



Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 1997-FOR-18

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: Frank McIntyre **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Toby Vigod Chair
Monty Mosher Member
David Walkem Member

DATE OF HEARING: November 13-14, 1997

PLACE OF HEARING: Cranbrook, B.C.

APPEARING: For the Appellant: Larry Schafer, Counsel
For the Respondent: Bruce R. Filan, Counsel

APPEAL

This is an appeal brought by Frank McIntyre against an Administrative Review decision dated June 11, 1997. The Review Panel upheld the determination of the District Manager dated March 26, 1997, that Mr. McIntyre contravened sections 96(1) and 97(1) of the *Forest Practices Code of British Columbia Act* (the "Code"). A penalty of \$16,810.43, levied pursuant to section 119 of the *Code* for the contravention of section 96(1), was also upheld.

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

Mr. McIntyre is seeking an order rescinding the contraventions or, in the alternative, reducing the penalty assessed.

BACKGROUND

Frank McIntyre and his mother, Evelyn McIntyre, are the present owners of the west half of Sublot 16, District Lot 361 near Grasmere, British Columbia. At the time that the unauthorized cutting occurred in 1996, Lewis McIntyre (subsequently deceased, July 12, 1996) and Evelyn McIntyre were the owners of this property. They have owned this property since 1960. The McIntyres also own other

properties in the same area, including Sublots 9, 10 and 11. Frank McIntyre has resided on his parent's property on the west half of Sublot 16 for the past ten years. He has also leased property from Mrs. Claire Phillips on the neighbouring Sublot 15 for the past five years. Mr. McIntyre primarily works as a rancher, hunting guide, and auctioneer. While not a logging contractor, he has worked for logging contractors as a skidder operator or faller.

On November 22, 1994, and April 2, 1995, Lewis McIntyre signed land owner's releases authorizing John Gravelle to use his timber mark and harvest timber on Sublots 9, 10, 11 and the west half of Sublot 16.

A copy of a log purchase agreement dated April 1, 1996, between Frank McIntyre (Vendor) and McDonald Ranch & Lumber Ltd. (Purchaser) was filed with the Commission. The agreement provides that deliveries will commence April 15, 1996, be completed by May 31, 1996, and that the agreement will expire June 30, 1996. The copy provided to the Commission did not have Mr. McIntyre's signature on it.

On June 4, 1996, an inspection by Forest Service personnel revealed that Crown timber had been harvested without authorization from an area east of the east boundary of the west half of Sublot 16, including a water pipeline right-of-way cleared on Crown land adjacent to Maguire Creek. A total of 343 cubic metres of Crown timber was cut.

Mr. Gravelle, a logging contractor, cut the vast majority of the unauthorized timber on the east half of Sublot 16. Vic Bossio, a water line contractor, was engaged by Mr. McIntyre, his parents, and Mrs. Phillips to build a water pipeline, which resulted in the unauthorized removal of additional Crown timber (approximately half of one load) on the east half of Sublot 16.

There is no dispute that a total of 343 cubic metres of timber was cut without authorization in 1996 on Crown land east of the east boundary of the west half of Sublot 16. Mr. Gravelle did his logging in January and February 1996. The logging associated with the construction of the water pipeline occurred in May and June 1996.

RELEVANT LEGISLATION

Unauthorized timber harvest operations

96. (1) A person must not cut, remove, damage or destroy Crown timber unless authorized to do so

(a) under an agreement under the Forest Act or under a provision of the Forest Act,

(2) If a person cuts, removes, damages or destroys Crown timber contrary to subsection (1), at the direction of, or on behalf of, another person, that other person also contravenes subsection (1).

Private Land adjacent to Crown land

97. (1) Before an owner or occupier of private land that is adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land.
- (2) Before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land.

ISSUES

1. Whether Frank McIntyre contravened section 96(1) and 97(1) of the *Code* in relation to the unauthorized cutting conducted by John Gravelle.
2. Whether Frank McIntyre contravened section 96(1) of the *Code* in relation to the unauthorized cutting conducted in the water pipeline right-of-way.
3. Whether the quantum of penalty is appropriate in the circumstances.

