Forest Appeals Commission

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APPEAL NO. 1997-FOR-17

In the 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
Andrew Thompson Chair
Patricia Marchak Member
Monty Mosher Member

DATE: December 5, 1997

PLACE: Victoria, B.C.

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

APPEAL

This is an appeal by Canadian Forest Products Ltd. ("Canfor") against the decision of a Review Panel, dated June 2, 1997, to send a Determination of District Manager Ray Schultz (the "DM"), dated October 17, 1997, back to the DM for reconsideration. The Determination at issue levied a penalty of $36,000 against Canfor for unauthorized timber harvesting contrary to sections 67(1) and 67(2)(d) of the *Forest Practices Code of British Columbia Act* (the "*Code*") and section 3(1) of the Timber Harvesting Practices Regulation.

Canfor seeks an order that the decision of the Review Panel and the DM be rescinded and that no penalty be levied.

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

RELEVANT LEGISLATION

The relevant sections of the *Code* considered in this decision are as follows:

67. (1) A person who carries out timber harvesting and related forest practices on
(a) Crown forest land,
(b) Crown range, or
(c) private land that is subject to a tree farm licence or a woodlot licence,
must do so in accordance with
(d) This Act, the regulations and standards,
(e) any silviculture prescription, and
(f) any logging plan.
(2) Without limiting subsection (1), the person must
...
(d) not harvest or damage trees that are required by the silviculture prescription to be left standing or undamaged.

Timber Harvesting Practices Regulation

3 (1) A person carrying out a timber harvesting operation on applicable land must delineate and mark the cutblock boundaries in the field so that they are visible, to the satisfaction of the district manager, before, during and at the completion of harvesting.

BACKGROUND

This background is based on the summary contained in Canfor's written submission. There is no disagreement among the parties as to these facts.

1. Canfor began field work in March of 1995 relating to plans for the salvage of the Hemlock Looper damaged stands in the Torpy watershed.

2. In approximately May of 1995, the Ministry of Forests (MOF) gave approval to plans to harvest the damaged timber. The Ministry of Environment, Lands and Parks (MELP) requested that Canfor incorporate two FENS (Forest ecosystem networks) into the plans. To meet this request, Canfor dropped Blocks 1 and 7 from the harvest schedule and also removed the northern one-third of Block 9.

3. During the course of Development Plan meetings with MOF for the Torpy area, numerous requirements of MOF and MELP were satisfied with respect to reserves on S4 creeks.

4. Block 9 was agreed to by MELP and MOF to be harvested as per the *Code* requirements for stream and management guidelines.

5. In the summer of 1995, MOF staff requested a flight to the Torpy to update themselves with the area and Canfor's plans. The persons participating in the flight were Fred Berekoff, MOF Zone Forester, Dave King from MELP, and Duncan McKellar, Divisional Forester for Canfor.

6. Fred Berekoff indicated he was concerned about the size of Block 9. He requested that Canfor put in some retention patches. Duncan McKellar gave copies of aerial photos to Mr. Berekoff and asked him to draw where he would put the retention patches as the helicopter hovered over Block 9. Mr. Berekoff drew the retention patches on the aerial photo. Mr. McKellar did not contest his choice of the retention patches and agreed to incorporate them into the Canfor plans.

7. The retention patches were a MOF request, not a MELP request. Mr. McKellar of Canfor was of the opinion that Canfor had left enough retention areas in the remaining blocks and in the FEN areas, especially when considering the removal of timber was a salvage operation. However, Mr. Berekoff insisted that some retention patches should remain on Block 9.

8. Mr. McKellar did not recall at any time during the discussion respecting the retention patches, any discussion regarding factors such as distance, travel corridors, or wildlife use in the proposed retention patches.

9. At the time when the retention patches were set out, the Bio-Diversity Guidelines had not yet been published.

10. On August 18, 1995, Canfor laid out the retention patches as requested by MOF and the patches were ribboned with orange ribbon.

11. The Silviculture Prescription ("SP") was reviewed by Fred Berekoff on November 6, 1995 and approved by the District Manager, Glen Baber, on November 15, 1995. The SP designates the reserves as "no harvest zones to provide retention within block" [Block 9]. The reserves are not referred to in the section of the SP headed "Wildlife" and were not designated as "wildlife tree patches".

