Province of British Columbia

Forest Appeals Commission

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## APPEAL NO. 2004-FOR-013(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

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|---|---|---|
| **BETWEEN:** | Marilyn Abram | **APPELLANT** |
| **AND:** | Government of British Columbia | **RESPONDENT** |
| **AND:** | Forest Practices Board | **THIRD PARTY** |
| **BEFORE:** | A Panel of the Forest Appeals Commission<br>Cindy Derkaz, Panel Chair | |
| **DATE:** | Conducted by way of written submissions concluding on February 9, 2005 | |
| **APPEARING:** | For the Appellant: Marius Alexander, Counsel<br>For the Respondent: Diane Roberts, Counsel<br>For the Third Party: Ben Van Drimmelen, Counsel | |

### APPEAL

This is an appeal brought by Marilyn Abram of the December 17, 2003 determination (the "Determination") made by Kerry Grozier, District Manager, Chilliwack Forest District (the "District Manager"). The District Manager found that Ms. Abram had contravened sections 96(1) and (2) of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Code*"), by cutting and removing timber, without authority, from Crown land within the Chilliwack Forest District. He levied a penalty of $3,828.00 pursuant to section 119 of the *Code*.

An administrative panel reviewed the Determination, pursuant to 129 of the *Code*. In a decision issued May 4, 2004, the review panel upheld the Determination.

Ms. Abram appealed the review panel's decision to the Commission on May 20, 2004. The appeal is brought before the Commission pursuant to section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69. Under section 84(1)(d) of the *Forest and Range Practices Act*, the Commission may confirm, vary or rescind the review panel's decision, or refer the matter back to the person who made the decision for reconsideration, with or without directions.

Ms. Abram seeks an order rescinding the review decision.

The appeal raises issues of procedural fairness and the standard of proof to be applied. The Forest Practices Board joins the appeal to address the issue of the appropriate standard of proof for an administrative remedy imposed in relation to forest practices. The Forest Practices Board does not take any position on the other issues raised in the appeal.

## BACKGROUND

The events leading to the Determination took place in June 2001. At the time, Lawrence Walter Abram held private timber mark EBLYD for the purpose of removing timber from his property in the vicinity of Ruby Creek, Chilliwack Forest District. Marilyn Abram, Lawrence Walter Abram's sister, regularly removed wood (shingle blocks, firewood and logs) from her brother's property.

On June 6, 2001, during a routine inspection of a salvage sale in the vicinity of Ruby Creek, Stan Smethurst, Waste Management Technician, Chilliwack Forest District, noticed Lawrence Noel's truck, loaded with freshly cut cedar shingle blocks, proceeding down the Ruby Creek Forest Service Road. Both Lawrence Noel, who owned a shingle mill at Popkum B.C., and Marilyn Abram were in the vehicle.

Mr. Smethurst thought it was strange that the truck was in that area of Ruby Creek because the majority of Lawrence Walter Abram's property was located at the bottom of the valley. Mr. Smethurst contacted the Chilliwack Forest District Office and Forest Officer Iain Hartley was dispatched to Mr. Noel's shingle mill to locate the shingle blocks.

At the mill, Mr. Hartley located recently cut shingle blocks marked to Lawrence Walter Abram's private timber mark EBLYD. According to Mr. Hartley's written Investigation Statement dated June 6, 2001, Mr. Noel confirmed that he had delivered the blocks to the mill for Ms. Abram, using Lawrence Walter Abram's timber mark.

Mr. Hartley drove to Ruby Creek where he met Ms. Abram cutting firewood near the bottom of the Ruby Creek Forest Service Road. Together they drove up to the area from where, according to Ms. Abram, the shingle blocks just delivered to Mr. Noel's mill had originated. Ms. Abram then led Mr. Hartley down a trail to a cutting site where Mr. Hartley observed some piled blocks and some debris placed over a stump.

Mr. Hartley returned to the Chilliwack Forest District Office and conducted a land status search for the cutting site. The search confirmed that the cutting site was on Crown land.

Mr. Hartley went to Mr. Noel's mill and seized the shingle blocks marked EBLYD brought in earlier that day.

On June 7, 2001, Mr. Hartley returned to the cutting site shown to him by Ms. Abram on the previous day and seized the remaining shingle blocks. Further investigation of the area in the immediate vicinity revealed three more cutting sites. In addition to the western red cedar tree noted on the previous day, another three western red cedar trees and one Douglas fir tree had been felled.

Mr. Hartley observed that stumps in the cutting sites had been covered with branches and leaves and that the spalls from the shingle blocks were turned "bark side up", in an apparent attempt to conceal the harvesting activity.

While driving up to the cutting site with Ms. Abram on June 6, 2001, Mr. Hartley noticed that she was eating licorice Beechnut cough drops from a roll with a black wrapper. On June 7th, while investigating the other cutting sites, Mr. Hartley found a black wrapper from a licorice Beechnut cough drop roll, near a tree stump.

Mr. Hartley verbally notified Ms. Abram on June 7, 2001 that the cutting site, from which the seized shingle blocks had originated, is Crown land. She was advised to cease all activity in that area.

Mr. Smethurst scaled the volume of timber involved in the unauthorized harvesting. He determined that a total of 28.295 cubic meters were cut, of which an estimated 14.14 cubic meters had been removed from the area.