DISCUSSION AND ANALYSIS

I. Whether Frank McIntyre contravened section 96(1) and 97(1) of the *Code* in relation to the unauthorized cutting conducted by John Gravelle.

Counsel for Mr. McIntyre argued that the primary issue was how sections 96 and 97 of the *Code* apply to a person who is neither a contractor nor an owner. He submitted that Mr. McIntyre was at best an agent of the owner, but an agent who had no direct involvement in the contractual arrangement between the owner and contractor and who derived no economic benefit from the unauthorized harvesting. He submitted that Mr. McIntyre did not cut, remove, damage or destroy Crown timber and that Mr. Gravelle did the actual cutting of Crown timber. Mr. McIntyre submits that he did not direct the contractor to cut timber on Crown land and that he was not obligated to lay out the boundary line between private and Crown land.

The Respondent argues that Frank McIntyre was responsible for the harvesting of timber. Barry Markin and Lloyd Bell, Compliance and Enforcement officers with the Ministry of Forests ("MOF"), testified that they spoke to Lewis McIntyre on June 4, 1996, in an attempt to determine who was responsible. They testified that Lewis McIntyre, who had emphysema and had been on oxygen for a number of years prior to his passing away in July 1996, said that Frank was responsible and that he was in charge of logging on their property. The Respondent argues that Frank McIntyre had care and control of the property during the last few years of his father's life and that Mr. Gravelle did the logging on behalf of, and at the direction of Frank McIntyre.

Peter Berukoff, a senior enforcement specialist, also testified on behalf of the Respondent. Mr. Berukoff has worked for MOF for 26 years in the Nelson regional office, Cranbrook Forest District. His responsibilities included investigating matters regarding revenue loss to the Crown and ascertaining the responsible parties. Mr. Berukoff and Pam Dykstra took over the investigation from Mr. Markin and Mr. Bell early in June 1996.

Mr. Berukoff testified that on June 12, 1996, he spoke to Frank McIntyre, and that on June 14 he went to Mr. McIntyre's house with Ms. Dykstra. Mr. Berukoff told Frank McIntyre that he was doing a review of unauthorized harvesting. He said Frank's first concern was how did he find out. He asked whether Arlin Johnson, his neighbour who owns Sublot 22 to the north of Sublot 16, had reported it. According to Mr. Berukoff, Frank asked, "how much trouble am I in", and said that he did not know where the boundary line was located.

Ms. Dykstra testified that she was present at the conversation on June 14, 1996, with Mr. Berukoff and Frank McIntyre. She took notes and said that Frank McIntyre said that if there was any unauthorized harvesting, it was his responsibility, and not his father's. He further stated that he did not know where the property boundary was for the eastern half of Sublot 16. Ms. Dykstra also testified that on June 19, 1996, she talked to Glen McDonald, from McDonald Ranch & Lumber Ltd. Mr. McDonald gave her a copy of the log purchase agreement between his company and Frank McIntyre.

Frank McIntyre testified that he had known Mr. Gravelle all his life, and that Mr. Gravelle had been a logging contractor for 10-15 years and was very dependable and reliable. He indicated that he knew about the logging done on Sublots 9 and 10 by Mr. Gravelle in the winter of 1995, as he had done some falling for Mr. Gravelle at that time. There is no dispute that Frank McIntyre contacted Mr. Gravelle to do the logging in 1996. However, Mr. McIntyre says that while he may have suggested Mr. Gravelle to his father, Lewis McIntyre ultimately made the decision. He testified that he did what his father asked him to do and contracted Mr. Gravelle to see what deal Mr. Gravelle could get for the wood. Frank McIntyre testified that he did not know if there was a contract between his father and Mr. Gravelle, and that he received no financial benefit from the logging done in 1996.

