



Forest Appeals Commission

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APPEAL NO. 1997-FOR-31

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:	Edward Yaremchuk	APPELLANT
AND:	Government of British Columbia	RESPONDENT
AND:	Forest Practices Board	THIRD PARTY
BEFORE:	A Panel of the Forest Appeals Commission	
	Toby Vigod	Chair
	Howard Saunders	Member
	Geza Toth	Member

DATE OF HEARING: March 3, 1998

PLACE OF HEARING: Kamloops, B.C.

APPEARING:	For the Appellant:	Edward Yaremchuk
	For the Respondent:	Wendy McKittrick, Counsel
	For the Third Party:	Calvin Sandborn, Counsel

APPEAL

This is an appeal brought by Edward Yaremchuk against an Administrative Review decision dated September 9, 1997, which upheld the determination of the District Manager dated June 13, 1997, that Mr. Yaremchuk contravened section 96(1) of the *Forest Practices Code of British Columbia Act* (the "Code") by unauthorized harvesting of timber. The Review Panel varied the penalty of \$32,569.00 initially assessed by the District Manager under section 119 of the *Code*, by reducing it to \$19,569.06.

The Forest Practices Board participated in this appeal solely on the issue of due diligence. It took the position that the defence of due diligence is not available to the Appellant as a defence to an administrative penalty for a contravention of section 96 of the *Code*. It relied on its written Statement of Points and did not attend the oral hearing held on March 3, 1998.

Mr. Yaremchuk is seeking an order rescinding the contravention or, in the alternative, reducing the penalty assessed. The Respondent is seeking an order confirming the Review Panel's finding of a contravention of section 96(1), but varying the penalty assessed by the Review Panel, by restoring the penalty levied by the District Manager.

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

BACKGROUND

On August 10, 1995, Ministry of Forests' ("MOF") officials discovered that an unauthorized harvesting of Crown timber had occurred on Crown land adjacent to the western boundary of the western portion of DL 4119, Lillooet Land District, in Fountain Valley, British Columbia. The western portion of DL 4119 is owned by Leonard Clark. Approximately 753 trees had been harvested off 2.6 hectares of Crown land. The volume was estimated to be 300.6 m³. On the western portion of Mr. Clark's property, 1268 recently harvested stumps were counted with an estimated volume of 511.9 m³.

Ainsworth Lumber Co. Ltd. ("Ainsworth") purchased the logs harvested from the western portion of DL 4119 and the trespass area from Mr. Clark for \$93.00 per cubic metre minus costs, under Mr. Clark's private timber mark, NAOJT. Ainsworth's weigh scale and load slips indicated that, in total, 23 loads of timber totalling 812.50 m³ were received by Ainsworth from DL 4119 and the trespass area. The market value of the 300.6 m³ timber harvested from Crown land was calculated to be \$27,965.10.

Mr. Clark contracted with Edward Yaremchuk and his two sons to log his property. Darren Yaremchuk was the faller, Darcy Yaremchuk did the skidding, and Edward Yaremchuk did the limbing and bucking.

Three separate hand written notes prepared by Mr. Clark and signed individually by Edward, Darren and Darcy Yaremchuk show that the three Yaremchuks were to log Mr. Clark's property and that they were to "work by metre". Edward and Darren were to receive \$5.00 per cubic metre and Darcy was to be paid \$7.00 per cubic metre (\$5.00 per cubic metre plus \$2.00 per cubic metre for the skidder). Ainsworth payment records show that Edward Yaremchuk was identified as the logging contractor and indicate that he was paid \$17.00 per cubic metre of wood delivered under Mr. Clark's timber mark.

Edward and Darren Yaremchuk flagged the boundary on three occasions, twice on their own. On the third occasion, Mr. Clark brought a compass and accompanied them half way up the boundary.

Mr. Reid Frederick, Compliance and Enforcement Officer, MOF, testified that on August 10, 1995, when he discovered the unauthorized harvesting, there was a boundary improperly located on Crown land that was flagged with orange, blue and pink ribbons.

There is no dispute that 300.6 m³ of timber was cut and removed without authorization during May-July 1995 on Crown land west of the western boundary of DL 4119, and that this was done by the Yaremchuks.

