Forest Appeals Commission

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DECISION NOS. 2011-FOR-001(a) and 2011-FOR-002(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*

BETWEEN:	Charles E. Kucera	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission David H. Searle, CM, QC, Panel Chair	
DATE:	Conducted by way of an oral hearing on September 14 and 15, 2011	
PLACE:	Golden, BC	
APPEARING:	For the Appellant: Bruce F. Fairley, Counsel For the Respondent: Natalie Hepburn Barnes, Counsel	

APPEALS

[1] Two appeals were filed by Charles Kucera. The first appeal is against a February 14, 2011 determination made by Garry Beaudry, District Manager, Columbia Forest District, Ministry of Natural Resource Operations (the "Ministry")[1]. The determination was made pursuant to section 71(2)(a) of the *Forest and Range Practices Act* ("*FRPA*"). In it, Mr. Beaudry found that Mr. Kucera contravened section 77(1) of the *Woodlot Licence Forest Management Regulation*, B.C. Reg. 325/98, and levied an administrative penalty of $1,000 [Appeal No. 2011-FOR-001].

[2] The second appeal is against Remediation Order No. 101, issued by Mr. Beaudry under section 74 of the *FRPA*, and also dated February 14, 2011 [Appeal No. 2011-FOR-002].

[3] The powers of the Commission on these appeals are set out in section 84 of the *FRPA*, which provides that, on an appeal, the Commission may:

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[1] Since the determination was made, the responsibilities of the Ministry of Natural Resource Operations relevant to this appeal were placed with the newly created Ministry of Forests, Lands and Natural Resource Operations. However, as this appeal dates back to 2000, it should be noted that the government functions/responsibilities relevant to this appeal were formerly carried out by the Ministry of Forests, and later, the Ministry of Forests and Range. For the purposes of this decision, the Panel will use the defined term "the Ministry" to encompass them all.

(c) consider the findings of the person who made the determination or decision, and

(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.

[4] Mr. Kucera asks the Commission to rescind the determination referred to in paragraph 1 (above) or, in the alternative, to decide that the contravention is "trifling" and that it is not in the public interest to levy the administrative penalty pursuant to section 71(2)(a)(ii) of the *FRPA* .

[5] Mr. Kucera also asks the Commission to rescind the Remediation Order.

BACKGROUND

[6] Mr. Kucera is the holder of Woodlot Licence #1587 dated in December, 2000, which contains a Site Plan (the "SP"). The SP sets out "Long-term Management Objectives" which provide in part:

- Manage a multi-species multi layered stand of Douglas-fir, spruce, lodgepole pine and aspen to provide structural diversity and maintain overstory cover to meet landscape level objectives for biodiversity, wildlife habitat and timber production.
- This cut will be a regeneration cut to create openings for regeneration and to remove pine infested with mountain pine beetle. Douglas–fir veterans, aspen and cottonwood are long-term reserve trees to contribute to landscape level objectives for biodiversity.

[7] Also contained in the SP is a "Silviculture Plan" which refers to both natural and artificial regeneration and requires regeneration to be completed within 7 years of the harvest. As the harvest here commenced on or before December 11, 2001, the openings were required to be reforested by December 10, 2008 in accordance with the stocking standards set out in the silviculture plan section of the SP, which includes both preferred and acceptable species (i.e., 700 well-spaced preferred and acceptable species per hectare, and 600 preferred species per hectare).

[8] On February 18, 2005, an amendment was made to the SP of Woodlot Licence #1587, revising the original cutting specifications by requiring the removal of Mountain Pine Beetle impacted trees as a priority. The amendment also required: "All openings will be regenerated artificially …".

[9] A stocking survey of Woodlot Licence #1587 was conducted by the Ministry in the spring of 2009. It found that 9.3 hectares of a 19 hectare opening in block 2 was not reforested as required in the SP. In particular, although the stratum had the overall minimum number of well-spaced stems per hectare, it fell short of meeting the minimum number of stems per hectare of the preferred species: there

were only 355 stems of preferred species per hectare when there should have been a minimum of 600. Mr. Kucera does not suggest otherwise.

