



# Forest Appeals Commission

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## APPEAL NO. 1997-FOR-07

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.

<b>BETWEEN:</b>	Hayes Forest Services Limited	<b>APPELLANT</b>
<b>AND:</b>	Government of British Columbia	<b>RESPONDENT</b>
<b>AND:</b>	Forest Practices Board	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A Panel of the Forest Appeals Commission	
	Toby Vigod	Chair
	Deborah Todd	Member
	Howard Saunders	Member

**DATE OF HEARING:** July 10, 1997

**PLACE OF HEARING:** Victoria, B.C.

<b>APPEARING:</b>	For the Appellant:	Murray Blok, Counsel
	For the Respondent:	Karen Tannas, Counsel
		Dawn House, Counsel
	For the Third Party:	Calvin Sandborn, Counsel

## APPEAL

This is an appeal by Hayes Forest Services Limited ("Hayes") against the February 26, 1997 decision of a Review Panel. The Review Panel confirmed the decision of a Senior Official dated October 15, 1996 that Hayes had contravened section 67(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*") and section 8(1) of the Timber Harvesting Practices Regulation ("THPR"). The Panel upheld a penalty of \$2500.00 levied for the contravention of section 67(1) and \$2500.00 levied for the contravention of section 8(1) of the THPR.

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

**BACKGROUND**

Hayes was the contractor for TimberWest Forest Limited ("TimberWest") in relation to Tree Farm Licence 46, Cutting Permit 5-A, Setting 5-10-C, Block C12 in the Gordon River Camp area. Block C12 is a very small block with a small intermittent stream running through it. The stream is located in an area of high annual rainfall and flows directly into the Caycuse River, a river considered by the Ministry of Environment, Lands and Parks to have high fisheries values.

On December 7, 1995, one load of timber from the west side of the stream was yarded in an easterly direction across the stream in contravention of the logging plan. The logging plan provided for falling and yarding away from the stream and there were red arrows on the plan indicating the direction of yarding. Timber to the east of the stream (labelled L-10 on the logging plan) was to be yarded in an easterly direction, whereas timber to the west of the stream was to be yarded south to a spur road, which had not been built at the time of the incident. The logging plan called for a spur road to be built in the western portion of the block in order to avoid yarding across stream L-10. There was also a specific provision in the logging plan that no cross-stream yarding will be permitted.

In the late fall of 1995, the spur road had not been built, but TimberWest authorized the Appellant to commence logging in accordance with the cutting permit and logging plan. Due to safety concerns, TimberWest agreed that in order to avoid the situation of having an isolated faller cutting timber in the western portion of the setting, Hayes should fall the timber on the western portion at the same time as the rest of the block, even though yarding of the timber on the western portion of the block could not take place until the spur road was constructed.

On November 23, 1995 prior to commencing yarding operations, Mr. Doug Prenevost, Logging Supervisor with Hayes reviewed the logging plan and map with the yarding crew. Hayes also prepared a summary of the logging plan which was transcribed on the back of the logging plan map. Each member of the crew signed an acknowledgment that he had reviewed the harvesting prescriptions for the area. Mr. Glen Golbeck, operations manager with Hayes, testified that the crew had been told that they were not to yard any timber from the west side of stream L-10.

The cross-stream yarding took place on December 7, 1995. Approximately one load of wood was yarded across the stream. It was discovered by Mr. Eric Steen of TimberWest who immediately ordered that harvesting operations cease. On December 8, 1995, Mr. Harold Hayes, Vice-President of Hayes, retained Coast Forest Management Ltd. to provide an independent review of the stream condition and to provide recommendations for remedial action. A written report was provided to Hayes on December 10th and approval by MOF to commence remedial work was given on December 13, 1995. Remedial work was completed to the satisfaction of both federal and provincial officials. The spur road was never constructed as the logging plan was amended to allow the remaining 1/2 load to be hoechucked across the stream.

Hayes has admitted from the start that it is responsible for the cross-stream yarding incident. Mr. Harold Hayes, Vice-President of Hayes Forest Services Limited, testified that Hayes took "full ownership and responsibility for the cross-stream yarding incident and the costs of remediation". Hayes has stated that the cross-stream yarding was caused by 'human error', although no explanation was given as to what the human error was. It was submitted that Hayes did not know why the incident occurred.

