Forest Appeals Commission

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APPEAL NO. 96/02 (b)

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act,* S.B.C. 1994, c. 41.

BETWEEN:	International Forest Products Limited	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
AND:	Friends of Clayoquot Sound	**INTERVENOR**

BEFORE: A Panel of the Forest Appeals Commission

Toby Vigod	Panel Chair
Gerry Burch	Member
Carol Roberts	Member

HEARING DATE: January 16 and 17, 1997

PLACE OF HEARING: Victoria, British Columbia

APPEARING:

For the Appellant:	Ross Switzer, Counsel
For the Respondent:	Neena Sharma, Counsel
For the Third Party:	Calvin Sandborn, Counsel
For the Intervenor:	Tim Howard, Counsel

APPEAL

This is an appeal from an Administrative Review decision issued August 8, 1996, upholding a determination of the District Manager, dated May 28, 1996, in which International Forest Products Limited ("Interfor") was found to have contravened section 17(1)(c) of the *Forest Road Regulation* ("FRR"). The Review Panel upheld the District Manager's finding that in contravening section 17(1), Interfor also contravened section 63(2) of the *Forest Practices Code of British Columbia Act* (the "*Code*"). It also upheld the penalty of $10,000.

The Appellant seeks an order rescinding the review decision, pursuant to section 138 of the *Code*. In the alternative, the Appellant claims that the penalty is excessive, bears no relationship to the facts, and should be cancelled or reduced.

FACTS

Interfor's contractor, Alliford Bay Road Building, ("Alliford") was constructing the Rolling Stone Mainline Road (the "Mainline") in Block R60, Tree Farm Licence (TFL) 54. The area is located in the Rolling Stone Creek drainage which flows into Fortune Channel, approximately 4 kilometres northeast of Tofino, within the Clayoquot Sound area of the Port Alberni Forest District.

The Mainline was constructed pursuant to a Road Permit issued by the Ministry of Forests on June 25, 1995, and amended July 4, 1995. Construction commenced on or about July 14, 1995. The permit was issued subject to certain conditions, one of which was that the goal of construction activities should "minimize erosion...of soil that can lead to...sedimentation in creeks." The terms also specified that construction should be stopped if the soils were soft, muddy and flowing, or fine textured soils were being transported by creeks. The conditions also required that if construction was stopped, ditches and culverts were to be left clear.

The Mainline was constructed of three feet of glacial till ballast on natural subgrade. No coarse gravel capping material had been applied past Station 3+500.

Between September 28 and October 1, Alliford also pioneered Spur roads R100 and R200.

Between October 1 and 11, Alliford voluntarily shut down road construction activity on a number of days due to heavy rainfall.

Alliford's Superintendent, (Road Foreman) David Carswell ("Carswell"), consulted with Interfor regarding his concerns that the amount of rain would damage a culvert on Spur R100 (the "Spur") and cause environmental damage to the stream if steps were not taken to protect it.

On October 11, Alliford hauled rip rap to armour the culvert, and installed guard logs above it in an effort to control erosion and to prevent sediment from entering the stream. The rip rap was hauled from Station 3+600 on the Mainline to the Spur by a dump-truck, which made approximately 4 trips.

In addition to armouring the culvert, Alliford also scraped the surface of the Mainline at the junction of the Spur with a bulldozer to remove mud slurry, placing it in an adjacent pit.

On October 11, Peter Goode ("Goode"), a Ministry of Forests ("MOF") Official, arrived to inspect the construction activity. He observed liquefaction of the road surface due to the heavy rain, and that the road beyond 3+600 was "axle deep in mud". He observed a dump truck moving blasted rock from the blast site at Station 3+600 to the culvert. Goode also observed that the dump truck traffic caused the liquified sand and silt to enter roadside ditches and streams, and although much of it was being captured at sediment controls, some was escaping the controls and travelling downstream. Goode authorized the final load of rip rap to be transported to the culvert, and ordered the installation of further silt traps. He also directed that Alliford

shut down operations until the surface of the road was no longer saturated or until they had written notification to continue.