[10] By letter dated February 14, 2011, Garry Beaudry, exercising authority delegated to him by the Minister, issued the determination under appeal. He found that Mr. Kucera had contravened section 77(1) of the *Woodlot Licence Forest Management Regulation* and, after noting that none of the statutory defences were raised by Mr. Kucera, and being satisfied that the facts do not support any of the statutory defences, he levied an administrative penalty of $1,000.

[11] Mr. Beaudry also issued Remediation Order No. 101 requiring Mr. Kucera to complete the regeneration to the minimum stocking levels prescribed in the SP for the area, or alternatively, "Have the original stocking standards reviewed by a professional forester and submit an amended plan." [Emphasis added] The work under the Remediation Order was to be carried out by July 15, 2011.

[12] On September 1, 2011, presumably in preparation for the hearing in this matter, a further regeneration survey was conducted on Mr. Kucera's woodlot by Alex McLean and Barb Wadey, with the Ministry. They found that, as a result of natural regeneration, there are now enough minimum preferred trees on site (682/hectare of preferred species were counted). However, they also state that, in all likelihood, this block will not meet the free growing dates as outlined in the SP.

ISSUES

[13] At the oral hearing before the Commission, Counsel for the Government took the position that, because Remediation Order No. 101 had expired on July 15, 2011, and also because natural regeneration of sufficient preferred species had occurred, though not within the time period required, the appeal in respect of Remediation Order No. 101 need not proceed. Counsel for Mr. Kucera concurred, as did the Panel.

[14] Counsel for Mr. Kucera, while Mr. Kucera was being cross-examined by opposing counsel, made the following admissions for the record:

a. That regeneration of Woodlot #1587 was not completed within the 7 year period as required, with respect to the number of preferred species, and

b. The only issues outstanding for determination in this appeal are:

   1. Whether Mr. Kucera is able to demonstrate due diligence and thereby avoid the contravention?

   2. If due diligence is not established, whether the administrative penalty of $1,000 is appropriate?

[15] Accordingly, the hearing proceeded upon the foregoing basis.

RELEVANT LEGISLATION

[16] Mr. Beaudry found that Mr. Kucera had contravened section 77(1) of the *Woodlot Licence Forest Management Regulation*, which states as follows:

Stocking requirements at regeneration date

77 (1) When establishing a free growing stand under section 76, the holder of a woodlot licence must establish a stand that meets the stocking requirements of this section on or before the regeneration date, …

[17] Mr. Beaudry made his determination under section 71 of the *FRPA*, which addresses administrative penalties for contraventions. [Note: part 11 of the *FRPA* makes section 71 applicable to contraventions of regulations under the *Forest Practices Code Act of British Columbia* that occurred after January 30, 2004, which is the case here.] The relevant provisions in section 71 of the *FRPA* states as follows:

Administrative penalties

71 (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.

(2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,

(a) if he or she determines that the person has contravened the provision,

(i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or

(ii) may refrain from levying an administrative penalty against the person if the minister considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty, [Emphasis added] or

(b) may determine that the person has not contravened the provision.

…

(5) Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:

(a) previous contraventions of a similar nature by the person;

(b) the gravity and magnitude of the contravention;

(c) whether the contravention was repeated or continuous;

(d) whether the contravention was deliberate;

(e) any economic benefit derived by the person from the contravention;

(f) the person's cooperativeness and efforts to correct the contravention;

(g) any other considerations that the Lieutenant Governor in Council may prescribe.

[18] The "prescribed amount" referred to in section 71(2)(a)(i) is found in the *Administrative Remedies Regulation*, B.C. Reg. 182/98. That regulation establishes

a maximum penalty of $50,000 for a breach of section 77(1) of the *Woodlot Licence Forest Management Regulation*.

[19] The statutory defences related to administrative proceedings are found in section 72 of the *FRPA* as follows:

> **72** 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,

DISCUSSION AND ANALYSIS

1. Whether Mr. Kucera is able to demonstrate due diligence and thereby avoid the contravention?

[20] The burden of proof is on an appellant to establish, on a balance of probabilities, the defence of due diligence. Having admitted that regeneration had not occurred within the 7 year period as required in the SP, Mr. Kucera is left with the need to establish due diligence to avoid liability.