On December 10, 2002, Kurt Froehlich, Compliance and Enforcement Supervisor, Chilliwack Forest District, sent a double registered letter to Ms. Abram advising:

> An inspection of your activities at Ruby Creek was conducted on June 12, 2001, and revealed that you may be operating contrary to Section 96 of the Forest Practices Code Act of British Columbia. Specifically, it appears that you harvested timber, in the form of shake blocks, off Crown land without authority.
>
> We will be investigating this matter further.
>
> …

On February 26, 2003, the District Manager sent a registered letter to Ms. Abram advising that Ministry of Forests staff had completed their investigation. He stated that the investigation had confirmed that Ms. Abram may have been operating contrary to sections 96(1) and (2) of the *Code*. The District Manager advised that he would be making a determination in respect to the alleged contraventions based on the evidence presented to him and that he would like to include Ms. Abram's evidence relevant to the matter. He offered her an opportunity to be heard and invited her to contact him before March 19, 2003 to make arrangements.

The District Manager did not hear from Ms. Abram before March 19, 2003.

On April 5, 2003 the District Manager received a letter from counsel for Ms. Abram, stating:

> …
>
> Further to your letter of February 26, 2003 and the Investigation Report June 6, 2001, please be advised that Ms. Abram denies any wrongdoing.
>
> She will not meet with you to discuss this matter. …

The District Manager issued the Determination on December 17, 2003. He found that Ms. Abram cut timber from vacant Crown land within the Chilliwack Forest District, without authority, contrary to section 96(1) of the *Code*. He further found that Ms. Abram had removed timber from vacant Crown land and transported the timber to private land, without authority, contrary to section 96(2) of the *Code*.

In the Determination, the District Manager noted that the maximum penalty that could be levied for the contraventions is $16,509.53, calculated pursuant to section 119 of the *Code*. He decided to levy a penalty of $3,828.00 stating:

> I have determined that **any benefits of the unauthorized harvest must be eliminated**. That amount was determined to be **$2,828.00** for contravention of Section 96(1) and (2).

> I have further determined that a **punitive penalty of $1,000.00** for contravention of Section 96(1) and (2) is required in order to send the message that unauthorized cutting of Crown timber is a serious offence.
>
> (Bold type in the original)

Ms. Abram appealed the review decision to the administrative review panel on the grounds that there was an undue delay in prosecution, a lack of proper notice of the hearing before the District Manager, and insufficient evidence before the District Manager to conclude, beyond a reasonable doubt, that Ms. Abram had contravened the *Code*.

The administrative review panel held an oral hearing on March 31, 2004. Ms. Abram was represented by counsel at the administrative review, but did not give any evidence or call any witnesses.

On May 4, 2004, the review panel issued its decision upholding the Determination.

Ms. Abram appeals to the Commission on the grounds that the administrative review panel erred in law by: 1) disregarding the undue delay in prosecution; 2) disregarding the lack of formal notice of the original hearing; and 3) applying the balance of probabilities standard of proof. Further, Ms. Abram submits that there has been an error in law "by not requiring that the physical evidence as far [as] was practicable be put before the commission." She also submits that the review panel made multiple errors of fact, in particular with respect to: 1) the lack of evidence linking Ms. Abram to the alleged infractions; 2) the time frame between the occurrence of the alleged infractions and the time the Ministry prosecuted Ms. Abram; and 3) the manner of notification to Ms. Abram that a formal hearing was to be held. She requests that the penalty be set aside and that she receive compensation for legal costs.

None of the parties called any witnesses to testify before the Commission. The hearing proceeded by written submissions, concluding on February 9, 2005.

## ISSUES

The Commission has characterized the issues to be decided in this appeal as follows:

1. Whether there was undue delay in the administrative process, amounting to procedural unfairness.
2. Whether proper notice of the proceeding was given to Ms. Abram.
3. Whether the review panel erred at law by applying the balance of probabilities standard of proof to the evidence in this case.
4. Whether, when the correct standard of proof is applied, there is sufficient evidence to support a finding that Ms. Abram contravened section 96(1) and/or section 96(2) of the *Code*.
5. Whether an order of costs is appropriate in this appeal.

## RELEVANT LEGISLATION

The unauthorized harvesting and removal of timber occurred in June 2001, when the *Code* was in force. On January 31, 2004, the *Forest and Range Practices Act* took effect and much of the *Code* was repealed.

The Determination was issued on December 17, 2003, before the *Forest and Range Practices Act* came into effect. The administrative panel's review decision was issued on May 4, 2004, after the *Forest and Range Practices Act* came into effect.

The issues in this appeal were considered based on the legislation in effect at the time the Determination was issued. However, the appeal process was conducted in accordance with the requirements of the legislation in effect when the review panel's decision was issued.

The following sections of the *Code* are relevant to this appeal. For convenience, other relevant legislation is set out in the "Discussion and Analysis" section of this decision.

### Unauthorized timber harvest operations

**96** (1) A person must not cut, 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 or for other prescribed purposes,

(d) under the *Park Act*,

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

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

(f.1) by the regulations, for the purposes of silviculture, stand tending, forest health or any other purpose that is ancillary to the purposes of this Act, or

(g) by the regulations, in the course of carrying our activities

(i) under a range use plan or a consent under section 101 or 102, or

...

(iii) that are incidental to or required to carry out activities authorized or approved under the *Forest Act*, the *Range Act*, this Act or another prescribed enactment.