Frank McIntyre testified that he had two conversations with Mr. Gravelle about the location of the boundary between the private land and Crown land on Sublot 16, one before, and one after logging. He said that the first occasion took place at his place of residence, before logging took place, in approximately December 1995 or January 1996. Mr. McIntyre also indicated that he was originally going to do the logging, but decided not to do so, as he had other work to be done on the property. He said he was asked by Mr. Gravelle if he knew the location of the east boundary of the west half of Sublot 16.

He says that Mr. Gravelle was aware there was Crown land to the east based on the discussion of where the boundary line was located. Mr. McIntyre said he got out a map belonging to his father with colouring on it, that had the timber marked in green. The map was the result of a timber cruise done at the suggestion of Frank McIntyre who also testified that he had hired the person who did the cruise. The purpose was to know how much timber was on the McIntyre property. Frank McIntyre says that he told Mr. Gravelle that if he followed the fence line of his neighbour, Arlin Johnson, and continued south, that that would be the boundary. Mr. Johnson owned Sublot 22, located just north of Sublot 16. Mr. McIntyre said that he also told Mr. Gravelle that he should stay below an old water pipeline

belonging to Mr. Johnson, and stay below the bluffs. He said he was not asked by Mr. Gravelle to have the property surveyed or flagged.

Frank McIntyre testified that the second discussion took place when Mr. Gravelle came over to his house and wanted some further clarification about the boundary. Mr. McIntyre claims that he restated his comments about the fence line, and also said to stay below a shack that had been a kid's fort. He said, at this time, he made no reference to Mr. Johnson's water pipeline, but did tell Mr. Gravelle to stay away from an old pipeline of his fathers on top of the ground that he did not want Mr. Gravelle to skid over. Mr. McIntyre said that he believed that the fence line was the property line, but that if one stayed below the hill and the kid's shack, it should be OK.

Mr. McIntyre said that he did attend twice at the site at noontime to see how the loggers were doing. He met them at the landing where they were having lunch. Mr. McIntyre testified that he did not inspect or oversee the logging. He testified that he had confidence that Mr. Gravelle was doing the right thing.

A very different story emerged from Mr. Gravelle. Mr. Gravelle testified that he owned property near Grasmere, and he was familiar with the area as he had lived there all his life. He said that he was acquainted with Lewis McIntyre, but did not talk to him. He knew Frank McIntyre since he was a boy. Mr. Gravelle testified that Frank had originally wanted to do the logging in October and that he, at first, did not want to do any. He testified that he contracted with Frank McIntyre and that it was a verbal contract, and a handshake arrangement. Mr. Gravelle testified that he knew there was Crown land to the east of the west half of Sublot 16. He said that he was told by Frank McIntyre that the property boundary was up in the cliffs and that as long as he stayed below the shack and the pipeline, that he would be OK. He said that he stayed 100 feet below the shack, just to be safe.

Mr. Gravelle testified that he did not recall seeing the timber cruise map that Mr. McIntyre referred to. He also said that he did not recall being told to follow Arlin Johnson's boundary line south.

In cross-examination, Mr. Gravelle was asked why he did not tell Mr. McIntyre that he wanted a survey. Mr. Gravelle said that he did, but that Frank McIntyre said it cost too much. Mr. Gravelle said he proceeded from north to south, as he did not want to go near Lewis McIntyre's old pipeline. He said he grossed \$30 per cubic metre while the McIntyres got \$51 per cubic metre.

Mr. Gravelle also testified that it was his recollection that a cheque he received had three names on it – Lewis, Evelyn and Frank McIntyre.

Transcripts of evidence given by Mr. Berukoff, Ms. Dykstra, Mr. Gravelle and Frank McIntyre at the review hearing on May 14, 1997, were filed at the hearing before the Commission. The following exchange between Mr. McIntyre and his lawyer deals with the second occasion that Mr. Gravelle and Mr. McIntyre discussed where the boundary was between private and Crown land.

Frank McIntyre: Well, to the best of my recollection I told him that if he stayed below the base of the hill he should be fine.

Larry Shafer: Did you say anything about any other means by which he could determine where the boundary was?

Frank McIntyre: Brought up several times about the kids play house and I do believe I told him that he definitely had to stay below that.