[21] In his evidence, Mr. Kucera said that he had ordered seedlings for artificial regeneration while also taking the position that natural regeneration was all that was necessary and required under the Long-term Management Objective of biodiversity. Mr. Kucera admits to cancelling the seedling order because it would have cost him between $10,000 and $12,000, money he did not have. Mr. Kucera further says that he had no money for seedlings because he chose to use what funds he had to pay $26,000 in legal fees.

[22] The $26,000 in legal fees relates to a civil law suit commenced by his neighbor, Irvine Graham, against Mr. Kucera in respect of access by Mr. Kucera through Graham's land to his own. Judgment was given in November 2009, with costs against Mr. Kucera. The access at issue in the law suit does not affect access to Woodlot Licence #1587, hence is largely irrelevant to these proceedings.

[23] Mr. Kucera further states that, on September 10, 2001, he suffered a serious accident which affected his eye sight, required much surgery, and prevented him from working. No medical evidence was offered to establish the seriousness of the injury.

[24] Mr. Kucera conducted site visits of his wood lot, but made no reports to the Ministry, nor took any positive steps to meet the requirements of his SP. Nor did he take other opportunities available to him to alter the requirements of his SP. In addition, although it was after Mr. Beaudry had already determined that there had been a contravention, the Remediation Order also specifically provided for a review by a professional forester of the original stocking standards and the opportunity to submit an amended plan. He did not take this opportunity.

[25] Notwithstanding the fact that Mr. Kucera had many years and many opportunities to be pro-active, the Panel finds no evidence of him ever doing so. To succeed in a defence of due diligence much more is required.

[26] When asked, neither Counsel were able to provide any legal authority for the proposition that a lack of funds can establish a defence of due diligence. Indeed, in this matter, the lack of funds has an element of choice to it: Mr. Kucera admits to making the choice to use his available financial resource to pay legal bills rather than to pay for the purchase of seedlings and their planting.

[27] In addition, the Panel finds that Mr. Kucera's reliance on biodiversity, because it is a Long-term Management Objective, does not provide a due diligence defence to a specific requirement that is part of the silviculture plan. Artificial regeneration was specifically required by the SP and it was to be completed within 7 years – it was not a matter of choice. In the Panel's view, the general long term requirements must give way to the specific short term requirements.

[28] The leading case from the Commission's perspective on the test for the defence of due diligence is *Pope & Talbot Ltd. v. British Columbia*, [2009] B.C.J. No. 2492, a judgment of Madam Justice Fisher. In that case, the Court was considering the Commission's interpretation of the statutory defence as found in section 72 of the *FRPA*. The following are, for the purposes of this matter, the relevant comments by the Court:

> 11 The Commission has interpreted this statutory defence in accordance with common law principles, following *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, and *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510. Its leading decision on the application of the defence under the *Forest and Range Practices Act* is *Weyerhaeuser v. The Government of British Columbia* (Decision No. 2004-FOR-005(b), January 17, 2006). The Commission has applied the interpretation in *Weyerhaeuser* in subsequent decisions, including the decision in this case.
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> 12 *Sault Ste. Marie* established "strict liability offences" as offences where the doing of the prohibited act *prima facie* imports the offence but the accused may avoid liability by proving that he took all reasonable care. At p. 1326, Dickson J. (as he then was) set out the defence of due diligence as follows:
>
> > The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.
>
> 13 In *MacMillan Bloedel*, a majority of the B.C. Court of Appeal concluded that the company had established the defence of due diligence on the basis of a mistaken set of facts. The court described the defence, as set out in the above passage from *Sault Ste. Marie*, as having two alternative branches:
>
> > [47] … The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may

> escape liability by establishing that he took reasonable care to avoid the "particular event".

[29] Consequently, he may only escape liability by establishing that he took reasonable care to avoid the particular event.

[30] There is nothing in the evidence to suggest that Mr. Kucera did anything "to avoid the particular event" (i.e., the contravention). Indeed, by making the choice to pay his legal fees rather than buying the seedlings, he caused the event to occur. The defence of due diligence therefore fails.