In a determination dated June 12, 1997, Mr. Clark was assessed a compensatory penalty of \$20,140.00 to re-capture the economic benefit derived by Mr. Clark from the unauthorized harvesting of Crown timber. That penalty has been paid by Mr. Clark.

On June 13, 1997, Mr. Dan Donaldson, District Manager, issued his determination in which he found Edward Yaremchuk to be in contravention of section 96(1) of the *Code*. He assessed a total penalty of \$32,569.00 under section 119 of the *Code*. He calculated the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 16 of the *Forest Act* for a subtotal of \$19,569.06 ($\$34.66 \text{ per m}^3 \times 300.6 \text{ m}^3 = \$10,418.80$ (stumpage) plus $\$30.44 \text{ per m}^3 \times 300.6 \text{ m}^3 = \$9,150.26$ (bonus bid)) plus the cost that will be incurred by the government in re-establishing a free growing stand on the area ($\$5000.00/\text{ha} \times 2.6 \text{ ha} = \$13,000$) for a total penalty of \$32,569.06 rounded to \$32,569.00.

Edward Yaremchuk applied for a review of the determination and a decision was issued by a Review Panel on September 9, 1997. The Review Panel varied the penalty issued by the District Manager to \$19,569.06, the amount equal to the stumpage and bonus bid as calculated in the original determination. It found that the costs to cover reforestation were recovered through the combined penalties to Mr. Clark and Mr. Yaremchuk.

GROUNDINGS OF APPEAL

In his Notice of Appeal, Mr. Yaremchuk identified the following two grounds of appeal:

1. He was an employee and was not charged with the responsibility of surveying Clark's property for logging purposes.
2. The line was flagged properly and checked personally by the landowner and supervisor Leonard Clark. The line was subsequently moved by someone.

ISSUES

1. Whether Edward Yaremchuk was an employee or an independent contractor of Mr. Clark.
2. Whether the defence of due diligence is available to Mr. Yaremchuk to avoid liability for a determination made under section 119 of the *Code* for a contravention of section 96(1) of the *Code*.
3. Whether the quantum of penalty is appropriate in the circumstances.

RELEVANT LEGISLATION

The relevant legislative provisions are 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,
- (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).

Private Land adjacent to Crown land

- 97.** (1) Before an owner or occupier of private land that is adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land.
- (2) Before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land.

117. 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 158.1 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.

Penalties for unauthorized timber harvesting

- 119.** (1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, he or she may levy a penalty against the person up to an amount equal to
- (a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 16 of the Forest Act, and
 - (b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.
- (2) A penalty may not be levied under both section 117 and subsection (1).
- (3) In addition to a penalty under section 117 or subsection (1), a senior official who determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, may levy a penalty against the person up to an amount equal to his or her determination of
- (a) the cost that will be incurred by the government in re-establishing a free growing stand on the area, and
 - (b) the costs that were incurred by government in applying silviculture treatments to the area that were rendered ineffective because of the contravention.

DISCUSSION AND ANALYSIS

1. Whether Edward Yaremchuk was an employee or an independent contractor of Mr. Clark.

In his Notice of Appeal, Mr. Yaremchuk claimed that he was an employee of Mr. Clark. In his Statement of Points, and at the hearing, Mr. Yaremchuk argued that he was not the contractor but rather was only hired "as an individual to buck the logs" and that he was not in charge of the logging operations. He testified that it was Mr. Clark that arranged with Ainsworth to pay him directly and issue him the one cheque for \$17.00 per cubic metre, rather than issue three separate cheques to himself and his two sons. He further argued that he received no payment for helping Mr. Clark flag his property.

The Respondent argues that Edward Yaremchuk was the logging contractor and supervisor of a family logging business that included himself and his sons Darren and Darcy. The Respondent submits that the question of whether Edward Yaremchuk was an employee or independent logging contractor of Mr. Clark depends upon a consideration of all the circumstances surrounding the relationship. It submits that Mr. Yaremchuk was an independent contractor as Mr. Clark paid no employee benefits on behalf of Mr. Yaremchuk. Mr. Yaremchuk also set his own hours, and jointly owned the skidder with his son Darcy. Further, Mr. Yaremchuk

was paid on a volume basis by Ainsworth, who identified Edward Yaremchuk as the logging contractor. The Respondent also argues that section 96(1) refers to any "person" and does not distinguish between whether the person is an employee or contractor for the purposes of finding a contravention for unauthorized harvesting.