Larry Shafer: Was there any discussion about fence lines?

Frank McIntyre: Well, I think, once again, that the fence line didn't seem to, what I think happened he lost site (sic) of the fence line and was there any other indication that I could give him.

Larry Shafer: Did you make any reference to the fence line again?

Frank McIntyre: I believed so. (p. 86)

In other excerpts from the transcripts, Mr. Gravelle denies that Mr. McIntyre told him that the boundary on private land could be determined by taking a continuation of the Arlin Johnson's fence line and running it straight down in a southerly direction (p. 35) and that he was told to "log down below the pipeline, ... and the shack" (p.36). He said, "there was no talk about the fence line" (p.26) and that he was told "the cliff was the boundary on top." (p.33)

Counsel for the Respondent asked Mr. Berukoff why he did not "go after" the contractor. He responded that he felt that Frank McIntyre was solely responsible and in control of the logging situation on the east side of Sublot 16. He also conducted an audit on Mr. Gravelle who "came up clean".

Frank McIntyre argues that under section 97(1) of the *Code*, the production of the map was sufficient in and of itself to discharge any obligation, if there was one, to the contractor to show him the property boundaries. He further submits that the map clearly delineated the boundaries between private and Crown land. Mr. McIntyre submits that his additional comments to Mr. Gravelle on how to delineate the boundary is irrelevant, as he was not obligated by legislation to do so. Counsel for Mr. McIntyre also submitted that if Mr. Gravelle really thought that the boundary was "up the cliff", than it did not make sense to log 100 feet below the shack "to be safe."

Mr. Berukoff, however, testified that just referring to a map is not enough to locate the boundary. He testified that without ribboning delineating the boundary, it would be very difficult to ascertain the eastern boundary of the west half of Sublot 16. He further indicated that if a person is standing half way down the property line, that the person would not be able to see Mr. Arlin Johnson's fence line.

The Commission agrees with the parties that the credibility of Frank McIntyre and Mr. Gravelle is very much in issue. Their recollection of events is often contradictory and inconsistent. The Panel finds that neither Mr. McIntyre nor Mr. Gravelle's versions of events are believable in their entirety.

The Commission finds that there is no dispute that Frank McIntyre was the one who contacted Mr. Gravelle to do the logging and, in fact, had initially planned to do some of the logging himself. The Commission finds that there was no written

contract between Lewis McIntyre and Mr. Gravelle and accepts the evidence of Mr. Gravelle that he entered into an oral contract with Frank McIntyre to do the logging. The land owner's releases signed in November 1994 and April 1995 by Lewis McIntyre to Crestbrook Timber are necessary authorizations for Mr. Gravelle to use Lewis McIntyre's timber marks, but are not contracts to log. There is also the evidence from the investigating officers that Lewis McIntyre had delegated many of the operations on his property, including the logging operations to his son. Notes from the investigators also confirmed that Frank McIntyre had indicated that he, rather than his father, was responsible for the logging. The Commission finds that Frank McIntyre had care and control over the logging operations on his father's property during the last years of his life and, in particular, at the time Mr. Gravelle was contacted by Frank McIntyre to do the logging in early 1996.

The Commission, therefore, finds that the logging was done by Mr. Gravelle at the direction or on behalf of Frank McIntyre. The Commission also finds that it was Frank McIntyre's direction to Mr. Gravelle on where to log that resulted in Mr. Gravelle cutting the unauthorized Crown timber. The Commission finds that Frank McIntyre failed to inform Mr. Gravelle of the boundary of the west half of Sublot 16, District Lot 361, contrary to section 97(1) of the *Code*. Section 97(1) provides that "before an owner or occupier of private land that is adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land."

