Province of British Columbia

Forest Appeals Commission

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APPEAL NO. 2004-FOR-005(b)

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, and section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

BETWEEN:	Weyerhaeuser Company Limited	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
AND:	Sierra Club of Canada	**INTERVENOR**
AND:	Council of Forest Industries	**INTERVENOR**

BEFORE: A Panel of the Forest Appeals Commission
Margaret Eriksson, Chair
Richard Cannings, Member
Stephen Willett, Member

DATE: January 18 and 19, 2005

PLACE: Vancouver, British Columbia

APPEARING:

For the Appellant:	Daniel Bennett and Heather Bradfield, Counsel
For the Respondent:	Diane Roberts, Counsel
For the Third Party:	Ben van Drimmelen, Counsel
For the Intervenor Sierra Club of Canada:	Jeanette Ettel, Agent
For the Intervenor Council of Forest Industries:	Mark Oulton, Counsel

MAJORITY DECISION OF PANEL MEMBERS MARGARET ERIKSSON AND STEPHEN WILLETT

APPEAL

This is an appeal brought by Weyerhaeuser Company Limited ("Weyerhaeuser") of a March 19, 2004 determination of Maxwell Tanner, District Manager (the "District

Manager"), Headwaters Forest District, Ministry of Forests (now the Ministry of Forests and Range)(the "Ministry"). The District Manager, exercising the authority of the Minister, determined that Weyerhaeuser had contravened section 96(1) of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 ("*Code*") and, pursuant to section 71(2) of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 ("*Act*"), required Weyerhaeuser to pay an administrative penalty of $2,012. The contravention relates to the unauthorized harvesting of Crown timber by a subcontracted feller-buncher operator who was working for Red Hot Forestry Services Ltd. ("Red Hot'), which had a contract to harvest cutting permit ("CP") 129, cutblock C ("Block C"), under Forest Licence ("FL") A18694, on behalf of Weyerhaeuser.

The appeal was brought before the Commission pursuant to section 82 of the *Act* and section 131 of the *Code*. Weyerhaeuser asks the Commission to rescind the determination on the basis that Weyerhaeuser met the due diligence defence contained in section 72 of the *Act*. The Commission's powers to make a decision in this appeal are contained in section 84 of the *Act*.

The Respondent is the Government of British Columbia, representing the Ministry of Forests ("Ministry"). The Third Party is the Forest Practices Board. Both the Sierra Club of Canada ("Sierra") and the Council of Forest Industries ("COFI") were granted intervenor status for the limited purpose of making legal argument on the application of the due diligence defence in section 72 of the *Act*.

BACKGROUND

Weyerhaeuser is the holder of FL A18694 in the Headwaters Forest District near Clearwater, BC. Block C is on the west side of, and runs parallel to, Axel Creek. The central part of Block C is relatively flat and was logged using conventional logging methods in the fall of 2000. It is accessed through McCarthy Creek Road. The upper third of Block C is steep and was laid out for cable logging. The cutblock boundaries, riparian management zones, and a split line between the upper and central parts of Block C were marked with ribbons in 1999, and were painted on trees in March 2000. (The lower third of Block C is not relevant to this appeal.)

Cutblock D ("Block D") of CP 129 under FL A18694 is to the east of, and runs parallel to, Axel Creek.

In December 2001, Weyerhaeuser made plans to build a new spur bridge across Axel Creek between Blocks C and D, so that the upper part of Block C could be accessed and logged. Weyerhaeuser was using its contractor, Red Hot, to harvest those areas. Red Hot had worked as a cable logger contractor for Weyerhaeuser since 1996. Its owner had previously been a Weyerhaeuser foreman supervising roads and logging work.

On December 24, 2001, Weyerhaeuser's logging supervisor, Brett Gunn, and Weyerhaeuser's bridge and road construction supervisor, Randy Redleback, had a pre-work meeting with Red Hot's owner, Gord Bryan, and Red Hot's bush foreman, Doug Chase. They discussed the harvesting to be performed by Red Hot within Block D, and the work to be performed within the upper third of Block C. Since Mr. Bryan was to be away on holidays until January 14, 2002, he designated Mr. Chase

to handle any matters on behalf of Red Hot concerning work needing to be done on Block C while he was away.

