Province of British Columbia

Forest Appeals Commission

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DECISION NO. 2005-FOR-004(b)

In the matter of appeals under section 82 of the *Forest and Range Practices Act*, R.S.B.C. 2002, c. 69.

BETWEEN:	Pope and Talbot Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Council of Forest Industries	**INTERVENOR**
BEFORE:	A Panel of the Forest Appeals Commission David Ormerod, Panel Chair	
DATE:	April 19, 2007	
PLACE:	Castlegar, BC	
APPEARING:	For the Appellant: Jason R. Fisher, Counsel For the Respondent: A. K. Fraser and Darcie Suntjens, Counsel For the Intervenor: Michael Stephens, Counsel	

APPEAL

This appeal is brought by Pope and Talbot Ltd. ("P&T") against a May 2, 2005 determination made by Larry Peitzsche, RPF, District Manager of the Arrow Boundary Forest District, Southern Interior Forest Region. The District Manager found that P&T had contravened section 67(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*")[1] , R.S.B.C. 1996, c. 159, by cutting trees on block 1 of cutting permit 403 ("CP 403"), within tree farm licence ("TFL") 23, contrary to the silviculture prescription ("SP"). The District Manager also found that the harvesting contractor and the falling sub-contractor had contravened section 67(1). The District Manager levied a total penalty of $1,000 for the contravention, which was apportioned 60 percent to P&T and 40 percent to the harvesting contractor. Only P&T appealed the determination made against it.

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[1] As the *Code* was in force at the time of the contravention, sections of the *Code* are cited in the determination. However, at the time of the determination and the appeal, the *Forest and Range Practices Act* was in force, and is the legislation that applies to the appeal process and powers of the Commission.

This appeal is heard pursuant to Division 4 of the *Forest and Range Practices Act* (the "*FRPA*"). The powers of the Commission on an appeal are set out in section 84 of that Act, which states:

84 (1) On an appeal

...

the commission may

...

(d) either

(i) confirm, vary or rescind the determination or decision, or

(ii) with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration.

P&T does not dispute that the trees were cut in contravention of the SP, but it submits that it was duly diligent, and the error was entirely the responsibility of the harvesting contractor and his sub-contractor, neither of whom disputed the determinations made against them.

The Government asks that the determination be upheld because P&T's defence of due diligence fails.

The Intervenor made submissions on the proper interpretation of the defence of due diligence as set out in section 72 of *FRPA*.

BACKGROUND

The harvesting of Crown timber in British Columbia is authorized by cutting permits appurtenant to one of several forms of tenure, including a TFL. CP 403 within TFL 23 has several blocks over which harvesting is authorized in compliance with the terms of the licence and the approved operational plans. One of these plans may be an SP.

An SP for block 1 of CP 403 was prepared and approved on August 4, 2001. That SP identified harvesting as clear-cut "with reserves", with the objective of leaving 10-12 m^2 of basal area per hectare and a residual inter-tree distance of 5-7 meters, in order to accommodate "heli-skiing". [The SP's reference to "reserves" is understood by the Panel to mean reserve trees, not reserve area.] An amendment to the SP was made and approved on November 13, 2003, but this did not materially change the tree retention objective.

P&T is the holder of TFL 23, and is responsible for all forestry operations on the licence area. In order to manage these responsibilities, the company has instituted an Environmental Management System ("EMS"), which sets out policies and

procedures to govern the conduct of forestry operations. Under the EMS procedures, a "pre-work" meeting was held on site on November 13, 2003, between the P&T Harvesting Superintendent, Daniel Paul, the logging contractor Mountain Meadow Contracting Ltd., represented by Larry Cameron, and the falling sub-contractor, Gregory Kehler.

At this pre-work meeting, it was stated that a second on-site meeting would be held once the guy-line clearing had been done, and it would be scheduled at the call of Mr. Cameron. The second meeting was not scheduled, and did not take place. Mr. Kehler began work on the block on November 17, 2003. On November 24, 2003, Randy Mackenzie, a logging supervisor with P&T, inspected the area and discovered an area that had been clear-cut instead of being selectively cut as required by the SP.