## **ISSUES**

The issues before the Commission are as follows:

1. Whether there has been a contravention of the logging plan for failure to construct the spur road or whether the contravention is due to the cross-stream yarding.
2. Whether the Ministry of Forests ("MOF") Policy 16.10- Determinations (the "Policy") should be deviated from in penalizing a contractor and not solely the licensee for this incident.
3. Whether the Appellant was subject to double jeopardy in finding contraventions of both section 67(1) of the *Code* and section 8(1) of the THPR and the imposition of penalties in relation to each contravention?
4. Whether the quantum of the penalty is appropriate in the circumstances.

In its Notice of Appeal and Statement of Points, the Appellant also raised the issue of whether the District Manager breached the rules of natural justice for not raising the issue of failing to build a spur road at the opportunity to be heard meeting. This ground was abandoned at the hearing as the Appellant conceded that any defect in natural justice at the hearings below could be cured by the hearing before the Commission.

## **RELEVANT LEGISLATION**

The relevant legislative provisions are as follows:

### **Division 3- Timber Harvesting**

#### **General**

- 67** (1) A person who carried out timber harvesting and related forest practices on
- (a) Crown forest land
  - (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.

## **Timber Harvesting Practices Regulation B.C. Reg. 181/95**

### **Yarding and skidding**

- 8** (1) A person carrying out a timber harvesting operation on applicable land must not yard or skid timber through or over any stream or fisheries-sensitive zone unless the yarding or skidding is
- (a) authorized in a logging plan for the area, or
  - (b) if the person has been exempted from requiring a logging plan, authorized by the district manager.

### **Penalties**

- 117** (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.

## **DISCUSSION AND ANALYSIS**

### **ISSUE 1: Whether there has been a contravention of the logging plan for failure to construct the spur road or whether the contravention is due to the cross-stream yarding.**

There is no dispute that Hayes is responsible for the cross-stream yarding that took place on December 7, 1996. There is also no dispute that this was done in contravention of the logging plan which states that "During harvesting, no cross-stream yarding will be permitted." What Hayes has argued is that the District Manager erred in making a finding that Hayes had violated the logging plan for

failure to construct a spur road. In his determination, the District Manager found that:

One of the key factors in this case is the requirement in the logging plan for a spur road to be built into the block, which would ensure that no cross-stream yarding would take place on stream L-10. The fact that the spur road was not built is a violation of the logging plan...

At the hearing, the Respondent argued that the District Manager's language was "imprecise" and that his reference to the failure to build the spur road being a contravention of the logging plan was his attempt at describing the reasons behind the incident occurring. The Review Panel agreed with Hayes that technically, because the spur road was not built prior to falling commencing, it had not violated the logging plan in that regard. However, the panel did say that because the spur road was not built, it was likely a contributing reason for the occurrence of the cross-stream logging. It then went on to find that a contravention had occurred as the spur road was not built prior to yarding commencing in the southwest corner of the cutblock. At the hearing before the Commission, the Respondent took the position that the contravention of the logging plan was a failure to follow the required yarding direction, as opposed to a failure to build the spur road.

The Commission, after hearing all the evidence, makes the following findings. There was no contravention of the logging plan for failure to construct the spur road. The logging plan did not require the spur road to be built prior to the commencement of any logging operations. The logging plan also expressly stated that construction activities could only be carried out between May 1st - September 30th. Further, Hayes had been instructed by TimberWest not to build the spur road during the 1995 roadbuilding season.

However, the logging plan does clearly show the direction of yarding as being away from the stream. There is no dispute that timber to the west of the stream was to be yarded south to the spur road, which had not been built at the time of the incident.

The Commission finds that there is a contravention of section 67(1)(f) of the *Code* for cross-stream yarding and for yarding in a direction contrary to that provided for in the logging plan. There is also a contravention of section 8(1) of the THPR for cross-stream yarding as it is specifically prohibited in the logging plan.

**ISSUE 2: Whether the Ministry of Forests ("MOF") Policy 16.10 Determinations (the "Policy") should be deviated from in penalizing a contractor and not solely the licensee for this incident.**

Policy 16.10 is the MOF Policy that covers the process and recording of determinations. The relevant section reads as follows:

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.

Hayes argued that the Senior Official and the Review Panel should not have deviated from Policy 16.10 and should have proceeded only against TimberWest, the licensee. The Review Panel stated that it considered that there were extenuating reasons for the district manager to have chosen to vary from Policy 16.10. The main reason given was that Hayes “has admitted to direct and unconditional responsibility for cross-stream yarding” and “stated that TimberWest is not at fault” in this matter. Further, the Review Panel found that it was Hayes that first sought remediation advice and undertook remediation action, not the licensee. It must also be noted that TimberWest was found to be in contravention of section 67(1) of the *Code*, although no penalty was assessed.

