BRITISH COLUMBIA

Forest Appeals Commission

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APPEAL NO. 1997-FOR-13

In the matter of an appeal under section 131 the *Forest Practices Code of British Columbia Act,* R.S.B.C. 1996, c. 159.

BETWEEN:	William Hollis	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Kristen Eirikson, Panel Chair

HEARING DATE: January 8, 1998

PLACE OF HEARING: Castlegar, B.C.

APPEARING:

For the Appellant:	David Miller, Counsel
For the Respondent:	Dawn House, Counsel
For the Third Party:	Calvin Sandborn, Counsel

APPEAL

This is an appeal brought by William Hollis against a Determination made by Mr. Arnett, dated January 7, 1997, which was confirmed in an Administrative Review Decision dated March 25, 1997, conducted by way of written submissions.

The Forest Appeals Commission (the "Commission") has the authority to hear this appeal under section 131 of the *Forest Practices Code of British Columbia Act* (the "*Code*").

The Appellant, William Hollis, was found in contravention of section 96(1) of the *Code*, for unauthorized timber harvesting. That section provides as follows:

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,

(b) under a grant of Crown land made under the Land Act,

(c) under the Mineral Tenure Act for the purpose of locating a claim,

(d) under the Park Act,

(e) by the regulations, in the course of carrying out duties as a land surveyor, or

(f) by the regulations, in the course of fire control or suppression operations.

An administrative penalty in the amount of $4,625.00 was levied pursuant to section 117 of the *Code* on the basis that 49 trees were unlawfully harvested from Crown land located in close proximity to property owned by the Appellant near Renata, B.C. The penalty rate assessed under section 117 of the *Code* was $125.00 per m^3, with the *Administrative Remedies Regulation* authorizing a maximum penalty of $200.00 per m^3. Seizure notices were initially placed on the logs and seizure costs were estimated at $3000.00. However, as discussed below, seizure penalties and fines were later withdrawn and the assessed penalty does not include an assessment for seizure or scaling costs.

BACKGROUND

The Appellant did not give evidence at the hearing, nor call any witnesses on his behalf.

Evidence was presented by Ministry of Forests' investigators that, acting on the basis of a tip, two investigators attended upon the Appellant's property near Renata, B.C., a remote property accessed by boat. The Appellant was in the process of building a log house on his approximately sixteen-acre property using pole quality cedar. A number of cedar, pine and other logs were stacked nearby. The Appellant told the investigators that he had harvested the wood from his own property and aided the investigators by indicating where the corner pins of his property were located.

Several investigations of the area took place during which Ministry of Forests' staff located two areas on Crown land proximate to the Appellant's land where cutting had taken place. No permits or licenses had been granted for the cutting. The investigators initially located an area where seven trees had been cut. On their second trip, a larger area where 52 trees had been cut was located, approximately 1-1/2 kilometers from Appellant's home site. Later, two other stumps were located. Most of the stumps on the 52-tree site were large, pole quality, cedar.

Because of the height of the stumps, the investigators determined that the trees had been cut during winter logging operations. It was estimated that most of the harvesting had taken place the previous winter due to various factors including the condition of the foliage from the treetops, which were still present on site.

The investigators collected cookie samples from trees on the sites during their several trips into the area. By selecting cookies from distinct stumps, they were able to match three cedar samples and three pine samples from the logs located on, and stacked on a roadway adjacent to the Appellant's property. Evidence was also presented that between the investigators second and third visits to the site, the butt ends of some of these logs had recent cuts, showing white, which had apparently been bucked off in order to thwart attempts at making further matches.

Evidence was further given that investigators conducted perimeter walks and traversed approximately 80-90% of Appellant's property to determine whether the logs could have come from his property. It was determined that the Hollis property was a relatively dry site that would not support the growth of cedar of the size and maturity of the logs found, as cedar grows in pockets near creeks and wet areas. Only one such area was found on the Hollis property, which had been cleared in the past and was a less mature stand.

In order to assess the amount of wood cut for penalty purposes, a district check scaler determined that 46.2 cubic metres of wood had been removed and damaged. Volume was assessed on the basis of 49 trees. Although 61 stumps had been located, older cuts and any questionable wood were factored out of the volume calculation.