The operations were suspended and the Ministry was advised. Ministry staff completed an inspection report the following day.

P&T was advised by a letter dated November 27, 2003, that the operations on this block may be in contravention of section 67 of the *Code*. Similar letters were sent to Mr. Kehler and Mountain Meadow Contracting in June 2004. Mr. Kehler was interviewed by Ministry staff on January 6, 2004, and this interview was recorded in a written statement that was signed by both the interviewers and Mr. Kehler. The essence of this statement is that Mr. Kehler made a mistake in continuing to clear-cut the area after clearing the guy-line areas, and he did not think about the reserve tree prescription in the SP.

On June 28, 2004, the District Manager wrote to P&T, Mountain Meadow Contracting, and Mr. Kehler, advising them that Ministry staff had completed their investigation and concluded that the harvesting of 1.9 hectares within block 1, CP 403, may have been done in contravention of sections 67(1) and 96(1) of the *Code*. The District Manager invited these parties to present their evidence in an "opportunity to be heard" meeting. That meeting took place on November 2, 2004.

In support of its submissions at the November 2, 2004 meeting, P&T provided a letter summarizing the facts as it saw them, and outlining its defence of due diligence. On the facts, P&T did not dispute the investigation's findings that section 67(2)(d) of the *Code* had been contravened and that 222.3 m^3 of timber had been clear-cut from 1.9 hectares contrary to the SP. Rather, P&T asserted that it had exercised due diligence and, therefore, it should not be held responsible for the contravention. In this regard, the P&T letter states:

a) All logging contractors and supervisors have been trained on our Environmental Management System (EMS) and Sustainable Forestry Initiative (SFI) program.

b) The contractor and his crew have copies of specific work instructions that explain the requirement for a pre-work conference and following the approved plan. The EMS Work Instruction, which all contractors

and supervisors receive, is included as an attachment. This Work Instruction clearly identifies the steps to follow and what to do if the plan cannot be matched to the ground.

c) Our logging supervisor for the block followed the EMS procedures for a pre-work meeting and documentation of the pre-work, which was signed by both parties. At the pre-work the contractor was instructed on the falling requirements for the block. He signed the pre-work indicating that he understood the plan.

d) We provided regular monitoring and inspection of the contractor as detailed in the following chronological order of events: [see chronology in Appendix A] …. The chronological events clearly indicate that Pope & Talbot conducted pre-work meetings, and harvest inspections diligently in order to ensure that the block was harvesting [sic] in accordance with the approved plan. However, the Contract Faller made a mistake.

e) We want to emphasize that it was important for Pope & Talbot Ltd. to conduct two separate reworks on this site. This particular cut block has an extremely complicated SP in order to accommodate Mountain Caribou values. Pope & Talbot has been at the forefront in the development of innovative biologically appropriate caribou management prescriptions for more than ten years. It was very important that Pope and Talbot Ltd. reviewed [sic] this cut block on the ground with the contractor to ensure that the prescription was doable prior to involving additional parties. At the initial pre-work we reviewed the cutting prescription for the block but approved the clearcut falling of only the guy-line clearances. The second pre-work was designed to review the caribou habitat requirements with the contractor and the additional parties involved in the prescriptions prior to falling the rest of the unit.

Administrative determinations that there was a contravention of section 67(1) of the *Code* were made by the District Manager on May 2, 2005.

In his determinations, the District Manager recognized that Mr. Kehler had admitted to, and accepted blame for, the contravention, but the District Manager did not hold him accountable. Instead, he found P&T 60% responsible and Mountain Meadow Contracting 40% responsible, and allocated a $1,000 penalty accordingly. In making his determination, the District Manager rejected P&T's assertion that it was not responsible as it had exercised due diligence over the operations. His conclusion was that, given the complexity of the SP, more could have been done by P&T and Meadow Mountain Contracting to prevent such an infraction.

