Forest Appeals Commission

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APPEAL NO. 1999-FOR-05

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:	Forest Practices Board	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Takla Development Corporation Ltd.	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Toby Vigod — Panel Chair
Katherine Lewis — Member
Lorraine Shore — Member

DATE OF HEARING: March 23, 2000

PLACE OF HEARING: Victoria, B.C.

APPEARING:
For the Appellant: Calvin Sandborn, Counsel
For the Respondent: Karen S. Tannas, Counsel

APPEAL

This is an appeal by the Forest Practices Board (the "Board") of a November 26, 1999 Review Panel decision as amended on January 10, 2000, referring a September 14, 1998 Determination back to the District Manager. The District Manager levied a penalty of $32,800 against Takla Development Corporation Ltd. ("Takla") for a contravention of section 67(2)(d) of the *Forest Practices Code of British Columbia Act* (the "*Code*"). The Review Panel found that subsections 67(1)(e) and (f) of the *Code* were a more appropriate basis for the finding of a contravention and recommended a penalty of $8,000 be levied. In referring the matter back to the District Manager, the Review Panel instructed him to consider the Panel's interpretation of section 67(2)(d) of the *Code*, and the Panel's rationale and method of calculating the value of the administrative penalty.

The Forest Appeals Commission (the "Commission") has the authority to hear this appeal pursuant to section 131 of the *Code*.

The Board is seeking an order from the Commission referring the matter back to the District Manager, with directions regarding the proper principles to be applied in setting the penalties.

Takla did not attend the hearing.

BACKGROUND

In 1996, Takla was conducting harvesting operations near Takla Lake, in the Fort St. James Forest District. The silviculture prescription and logging plan for the area identified Riparian Management Zones ("RMZ") and Riparian Reserve Zones ("RRZ") in which trees were to be reserved from harvesting.

According to the silviculture prescriptions, all trees within the RRZ were to be reserved. Furthermore, the only harvesting that was to occur in the RMZ was the removal of trees attacked by mountain pine beetle and those that were not windfirm.

On January 9, 1996, it was discovered that clearcutting had occurred within both the RMZ and RRZ. It was found that a total of 1.45 hectares in the RMZ and 0.7 hectares in the RRZ had been clearcut on the eastern boundary of an area known as Standards Unit 4.

On September 14, 1998, the Fort St. James District Manager found Takla in contravention of section 67(2)(d) of the *Code*, and levied a penalty of $32,800 against the company for clearcutting the 2.15 hectares, plus an additional 0.67 hectares that is not in issue in this appeal. The penalty represented 1% of the maximum penalty of $5,000 per tree for a contravention of section 67(2)(d). Takla appealed the determination to a Review Panel.

The Review Panel issued its decision on November 26, 1999, and a revised decision on January 10, 2000, which corrected an error in the original decision. In summary, the Review Panel concluded that a finding that section 67(1)(e) and (f) of the *Code* had been contravened was more appropriate in the circumstances than a finding that section 67(2)(d) had been contravened. The Review Panel also set out a method for calculating the value of the administrative penalty. Following this method, the Review Panel recommended a penalty of $8,000 for the contravention. To obtain this figure, the Review Panel calculated the economic benefit that Takla derived from the contravention, and then reduced that figure by two thirds after consideration of the other factors listed in section 117(4)(b) of the *Code*. The Review Panel referred the determination back to the District Manager with instructions to consider the Review Panel's interpretation of section 67(2)(d), as well as its method and rationale for calculating the administrative penalty.

On January 17, 2000, the Board appealed the review decision to the Commission on the grounds that the Review Panel's directions regarding the proper method and rationale for calculating the value of the administrative penalty were in error for the following reasons:

1. The directions given by the Review Panel failed to respect the principle that the penalty should remove all economic benefit that Takla derived from the contraventions.

2. The Review Panel failed to properly take into account all of the relevant factors listed in section 117(4)(b), and specifically failed to calculate any penalty amount whatsoever for the environmental damage caused by the unauthorized clearcutting of riparian reserve and management zones.

The Board requests that the Commission refer the matter back to the District Manager, with directions regarding the proper principles to be applied in setting the penalties.

The Government notes that the District Manager who made the original determination has retired. It, therefore, requests that the matter be referred to the current District Manager for a new determination with the following directions:

- Consideration of whether to base the determination on section 67(1) or section 67(2).

