BRITISH COLUMBIA

Forest Appeals Commission

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

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

APPEAL NO. 1997-FAB-06

In the matter of an appeal under section 146 of the *Forest Act*, R.S.B.C. 1996, c. 157.

BETWEEN:	William John Alexander	**APPELLANT**
AND:	The Province of British Columbia (Ministry of Forests)	**RESPONDENT**

BEFORE: A Panel of the Appeal Board

Gerry Burch	Panel Chair
Kristen Eirikson	Member
Bruce Devitt	Member

DATE OF HEARING: January 13, 1998

PLACE OF HEARING: Kamloops, B.C.

APPEARING: For the Appellant: William John Alexander
For the Respondent: Jan Hill, Counsel

APPEAL

On June 28, 1995, a Determination was made against the Appellant, William John Alexander, for unauthorized cutting of Crown timber on Crown land, in violation of section 138 of the *Forest Act*, R.S.B.C. 1979, c. 140. The Determination, which carried a penalty of $12,118.75 was confirmed by an August 15, 1997 Administrative Review Decision by Dwayne Clark, R.P.F. Tenures Officer, Kamloops Forest Region.

Mr. Alexander appeals, disputing each of the six points of the Respondent's case as set forth in the Administrative Review, and saying that the cedar blocks in question were cut from his Timber Sale Licence (TSL) A50956 or were retrieved by him after being dropped on forest roads by other operators.

BACKGROUND

On February 21, 1995, the Respondent's representatives discovered a timber trespass on Crown land within the Salmon Arm Forest District in an area identified on forest maps to be lying near a spur road off Branch 4 of the Wap Creek Road.

An investigator gave evidence that the two investigators had initially seen fresh skidoo twin tracks in the vicinity, which they followed to a twin track skidoo with a broken cowling found near the Wap Creek Bridge on Branch 4. A skidoo sled was found further along the trail nearby. From there, they followed the skidoo twin tracks to a location near the edge of the cutblock site where they found shake cutting tools consisting of three froes and three mallets, as well as oil and gas containers. They also found a piece of cowling torn from a skidoo lying near the tools.

The investigator further stated that along a well-used track about 20 meters inside the block, they found evidence of fresh shake cutting consisting of trees that were felled and blocked in an area which was identified on the forest maps as Site 1. The fallen trees in this site were almost entirely green cedar that had been cut to 24" lengths and split to make shake blocks. Blocks and fresh cedar chips were strewn along the trail and the cutting area. No one was present.

While returning to the turnaround up Branch 4, one of them noticed that a dual-wheeled vehicle had gone up the spur road. The investigators then contacted their District Office for assistance. Another investigator arrived in less than a hour and the investigators again proceeded on snowmobiles and a truck towards the site. On the way up Branch 4 near the junction of the spur road, they met Alvin Duane Wolcoski in the alpine twin track skidoo towing the snow sled, which now contained shake tools similar to those that had been seen near the edge of the site. He told the investigators that he was working for Bill, meaning Bill Alexander, getting firewood that they were taking to the Three Valley Motel. A few minutes later, Bill Alexander came down the trail in a three ton crew cab vehicle. When questioned, he also indicated to the three forest officers that he was up there getting firewood. Mr. Alexander was read his rights, his sled and tools were seized, and he was asked to attend at the Salmon Arm Forest Office to give a statement. On February 22, 1995, the Appellant went to the Forest Service Office and retrieved the tools. On February 23 he again attended at the office and retrieved his chainsaw.

In further investigating the area later in the day on February 21, 1995 the investigators found that the Site 1 area had been tidied, the shake blocks had been stacked up, and some stumps had been covered with cedar branches in an apparent effort to hide them. Footprints were noted at Site 1 heading to the bridge that had not been there earlier in the day. By following the skidoo tracks, another nearby and larger site, identified as Site 2, was also located. One of the investigators also noticed that the twin track skidoo used by the Appellant left an unusual impression, apparently due to a rear suspension problem related to the cowling broken off the machine. That day and during later investigations of the area, photographs were taken and distinct shake blocks and biscuits were selected from both sites and marked in order to attempt to locate matching blocks. The timber was later scaled and volume was estimated at 45.7m^3.

