Forest Appeals Commission

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APPEAL NO. 2000-FOR-006

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:	Klaus Orleans	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Lorraine Shore, Panel Chair	
DATE OF HEARING:	February 20, 2001	
PLACE OF HEARING:	Prince Rupert, BC	
APPEARING:	For the Appellant: Klaus Orleans For the Respondent: Kyle Beadman	

APPEAL

This is an appeal brought by Klaus Orleans of the February 3, 2000 determination by Gary Adolph, District Manager, as varied in a July 13, 2000 review decision by Jim Snetsinger, Prince Rupert Forest Region. The District Manager found that Mr. Orleans had contravened section 96(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*") by harvesting a spruce log from Crown land without authority, and imposed a penalty of $1,824.08. On review, Mr. Snetsinger confirmed the contravention but reduced the penalty to $1,582.84.

The appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*. Under section 138 of the *Code*, the Commission may confirm, vary or rescind the determination appealed from. The Commission may also refer the matter back to the person who made the determination, with or without directions.

Mr. Orleans is seeking an order rescinding the contravention and penalty.

BACKGROUND

Mr. Orleans is a beachcomber in and around the North Coast area, near Prince Rupert. Beachcombing is permitted in this area provided that it is done below the high water mark and that there has not been a closure due to a log spill. The contravention in this case relates to the alleged harvesting of a Sitka Spruce tree

from above the high water mark within an old slide deposition area near the mouth of the Ensheshese River.

Most of the following background facts are undisputed.

On February 11, 1997, the Ministry of Forests ("MOF") received a phone call advising that Walter Moraes, the caretaker of a fish camp located at Worsfold Bay, which is on Work Channel, noticed some unusual activity in his area. Mr. Moraes had seen two tugboats working along the shoreline cutting and taking wood. As a result of the report, two employees of MOF, Kyle Beadman and Reg Nolander, and one RCMP officer, Max Fossum, flew up the Work Channel area later that day. In the course of the flight they noticed two boats. One was working close to shore, and the second was steaming towards the first one. They also observed a small bag of wood located near the fishing camp.

When they arrived at Worsfold Bay, they met with Mr. Moraes who advised them that the two boats he had seen were the Jaiger II, owned by Bob Rivard, and the Kaien Princess, owned by Klaus Orleans. The officials inspected the bag of wood and noted that it contained some spruce. It was determined that all of the wood was legitimate in that it was dead and looked as though it had been taken below the high water mark.

Later that month, on February 25, 1997, Mr. Beadman and another MOF employee and a deckhand were doing a routine skiff patrol of the Work Channel area. They came across a slide deposition near the mouth of the Ensheshese River. The slide, which had occurred some time before, had brought down a considerable number of trees, which had been deposited in a tangle near the river but above the high water mark. The officers noticed about a half dozen recently cut stumps throughout the slide area, all above the high water mark, and evidence that wood had been yarded out. The officers particularly noted one very large bucked spruce root wad. In his testimony before the Commission, Mr. Beadman said that it looked as though someone had cut a number of the downed trees in order to get to this particular spruce. The officers took photos of the slide site.

In the course of the patrol, Mr. Beadman encountered Bob Rivard and questioned him about the bag of wood they had earlier inspected at Worsfold Bay. Mr. Rivard told him that the wood had been scaled and was located at Hospital Island near Dodge Cove, which is near Prince Rupert. The next day, Mr. Beadman and the other MOF employees located the bag of wood. They noted that the spruce component, which had been present when it was at Worsfold Bay, was no longer there.

After returning to their office, the MOF employees talked to Ray Kabool, the District Scaling Supervisor, who provided them with a scale return that had been submitted earlier. It showed that two high value spruce pieces had been scaled for Mr. Orleans. Mr. Kabool suggested that they call around and see who was buying spruce. The MOF employees located someone who advised that Klaus Orleans had called about selling some spruce, and that the wood was located in front of Bob Rivard's house in Dodge Cove.