Photographs were tendered and reviewed, including those showing the cutting sites, cookie matches, the Appellant's partially completed home, and the log piles located on, and adjacent to the Appellant's property. The cookie samples were also tendered and the matching process described.

ISSUES

Submissions made by legal counsel on behalf of the Appellant consisted solely of legal arguments. The Appellant's counsel argued that Mr. Arnett did not have sufficient evidence before him to find the Appellant in contravention of section 96(1).

Appellant's counsel further submitted that an error of law was made in the making of the Determination in that Mr. Arnett was not able to determine which of the four prohibited acts had been committed, i.e., was the timber cut, removed, damaged or destroyed.

Issue was also taken with the reliance placed upon circumstantial evidence and the use of the doctrine of presumption, which was characterized as a criminal law concept. It was argued that the use of a criminal law concept of this nature gave rise to an error of law in that the criminal standard of proof should likewise have been invoked.

It was further argued that, on the basis of the specific facts of this case, the size of the penalty should give rise to the criminal burden of proof rather than the lesser civil burden of proof generally applicable in administrative decisions of this nature.

Also at issue at the time of the hearing were the additional seizure costs and penalties that could potentially be imposed upon the Appellant. Seizure notices had been placed on the wood and seizure costs were estimated at $3000.00 on the September 13, 1996 Timber or Forest Products Report that was issued.

The issues have been summarized as follows:

1. Whether there was sufficient evidence to find that the Appellant contravened section 96(1).

2. Whether the criminal standard of proof is applicable in this case.

3. Whether seizure costs or fines should be imposed.

DISCUSSION

1. Whether there was sufficient evidence to find that the Appellant contravened section 96(1).

The Appellant took issue with the evidence available at the time of making the Determination, including:

- the lack of evidence and definition of “recently” cut;
- the lack of direct evidence linking the Appellant to the unauthorized cutting
- the lack of evidence connecting the Appellant to the removal of the logs
- the lack of evidence connecting the Appellant to the damaging of any logs
- the lack of evidence connecting the Appellant to destroying any logs.

The Panel finds that it is not necessary to find the Appellant in violation of each and every element of section 96(1), as submitted by Appellant’s counsel, nor is it necessary to specify exactly which element of section 96(1) was breached. It is clear that unauthorized cutting and removal took place and there was also further evidence of damage and destruction. It is also not necessary to pin point an exact date for a violation that undoubtedly took place over a considerable length of time the previous winter.

2. Whether the criminal standard of proof is applicable in this case.

Appellant’s counsel argued that because of the magnitude of the monetary assessment facing Mr. Hollis, which at the time of the hearing included the possibility of additional seizure fines, as well as losing the logs under seizure in his partially completed house, the criminal standard of proof should apply in this case. The application of the criminal standard would mean that the guilt of the Appellant would need to be established beyond a reasonable doubt, a higher standard than the balance of probabilities standard generally applied in civil and administrative law cases.

It was argued that the $4,625.00 fine, together with the seizure of the logs themselves and seizure costs that had initially been estimated at $3000.00, would amount to a true penal consequence for the Appellant. It was submitted, though no evidence was led in this respect, these sums would represent an enormous financial burden to the Appellant in his financially reduced circumstances and payment of them could cost him his property. As such, the penalties were characterized as those with truly penal consequences.

It was further argued that this is the type of criminal or quasi-criminal offence to which section 11(d) of the *Canadian Charter of Rights and Freedoms* applies. Section 11(d) states that:

> 11 Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

R. v. Wigglesworth [1987] 2 S.C.R. 541, and other case law was cited in support of finding that the penal consequences to the Appellant were such as to require that the highest level of procedural protection available, that is, the criminal standard of proof, should apply in this instance. *Wigglesworth* is a double jeopardy case involving a disciplinary offence that narrowly interprets the types of offences that attract the procedural safeguards of section 11 of the *Charter*. These are defined as public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted.

Madame Justice Wilson, at page 193, was cited as follows:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within section 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity....
>
> ...In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

In furtherance of this argument, the Appellant's counsel submitted that, to the extent that the *Code* regulates license holders within the forest industry, this is more in the nature of a private, domestic or disciplinary matter which is regulatory, protective or corrective in nature to which the civil standard of proof would apply. It was argued, however, that where a private individual, such as the Appellant, who

is outside of the forest industry fraternity is facing penal consequences of this magnitude, the criminal standard should apply.