Shake blocks that had been delivered on February 13, 1995 to Independent Cedar in Malakwa under Appellant's Timber Mark No. 50956 were also seized and distinct samples were taken in an effort to locate blocks that matched those from the trespass sites.

By piecing together unique sections of the blocks retrieved on site and in the bundles seized from Independent Cedar, several matches were made, including one block from Independent Cedar bearing the Timber Mark A50956 that had four matching pieces from Site 2. Altogether three blocks were located in the bundle seized from Independent Cedar that bore this timber mark.

Timber Mark No. 50956 is for the Appellant's TSL, which is located approximately 30 kilometers up the Wap Forest Road, within the Vernon Forest District. A report obtained by the investigators from the Vernon Forest District indicated that the Wap Road was impassable due to approximately ten feet of snow. The investigator also stated they had met up with a logging contractor on February 21, 1995 who indicated he was ploughing out the Wap Road with a large crawler tractor in order to get his equipment out, but that since they had not travelled up the road they were not certain as to its condition throughout its length. A field report from the Vernon Forest District referred to during the hearing stated that there was no operator on the Appellant's site and that there had been no sign of salvage activity up to the time of the January 25, 1995 report.

The Appellant argued that the matching pieces of wood retrieved from Independent Cedar could have been blocks that he picked up on the road, as shake cutters make an effort to keep the roads clear of debris. He denied that the Wap Road was closed due to snow conditions and maintained that he kept the road open by constantly packing the snow with his three-ton double track truck. He further stated that the road had to be open because about two weeks later he was also charged with trespass for cutting shakes just off his TSL area, thereby indicating that the Forest Service had incorrectly determined that the road was closed at the time he was charged with the trespass in issue.

The Appellant maintained that the wood turned into Independent Cedar had been cut from his TSL further up the Wap Road and said that he had been working the site from before Christmas up until the time of the trespass. He indicated that the wood turned into Independent Cedar had probably included wood that he picked up from the road, and that in any event the wood pieces appeared to be of different lengths and did not appear to match - they could have been from anywhere. With respect to one particular block containing what appeared to be wormholes, he insisted it could not be his because he would never turn in wormy wood.

The Appellant was further concerned that there had been a conspiracy between the Vernon and Salmon Arm Forest District Offices to manufacture and "trump up" evidence against him, and that the Forest Service had no idea that he kept the Wap Road open to his TSL. He indicated that the Administrative Review Decision was misleading in that it did not state that any wood had been found with him or in his truck and that he was miles away from the trespass site when the investigators first encountered him. He also indicated that the Administrative Review decision was incorrect in that it referred to his owning a one ton pick-up, not the three ton dual tire vehicle he had used to pack down the road to his site.

The Appellant's explanation for being in the vicinity of the unlawful cutting area consisted of various statements to the effect that he could have simply taken a

wrong turn into the area or been touring the area looking for firewood. When questioned about his previous statements that he had been cutting firewood, he indicated that he had also been cutting firewood in the area, yet also insisted that he would never cut green cedar for firewood.

The Appellant also argued that he had been charged by the R.C.M.P., with a criminal offence in relation to this trespass and that because he was found not guilty for the theft of Crown timber, this should prove that he is not guilty under these proceedings. Under cross-examination, it was clarified that a plea bargain had been entered into by the Appellant. It would appear that on advice from counsel, which the Appellant is now convinced was erroneous advice, he had plead guilty to possession of a small amount of Crown timber in exchange for the Crown staying related theft charges.