Neither Mr. Kehler nor Mountain Meadow Contracting requested a review or an appeal of the determinations. However, P&T requested a review, and submitted supporting information in a letter dated May 20, 2005. This information clarified

that both the original SP and its amendment on November 13, 2003, were consistent in specifying requirements for leave trees. However, on review, the District Manager found that P&T's submission failed to establish a defence of due diligence, and the District Manager confirmed his determination in a reply sent to P&T on June 15, 2005.

P&T subsequently appealed to the Commission.

The grounds for P&T's appeal are that the District Manager did not properly consider its due diligence defence. The due diligence defence under *FRPA* is set out in section 72(a), as follows:

> For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the
>
> (a) person exercised due diligence to prevent the contravention,
>
> (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
>
> (c) person's actions relevant to the provision were the result of an officially induced error.

Reference to the minister in *FRPA* includes the minister's delegate, in this case the District Manager. Under section 58.2 of *FRPA*, *Code* contraventions prior to January 31, 2004, are subject to the administrative penalties under section 71 of *FRPA*, and section 72 defences can apply.

P&T does not dispute that the contravention occurred, or argue that it was caused by an officially induced error. Further, P&T does not submit that the contravention resulted from mistaken belief. The appeal is based entirely on the ground that the falling contractor's actions were contrary to P&T's specific instructions as reinforced by the procedures specified in the EMS, and were unforeseeable. Therefore, P&T submits that it must be found to have exercised due diligence, and must be excused from responsibility on this ground.

P&T asks that the Commission rescind the determination.

ISSUE

The only issue in this appeal is whether P&T has established that it exercised due diligence, which is a defence to the contravention of section 67 of the *Code.*

RELEVANT LEGISLATION

The relevant provisions of the *Code*, as it was when the contravention occurred, are as follows:

PART 4 - FOREST PRACTICES SPECIFIC TO FOREST AND RANGE TENURE AGREEMENTS AND THE GOVERNMENT

DIVISION 3 - TIMBER HARVESTING

General

67 (1) A person who carries out timber harvesting and related forest practices on

(a) Crown forest land,

…

must do so in accordance with

(d) this Act, the regulations and standards, and

(e) any operational 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.

DISCUSSION AND ANALYSIS

Whether P&T has established that it exercised due diligence, which is a defence to the contravention of section 67 of the *Code.*

This appeal is on a defence of statutory due diligence, pursuant to section 72(a) of *FRPA*. The *actus reus* (i.e. harvesting contrary to the SP) is not in dispute. The case law on due diligence in "public welfare" offences has been dealt with at length in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153 (H.L.(E.)) (hereinafter *Tesco*), in *Regina v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C), and in *Regina v. MacMillan Bloedel Limited*, [2002] B.C.J. No. 283 (B.C.C.A) (hereinafter *MacMillan Bloedel*). The Commission recently considered many of those judicial decisions, and other relevant decisions, in *Weyerhaueser v. the Government of British Columbia* (Decision No. 2004-FOR-005(b), January 17, 2006) (unreported) (hereinafter *Weyerhaeuser*). In *Weyerhaeuser*, the Commission set out the following test for establishing the defence of due diligence:

> …the test for due diligence has two branches, as described in *R. v. MacMillan Bloedel Ltd.* Accordingly, the Panel must ask itself:
>
> (1) whether the event was reasonably foreseeable; and

(2) if so, did Weyerhaeuser take all reasonable care to establish a defence of due diligence.

In the context of a licensee who engages a contractor whose acts or omissions result in the contravention, the test applied by the Supreme Court of Canada in *R. v. City of Sault Ste. Marie* requires the licensee to demonstrate that:

(a) the act took place without the licensee's direction or approval; and

(b) the licensee exercised all reasonable care by taking all reasonable steps to ensure that the contravention did not occur.

The determination of whether a licensee is duly diligent depends on the circumstances of the case. Whether a licensee took "all reasonable steps" must be considered in the specific context of the "particular event" which comprised the contravention in question, and not in the context of a broader duty of care.

