



Forest Appeals Commission

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APPEAL NO. 96/07

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: Houston Forest Products Ltd. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

AND: Forest Practices Board **THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Gerry Burch Panel Chair
Carol Roberts Member
Andrew Thompson Member

HEARING DATE: September 25, 1996

PLACE OF HEARING: Victoria, British Columbia

APPEARING: For the Appellant: Paul Cassidy, Counsel
For the Respondent: Dennis A. Doyle, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal from a review decision issued on January 5, 1996, upholding a Stopwork Order ("SWO") issued on October 23, 1995, and a Remediation Order ("RO") issued November 1, 1995, against the Appellant, Houston Forests Products ("HFP").

HFP seeks an order from the Commission rescinding the review decision, the SWO and the RO, pursuant to section 138 of the *Forest Practices Code of British Columbia Act* (the "*Code*").

BACKGROUND

HFP was carrying out road construction on the Whitesail Forest Service Road pursuant to a road permit issued by the Ministry of Forests on August 16, 1995. On October 17, 1995, HFP decided to cease activities for the season because of deteriorating weather conditions, siltation problems, and concerns that continued work might cause environmental damage. HFP's contractor withdrew its equipment over several days, and some remediation work was done.

During the construction of the road and after shutdown of activities, the contractor undertook many voluntary remedial measures to minimize the possibility of adverse environmental impacts, including

- * installing water bars
- * placing geotextile under Lucy Creek bridge
- * installing sediment traps.

All of the equipment had been removed by October 19, 1995, and substantially all of the activities had ceased by that date. On October 20, 1995, a Conservation Officer with the Ministry of Environment, Lands and Parks ("MELP") carried out a field inspection and then telephoned an officer of HFP and advised him that a SWO would be issued. On October 21, 1995, HFP employees inspected the site and carried out minor work on the road and on October 23, 1995, they cleaned off a bridge.

At approximately 4:00 p.m. on October 23, HFP was served with a SWO issued pursuant to section 123(1) of the *Code*. Section 123 of the *Code* states:

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 the 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 or prescription or approval.

The SWO was issued on the grounds that the Conservation Officer, Mr. Sprado, believed HFP had violated section 45 (1) of the *Code*; namely, that sediment was deposited in the streams causing environmental damage. Section 45 provides:

45. (1) A person must not carry out a forest practice that results in damage to the environment.
- (2) Subject to subsection (3), a person does not contravene subsection (1) if, with respect to the forest practice referred to in subsection (1),
- (a) the person is acting in accordance with an operational plan or a permit issued under this Act or the regulations

No other violation of the *Code*, its regulations or the permit was alleged.

Relying upon the information provided by Mr. Sprado, Mr. Hooten, Acting Regional Fish and Wildlife Manager with MELP, issued a RO on November 1, 1995. A summary of the remedial work required by the RO is as follows:

1. Divert water from the surface of the road into the ditches and divert ditchline water into surrounding timbered area;
2. Where appropriate, place hay, silt fences or sandbags to collect, control and reduce the flow of ditchline water;

3. Remove twigs, branches and other fine woody debris which could obstruct fish passage in the waters of the tributary downstream of the bridge crossing, but leave tree trunks in situ; and
4. Where appropriate, and weather conditions permitting, place armouring rock in ditchlines and sumps; improve road surface and roadcut drainage and sediment control near bridge on Hammer Creek tributary; and extend gravel surfacing of roadbed southward to provide a stable, weather resistant surface on the existing shaped roadbed.

The RO was issued pursuant to section 118 of the *Code* which provides as follows:

118. (1) If a senior official determines that a person who is the holder of an agreement under the *Forest Act* or the *Range Act* has contravened this *Act*, the regulations, the standards or an operational plan, he or she, in a notice of determination given under subsection (2) may order the person to do work to remedy the contravention....

(2) A senior official who orders work to be done under subsection (1), ... must give a notice of determination to the person setting out all of the following that is applicable:

- (a) the nature of the contravention;
- (b) the nature of the work to be done to remedy the contravention;
- (c) the date by which the work must be completed;
- (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;
- (e) the right of the government to carry out the work and levy an penalty if the person fails to comply with the order.

At a review hearing on January 5, 1996, the sole Reviewer found that the verbal SWO was not valid. HFP accepts this finding, and no appeal was made in respect of this determination. The Reviewer upheld both the written SWO and the RO, although he acknowledged that HFP had undertaken substantial efforts to take remedial measures during the period October 17-23, 1995.

The Commission was advised that the work required to be done in the RO was completed.