The Respondent argued that the Policy does not require that the Licensee be penalized in every instance and that the main goal of the Policy is to avoid determinations against individuals in most cases. The Respondent submits that Hayes is a very large company and is also a licensee as well as a contractor and should therefore be held to a higher standard of performance.

The Commission, first of all, notes that section 117(1) of the *Code* clearly provides that any person, not just the licensee, may be found to be in contravention of the *Code*. The senior official has a clear discretion under the statute to decide who should be the subject of a determination. Second, the Policy itself uses the term “normally” to describe the circumstances under which a determination should be made against a licensee involved in an incident. It does not use mandatory language and clearly anticipates a situation where someone other than a licensee may be found to be in contravention of the *Code*. In fact, it is well-established law that a person charged with the exercise of discretion under a statute must do so without fettering that discretion with an inflexible policy.

The Commission finds that the Review Panel properly exercised its discretion in making a determination against the contractor. The Commission also finds that it is appropriate that where a contractor takes full responsibility for a contravention, that a determination may be made against it. The fact that Hayes is a major player in the Duncan Forest District is also relevant. Policy is to guide discretion, not to fetter it. The statute leaves it entirely open as to who may be the subject of a determination. The Commission finds that this was an appropriate case to make a determination against the contractor.

**ISSUE 3: Was the Appellant subject to double jeopardy in finding contraventions of both section 67(1) of the *Code* and section 8(1) of the THPR and the imposition of penalties in relation to each contravention?**

The Appellant argues that the finding by the District Manager and the Review Panel of two separate contraventions and the imposition of two separate penalties for a single infraction constitutes fundamental unfairness because double punishment is being imposed for a single incident.

The Forest Practices Board (“the Board”) takes the position that while a person can be found to be in contravention of two or more sections of the *Code* for a single action, a person should not be found to be in contravention of two or more sections

of the *Code* for a single action where there is a single legal prohibition. It argues that the Appellant should not be held liable under both section 8 of the THPR and section 67 of the *Code* for the single action of cross-stream yarding. It says that a single action is involved, and a single legal prohibition.

The Board submits that, because this case involves administrative penalties and not criminal law, the principle against being punished twice for the same offence does not apply. However, it submits that an issue of fairness is raised in these circumstances. At the same time, the Board raises a concern that if contraventions are struck in order to deal with overlap problems, in some circumstances, remedial powers that depend upon a finding of contravention of a particular section might be jeopardized.

The Respondent argues that there was no double punishment in this case as two sections had been contravened. It submitted that although the District Manager did attribute \$2500.00 to each contravention, he was really imposing a 'global' amount for the entire incident and that there was not a doubling of the penalty. The Respondent did submit that the Commission could make a new determination and find that two penalties were inappropriate. However, Counsel urged the Commission that the total penalty of \$5000.00 be retained as it was an appropriate amount for the incident.

The Appellant and the Board referred to a decision of this Commission in *International Forest Products Limited v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/02(b), March 19, 1997, (unreported)). In that case, a determination had been made that Interfor contravened section 17(1)(c) of the Forest Road Regulation and section 63(2) of the *Code*. Interfor argued that this constituted double jeopardy or was contrary to the common law principle against multiple convictions in spite of the fact that only one penalty was assessed for the contraventions.

The panel in that case found that, once a contravention of section 17 of the Regulation was found, by operation of statute, section 63 of the *Code* was also contravened - no independent determination of a contravention was required. It found that the *Code* and the regulations constitute an integrated scheme of forest protection and could not be applied separately. The panel held that it was "unable to find that the application of one penalty by the District Manager and upheld by the Review Panel constitutes either double punishment or unfairness."

The case now before the Commission is similar in that two contraventions were found, one under the Regulation and one under the *Code*. However, in this case two separate penalties were assessed.

The Commission agrees with the finding in *Interfor* that the common law rule against multiple convictions for the same wrongful act is not applicable to contraventions assessed under the *Code* and its regulations. As stated by the panel in *Interfor*, the *Code* and the regulations constitute an integrated scheme of forest protection. The drafters of the *Code*, its regulations, and standards created a scheme with general prohibitions against a range of activities as well as specific

prohibitions against what are sometimes the same activities. In doing so, there can be significant overlap as in this case.

In our view, this scheme was created in an effort to create consistency in the determination process and a "gapless" regulatory scheme. Thus, there is evidence that the Legislature intended to allow the government officials to find a person to be in contravention of two or more sections of the *Code* and its regulations for a single action, even though it may constitute a single legal prohibition.

