BRITISH COLUMBIA

Forest Appeals Commission

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APPEAL NO. 96/03

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:	Weldwood of Canada Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission

Toby Vigod	Chair
Gerry Burch	Member
David Ormerod	Member

DATE OF HEARING: January 9, 1997

PLACE OF HEARING: Victoria, British Columbia

APPEARING:

For the Appellant:	Daniel Bennett, Counsel
For the Respondent:	Angela Westmacott, Counsel
	Dawn House, Counsel
For the Third Party:	Calvin Sandborn, Counsel

APPEAL

This is an appeal brought by Weldwood of Canada Ltd. ("Weldwood") of a review decision made by Mr. Ken Brahniuk (Panel Chair) and Mr. Ken Bloom dated July 23, 1996, which found that Weldwood had contravened subsection 51(2)(b) of the *Forest Practices Code of British Columbia Act* (the "*Code*"), specifically that Weldwood had failed to promptly notify the District Manager of the presence of an aboriginal grave site within an approved cutblock. The Review Panel varied a Stopwork Order ("SWO") issued by Mr. Daniel Laurie, on May 24, 1996, pursuant to section 123 of the *Code*.

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

BACKGROUND

Weldwood was issued Cutting Permit ("CP") 982 under Forest Licence A45024 on July 1, 1995. Mr. Ernest Schmid, Operations Superintendent with Weldwood,

testified for the company that the Alexis Creek Indian Band (the "Band") had been involved in the evolution of the development plan which had been issued in draft in the Spring of 1994. Mr. Percy Guichon, Resource Manager for the Band, had helped design the cutblocks and identified wildlife areas. Both the Band and the Ministry of Forests had indicated to Weldwood that no archeological work needed to be undertaken for CP 982.

On May 13, 1996, harvesting re-commenced on Cutblock ("CB") 2A, the area of interest in this appeal. On May 22, 1996, a meeting was held on the consolidated forest development plan with all the licencees involved, including Weldwood, the Band, and Ministry of Forests ("MOF") staff. Ms. Kate Leishman, aboriginal liaison officer for the Chilcotin Forest District, and a witness for MOF testified that she had arranged the meeting and that she transcribed the comments made there. This was an annual meeting to review the consolidated plan with the Band and was not a meeting specific to the activities of Weldwood. In attendance were three other MOF staff, a number of elders and members of the Band, including Mr. Casimir Williams, an elder, Mr. Percy Guichon, Mr. Sam Guichon, and Mr. Kelly Tate, area supervisor for Weldwood. Other licencees were also present.

At the meeting, while reviewing a series of map sheets, Mr. Casimir Williams identified a number of possible grave sites, including a potential grave site within CP 982, CB 2A of Weldwood's operations. Mr. Williams does not speak English and this information was given by Mr. Percy Guichon who acted as Mr. William's interpreter. Because it appeared that grave sites might be located in an area of CP 982 that had already been logged, it was decided to immediately try to search the area for evidence of a grave site.

Mr. Kelly Tate, who was a witness for Weldwood, testified that he accompanied Mr. Percy Guichon and Mr. Casimir Williams to look for the site that afternoon. They drove along an old wagon road into the logged area which had been skidded. According to Mr. Tate, Mr. Williams stopped a number of times where he thought the site might be and then moved on. Finally, they came to a natural terraced area where Mr. Williams thought the grave site might be and where he found a notched log, about one metre in length. The significance of the notched log was that it exhibited evidence of the remains of the 'cribbing' which had surrounded the grave site. Mr. Williams indicated that this was where he thought the grave site was located. Mr. Tate proceeded to ribbon off an area of approximately ¼ hectare. He then visited the logging contractor, giving him instructions to keep operations on the east side of the access road to the CB 2A and to avoid the ribboned off area.