12. In the winter of 1996, harvesting of Cutting Permit 785 and 786 began and was carried out by a contractor. It soon became evident in harvesting the first few areas on Blocks 2 and 3 in CP785, that the cedar component of the stand was not of market quality. A decision was made by MOF to amend all of the SPs, including the SP for Block 9, to leave all cedar standing in the blocks for wildlife use. The SP for Block 9 was amended on February 9, 1996 to include the following statement:

    > Cedar trees will be left standing where possible to accommodate bird nesting and mammal habitats. Cedar leave trees range from 0 to 40 stems per hectare. Leave tree cedar stems will not be billed against cut control or waste assessment.

13. Canfor provided the contractor with a map of the block, and the SP, as well as the logging plan, and gave instructions respecting the harvesting of the block including the retention of the "no harvest zones".

14. However, in February of 1996, the contractor advised that he had inadvertently harvested a portion of one of the "no harvest zones". The contractor immediately stopped harvesting and reported to Canfor. In turn, Canfor immediately reported the incident to MOF.

15. The inadvertent harvesting by the contractor covered approximately 1.6 hectares of one of the "no harvest zones".

16. Canfor has no explanation as to how the contractor came to harvest the 1.6 hectares within the "no harvest zone". Canfor had ribboned the zone with orange ribbon and had mapped the zone using GPS. When Canfor inspected the harvested area, a portion of the ribboning of the zone was not located and could have been taken out as a result of the harvesting. The contractor could provide no explanation for the incident.

17. In an effort to offset the harvest in the retention patch, Canfor voluntarily reserved other patches (the "alternate retention patches") of timber within Block 9.

18. The Canfor maps show:

    - Map 1, Exhibit 2, the reserve areas specified in the SP (the "prescribed reserves").

    - Map 2, Exhibit 2, the actual retention areas left on the Block.

    - Map 3, Exhibit 2, an overlay of the prescribed reserves and the alternate reserves.

19. The total area of prescribed reserves was 9.3 hectares.

20. The total area of the alternate reserves actually protected is 11.9 hectares.

21. Accordingly, Canfor protected a greater area of reserves than was originally prescribed as mitigation and replacement for the portion of prescribed reserves inadvertently harvested by the contractor.

22. Canfor paid full stumpage for the 1.6 hectares of timber (265.5 cubic metres) harvested by the contractor from the prescribed reserve.

23. In addition, Canfor voluntarily protected an area equal to the 1.6 hectare area PLUS an additional 2.6 hectares within the block.

24. On September 10, 1996, the DM held an "opportunity to be heard" meeting with Canfor, with respect to its harvesting in Block 9. As a result of this meeting, the DM issued a Determination dated October 17, 1996 under section 117 of the *Code* that Canfor had contravened sections 67(1) and 67(2)(d) of the *Code* and section 3(1) of the Timber Harvesting Regulation.

25. There being no dispute as to the facts, the DM levied a penalty of $36,000.

26. The DM's Determination was reviewed by way of an oral hearing pursuant to section 129 of the *Code* by a duly appointed panel of three on April 30, 1997. On June 2, 1997 the Review Panel decided to return the determination to the DM as it found that additional information was available that was not available at the time of the DM's Determination, and the DM should give additional consideration to the fact that Canfor left reserve patches elsewhere on the block.

CANFOR'S GROUNDS OF APPEAL

In its argument that the matter not be referred back to the DM, Canfor, in its written submission dated December 3, 1997, stated that the matter should be resolved by the Commission rather than be referred back to the DM for reconsideration. Canfor argued that a referral back would serve no useful purpose and might result in a further series of appeals resulting in further time, costs, and expenses for all parties.

As to a rehearing by the DM, Canfor argued that the DM had prejudged the outcome and should therefore be disqualified from further involvement in the Determination. As evidence of prejudgment, Canfor provided a written submission of the DM before the Review Panel which challenged each of the issues discussed in the expert opinion of Dr. Lousier though acknowledging that he, the DM, had no expertise in the disciplines of ecology or wildlife habitat.

Finally, Canfor submitted that the Commission had before it all of the evidence needed to render a final decision on the issue of penalty and that it would best serve the interests of all parties by concluding the proceedings now.

Canfor requested that the decision of the Review Panel and of the DM be rescinded and that no penalty be levied.

GOVERNMENT OF BRITISH COLUMBIA'S POSITION ON APPEAL

The Government's position on this appeal was that Canfor had failed to demonstrate that there was any basis to overturn the DM's determination under section 117 of the *Code*.