2. Whether the administrative penalty levied is appropriate?

[31] The administrative penalty levied is $1,000.

[32] The maximum penalty allowed by law is $50,000.

[33] In his determination, Mr. Beaudry was required to consider the factors set out in section 71(5)(a) to (g) of the *FRPA*. While Mr. Beaudry does itemize the factors, he does not relate each of them to the circumstances of this matter. What he does say is the following:

> Having regard to the facts of this case, I have decided the contravention is not trifling and that it is therefore appropriate to levy a penalty in the amount of $1000. My reasons are as follows:
>
> You have known about this contravention since the expiry of the reforestation deadline in December 2008. In addition, the Forest Service sent you a notice on October 20, 2009 stating that there was an investigation underway and CP A block 2 may not meet legal regeneration requirements. Regardless of these warnings, you have taken no action to remedy the contravention. This penalty is meant to be a deterrent from future similar contraventions.
>
> The mitigating factors your [sic] presented were all related to economic hardship. Economic hardship is not one of the factors listed in section 71(5) of the *Act* which must be considered before levying a penalty.
>
> The penalty is not larger due to the fact that you still have the obligation to reforest the area.

[34] With the benefit of the passage of time, Mr. Beaudry's final assessment quoted above is no longer correct. The Remediation Order has been abandoned because over the 9 years since harvesting occurred, there has been a natural regeneration of the preferred species in sufficient numbers to meet the SP requirement.

[35] What has been lost is time; to be specific, the timely regeneration of the wood lot. Barb Wadey's evidence at the hearing was that if the trees had been planted as required, they would have been approximately 3 feet high by now. Instead, the preferred species observed on the block were so small and immature that it is unclear how many will survive. The consequence of this were expressed at the hearing as well as in the September 1, 2011 "Kucera Woodlot Regen Survey" by Alex McLean and Ms. Wadey, where they state:

> In all likelihood this block will not meet the free growing dates as outlined in the Silviculture Prescription.

[36] In Exhibit 2-1, Tab 2 at p. 2-3, Alex McLean, the investigating officer, deals with each of the factors set out in section 71(5).

[37] Based on all of the evidence before the Panel, the Panel agrees with Mr. Beaudry that the contravention is not trifling, and that it is in the public interest to levy an administrative penalty. Therefore, the Panel has considered the factors in section 71(5) and its findings on each of the factors is as follows:

> Previous contraventions of a similar nature
>
> None were advanced in evidence.
>
> The gravity or magnitude of the contravention
>
> The investigating forest official, Mr. McLean, comments that 49% of the natural regenerated trees is balsam, an inferior species with nominal economic value. The Panel's view is that the gravity or magnitude of the contravention is relatively serious.
>
> Whether the contravention was repeated or continuous
>
> The Panel concurs with Mr. McLean that it is continuous, for 9 years in fact.
>
> Whether the contravention was deliberate
>
> The Panel's view is that it was a clear choice, hence deliberate.
>
> Any economic benefit derived from the contravention
>
> Yes. Mr. Kucera saved $10,000 to $12,000 (the cost of the seedlings), plus the cost of planting.
>
> Cooperativeness and efforts to correct the contravention
>
> Based on the evidence, in the Panel's view, there were none.

[38] Based upon the Panel's view of each of the factors that are required by law to be taken into account, the administrative penalty of $1,000 is inadequate. The Panel would have assessed a higher penalty, equal to the benefit received by Mr. Kucera's failure to purchase and plant the seedlings as required under the SP, as a minimum.

[39] That being said, there was no request by the Government for an increase of the penalty, which I must assume was not an oversight.

[40] While tempted to raise the penalty to an amount that would constitute a reasonable deterrent, the Panel declines to do so on its own motion.

DECISION

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

[42] For the reasons stated above, the Panel confirms the determination of the District Manager, Garry Beaudry, and the administrative penalty of $1,000, and concurs that the Remediation Order, having expired and the regeneration terms having been met, is no longer in force or effect.

[43] Accordingly, the appeals are dismissed.

"David H. Searle"

David H. Searle, CM, Q.C., Panel Chair
Forest Appeals Commission

October 6, 2011