The standard to be applied is that of a reasonable licensee in the particular circumstances of the particular case, and will be shaped by the following factors discussed in *R. v. Placer Developments Ltd*. and *R. v. Gonder*:

(a) gravity of the potential harm,

(b) the available alternatives to protect against the harm,

(c) the likelihood of the potential harm,

(d) the skill required, and

(e) the extent the accused could control the causal elements of the offence.

[emphasis added]

In *Weyerhaeuser*, the Commission also found that, based on the plain language in sections 71(3) and 72(a) of *FRPA*, it is the due diligence of the person held liable that is considered in determining whether the defence applies.

This Panel of the Commission finds that the test set out above is applicable to the present appeal. As in *Weyerhaeuser*, the present appeal involves a licensee that has been held responsible for a contravention, and the licensee maintains that it should not be held liable because unexpected and unauthorized actions by its contractor and subcontractor caused the contravention. Thus, the question is

whether, applying the standards discussed above, P&T was duly diligent in the circumstances of this case.

In this appeal, P&T's defence is based primarily on its position that the EMS was adequate, reasonable and had been properly followed by its staff and contractors in this case; therefore, P&T exercised due diligence. In his determination, the District Manager rejected that argument, with the following reasoning at pages 6 to 7 of his determination:

> - P&T has stated that the prescription for CP 403 block 1 was extremely complicated and therefore was well aware of the higher level of risk involved.
>
> - [retracted observation on leave tree specifications, by the review letter dated June 15, 2005]
>
> - The prescribing forester was not in attendance at the pre-work. This should be standing practice when dealing with such complex prescriptions.
>
> - The evidence shows that the leave tree specifications were discussed at the pre-work, but it is obvious from the interviews that there was not a clear understanding of these specifications. Harvest operations (felling of the R/W and guy line clearances) was still allowed to commence.
>
> - Although all parties agree that a second pre-work was to be scheduled before felling operations commenced on the block, the requirement was not stated in writing on the pre-work form and no date was scheduled for the second meeting.
>
> I conclude that the due diligence actions, as described, were appropriate for an average level of risk operation. **In the case of this higher risk and more complex prescription, I conclude that it is reasonable that the company should have taken, and known the necessity for, a higher level of care to ensure compliance.**
>
> [emphasis added]

P&T argues that the District Manager erred in focusing on the foreseeability of the general contravention, rather than the specific cause of this particular contravention, contrary to the reasoning applied in *MacMillan Bloedel*, and that if the specific cause had been fully examined, it would have been clear that the event was unforeseeable, as were the events in *Weyerhaeuser* and other cases. P&T argues that, in this case, as in *Weyerhaeuser*, the contractor failed to follow the specific instructions given, and this could not have been foreseen. Further, P&T

submits that the District Manager's finding that the pre-work meeting was inadequate ignores the specific instructions given to the contractor.

In support of P&T's submissions, Randall Trerise, RPF, and Daniel Paul, testified. Mr. Trerise is a Forest Practices Manager with P&T. Mr. Paul is a Harvesting Supervisor with P&T, and was present at the pre-work meeting with Mr. Cameron and Mr. Kehler.

Mr. Trerise testified that P&T's EMS was developed in 2000, and is maintained and managed by Mr. Trerise, who had been in his current position with P&T for 12 years. Based on oral evidence and a review of the EMS itself, the Panel understands that the EMS is the codification of the Environmental Policy approved by the board of directors, and implemented by the Vice-President, Woodlands, for P&T.

Mr. Trerise, as the Forest Practices Manager, advises the Vice-President of Woodlands in the ongoing development and review of the policy. All staff and operations crews are required to conduct their activities in accordance with the direction and intent of the policy, by complying with the program procedures and tasks detailed in the EMS. Mr. Trerise develops EMS training materials, and determines the training needs of staff and crews. In providing evidence to the hearing he explained that the Woods Manager implements the requisite training of staff and crews, and the staff and crew supervisors assess the competence of those receiving training.

