BRITISH COLUMBIA

Forest Appeals Commission

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APPEAL NO. 1997-FOR-06

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:	Canadian Forest Products Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission	
	Toby Vigod — Chair Andrew Thompson — Member Geza Toth — Member	
DATE OF HEARING:	June 6, 1997	
PLACE OF HEARING:	Victoria, B.C.	
APPEARING:	For the Appellant: Bradley Armstrong, Counsel For the Respondent: Bruce R. Filan, Counsel	

APPEAL

This is an appeal brought by Canadian Forest Products Ltd. ("Canfor") against an Administrative Review decision dated February 10, 1997. The Review Panel upheld the determination of the District Manager dated July 30, 1996, that Canfor contravened Section 67 of the *Forest Practices Code of British Columbia Act* (the "*Code*"), but rescinded the $1,500.00 penalty levied pursuant to section 117 of the *Code*. The Review Panel also recommended that the determination not contribute to any further determination arising from the application of the Performance Based Harvesting Regulation.

The appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to Section 131 of the *Code*.

BACKGROUND

The facts are not in dispute. The Review Panel produced a "Summary of Information Presented and Agreed as Substantially Accurate by both Parties" and

both parties agreed that the additional facts as set out in the Appellant's Statement of Points were accurate. No witnesses were called at the hearing.

Briefly, Canfor hired Asgaard Contracting (the "Contractor") to log in its Forest Licence area, A40873, Cutting Permit 631. A creek runs through the area in question, specifically Cutblock 61 of Cutting Permit 631. The silviculture prescription established a 40 m Riparian Management Area ("RMA") adjacent to the creek, consisting of a 20 m riparian reserve zone ("RRZ") where there was to be no cutting, and a 20 m riparian management zone ("RMZ") which would have 50% basal area cutting in a "feathered" configuration.

On November 27, 1995, Canfor's Logging Plan was approved by the Ministry of Forests ("MOF").

On November 30, 1995, before cutting commenced, Canfor's logging supervisor, Ludo Vitalos, met with the Contractor owner and its logging foreman and reviewed the cutting permit documents, logging plan, pre-harvest silviculture prescription and site maps. Copies were provided to the Contractor. One of the three feller buncher operators was briefed by the Contractor about the streamside logging prescription. It was intended that only the feller buncher operator properly briefed would work near the stream.

Canfor marked trees to be cut in the RMZ, after which Angie Palmer, a MOF official, attended the site. On January 22, 1996, she approved the commencement of cutting, stipulating that Ludo Vitalos be on site "to supervise and instruct the falling operations in this area." Mr. Vitalos inspected the site with the Contractor's logging foreman and arranged to supervise the cutting in the RMZ on January 24, 1996 at 9:00 a.m.

On January 23, 1996, Mr. Dunn, a feller buncher operator employed by Coyote Transportation, a subcontractor, provided some "unplanned assistance" to the operator assigned to cut in the RMA. Mr. Dunn had not been briefed on the streamside logging prescription, but according to Mr. Norm Poitras, Asgaard's logging foreman, had been instructed not to log in the RMZ. He cut ten trees in the RRZ and clearcut a small section of the RMZ. Mr. Dunn subsequently wrote a letter explaining his actions and taking full responsibility for the error. He stated:

> …I decided to go fall a few trees in the Raparian (sic) zone as that was all that was left. I have read and been told about the different zones and apparently I did the wrong thing in the wrong place. There is nobody to blame for my actions but me and (it) will never happen again.

There is no dispute in this case that Mr. Dunn was directly responsible for the contravention of the *Code* by the unauthorized timber cutting in the RRZ and RMZ.

On July 30, 1996 the District Manager determined that Section 67 of the *Code* had been contravened, in that the logging plan and pre-harvest silviculture prescription had not been followed.

The District Manager described the impact on resources caused by the excess cutting of trees in the RMZ as "inconsequential" and the impact of cutting in the RRZ as "minor". A $1,500 penalty was levied pursuant to Section 117 of the *Code*. Guided by Ministry *Policy 16.10 Determinations* ("*Policy 16.10*"), the District Manager made the determination against Canfor and *not* against the Contractor:

> I accept the policy guidance which suggests that Canfor, not their contractor, is accountable for this contravention (page 5).

The stated purpose of *Policy 16.10* is:

> To ensure that determinations are made in a fair and equitable manner, with due regard to the rules of administrative law.

The section titled "Making a Determination" includes the following passages:

> Where an incident involves a licensee, it is normally the licensee that is responsible for the activity, and therefore should be penalized, rather than individuals working for that licensee. Where an incident involves a private land owner, it is normally the land owner that is responsible for the activity, and therefore should be penalized rather than individuals working for that private land owner.
>
> It is recognized that occasionally certain individuals wilfully or recklessly fail to comply with the legislation. The option to penalize individuals for wilful or reckless non-compliance exists, but restraint should be exercised in penalizing those who do not have the primary responsibility to ensure that *Code* requirements are met.