Mr. Tate then phoned the owner of the contractor, Onward Resources, to confirm the situation. He dropped Mr. Williams off at his residence and took Mr. Guichon back to the reserve. At approximately 5:00-5:30 p.m. Mr. Tate put in a call to the archeological firm on retainer, Antiquus Archeological Consultants Ltd. ("Antiquus"), and advised Jim Spafford, head archeologist, of the situation. Mr. Spafford undertook to seek clarification of an existing archeological permit to see if the firm had authorization to undertake activities in the area in question. The area in the vicinity of the site within CB 2A had been harvested prior to May 22, 1996. Felling

and skidding operations on CP 982 were not occurring on that date due to wet weather conditions.

Mr. Daniel Laurie, Compliance and Enforcement Technician with the Chilcotin Forest District, was a witness for MOF. He testified that, on May 22, 1996, at approximately 3:00-3:30 p.m. at the District Office, he overheard a conversation with one of the licensees who had been at the development plan meeting earlier that day and who related that there might be a grave site in CB 2A. Mr. Laurie made a mental note to investigate the situation further the next day.

On Thursday, May 23rd, Mr. Tate went to his office and called Mr. Mike Rousseau at Antiquus to explain the situation. He faxed him some maps to help in the determination of whether the existing archeological permit covered CB 2A or whether an amendment was needed. Mr. Tate also outlined to his supervisor, Mr. Schmid, what had happened at the site visit and his contacts with Antiquus. Mr. Schmid testified that he examined the *Code* and decided that, from the information that they had at that time, he could not determine that a grave site existed. Mr. Schmid indicated that it was his intention to contact the District Manager when the site was confirmed.

On that same day, May 23rd, Mr. Laurie went to CB 2A in mid-afternoon. He met the contractors who took him to the ribboned-off site. He testified that he saw evidence of traditional grave crib logs. He wondered at the time if the notched log may have been moved into the site by the log skidding operations. Mr. Laurie testified that he is familiar with the identification of aboriginal grave sites and has seen cribbing before.

On Friday, May 24, 1996, Mr. Tate received a call from Mr. Laurie. They had a general discussion about the possible grave site. Mr. Tate told him what they were doing, that they may have found a grave site and that an archeological investigation would be taking place. Mr. Laurie called back later that day and asked about the contractor's schedule in the field. Mr. Tate testified that at no time did Mr. Laurie raise the issue of the need to notify the District Manager.

Mr. Laurie testified that he had raised the grave site issue with his supervisor as soon as he became available on May 24th. Ms. Leishman testified that she had been out of town on May 23rd, but returned to the District Office at approximately 1:00 p.m. on May 24th. The issue of the grave site was brought to the attention of Mr. Tom Jackson, Acting District Manager. She met with Mr. Laurie, Mr. Ken Vanderburg and Mr. Jackson to discuss the matter. They pulled the file on CP 982 and came across a note in the margin that said "grave sites—OK." She talked to the resource officer who was not aware what the notation meant. However, it seemed to Ms. Leishman that there was at least an implication of other grave sites in the area and that this was of concern, given the significance to the Band of such sites. The meeting in the district office went on for a couple of hours.

Mr. Grant, the District Manager, had been out of the office but when he returned on May 24th, he was made aware of the grave site issue. He told Ms. Leishman, Mr. Laurie and Mr. Jackson that he was leaving it up to them to deal with the situation.

Mr. Laurie determined that, based on the information that he had which included the identification of the grave site by Mr. Williams, his field trip, the notation in the file about 'grave sites', that the only way to protect the area was to stop all operations in the vicinity of the ribboned area, which meant the entire cutting permit. He testified that he knew that the grave sites were of concern to aboriginal people and that he could not be sure that there were not more sites beyond the one identified by Mr. Williams. After an examination of the provisions of the *Code*, he proceeded to issue the SWO. The SWO was issued for possible contraventions of subsections 51(2)(a) and (b). The order was to remain in effect until an archeological report had been approved by the District Manager.

