



Forest Appeals Commission

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APPEAL NO. 1997-FOR-16

In a matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN:	Canadian Forest Products 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
	Kristen Eirikson	Member
	Kathy Lewis	Member

DATE OF HEARING: December 11 and 12, 1997

PLACE OF HEARING: Victoria, B.C.

APPEARING:

For the Appellant:	Bradley Armstrong, Counsel
For the Respondent:	Karen Tannas, Counsel Dawn House, Counsel
For the Third Party:	Calvin Sandborn, Counsel

APPEAL

This appeal was filed by Canadian Forest Products Ltd. ("Canfor") against an administrative review decision made on May 26, 1997 that varied the January 6, 1997 determination that Canfor contravened section 67(1)(d) and 67(2)(a) of the *Forest Practices Code of British Columbia Act* (the "Code") and sections 5(1), 7(1), 8(1), and 16(1) of the *Timber Harvesting Practices Regulation* ("THPR"). The Review Panel rescinded the contravention of section 5(1) of the THPR.

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

BACKGROUND

The Appellant, through a contractor, carried out logging operations on CP 303, Block 1 of TFL 48 in the Dawson Creek Forest District. Two streams were identified in or adjacent to the block; one was an S2 stream (Dowling Creek) and the other classified as S3.¹ Both were protected with Riparian Reserve Zones.

¹S1 to S4 streams are fish streams (all streams <20% gradient unless proven not to have fish) or are streams located in a community watershed. S5 and S6 streams are streams outside of

During a Harvest Inspection on February 13, 1996, Mr. Ken Dahr (accompanied by Mr. Warren Jukes, Canfor), a Compliance and Enforcement Officer with the Ministry of Forests ("MOF") identified a watercourse in the block which had no Riparian Management Area and had apparently been ignored during logging operations. He found machine tracks and logs across the watercourse.

On February 15, 1996, Mr. Brent Jeurgenson, Conservation Officer with the Ministry of Environment, Lands and Parks was notified of the suspected contraventions, and on February 16, 1996, Mr. Dahr, Mr. Jeurgenson, and Mr. Barry Ortmann (MOF) returned to the site and took photographs of the watercourse in the block. They also measured the length of the watercourse in the block as 117 metres. On the same day, a letter was sent to Canfor notifying it of the suspected contravention. A third visit was made by Mr. Jeurgenson and Mr. Dahr on Feb. 26, 1996, during which they observed flowing water in the watercourse within the block. The ambient air temperature at that time was between -20 and -30C.

Interviews were conducted with Canfor and their contractors during February and March 1996. According to Mr. Jeurgenson, Canfor disagreed that the watercourse met the definition of "stream" for the purposes of the *Code*. Therefore, on May 23, 1996, Mr. Jeurgenson and Mr. Dahr returned to the block to videotape the watercourse from its origin in the block, all the way to its confluence with Dowling Creek. This video was presented in evidence at the hearing before the Commission.

On October 10, 1996, CP 303 Block 1 was audited by the Prince George Regional Office as part of their random audit of district activities surrounding Riparian Management Zone practices. The watercourse in question was identified during this inspection.

The Pre-determination hearing was held on October 15, 1996 and a Determination letter dated January 6, 1997 was sent to Canfor. Canfor was found to have contravened sections 67(1)(d) and 67(2)(a) of the *Code* and sections 5(1), 7(1), 8(1), and 16(1) of the THPR. A penalty of \$3000.00 was imposed on Canfor for the violations.

Canfor requested an Administrative Review and an oral hearing was held on April 29, 1997. The Review Panel, in its decision dated May 26, 1997, rescinded the contravention of section 5(1) of the THPR, but upheld the remainder of the contraventions and the penalty.

RELEVANT LEGISLATION

Section 67 of the *Code* deals with general timber harvesting practices. Specifically, sections 67(1)(d) and 67(2)(a) state that:

community watersheds that are not fish streams. S1-S4 streams are further classified by channel width, with S1 being the widest. Stream classification is used to determine riparian reserve zones and riparian management zones.