On October 12, Goode and Dean Fenn, the MOF Supervisor, visited the site along with John Wilson, Interfor's contract supervisor, and Carswell. They inspected the Mainline from Station 3+800 to Station 4+208, which was the junction of Spur R200, and reviewed the construction activity. They videotaped and photographed the conditions of the road, and ordered the installation of more sediment controls. They also ordered that all vehicular traffic cease. Alliford installed extra sediment and erosion control measures, including installing extra silt fences, hay bales, and constructed water bars and cross ditches.

On October 13, Goode, Fenn, other Ministry officials including Denis Collins, the Watershed Restoration Program Specialist, and Doug Erickson, the RO Engineer, and John Wilson, again inspected the site. At that time Interfor was notified that it was in contravention of the *Code*, and a hearing was held.

The District Manager found that in spite of the sediment controls, some of the silt and water was escaping and travelling further downstream. Deposits of silt, sand and fine gravel were found trapped in pools, stream bed depressions and by felled and bucked timber lying within the stream beds for a distance of approximately 80 metres downstream from the Mainline.

The Review Panel found that the surface of the Mainline between Stations 3+500 and 3+850 had liquified and was up to 25 centimetres deep in several sections of the road. The dump-truck traffic caused the liquified sand and silt to ooze into roadside ditches and streams crossing the Mainline. The Review Panel determined that measures taken to control siltation/sedimentation were inadequate, and determined that Interfor had contravened section 17(1)(c) of the FRR and section 63(2)(b) of the *Code*, and imposed an administrative penalty of $10,000 for the contravention of section 17(1)(c).

Both the District Manager and the Review Panel found that Interfor had not contravened sections 45(3) of the *Code*, or sections 12, 13(a) or (b) of the FRR. No appeal was made in respect of this finding.

ISSUES

There are three issues arising on appeal:

1. (a) Whether section 17 of the FRR or section 63 of the *Code* applies to the activities undertaken by the Appellant; and if so

   (b) whether there was a contravention of section 17(1) of the FRR;

2. Whether the finding that a contravention of section 17(1) of the FRR constitutes a contravention of section 63(2) of the *Code* constitutes double jeopardy or runs contrary to the common law principle against multiple convictions.

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

Although the Appellant also raised the defence of due diligence, this ground of appeal was abandoned at the hearing.

REVIEW OF SUBMISSIONS

Interfor argued that it had no obligations under section 63 of the *Code* and section 17 of the FRR, and that even if it did, there was insufficient evidence upon which to find a contravention.

Interfor contends that section 17(1) was not applicable, as it referred to road maintenance under section 63 of the *Code*. That section refers to the use of a road under the authority of a permit. Interfor argued that the Mainline and the Spur were still under construction in October 1995, and that the obligation to maintain did not arise until the road was completed.

In the alternative, Interfor also contended that the duties arising under section 17 were to inspect and to repair. Interfor contended that the Appellant inspected every day, and that as there was no damage to the road, no duty to repair arose. Alternatively, Interfor contended that any obligation to repair had been fulfilled when Alliford installed sediment control measures.

Interfor also argued that the finding of a contravention of both section 17 of the FRR and 63 of the *Code* amounted to double jeopardy and contravened the rule against double convictions outlined by the Supreme Court of Canada in *R*. v. *Kienapple* (1974), 44 D.L.R. (3d) 351.

Interfor submitted that even if a contravention of section 17 or 63 was found, that the penalty was inappropriate, or if it was, the quantum was disproportionate to the events and the circumstances. Interfor argued that it had no prior contraventions, was cooperative, the work done was in an effort to prevent the failure of the culvert, which could have resulted in environmental damage, there was no intentional contravention of the *Code*, and the sediment did not reach any fish bearing streams. Interfor noted that the maximum penalty was $20,000, and that a $10,000 penalty was disproportionate in the circumstances.

MOF, the Forest Practices Board ("Board") and the Friends of Clayoquot Sound ("Friends") argued that the decision of the Review Panel should be upheld, and that the penalty was appropriate in the circumstances. They all argue that the findings of a contravention of both sections 17(1) and 63(2) do not contravene the *Kienapple* rule against double convictions because the proceedings are regulatory, not criminal in nature.