At approximately 3:00 p.m. on May 24th, Mr. Tate received a faxed SWO from the Chilcotin Forest District Office. On May 27, 1996, Mr. Schmid had a conversation with Mr. Laurie about what activities could continue at the site. Later that day, Mr. Andy Turner, of the Chilcotin Forest District Office, faxed him a note further defining operations. On May 29, 1996, Mr. Schmid, on behalf of Weldwood, filed a request for a review of the SWO. On May 31, 1996, the District Manager wrote to Mr. Tate clarifying the archeological requirements to be fulfilled before the SWO would be lifted. Archeological impact assessments were to be conducted on all blocks contained within CP 982, including both those blocks which had been previously harvested and those which had not.

Over the next few weeks, Mr. Kelly continued to deal with the Band and the archeologists almost on a daily basis. He attended the site on June 5th along with Ms. Leishman, Mr. Dan Laurie and three archeologists. At that time, a considerable amount of lithic scatter was identified. Lithic scatter indicated human presence and added to the potential of there being a grave site. According to Ms. Leishman, the archeologists indicated there was strong evidence of a grave site and described this whole area as one of traditional use. There was some discussion about removal of the decked wood from the area.

On June 19th, Mr. Tate held a meeting with Chief Charleyboy and Mr. Percy Guichon to discuss the findings. A preliminary report had been obtained from Antiquus that identified three archeological/heritage concerns in, and/or immediately adjacent to CB 1; two archeological/heritage concerns, one of which includes a reported burial in, and/or immediately adjacent to CB 2A. No archeological/heritage concerns were identified in the remaining cutblocks. The results in CB 2A were consistent with the location identified by Mr. Williams.

The Band did not want to excavate the area but were interested in further work being done to determine the exact location of the grave site. Golder Associates was contacted to do a ground penetrating radar survey. A draft report was received from Golder Associates and a meeting was planned for June 25th to go over the results. Mr. Tate faxed out an agenda which included the issue of compensation as well as a discussion of the Golder report. In attendance at the June 25, 1996, meeting were Mr. Tate, Ms. Leishman, Mr. Ken Vanderberg, Chief Ervin Charleyboy and the District Manager, Mr. Gerry Grant. The issue of compensation was raised by Chief Charleyboy and according to Ms. Leishman, Mr. Tate asked what the Band wanted and the Chief indicated CB 1. It was agreed that the Band would be able to

harvest the wood on CB 1. Mr. Schmid testified that he agreed with this arrangement to maintain good relations with the Band, regardless of whether a grave site existed.

On July 10th, the review hearing took place, at which time Mr. Grant indicated that he had still not received formal notification of the potential grave site. Mr. Tate then sent a formal letter of notification of the possible archeological site to the District Manager. Mr. Tate noted in that letter that "although your district staff were present at this meeting [May 22] and we assumed that they would notify yourself with the applicable information, it would appear that this was not the case."

Golder's Final Report, that was substantially the same as the draft report, was submitted on July 8, 1996. It concluded that "...it is likely that a burial site is located around the survey grid coordinates of approximately 2E, 7W (sic).... The location of this site coincides with the location of scattered wood cribbing and with the memory knowledge of a local native elder." The archeological reports completed by Antiquus and Golder Associates complied with the conditions of the SWO and the subsequent letter of May 31st from the District Manager outlining the extent of archeological impact assessment required.

GROUNDS FOR APPEAL

The Appellant appeals the decision of the Review Panel that Weldwood did contravene subsection 51(2)(b) of the *Code* "on the basis that (a) there was no proof that a resource feature was in "existence" and (b) in the alternative, the District Manager was promptly advised of the potential resource feature."

DISCUSSION

It is useful to set out the relevant sections in the *Code* that were relied on at the initial determination and the subsequent decision made by the Review Panel. Stopwork orders are provide for in section 123:

> (1) If an official considers that a person is contravening a provision of this Act, the *Forest Act* or the *Range Act* or the regulations or standards made under those Acts, the official in accordance with the regulations may order that the contravention cease, or cease to the extent specified by the order until the person has a required licence, permit, plan, prescription or approval.