...

(2) Without limiting subsection (1), a person must not remove 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*, or

(c) under the *Park Act*.

**Penalties**

**117** (1) If a senior official determines that 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.

...

(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 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.

**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 20 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).

## DISCUSSION AND ANALYSIS

### 1. Whether there was undue delay in the administrative process, amounting to procedural unfairness.

Ms. Abram submits that there has been "undue delay in prosecution", amounting to procedural unfairness and a denial of natural justice. She notes that 18 months elapsed between the time of the alleged unauthorized harvesting and removal of timber (June 6, 2001), and the date when she was first advised of the investigation by the December 10, 2002 letter from Mr. Froehlich. The Determination was not issued until December 17, 2003, over 2 years and 6 months from the date of the alleged contraventions of the *Code*.

The Government submits that Ms. Abram has not established a legal basis for her claim of undue delay. It submits that in administrative law there must be proof of significant prejudice that results from an unacceptable delay. Ms. Abram did not lead any evidence of prejudice that she has suffered as a consequence of the delay.

The Government refers to the limitation period set out in section 4(1) of the *Administrative Remedies Regulation*, B.C. Reg. 182/98 (the "*ARR*"):

**Limitation period**

**4** (1) For the purposes of section 117(1) of the Act, the time period for levying a penalty against a person is 3 years after the facts on which the penalty is based first came to the knowledge of a senior official.

[Emphasis added]

Ms. Abram submits that, while the *ARR* may specify a longer period, "such regulation should be set aside for a common law notice period of much shorter duration and certainly no longer than one or two months after the date the investigation is completed." She did not present any legal authority to support this submission.

The Commission notes that section 4(1) of the *ARR* applies to penalties levied pursuant to section 117(1) of the *Code*. In the present case, the District Manager levied the penalty against Ms. Abram pursuant to section 119 of the *Code*. The parties did not refer the Commission to any statutory limitation period for levying a penalty pursuant to section 119.

The Commission does not find section 4(1) of the *ARR* to be determinative of the issue. However, it is an indication of the maximum time that the legislature contemplated for levying administrative penalties under the *Code*.

Based upon the Ministry's Investigation Report, it is clear that the unauthorized harvesting and removal of timber first came to the attention of Ministry staff on June 6, 2001. The Commission finds that the time between any Ministry staff becoming aware of the facts and the Determination on December 17, 2003, was

well within the 3-year period contemplated by the legislature for consequences arising from contraventions of the *Code*.

Next, the Commission will consider if the more than 18 months that elapsed between June 6, 2001 and December 10, 2002, when Ms. Abram was first advised in writing of the investigation, constitutes an undue delay amounting to procedural unfairness and a denial of natural justice.

The Supreme Court of Canada considered the issue of whether a lengthy delay in processing complaints in an administrative proceeding amounted to a denial of natural justice in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307. Barstarache J., writing for the majority, stated:

> [101] … In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
>
> [102] There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy … It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied …
>
> [121] To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate … There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings.
>
> [122] The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether the delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

The Commission finds that the 18-month delay, of which Ms. Abram complains, does not *per se* constitute procedural unfairness or a denial of natural justice. Ms. Abram has not advanced evidence of any prejudice that she suffered as a result of the delay. The Commission finds that Ms. Abram has failed to establish a legal basis for her claim of undue delay.

### 2. Whether proper notice of the proceeding was given to Ms. Abram.

Ms. Abram submits that the District Manager failed to give proper notice to her of the opportunity to be heard, prior to making the Determination. She argues that

the lack of proper notice amounts to procedural unfairness and a denial of natural justice.

Ms. Abram's written submissions to the Commission, on this ground of appeal, state:

> (B) It is further respectfully submitted a prosecution for theft in this particular forum concerns a quasi-criminal allegation and a finding of theft could affect the Appellant's life well beyond the outcome of the prosecution and that accordingly all common law rules of procedural fairness and natural justice should have been followed.
>
> (C) While it is admitted that the District Manage's (sic) hearing is not a court of law, it is a fact that it concerns a quasi-criminal matter that is being decided, not just an investigation in progress as would be the case when the police invites a prospective witness or accused to the station for purposes of the investigation. The District Manager's letter [February 26, 2003] is at best ambiguous as to the purpose of the hearing. It was not clear at all that a decision would be made or whether this was part of an ongoing investigation.
>
> (D) It is further respectfully submitted that it is not the forum that determines the appropriateness of notice, it is the substance of the matter that dictates the notice requirement, in this case a quasi-criminal prosecution.
>
> (E) Accordingly, it is respectfully submitted that there was no proper notice issued.
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> (pages 13 and 14)

The Commission was not provided with any legal authority or argument in respect to the "common law rules of procedural fairness and natural justice" relating to notice, that Ms. Abram submits should have been followed in this case.

The Commission also notes that this appeal involves an administrative penalty levied under Part 6, Division 3 of the *Code*, and not a penalty for an offence under Part 6, Division 5 of the *Code*. Thus, on its face, the determination is not quasi-criminal in nature. However, that question is discussed in detail below, under issue 3 in this decision.

The Government submits that Ms. Abram does not establish a legal or factual basis for her claim that she was denied proper notice of the opportunity to be heard.

The Government submits that the District Manager's letter of February 26, 2003 gave Ms. Abram the opportunity to be heard and to know the case against her. It argues that the letter satisfied the requirements of fairness and natural justice in respect to notice.