On January 3, 2002, Mr. Gunn, Mr. Redleback and Mr. Chase had an on-site pre-work meeting to discuss the harvesting of the upper third of Block C and the construction of the spur bridge and access road. During that meeting, they inspected the proposed bridge site. They then walked the upper third of Block C, paying particular attention to the area between the road right-of-way and the split line. To minimize disturbance of the stream, they agreed that Red Hot's feller-buncher should log the right–of-way for the spur backwards, by beginning work on the upper third of Block C, where the operator would cut a path from the northwest corner of the split line ("Point A") to Landing 1 of the road right-of-way, and then continue along the road right-of-way to the proposed bridge site. They were unsure whether the feller-buncher could safely make it up the proposed route from Point A due to the approximately 30 degree, snow-covered, slope he would have to go up. Accordingly, Mr. Gunn instructed Mr. Chase to walk the area with the feller-buncher operator prior to beginning the work, to ensure that the feller-buncher could safely make it up the slope from Point A to Landing 1 in the upper part of Block C along the right-of-way. He instructed Mr. Chase to contact him if the operator felt that the conditions and slope were too hazardous, so they could agree upon an alternative route.

In spite of these instructions, Mr. Chase did not walk the area with the feller-buncher operator, Don Glover. Mr. Chase simply reviewed the map (i.e. the logging plan) with Mr. Glover and then sent him out to work.

On January 14, 2002, Red Hot's owner, Mr. Bryan, now back from holidays, had a meeting with Mr. Gunn. There was little evidence regarding what was discussed at this meeting, beyond the following. Mr. Bryan was upset over a side arrangement, which Mr. Chase made with Mr. Redleback while Mr. Bryan was away, that gave Mr. Chase's independent company a contract to construct the bridge and log the road right-of-way. Logging within a cutblock is typically done by the logging contractor, which in this case was Red Hot, so the side arrangement with Mr. Chase's independent company came as a surprise to Mr. Bryan and, accordingly, he was upset over this side deal.

On January 16, 2002, the feller-buncher machine and Mr. Glover were left at an old landing in the previously harvested central part of Block C.

Instead of proceeding from the old landing across the central part of Block C to Point A and cutting a strip from the split line to the right-of-way, Mr. Glover apparently misread his location on the map and started felling trees in the wrong direction on the opposite site of the central part of Block C. He cut a strip from the south-east boundary of the central part of Block C toward Axel Creek, harvesting a five metre wide strip of timber for approximately 190 metres beyond the boundaries of Block C before he realized he was in the wrong place and shut down his machine. A total of 55.6 cubic metres (approximately one truck load) of timber was harvested outside the boundaries. Fortunately, there were no related soil or water impacts.

Mr. Glover then notified Red Hot of his error, and Red Hot in turn told Weyerhaeuser. Weyerhaeuser's logging supervisor, Mr. Gunn, immediately came out to inspect the area. When Mr. Gunn arrived, he noted that there was two feet of snow in the previously logged central portion of Block C although the visibility was good. He asked Mr. Glover if he had physically walked the site with Mr. Chase. Mr. Glover said that they hadn't walked the site, but instead Mr. Chase had given him the map and had explained what he wanted done. Mr. Glover told Mr. Gunn that he could have avoided the error if he had gotten out of his machine and walked from the old landing, where his machine had been dropped off in the central part of Block C, to Point A where he was supposed to begin cutting.

It should be noted that, when the logging plan (map) for Block C was prepared, global positioning system ("GPS") points were not used. However, at the hearing before the Commission, Mr. Gunn testified that lack of GPS points on the map shouldn't have made any difference, because Point A was a 90 degree corner that would have been physically indicated by a "T" intersection of 3 painted lines.

Weyerhaeuser reported the incident to Mark Taylor of the Ministry on January 16, 2002. Weyerhaeuser also sent a disciplinary letter to Red Hot following the incident, which stated in part:

> There was a process breakdown in this incident. Specifically, Red Hot's bush foreman did not provide adequate direction to the buncher operator on where to start cutting. The buncher operator did not know his exact location on the ground prior to starting to cut. As discussed after the initial trespass, we expect Red Hot Forestry Services Ltd. to take the steps to ensure that:
>
> A. the buncherman knows where he is cutting at all times and,
>
> B. if the buncherman is in doubt as to his location, he gets off the machine and determines where he is within the block prior to starting to cut.
>
> C. if still unable to find his location on the map, the operator is to contact the Contractor for further instruction prior to starting to cut.