The investigating officials went to Dodge Cove that same day to look at the wood. They noticed a large piece that resembled the cut-off "root wad" in the Ensheshese River slide area. Another piece matched the piece that resembled the root wad. MOF employees compared photos which had been taken at the Ensheshese River with the wood found at Dodge Cove. They concluded that one of the spruce logs found at Dodge Cove, in particular, had been cut into two pieces.

Mr. Orleans and Mr. Rivard were interviewed by MOF officials on March 7, 1997. They acknowledged that they had been beachcombing in the Work Channel area. Both denied that they had removed any timber above the high water mark.

On March 12, 1997, Mr. Beadman and another officer returned to the Ensheshese River and cut two "cookies" from the stumps in the slide area, at a point approximately 20 metres above the high water mark. The cookies were brought back to the MOF office and photographed. Subsequently, another "cookie" was cut from one of the spruce logs found at Dodge Cove. Mr. Beadman, who is trained in the area of timber cruising and is a certified logging waste and residue surveyor, compared the two and concluded that the log at Dodge Cove matched the cut stump at the Ensheshese River. Mr. Orleans subsequently sold the wood in question for $692.48.

On December 1, 1997, Mr. Orleans was given an opportunity to be heard with respect to the alleged unauthorized harvesting of the spruce tree. At that time, he denied that he had removed any logs from above the high water mark. He also stated that he could not recall the exact location where he had obtained the log in question because he was working long hours at the time and was fatigued.

On February 3, 2000, the District Manager issued his determination. On a balance of probabilities, he found that Mr. Orleans had contravened section 96(1) of the *Code* by harvesting a spruce log from Crown land without authority. He found that the volume of the timber harvested was 8.656 cubic metres, of which the entire volume was scaled to a "I" grade.

The District Manager assessed a penalty of $1,824.08 for the contravention, based upon his assessment of the anticipated price that Mr. Orleans would have received for the two logs from the Vancouver Log Market at the time of the sale in April of 1997. He notes "I did not assign a higher level of penalty fact (up to twice market value) as stipulated in Section 119(1)(b) of the Act. For this incident, I determined it appropriate to leave the fine stand at (one times market value) level."

Mr. Orleans requested a review of this determination. The review was conducted by way of written submissions by Mr. Snetsinger. In a decision issued on July 13, 2000, Mr. Snetsinger upheld the finding that Mr. Orleans had contravened section 96(1) of the *Code*. However, he reduced the penalty to $1,582.84 based upon a recommendation by the senior official.

Mr. Orleans appealed these decisions stating that the "civil burden of proof has not been satisfied." He seeks an order rescinding the contravention and the penalty in their entirety.

RELEVANT LEGISLATION

Unauthorized timber harvest operations

96 (1) A person must not cut, 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*,

(b) under a grant of Crown land made under the *Land Act*,

(c) under the *Mineral Tenure Act* for the purpose of locating a claim or for other prescribed purposes,

(d) under the *Park Act*,

(e) by the regulations, in the course of carrying out duties as a land surveyor,

(f) by the regulations, in the course of fire control or suppression operations, or

(g) by the regulations, in the course of carrying out activities

(i) under a range use plan or a consent under section 101 or 102,

(ii) under a silviculture prescription for a backlog area or a stand management prescription,

(iii) [Not in force.]

Penalties for unauthorized timber harvesting

119 (1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, he or she may levy a penalty against the person up to an amount equal to

(a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 16 of the Forest Act, and

(b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.

ISSUES

1. Whether Mr. Orleans contravened section 96(1) of the *Code*.

2. If so, whether the penalty is appropriate.

DISCUSSION AND ANALYSIS

1. Whether Mr. Orleans contravened section 96(1) of the *Code.*

Section 96(1) prohibits a person from cutting, damaging or destroying Crown timber unless authorized to do so by a specific agreement or in particular circumstances.

There is no dispute that Mr. Orleans did not have authorization to cut the Crown timber, which was cut in the slide area near the mouth of the Ensheshese River. As a beachcomber, he does not require a particular licence to engage in the activity of beachcombing, but he is only allowed to collect timber that is below the high water mark. There is no dispute that the timber in question was located about 20 metres above the high water mark.