Appellant's counsel also argued that according to the Commission's Procedure Manual, the Panel has latitude to vary its own policies which would include the ability to vary the burden of proof. Section 4.4.3 of the Manual states that the burden of proof to generally be applied is the civil burden of proof, "on a balance of probabilities".

The position of the Crown and the Forest Practices Board, which the Panel accepts, is that the correct standard of proof to be applied to administrative penalties under the *Code* is the civil standard of proof. It was argued that this issue has been addressed in numerous past decisions of the Commission. In *Tolko Forest Products* v. *Forest Practices Board* (Forest Appeals Commission, Appeal No. 95/02, November 12, 1996)(unreported) the Commission found that administrative proceedings under the *Code* are not offences under the *Offence Act,* but rather fall within the realm of activity described in *Wigglesworth* which is to "regulate conduct within a limited private sphere of activity".

It was further argued that Madame Justice Wilson in *Wigglesworth* had been misinterpreted and goes on to state, also at page 193, that:

> Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

Despite having the latitude to vary from principles established in past decisions of the Commission, the Panel can find no compelling reason to do so in this case, especially given the leading authority cited. The argument that a different standard should apply to persons who are not members of the "forest fraternity" would impose extensive enforcement difficulties with respect to a statute that does not intend that two different standards apply. Furthermore, the standard of proof is not determined on a fact specific basis; it is determined on the basis of the legislative scheme. In any event, the Appellant's argument that the penalties are of a magnitude that they could lead to such hardship as to require a higher standard of proof, is of limited merit given that:

- the penalty amount in this instance is considerably less than the maximum allowed under the *Code;*
- the penalty amount is, roughly, only the cubic meter value of the trespassed wood, and care was taken to eliminate older cuts and questionable wood;
- even with the potential addition of seizure costs and the loss of the wood to the Appellant from a seizure (which costs and seizure notices were withdrawn as discussed below), the magnitude of the penalties is not great in light of the value of the high-grade cedar and other woods that were trespassed; and

- no evidence was led that the penalties would truly amount to a hardship to the Appellant.

3. Whether seizure costs or fines should be imposed.

At the time of the hearing, there was uncertainty as to whether the wood would be seized and seizure costs applied in addition to the penalties, and/or whether monies received from any such sale would be applied against seizure costs or penalties. Various arguments were made as to whether seizure issues were separate matters that are not appealable under section 127 of the *Code,* or whether they were matters in issue before the Panel because issues relating to the seizure were related to the argument that the magnitude of the penalties, and potential loss of a partially-built home, would invoke the application of a higher burden of proof.

By agreement, additional submissions were made with respect to this issue. In its submission, the Crown advised that it would not be pursuing any seizure costs or fines against the Appellant, making this a non-issue that will not be further considered here.

DECISION

The appeal of William Hollis is dismissed.

The Panel finds that the Appellant is in breach of section 96(1) of the *Code*. The evidence of Ministry of Forest investigators is accepted and was not refuted by Appellant.

The evidence was sufficiently direct and compelling to link the Appellant to the offence. Though some of the evidence was circumstantial, it is acceptable on either a civil or criminal standard to consider compelling circumstantial evidence. On either standard it is not necessary to catch the offender in the act or match every stump or cookie sample with the logs in issue and it is more than reasonable to presume on the basis of six matches, and lack of matching stumps on the Appellant's property, that the 49 logs in issue were all illegally harvested by the Appellant.

The standard of proof applied in this case is the civil burden of proof, that is, the balance of probabilities standard. It might also be noted that, given the compelling nature of the evidence presented, if the criminal standard had been applied, the Panel would also have found the Appellant to be in violation.

The argument that the penalties were of such magnitude as to invoke the full protection of section 11(1) of the *Charter* and require the application of the criminal standard is not accepted. To requote Madame Justice Wilson in *Wigglesworth*:

> Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

In any event, this issue became much less compelling when the Crown withdrew the seizure costs and fines. The applied penalty of $125.00 per cubic meter is considerably less than the maximum allowed under section 117 of the *Code* and may not even cover the value of the high-grade pole quality cedar and other woods that were trespassed. As well, the cost to the public for scaling costs were not applied in this case.

The penalty of $4,625.00 is upheld.

Kristen Eirikson, Panel Chair
Forest Appeals Commission

August 31, 1998