The District Manager gave Weyerhaeuser an opportunity to be heard in October 2002, and then made a determination on March 19, 2004, finding that Weyerhaeuser had contravened section 96(1) of the *Code*. The District Manager levied a penalty of $2,012 under section 71(2) of the *Act*.

Weyerhaeuser's Environment Management System (EMS)

In addition to the facts surrounding the incident, Weyerhaeuser led extensive evidence about its environmental management system ("EMS").

Weyerhaeuser's BC interior division developed an elaborate EMS in 1998, which was certified under ISO 14001 1999 and more recently certified under a new CSA forestry standard. The EMS is designed to identify, manage and control all potentially significant environmental aspects of Weyerhaeuser's operations. Since

unauthorized harvesting of timber is considered a significant aspect, the EMS has standardized methods to prevent such harvesting, including:

(i) annual training sessions for all contractors;

(ii) use of standardized ribbon and paint marking schemes to delineate boundaries, roads and sensitive areas on all blocks, which are also consistently marked on the logging plans;

(iii) Weyerhaeuser supervisors conduct an on-site pre-work meeting with the contractor before any work can begin and the contractor is required to conduct a similar on-site pre-work meeting with its crew before any work begins;

(iv) bi-weekly inspection and monitoring of all sites by Weyerhaeuser logging supervisors;

(v) continual improvement of the EMS requirements, in part by ensuring that all environmental incident reports are documented and reported with recommendations for required follow up action to prevent future incidents; and

(vi) annual internal and external audits.

Further details about those requirements are discussed below.

Weyerhaeuser's EMS requires that its contractors receive annual training in *Code* and EMS requirements. Weyerhaeuser maintains a data base of all individuals and companies requiring training, as well as their past and future training dates. The contractor's crew is also invited to attend training sessions.

On June 1, 2001, Weyerhaeuser hosted a Forest Worker's Training School, which was attended by Mr. Bryan, Mr. Chase, Mr. Glover and several other Red Hot employees and subcontractors. At this School, Mr. Gunn provided training on Weyerhaeuser's ribbon and paint standards. He also taught the session concerning mandatory on-site pre-work meetings that must occur prior to beginning any work, including what must be discussed at such meetings and what Weyerhaeuser requires its contractors to cover in subsequent mandatory on-site pre-work meetings with their crews.

Weyerhaeuser uses uniform paint and ribbons schemes to mark its block boundaries, in order to prevent unauthorized harvesting of timber and to ensure that key features and sensitive areas are identified. Block boundaries are painted with two horizontal stripes of orange paint, which remain visible for up to 10 years. Block boundaries are also marked with winter grade ribbon, which has a life span of 3-4 years. Paint and ribbon is to be placed as high up on trees as possible so it won't be covered by snow. As the paint is considered to be the boundary, contractors are instructed to cut to the paint, rather than the ribbon, but not to cut the painted trees themselves, so boundaries will remain visible after a block is harvested. Split lines between different parts within a block are also marked with paint and ribbons, as are roads, landings and sensitive features such as riparian management zones, using specific colours and marking schemes. The logging map for each cutblock, which is given to the contractor (with enough copies for each

machine operator), shows the ribbon and paint scheme for the boundaries, split lines, landings, roads and other sensitive features of the cutblock. As part of the EMS, contractors and their employees receive annual training in Weyerhaeuser's paint and ribbon standards.

Before a contractor may commence any work on a cutblock, the EMS requires that Weyerhaeuser's supervisors hold a pre-work on-site meeting with the contractor. During an on-site meeting, the supervisor must review the logging plan (map) for the block, *Code* requirements, safety issues, environmental issues, such as riparian management zones and other unique and sensitive features, and paint and ribbon schemes with the contractor. The contractor is given enough copies of the logging plan so that every machine operator and power saw operator involved in harvesting, skidding, road construction and site preparation will also have a copy. The EMS then requires the contractor to conduct a similar on-site pre-work meeting to discuss the same issues with its crew before any work begins on the block.

