matter with the Province outside of the appeal process.

DECISION

The Commission finds that the defence of due diligence is not available to absolve Canfor from liability under section 117 of the *Code*. The Commission makes no decision and no comment respecting *Policy 16.10*. The appeal is dismissed.

Toby Vigod, Chair
Forest Appeals Commission

May 26, 1997