ISSUES

There are two main issues to be determined on this appeal:

1. Was the SWO properly issued?
2. Was the RO properly issued?

REVIEW OF SUBMISSIONS

HFP's Case

1. HFP contends that the SWO is invalid as no work was being carried out at the time it was issued, and argues that, based upon the wording of section 123, there must be some "forest practice" occurring at the time the Order is issued. As HFP's

contractors had removed all of their equipment, and all remedial work had been completed by 4:00 p.m. on Monday, October 23, 1995, HFP argues that there could be no violation of 45(1) and no basis for issuing a SWO pursuant to section 123(1) of the *Code*. HFP contends that section 123(1) should be strictly construed and cannot operate to cover events which occurred in the past.

2. HFP also contends that the legal right or a permit to carry out a forest practice cannot be equated to the actual act of carrying out a forest practice. Other legislation which includes past actions in the scope of provisions was submitted to the Commission in support of this argument (see Schedule A). HFP argues that, had the Legislature intended this retroactive consequence with this legislation, it would have so provided (e.g., section 118). It contends that the Commission should not attempt to legislate, or fill in the gaps in the existing legislation.
3. HFP argues that section 45(2) of the *Code* provides that section 45(1) is not contravened where a person carrying out a forest practice is acting in accordance with an operational plan or a permit issued under the *Code* or its regulations. Accordingly, where the person who is the subject of an alleged contravention of section 45(1) holds a permit to carry out the impugned forest practice, sections 45(1) and 45(2) operate together such that, in order to contravene section 45(1), the person must also violate the permit.
4. The RO was issued by the senior official on the basis that fish habitat may have been negatively impacted by HFP's road building activities. HFP argues that the RO states that these negative impacts are 'considered' to be in contravention of section 45(1) of the *Code* but, because a determination was not made, the RO should not have been issued.
5. The Reviewer also erred in law in finding that the RO was properly issued. HFP states that a field officer may issue a SWO where he considers that a person is contravening the *Code*, whereas section 118 of the *Code* requires that the senior official must determine that a provision of the *Code* has been contravened. Further, section 118(2) provides that a 'notice of determination' must be given to the person who is the subject of the RO. HFP submits that the difference between the words 'consider' and 'determine' are noted in many sections of the *Code*.
6. The requirements for a valid determination under the *Code* are set out in Ministry of Forests Policy 16.10, which provides that its purpose is to "ensure that determinations are made in a fair and equitable manner, with due regard to the rules of administrative law." In this regard, the senior official did not ensure that the person (HFP) subject to the determination was given an opportunity to present evidence relating to the subject matter of the determination, nor was the 'nature of the allegation' included in the written order.

Government of British Columbia's Case (the "Province")

1. The Province maintains that HFP was conducting a 'forestry practice' when it was carrying out road maintenance and conducting remedial work in the period October 21 to October 23, 1995. Section 45(2) of the *Code* was not valid as an exemption in this case because the road permit was issued under the *Forest Act*, not the *Code*.

2. The Province contends that the word 'determines' in section 118(1) of the *Code* is not stronger than the word 'considers' and therefore, the senior official and the Reviewer can accept and rely on the determination of the Conservation Officer in arriving at a decision on whether a contravention of the *Code* has occurred or not.
3. The Province contends that the SWO issued to HFP was clear and adequate as to the infraction, and that Ministry of Forests Policy 16.10 was not known to MELP. In any event it was only a guideline, and no breach of administrative fairness occurred. Both the SWO issued under section 123(1) of the *Code*, and the RO issued under section 118(2)(a) of the *Code* contain sufficient detail of the nature of the contravention that is alleged. There is no evidence that HFP has, in any way, been misled or inconvenienced by lack of detail.

Forest Practices Board's Case (the "Board")

1. The Board urges the Commission to interpret the *Code* in light of its stated purpose and intent, and uphold the SWO. The Board submits that merely because mud was shovelled from the bridge deck to the approaches on the morning of October 23, 1995, rather than at 4:00 p.m., should not lead to the conclusion that there was not a 'forest practice' being carried on at the time the SWO was issued. The Board contends that the permit which authorized the construction of the road granted HFP the right to carry out that activity at any time, and even though the company had temporarily ceased operations for the season, they were still 'carrying out a forest practice'. It argues that this phrase should be interpreted broadly; i.e. the person is still carrying out the practice while holding a permit unless there is evidence that there is no intent to resume the activity.
2. The Board contends that violations can occur under section 45(1) even though a violation of a permit issued by another government agency is not alleged. Therefore, a SWO based on section 45(1) need not also demonstrate a violation of the road permit.
3. The Board argues that under section 45(2)(a), plans and permits authorize 'damage to the environment' that is acceptable. Such activities that are described in the plan or permit, if done 'in accordance with' the permit, are not 'damage to the environment.' However, deposition of sediment in a stream cannot be said to be 'in accordance with' the permit, because the permit was silent on sediment deposition. The permit does not authorize the licensee to deposit unreasonable amounts of sediment into a stream in an unreasonably damaging or reckless way.
4. The Board also argues that, if operational plans or permits are viewed as replacements for the general environmental protection afforded by section 45(1), it could lead to governmental agencies adding details into plans and permits that would lead to extremely detailed and cumbersome documents.
5. The Board also argues that section 45(2)(a) may not apply to the permit in question because it was issued under the *Forest Act*, not the *Code*.