Weyerhaeuser's EMS also requires its supervisors, including Mr. Gunn, to visit the site once or twice a week while work is on-going, to monitor the work and ask questions of the contractor and its crew to ensure that they understand environmental and *Code* requirements, EMS steps, how to read maps, and practical issues. These bi-weekly visits and on-site testing/training help Weyerhaeuser to ensure compliance.

After an environmental incident occurs, Weyerhaeuser's EMS requires that an environmental incident report is prepared, which documents the incident and discusses any corrective action that could be taken to prevent similar incidents in the future. As appropriate, the EMS and field requirements are changed to reflect those recommendations.

Weyerhaeuser also performs annual internal and external audits of its EMS and field operations, and implements recommendations arising from those audits in its EMS and field requirements.

ISSUES

1. Whether an appeal under the *Code* and the *Act* is a hearing *de novo* or merely an appeal on the record of the administrative decision maker below.
2. What is the correct test to apply when considering whether a person can rely on the statutory defence of due diligence in section 72(a) of the *Act*?
3. Whether Weyerhaeuser's conduct, in the context of the events that led to the section 96(1) *Code* contravention, amounts to due diligence for the purpose of section 72(a) of the *Act*.

RELEVANT LEGISLATION

Legislation Relevant to Issue 1

Sections 82 and 84 of the *Act* are relevant to the nature of the Commission's powers on this appeal.

This appeal arises under section 82(1) of the *Act*. Section 82 provides:

82 (1) The person who is the subject of a determination referred to in section 80, other than a determination made under section 77.1, may appeal to the commission either of the following, but not both:

(a) the determination;

(b) a decision made after completion of a review of the determination.

(2) Sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under this section.

The powers of the Commission are contained in section 84(1) of the *Act*. It states:

84 (1) On an appeal

(a) by a person under section 82(1), or

(b) by the board under section 83(1),

the commission may

(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.

In addition, sections 131 through 137 of the *Code* set out additional procedures and powers of the Commission in this appeal.

Appeal

131 (12) A party may

(a) be represented by counsel,

(b) present evidence, including but not limited to evidence that was not presented in the review under section 129,

(c) if there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(13) The commission may invite or permit a person to take part in a hearing as an intervenor.

(14) An intervenor may take part in a hearing to the extent permitted by the commission and must disclose the facts and law on which the intervenor will rely at the appeal, if required by the regulations and in accordance with the regulations.

(15) A person who gives oral evidence may be questioned by the commission or the parties to the appeal.

...

Evidence

137 (1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,

(a) any oral testimony, or

(b) any record or other thing

relevant to the subject matter of the appeal and may act on the evidence.

...

(4) The commission may retain, call and hear an expert witness.

Legislation Relevant to Issues 2 and 3

The District Manager determined that Weyerhaeuser had convened section 96(1) of the Code, which states:

96 (1) A person must not cut, damage or destroy Crown timber unless authorized to do so under an agreement under the Forest Act or under a provision of the Forest Act.

Since the determination under appeal was made after the Act came into force, the Act's administrative penalties apply. The District Manager, as a delegate of the Minister, levied an administrative penalty against Weyerhaeuser under section 71 of the Act, applying the vicarious liability provision of 71(3). The relevant provisions of section 71 provide as follows:

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.

...

(3) Subject to section 72, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.

...

Weyerhaeuser asserts that it has established the defence of due diligence, which is available under section 72(a) of the *Act*. Section 72(a) provides:

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,

PARTIES' SUBMISSIONS

(a) Weyerhaeuser

Weyerhaeuser asserts that this appeal is not limited to a hearing on the record but that the Commission has *de novo* hearing powers to deal with the issues raised in this appeal. Weyerhaeuser focused its submissions on the substantive issues raised in this appeal.

Weyerhaeuser does not question that a violation of section 96(1) of the *Code* occurred due to the actions of its contractor, for which Weyerhaeuser is vicariously liable under section 71(3) of the *Act*. Section 71(3) is subject to the due diligence defence in section 72(a) of the *Act*. It maintains that, on the facts of this case, it was duly diligent.

Weyerhaeuser submits that the proper test for due diligence has two branches, as described by the majority of the Court in *R. v. MacMillan Bloedel Limited (now Weyerhaeuser Company Limited),* [2002] B.C.J. No. 2083 (B.C.C.A.) (hereinafter *R. v. MacMillan Bloedel*), at paragraph 47:

> Thus, there are two alternative branches of the due-diligence defence. The first applies where 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".