Mr. Laurie issued a stopwork order for an alleged contravention of subsections 51(2)(a) and (b) of the *Code* which provides:

> (1) In this section "**resource feature"** includes all of the following:
> (a) a cultural heritage resource;
> (b) a recreation feature;
> (c) a range development;
> (d) any other feature designated in the regulations.
> (2) If a person carrying out a forest practice, other than fire control or suppression, finds a resource feature that was not identified on an approved operational plan or permit, the person carrying out the forest practice must

(a) modify or stop any forest practice that is in the immediate vicinity of the previously unidentified resource feature to the extent necessary to refrain from threatening it, and
(b) promptly advise the district manager of the existence and location of the resource feature.

While a "cultural heritage resource" is not specifically defined in the *Code*, section 1(2) provides that "words and expressions not defined in this Act have the meaning given to them in the *Forest Act* and *Range Act* except where the context indicates otherwise." "Cultural heritage resource" as defined in section 1(1) of the *Forest Act* "means an object, a site or the location of a traditional societal practice that is of historical, cultural or archeological significance to the Province, a community or an aboriginal people." While Weldwood has argued that the definition of cultural heritage resource is not as clear as other features defined in the *Code*, the evidence clearly shows that grave sites are of considerable cultural significance to aboriginal people, in this case the Band.

The Review Panel, chaired by Mr. Ken Brahniuk heard the matter on July 10, 1996, and issued its decision on July 23, 1996. The Review Panel concluded that:

1. Weldwood has not contravened section 51(2)(a) of the *Forest Practices Code of B.C. Act.*
2. The designated Forest Official, (Dan Laurie), is instructed to lift the Stop Work Order dated May 24, 1996, and delete this record from the ERA [Enforcement Actions, Administrative Review and Appeal] system.
3. Weldwood did contravene section 51(2)(b) of the *Forest Practices Code of B.C. Act.*

Weldwood filed a Notice of Appeal with the Commission on August 9, 1996, requesting that the finding of a contravention of subsection 51(2)(b) be withdrawn.

Section 130 provides that an appeal under section 131 is an appeal of the determination as varied by the review decision. Section 138 sets out the very broad powers of the Commission on considering an appeal. The section reads as follows:

(1) On considering an appeal, the commission may
(a) confirm, vary or rescind the decision appealed from,
(b) make any decision that the person whose decision is appealed could have made, or
(c) refer the matter back to the person who made the determination with or without directions.

As found by the Commission in *Tolko Forest Products* v. *Government of British Columbia* (Forest Appeals Commission Appeal No. 95/02, November 12, 1996), both the original determination and the decision of the Review Panel are properly before the Commission in any appeal.

The Commission finds that the original issuance of a SWO on May 24, 1996 pursuant to section 123(1) was an appropriate action by Mr. Laurie. A SWO is a precautionary order and there is no need to show that a contravention has taken

place before a SWO is issued. As noted above, section 123 only requires that an official "considers" that a person is contravening a provision of the *Code*. This must be contrasted to other sections of the *Code* in which a senior official must "determine that a person has contravened this Act..." (see, for example, sections 117, 118) before an administrative remedy can be ordered.

The Commission finds that the reference in the SWO to a possible contravention of subsection 51(2)(a) was correct, as the evidence available at the time indicated that there was a significant possibility that a "cultural heritage resource", namely a First Nations traditional burial site, had been disturbed by the active logging operations within CB 2A and that there was a possibility that there were other grave sites within the operating area. The evidence of both Ms. Leishman and Mr. Tate was that possible grave sites were identified at the May 22nd meeting by Mr. Williams. The decision taken by the Weldwood representative, Mr. Tate, to immediately visit the cut block the same afternoon with representatives of the Band emphasized the concern about this issue especially given the fact that logging had already taken place.