The Commission finds that there is no dispute that Frank McIntyre was an "occupier" of the property owned by Lewis McIntyre. Mr. McIntyre met with Mr. Gravelle on two occasions and the location of the boundary was the subject matter of their conversation at both of those meetings. While there was contradictory evidence given by Frank McIntyre and Mr. Gravelle as to whether the coloured map actually was shown to Mr. Gravelle, the Commission is prepared to accept the evidence of Frank McIntyre that he did show Mr. Gravelle the map. However, the Commission does not find that the mere showing of a map indicating boundary lines meets the test of informing the contractor as set out in section 97(1). In this case, as Mr. Berukoff testified, just reference to a map is not enough to locate the boundary given the topography and dense brush on the site.

Further, while Frank McIntyre and Mr. Gravelle's testimony is not entirely consistent on how Mr. Gravelle was told to identify the boundary, the Commission finds that Frank McIntyre did tell Mr. Gravelle to stay below the base of the hill, to stay below Mr. Johnson's old water pipeline, and the kid's shack as well as to follow Mr. Johnson's fence line south. This series of instructions coupled with a failure to ribbon the boundary led to the unauthorized cutting. The Commission agrees with the finding of the District Manager that it was inadequate for Mr. McIntyre to use Mr. Johnson's fence line as a bearing position to inform Mr. Gravelle of the location of the boundary between the west half of Sublot 16 and Crown land.

Mr. McIntyre's instructions to Mr. Gravelle are consistent with the evidence of Mr. Berukoff and Ms. Dykstra that Frank McIntyre had indicated to them that he did not know where the boundary of the west half of Sublot 16 was located.

The Commission, therefore, finds that Frank McIntyre contravened section 96(1) of the *Code* and section 97(1) in relation to the unauthorized harvesting of timber done by Mr. Gravelle.

2. Whether Frank McIntyre contravened section 96(1) of the *Code* in relation to the unauthorized cutting in the water pipeline right-of-way.

Frank McIntyre testified that in 1996, he, his parents and Ms. Phillips signed a written contract with Vic Bossio to install a water pipeline on Crown land to the east of the west half of Sublot 16. Ms. Phillips had to have a water pipeline put in by a certain deadline, or she would lose water rights on Mcquire Creek. Mr. McIntyre testified that he had known Mr. Bossio for several years, and that he had a good reputation with an expertise in pipeline construction. Mr. McIntyre therefore contacted Mr. Bossio. Part of their arrangement was that, if Mr. McIntyre had not taken the timber by a certain day, Mr. Bossio would do so. Due to the fact that Mr. McIntyre had not taken the timber, Mr. Bossio did the falling with a hoe, and then Mr. McIntyre hired one of Mr. Gravelle's machines and operators to do the skidding. Mr. McIntyre testified that he paid the skidder \$100 a day for two days and that he did the bucking. It had been his idea to use the money from the sale of the timber to pay for his share of the pipeline. The pipeline was put in during May/June 1996.

A cutting permit had never been obtained as required. The Permit under the *Water Act* authorizing the occupation of Crown land provides in subparagraph (c) that:

Subject to the payment of royalty, stumpage, and other compensation, and the *obtaining of a licence to cut timber* as provided under Condition 5, the permittee may cut and remove from the said land any timber, the removal of which is necessary to permit construction and maintenance of said works. [emphasis added]

Mr. McIntyre testified that there was approximately one load of Crown and private timber cut from the right-of-way and that the timber is still sitting on the west half of Sublot 16. He said that slightly in excess of one-half of that load was Crown timber.

Frank McIntyre argues that Mr. Bossio was an independent contractor and that he was solely responsible for obtaining and complying with all required permits and authorizations with respect to the water pipeline. He says that he relied on Mr. Bossio to get the appropriate permits and should not be held responsible for a contravention of section 96(1) of the *Code*

The Respondent argues that Frank McIntyre contravened section 96(1) of the *Code* as Mr. Bossio removed timber on the pipeline right-of way at the direction of, or on behalf of Mr. McIntyre; as well, Mr. McIntyre himself cut or removed Crown timber on the pipeline right-of-way; and further, the skidder also removed Crown timber from the pipeline right-of-way at the direction or on behalf of Mr. McIntyre.