Further, the Government submits that any concerns regarding the adequacy of the District Manager's notice of the opportunity to be heard, were remedied by an oral hearing before the administrative review panel, at which Ms. Abram was represented by counsel.

The District Manager's February 26, 2003 letter to Ms. Abram states:

> Further to our letter dated December 10, 2001 (sic) [2002] … regarding suspected contravention of Section 96 of the *Forest Practices Code of British Columbia Ac*t, please note that ministry staff have now completed their investigation.
>
> The investigation has confirmed that you may have been operating contrary to Section 96(1) and 96(2) of the *Forest Practices Code of British Columbia Act*. Specifically, my staff have reported that you harvested and removed timber from Crown land adjacent to private property in the Ruby Creek area.
>
> I will be making a determination regarding this alleged contravention on the basis of the evidence presented to me. Before I make my determination I would like to include your evidence relevant to this matter and therefore offer you an opportunity to be heard. Please let me know if you wish to have legal representation and/or witnesses at the opportunity to be heard.
>
> To make arrangements to be heard, please contact me at 604-702-5700 before March 19, 2003. If I do not hear from you by this date, I will make my determination based on the information before me.

Ms. Abram retained legal counsel and by letter dated April 5, 2003, her counsel advised that Ms. Abram would not meet with the District Manager in respect to the matter. In her submissions to the Commission, Ms. Abram explains that the decision not to meet with the District Manager was partially based on the fact that the February 26, 2003 letter did not indicate any "specific charge."

Ms. Abram also states in her submissions to the Commission, that the existence of the Ministry's Investigation Report was only revealed, and made available, to her at the insistence of her counsel at the administrative review hearing on March 19 (sic), 2004. However, the Commission notes that Ms. Abram's counsel refers to the "Investigation Report June 6, 2001" in his letters of April 5, 2003 and January 11, 2004, addressed to the Ministry.

The Commission notes that the *Code* does not contain express provisions requiring that notice be given prior to a senior official making a determination under section 117 or 119.

At common law, notice is an element of natural justice. It is part of the duty of procedural fairness that requires a person to be given notice if he or she has an interest in, or may be affected by, a proceeding. The purpose of notice is to provide the recipient with "sufficient information with respect to the proceeding to be able to prepare and present his case."[1]

In the absence of a specific statutory prescription, the general rule is that a decision-maker must give "adequate" notice, such that a person will know how he or she might be affected by the impending decision, and may prepare to make representations.

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[1] R. Macauley and J. Sprague, (2004) *Practice and Procedure Before Administrative Tribunals*, Vol. 2 (updated to Release 5, 2004), at pp. 12-51 to 12-52.

The Commission finds that the District Manager's February 26, 2003 letter satisfies the common law requirements for proper notice. In particular, the letter advises Ms. Abram of the sections of the *Code* that she is alleged to have contravened, it provides a brief description of the nature and location of the alleged contraventions, it informs her that an investigation has been completed by Ministry staff, and it offers her an opportunity to present evidence and be represented by counsel at a hearing before a determination is made. The Commission finds that the letter provides clear and unambiguous notice that the District Manager would be making a determination in respect to the alleged contraventions of the *Code*, based on all the evidence presented to him.

The Commission further finds that as early as April 5, 2003, counsel for Ms. Abram was aware of the Ministry's Investigation Report of June 6, 2001. The Commission finds that Ms. Abram had adequate notice of the impending determination and that she had access to sufficient information to be able to prepare and present her case. Instead, Ms. Abram, with the benefit of legal representation, chose not to participate in the opportunity to be heard.

The Commission finds that Ms. Abram has not established a legal or factual basis to succeed on this ground of appeal.

### 3. Whether the review panel erred at law by applying the balance of probabilities standard of proof to the evidence in this case.

Ms. Abram submits that the review panel erred at law in applying the balance of probabilities standard of proof to the evidence in this case. She submits that the error arises from the review panel's failure to make a distinction between regulatory and criminal or quasi-criminal matters under the *Code*. Ms. Abram argues that the alleged contraventions of sections 96(1) and (2) of the *Code* are criminal or quasi-criminal in nature and, therefore, the more stringent beyond a reasonable doubt standard of proof should have been applied.

The Government and the Forest Practices Board submit that the applicable standard of proof for regulatory offences under the *Code* is on the balance of probabilities.

All parties provided legal argument and authorities in support of their submissions on this ground of appeal.

The Commission has previously considered the issue of the appropriate standard of proof for an administrative remedy in respect to a contravention of section 96 of the *Code*. It has consistently held that the correct standard of proof is the civil standard of proof on the balance of probabilities. (See: *Hollis v. Government of British Columbia (Forest Practices Board, Third Party)*(Appeal No. 97-FOR-13, August 31, 1998)(unreported); *Orleans v. Government of British Columbia* (Appeal No. 2000-FOR-006, April 2, 2001)(unreported)).

Until February 2004, the common law in British Columbia was clear that the standard of proof for administrative remedies in respect to strict liability regulatory offences, was proof on the balance of probabilities, not the criminal standard of proof beyond a reasonable doubt. However, as discussed below, there are now conflicting judgments of the B.C. Supreme Court on this issue. Those judgments raise a question regarding whether the standard of proof for administrative remedies has been elevated to proof beyond a reasonable doubt.