The District Manager also rejected Canfor's assertion that the defence of due diligence was available to it, citing a decision of the Forest Appeal Board in *Re MacMillan Bloedel Limited* v. *District Forest Manager* (June 7, 1996)(unreported).

Canfor appealed the decision to a Review Panel. The Review Panel held that the District Manager did not fetter his discretion when deciding who should be the subject of the determination. The Review Panel also concluded that the defence of due diligence was not available to Canfor for a section 117 determination as a result of contraventions of section 67 of the *Code*.

ISSUES

The issues before the Commission are as follows:

1. Whether the District Manager fettered his discretion under section 117 of the *Code* through the consideration and application of MOF *Policy 16.10* when he decided to make the contravention determination against Canfor rather than the Contractor; and did the Review Panel err in finding that the District Manager had not so fettered his discretion.

2. Whether the defence of due diligence is available to Canfor to absolve itself from liability for a breach of section 67 of the *Code*.

3. Whether the sub-contractor committed the contravention "in the course of carrying out the contract" pursuant to section 117(2) of the *Code*.

THE LEGISLATIVE PROVISIONS

Section 67 of the *Code* is a general directive that timber harvesters must abide by rules and standards set out. The relevant portion of the section is reproduced below:

> **General**
>
> **67** (1) A person who carries out timber harvesting and related forest practices on
>
> (a) Crown forest land
>
> (b) Crown range, or
>
> (c) private land that is subject to a tree farm licence or a woodlot licence,
>
> must do so in accordance with
>
> (d) this Act, the regulations and standards,
>
> (e) any silviculture prescription, and
>
> (f) any logging plan.

Section 117 of the *Code* reads:

> **Division 3–Administrative Remedies**
>
> **Penalties**
>
> **117** (1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.
>
> (2) If a person's employee, agent or contractor, as that term is defined in section 152 of the Forest Act, contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.
>
> (3) If a corporation contravenes this Act, the regulations or the standards, a director or officer of it who authorized, permitted or acquiesced in the contravention also commits the contravention.
>
> (4) Before the senior official levies a penalty under subsection (1) or section 119, he or she
>
> (a) must consider any policy established by the minister under section 122, and

(b) subject to any policy established by the minister under section 122, may consider the following:

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

(ii) the gravity and magnitude of the contravention;

(iii) whether the violation was repeated or continuous;

(iv) whether the 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.

Division 5–Offences and Court Orders

Fines

143 (2) A person who contravenes section 67…commits an offence and is liable on conviction to a fine not exceeding $500 000 or to imprisonment for not more than 2 years or to both.

Employer Liability

157 (1) In a prosecution for an offence under this Act or the regulations it is sufficient proof of the offence to establish that it was committed by the defendant's employee, agent or contractor, as that term is defined in section 158.1 of the *Forest Act.*

(2) It is a defence to a prosecution under subsection (1) if the defendant establishes that they exercised due diligence to prevent the commission of the offence.

(3) This section applies even if the employee, agent or contractor has not been identified or prosecuted for the offence.

DISCUSSION AND ANALYSIS

1. Whether the District Manager fettered his discretion under section 117 of the *Code* through the consideration and application of MOF *Policy 16.10* when he decided to make the contravention determination against Canfor rather than the Contractor; whether the Review Panel erred in finding that the District Manager had not so fettered his discretion.

The Appellant argues that *Policy 16.10* is not authorized under the provisions of the *Code* in that it has not been established under section 122 which specifically authorizes the Minister of Forests to establish policies respecting penalties.

The Appellant further argues that the District Manager fettered his discretion by blindly applying the policy and making a determination of a contravention against

Canfor rather than the Contractor. It refers specifically to the following statements in the District Manager's decision:

> It is clear to me from the policy that ministry executive intends that the party with the direct relationship with the Crown (the licencee through his tenure) will normally be held accountable where a contravention is found. It is equally clear that a contractor may be held accountable rather than the licencee if the contractor recklessly or wilfully contravenes the Act. The information presented me by staff and by Canfor does not suggest the feller buncher operator employed by Canfor was motivated by wilfulness or recklessness (decision at page 4).
>
> ...
>
> I accept the policy guidance which suggests that Canfor, not their contractor, is accountable for this contravention (decision at page 6).

The Appellant submits that the District Manager's determination does not constitute an exercise of discretion but rather a mere application of the Ministry's unauthorized policy. It claims that the only factor taken into consideration by the District Manager was whether the feller buncher operator was motivated by wilfulness or recklessness. The Appellant says that the District Manager did not apply any independent judgment but rather applied the criteria of the policy and determined on the basis of those criteria alone that Canfor rather than the Contractor was to be held liable.