MOF also contends that as no reversible error in the decision of the District Manager had been demonstrated, it ought not to be interfered with. MOF argued that the Commission's hearing was in the nature of an appeal, not a hearing *de novo*. MOF also argued that there were no factual errors in the determination which could provide grounds for setting it aside.

MOF, the Board and the Friends all contend that the duty to maintain a road under section 63 applied to anyone using a road under the authority of a road permit, and that since the conditions of the permit had been contravened, a contravention of section 63 could also be found.

The Board submitted that the potential for double punishment from the same contravention may be unfair to the licensee. The Board further submitted that the Commission should exercise caution in fashioning a penalty which did not have the effect of double punishment, but which also did not prohibit the application of remedies flowing from one or more of the contraventions.

MOF and the Friends contend that Interfor's failure to minimize transport of sediment arose as a result of its continued use of the Mainline in conditions which caused the road surface to become saturated and covered in muddy slurry. They say that the use of the road in those conditions resulted in the slurry entering the ditches and creeks. They further argue that Interfor's actions in armouring the culvert on the Spur to prevent damage to the environment could not excuse its actions in operating vehicles on a muddy road causing sediment to flow into streams.

DECISION

In *Tolko Forest Products* v. *Government of British Columbia* (Forest Appeals Commission) Appeal 95/02, November 12, 1996 (unreported), the Commission found that an appeal under the *Code* took the form of a hearing *de novo*. Consequently, although there is a decision from which the appeal is taken, it is open to the Commission to hear or rehear evidence, consider evidence given in previous hearings, as well as consider the determination and review decision appealed from in arriving at its decision. The Commission may also substitute its own decision for that of the review panel. It is not incumbent upon an Appellant to demonstrate a factual or reversible error before the Commission will rehear any evidence.

ISSUE 1(a) Application of section 17(1)

Section 63(2) of the *Code* provides that

> A person who is required to maintain a road under subsection (1), (4.1) or (6) must maintain it in accordance with the requirements of
> (a) any forest development plan or access management plan
> (b) the Act, regulations and standards, and
> (c) the cutting permit, road permit,...

The Review Panel determined that construction of the Mainline to the Spur was complete. Although the road may not have been completed in its length, there was no dispute taken to their finding that the road had been "subgraded, ditched, ballasted, culverted and graded" to that point. The evidence is also that the road had been used by Alliford, Interfor and Ministry Officials as well as members of the public. The Commission agrees that once a road reaches this stage of completion and is in use, it is subject to the maintenance requirements of section 63. Under section 63, persons who use a road must meet the requirements of section 4 of the FRR. Consequently, the Commission finds that the maintenance provisions of section 17 of the FRR apply.

ISSUE 1(b) Was section 17 contravened?

The contravention of section 63 (2) of the *Code* arises as a result of a finding that Interfor contravened section 17 of the FRR.

Section 17(1) of the FRR provides that

> A person who maintains a road under section 63 of the Act **must inspect** the road and **repair** the road to **ensure** that
> (a) the structural integrity of the road prism and clearing width are protected,
> (b) the drainage systems of the road are functional,
> (c) the transport of sediment from the road prism and its effects on other forest resources are minimized, and
> (d) the road can safely be used by industrial users, even if industrial use has been temporarily suspended. (emphasis added)

There was no dispute to the findings that due to heavy rainfall, the surface of the Mainline had liquified. The District Manager found that the use of this section of the road by Interfor's road and falling crews caused the transport of sediment from the road prism to the tributary streams and that Interfor's failure to take remedial action resulted in a contravention of section 17.

The Determination that section 17(1)(c) was contravened when Interfor failed to minimize the transport of sediment from the road prism was upheld by the Review Panel. The Panel held that the onus was on the licensee to have adequate silt control measures in place, and the fact that the siltation in the streams may have been caused in part by measures taken by Interfor to prevent the erosion of a culvert, which may have caused further environmental damage, was immaterial. The Panel found that the situation should not have been allowed to develop to that stage.

The key word in this section is minimize, not eliminate. Because both the *Code* and the regulations do not define the term minimize, there will be an element of subjectivity in determining what is appropriate in the circumstances.