ANALYSIS

Issue 1 - Was the SWO properly issued?

There is no dispute that HFP *had* been carrying on a forest practice in the area. Nor is there any dispute that HFP's activities were virtually wound down for the season at the time the SWO was issued and, on the evidence, there were no plans to resume the activity in the near future. The disagreement arises over whether, in these circumstances, a SWO can be issued.

Section 123(1) is worded in the present tense; considers that a person is contravening. When such language is used, it cannot be applied to past events unless it is clearly stated in the legislation. There is no language in section 123(1) that would indicate that the Legislature intended this section to apply to past events. To the contrary, there is every reason to believe the Legislature did not intend it to apply to past events. Reference to the words, "has occurred, is occurring", etc. in other sections of the *Code*, and other legislation (see Schedule A) suggests that the absence of those words in this section was deliberate - the Legislature did not intend a SWO to apply to past events.

There are practical reasons for this. Most evident is that there is no need to stop work from occurring if that work is no longer contravening the legislation. A SWO is a tool to allow field officials to halt operations where it appears that such operations are contravening the specified enactments. The Commission finds that a SWO allows "down time" to better assess the situation and take whatever additional action may be required. If a contravention occurred in the past and is no longer contravening the legislation, then other methods are available to deal with the situation such as penalties, remediation orders or prosecution.

The Commission finds that the wording of section 123(1) is clear; a contravention must be occurring at the time of the field inspection for a SWO to be issued. This does not mean that the official must prove a violation of a permit or a contravention, but he or she must have reasonable grounds to consider that a contravention is occurring. On the facts of this case, the Commission must therefore find that, on October 23rd, 1995, the Conservation Officer considered, on reasonable grounds, that HFP was carrying out a forest practice and that the forest practice resulted in damage to the environment.

The Province submits that the Conservation Officer believed that HFP was "carrying out a forest practice", and that "damage to the environment" was occurring at the time of the field inspection. Reference was made to section 4(2) of the Administrative Remedies Regulation enacted under the *Code*, which states:

"if the official is of the opinion that the nature of the contravention is causing or may imminently cause serious damage to the environment, the official may order that the contravention cease or cease to an extent specified, and the order need not be in writing."

Section 4(3) requires the official within 72 hours to give the person a written SWO if action is taken under section 4(2).

The Reviewer found as a fact that HFP's shutdown was completed on October 19th. However, he found that HFP was carrying out a "forest practice" at the time the SWO was issued on the basis that HFP held a valid road permit to carry out road construction activities. He states that by "simply removing one's equipment and ceasing to work, the legal right to carry out the 'forest practices' is unchanged until a Stop Work Order is issued."

The Commission cannot agree with this conclusion.

Forest practice is defined under section 1 of the *Code* as follows:

"forest practice" means timber harvesting, road maintenance, road use, road deactivation, silviculture treatments, botanical forest product collecting, grazing, hay cutting, fire use, control and suppression and any other activity that is

(a) carried out on land that is

- (i) Crown forest land,
 - (ii) range land, or
 - (iii) private land that is subject to a tree farm licence or a woodlot licence,
- and

(b) carried out by

- (i) any person
 - (A) under an agreement under the Forest Act or Range Act,
 - (B) for a commercial purpose under this Act or the regulations, or
 - (C) to rehabilitate forest resources after an activity referred to in clause (A) or (B), or
- (ii) the government

Although, as stated by the Reviewer, HFP had the *legal* right (a valid permit) to return to the site and carry out the forest practice (road construction), the Commission finds that it was not, in fact, "carrying out" a forest practice at the time of the field inspection as required by section 45(1). Given the nature and purpose of a SWO (as above) the Commission finds that some activity must be occurring for a SWO to be issued. In this case, there was no forest practice occurring or scheduled to occur and no evidence that the previous activities would "imminently cause serious damage to the environment" contrary to subsection 4(2) of the Administrative Remedies Regulation (above).