The Respondent submits that there is nothing improper in law with the Ministry establishing a policy such as *Policy 16.10* which deals with the making of a determination under the *Code*. The issue is what the District Manger did with the policy. The Respondent submits that the District Manager did not fetter his discretion by considering the policy and that while accepting guidance in the policy, he did not treat the policy as a binding rule.

In support of its argument, the Appellant referred the Commission to a number of cases dealing with the issue of fettering of the discretion of a decision-maker. The general principle is that a person charged with the exercise of discretion under a statute must not fetter his or her discretion by the application of an inflexible policy. In *Re Maple Lodge Farms Limited* v. *Government of Canada*, [1982] 2 S.C.R. 2, the Supreme Court of Canada held that:

> The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion...but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion...(page 7).

Canfor argues that the District Manager and Review Panel fettered their discretion as they considered the policy binding upon them and excluded other valid reasons for the exercise of their discretion. The Appellant also refers to *Re Lloyd and Superintendent of Motor Vehicles* (1971), 20 D.L.R. (3d) 181 (B.C.C.A.), a leading

case in British Columbia on the fettering of discretion. In that case, the British Columbia Court of Appeal held that the Superintendent of Motor Vehicles had fettered his discretion by issuing a policy of suspending all drivers convicted of impaired driving.

At page 189, the Court said:

> In my view it is crystal clear that the respondent Superintendent did not enter into any inquiry at all as to whether or not the appellant was or was not, by virtue of any reason, unfit to drive a motor vehicle. He formed no opinion of the appellant's fitness at any time, and never at any time put his mind to that question. ...I fail to see on what valid grounds it can be said that the respondent Superintendent judicially formed an opinion of the appellant's unfitness to drive at the time of the opinion and which unfitness had been satisfactorily proved to him, when he did nothing more than give directions at some unknown earlier date to his staff to send out suspension notices to all persons who had been convicted of a violation of s. 222 of the *Criminal Code* and to place his stamped name thereon.

A similar result occurred in *Re Lewis and Superintendent of Motor Vehicles for British Columbia* (1980), 108 D.L.R. (3d) 525 (B.C.C.A.) where the British Columbia Court of Appeal quashed the Superintendent's refusal to issue a driver's licence to the respondent on the ground that he failed to meet certain eyesight criteria laid down in the guidelines adopted by the Superintendent. At page 528, the Court said:

> Had the legislature decided that licences be granted or refused on the basis of compliance with particular standards it would have authorized that standards be established by regulation.

Canfor argues that had the Legislature decided that contractors would only be held responsible in situations where they acted recklessly or wilfully, it would have included these conditions in the legislation.

The Appellant also referred the Commission to *Alkali Lake Indian Band* v. *Westcoast Transmission Company Limited* (1984), 53 B.C.L.R. 323 (B.C.C.A.) where the British Columbia Court of Appeal found that the British Columbia Utilities Commission fettered its discretion to award costs to an intervenor following a public hearing by acting in accordance with a ministerial direction not to award costs.

The Respondent referred to *Sebastian* v. *Saskatchewan* (1993), 20 Admin. L.R. (2d) 146 (Sask.Q.B.) where the Court found that the Workers' Compensation Board had fettered its discretion by applying a policy denying the applicant's benefits during a period of incarceration. The Court found:

> So the board must look at each case and in accordance with s. 25 make a decision "upon the real merits and justice of the case." In doing so the board is entitled to implement policies to achieve the purpose that the

> scheme of the Act is designed to facilitate. Using such policies does not of itself constitute a loss of discretion but in those cases where administrative tribunals such as the board adhere strictly to the policy and ignore the exercise of its discretion as the Act provides, the result can be a fettering of the board's discretion (page 160).

The Respondent argues that the District Manager, while "accepting" the policy guidance of *Policy 16.10*, did not strictly adhere to it.

The Respondent also submits that in *Alkali* the court found that the adverse inference that the Utilities Commission did not exercise unfettered discretion resulted from the failure to give any reasons for refusing the order for costs. It argues that, in this case, the District Manager looked to the scheme of the *Code* and gave reasons for his decision. The Appellant, on the other hand, argues that this case is "on all fours" with Alkali as no reasons were given for not pursuing the Contractor or sub-contractor once a decision was made that Mr. Dunn had not acted wilfully or recklessly.