As to Canfor's allegation that the DM was biased, the Government argued that there was no reasonable apprehension of bias merely because the DM performed his statutory role by rigorous questioning and argument, particularly when the statutory scheme permits overlapping functions by officials.

FOREST PRACTICES BOARD'S POSITION ON APPEAL

In the Statement of Points and argument on behalf of the Forest Practices Board counsel did not take a position on the amount of penalty that should be levied by the DM. However, counsel outlined some of the principles it thought should be respected in cases such as this.

In principle, the Board submitted that a reduction of penalty should be contingent upon the company establishing that the cutting of the original reserve was an innocent and unintentional mistake. The penalty must be high enough to remove all economic benefits, to discipline the transgressors and to deter reserve violations. The penalty should take into account all ecological values that have been compromised by changing the reserve area and should reflect all other losses to the Crown. Finally, credit for the establishment of compensatory reserves should be greater if they are pre-approved by government officials, and reserves should be discouraged in areas that are simply convenient and beneficial for the contractor.

REQUEST FOR WITHDRAWAL OF THE APPEAL

After completion of the hearing of this appeal, Canfor provided the Commission with a letter dated December 23, 1997, requesting that its appeal be withdrawn, citing section 5 of the Forest Appeals Commission Procedure Manual. This section addresses withdrawal of an appeal. However, the Procedure Manual is not legally binding and does not specifically address a situation where a hearing has been completed.

In the circumstances, and particularly in the case where the request for withdrawal is made after the hearing has been completed, it is acknowledged by the parties that the disposition of the matter lies within the discretion of the Commission. As stated by Chitty L.J. in *Fox* v*. Star Newspaper Company,* 1898, 1 Q.B. 363 (C.A.) at p. 639:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject matter.

The Commission has decided that, in the circumstances, it is not appropriate to allow a withdrawal of the appeal. A hearing has taken place at considerable time and expense to all involved, and the Commission is in a position to make a decision. Canfor asked the Commission, in the alternative, to consider sending the matter back to the DM for reconsideration. This matter will be addressed below.

ISSUES

1. Should the Commission refer the appeal back to the DM for a new determination?

2. What penalty should be levied against Canfor?

ANALYSIS

1. Should the Commission refer the appeal back to the DM for a new determination?

All of the parties took the position at the hearing of the appeal that the matter should be referred back to the DM for a redetermination. This could be accomplished either by a ruling of the Commission that the matter be referred back, with or without directions, or simply by dismissing the appeal with the result that the matter would automatically return to the Review Panel and the DM for redetermination.

For Canfor, this meant an about-face in its stance that the DM was biased against it. As well, Canfor now supported the position of the Review Panel and the DM to the effect that a redetermination was necessary because new information was now available that was not available to the DM at the time of the original determination. This included new cruise information respecting timber volumes, a supplementary expert report of Dr. Lousier respecting ecological values, and a recognition that Canfor may be entitled to a credit for payment of stumpage.

The Commission's decision is that, the appeal having been heard, the issue now is not whether all the evidence was heard by the DM but whether it has been heard and considered by the Commission.

The Commission believes it has all the evidence it needs to hear and determine the issues before it on this appeal. Even counsel for Canfor agreed that all necessary evidence has been heard and, therefore, the Commission must proceed promptly to provide a decision (written submission of Canfor dated December 3, 1997). On the other hand, if the matter is referred back to the DM, that will take substantial hearing time. There is then the possibility of an appeal from a redetermination by a new Review Panel followed by a new appeal to this Commission. Time and uncertainties are the negative side of the hearing and appeal processes.

Taking all these matters into consideration, the Commission rules against a referral back to the DM for a redetermination of the issues.

2. What penalty should be levied against Canfor?

There is no disagreement that substantial harvesting occurred on Block 9 in violation of sections 67(1) and 67(2)(d) of the *Code*, and section 3(1) of the Timber Harvesting Practices Regulation. For this harvesting, a deterrent penalty must be levied, sending a message to the industry that it will not profit a company to violate the harvesting legislation. Against this deterrent penalty, Canfor is entitled to an offsetting benefit for establishing alternative retention patches.

This deterrent penalty is to be distinguished from a compensation penalty to be levied against Canfor to compensate the Crown for the value of timber lost.

The expert reports by Dr. Lousier and the DM's assessments indicate the trade-offs that must be made. The Commission will first deal with the deterrent penalties.