Mr. Orleans does not dispute that the log found at Dodge Cove matches the "butt" at the Ensheshese River site. However, he denies that he cut or removed the timber in question. He repeated his assertions made at the opportunity to be heard that he could not recall the exact location where he had obtained the log in question because he was working long hours at the time and was fatigued. Mr. Orleans also suggested that a beachcomber may attempt to salvage a log, but not be successful. Then, when a larger tide occurs, the piece will float free and be available for another beachcomber. He suggested that this occurred with the pieces in question. In cross-examination, he said that perhaps the person had had tow line or propeller problems.

There is no direct evidence that Mr. Orleans cut the log and removed it from the site. MOF says that, given all of the circumstances, it is more probable than not that Mr. Orleans was responsible for cutting the log. The Panel agrees.

The evidence against Mr. Orleans is circumstantial, but that is not unusual in such a situation. In cases of the unauthorized cutting of Crown timber, there are rarely witnesses to the actual act.

Further, the circumstantial evidence is strong in this case. Mr. Orleans acknowledges that he was beachcombing in the Work Channel and Quotoon Inlet area, the same general area where the contravention occurred on the Ensheshese River. Therefore, he was collecting logs in the relevant area at the relevant time. Further, he does not dispute that the wood seized at Dodge Cove was his property, nor does he dispute that he was in possession of wood that matched the "butt" located at the Ensheshese River slide area. Those circumstances call for some credible explanation by Mr. Orleans as to how he came into possession of the wood.

His explanation is that he found it, but that he does not remember where he found it. The Panel does not find this explanation to be credible. The wood in question stood out as being more valuable than the other wood which Mr. Orleans had legitimately salvaged. It is reasonable to conclude that he would have remembered finding such valuable wood. Similarly, his explanation that someone else cut it and was unable to remove it is not credible. The photographic evidence produced by MOF shows that the slide had produced a tangle of downed trees. Someone would have gone to considerable trouble to clear the way to get to the spruce in question.

Further, the tangle of trees was clearly above the high water mark and this would have meant that someone would have had to haul it towards the beach in order for it to float on a high tide. Why would someone go to the trouble of cutting the timber, move it to the beach where it could float at high tide, and then abandon such a valuable piece of timber?

There is no evidence that anyone other than Mr. Orleans and Mr. Rivard were beachcombing in the area in February 1997. Mr. Orleans argues that the caretaker Walter Moraes, says he did not see any boats *after* he saw those of Mr. Orleans and Mr. Rivard, but that does not mean he did not see any boats *before* that time. That may be correct, but, on the other hand, Mr. Orleans was in the area at the time, and he did not testify that there were any other boats in the area at the same time.

At the hearing Mr. Orleans also argued that MOF should be required to prove its case on the criminal burden of proof, that MOF has not met the civil burden of proof on a balance of probabilities.

Regarding the appropriate standard of proof, the Panel notes that this issue has been considered by the Commission in previous appeals. In *Hollis* v. *Government of British Columbia (Forest Practices Board, Third Party)*, (Appeal No. 97-FOR-13, August 31, 1998) (unreported), the Appellant was found in contravention of section 96(1) of the *Code*, his logs were seized (although later returned), and a penalty of $4,625 was levied pursuant to section 117 of the *Code*. The Appellant's counsel argued that the criminal standard of proof should be applied in that case. The Commission rejected that argument. It stated at page 4:

> The position of the Crown and the Forest Practices Board, which the Panel accepts, is that the correct standard of proof to be applied to administrative penalties under the *Code* is the civil standard of proof.

Although previous decisions of the Commission are not binding on this Panel of the Commission, the Panel agrees with the previous Commission decision that the criminal standard is not applicable to penalties of the nature imposed on Mr. Orleans.

The Commission further finds that MOF has demonstrated that, on the civil standard of proof, a balance of probabilities, Mr. Orleans is responsible for the unauthorized cutting of the Crown timber.