The Commission finds that, first of all, the Ministry can develop policy in relation to the making of determinations under the *Code*. While section 117 requires that senior officials must consider any policy that has been established under section 122 of the *Code*, this does not preclude the Ministry from making a general policy such as *Policy 16.10* with the stated purpose of ensuring "that determinations are made in a fair and equitable manner, with due regard to the rules of administrative law." Nor does it preclude the senior official from looking to such a policy for guidance. The Appellant, in response to questioning by the Commission, agreed that it was not arguing that the Ministry could not make any of the policy, but was focusing more on the wording of *Policy 16.10* and the Ministry's rigid application coupled with the fact that it was not a policy established under section 122 of the *Code*.

Second, the statement in the policy that "...it is normally the licencee that is responsible for the activity, and therefore should be penalized" (emphasis added) is clearly acceptable. In *Re Maple Lodge Farms Ltd.*, the Supreme Court of Canada dealt with the discretion of the Minister as to whether or not to issue import permits pursuant to section 8 of the *Export and Import Permits Act*. The Court found that language in the policy guidelines that: "If Canadian product is not offered at the market price, a permit will normally be issued..." does not fetter the exercise of the Minister's discretion. Further, the Court held that the use of the expression "a permit will normally be issued" is by no means equivalent to the words "a permit will necessarily be issued," as it does not impose a requirement for the issuance of a permit (page 7).

In this case, however, *Policy 16.10* goes on to say that "the option to penalize individuals for wilful or reckless non-compliance exists, but restraint should be exercised in penalizing those who do not have the primary responsibility to ensure that *Code* requirements are met." The District Manager in his decision (cited above) stated that the policy guided him when deciding who to name in the determination. He states that "it is equally clear that a contractor may be held

accountable rather than the licencee if the contractor recklessly or wilfully contravenes the Act" (emphasis added). He went on to find that "the information presented to me by staff and by Canfor does not suggest the feller buncher operator employed by Canfor was motivated by wilfullnes or recklessness."

The Review Panel found that the District Manager did not fetter his discretion when deciding who should be the subject of the determination. The Panel also found that, had the 'letter of explanation' from Ron Dunn been considered,

> it would not have supported the contention that his actions were wilful or reckless, as he implied he believed he was doing the right thing in the right place. It is the opinion of the panel that Ron Dunn's letter appears to support the actions of a person who accidentally or unintentionally caused a contravention of the act and not one of a person who acted wilfully or recklessly.

The Review Panel upheld the determination against Canfor but went on to consider the factors in section 117(4) and rescinded the penalty levied against Canfor by the District Manager.

The Commission agrees with the Appellant that, once the District Manager concluded that the feller buncher was not wilful or reckless, that was the end of the matter for him. This finding lead directly to his decision that the Contractor or sub-contractor would not be the subject of the determination. The Commission agrees with Canfor that, had the Legislature decided that contractors would only be held responsible in situations where they acted recklessly or wilfully, it would have included these conditions in the *Code*. In fact, there is no requirement to prove *mens rea* before a person can be subject to either an administrative remedy or a prosecution for a contravention of section 67 of the *Code*. The District Manager did not consider any other reasons for his decision not to make a determination against the Contractor or sub-contractor.

The Respondent argues that even if the District Manager fettered his discretion, it is irrelevant as the Review Panel rescinded the penalty against Canfor. The Respondent says that the Appellant is found to have contravened the *Code* "by operation of law" and that there is no discretion to be exercised here. It argues that *Policy 16.10* was applied to the issue of penalty and not to the finding of a contravention. The Appellant submits that the concept of vicarious liability has to be distinguished from the District Manager's decision to make a determination only against Canfor. It argues that *Policy 16.10* was applied to the question of who would be the subject of a determination under the *Code*.

The Commission concurs with the Appellant on this point. The Commission finds that pursuant to Section 117(1) of the *Code* any person can be found to have contravened a provision of the *Code*. This would include licencees, employees, contractors and sub-contractors. Section 117(2) provides that a licensee, for example, will be held vicariously liable for contraventions of the *Code* committed by its contractors. The Senior Official exercises his discretion, first of all when determining who should be subject to a formal determination of a contravention of

the *Code* and, secondly, in determining whether a penalty should be levied against that person and what the quantum of the penalty should be. In this case, the Senior Official clearly has the discretion to make a determination of a contravention against the licencee, contractor and sub-contractor, either individually, or together.

However, while the Commission can agree that the District Manager may have fettered his discretion as far as his decision not to proceed against the Contractor or sub-contractor, there is still the issue of whether he proceeded improperly in making a determination against Canfor. While Canfor has submitted that the District Manager should have considered all the facts of the present case to determine whether Canfor or the Contractor should be held responsible, the Commission finds that the decision of whether or not to proceed against the Contractor or subcontractor does not preclude the senior official from proceeding against the licencee. It is not an either/or situation. In fact, in this case, the District Manager was only dealing with the allegation against Canfor when it held the "opportunity to be heard" proceeding prior to his July 30, 1996 determination.