The review of the Ministry file on the afternoon of May 24th, showed that the possibility of grave sites had previously been noted and, therefore, raised the concern that there might be more than just one. The evidence given by Mr. Laurie concerning his field visit to CB 2A of CP 982 on May 23rd, suggested that a traditional grave site had been disturbed by the logging operations within, or close to, an area that had been ribboned off by Mr. Tate the previous day. Mr. Laurie testified that he saw evidence of traditional grave crib logs, that may have been located within the ribboned-off site or may have been moved into the site by the log skidding operations. The Commission accepts that Mr. Laurie has adequate knowledge of traditional burial methods within the region to identify such cribbing material.

Weldwood has argued that the grave site has still not been conclusively determined by anyone as being an identifiable grave site and that therefore it "could not have been said that a resource feature was in 'existence'" to trigger the requirement under subsection 51(2)(b) to notify the District Manager. It further argues that it was reasonable to do further investigations to confirm whether the site actually existed prior to notifying the District Manager. The Commission does not accept these submissions. The evidence shows that a grave site was identified by the elder, Mr. Williams on May 22, 1996, and, in fact, the area was ribboned off by Mr. Tate that afternoon.

The intent of section 51 is precautionary, and while clearly some evidence is required of the existence of a resource feature, conclusive proof is not required to trigger the requirements of this section. This section deals with "previously unidentified resource features" that were not identified in an approved operational plan or permit, which implies that they may not be as obvious as those features already identified. It is clear that Weldwood itself did take the identification of the grave site very seriously as Mr. Tate immediately contacted Antiquus to undertake work in the area.

In the alternative, Weldwood submits that it did promptly advise the District Manager according to subsection 51(2)(b). There is no dispute that "promptly advise" generally means "with that degree of promptness that is reasonable in all the circumstances" (*Filatrault* v. *Zurich Insurance Co.* (1981), 126 D.L.R. (3d) 355 (B.C.S.C.)). The issue is what degree of promptness is reasonably required by subsection 51(2)(b) given the facts of this case.

The Commission finds that, because the statute addresses the need to modify or stop forest practices that may threaten previously unidentified resource features, in this case an aboriginal grave site, the District Manager should be notified within a very short timeframe. The Commission finds that this has occurred in this case and it therefore finds that the SWO should not have been issued for a breach of subsection 51(2)(b). We interpret that the intent of this subsection of the *Code* is to assure that knowledge of previously unidentified resource features is not kept from the District Manager and MOF staff administering the cutting authority. On the evidence, it is clear that Ms. Leishman and three other MOF staff knew about the potential grave site from their attendance at the May 22, 1996, meeting. Mr. Laurie knew about the potential grave site later that day and on May 24, 1996, both the Acting District Manager and, on his return to the office, the District Manager, were informed by staff of the existence of the potential grave site.

The subsection does not dictate that notice be in writing. Weldwood knew that MOF staff were aware of the potential grave site on May 22nd and reasonably assumed that this information would be passed on to the District Manager. While the Commission finds that there may be a risk in assuming that information may be passed on to the District Manager, based on the facts in this case, it seems clear, that by May 24th, at the latest, the District Manager was advised of the existence of the potential grave site. On the facts, there was no need to be told directly again by the licensee. Further, specific instructions on how to carry out the archeological report were sent to Weldwood by the District Manager on May 31, 1996.

Consequently, the Commission upholds the original issuance of the SWO, but varies it by removing the reference to a contravention of subsection 51(2)(b). We find that the conditions for lifting the SWO have been fully complied with, and, therefore, no further action is required. The evidence given by the witnesses for the Appellant showed that Weldwood had pursued the archeological investigation with diligence, speed and thoroughness and had fully met the requirements of the District Manager as outlined in his letter of May 31, 1996.

We, therefore, also find in favour of the Appellant in rescinding the finding of the Review Panel, dated July 23, 1996, that a contravention of subsection 51(2)(b) had taken place. As we have concluded above, the District Manager was fully aware of the situation. We have upheld the issuance of the SWO for a possible contravention of subsection 51(2)(a), and therefore reject the Review Panel's finding that the SWO should be cancelled.