Accordingly, Weyerhaeuser says that the panel should 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 terms of whose due diligence is at issue, Weyerhaeuser argues that the plain language of section 72(a) makes it clear that it is only the due diligence of "the person" accused of the contravention that is being considered in this defence. Section 72(a) states:

> 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,
>
> [emphasis added]

Thus, section 72(a) does not require that the due diligence of others involved in the contravention also be considered. The contractor's due diligence becomes an issue only if the contractor is also accused of the contravention, and it is then assessed in terms of whether the contractor can itself rely on the due diligence defence.

Weyerhaeuser maintains that due diligence is, by its nature, very fact specific. It urges the panel to interpret section 72 in such a way that the defence will not be negated. Rather, the panel should focus on whether the event that occurred was reasonably foreseeable, not on whether unauthorized harvesting of timber in a general sense was reasonably foreseeable. Otherwise, the panel would be applying a standard tantamount to absolute liability.

In *R. v. MacMillan Bloedel*, pipes at an industrial facility had leaked and caused a spill. The leak was caused by a chemical reaction. The Court focused not on whether it was reasonably foreseeable that pipes, in a general sense, may leak. Instead, they focused on whether the actus reas in the particular case was reasonably foreseeable (i.e. whether it was reasonably foreseeable that a chemical reaction would occur in those pipes and cause a leak). Madam Justice Smith, speaking for the majority of the Court, stated at paragraphs 44 and 52:

> In my view, the focus of the inquiry must be the foreseeability of the actus reas of the offence charged, not "the general foreseeability of environmental contamination" or "the foreseeability of the specific cause".
>
> ...
>
> It is irrational to say that an accused may escape liability for an event that was not reasonably foreseeable by taking all reasonable steps to avoid it. One cannot consciously take steps to avoid an event that one cannot foresee. A reasonable step is one for which a reason can be assigned. No reason could have been assigned for a plan that would have satisfied the second branch of the defence of due diligence in the circumstances here. One could not say, without the benefit of hindsight, that a plan to replace the pipes at any specific time would have been a reasonable step to avoid the escape of fuel into the creek on May 16, 1997, because no one could reasonably foresee the happening of that event.

Similarly, although unauthorized harvesting outside of the boundaries of a cut block is reasonably foreseeable in a general sense, Weyerhaeuser maintains that the unauthorized harvesting of trees in this particular case was not reasonably foreseeable. The operator was entirely on the wrong side of Block C. Weyerhaeuser had given express instructions to Red Hot's foreman to walk the operator over to Point A where he was to begin cutting. If those instructions had been carried out, the violation would not have occurred. Accordingly, Weyerhaeuser maintains that it could not reasonably foresee that Mr. Chase would ignore its supervisor's instructions and fail to walk Mr. Glover to the place where he was to begin cutting.

Weyerhaeuser cited two environmental cases involving offences which occurred after contractors disregarded instructions of the company which contracted them to carry out the work.

In *R. v. Pacifica Papers Inc.* (2002), 46 C.E.L.R. (N.S.) 93 (B.C. Prov. Ct.) (hereinafter *R. v. Pacifica Papers*), Pacifica hired a contractor to dig an excavation pit and directed the contractor to pump water onto a hog fuel pile. The contractor ignored the instructions and instead pumped the water onto the road, where it drained into a fish-bearing creek in violation of the federal *Fisheries Act*. The Court found that Pacifica had no reason to believe that its instructions would be disregarded, and moreover, that it was not reasonable to expect Pacifica's representative to personally supervise the project by remaining there throughout.

In *R. v. Columbia Bitulithic Ltd.* (1991), 8 C.E.L.R. (N.S.) 7 (B.C.S.C.) (hereinafter *R. v. Columbia Bitulithic*), a contractor to Columbia Bitulithic Ltd. received instructions to fill a tank in one location, but instead filled a different tank in another location. Columbia Bitulithic Ltd. was charged under the provincial *Waste Management Act* and the federal *Fisheries Act*. The Court held at paragraph 12:

> There must be a causal connection between the event and the accused…. I do not believe that Columbia should be held to anticipate an independent trucking company would ignore its instruction on where it was to find the storage tank, and to fill it at a different location without making inquiries.