- A penalty which at least removes the economic benefit derived by Takla as a result of the contravention.

- A penalty which reflects consideration of all of the factors listed in section 117(4) of the *Code*.

ISSUES

1. Whether section 117(4)(b) of the *Code* requires that all economic benefit derived from a contravention must be removed in assessing a penalty.

2. Whether the Review Panel properly considered the factors in section 117(4)(b) when assessing the value of the penalty in this case.

Counsel for the Government also submits that the unauthorized harvesting by Takla could be a violation of either section 67(1), or section 67(2) of the *Code*, and that the District Manager has the discretion to decide which section is more appropriate in the circumstances of this case. The Board took no position with respect to this submission. Upon consideration of the wording of the provisions, it appears that either could be used for the contravention in this case. Accordingly, the Commission agrees that the District Manager has the discretion to decide which provision should be used for the contravention.

RELEVANT LEGISLATION

At the time of the contravention, section 67 of the *Code* stated:

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.

Section 117(4) of the *Code* states:

Penalties

117 (4) Before the senior official levies a penalty in subsection (1) or section 119, he or she

(a) must consider any policy established by the minister under section 122, and
(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 violation 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.

DISCUSSION AND ANALYSIS

1. Whether section 117(4)(b) of the Code requires that all economic benefit derived from a contravention must be removed in assessing a penalty.

In its decision, the Review Panel stated that it would be appropriate to levy a penalty that recovers "a portion" of the economic benefit that Takla may have derived from the contravention. The Review Panel calculated the value of the penalty by taking the estimated amount of economic benefit drawn from the unauthorized harvesting and then reducing that amount by two thirds, after considering the "mitigating circumstances" in section 117(4)(b) of the *Code*.

Both the Board and the Government take the position that the approach taken by the Review Panel was wrong and that, in this case, it would have been appropriate to assess a penalty that at least removed the economic benefit which Takla derived from the contravention. Where the parties disagree is that the Board takes the position that the penalty for a contravention of the *Code* must remove all of the economic benefit that is derived from the contravention. In other words, the Board submits that recovery of contravention profits is "the floor" for penalties under the *Code*, not "the ceiling". The Government submits that economic benefit received should not always be considered to be a minimum penalty which is increased according to other factors in section 117(4), nor is it always to be considered the maximum penalty which is reduced by other factors in section 117(4).

Although section 117(4)(b) states that a senior official "may consider" the enumerated factors, including "any economic benefit derived from the contravention," the Board argues that the word "may" is not to be interpreted as giving senior officials the discretion to decide whether or not to consider the enumerated factors in a particular case. The Board argues that Legislature used the word "may" as opposed to "must" because the enumerated factors will not exist in every case. For example, previous contraventions will not be a factor in all cases. According to this interpretation, it would be an abuse of discretion for the senior official not to consider the factors that exist in a particular case. The Board states that the Legislature has determined the relevant factors to be considered in setting penalties, and the official must consider them.

The Board submits that the word "consider" means to "think about carefully" or "take into account". Thus, if the factors exist, the Board argues that they "must" be "taken into account" in levying a penalty. Finally, the Board argues that "any" economic benefit in the context of the section means "all" economic benefit.

The Board asserts that its interpretation is consistent with both the purpose of the *Code* and section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which states:

> 8. Every enactment must be construed as remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The Board submits that the purpose of the *Code,* sustainable use of British Columbia's forests, is evident from the Preamble to the *Code*, which states:

> WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;
>
> AND WHEREAS sustainable use includes
>
> a) managing forests to meet present needs without compromising the needs of future generations,
>
> b) providing stewardship of forests based on an ethic of respect for the land,

c) balancing economic, productive, spiritual, ecological and recreational values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations,

d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and

e) restoring damaged ecologies;

The Board argues that to allow people to earn a profit from violating the *Code* runs counter to the purpose of the *Code* described above.

The Board also argues that it would be an absurdity to interpret the *Code*, the overriding purpose of which is sustainable use, in a way that would allow people to profit from violating the rules of sustainable use. The Board cites *Driedger on the Construction of Statutes* (3rd edition by Ruth Sullivan) at p. 85:

> Where the words of legislative text allow for more than one interpretation, avoiding absurd consequences is a good reason to prefer one interpretation over another. Even where the words are clear, the ordinary meaning may be rejected if it would lead to an absurdity.