ISSUES AND ANALYSIS

a) The cedar block matches

The photographs introduced into evidence and the blocks and biscuits brought to the hearing, though dry, indicate clear matches of unique blocks. Furthermore, four blocks and a stump biscuit obtained from trespass Site 2 matched a block seized from Independent Cedar that was marked with Appellant's Timber Mark No. 50956, in effect re-creating a section of the tree trunk. This match provides very strong evidence tying the Appellant to the trespass, as it is very unlikely that a block marked with his Timber Mark could have been a block picked up by the Appellant along the forest road.

b) Potential for third party responsibility

Given that the investigators noted distinct skidoo tracks at the site matching the Appellant's vehicle and that these were the only tracks noted running up the spur road into the trespass site on both of their February 21, 1995 trips into the trespass area, it is highly improbable that anyone other than the Appellant and his workers were responsible for the cutting. Because of these distinct tracks, the Appellant's argument that he was found a long distance from the site without evidence of any wood on him, bears little credence. The Forest Service estimated the distance at approximately 8-10 kilometers, and because his skidoo's distinct tracks directly tie the Appellant to the area, the distance is immaterial.

Very convincing proof is added by the evidence that the cutting was recent and had not been snowed over, that no one else was working in the area at that time, and that, when making their second trip into trespass Site 1 that day**,** the investigators noted that the tools were no longer there, that there were footprints present that had not been there earlier, and that the wood had been piled up and some of the stumps placed under cedar boughs. In addition, the tools found in the snow sled being towed by Appellant's employee were common shake cutting tools and the tools were similar to those seen earlier by the inspectors on site. The piece of snowmobile cowling earlier seen near the site and later found in the snow sled being towed by Appellant's employee also matched the Appellant's snowmobile.

Further, since it was apparent that the Appellant was returning to this area for at least the second time since the last snowfall, his attempts to explain that he could have simply made a wrong turn into the area or was touring the area do not hold up. It is also highly improbable that the Appellant was cutting firewood in the vicinity of the trespass site, as initially claimed when the investigators first located him. There was no evidence of firewood in the Appellant's vehicles; the blocks cut at the site had been split into 24" shake block lengths, and the blocks at Site 1 were mostly green cedar. By his own admission, the Appellant claimed he would never use green cedar for firewood.

c) The passability of the Wap Forest Road to Appellant's Timber Sale

In view of the compelling nature of the evidence reviewed above, which directly ties the Appellant to the unlawful cutting at the trespass sites, the issue of whether the Appellant kept the Wap Forest Road open to his TSL 30 kilometers up the Wap Road is of little relevance to the Board's decision. Even if, as claimed by the Appellant, the investigators were mistaken about the impassability of the road due to snow conditions, and the Administrative Review Decision incorrectly set forth the size of the vehicle the Appellant said he drove to pack down snow along the Wap Road, this information does not alter the very compelling evidence directly tying the Appellant to the trespass sites.

d) Criminal charges against Appellant

The Appellant's argument that being found not guilty of criminal charges means that he should likewise be cleared in these proceedings is based on a mistaken assumption. Firstly, the Appellant was not found "not guilty" as initially claimed, but instead he entered into a plea bargain. Secondly, the criminal and civil charges against Appellant are separate proceedings and different burdens of proof apply and different defences are available in criminal proceedings that are not available in administrative proceedings. The burden of proof applied in administrative proceedings of this nature is whether the Appellant, on a balance of probabilities, carried out the alleged violation. In criminal proceedings, where the consequences are much greater and incarceration is a possibility, the standard of proof is a higher test, that is, whether there is any reasonable doubt that an alleged offence was not committed. Thus, it is possible that a person could be found not guilty in criminal proceedings, but in violation of the lesser standard of proof in administrative proceedings.

The test applied in these proceedings was the balance of probabilities test. However, the Board is also of the view that that the evidence presented against the Appellant was sufficiently compelling to leave no room for any reasonable doubt that he was responsible for the trespass.

It is unfortunate that the Appellant now regrets having plead guilty to the possession charges and feels he was given bad advice, but the Board is not in a position to second guess those events or question the various reasons for his decision at that time. The criminal charges have no bearing upon this case; it has

been decided on its own merits on the facts before the Board in accordance with administrative law principles.

CONCLUSION

In view of all of the evidence, the Board finds that on a balance of probabilities, the Appellant unlawfully cut timber on Crown land contrary to section 138 of the *Forest Act*.

The Appellant's fine of $12,118.75 for wilful trespass is upheld.

The Appeal is denied.

Gerry Burch, Chair
Forest Appeal Board

February 2, 1998