*Zodiac Pub Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2004 BCSC 96 (issued January 23, 2004) (hereinafter *Zodiac*), was the first of a series of B.C. Supreme Court decisions relating to the *Liquor Control and Licensing Act*. The legislation had previously provided that a decision from an enforcement hearing could be appealed to the Liquor Appeal Board and then, with leave, to the B.C. Court of Appeal. Amendments to the legislation abolished the Liquor Appeal Board and its appeal procedure. A licensee is now limited to bringing an appeal to the B.C. Supreme Court under the *Judicial Review Procedure Act*.

*Zodiac* is the first decision on a petition filed pursuant to the *Judicial Review Procedure Act*, after the abolition of the Liquor Appeal Board. It involved the allegation that, on two separate occasions, an operator of a Kelowna cabaret had permitted an intoxicated person to remain in a licensed establishment contrary to section 43(2)(b) of the *Liquor Control and Licensing Act*. The adjudicator who conducted the enforcement hearing found that Zodiac had contravened the *Act* and assessed a .005,000 penalty and a five-day suspension.

At the Supreme Court, Zodiac argued that the adjudicator had erred in applying to the evidence the civil burden of a balance of probabilities rather than the criminal standard of proof beyond a reasonable doubt. Mr. Justice Blair concluded that, in respect to an enforcement hearing pursuant to section 20 of the *Liquor Control and Licensing Act*, the standard of proof is on the balance of probabilities.

In *532871 B.C. Ltd. (c.o.b. The Urban Well) v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, 2004 BCSC 127 (issued February 3, 2004), (hereinafter *Urban Well*), Mr. Justice Pitfield first introduced the notion that the criminal standard of proof could apply to an administrative proceeding. *Urban Well* involved contraventions of conditions associated with a liquor licence including: permitting an excessive number of patrons on the premises; allowing an intoxicated person to remain on the premises; unauthorized entertainment; and failure to be primarily engaged in food service.

After finding that the standard of review that the Court should apply to the General Manager's determinations of contravention is reasonableness, Mr. Justice Pitfield stated:

> [67] … I am of the view that it is not appropriate to consider reasonableness solely in the context of proof on a balance of probabilities or proof beyond a reasonable doubt. Rather, the reasonableness of the determination of contravention must be assessed by reference to proof of the *actus reus* beyond a reasonable doubt (whether the *actus* be over-crowding, the presence of an intoxicated patron in the premises, or not being primarily engaged in the service of food during all hours of operation) and proof of due diligence on the balance of probabilities.
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> …
>
> [71] Applying the Whistler Mountain[2] and Sault Ste. Marie[3] cases in the context of the regulatory enforcement of strict liability

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[2] *Whistler Mountain Ski Corporation v. British Columbia* (*General Manager Liquor Control and Licensing Branch*), 2002 BCCA 426

> contraventions, the initial requirement should be that the General Manager have evidence, derived from a hearing or otherwise, sufficient to establish the *actus reus* at the heart of the contravention beyond a reasonable doubt. If the evidence supports that determination, the onus shifts to the licensee to establish, on a balance of probabilities, that it took the steps a reasonable and prudent person would have taken to prevent the contravention.

Mr. Justice Pitfield held that the evidence before the General Manager did not prove beyond a reasonable doubt that an intoxicated person was on the premises as alleged. He quashed the General Manager's determination that Urban Well had contravened section 43(2)(b) of the *Liquor Control and Licensing Act*.

In *Plaza Cabaret Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, 2004 BCSC 248 (issued February 23, 2004) (hereinafter *Plaza Cabaret*), the licensee was alleged to have authorized or permitted the sale of a drug or controlled substance on its premises. Mr. Justice Pitfield held that "the reasonableness of the General Manager's decision with respect to the finding of a regulatory offence under the *Act*, should be assessed in the context of the burden of proof applicable to strict liability offences, namely proof by the Branch of the *actus reus* [of drug-trafficking] beyond a reasonable doubt and the proof by the licensee of due diligence on the balance of probabilities." [paragraph 12].

In *New World Entertainment Investment Ltd.(c.o.b. Richard's on Richards) v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, 2004 BCSC 616 (issued April 23, 2004) (hereinafter *New World Entertainment*), Madam Justice Gill reviewed the legal authorities on the issue of the appropriate standard of proof. She dismissed Mr. Justice Pitfield's interpretation that *Whistler Mountain* stands for the proposition that the burden of proof in administrative enforcement proceedings under the *Liquor Control and Licensing Act* is proof beyond a reasonable doubt, stating:

> [11] … Nevertheless, as Hollinrake J.A. said [in Whistler Mountain] at [paragraph] 21, under the Liquor Control and Licensing Act there are two regimes for enforcement, criminal and quasi-criminal under s. 48 and administrative or regulatory under s. 20. The question in Whistler Mountain was whether the principle of due diligence that applied to charges under s. 48 also applied to the administrative or regulatory process under s. 20. I do not accept that a conclusion that the defence was available means that the burden of proof in administrative proceedings is proof beyond a reasonable doubt.
>
> …
>
> [13] In summary, I follow and concur with the decision in Zodiac and conclude that the standard of proof is a balance of probabilities. …

The issue came before the B.C. Supreme Court again in *Sentinel Peak Holdings Ltd. (c.o.b. No. 5 Orange Street Hotel) v. British Columbia (Liquor Control and Licensing*

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[3] *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299

*Branch, General Manager)*, 2004 BCSC 885 (issued June 30, 2004) (hereinafter *Sentinel Peak*). Morrison J. stated:

> [39] Having reviewed the four recent cases dealing with the amended [*Liquor Control and Licensing Act*], I agree with the views stated by Mr. Justice Blair in the Zodiac case. Namely, that the standard of review is that of reasonableness simplicitor, and the appropriate standard of proof is on a balance of probabilities.