The *Code*, as remedial legislation, must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. (Section 8, *Interpretation Act*). The preamble, which, pursuant to section 9 of the *Interpretation Act*, is intended to assist in explaining its meaning and object, cites the desire of British Columbians for sustainable use of the forests which are held in trust for future generations. In addressing the term 'sustainable use' the preamble refers to, among other things, (d) conserving...soil, water, fish...and other forest resources, and (e) restoring damaged ecologies.

It is in light of this objective that the Commission has considered the legislation and viewed the evidence.

The Commission is of the opinion that it is not necessary to quantify the amount of sediment. The obligation is to 'ensure the transport of sediment and its effects on

other forest resources are minimized'. The Concise Oxford English Dictionary defines minimize as "reduce to, or estimate at, smallest possible amount or degree".

The Commission has viewed videotape and photographic evidence, reviewed the documentary evidence, and heard the testimony of four witnesses. Where there is a discrepancy in the evidence, the Commission prefers that of Mr. Goode and Mr. Fenn, the MOF officials who were at the site on October 11. Mr. Goode had also been on the Mainline weekly during the fall. Don McMillan, Interfor's area Engineer, visited the site in August, and then not again until October 25. Ms. Langer, a Director of the Friends, testified that she visited the site on October 27.

The evidence is that in early October, there was a heavy coastal downpour, resulting in 227 millimetres of rainfall in 11 days.

The Commission accepts that Interfor commenced installation of silt fences and erosion controls on October 6, and completed the fences and silt fences according to internal plans on October 10.

The Commission further accepts that the activity taking place on October 10 and 11 was not for the purpose of constructing a road, but to armour a culvert on the Spur.

The Commission accepts the evidence of Mr. Goode and Mr. Fenn, who testified that there was up to 25 centimetres of "muck" in several sections of the road between Stations 3+500 and 4+067. The Commission accepts that the very muddy conditions existed on only approximately 50 metres of road, not the entire length of the Mainline. The undisputed evidence of Doug Erickson was that up to 4 centimetres of sediment was deposited in the streams during the first 20 metres of the stream, although almost no trace of sediment was observed at approximately 80 metres down stream.

As Rolling Stone Creek is only fish bearing for the first one kilometre from the ocean, there was no evidence of any impact on fish. In spite of this, and even though there was little if any evidence of the siltation the next day, the Commission finds that there has been a contravention of section 17 of the FRR.

The Commission finds that the surface layer of the road had become saturated with water and turned into a slurry mix due to the heavy rainfall in October. The Commission finds that there was siltation in 75% of all culverts and ditchlines from Station 3+600 to 4+200, and that on October 11, mud and silt was flowing past guard logs and the silt traps, and that the waterbars had become ineffective as they had filled with mud. The use of traffic on the road, whether light or heavy vehicles, caused the slurry on the surface of the road to enter ditches and streams. There were ruts anywhere from 5 to 15 centimetres deep on the road from the traffic, and parts of the road sides contained slurry up to 20 centimetres deep.

Although the Commission notes that Mr. Goode authorized a load of rip rap to be delivered to the culvert on the Spur, the armouring was virtually completed by that time, and Carswell's decision to take this step was not made in consultation with any government officials. Although the appropriate steps to be taken to armour the culvert in the circumstances is open to debate, the issue before the Commission is not

whether, or how, the culvert was protected, but the circumstances which brought Interfor to that stage.

The fact is that Interfor waited until the road was liquified before taking any steps to armour the culvert. The Commission finds that although the siltation control measures implemented by Interfor may have been adequate, Interfor was in violation of section 17 in that it continued to use the road in a fashion which allowed sediment to enter ditches after the rainfall had liquified the road surface. That activity exacerbated, rather than minimized, the transport of sediment from the road prism.

The Commission notes that on September 19, 1995, a Ministry of Environment, Lands and Parks ("MELP") official visited the site and expressed concerns to Interfor regarding the impact of heavy rain on the compacted surface of the Mainline. He noted in his letter to Mr. McMillan that "it is evident that if the road does not properly dry out before the onset of the winter rains that there will be a high sedimentation hazard into the surrounding creeks....On this day I observed that there was silt/clay runoff from a low spot in the road into standing water on the roadside. This area has experienced very little precipitation recently and there is already evidence of a siltation problem."