The Commission has the authority under section 138 of the *Code* to "make any decision that the person whose decision is appealed could have made." Even if the fettering of discretion in relation to a decision on whether to proceed against the Contractor or subcontractor can be said to have impacted on the decision to proceed against Canfor, the hearing before the Forest Appeals Commission is a hearing *de novo* and the Commission has the power to cure a decision made by a lower level decision-maker who has fettered his discretion (see *Re Saunders Farms Ltd. and General Manager Liquor Control and Licensing Branch* (1995), 122 D.L.R. (4th)(B.C.C.A.)).

In this case, no witnesses were called and no additional evidence was put before the Commission. There is no dispute on the facts that a contravention occurred; that timber was cut in the RRZ where no harvesting was to take place, and in RMZ contrary to the specific silviculture prescription. While stumpage was paid, there was still some minor economic benefit to the company from the cutting of the trees.

The one fact that the Respondent disputed in its oral submissions, was the issue of whether Mr. Poitras had instructed Mr. Dunn not to go into the RMZ. The Respondent said that it did not dispute that Mr. Poitras has made such a statement to Ms. Palmer, but counsel urged the Commission not to rely on the truth of this statement as it was hearsay. The Appellant took issue with the Respondent's submissions on this point, noting that there had been an agreed statement of facts and that the statement had been made in the course of the investigation by Ms. Palmer, an MOF official. Unfortunately, the written statement filed by Mr. Dunn does not shed much light on the details of whether or what specific instructions were given to him. We do know that he was not briefed on the details of the streamside silviculture prescription and that he was just trying to be helpful. We also know that the actual trees to be cut were not marked. We also know that Canfor and the Contractor have subsequently "instituted new additional measures to reduce the chance of a similar occurrence" (see Determination of the District Manager, July 30, 1996 at page 6).

Whether or not the Contractor should be the subject of a determination for the contravention of section 67 does not absolve the licencee of liability under the *Code,* nor does it preclude a senior official or the Commission from making a finding that Canfor has contravened the *Code*. One must hearken back to the rationale for vicarious liability. In *R*. v. *Geraghty* (1990), 55 C.C.C.(3d) 460, the British Columbia Court of Appeal looked at the doctrine of vicarious liability in the course of rendering its decision on whether an offence under the *Motor Vehicle Act* was one of strict or absolute liability. It said:

> The doctrine of vicarious liability had its origins in the common law. No notion of fault exists in the common law doctrine of vicarious liability. Put another way, the state of mind of the person to whom the common law vicariously attaches liability for the act of another, is irrelevant. The basis upon which the common law affixes liability in one, for the act of another, rests on the nature of the relationship between them.

The *Code* sets out a detailed regime for protecting and regulating the public interest in Crown timber. Licencees are given the privilege of carrying on business on Crown land and are entrusted with managing the forests that belong to the people of British Columbia. While contractors often undertake harvesting and other forest practices on behalf of the licencees, it is the licencees who are responsible for the development of logging and other plans and pre-harvest silviculture prescriptions and for ensuring that they are properly implemented. These considerations have led to the vicarious liability provisions set out in section 117(2) of the *Code*. In accordance with this rationale, as *Policy 16.10* states, it is normally the licencee that is responsible for the activities in the woods under its licence, and therefore should be penalized if a contravention occurs.

Although it may have been appropriate to also name the Contractor in the Determination, there is no basis for finding that there was a fettering of discretion in relation to the determination that Canfor has contravened section 67 of the *Code*. This is not the end of the matter, as two other arguments were made by the Appellant which are addressed below.

2. Whether the defence of due diligence is available to Canfor to absolve itself from liability under section 117 of the *Code* for a breach of section 67 of the *Code*.

Canfor urged the Panel find that a defence of due diligence is available for a determination under section 117 for a contravention of section 67 of the *Code.* This issue was previously addressed by the Commission in *MacMillan Bloedel Ltd.* v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/05(b), February 19, 1997)(unreported)), where the Commission held that the defence of due diligence is not available to excuse an individual or company from liability for a administrative penalty under section 117 or section 119 of the *Code* for a contravention of section 96 of the *Code*. This decision was followed by another panel of the Commission in *Canadian Forest Products Ltd.* v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-03, May 26, 1997

(unreported)). Both of those cases involved contraventions of section 96(1) of the *Code*.

The Appellant urged the Commission to reconsider its previous decisions based on a number of new arguments placed before the Commission. The Appellant argued that in *R.* v. *Sault Ste- Marie (City)*, [1978] 2 S.C.R. 1299, the Supreme Court of Canada, which recognized, for the first time, three categories of offences, introduced a presumption that where an offence is classified as regulatory, it is presumed to impose strict liability. The Court also defined where absolute liability offences might be found:

> Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category (pages 1325-26).