Mr. Paul testified that he completed a "Harvest Inspection Report" at the time of the pre-work meeting, and this was signed off by himself, and Larry Cameron (for Mountain Meadow Contracting). This report contains information that shows that the SP and logging plan were reviewed, and that leave trees were required. His testimony corroborates the written statement of Mr. Cameron that the three of them walked the block to discuss the leave tree requirements at this pre-work meeting. Pointing to this evidence, Mr. Paul stated that he cannot explain why Mr. Kehler then clear-cut the areas outside of the road right-of-way and guy-line clearances.

Mr. Kehler did not appear at the hearing, and has declined to add anything further to the statement that was recorded in the Ministry interview on January 6, 2004. This interview record, which was signed by Mr. Kehler, states:

> Greg said that he didn't consider the prescription [SP] after clearcut falling of the R/W. Greg said he just continued clearcutting and not thinking about the change required to leave trees.
>
> F.O. Anderson asked about the prescription of the block completed in Burton/Woden Cr [a separate harvesting operation] in that weren't reserve trees left there. Greg said reserve trees were required in Burton and that in this case a mistake on his part had been made.

> Greg also said that he talked to Larry Cameron and told him that this would be the information & statement he would be giving to us. Greg said that his statement would not change if an opportunity to be heard is held.

In summary, P&T's defence relies on showing that the procedures implemented under the EMS were sufficient to prevent foreseeable harm, that those procedures were properly followed in this case, that the contravention was entirely unforeseeable, and therefore, P&T exercised due diligence.

In response, the Government says that the contravention was reasonably foreseeable. Specifically, the Government submits that it was reasonably foreseeable that Mr. Kehler would fail to comply with the SP, as there is always a risk that harvesting may deviate from operational plans.

The Government also submits that P&T is the "person" seeking to avail itself of the due diligence defence, and therefore, P&T must establish that the contravention took place without the direction or approval of the "directing mind" of P&T. The Government submits that the verbal instructions given by Daniel Paul to Larry Cameron and Greg Kehler, to only cut the road right of way and guy-line clearances, were given by a low level employee of P&T, and the due diligence in this act was that of the employee, and not that of the company.

The Government submits that, not only did Mr. Paul fail to take reasonable care in the circumstances, but also, that Canadian case law suggests that the due diligence defence should be assessed at a higher level of responsibility within corporations; namely, at the level of the persons responsible for putting proper systems in place to prevent such contraventions. The Government submits that, in this case, Mr. Paul would not be considered a directing mind of P&T, because there is no evidence that he had the authority to devise and supervise the implementation of corporate policies regarding the hiring, direction and supervision of harvesting contractors in BC. The Government submits that P&T has failed to provide evidence to establish who was directly involved in developing policies and procedures for hiring, directing and supervising harvesting contractors in BC.

Furthermore, the Government submits that the evidence does not establish that P&T had adequate systems in place. In particular, the Government notes that Mr. Paul instructed Mr. Kehler to begin clear-cutting the guy-line clearances and road right-of-way despite the fact that P&T was seeking an amendment of the SP and logging plan at that time. Additionally, the Government submits that, in contrast to *Weyerhaeuser*, P&T has neither established that Mr. Kehler was a reputable contractor, nor provided evidence of its procedures for hiring, instructing or supervising contractors.

The Government also argues that the instructions to Mr. Kehler were given orally, required a further procedure that was not the usual practice after a pre-work meeting, and relied on Mr. Kehler to initiate and perform multiple instructions without supervision. The Government maintains that, in the context of a complex

silviculture plan, these factors are insufficient to establish a defence. Furthermore, P&T has not demonstrated that it ensured that Mr. Kehler understood those instructions.

The Intervenor was not granted leave to take a position on the particular merits of either P&T's or the Government's evidence and arguments in this case, but to comment on the proper interpretation, application and scope of the due diligence defence. They take the position that the test set out in *Weyerhaeuser* is correct and should be adopted in this appeal. Further, they say that the standard of care to be demonstrated in a due diligence defence varies with the facts of a particular case, and the factors that shape the appropriate standard of care include the gravity of potential harm, alternatives available to protect against harm, the likelihood of harm, the skill required, and the extent of control that the accused has over the causal elements.