The Board also submits that the Commission has recognized in past decisions that a penalty should remove all of the economic benefits derived from a contravention. Specifically, the Board points to the Commission's decision in *Canadian Forest Products Ltd.* v. *the Province of British Columbia* (Appeal No. 97-FOR-17, April 23, 1998) (unreported) ("*Canfor*"). In that case, the Commission stated, in reference to the calculation of a penalty, that: "The final step is to eliminate any economic benefit that may have accrued to Canfor." The Board submits that the Commission's use of the word "any" in this context means "all," such that the penalty was calculated to remove all of the economic benefit to Canfor.

The Government acknowledges that economic benefit is one of the factors to be considered in assessing a penalty. However, the Government argues that the determination of an appropriate penalty is at the discretion of the decision-maker, and should be considered in light of the facts of a particular case. The Government submits that the wording of section 117(4)(b) does not support an interpretation that all economic benefits must be removed in every case. However, the Government concedes that in most, if not all cases, the appropriate penalty for a violation of the *Code* will at least remove the resulting economic benefit.

As for the *Canfor* decision, the Government submits that it is a particular case where the Commission found it appropriate to remove the economic benefit that Canfor gained from the contravention. As such, the Government argues that this does not mean that the entire economic benefit must be removed in all cases.

In response to the Government's argument, the Board submits that even if the senior official has discretion in assessing a penalty under section 117(4), that

discretion is not absolute or unfettered. The Board refers to a text by Sara Blake, *Administrative Law in Canada* (2nd ed.), which states:

> All discretionary powers must be exercised within basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act … Conversely, a discretion may not be used to frustrate or thwart the intent of the statute. (pp.81-82)

The Commission finds that section 117(4)(b) of the *Code* does not necessitate the removal of all of the economic benefit derived from a contravention in every case. Rather, it provides senior officials with discretion as to whether or not the economic benefit should be removed.

Section 117(4)(b) states that senior officials "may consider" any economic benefit derived from the contravention, along with the other factors listed in section 117(4)(b). The Board takes the position that the senior official "must" consider all the factors listed in section 117(4)(b) and has argued that the legislature used the word "may" as opposed to "must" because the enumerated factors will not exist in every case. The Commission does not find this rationale compelling, as even if there were, for example, no previous contraventions, it could still be a factor that can be "considered." However, the Commission does agree that the senior official must consider all the factors listed in section 117(4)(b). Why would the Legislature have gone to such lengths to set out factors (i) to (vii) in relation to administrative penalties if it did not intend for such factors to be considered in each case. The official's discretion to ascertain the relevance of each factor, and to levy a penalty, if any, comes from the word "consider."

The Commission finds that, where a factor in section 117(4)(b) is relevant to a particular situation, it must be "considered." The Commission accepts that "consider" in section 117(4) means to "contemplate" or "take into account." This finding is consistent with the definition of "consider" found in the Canadian Oxford Dictionary. That definition reads as follows:

> 1. contemplate mentally, especially in order to reach a conclusion. 2. examine the merits of. 3. give attention to. 4. take into account. 5. have the opinion. 6. believe; regard as. 7. show thoughtfulness for. 8. look at.

Accordingly, while the senior official must "contemplate" or "take into account" the economic benefit derived from a contravention, if it exists, there is no obligation to remove all economic benefit. It is only a factor to be "taken into account".

Having said that, the Commission agrees that in most, if not in all cases, it will be appropriate to remove the entire economic benefit derived from the contravention at issue. Through section 117(4), the Legislature intended to provide officials with discretion in assessing penalties. The Commission recognizes that there are some constraints on the exercise of discretion by officials, in that the principles of administrative law require that discretion under an Act be exercised in accordance with the objects and purposes of that Act. The Commission agrees that the primary

purpose of the *Code* is to ensure the sustainable use of British Columbia's forests. It also agrees with the Respondent that the main purposes of administrative penalties are compensation to the Crown for the loss of any values, and deterrence. In most cases, it would be contrary to these purposes to assess a penalty that is less than the economic benefit drawn from a contravention. However, the Commission is not prepared to find that it will never be appropriate to assess such a penalty.