Division 3 – Timber Harvesting

- 67** (1) A person who carries out timber harvesting and related forest practices
- (a) on Crown forest land,
- must do so in accordance with
- (d) this Act, the regulations and standards,
- (2) Without limiting subsection (1), the person must
- (a) conduct forest practices in and around streams in accordance with the regulations and standards.

The THPR deals with general harvesting practices and special harvesting practices. Specifically, sections 7(1), 8(1), and 16(1) state that

- 7** (1) A person carrying out a timber harvesting operation on applicable land must not fell the timber onto a stream, lake, wetland, marine-sensitive zone or fisheries-sensitive zone, unless
- (a) that is the only practicable way the timber can be felled, or
 - (b) a logging plan allows it.
- 8** (1) A person carrying out a timber harvesting operation on applicable land must not yard or skid timber through or over any stream or fisheries sensitive zone unless the yarding or skidding is
- (a) authorized in a logging plan for the area, or
 - (b) if the person has been exempted from requiring a logging plan, authorized by the district manager.
- 16** (1) A person carrying out a timber harvesting operation on applicable land must not permit the tracks or wheels of ground-based machinery within 5 m of a stream bank except
- (a) for carrying out fire fighting activities,
 - (b) in response to natural disasters,
 - (c) at stream crossings authorized by the district manager, or
 - (d) if operations will be conducted in such a manner that they protect stream banks and minimize damage to understory vegetation.

ISSUE

The key issue at the hearing was whether the watercourse in question is a stream pursuant to the provisions of the *Code* and the THPR.

EVIDENCE AND ARGUMENT

The fact that harvest operations took place, that trees were felled across the watercourse in question, and that machines travelled across the watercourse is not in dispute.

The Appellant submits that the key issue to be dealt with in this appeal is determining an appropriate interpretation of the definition of stream, and application of that definition to the watercourse in question. The Appellant's position is that the watercourse is not a stream pursuant to the provisions of the *Code* and THPR.

Under section 1 of the THPR, "stream" has the following definition:

"stream" means a watercourse, having an alluvial sediment bed, formed when water flows on a perennial or intermittent basis between continuous definable banks

The Respondent takes the position that the watercourse in question meets the definition of "stream" in the THPR.

The Appellant also raised the following points in its opening statement:

- 1) The Silviculture Prescription was issued during a 6 month transition period after the *Code* came into force, and therefore there were less stringent requirements for operational plans during that time.
- 2) During the Road and Cutblock Review process (section 225 of the *Code*), there was no identification of the watercourse as being a high value fish bearing stream.
- 3) The Ministry of Forests did not require any changes made to logging plans and other documents that showed no indication of the watercourse, and the watercourse was not discovered until the February 1996 inspection.

Most of the argument presented by the Appellant centred on the testimony of Mr. Vince Poulin, an environmental consultant. The evidence presented by Mr. Poulin and the Respondent's witnesses can be broken down into two parts: evidence relating to the watercourse within the block, and evidence relating to the 50 m section of the channel just before its confluence with Dowling Creek. The watercourse is approximately one kilometre in length from its origin in the cutblock to the confluence with Dowling Creek. Approximately 117 metres are located in the block.

1. The Watercourse in the Block

On September 26, 1997, Mr. Poulin inspected the watercourse at its confluence with Dowling Creek, then followed the channel upstream approximately 450 m to where it intersected with the road. He then proceeded directly through the block to where the watercourse left the block boundary. He inspected approximately 20 m of the

watercourse in the block adjacent to the boundary. Other people on site at the same time inspected the rest of the watercourse and reported that it was similar to the 20 m at the block boundary. One of the photographs presented at the hearing by Mr. Poulin was described as showing a small section of alluvial material which could indicate the watercourse met the definition of a stream within that 20 m section. Poulin did not walk further as he had already determined this was a "non-classified drainage" as outlined below.