The Commission's findings

According to the test set out in *Weyerhaeuser*, the Commission must first determine whether the contravention was reasonably foreseeable. The Panel finds that it was reasonably foreseeable that there could be difficulties with recognizing the boundaries between the areas to be clearcut and the areas to be selectively cut in the cutblock. In that regard, the Panel finds that there is always a risk that harvesting may deviate from operational plans and, in this case, that risk was higher than usual because the cutblock had an extremely complicated SP.

The second question focuses on the *actions* of the party claiming the defence of due diligence. It focuses on the actions taken to prevent the reasonably foreseeable problem from occurring. As noted in *Weyerhaeuser*, when a licensee engages a contractor whose acts or omissions result in a contravention, for the licensee to establish a defence of due diligence the licensee must demonstrate that:

(a) the act took place without the licensee's direction or approval; and

(b) the licensee exercised all reasonable care by taking all reasonable steps to ensure that the contravention did not occur.

In this case, the evidence shows that Mr. Paul of P&T followed P&T's EMS procedures for a pre-work meeting with Mr. Cameron, of Meadow Mountain Contracting, and Mr. Kehler, the falling subcontractor. Further, Mr. Kehler was instructed on the falling requirements for the cutblock. The evidence also shows that P&T did not know that the second on-site pre-work meeting did not take place, and did not know that the contravention had occurred until one of its staff inspected the area several days after the contravention occurred. It is clear that P&T relied on Meadow Mountain Contracting to schedule the second on-site pre-work meeting, and to ensure that Mr. Kehler followed the SP.

The next question is whether P&T exercised all reasonable care by taking all reasonable steps to ensure that the contravention did not occur. In this regard, the Commission notes that whether a licensee took "all reasonable steps" must be considered in the specific context of the "particular event". Further, the standard to be applied is that of a "reasonable licensee in the particular circumstances of the particular case", as informed by the factors of: gravity of the potential harm, the likelihood of the potential harm, the available alternatives to protect against the harm, the skill required, and the extent the accused could control the causal elements of the offence.

It is clear to the Panel that P&T, on the one hand, maintains that their EMS is as "good as it gets" in being a system to ensure regulatory compliance and good stewardship, while the Government, on the other, maintains that the procedures applied were deficient. The Government's position is that the EMS procedures were deficient because they are aimed at the "average" situation rather than complex ones such as this. It submits that, in this case, the EMS was deficient in the face of implementing a complex prescription on the ground, and that the contravention that occurred could have been prevented by better procedures. The Government submits that the "directing mind[s]" in the company should have foreseen the possibility of unauthorized harvesting in the circumstances of a complex prescription, and taken care to implement procedures that would prevent it.

There is no evidence before this Panel to show that the deployment and application of the EMS, including training of relevant staff and contractor crews, had been incomplete or less than as designed, in the present case. The Commission finds that there were no observable lapses from the EMS, as designed. However, the Commission finds that there is evidence that the EMS was inadequate, based on the evidence. Although P&T did not specifically address whether the EMS recommended, or required, the pre-marking of leave trees or the boundaries of the reserve areas, P&T states that its operational procedures are entirely implemented under its EMS. Given the potential environmental harm that can arise from the unauthorized harvesting of reserve trees, especially in this case where the leave trees were intended to reduce impacts on sensitive mountain caribou, the Commission finds that clear marking of reserve areas and/or leave trees is something that a reasonable licensee would have paid more attention to. Licensees often have a pre-work system for marking reserve areas and/or leave trees, and checking things such as the accuracy of falling boundary locations and harvesting methods. There is no indication that P&T had a system in place for ensuring the proper marking of reserve areas and/or leave trees.