Finally, the Respondent argues that even if Edward Yaremchuk was not the supervisor, his own activities of limbing and bucking the timber would constitute "cutting" pursuant to section 96(1) of the *Code*.

Mr. Clark testified that he considered Edward Yaremchuk to be the "logging boss". When making the arrangements with Ainsworth, he indicated that the one cheque should be made payable to Edward Yaremchuk who would then pay Darren and Darcy. Mr. Clark also indicated that he did not give any instructions to the Yaremchuks as to when logging was to commence or how to do the logging. He also said that it was Edward Yaremchuk who told him to pay Sean O'Neil, who also did some limbing at Edward Yaremchuk's request.

Don Donaldson, the District Manager, testified that when he made his determination he had no doubt that Edward Yaremchuk was the contractor in charge of supervising the operation. He also indicated that his interpretation of the prohibition in section 96(1) included the cutting down of the trees, skidding, limbing, and bucking. However, he indicated that he made his determination based on his conclusion that Edward Yaremchuk was the contractor and supervisor of the logging operation.

In Darren Yaremchuk's statement to the RCMP given on November 29, 1995, he states: "My dad Ed Yaremchuk made arrangements with Len Clark to log his property behind his house" and further that "My dad did the limbing, pushing my brother did the skidding with his machine." The Review Panel noted, in its decision, that the term "pushing" is common to the logging industry as meaning supervising.

The Commission finds no evidence that Edward Yaremchuk was an employee of Mr. Clark. No employee benefits, such as Workers' Compensation, were paid by Mr. Clark on Mr. Yaremchuk's behalf; Edward Yaremchuk set his own hours of work; he was paid on a volume basis by Ainsworth; and he owned and used his own tools.

However, the Commission finds that Edward Yaremchuk was an independent contractor and, on the balance of probabilities, finds that he had the primary role in supervising the logging operation. He was the one who made the initial arrangements with Mr. Clark to log his property. Mr. Clark gave his name to Ainsworth as the "logging contractor" that should be issued the cheque for the logging. Further, Edward Yaremchuk was the one that flagged the disputed boundary with Darren on all three occasions, the last occasion accompanied by Mr. Clark. In any event, the Commission finds that Edward Yaremchuk's activities of limbing and bucking the Crown timber would in and of themselves constitute a violation of section 96(1) of the *Code*.

2. Whether the defence of due diligence is available to Mr. Yaremchuk to avoid liability for a determination made under section 119 of the *Code* for a contravention of section 96(1) of the *Code*.

There is no dispute that unauthorized harvesting of approximately 300.6 m³ of timber took place on Crown land adjacent to the western boundary of DL4119.

Mr. Yaremchuk has urged the Commission to find that the defence of due diligence is available to absolve him of liability for a determination under section 119 for a contravention of section 96(1) of the *Code*. Mr. Yaremchuk argues that if the defence is available, the Commission should find that he 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 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).

The Commission has also 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* (see *Canadian Forest Products Ltd. v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-06, October 10, 1997) (unreported), *Repap v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-02, January 9, 1998) (unreported) and *TimberWest Forest Limited v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-10, February 11, 1998) (unreported)).

The Appellant, in this case, asserted that he was duly diligent and that he should not be found to be in contravention of section 96(1) of the *Code*. He did not make any legal arguments as to why the Commission's previous rulings should be altered. 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, based on the circumstances in this case, Edward Yaremchuk had not shown that he was duly diligent.

The Commission adopts the reasoning found in the earlier cases and finds that a defence of due diligence is not available to Edward Yaremchuk to avoid liability for a determination under section 119 of the *Code* for a contravention of section 96(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. This will be discussed below.