Weyerhaeuser asserts for similar reasons that it could not have reasonably foreseen that Red Hot would disregard its instructions, and therefore, that the breach was not reasonably foreseeable. Accordingly, it submits that it is entitled to the due diligence defence under the first branch of the test.

Alternatively, if the panel finds that the event was reasonably foreseeable, Weyerhaeuser claims that it took all reasonable care to prevent the event from occurring, and it met the standard of due diligence required of a licensee who engages a contractor or subcontractor to perform work on its behalf.

Weyerhaeuser submits that the standard of due diligence that was required of it was established in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 (S.C.C.)(hereinafter *R. v. City of Sault Ste. Marie*), at pages 1330-1, and it requires Weyerhaeuser to show that it exercised "all reasonable care" by establishing a proper system to prevent the commission of the act, and then taking all reasonable steps to ensure that the system operated effectively.

Weyerhaeuser relies on *R. v. Bata industries Ltd.* (1992), 7 C.E.L.R. (N.S.) 245 (Ont. Prov. Ct.) (hereinafter *R. v. Bata Industries*), at paragraph 71, for an interpretation of the phrase "all reasonable care":

> The cases interpreting the phrase "all reasonable care" indicate that the wording does not require that all steps be taken, only these that could be reasonably expected in the circumstances. The case law makes no distinction between "all reasonable care" and "reasonable care." The degree of reasonable care to be exercised is dependent upon the circumstances of the case.

Weyerhaeuser points to a number of factors to support its claim that it took all reasonable care in the circumstances of this case.

Specifically, Weyerhaeuser maintains that it exercised all reasonable care by devising a proper system (i.e. the EMS) to prevent the event from being committed, and ensuring that its system operated effectively. It retained and supervised qualified professionals to lay out and flag the block boundaries with high visibility orange ribbon, and a qualified contractor to paint the boundaries of Block C with high visibility orange paint. It retained, trained, and supervised a qualified logging contractor to harvest Block C pursuant to the terms of the approved operational plan and the *Code* requirements. The logging contractor, Red Hot, had worked as one of Weyerhaeuser's contractors since 1996. Its principal had been a former supervisor at Weyerhaeuser and he and his employees and subcontractors had attended Weyerhaeuser training courses. Weyerhauser implemented systems and procedures to ensure that its contractors would comply with operational plans and legislation. It trained harvesting contractors annually on relevant aspects of its EMS, including ribbon and paint standards, pre-work meeting requirements and requirements for contractors to train and instruct their crews. In fact, seven months before the incident, in June 2001, all persons involved in the incident had attended Weyerhaeuser's Forestry School. Weyerhaeuser also held internal and third party audits of its EMS and operations. Weyerhaeuser logging supervisors conduct bi-weekly inspections when harvesting contractors are working on site, and test operators to ensure that they understand the logging plans (maps), environmental and safety requirements. Environmental requirements are also included in contracts with harvesting contractors, and non-compliance is subject to a system of progressive discipline. The EMS is also continually being improved to address problems that arise or issues brought up in audits.

Finally, in this case, Weyerhaeuser submits that it held a comprehensive pre-work meeting with the contractor before the work commenced and gave the contractor specific instructions to walk the operator to the place where he was to begin cutting. The feller-buncher operator's act of cutting beyond the boundaries took place without Weyerhaeuser's direction or approval and would not have occurred had its explicit instructions to the contractor been carried out.

Weyerhaeuser asserts that the relevant standard of care is that of a "reasonable professional possessing the expertise suitable to the activity in issue," and is to be measured on the balance of probabilities: *R. v. Northwood Pulp and Timber Co.,* [1995] B.C.J. No. 2380 (B.C.S.C.), at paragraph 44, where the Court cites Dixon J. in *R. v. Sault Ste. Marie* at page 6.

Weyerhaeuser also cites *R. v. Midland Transport Ltd.* (1982), 8 C.E.L.R. (N.S.) 314 (NS Prov. Ct.) (hereinafter *R. v. Midland Transport*), at paragraph 24, as authority for the proposition that the standard is reasonableness, not perfection. It can only be asked to take all reasonable steps to prevent the harm, not all conceivable steps: *R. v. British Columbia Hydro & Power Authority* (1997), 25 C.E.L.R. (N.S.) 51, at paragraph 66, [1997] B.C.J. No. 1744 (B.C.S.C.) (hereinafter *R. v. BC Hydro*). Nor is it reasonable to expect Weyerhaeuser to personally supervise all operators: *R. v. Pacifica Papers*, at paragraphs 143-144.