The Panel finds that too much discretion was given to P&T's logging supervisory staff, the contractor and the sub-contractor in deciding how to implement the leave tree requirements of the SP.

In reaching those conclusions, the Commission relies on the following evidence. When Mr. Trerise was asked why the leave trees in a SP such as this would not have been pre-marked, the response was that falling safety issues made it difficult to pre-mark. While pre-marking of the individual leave trees would have shown

due diligence to the satisfaction of the Panel, the Commission accepts that the safety issue is a reasonable and acceptable reason for not doing so.

In examination of the evidence of Mr. Paul, and in particular the SP map and the oblique aerial photograph of the block after harvesting, it became evident that there was no marking ribbon or paint marking of the limits of the guy-line clearance areas, but there was block boundary marking, and the boundary between sub-units 'B' and 'C' were also marked with ribbon. The area that had been improperly clearcut is entirely within the west half of sub-unit 'B' and above the road way, and in its northern extent, it tends to follow the split line between 'B' and 'C'. Consequently, Mr. Paul was asked if Mr. Kehler could have been attempting to clearcut to the ribboned split line. His response was simply that this area was to be selectively harvested and that Mr. Kehler only had permission to clearcut the guy-line clearances. The Panel finds this to be a distinctly unhelpful response, which only begs the question of how Mr. Kehler was supposed to know the limits of the guy-line clearances.

In *Weyerhaeuser*, the evidence was that, under that company's EMS, all contractors and their employees receive annual training in a comprehensive and systematic system of ribboning and tree painting to ensure that all of the different parts of a cutblock are treated in accordance with the SP, and that there can be no confusion. The details of any marking systems that might be mandated or specified by P&T's EMS were not provided in evidence, but the Panel does find that the lack of marking of the limits to the guy-line clearances contributed to Mr. Kehler's mistake, and that such marking would have been prudent under the SP being implemented.

In addition to P&T leaving it up to the faller to decide which trees to leave in the selective harvesting areas of the cutblock, the Panel finds that an overly broad discretion was given to Mr. Paul, the harvesting supervisor, in deciding what the content of the pre-work meeting was to be, what was to be documented in writing, and what directions could be given only verbally. Mr. Paul stated that it had not been necessary for Mr. Kehler to attend the pre-work meeting, as it was sufficient to rely on the contractor, Mountain Meadow Contracting, to properly instruct their sub-contractors.

While Mr. Kehler's attendance at the pre-work meeting of November 13th was no doubt helpful to Mr. Cameron, the Panel is not reliant on this, and would weigh the evidence the same had he not been in attendance. The chain of command through Mr. Paul to the contractor, Mr. Cameron, and on down to the sub-contractors is in itself not relevant to the issue of due diligence on the part of P&T.

In giving the contractor the responsibility to decide on the limits of the guy-line clearance areas and to select leave trees beyond these limits, without the benefit of clearance area boundary layout or leave tree markings, set up circumstances which led to the contravention. The Panel finds that the collective efforts of P&T through its EMS, their layout of the harvesting area, and their supervision of the contractor, were deficient.

That this event was reasonably foreseeable, and that more could have been done to prevent its occurrence, is clear to the Panel. The Commission finds that P&T's standard operating procedures relied on a faller to decide on the location of the boundary between a clear cut area (the guy-line clearance area) and a selective harvesting (thinning) area. The Commission finds that the blame in this case must be placed on P&T's operating procedures, and the lack of a requirement to place appropriate markings in the field in particular. The Panel agrees with the District Manager that the defence of due diligence is not established in this case.

P&T's is reduced to an absolute reliance on the verbal instructions given by their employee at the field supervision level, under the umbrella of the operating procedures dictated by their EMS. There is no evidence that Mr. Paul failed to meet a requirement of these operating procedures, and the Panel finds that the EMS contains the instructions given by the "directing mind" of the company. In this context, the Panel finds that the Vice-President, Woodlands and his Forest Practices Forester, and possibly also the Woods Manager, can collectively be considered the directing mind of policies and procedures designed to ensure regulatory compliance, and that they failed in establishing adequate procedures to prevent the unauthorized harvesting from occurring.