Dr. Hugh Hamilton (Summit Environmental Consultants), on behalf of the Appellants, inspected the site on two occasions. On Feb. 26, 1996 he visited the watercourse within the block and on May 27, 1996 he inspected the full length of the watercourse in the block, and the outlet of the channel to Dowling Creek. On both occasions he was accompanied by Mr. Jukes of Canfor. His written report was filed in evidence at the hearing, although he did not testify. Dr. Hamilton reported that "through about 70 m within the cutblock the drainage has continuous banks, and short sections of the stream bottom do contain fine alluvial sediments transported by the flow through the channel. Only the highest flows carried by the channel are capable of moving this alluvial sediment. In other sections there are not alluvial sediments." Dr. Hamilton goes on to conclude that "by a narrow definition, this channel could be considered a stream."

Under cross-examination, Mr. Poulin agreed that the watercourse in the block could be considered a stream, again based on a narrow interpretation of the "alluvial sediment bed" requirement. He did admit that the part of the watercourse he had looked at in the cutblock had continuous definable banks and alluvial sediment. There was no apparent dispute regarding the presence of continuous definable banks for the watercourse within the cutblock nor was there disagreement on the numbers provided in Dr. Hamilton's report with respect to the amount of alluvial sediment observed in the cutblock watercourse. The argument revolved around the alluvial sediment bed requirement, specifically how much alluvial sediment was necessary for the watercourse to be called a stream for the purposes of the *Code*.

Mr. Dahr, Compliance and Enforcement Officer with the MOF, testified that when he first went to the block on February 13, 1996, the stream was easy to find and that on all his visits where he walked the length of the watercourse he observed it flowing from its origin in the block to Dowling Creek.

The Respondent's expert witness, Mr. Steve Chatwin, Manager, Fishery-Forestry Interactions, Research Branch, MOF, is a geomorphologist specializing in stream and watershed assessments and was a member of the technical committee that worked on the regulations under the *Code* and the definition of "stream". He testified that he did not go to the site, but reviewed photographs, the video and the reports of Dr. Hamilton and Mr. Poulin. He provided an explanation for the alluvial sediment bed requirement within the definition of "stream", that being the identification of the force of the stream. As an indicator of stream force, any alluvial sediment, in Mr. Chatwin's opinion, was enough to satisfy the requirement. Mr. Chatwin also noted that no streams are entirely alluvial and that there are many streams in British Columbia, particularly higher gradient streams that have very little alluvium because they flow over glacial moraine deposits. Nonetheless, he

would still classify these watercourses, which may have very small deposits of sand, as streams. Mr. Chatwin testified that one is looking for an indicator that material is transported and eroded and that those indicators are alluvium.

The Appellant argued that if this definition were accepted, then every watercourse with any alluvial sediments would have to be protected and that this would severely hamper operations. The Respondent indicated that operations on CP 303 Block 1 would not be impacted – no logging restrictions would apply in the areas adjacent to the stream and a contractor would only have to follow the 5 m machine-free regulation that does not allow the falling or skidding of timber through streams of this nature.

2. Watercourse at confluence with Dowling Creek

The Appellant argued that the last 50 m of the watercourse before its confluence with Dowling Creek does not meet the definition of “stream” due to a lack of continuous definable banks, and the lack of an alluvial sediment bed. Photographs of this section of the watercourse were submitted as evidence and it was argued that there were no incised banks, and no sediment deposition. The Appellant also suggested that the amount of vegetation in and around the channel indicated the lack of stream flow for most of the year. Mr. Poulin estimated in his testimony that flow would occur in that channel for approximately 1 month of the year during peak runoff.

Dr. Hamilton inspected the confluence on May 27, 1996, which he estimated was during a period of peak flow. He measured velocity, pool depth at the confluence and channel width. He did not mention the channel banks in his report, but he did note that the channel bottom just above the confluence was composed of native soil with a surface layer of leaves which he said suggests surface flow at that location only during peak flow conditions and that flow infiltrates into the Dowling Creek floodplain through most of the year. There was no disagreement between the Appellant and the Respondent over Dr. Hamilton’s measurements and observations.

According to Mr. Dahr, water was observed in the channel every time he visited the cutblock and the confluence with Dowling Creek. This was at least 3 times, including twice during non-peak flows (winter and fall). Mr. Chatwin did not visit this site, but through his review of the photographs and videos he determined that the first reach of the watercourse (from the confluence with Dowling Creek to 50 m up stream) exhibited a “distributary channel network”, and that the reach above this became a single thread, with more definable banks. Mr. Chatwin noted that the flow at the mouth was confined; however he could not see the channel banks or bed in the last 50 m because of the water flow.

