



Forest Appeals Commission

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APPEAL NO. 1997-FOR-10

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:	TimberWest Forest Limited	APPELLANT
AND:	Government of British Columbia	RESPONDENT
AND:	Forest Practices Board	THIRD PARTY
BEFORE:	A Panel of the Forest Appeals Commission	
	Toby Vigod	Chair
	Deborah Todd	Member
	Howard Saunders	Member

DATE OF HEARING: July 11, 1997

PLACE OF HEARING: Victoria, B.C.

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

APPEAL

This is an appeal by TimberWest Forest Limited ("TimberWest") 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 TimberWest had contravened section 67(1) of the *Forest Practices Code of British Columbia Act* (the "Code"). No penalty was levied by the Senior Official or the Review Panel.

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

BACKGROUND

TimberWest is the holder of Tree Farm Licence 46, and is entitled to harvest timber from Setting 5-10-C, Block C12, under the authority of Cutting Permit 5-A. Block

C12 is a very small block with a small intermittent stream running through it. The stream flows into the Caycuse River, a river considered by the Ministry of Environment, Lands and Parks to have high fisheries values.

Hayes Forest Services Limited ("Hayes") was the contractor for TimberWest on this block. On October 17, 1995, in accordance with TimberWest's Standard Operating Plan, Mr. Eric Steen, Contract Supervisor, Mr. Dennis Cronin, Engineering Technician, and Mr. Ken Kaps, Assistant Engineer, met with representatives from Hayes to review a number of blocks, including Block C12. At this meeting, Hayes was provided with a copy 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 was not 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. The prescription for stream L-10 was discussed at the meeting, including the fact that there was to be no cross-stream yarding, and Hayes signed on to the logging plan.

At this point in time, the spur road had not been built, but TimberWest authorized Hayes to commence logging in accordance with the cutting permit and logging plan. Due to safety reasons, 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 21, 1995, Hayes started its fallers on the Block. Mr. Steen and Mr. Kaps attended at the Block and again went over the logging plan commitments with Mr. Doug Prenovost, from Hayes, and Dick Worthing, the supervisor for the falling contractor. On November 27, Mr. Kaps inspected what had been done on Block C12 to date. On December 1, 1995, Mr. Kaps and Mr. Don Hopkins (Assistant to Mr. Kaps) were on site to monitor and inspect harvesting activities and on December 6, 1995, Mr. Hopkins and Mr. Dennis Cronin were on-site. On December 7, 1995, one load of timber from the west side of the stream was yarded by Hayes in an easterly direction across the stream in contravention of the logging plan.

The cross-stream yarding was discovered on December 7 by Mr. Steen who immediately ordered harvesting operations to cease. On December 8, Mr. Kaps attended the site and observed Hayes hand-cleaning the stream on site.

On December 13, 1995, representatives of TimberWest met with MOF, Ministry of Environment, Lands and Parks, and Hayes. At that meeting, Hayes expressly admitted that the contravention of the logging plan was entirely its responsibility.

On October 15, 1996, a determination was made that TimberWest had contravened the logging plan and had therefore contravened section 67(1) of the *Code*. This

was upheld by the Review Panel on February 26, 1997. No penalty was levied against the Appellant.

ISSUE

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

RELEVANT LEGISLATION

The relevant legislative provisions are as follows:

Division 3-Timber Harvesting

General

- 67** (1) A person who carries 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.

Division 3—Administrative Remedies

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.

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 TimberWest 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 cross-stream yarding of stream L-10 took place contrary to the terms of the approved logging plan which states that "during harvesting, no cross-stream yarding will be permitted." Hayes has admitted responsibility for the

incident and a determination was made against it for a contravention of section 67(1) of the *Code* and section 8(1) of the *Timber Harvesting Practices Regulation*.¹

TimberWest has 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 argues that if the defence is available, the Commission should find that it was duly diligent and that the determination 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 an 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, and subsequent to the hearing of this appeal, 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) and *Repap v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-02, January 9, 1998) (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. 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 its earlier decisions and 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 TimberWest had not shown that it was duly diligent.

The Commission adopts the reasoning found in the earlier cases, especially the *Repap* case. It notes that counsel was the same in *Repap*, as in this case, and almost identical legal arguments were made. Therefore, the Commission finds that a defence of due diligence is not available to TimberWest to avoid liability for a determination under section 117(2) of the *Code* for a contravention of section 67(1) of the *Code*.

In previous cases, the Commission has found that evidence of whether reasonable care was taken is relevant in assessing the quantum of penalty. In this case, no penalty was levied by the Senior Official or the Review Panel after a consideration of

¹ Hayes Forest Service appealed the Review Panel's decision to the Forest Appeals Commission and the matter was heard on July 10, 1997. Decision No. 97-FOR-07 was issued on February 4, 1998.

the factors set out in section 117(4) of the *Code*. The quantum of penalty was not argued at the hearing and the Commission finds no reason to alter the penalty assessed.

DECISION

The Commission, pursuant to section 138 of the *Code*, upholds the decision of the Review Panel which found TimberWest in contravention of section 67(1) of the *Code* and which assessed no penalty for this contravention. The appeal is dismissed.

Toby Vigod, Chair
Forest Appeals Commission

February 11, 1998