There is no dispute that the majority of the sediment was trapped by the silt control measures instituted by Interfor and the streams were running clear within one day of the occurrence. Nevertheless, even though Interfor installed sediment control measures before and after MOF inspections, those were unable to trap all the material that was being introduced into the streams. Some of the silt barriers were full, others had fallen down. The water bars had filled with liquified clay and had become damaged by vehicle traffic.

The evidence of D. Erickson, the MOF Engineer, was that the road constructed in September (below Station 3+800) had set up well. He further noted that "However, due to the fine textured nature of the material used for ballast, it would be doubtful that this road would be able to stand up to heavy traffic until prolonged drying had taken place and all settling had been completed."

The Commission finds that Interfor failed to maintain the road and, therefore, contravened section 17(1) of the FRR. The steps taken to armour the culvert are irrelevant, as it is clear that Interfor should not have been on the road at that time in any event. Interfor had been warned about the problem in September. In October the road surface had become liquified. In spite of these conditions, Interfor drove traffic, including heavy traffic across the road, which Mr. McMillan acknowledged made the road worse.

ISSUE 2

The Commission finds that once a contravention of section 17(1) is found, by operation of statute, section 63 of the *Code* is also contravened. No independent determination of a contravention is required.

One penalty was levied, for the contravention of section 17(1)(c). The *Code* and the regulations constitute an integrated scheme of forest protection, and cannot be applied separately. The Commission is unable to find that the application of one penalty by the District Manager and upheld by the Review Panel constitutes either double punishment or unfairness.

MOF has in fact recorded the contravention in a manner which does not show as two independent contraventions. (See MOF Annual Report of Compliance and Enforcement Statistics for the Forest Practices Code, June 15, 1995-June 15, 1996.) Provided the method of reporting continues in this fashion, and the Commission recommends that it does, there is no public unfairness.

The Commission does not agree in any event that the prohibition against multiple convictions for criminal offences, as enunciated by the Supreme Court in *R.* v. *Kienapple*, has any application to administrative schemes such as the *Code*.

ISSUE 3

Is the quantum of the penalty proportionate to the facts?

The Commission notes the evidence of both Mr. Goode, who has 3 years experience with the Ministry, and Mr. Fenn, who has 9 years experience in the field with the Ministry, including monitoring logging road construction and maintenance, who stated that this was one of the worst cases of liquified sediment on a logging road they had observed. Their evidence was supported by that of Ms. Langer, who has been inspecting forestry activities in the Clayoquot Sound area for 3 years.

The Commission notes that there were adverse effects, although minimal, on local stream biota. However, as the Friends note, the effects of sedimentation are cumulative and damaging over time and distance. As a result, the Commission is of the opinion that a penalty is appropriate in the circumstances, and does not disturb the determination in this respect.

Section 117 (4) of the *Code* provides that the following factors may be considered by a senior officer prior to issuing a penalty:

(i) previous contraventions of a similar nature by the same person

(ii) the gravity or 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

The maximum penalty permitted for a contravention of this section is $20,000.

The evidence is that there have been no previous contraventions by either Alliford or Interfor, that the violation was not deliberate nor repeated, that Interfor was cooperative, and that although sediment did enter streams, the streams were running clear within a day of Goode's initial visit. The evidence is that the streams affected were not fish bearing, and there is no evidence that fish habitat were directly affected by the sedimentation.

It appears that the District Manager was of the opinion that Interfor may have derived an economic benefit in its decision not to haul in crushed rock or gravel to cap the surface of the Mainline beyond station 3+500, imposed one half of the prescribed penalty as a result. This was upheld by the Review Panel.

Having heard the unchallenged evidence of Don McMillan on behalf of Interfor, the Commission accepts that there was no economic benefit to Interfor arising from the contravention.

Consequently, the Commission is of the opinion that the penalty should be reduced. In light of all of the findings, the Commission concludes that a reduction of $2500 is appropriate in the circumstances.

DECISION

The Commission, therefore, under section 138 of the *Code*, upholds the decision of the Review Panel but varies the penalty to $7500.

Carol Roberts, Member
Forest Appeals Commission

March 19, 1997