Mr. Poulin presented information that he uses during training sessions on determining streams for the purposes of the FPC. He submitted that interpretation of the “continuous definable banks” portion of the definition was quite contentious. In his training sessions, and as part of his testimony, he offered the following interpretation of “continuous definable banks”:

those that can be traversed from a known stream, lake or wetland to a point where the stream channel is no longer present or becomes spatially discontinuous due to topographic characteristics that are not conducive to erosion of a stream channel either on the surface or underground.

In addition, he testified that the *Riparian Management Area Guidebook* does not have a term to describe watercourses that are not streams. Therefore he has been recommending through his courses that:

An area, segment, or section of a watercourse or drainage located above an area of the drainage that does not meet the FPC definition of a stream be referred to as a 'non-classified drainage'.

The Appellant submitted that the requirement for continuous definable banks along the entire watercourse was not met, and therefore the watercourse could not be classified as a stream.

The Respondent's expert witness, Mr. Chatwin, strongly disagreed with this conclusion and suggested that such an interpretation could lead to many important streams losing the "stream" definition due to flow that "goes to ground" as they enter the flood plains of larger systems.

The Appellant referred the Commission to its decision in *International Forest Products Ltd. v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/12, September 12, 1997)(unreported) in which a watercourse was determined not to be a stream within the definition provided in the THPR. In that case, it was decided that the existence of continuous definable banks was inconclusive, and that the evidence did not adequately support the requirement of an alluvial sediment bed. The Appellant argues that the current case is similar in that the watercourse in the block was not "aggressively" eroding and depositing material. Further that the MOF had no definition of the amount of sediment bed required. The Commission's finding in *Interfor* was that there was insufficient force to generally form a sediment bed.

The Respondent argued that the *Interfor* case was based on written submissions and that this is a different watercourse. Furthermore, in the *Interfor* case, the panel stated that there was not adequate information to call the watercourse a stream. The Respondent submitted that in the present case there is more than sufficient evidence upon which such a finding can be made.

DISCUSSION AND ANALYSIS

After hearing the evidence and arguments presented, it became clear to the Commission that the final decision in this appeal would result from a sequence of decisions as follows: first, does the Commission accept the interpretation provided by the Appellant's witness, Mr. Poulin in *Code* training courses that "An area, segment, or section of a watercourse or drainage located above an area of the drainage that does not meet the FPC definition of a stream be referred to as a 'non-classified drainage'". If the answer to this is yes, then the Commission must decide if the watercourse in question does, or does not meet the definition using the above

interpretation. If it does not meet the definition in the 50 m before the confluence, then the status of the watercourse in the block is irrelevant. If the Commission does not accept the interpretation put forward by Mr. Poulin, then it is necessary to make a decision only on the watercourse within the block.

As Mr. Poulin admitted, the interpretation he provided does not constitute government policy although he stated that his interpretation of "continuous definable banks" is well accepted across the Province. The Commission recognizes that the definition of stream in the *Code* was made in order to separate streams that need protecting due to their ability to move sediment and debris, from wet sites, seeps and small watercourses that do not move sediment and do not require the same level of management. It also recognizes that to call every wet area a stream would be unmanageable. However, the Commission finds that application of the 'Non-classified Drainage' concept as outlined by Mr. Poulin to be unacceptable in this case.

The Commission agrees with the Respondent that such a concept, taken to further extremes, would also be unworkable. There are many cases of streams that go to ground when reaching flood plains due to the coarse deposits of those flood plains. Therefore the Commission does not accept that, in this particular case, that Mr. Poulin's interpretation should apply. Because of this, the status of the 50 m section at the confluence with Dowling Creek is irrelevant to the final decision. However, the Commission finds that the evidence suggests that water was observed, confined in a channel, at least three different times of the year, including twice at non-peak flows. Further, there was insufficient evidence to conclude that there is a lack of continuous definable banks or alluvial sediment bed in the reach closest to the mouth.