The Appellant referred to the cases of *R.* v. *Chapin*, [1979] 2 S.C.R. 121 and *R.* v. *DeSousa*, [1992] 2 S.C.R. 944 where the Supreme Court of Canada found that the provisions in question created "public welfare or regulatory offences" and that a defence of due diligence would be available. Canfor submits that the prohibitions contained in the *Code* fall into the category of public welfare or regulatory offences and are therefore subject to the presumption of strict liability—under which the defence of due diligence would be recognized. The Appellant submits that administrative penalties are just "an offence by a different name" and that the consequences are the same—guilt and penalty.

Canfor also referred to *R.* v. *Martin* (1991), 2 O.R. (3d) 16 where the Ontario Court of Appeal found that section 13 of the *Export and Import Permits Act* was an offence of strict liability. Section 13 prohibited the export of goods included on the Export Control List (in this case polar bear skins). The respondent, in that case, took the position that section 13 created an absolute liability offence, and that because it may be punished with a possible term of imprisonment, it contravened section 7 of the *Canadian Charter of Rights and Freedoms.* This argument was successful at trial and Mr. Martin was acquitted. The Court of Appeal allowed the Crown's appeal and found that the offence was one of strict liability. The Court rejected the respondent's argument that a provision for the defence of due diligence in another offence section of the Act should lead to the conclusion that section 13 was intended to be an absolute liability offence. Mr. Justice Griffiths found:

> I accept the proposition that contextual analysis of other sections of the statute may in some instances provide an aid to construction. In my view, however, such analysis should not be considered conclusive. The decision of *Sault Ste. Marie* mandates that a court start with the general proposition that public welfare offences are strict liability offences and that the common law defences of due diligence and mistake of fact are available to the accused. I am prepared to assume that the due diligence

> provision of s. 21 was inserted by the legislature without consideration of the implications to other offences. Section 21 addresses a very specific situation and, in my view, its provision for the defence of due diligence was not intended to operate exclusively in the circumstances of that section (page 25).

The Respondent, first of all, argues that all the cases cited by Canfor involved regulatory offences and not administrative monetary penalties. *Sault Ste. Marie*, *Chapin* and *Martin* all dealt with offence provisions. In the *Forest Practices Code*, there are two very distinct sections dealing with administrative remedies and offences. As the Commission found in *MacMillan Bloedel*, there are two very different routes that may be followed for compliance and enforcement of the *Code*. Division 3 deals with "Administrative Remedies", while a separate division, Division 5, deals with "Offences and Court Orders".

There is no dispute that a contravention of a provision of the *Code*, including section 67, may lead to a prosecution under Division 5, section 143(2), as well as to an administrative penalty authorized under Division 3, section 117.

The Respondent says that a contravention is considered to be an offence only in the context of a prosecution brought pursuant to section 143 of the *Code.* The Commission concurs. The language of section 143(2) states that a person "who contravenes" a number of sections of the *Code* including section 67 "commits an offence and is liable on conviction to a fine not exceeding $500 000 or to imprisonment for not more than 2 years or to both." On the other hand, section 117 states that if a senior official determines that a person "has contravened" the *Code*, "the senior official may levy a penalty." Under section 117 there is no offence committed and there is no court proceeding with a finding of guilt and chance of imprisonment.

The *Code* sets up a new regime of administrative penalties. As the Commission stated in *MacMillan Bloedel*:

> …in its desire to create an efficient, effective system for dealing with contraventions and to meet the goal of sustainable use of forests in British Columbia, the Legislature has provided for two very different routes in pursuing contraventions under the *Code*. One route allows for the defence of due diligence and one does not. To import a due diligence defence into the administrative penalties sections of the *Code* would defeat the legislative intent to have a simple, effective approach to compliance and enforcement to deal with contraventions of a nature that would not normally be brought to the criminal courts.

While the Court in *Martin* looked at the relevant statute and found that a due diligence defence could be read into an offence provision even though it was not specifically referred to, and even though it was expressly provided for in another offence provision, the Commission notes that the Court held that it should "interpret a public welfare statute in order to validate the legislation so that it is consistent with the provisions of the *Charter.*" In *Martin*, the Court was dealing with two

offence provisions, here we are talking about an administrative penalty regime where there is no chance of imprisonment and therefore no *Charter* issue.

The Appellant also urged the Commission to look at the particular language of the contravention provision to see if it should be construed as an absolute liability or strict liability provision. Canfor argued that the issue is not whether section 117 provides or does not provide for a defence of due diligence in connection with all contraventions which proceed by way of administrative penalties. Some contraventions may entail absolute liability and some may entail strict liability.