2. Whether the penalty is appropriate.

Mr. Orleans also argued that the penalty was excessive. He said that the photos showed "rot pockets" and, therefore, the wood was not "high end". He said that he sold it for $692.48, based on a selling price of $80 per cubic metre. Mr. Beadman testified that the wood was valued at $220 per cubic metre for 8.656 cubic metres.

In the determination, the District Manager assessed a penalty of $1,824.08, which was based upon his assessment of the anticipated price that Mr. Orleans would have received for the two logs from the Vancouver Log Market at the time of the sale. He calculated the penalty in accordance with section 119 of the *Code* as follows:

a. Stumpage – N/A (stumpage was paid on April 4, 1997 to equal a total of $95.95).

b. Market value of the logs – The log value equals $1,824.08. This value was calculated based on the month average domestic log-selling price for the coast as of April 1997. For this contravention, the volume of two logs (8.656 m^3) was multiplied by the selling price of grade I Sitka Spruce ($210.73 m^3) to equal the fine total of $1,824.08).

c. Less credit for previous billing – N/A.

d. Plus cost of re-stabling a free growing stand on the area – N/A.

e. Plus costs of applying silviculture treatments to the area – N/A.

The District Manager noted that, while Mr. Orleans did not have a record of official contraventions, a warning ticket had been issued on April 17, 1996 for possession of 6 to 8 cedar logs that had been harvested above the high water mark. The District Manager said that this incident indicates that Mr. Orleans had been engaged in at least one prior unauthorized harvesting activity. He also stated that "Based upon the above evidence, I believe that a penalty to this contravention of $1,824.08 is appropriate to ensure that you clearly understand that timber cannot be cut or removed from above the high water mark without authority."

On review, Mr. Snetsinger noted that the method for determining the penalty was calculated using appropriate log values for the period, and would only remove the economic gain received from the two logs. However, he states that, since that time, it had been recommended by a senior official that the monetary penalty be reduced to more adequately reflect the average coast log market values at the relevant time. He therefore reduced the penalty to $1,582.84. At the hearing before the Commission, the MOF said that it did not object to the reduction in the penalty.

Section 117(4)(b) states that a senior official may consider the following when assessing a penalty:

(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.

In this case, the Panel finds that it was appropriate to remove any economic benefit to Mr. Orleans from the sale of the timber. However, pursuant to section 117, the

economic benefit derived from the contravention is only one of the factors that may be taken into account in determining the penalty. Previous contraventions of a similar nature may also be considered. In the Panel's view, "previous contraventions" means an "official" contravention as set out in a determination where the person has had the benefit of all of the associated procedural protections of notice, an opportunity to be heard, and so on. A warning ticket does not fit within this category and, therefore, is not an appropriate consideration under section 117(4)(b)(i).

Having said that, the Commission notes that Mr. Orleans could have disputed the contravention alleged in the warning ticket in the administrative review and at his hearing before the Commission, but did not do so.

Considering the other factors, the Panel finds that the gravity and magnitude of the contravention is relatively minor and it was not repeated or continuous. However, the Panel finds that it was deliberate, in that Mr. Orleans knew he was not to remove logs from above the high water mark. Further, he did not admit the contravention, which has resulted in additional MOF resources having to be put into the investigation of this case. The Panel also agrees with the District Manager that, in addition to removing his economic benefit, the penalty should be sufficient to ensure that Mr. Orleans clearly understands that timber cannot be cut or removed from above the high water mark without authority – it should act as a deterrent. Accordingly, the Panel finds that it was appropriate to impose a penalty that may have exceeded the *actual* sale price of the wood in question. In keeping with the recommendation of the senior official, the Panel finds that the circumstances warrant a penalty, which reflects the average *market value* of the logs at the time of sale.

DECISION

For the reasons outlined, the Commission upholds the determination that there was a contravention of section 96(1) of the *Code*, and further finds no reason to disturb the penalty as reduced by the reviewer of $1,582.84.

Accordingly, the appeal is dismissed.

Lorraine Shore, Panel Chair
Forest Appeals Commission

April 2, 2001