The question now becomes "what is the status of the watercourse within the cutblock?" In coming to its decision, the Commission relied upon the video filed at the hearing; the evidence of all the experts that testified; as well as the observations made by Dr. Hamilton in his report. The presence of continuous definable banks of the watercourse within the cutblock was not in dispute. The issue became whether the watercourse within the cutblock had a sufficient alluvial sediment bed to meet the definition of "stream" pursuant to section 1 of the THPR. Dr. Hamilton reported that "through more than half of the channel within the cutblock there were no alluvial sediments" which suggests to the Commission that while less than one half of the channel had alluvial sediments, it was not "less than one-third" or "less than one-quarter" of the length. Dr. Hamilton also indicated that the amount of alluvial deposits were consistent with a stream at the limit of its ability to move sediment. However, material was moved and deposited.

While all parties agree that the definition of "stream" does not require a "continuous" alluvial sediment bed, there is disagreement on how much of an alluvial sediment bed a watercourse must have to be considered a "stream" under the *Code*. There are no guidelines or policies in place for determining the amount of alluvial sediment required for a watercourse to meet the definition of stream. Furthermore, there are no adjectives used in the definition such as "continuous" or "predominantly" that clarify legislative intent. Given that the Appellant's witness

himself admitted that the watercourse up to 20 m inside the block could be classified as a stream, and the statement of Dr. Hamilton that a narrow interpretation of the *Code* would call the watercourse a stream, and the explanation provided by Mr. Chatwin of the use of alluvial sediment bed as an indicator of water flow force, it is the Commission's view that the watercourse in the block had sufficient alluvial sediment to meet the definition of "stream" as set out in the THPR.

The Commission also rejects the Appellant's argument that because the watercourse was not identified on forest cover maps, and the Logging Plan and Silviculture Prescription were approved by the MOF even though the accompanying maps also did not show the watercourse, that Canfor should not be held responsible. The *Code* does not specify that only streams identified on maps and in plans are to be protected. It is clear that the onus of stream identification and classification is on the licensee, except for special cases such as outlined in section 225. There were many operations carried out on the block such as timber cruising, fieldwork for the Silviculture Prescription, and boundary layout, that provided opportunities for the watercourse to have been identified.

The Appellant also raised the issue that the watercourse in question had not been designated as a high value fish-bearing stream by MOF or the Ministry of Environment, Lands and Parks during the road and cut block review process set out in sections 225 and 226 of the *Code*. The Respondent argued that whether the watercourse is a high value fish stream is not relevant to this appeal. The issue is whether or not it is a "stream" as defined in the THPR. Further, there is no relevance to the road and cut block review process given the fact that there is no reliance on the presence or absence of fish. The Respondent submits that this case does not involve planning issues, but rather deals with practices in the field.

The Commission agrees with the Respondent on this point. It is the Commission's view that section 67 of the *Code* and the THPR are clear that the identification and protection of "streams", regardless of their designation as high value or not, is the intent of these sections. Therefore, Commission need not make any findings as to whether the watercourse is a high value fish stream or a fish stream

Finally, the Appellant argued that because the silviculture prescription was issued in November 1995, during the transitional period of June 15, 1995-December 15, 1995, less stringent *Code* requirements applied for operational plans issued during that period. The Appellant refers to section 232 of the *Code* which provides that where a silviculture prescription is issued before December 15, 1995, the prescription need not meet the content requirements of the *Code* and the regulations. The Respondent submits that only plans were transitioned and we are not dealing with plans in this case. This appeal is not dealing with a contravention of the silviculture prescription but with a contravention of the THPR which was not the subject of any transitional provisions in the *Code*. The Commission finds that section 232 does not apply in this case where the contraventions relate to violations of the THPR.

DECISION

The Commission, pursuant to section 138 of the *Code*, upholds the decision of the Review Panel that Canfor contravened sections 67(1)(d) and 67(2)(a) of the *Code*, and sections 7(1), 8(1) and 16(1) of the THPR. The penalty of \$3000.00 is also upheld.

Kathy Lewis, Member
Forest Appeals Commission

February 16, 1998