In final argument, Counsel for Mr. McIntyre submitted that it had not been established that the cutting of the Crown timber on the water pipeline right-of-way was unauthorized. He argued that Frank McIntyre had said that he saw a document

that indicated that work could be done on the right of way, and that there was a shortfall of evidence due to the fact that the Respondent had not called Mr. Bossio as a witness. The Respondent submits that, first of all, it was unfair for Mr. McIntyre to raise this issue for the first time at the end of this hearing, but in any event, it contends that the onus must be on Mr. McIntyre to produce a cutting permit, if he has it. The Respondent says that Mr. Markin testified that he reviewed the records in the course of his investigation, and that there was no record of any cutting permit. Further, the Respondent submits that no cutting permit was produced in evidence by Mr. McIntyre, and that Mr. McIntyre never obtained any authorization.

The Commission finds that in this case, there is no dispute that Frank McIntyre was one of four parties that signed a contract with Mr. Bossio to install the water pipeline. It was Mr. McIntyre who contacted Mr. Bossio and in fact, the initial arrangement was that Mr. McIntyre was going to do the logging, and when this did not work out, the timber was taken out by hoe by Mr. Bossio. It was Mr. McIntyre that hired one of Mr. Gravelle's contractors to do the skidding, and it was Mr. McIntyre that did the bucking.

There was also evidence that Mr. McIntyre had copies of the water licences in question. He confirmed, at the hearing, that one of water licence documents had his writing on it, indicating where his house and Ms. Phillip's house was located and the location of the "proposed pipeline for M.C. Phillips domestic water rights." Mr. McIntyre testified that he had received the documents from his parents and that he had passed them on to Mr. Bossio.

The Commission finds that Mr. McIntyre contravened section 96(1) of the *Code* as Mr. Bossio cut Crown timber on his behalf or under his direction without the required cutting permit. Further, Mr. McIntyre also did the bucking and hired the contractor who did the skidding of the timber from the right-of-way in contravention of section 96(1).

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

Mr. McIntyre argues that, in the event that the contraventions are upheld, that the penalty should be reduced, as it is excessive. Mr. McIntyre submits that he did not receive any financial benefit from the cutting of the timber, and that the financial rewards went to Mr. Gravelle and Mr. and Mrs. Lewis McIntyre. Frank McIntyre further states that to impose a penalty on him, when he was at best an agent, was punitive.

The Respondent argues that the penalty was reasonable in all the circumstances. It argues that whether or not Frank McIntyre received any financial benefit is not relevant to the issue of compensation to the Crown. The Respondent also submits that the penalty imposed was based only on a consideration of the stumpage and bonus bid that would have been payable had the timber been sold under the Small Business Forest Enterprise Program. It submits that no additional deterrent penalty was levied in this case.

Section 117(4) of the *Code* sets out the factors that may be considered in assessing a penalty. The District Manager considered these factors, making a particular note that the magnitude of the contravention was relatively large and that the failure to exercise all reasonable care was a significant factor leading to the unauthorized cutting. The District Manager also noted that no stumpage had been paid on the Crown timber as it was marked to a Private Timber Mark, upon which no stumpage is paid. However, the District Manager did not impose any additional deterrent penalty, nor did he impose any additional penalty for the contravention of section 97(1) of the *Code*. The Review Panel upheld the penalty. The Commission finds that all the factors were properly weighed and that the penalty was not excessive. There is no reason to alter the penalty assessed.

DECISION

Section 138 of the *Code* provides that the Commission may confirm, vary or rescind the decision appealed from and make any decision that the person whose decision is appealed could have made.

The Commission upholds the decision of the Review Panel that Frank McIntyre contravened section 96(1) and section 97(1) of the *Code* in relation to the unauthorized cutting of Crown timber done by Mr. Gravelle, and in contravention of section 96(1) in relation to the unauthorized cutting of Crown timber done on the water pipeline right-of-way.

The Commission also finds the penalty assessed by the Review Panel for the contravention of section 96(1) is appropriate.

The appeal is dismissed.

Toby Vigod, Chair
Forest Appeals Commission

August 17, 1998