Ms. Abram submits that the reasoning of the B.C. Court of Appeal in *Whistler Mountain* should be followed in respect to contraventions under the *Code*. She argues that the *actus reus* of the alleged contravention of section 96(1) and (2) must be proven beyond a reasonable doubt. In other words, the evidence before the District Manager must be sufficient to establish beyond a reasonable doubt that Ms. Abram cut and removed timber, without authority, from Crown land.

The Forest Practices Board submits that there are compelling policy reasons to maintain the standard of proof as the balance of probabilities for administrative penalties in respect to forest practices. The regulation of forest practices in B.C. has evolved from a prescriptive regime, with the Government overseeing and approving forest practices, to a results-based regime where the Government's role is primarily setting broad objectives and enforcement.

The Forest Practices Board argues that the standard of proof in the forestry context should reflect sound stewardship of the public's forest resources by licensees. It contends that effective enforcement requires a moderate burden of proof, commensurate with public values and expectations. If proof beyond a reasonable doubt were required to prove a contravention in respect to forest practices, enforcement would be less effective. Conversely, if the civil standard of proof on the balance of probabilities is maintained, effective enforcement will be encouraged.

The Commission notes that the *Code* is similar to the *Liquor Control and Licensing Act* in that it contains two distinct regimes for enforcement - an administrative regime and a criminal regime. The administrative regime is set out in Part 6 - Compliance and Enforcement Division 3 - Administrative Remedies, with various review and appeal options pursuant to Division 4 - Administrative Review and Appeals. The criminal regime is established by Part 6 Division 5 - Offences and Court Orders. Under the administrative regime, a senior official has the authority to make determinations in respect to contraventions of the *Code* and regulations. The criminal regime involves the laying of an information and substantial fines and/or imprisonment upon conviction.

Clearly, the criminal standard of proof beyond a reasonable doubt applies to a prosecution under Part 6 Division 5 of the *Code*. Ms. Abram submits that, in the present case, the District Manager was engaging in a criminal or quasi-criminal prosecution under the *Code* and, therefore, the criminal standard of proof should be applied to the evidence.

However, the Determination was made pursuant to Part 6 Division 3 - Administrative Remedies provisions of the *Code*. Although, on the facts, a prosecution under Part 6 Division 5 of the *Code* could have been undertaken, this was not the enforcement regime used by the District Manager in Ms. Abram's case.

The Commission has considered the nature of administrative penalties levied under the *Code* for unauthorized timber harvesting. The Commission finds that the special nature of penalties under section 119 of the *Code* must be considered when analyzing the question of whether the standard of proof for administrative remedies under Part 6 Division 3 of the *Code* has been elevated to proof beyond a reasonable doubt, based upon the B.C. Court of Appeal decision in *Whistler Mountain* and the B.C. Supreme Court decisions in *Urban Well* and *Plaza Cabaret*.

In *MacMillan Bloedel v. Government of British Columbia (Forest Practices Board, Third Party)*, (Appeal No. 95/05(b), February 19, 1997) (unreported) (hereinafter *MacMillan*), the Commission considered whether penalties under section 119 of the *Code* may be considered penal in nature. The appellant argued that the principles set out by the Supreme Court of Canada in *R.* v. *Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (hereinafter *Sault Ste. Marie*), regarding the defence of due diligence should apply to the administrative penalty sections of the *Code* because such penalties can be quite large, and therefore, can have penal consequences. The Commission disagreed. It found key differences between the regulatory offences considered in *Sault Ste. Marie* and the administrative penalty regime set out in the *Code*.

Specifically, the Commission found that the administrative penalties authorized in the *Code* are linked to the remedial purpose of the legislation, even though they may provide for some level of deterrence. Furthermore, although there may be some stigma attached to administrative penalties, the stigma is less severe than that associated with criminal and quasi-criminal convictions. The Commission also held that the primary purpose of penalties under section 119 of the *Code* is not to punish wrongdoers, but rather to protect public forest resources and compensate the Crown for loss or damage suffered. In that regard, the Commission noted that the maximum penalty that may be levied under section 119 is calculated based on the stumpage that would have been payable on the timber that was harvested illegally, the market value of that timber, and the market value of any special forest products that were, or could have been, produced from the site.

This panel of the Commission agrees with the analysis in *MacMillan*. Administrative penalties under the *Code* are linked to the remedial purpose of the Act, and the primary purpose of penalties under section 119 of the *Code* is not to punish wrongdoers, but rather to compensate the Crown for loss or damage suffered, and to protect public forest resources by deterring unauthorized harvesting. The maximum potential penalty calculated under section 119 is proportional to the damage to Crown forest resources. However, the Ministry has discretion to levy a penalty that is lower than the maximum, and in levying a penalty under section 119, officials must consider several factors listed in section 117(4). Those factors relate to both the nature of the contravention and the person's motivations and conduct. Therefore, deterrence is, by inference, taken into account when the factors under section 117(4) are considered, but only after the maximum potential penalty has been calculated under section 119 based on the damage to public forest resources.