The Deterrent Penalty

The Commission accepts the expert advice of Dr. Lousier regarding the ecological values of the areas in question. We understand him to have said that, from an ecological standpoint, in general, an “island” reserve is better than peripheral areas. However, taking into account the FEN areas and the composition of the replacement stands at the periphery of the logged region, the replacements were adequate and appropriate substitutes. The Commission appreciates that the replacements were greater in total hectares than the original reserve area. The difference of opinion regarding the advantages of a "blocky" versus an elongated reserve was noted. Overall, the Commission is of the opinion that the substitutes were appropriate and that, had Canfor not provided substitutes, the penalty should have been much greater.

Another factor is the extent to which the deterrent penalty should be eliminated or reduced because of Canfor's actions as assessed under section 117(4) of the *Code* which states:

> 117 (4) Before the senior official levies a penalty under subsection (1) or section 119, he or she
>
> ...
>
> (b) subject to any policy established by the minister under section 122, may consider the following:
>
> (i) previous contraventions of a similar nature by the person;
>
> (ii) the gravity and magnitude of the contravention;
>
> (iii) whether the violation was repeated or continuous;
>
> (iv) whether the contravention was deliberate;
>
> (v) any economic benefit derived by the person from the contravention;
>
> (vi) the person's cooperativeness and efforts to correct the contravention;
>
> (vii) any other considerations that the Lieutenant Governor in Council may prescribe.

Canfor deserves credit for its prompt efforts to minimize the effects of the unauthorized harvesting and its establishment of retention patches.

In weighing the factors that make up the deterrent penalty, the Commission concludes that no penalty should be imposed, the unlawful harvesting being offset by the provision of retention patches and the prompt and cooperative response extended by Canfor.

The Compensation Penalty

To ascertain whether the Crown has been fully compensated for the volumes of timber removed without authorization, the first step is to ensure that the Crown has

been paid for the original stumpage of $33/cubic metre plus an amount for the "Bonus Bid" that the Crown would have received had the timber removed from the original reserve area been sold at public auction as a "small business sale." This Bonus Bid is estimated at $24/cubic metre.

All the merchantable timber from Block 9, including that from the original reserve area, was delivered to a sort yard where it was officially scaled as it arrived. Therefore, we assume that the original stumpage of $33/cubic metre must have been paid. It remains to ensure that the Bonus Bid of $24/cubic metre is collected for the Crown.

To calculate the total amount of the Bonus Bid, the volume removed without authorization must be established. The Commission was given two estimates of the volume removed from the restricted area. The first estimate was derived from the official scale at the sorting yard of those truckloads thought to have come from the original reserve area. That volume was established at 265.5 cubic metres and was initially agreed to by both parties.

The second estimate was derived from a "stump scale" that was done by Canfor, or on Canfor's behalf, at a later date. This volume was established at 523 cubic metres.

Neither method can claim scientific objectivity, considering the great extent of judgment required to reach a reasonable estimate. The Commission's conclusion is that a reasonable estimate is 395 cubic metres for the volume of timber wrongly harvested. The Commission used the "average" of the two estimates to establish the "volume". That would make it 394.25 cubic metres. For simplicity it has been rounded off at 395 cubic metres. Therefore, the total amount of the Bonus Bid yet to be collected for the Crown is 395 x $24 = $9,480.

The final step is to eliminate any net economic benefit that may have accrued to Canfor. To calculate this part of the penalty, the Commission adopts a simple and reasonable formula outlined by the DM during the hearings. This formula is: penalty = unauthorized volume x 1/2 (market value of spruce saw logs). This approach eliminates the necessity of a complicated, time-consuming and questionable "end product evaluation".

This portion of the penalty is, therefore, the unauthorized volume previously established as 395 cubic metres, multiplied by one half of the market value of spruce saw logs estimated to be $138/cubic metres. Spruce was chosen because approximately 90% of the unauthorized harvest was spruce.

This penalty for the wood Canfor wrongfully harvested is: 395 x ($138/2) = $27,255.

There was also a penalty assessed for inadequate boundary marking (section 3(1) of the regulation). This penalty of $1,000 was agreed to by both parties so it will remain the same.

Therefore, the Commission finds that the total of the penalty for unlawful harvesting is: $1,000 + $9,480 + $27,255 = $37,735. This amount equates to $95.53/cubic metre using the authorized volume of 395 cubic metres. Once the stumpage of $33/cubic metre is added on, it means that Canfor will have been assessed $128.53/cubic metre for the wood it wrongly harvested.

Andrew Thompson, Panel Chair
Forest Appeals Commission

April 23, 1998