3. Whether the quantum of penalty is appropriate in the circumstances.

Mr. Yaremchuk argues that, in the event that the contravention is upheld, the penalty should be reduced, as it is excessive. Edward Yaremchuk claims that he and his son, Darren, told Mr. Clark to get professional help in flagging his boundary. He testified that Mr. Clark said a surveyor would cost too much, he wanted it done with a compass and asked Mr. Yaremchuk to help him. Mr. Yaremchuk also claims that he took care in flagging the boundary, and that the ribbons must have been relocated after the third occasion the boundary was flagged.

Edward Yaremchuk testified that the boundary line was flagged on three occasions. On the first occasion, Darren Yaremchuk indicated that he and his father started ribboning the boundary from the NW corner post and went south, but they ran out of ribbon approximately $\frac{3}{4}$ of the way along the boundary. They returned a few days later and ribboned the entire boundary starting from the SW corner post. Edward Yaremchuk, in his sworn statement made to Constable Peter Jadis, of the R.C.M.P., on October 16, 1995, indicated that he and Darren had flagged the boundary on the first two occasions, but was not sure which corner post they had started from. However, he indicated that they had started at opposite ends of the property on each of those two occasions.

On the third occasion, Mr. Clark accompanied Edward and Darren with a compass. They started at the SW corner post and Mr. Clark walked approximately half of the boundary with the two Yaremchuks. This time, Mr. Clark brought blue ribbon to mark the boundary.

Mr. Frederick testified that pink ribbons were found running from the NW corner post and orange and blue ribbons were found running from the SW corner post, meeting in the middle on Crown land. The unauthorized harvesting took place in the triangle shaped area generally bounded by the ribbons. Mr. Frederick also found pink ribbons in a continuous line extending past the point where they met the blue and orange ribbons. He testified that it appeared that the Yaremchuks had used the wrong declination and that is why, even though they started at the corner posts at either end of the property, the boundary headed off at the wrong angle. He also said that whoever put in the pink ribbons would have realized their error when they walked that line.

There are a number of discrepancies in the stories of Mr. Clark and Edward and Darren Yaremchuk as to the events around the flagging of the boundaries. Mr. Clark's statement to Constable Jadis on September 11, 1995, indicated that he had been told by Mr. McCurdy of Ainsworth that he had heard that Darren Yaremchuk had been charged with trespass in the past and that he should be very careful about not going over the boundary. Mr. Clark said that he told Edward Yaremchuk to be careful about the boundary and that he wanted to get someone professional to go out and mark it. Mr. Clark claims that Edward Yaremchuk reassured him that

he had worked as a surveyor in Alberta and that he would mark the boundary. Edward Yaremchuk relates a very different story. He says that he told Mr. Clark to get a surveyor to run the line, but that Mr. Clark wanted to save money and asked him to help, which he did. Edward Yaremchuk stated that while he had two years experience on land survey crews in Alberta, he worked as a rod and chainman and did not know how to operate a transit.

Darren Yaremchuk said that while he and his father ribboned the line, at no time was it to be used as a legal line. He said he told Mr. Clark that he would still have to get it surveyed and that his father provided him with the name of the surveyor. Darren Yaremchuk testified that two weeks after they flagged the boundary, Mr. Clark told him to start falling and to follow the blue ribbons. Mr. Clark denies that he gave Darren these instructions. Darren claims that the ribbons he followed were not the ones he laid out. However, he does not remember the colour of the ribbons he and his father used to flag the boundary the first two times, except that they were bright colours. Darcy Yaremchuk, on the other hand, testified that he stayed inside "pink ribbons".

Edward Yaremchuk stated that orange and pink ribbons were used the first two times and that on the third occasion, Mr. Clark brought a roll of blue ribbon which was used to mark the boundary. Mr. Clark testified that he flagged half the boundary with blue ribbons and that the Yaremchuk's flagged the other half.

Section 117(4)(b) of the *Code* sets out the factors that may be considered in assessing a penalty. 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. (p.16)

In this case, Edward Yaremchuk claims that he was duly diligent in locating the boundary, and submits that someone moved the boundary after it had been properly located.

The Commission finds that there is no evidence to show that the boundary was moved. When Mr. Frederick investigated the trespass he found the boundary ribboned in pink, orange and blue ribbons. While the Yaremchuks gave contradictory evidence as to the colours of the ribbons, the Commission notes that Edward Yaremchuk's recollection of orange and pink ribbons being used the first two times, and blue being used on the third occasion, correspond to the ribbons found by Mr. Frederick. Further their location corresponds to the configuration that would have occurred had someone, using an incorrect bearing, started from either

end of the property using different coloured ribbon. The Commission concludes that the boundary is the one that was laid out by Edward and Darren Yaremchuk and checked by Mr. Clark.