Further, the Commission has some concerns with the Review Panel's approach to the determination they were to review. In this case, the question properly before the Review Panel was whether or not the official when issuing a SWO, reasonably

'considered' that a contravention was taking place; not whether a contravention did in fact take place. The question of whether a contravention did take place is a separate legal question, and should be determined as a separate issue. In this case, the Review Panel did not, in its decision, discuss whether the SWO was properly issued. Instead it vacated the SWO as it concluded that an actual contravention of subsection 51(2)(a) had not taken place. It then went on to find that a contravention of subsection 51(2)(b) had occurred.

The Commission further finds that this bald statement of a contravention of subsection 51(2)(b), without addressing the need to levy a penalty under section 117(1) or some other administrative remedy under Division 3, is inappropriate. According to section 130 of the *Code*, a determination or failure to make a determination may only be appealed if it has first been reviewed under sections 127 to 129. Section 127 sets out the matters that may be reviewed. Section 123(1), which provides for the issuance of SWOs is listed there: and there is no issue that this was a matter that could properly be reviewed by a Review Panel and, subsequently, by this Commission.

However, section 51 is not listed separately in section 127 as a matter that can be reviewed. This is because a contravention of section 51 can either be pursued by a prosecution or by the application of an administrative remedy. It is the application of an administrative remedy under sections 117-120 or 123(1) that can be reviewed. This issue was raised by the Commission at this hearing, and we concur with the submissions of the Forest Practices Board that it appears that while the Review Panel did not explicitly refer to section 117, they were relying on this section and in its discretion decided that a monetary penalty would not be levied. The Commission urges review panels in the future to clearly reference the relevant sections of the *Code* and to set out the reasons for any decision not to levy a penalty.

This Commission notes that the Review Panel also entitled its report an "Appeal Decision Report." This language should be corrected so there is no confusion between a review by a review panel and an appeal to this Commission.

Lastly, we wish to address the concerns raised by the Third Party, the Forest Practices Board. We concur with the submission of Mr. Sandborn, counsel for the Board, that the role of SWOs may not be properly understood by some MOF staff administering the *Code*. SWOs are issued as a preventative measure where there may be evidence suggesting that contraventions of the *Code* or regulations may be occurring and that resource damage or further contravention can be mitigated by suspending forest operations temporarily until some further action is taken. It should also be noted that SWOs can be issued by any official, not just by "senior officials" and require less evidence than is required for a determination of a contravention. The Commission agrees with the Forest Practices Board, that if SWOs are equated with contraventions and are overturned every time a contravention is not later proven, then officials in the field will be discouraged from using them.

Further, the SWO form used by MOF should be revised to make it clear that the official who issues the SWO "considers" that a person is contravening a provision of the *Code* or regulation rather than stating categorically that a "contravention has occurred." It is preferable to use the wording of section 123(1) to wording which may imply that a determination of a contravention has been made. We also concur with Mr. Sandborn that it is inappropriate for MOF to publish the issuance of SWOs as if they were determinations of contraventions, as set out in the recent Ministry Report entitled, "The Annual Report of Compliance and Enforcement Statistics for the Forest Practices Code June 15, 1995-June 15, 1996". The finding of a contravention has consequences for individuals and companies including the possible application of the Performance Based Harvesting Regulation. This would not preclude MOF from setting out a separate section of its annual report for a list of SWOs issued.

DECISION

The Commission upholds the original issuance of the Stopwork Order pursuant to section 51(2)(a) of the *Code* but rescinds any reference to a contravention of subsection 51(2)(b) and further rescinds the finding of the Review Panel that there was a contravention of section 51(2)(b). We find that the conditions for lifting the SWO have been fully complied with by the filing and approval of the archeological reports and therefore no further action need be taken by Weldwood. Further, there should be no notation in the MOF compliance and enforcement statistics of a contravention of the *Code*.

Toby Vigod, Chair
Forest Appeals Commission

January 30, 1997