If the instructions given to Mr. Paul with respect to regulatory compliance were simply that he should do whatever he considers necessary to prevent contraventions, would P&T have better insulated themselves from liability, and instead let their employee, Mr. Paul, take the fall for failing to have adequately instructed or supervised the contractors? This essentially was the line of defence in *Tesco* and it was successful. However, the circumstances in the present case are considerably more complex and subtle. As noted above, the Commission finds that it is prudent practice in forestry to lay out complex SP's in a manner that avoids confusion, including placing clear markings on the boundaries of the different treatment areas within the block. That Mr. Paul did not have the limits of the guy-line clearances marked for Mr. Kehler's benefit, and that there is no evidence that P&T saw this as a contributing factor in failure to properly implement the SP, speaks more to a blind and unquestioning reliance within P&T's forestry management on their EMS, as developed to that point in time, than to any lack of diligence on Mr. Paul's part.

The Panel rejects P&T's argument that it could not have foreseen that Mr. Kehler would not follow the verbal instruction to only clear the guy-line areas. Such an outcome was foreseeable, and could have been prevented with greater effort to mark the limits of the guy-line clearances. Mr. Paul could have done so on his own initiative, but that does not excuse P&T from its overarching responsibility to manage their operations so that such contraventions would not occur.

For all of these reasons, the Commission confirms the District Manager's determination.

DECISION

In making this decision, this Panel of the Commission has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons provided above, the Commission confirms the May 2, 2005, determination of the District Manager.

The appeal is dismissed.

"David Ormerod"

David Ormerod, Panel Chair
Forest Appeals Commission

September 4, 2007

APPENDIX A

Chronology of events from P&T letter November 2, 2004

November 13, 2003 (Thursday)

- We held a prework meeting (copy of the prework is attached) with Mountain Meadow Contracting (Larry Cameron) and the Contract Faller (Greg Kehler). At the prework we reviewed:
- Silviculture Prescription and Logging Plan (attached)
- Falling pattern.
- Requirements for follow-up meeting with Pope & Talbot Ltd, Mountain Meadow Contracting and CMH prior to further falling within the cut block.
- Agreed that felling of guyline clearance right of way could commence prior to meeting with CMH.

November 17, 2003 (Monday)

- Felling commenced.

November 21, 2003 (Friday)

- Harvest Inspection.
- Portion of block had been clearcut.
- Faller not on-site.
- Contacted Larry Cameron by phone and instructed him to cease falling.
- P&T contacted MoF by phone and e-mail.
- MoF not available.

November 24, 2003 (Monday)

- Pope & Talbot meet on site with Contract Faller (Greg Kehler) to review this incident.

November 25, 2003 (Tuesday)

- MoF and Pope & Talbot meet on site to review this incident.

December 1, 2003 (Monday)

- Pope & Talbot meet with Mountain Meadow Contracting (Larry Cameron) to review this incident.
- Arrangements made for another prework with CMH and Development Foresters.

December 4, 2003 (Thursday)

- Prework Meeting with Mountain Meadow Contracting, Contract Faller and CMH.
- Felling re-commences.

December 11, 2003 (Thursday)

- Pope and Talbot and CMH conduct a joint inspection of block.
- Looks good.

December 17, 2003 (Wednesday)

- Pope and Talbot, MoF and CMH inspect block.
- Looks good.

January 6, 2004 (Tuesday)

- MoF interview Contract Faller (Greg Kehler)
- Contract Faller admits he made a mistake.

January 7, 2004 (Wednesday)

- Pope & Talbot, MoF and Dennis Hamilton (biologist) inspect block.
- Looks good.

January 20, 2004 (Tuesday)

- Mountain Meadow Contracting notifies the MoF and confirms that a prework was done on November 13, 2003 but another meeting with CMH would be required prior to felling the block.
- Mountain Meadow Contracting confirms that the Contract Faller made a mistake.