While Mr. Yaremchuk was not found to be in contravention of section 97 of the *Code*, the District Manager noted that section 97(2) of the *Code* provides that, before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land. The Review Panel noted that it believed that there may have been a contravention of section 97(2) by Edward and Darren Yaremchuk, but that it was not going to vary the original determination which did not make that formal determination. There is also a corresponding duty on the owner of the property to inform any person, authorized to cut or remove timber from private land, of the boundaries of that private land.

The Commission agrees with the Review Panel that the responsibility for the erroneous boundary layout is shared between Edward and Darren Yaremchuk, and Leonard Clark. The Commission finds that there is no evidence that Edward Yaremchuk exercised due diligence in the laying out of the boundary. Further, all parties agree that there was a pig barn located very close to the actual property boundary. Aerial photographs of the site show a significant distance between the pig barn and the harvesting boundary. As the Review Panel noted, it would have been highly improbable that the Yaremchuks did not know that the boundary was incorrect and that they were harvesting on Crown land.

Finally, Edward Yaremchuk raised the issue of the penalty being too excessive, as he personally only received \$4062.53 for the total logging operation, including Mr. Clark's property and the trespass area. The Commission heard evidence that Mr. Clark received a penalty of \$20,140.00 for his contravention of section 96(1) of the *Code*. The penalty levied against Mr. Clark recaptured his benefit from the sale, which is the price the logs sold for, less the amount that he paid for logging and delivery (\$93.00 per m³ less \$9.00 paid for trucking, less \$17.00 per m³ paid for logging, or \$67 per m³). This is also approximately the amount calculated by MOF as the stumpage value of the timber - \$34.66 per m³ upset stumpage, plus \$30.44 per m³ for the bonus bid for a total of \$65.10 per m³. The Respondent, by this assessment, took Mr. Clark's misappropriated gains and simultaneously put itself in the same position as if the timber had been sold at auction. No deterrent penalty was assessed against Mr. Clark.

In the case of Mr. Yaremchuk, the Crown is not recovering lost revenues, but is penalizing him for his involvement in the unauthorized timber harvesting. Edward, Darren and Darcy Yaremchuk were paid a rate of \$17.00 per m³ for harvesting the timber. The Yaremchuks were paid \$5,110.20 for harvesting the Crown timber (300.6 m³ x \$17.00 per m³). The original penalty assessed by the District Manager at \$32,569, was 2.26 times the Yaremchuk's total compensation, and 6.4 times the amount they received for logging the Crown timber. The Review Panel's reduced penalty of \$19,569.06 is 3.8 times the amount they were paid for logging the Crown timber.

The Commission finds that Mr. Yaremchuk should not profit from the unauthorized harvesting of timber. A deterrent penalty is also warranted in this case as Mr. Yaremchuk has had a previous contravention of the *Code* for a violation of section 96(1), the same section at issue in this case. Further, Mr. Yaremchuk did not establish that he had taken reasonable care in delineating the boundary line between the Crown and private land during the logging operation. However, the Commission finds that the total amount of the penalty assessed for this incident should be more evenly balanced between Mr. Clark and Mr. Yaremchuk and that the penalty assessed against Mr. Yaremchuk was excessive in the circumstances.

The Commission finds that the penalty should be reduced to \$10,418.78 which is the average stumpage rate times the volume of Crown timber cut ($\$34.66 \text{ per m}^3 \times 300.6 \text{ m}^3$). This amount is approximately two times the economic benefit that the Yaremchuk's gained by the unauthorized cutting of Crown timber ($\$5110.20 \times 2 = \$10,220.40$).

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 upholds the decision of the Review Panel that Edward Yaremchuk contravened section 96(1) of the *Code*. However, the Commission finds that the penalty should be reduced to \$10,418.78.

The Appeal is allowed in part.

Toby Vigod, Chair
Forest Appeals Commission

September 4, 1998