This is not to say that a momentary lack of activity at the time of a field inspection will prevent an official from issuing a SWO. The Commission is of the opinion that the facts should be carefully examined in each individual case with the onus on the person (e.g. the permittee or licensee) to establish not only that the activity is completed or the operations have been voluntarily shut down, but also that there are no plans to resume activities in the near future; i.e. that the shutdown is not only voluntary but in good faith. This requirement will ensure that the person has not merely ceased operations for the period when an official is on the site in question. If this procedure is followed, a SWO can be effective for the enforcement of the *Code* without becoming a capricious tool in the hands of field officials. In this case, the Commission is satisfied that there was no activity in the area and no activity was scheduled to resume. Thus, there was no practical need, let alone any legal authority for the officer to issue a SWO.

The Commission, therefore, finds that the SWO issued by the Conservation Officer was not valid, and allows the appeal on this issue.

Issue 2 - Was the RO properly issued?

HFP has argued that the RO was issued in breach of the Ministry of Forests' policy 16.10; specifically, the nature of the allegation was not included in the determination (also required by section 118(2)) and HFP was not given an opportunity to present evidence relating to the subject matter of the determination.

The relevant portions of the Ministry of Forests' policy statement 16.10 are as follows:

Opportunity to be Heard

The senior official should ensure that the person responsible for the non-compliance is offered an opportunity to present any evidence prior to the senior official making the determination.

The offer must be in writing, and:

- must provide a reasonable time frame for the person to take advantage of the opportunity to be heard
- must indicate the method by which the person must contact the senior official to discuss the incident
- must indicate that the person may have legal representation, and/or witnesses if desired; and,
- must include a statement that the determination will be made after the expiry of the opportunity time frame

Meeting with Person Responsible

If the person takes advantage of the opportunity to be heard, the meeting should involve all parties to the incident, including any staff or other parties involved in the investigation.

The senior official who will make the determination must be at the meeting.

All relevant evidence that the senior official will base the determination on should be brought forward at the meeting and the person responsible be given the opportunity to present relevant evidence.

Notice of Determination

A Notice of Determination will be given to each person involved, even if that person has been found not to have contravened a statute.

....

The Notice of Determination must:

- be in writing
- clearly state the nature of the contravention(s)
- state the amount (and breakdown, if appropriate) of any monetary penalty

- state that an invoice will be sent upon the completion of all reviews and appeals; however, interest charges will be assessed from the date of this notice
- state that it is this "Notice of Determination", and not the invoice, that the person may request a review of
- outline the person's right to a review and appeal, including the title and address of the Reviewer to whom a request for a review may be made
- state that there is a 3-week period from receipt or deemed receipt of the Notice of Determination that the person can request a review; and,
- outline the form that the request for review must take ...
[emphasis added]

The evidence tendered by the Province was that the Ministry of Forests' policy was not known by MELP staff and, in any event, the policy is only a guideline: any failings to include HFP in discussions and meetings is not fatal to the RO. The Commission agrees that the senior official cannot be held to the standards set out in a policy of which he was not aware. However, the Commission notes that the guidelines in the policy reflect many of the principles of procedural fairness which are required by law.

The Province contends that the principles of administrative fairness were met in this case because HFP was well aware of the details of the contravention, and the need for the RO. In particular, reference was made to a telephone conversation between Mr. Sprado, the Conservation Officer, and Mr. Barr, of HFP, on Saturday, October 21, 1995. Mr. Barr, however, denies that he fully understood the details of the alleged violation following the telephone call.

The Commission finds that HFP was not given an opportunity to be heard prior to the issuance of the determination. As the RO alleged a significant breach of the *Code* (damage to the environment), and required HFP to perform additional works, the Commission finds that fairness dictated that HFP be given more information, in writing, by the senior official regarding the alleged contravention and an opportunity to be heard before the RO was issued. At that time, any deficiencies in the detail provided in the RO could have been addressed.

However, as the Commission found in *Tolko Forest Products v. Government of British Columbia* (Forest Appeals Commission Appeal No. 95/02, November 12, 1996), defects in procedure may be cured by a review or on appeal to the Commission.

The Commission has considered the issuance of the R.O. and whether the evidence justifies its reinstatement, despite the decision that the senior official erred in the procedure used in making his determination.