The Panel also finds that the other factors listed in section 117(4)(b) of the *Code* are not "mitigating factors" which are then applied to the factor of "economic benefit" set out in section 117(4)(b)(v). Rather, they are all factors which must be considered, and depending on the particular circumstances of each case, each factor may result in an increase or decrease in the penalty.

As for the *Canfor* decision, the Commission agrees with the Government's submission that *Canfor* represents a particular case where the Commission considered it appropriate to remove the economic benefit derived from a contravention. The *Canfor* decision does not, however, stand for the principle that all of the economic benefit must be removed in all cases.

2. Whether the Review Panel properly considered the factors in section 117(4) when assessing the value of the penalty in this case.

a) Economic Benefit

Both parties submit that, in this case, the penalty should have at least removed the economic benefit derived from the contravention. The Commission agrees. Takla harvested trees that should have been left standing, and this unauthorized harvesting compromised the intent and integrity of the RMZ and RRZ. Based on the evidence before the Commission, there is no reason that Takla should retain the economic benefit it received from this contravention of the *Code*.

b) Other Factors

The Board submits that the Review Panel failed to consider all of the relevant factors listed in section 117(4) of the *Code*, including the "gravity and magnitude of the contravention".

In its decision, the Review Panel stated:

> …this was the first contravention of this type by (Takla), the effect of the contravention was minimal, it was not continuous, it was not deliberate and (Takla) co-operated fully during the investigation.

However, the Board submits that that the Review Panel failed to consider levying any penalty amount to reflect the environmental damage and damage to other Crown resources.

The Board provided expert evidence indicating that the unauthorized clearcutting will have an impact on environmental and other Crown resources. Robert Thomson, a Professional Biologist and Senior Complaint Analyst with the Board, testified that the impact of the contravention should be considered significant. Mr. Thomson authored a report for the Board on the impact of the unauthorized harvesting in the wetland riparian area. The report, dated February 22, 2000, was based on file material, discussions with Fort St. James Forest District staff and Ministry of Environment, Lands and Parks staff located in the forest district office, and a field inspection carried out in February 2000. In the report, Mr. Thomson stated that, in addition to the direct loss of habitat in the riparian zones, the unauthorized harvesting would also likely have a significant impact on the wetland itself, and the number and diversity of organisms that use the wetland. Mr. Thomson also referred to an incremental impact on the ability of the landscape unit to support wildlife due to the heavy development that already existed in the area, and the fact that wetlands represent a relatively uncommon ecosystem within this particular landscape. The Board also provided an abundance of evidence regarding the ecological importance of wetlands and riparian habitat in general.

The Government does not dispute the significance of wetlands or riparian areas. Further, the Government agrees that the senior official should take into account the "gravity and magnitude" of the contravention, as well as the other factors in section 117(4) in assessing a penalty. The Government submits that it is up to the senior official to determine the extent of damage to the environment, if any, and consider it as a factor in assessing the penalty.

The Commission agrees that the Review Panel did not properly "consider" the factors listed in section 117(4) of the *Code* in assessing the penalty in this case. While the Panel did state that "the effect of the contravention was minimal," there is no indication in the decision that the Review Panel contemplated the impact of the unauthorized harvesting on the environment.

Upon consideration of the evidence provided by the Board, the Commission finds that the unauthorized harvesting of mature trees in the wetland riparian zones may well have compromised ecological values. Therefore, in assessing a penalty to Takla, the Commission finds that it is appropriate to take into account the environmental impact of the unauthorized harvesting as part of the gravity and magnitude of the contravention.

DECISION

In coming to this decision, the Commission has carefully considered all of the evidence before it, whether or not specifically reiterated here.

Pursuant to section 138 of the *Code*, the Commission rescinds the directions of the Review Panel as set out in its January 10, 2000 decision, and refers the matter back to the current District Manager with directions to:

1. determine whether a violation of section 67(1) or 67(2) is more appropriate in the circumstances;

2. assess a penalty for the contravention which removes the economic benefit that Takla derived from the contravention; and,

3. consider all of the relevant factors listed in section 117(4)(b), including the ecological impact of the contravention, in determining the appropriate penalty.

The appeal is allowed, in part.

Toby Vigod, Chair
Forest Appeals Commission

April 10, 2000