The Commission notes that all of the B.C. court decisions above involved administrative penalties for violations of the *Liquor Control and Licensing Act*. That Act has different objectives than the *Code*, and the purposes of administrative penalties under the *Liquor Control and Licensing Act* do not include protecting

public natural resources or compensating the Crown for loss or damage suffered to such resources.

The Commission has considered the nature of the particular penalty levied against Ms. Abram under section 119 of the *Code*. A maximum penalty of $16,509.53 could have been levied against Ms. Abram based on section 119. After considering the factors listed in section 117(4) of the *Code*, the District Manager exercised his discretion to levy a penalty of only $3,828.00. Of that amount, $1,000.00 is referred to by the District Manager as being "punitive." However, he appears to have intended that portion of the penalty to be deterrent in nature, because he states that its purpose is "to send the message that unauthorized cutting of Crown timber is a serious offence". In any case, the Commission finds that the $1,000.00 amount is properly characterized as deterrent in nature, given the small size of the total penalty relative to the maximum penalty that could have been levied to fully compensate the Crown.

Thus, the judicial decisions above may be distinguished from the present appeal on the basis that the primary purpose of the penalty against Ms. Abram is to compensate the Crown for damage to public forest resources, and secondarily, to act as a deterrent against unauthorized timber harvesting.

In addition, the Commission notes that the issue of the appropriate standard of proof to be applied in an administrative proceeding was not before the Court in *Whistler Mountain*. Nor did the Court address the issue in *obiter*. In *Whistler Mountain*, the issue before the Court was whether a defence of due diligence was available to the licensee in an administrative proceeding under section 20 of the *Liquor Control and Licensing Act*. If, instead of imposing an administrative sanction, the licensee had been charged with an offence under section 48 of the *Act*, a defence of due diligence would have been available. The Court found that the defence of due diligence also applies to proceedings under section 20 of the *Act*.

The Commission agrees with Madam Justice Gill's analysis of the *Whistler Mountain* case in *New World Entertainment*. The Court of Appeal's conclusion that the defence of due diligence was available does not elevate the burden of proof in administrative proceedings to proof beyond a reasonable doubt.

The Commission, after carefully considering the conflicting decisions by the B.C. Supreme Court on this issue, agrees with the views stated by Mr. Justice Blair in the *Zodiac* case and approved in *New World Entertainment* and *Sentinel Peak*. Namely, that the appropriate standard of proof is on the balance of probabilities.

The Commission has also considered the policy arguments advanced by the Forest Practices Board. The Commission agrees that if the standard of proof for administrative remedies in the forestry context is elevated to proof beyond a reasonable doubt, the enforcement of forest practices will be less effective. In the absence of a decision of the Court of Appeal resolving this issue, the Commission finds that it should not change the standard of proof that it has maintained in the past.

In the alternative, Ms. Abram submits that if the correct standard is not proof beyond a reasonable doubt, the standard is nevertheless a higher standard than proof on the balance of probabilities. She relies on the B.C. Supreme Court decision in *Kolesnykov v. I.C.B.C.*, 2004 BCSC 173 (issued February 6, 2004) (hereinafter *Kolesnykov*).

*Kolesnykov* was an appeal from a decision of a judge of the Civil Division of the Provincial Court dismissing Mr. Kolesnykov's claim against the Insurance Corporation of British Columbia for compensation based on the theft of his vehicle. The insurer alleged complicity by Mr. Kolesnykov.

After finding that that the insurer bears the burden of proof of complicity, the Court considered the applicable standard of proof. Madam Justice Martinson discussed the Court of Appeal decision in *Bevacqua v. I.C.B.C.* (1999), 68 B.C.L.R. (3d) 262 and said:

> [31] Bevacqua says that the standard of proof is on a balance of probabilities. It is well-established that this means that the party with the burden of proof must prove that the proposition advanced is more likely than not. If the weight of the evidence is evenly balanced, or weighs in favour of the other party, the standard of proof has not been met.
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> [32] Within that standard of proof different degrees of proof may be required. Ordinarily, a mere tilting of the scales is sufficient to prove that the proposition advanced is more likely than not. However, as noted above, when fraud - such as participation by the claimant in the theft - is alleged, "substantially more than a mere titling of the evidentiary scale" is required (Bevacqua at para. 48).
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> [33] Because fraud is a quasi-criminal allegation and a finding of fraud could affect the claimant's life well beyond the outcome of the insurance claim, the trial judge, when scrutinizing the evidence, must keep in mind that substantially more than a mere tilting of the evidentiary scales is required. The quality of the evidence must be assessed taking into account the degree of proof required. The scrutiny is heightened in the sense that the judge must determine whether the evidence is clear and cogent enough to more than just tilt the scales. The more serious the allegation and its consequences, the greater the degree of proof required.

The Commission finds that the *Kolesnykov* case does not support Ms. Abram's proposition that there is a standard of proof greater than proof on the balance of probabilities, but lesser than proof beyond a reasonable doubt. Madam Justice Martinson, in *Kolesnykov*, expressly adopts and applies the civil standard of proof on the balance of probabilities. The discussion in that case related to the quality of the evidence required to meet the standard of proof on the balance of probabilities when serious allegations are raised. The Commission will consider the quality of the evidence in the present appeal, under the next issue.