Having said that, the Commission also recognizes that this scheme may result in an unfairness if two separate penalties are assessed for what is essentially one wrongful action having one legally prohibited effect (e.g. cross stream yarding). However, the place for any unfairness to be remedied is at the penalty assessment stage. Section 117 provides government officials with significant discretion in assessing a penalty. Where it is clear that the contraventions arise out of a single action and are for a single legal prohibition, these circumstances should be factored into the penalty assessment.

#### **ISSUE 4: Whether the quantum of the penalty is appropriate in the circumstances.**

The Appellant argued that the Senior Official and Review Panel had taken into account improper considerations in the assessment of the penalties. It also argues that the penalties were excessive and is urging the Commission not to impose any penalty.

Specifically, the Appellant challenged the Review Panel's conclusion that in assessing the penalty, it was open for the District Manger to consider two other incidents where contraventions had been initially found, even though these determinations had been subsequently rescinded by a Review Panel. The Review Panel stated:

However, it is our opinion that in making his determination for this case, the district manager was justified in considering 'similar incidents' or 'apparent difficulties' and could have referred to a perceivable trend toward harvesting/prescription errors. These possible infractions, while not part of Hayes' performance record, are certainly real, and in our view, worthy of consideration in the district manager's decision-making process.

The Appellant argued that while section 117(4) allows a senior official to consider "previous contraventions of a similar nature" in assessing penalty, that this does not apply to previous "similar incidents" or "apparent difficulties" as stated by the Review Panel. The Board supported this position, and noted that pursuant to section 126(1) of the *Code* previous findings of contraventions are not "effective" until a person has exhausted his/her rights of review or appeal. The Board argues that they should not be considered in subsequent proceedings until the time for review and appeal has elapsed. In this case, two determinations of contraventions of the *Code* were made by a senior official, but were later rescinded by a Review

Panel. The Board argues that a rescinded contravention is not a “previous contravention.”

At the hearing before the Commission, the Respondent conceded that this was an improper consideration. However, it urged the Commission not to alter the penalty as this was not a major factor in the determination of the penalty. The Respondent submitted that the penalty would have been the same even if the other incidents had not occurred. The Commission finds that the contraventions, which were later rescinded, should not have been taken into account in the determination of the penalty. While this may not have been a major factor, it still was considered in the determination of the penalty, and there should be some reduction in the penalty due to this factor having been considered.

The Appellant also argued that the Review Panel improperly considered site investigation costs incurred by the Respondent as relevant to the quantum of penalty. In *Canadian Forest Products Ltd. v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/01, December 11, 1996)(unreported)), the Commission found that a penalty should not be imposed for the costs involved in investigating possible violations of the *Code*. The Respondent concedes that this would be an inappropriate consideration, but again submits that this was not a major factor in the determination of the penalty. The Commission again finds that this was an inappropriate consideration and again finds there should be some reduction in the penalty assessed due to these costs being considered.

The Administrative Remedies Regulation outlines the maximum penalties payable for these infractions: section 67(1) of the *Code*: \$50,000 and section 8(1) of the THPR: \$10,000.

The Respondent submits that the total penalty of \$5000.00 was reasonable to provide a sufficient deterrent and compensation for the incident as a whole. It submits that there was potential for environmental damage in this case, as the stream flowed directly into the Caycuse River, which is fish bearing. The Respondent also argued that more could have been done by Hayes, including better marking of the stream, to ensure that the cross-stream yarding did not occur. Finally, the Respondent also referred to section 168 of the *Code*, which provides that taking remedial action after a contravention does not affect any penalty to which a person may be liable under the *Code* or regulations.

Section 117(4) of the *Code* sets out the factors that may be considered in assessing a penalty. The Commission finds that the penalty should be reduced somewhat to take into account the improper considerations taken into account by the District Manager and the Review Panel discussed above. The Commission finds that a penalty of \$4000.00 is appropriate in the circumstances.

## DECISION

Section 138 of the *Code* provides that the Commission may confirm, vary or rescind the decision appealed from and make any decision that the person whose decision is appealed could have made.

The Commission varies the decision of the Review Panel and finds that the Appellant was in contravention of section 67(1) of the *Code* for yarding in the wrong direction and cross-stream yarding contrary to the provisions of the logging plan and section 8(1) of the THPR for cross-stream yarding contrary to the logging plan. The Commission assesses one penalty of \$4000.00 for these contraventions.

Toby Vigod, Chair  
Forest Appeals Commission

February 4, 1998