The only evidence submitted to the Commission in relation to the R.O. was the RO itself dated November 1, 1995 which states:

Site inspection by ministry staff, including Tobe Sprado, Conservation Officer, on October 20, 1995 indicated that sediment was entering both Lucy and Hammer Creek drainages from recent road construction. It also appears that fish habitat may have been negatively affected as a result of bridge and culvert placements. These impacts are considered to be in contravention of section 45(1) of the Forest Practices Code of British Columbia Act. [emphasis added]

The senior official then went on to set out the remedial work required to be performed. The senior official's statement only indicates the possibility of a violation. In addition, the Reviewer states in his decision as follows, "I do not believe that one has to be an expert in order to recognize that an action may be causing damage to the environment."

The Commission concludes that these statements reflect a misunderstanding of both the seriousness of the allegation and the degree of proof needed to issue a RO in this case. The issuance of a RO requires proof of damage to the environment. Further, section 118(1) requires the senior official, and upon review, the Reviewer, to determine whether the allegation is true. The Commission finds that the reasons given for the Order do not constitute a sufficient basis upon which to issue a RO. Further, the road permit requires a "minimization of sediment", and no evidence was presented that the issuing agency, the Ministry of Forests, reported any violation of this requirement.

Similarly, the review decision and the Conservation Officer's testimony at the hearing before the Commission, indicate the "possibility" of a violation. The mere existence of sediment in the drainage area does not, alone, support a violation of section 45(1).

No further evidence was presented to the Commission regarding the details of the contravention. The video which was presented at the review was not entered as evidence at the Commission hearing. The Commission, therefore, does not have sufficient evidence to independently assess the amount of siltation, the possible impairment of water quality and, ultimately, whether there was "damage to the environment". Therefore, based upon the evidence that *is* before us, the Commission finds that the senior official and Reviewer erred in finding a violation of section 45(1) on the mere assumption, or possibility of "damage to the environment".

The Commission has considered the option of referring this appeal back to the senior official for further consideration. However, the Commission has determined that this would not be appropriate in this instance. The Commission finds that the RO was not valid, and allows the appeal on this issue.

Given our findings in this decision, it is unnecessary to address the application of subsection 45(2) of the *Code* to the facts of this case.

DECISION

On the basis of all the evidence and argument, the Commission finds that the SWO and the RO were not properly issued. The appeal is allowed.

RECOMMENDATIONS

In this case, it was noted that the senior official from the Ministry of Forests, who issued the road permit, and was responsible for monitoring the activities, was not present on the field trip, nor at the review hearing, nor was a copy of the review decision copied to him.

The Memorandum of Understanding (MOU) between the three ministries involved in the administration of the *Code* requires that, where a contravention impacts on the mandates of more than one of the ministries, the investigating official shall contact the other ministry as soon as possible to decide whether:

- to transfer the file to the other ministry,
- to undertake a joint investigation with one ministry acting in the lead role, or
- to continue with the investigation and simply advise the other ministry of the outcome of the investigation.

The Ministry of Forests is responsible for monitoring activities under the road permit, but no violation was reported. The Commission recommends that the two ministries make better efforts to educate their employees in the field on the contents of the MOU. Cooperation and communication between ministries are essential, as are required under the MOU, but appear to be absent in this case.

Further, the Commission recommends that the Ministry of Forests Policy 16.10 be made available to the other ministries who have the responsibility of monitoring activities under the *Code* (MELP and Ministry of Employment and Investment).

Gerry Burch, Panel Chair
Forest Appeals Commission

February 28, 1997

SCHEDULE A

List of provisions which create preventative order powers and provide the appropriate authority with the power to order that certain actions be taken, or certain activities cease where some statutory violation or other event has occurred or may occur in the future.

(a) Section 22.2(2) of British Columbia's *Waste Management Act* S.B.C. 1982, c.41 provides:

Pollution prevention order

22.2(2) If a manager is satisfied on reasonable grounds that an activity or operation has been or is being performed by a person in a manner which is likely to release a substance that will cause pollution of the environment, the manager may order a person referred to in subsection (3), at that person's expense, to do any of the following:...

(b) Section 102 of Alberta's *Environmental Protection and Enhancement Act*, S.A. 1994, c. E13.3 provides:

102. Environmental protection order for release. (1) Subject to subsection (2), where the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an adverse effect, the director may issue an environmental protection order to the person responsible for the substance.

(c) Section 37 of the federal *Fisheries Act*, R.S.C. 1985, c. F-14 provides:

37.(1) **Minister may require plans and specifications.** — Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish..., the person shall,..., provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine.

(a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or

(b) where there is or is likely to be a deposit of a deleterious substance by reason of the work of undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof. [emphasis added]