The Commission finds that the review panel did not err at law by applying the balance of probabilities standard of proof to the evidence in this case.

### 4. Whether, when the correct standard of proof is applied, there is sufficient evidence to support a finding that Ms. Abram contravened section 96(1) and/or section 96(2) of the *Code*.

Ms. Abram submits that the Government must prove there was theft in this case. She argues that, whatever standard of proof is applied to the evidence, the Government has failed to prove that she stole wood from the property where the

alleged theft took place. She submits that the Investigation Report of June 6, 2001, prepared by Forest Officer Iain Hartley, contains evidentiary gaps, including:

- No sworn statement of Mr. Hartley;
- No indication that Ms. Abram was asked whether she cut the trees in question;
- No sworn statement of Mr. Smethurst;
- No connection established between the shingle blocks in Lawrence Noel's truck and the wood at the cutting sites;
- No production of the candy wrapper or fingerprint test.

In her statement of points, Ms. Abram also alleges an error in law "by not requiring that the physical evidence as far was (sic) practical be put before the commission." This point was not pursued in the written submission filed with the Commission.

The Commission notes that, at every stage of the proceedings, Ms. Abram had the opportunity to present evidence and test the Ministry's evidence through cross-examination. She was represented by legal counsel at least nine months prior to the Determination. The same counsel represented her at the review hearing and in the appeal to the Commission. Although Ms. Abram raises questions about the evidence in her written submissions, she chose not to require the Ministry witnesses to attend and give oral evidence under oath.

The Commission has considered the following sections of the *Code*:

**Review**

**129** (2) The reviewer may decide the matter, based on one or more of the following:

(a) the request for review and the ministries' files;

(b) the request for review, the ministries' files and any other communication with persons the reviewer considers necessary to decide the matter, including communicating with the person or board requesting the review and with the person who made or failed to make the determination.

**Evidence**

**137** (1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,

(a) any oral testimony, or

(b) any record or other thing

relevant to the subject matter of the appeal and may act on the evidence.

**Powers of commission**

**138** (1) On an appeal of a determination or of the confirmation, variance or rescission of a determination, the commission may consider the findings of

(a) the person who made the determination that is being appealed, or

(b) the reviewer.

The Commission finds that in an administrative proceeding under Part 6 Division 3 of the *Code*, testimony and documents may be accepted as evidence whether or not given or proven under oath.

The Commission has reviewed the evidence of the Ministry of Forests contained in the binder identified as ERA Case File DCK-2002-0069, which formed the evidentiary basis for the Determination.

Further, the Commission has considered the findings of the District Manager and the review panel. The review panel found that the District Manager's evidence was compelling, stating as follows:

- Lawrence Noel was seen leaving the Ruby Creek area with Marilyn Abram on June 6, 2001, in a truck loaded with freshly cut shingle blocks.
- The shingle blocks were located in Mr. Noel's mill site with Lawrence Abram's timber mark identified on the blocks.
- Ms. Abram regularly harvests timber using Lawrence Abram's timber mark.
- The stumps in the cutting area were covered with branches and leaves in an attempt to hide them.
- The spalls removed from the shingle blocks were turned bark side up. This practice is a common method to camouflage theft of cedar.
- The area where the falling took place had been partially ribboned with boundary marking tape by Northwest Hardwoods for an upcoming clear-cut, Block 32 -9. This would be an indication to Ms. Abram that this area was not private land belonging to Lawrence Walter Abram, Ms. Abram's brother.
- Ms. Abram willingly accompanied the FO to the first site, and did not deny that she was responsible for the unauthorized harvesting.
- When FO Iain Hartley drove up to the cutting site with Marilyn Abram on June 6, 2001, he noticed that she was eating licorice Beechnut cough drops from a roll in a black wrapper. Later investigation of the cutting sites revealed a black wrapper from a licorice Beechnut cough drop roll located near a tree stump.

The Commission agrees that the evidence is compelling. The Commission finds the evidence supports a finding, on the balance of probabilities, that Ms. Abram contravened sections 96(1) and (2) of the *Code*. The Commission further finds that the evidence against Ms. Abram is clear and cogent enough to more than merely tilt the evidentiary scales.

### 5. Whether an order of costs is appropriate in this appeal.

In her notice of appeal and statement of points, Ms. Abram requests compensation for legal costs. This was not pursued in her written submission.

In its statement of points, the Government requests costs against Ms. Abram on the grounds that the appeal is frivolous and vexatious in nature. The claim was not pursued in its written submission.

Under section 84(3) of the *Forest and Range Practices Act*, the Commission "may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal." The Commission has adopted a policy, as set out in its Procedure Manual, to award costs in special circumstances. Those circumstances may include situations where an appeal is brought for improper reasons or is frivolous or vexatious in nature, or where a party unreasonably delays the proceedings. The Commission has not adopted a policy that follows the civil court practice of the loser in a proceeding paying the winner's costs.

The Commission finds that there are no special circumstances in this case that warrant an order for either Ms. Abram or the Government.

## DECISION

In making this decision, the Commission has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons provided above, the Commission agrees with the Determination in its entirety, and upholds the review panel decision.

Accordingly, the appeal is dismissed. The requests for costs are denied.

Cindy Derkaz, Panel Chair
Forest Appeals Commission

April 12, 2005