The Appellant urged the Commission consider a distinction between the contravention set out in section 67 and the contravention set out in section 96 of the *Code*. It argues that section 96, which prohibits unauthorized harvesting of crown timber and trespass, is a clear provision where a contravention is easy to determine and may therefore be characterized as an absolute liability provision. The Appellant argues that a contravention of section 67 for carrying out a forest practice not in accordance with a silviculture prescription or a logging plan turns on language in the prescription or plan and is the subject of judgment in the field and therefore should not be interpreted as an absolute liability provision.

The Respondent submits that there is no real difference between the contraventions set out in section 96 and section 67 of the *Code*. Both involve the unauthorized cutting of timber and both involve questions of fact. In the case of section 96, the issue is whether cutting has taken place contrary to an agreement under the *Forest Act* or under a provision of the *Forest Act*, while under section 67, the issue is whether timber harvesting has taken place contrary to the *Code*, regulations, standards or logging plan or silviculture prescription.

The Commission agrees with the Respondent that this is a distinction without a difference. In the case of both section 96 and section 67 a determination has to be made as to whether a person is cutting outside the area permitted to be harvested pursuant to an agreement or provision under the *Forest Act*, or whether the person has cut contrary to the provisions of the logging plan or silviculture prescription (section 67). In this case, the issue was whether harvesting took place in the RRZ or RMZ contrary to the provisions of the logging plan and silviculture prescription. Both section 96 and 67 contraventions deal with “boundary” issues.

Further, the Appellant argues that, in the case of a section 96 contravention, it could be an absolute liability provision whereby the defence of due diligence would not be applicable. The Commission does not find this argument compelling as it is clear that if a contravention of section 96 is prosecuted as an offence under section 143, due diligence is available as a defence, while under section 117 when a determination of a contravention is made and an administrative penalty assessed, there is no reference to a defence of due diligence. The same would happen with a contravention of section 67. There are no absolute liability offences, as section 157 provides for a defence of due diligence to a contravention prosecuted as an offence.

Canfor also argues that it is incongruous to have a senior official find someone is absolutely liable for a contravention and assess a large fine, while the court on the

same set of facts could find a person not guilty of an offence due to the defence of due diligence. This argument was raised by the appellant in the *McMillan Bloedel* case. The Respondent argues that the scheme of the *Code* provides for this very result. The purpose of administrative determinations is to ensure compensation to the Crown and to provide a deterrence to non-compliance. Administrative determinations are not made nor are administrative remedies imposed for the purpose of addressing a wrong to society. They are made and imposed to encourage compliance with forestry law.

The Respondent also refers to *Gordon Capital Corp.* v. *Ontario (Securities Commission)* (1991), 1 Admin. L.R.(2d) 199, a decision of the Ontario Court of Justice where Gordon Capital faced the possibility of both a prosecution or an administrative penalty in relation to a breach of the Securities Commission take-over bid rules as well as those respecting insider trading. The Court noted that:

> Of course if Gordon had been charged with breaches of the Act under s. 118, the defence of due diligence would have been available to it. Such charges result in criminal or quasi-criminal proceedings with penal consequences; a conviction under s. 118 can lead to a fine or imprisonment or to both. *The decisions in the last-mentioned cases support the proposition that the classification of criminal and quasi-criminal offences into categories of "absolute liability", "strict liability" and full "mens rea" as defined in R. v. Sault Ste. Marie is irrelevant to proceedings under subs. 26(1). The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon* (page 210). [emphasis added]

The Commission finds that it is perfectly acceptable to have different standards of proof and different defences available for the commission of an offence and an administrative sanction arising out of the same set of facts or actions. Canfor argued that Gordon Capital did not involve an administrative penalty but a preventative order. However, the Commission notes that it was the same contravention that led to either a prosecution, where a defence of due diligence was available, or an administrative sanction where due diligence was not available under the statute.

In conclusion, the Commission finds no reason not to follow its earlier decisions in *MacMillan Bloedel* (Appeal No. 96/05(b)) and *Canadian Forest Products Ltd.* (Appeal No. 97-FOR-03) and adopts the reasoning in those cases in addition to its findings herein.

3. Whether the sub-contractor committed the contravention "in the course of carrying out the contract" pursuant to section 117(2) of the *Code*.

The Appellant has argued that, based on the circumstances of this case, vicarious liability under section 117(2) of the *Code* should not be extended to it. In addition to its claim that a defence of due diligence should apply and that it exercised all due

diligence based on the facts of the case, the Appellant also argued that it can only be liable if the contravention was committed by the Contractor (or in this case the sub-contractor) "in the course of carrying out…the contract" (section 117(2)). It argues that where the infraction occurred as a result of express instructions to both the Contractor (directly from Canfor) and to the sub-contractor (through the Contractor) to refrain from harvesting in the RMZ until Canfor was there to supervise, the sub-contractor was not acting "in the course of carrying out…the contract."

The Respondent submits that the Contractor was contracted to cut timber on the cutblock and that is what was done. It argues that Mr. Dunn was just trying to do his job and trying to be helpful and that he was not off on "a frolic of his own." It submits that Canfor is therefore vicariously liable.

Canfor argued that there should be a limit on vicarious liability and a distinction should be made between a situation where the Contractor went in and harvested and did a bad job and where the operator was told to stay out and goes in and harvests without authorization.

Canfor has acknowledged that the case law in this area of vicarious liability for both employees and contractors is extensive, is not consistent, and often turns on the specific facts of the case. However, Canfor did refer to *The Queen* v. *Crown Diamond Paint Co. Ltd*., [1983] 1 F.C. 837 where the Crown was not found liable for the acts of its inspector which led to a fire in Crown Diamond Paint Company's premises. The National Capital Commission, an agent of the Crown, was the landlord and the inspector was one of its employees. The inspector permitted his sons to remove refrigeration piping from a refrigeration room on the premises. An ocy-acetylene torch was used, which apparently ignited insulating material thereby leading to the fire. The inspector subsequently pleaded guilty to a charge of attempted theft and was dismissed from his employment.

The Federal Court of Appeal found that, when the inspector permitted his sons to remove the piping, the inspector was acting outside his work duties and was not acting in the course of his employment. The inspector's duties were to inspect the Commission's properties at regular intervals and were not to dismantle the refrigeration piping, which was an unauthorized act. He was using his employer's time and place of business for his own purposes and was acting outside of his scope of employment. Therefore the Court found that the Crown, as employer, could not be vicariously liable for damages.

In reviewing the categories of vicarious liability in the employment context, the Court described circumstances where the employer *could* have been vicariously liable. The Court noted that a master could be vicariously liable for a servant if the servant does an act, which he is authorized by his employment to do under certain circumstances and conditions, but does them under circumstances or in a manner which is unauthorized and improper. In this category, vicarious liability would exist if the servant did work that the master had appointed, but did it in an unauthorized manner. On the facts of the case, the Court found that the inspector did not fall within this category since taking the refrigeration pipes was not a matter of doing

the appointed work in an unauthorized manner. Taking the pipes was not authorized work in the first place. The Court stated at page 846 that:

> There is absolutely no evidence that included in his duties was the dismantlement of the refrigeration piping whether with an oxy-acetylene torch or otherwise...In fact, not only was it not part of his duties, it was contrary to instructions in that he had been refused permission by the appellant to do what he had his sons doing for him...[H]e was not acting in the course of his employment. He had gone outside it. Nor was he doing the work he was appointed to do in an unauthorized manner. (emphasis added)

In this case, Canfor submits that it, like the Crown in *Crown Diamond Paint*, should not be vicariously liable for the unauthorized acts of the Contractor or sub-contractor since the Contractor was acting beyond the course of its contract.

However, the Commission finds that the *Crown Diamond Paint* case does not assist Canfor's position that it should not be vicariously liable. In this case, the facts are closer to the category where vicarious liability exists because a servant, or contractor, performs appointed work but does it under circumstances and in a manner which is unauthorized and improper. The harvesting of trees in the RMA is not a matter of unauthorized work falling outside the scope of the contract duties. Rather the harvesting of trees in the RMA is a case of a contractor performing contractual work (i.e. the cutting of trees pursuant to a contract to harvest) but doing the work in an unauthorized and improper manner (i.e. contrary to *Code* requirements).

In sum, the Commission finds that the *Crown Diamond Paint* case does not assist Canfor in avoiding vicarious liability.

Section 117(2) provides for vicarious liability for licencees when their contractors contravene the provisions of the *Code*. The rationale is stated above. All contraventions of the *Code* are unauthorized in the sense that they are unlawful. In this case, the contravention is for failure to harvest in accordance with the silviculture prescription and the logging plan. The licencee cannot escape liability by trying to show that the Contractor or sub-contractor was acting in an unauthorized manner contrary to the *Code*. Otherwise no licencee would ever be held to be vicariously liable.

The Commission finds that the logging of the cutblock was the task for which the contractor and sub-contractor had been employed, but that it had been undertaken in an unauthorized manner. In conclusion, the Commission finds Canfor vicariously liable for the activities of the sub-contractor who was acting "in the course of carrying out…the contract."

DECISION

The Commission, pursuant to section 138 of the *Code,* upholds the decision of the Review Panel to find Canfor in contravention of section 67. In the circumstances of

the case, the Commission finds the penalty assessed by the Review Panel appropriate. The Panel, therefore, confirms the zero penalty and the recommendation of the Review Panel that this determination not be considered in any determination arising from the application of the *Performance Based Harvesting Regulation*.

Toby Vigod, Chair
Forest Appeals Commission

October 10, 1997