Weyerhaeuser maintains that the District Manager erred in placing weight on the sparse flagging and painting in the area where the feller-buncher committed the unauthorized harvesting, as being a cause of the contravention and an absence of due diligence. Weyerhaeuser says that it could not have anticipated that repainting

or flagging the entire lower part of the block would have prevented this incident because the feller-buncher was never expected to be in that area in the first place. There were significant block features that indicated where the 90-degree corner was at Point A. If the contractor had followed the Weyerhaeuser supervisor's instructions, the operator would have been walked to Point A and the feller-buncher would have gone straight to Point A at the split line and started cutting from there.

Finally, Weyerhaeuser argues that, in environmental cases, the principles governing the standard of reasonable due diligence include consideration of the seriousness of the damage that could result and the likelihood of harm occurring. The greater the potential for substantial injury and the greater the likelihood of the harm occurring, the greater the degree of care required: *R. v. Gulf of Georgia Towing Co.,* [1979] 3 W.W.R. (B.C.C.A) at 87, (1979), 10 B.C.L.R. 134 (C.A.) (hereinafter *R. v. Gulf of Georgia Towing Co.*); *R. v. Placer Developments Ltd.* (1984), 13 C.E.L.R. (N.S.) 42 (Yukon Terr. Ct.)(hereinafter *R. v. Placer Developments Ltd.*), at 51-52. Weyerhaeuser argues that, in this case, there was no environmental damage caused by felling 55.6 cubic metres of timber. The likelihood of the feller-buncher cutting outside of the block was small, given that the contractor and the operator were provided with detailed maps, and specific instructions were given to the contractor to walk the operator to Point A where he was to have begun cutting.

Weyerhaeuser maintains that the standard of care behind the due diligence standard in section 72 must be interpreted in a way that is reasonable and achievable. Otherwise, it would undermine the whole purpose of including section 72 in the *Act*. The Legislation has codified the due diligence defence and, according to Weyerhaeuser, it should be applied in its natural and ordinary sense as defined by the case law.

Weyerhaeuser notes that the cut block in question in this case is only one of thousands of cut blocks being harvested in the Province. Weyerhaeuser maintains that it is simply not reasonable that Weyerhauser should personally supervise every contractor and every activity of the equipment operators of its contractors. It will always be possible for someone using hindsight to think of something more that hypothetically could have been done to prevent a contravention, whether or not that hypothetically is reasonable. Weyerhaeuser submits that the standard should not be set at a level tantamount to an absolute liability standard. That is not what the Legislature intended when it introduced section 72 of the *Act*.

(b) Respondent

The Respondent maintains that the panel ought not to interfere with the findings of fact or the decision of the District Manager. The Respondent asserts that this appeal is not a hearing *de novo*. Rather, it should be limited to a review of the record of the decision-maker below. Accordingly, if the District Manager applied the correct test, the Commission ought not to interfere with the findings of fact or the decision of the District Manager.

On the substantive issues, the Respondent asserts that the onus is on the appellant to establish due diligence. The case turns on two key issues:

(1) whether the event that occurred was reasonably foreseeable; and

(2) whether Weyerhaeuser took all reasonable care to avoid the event.

These questions turn on the facts of the specific case. The Respondent argues that, on the facts of this case, Weyerhaeuser has not shown due diligence.

First, the Respondent submits that it is reasonably foreseeable that an equipment operator may get lost and cut trees outside the cut block boundaries especially when harvesting activities occur in the winter. Thus, the unauthorized harvesting that occurred in this case was reasonably foreseeable.

Second, the Respondent argues that Weyerhaeuser did not have sufficient control mechanisms in place to prevent the contravention from occurring. Comments on the Environmental Incident Report, which Mr. Gunn prepared as part of Weyerhaeuser's EMS, indicate that some of the operator's confusion about where he was to begin cutting arose because some of the painted trees within the central portion of Block C had blown over during the previous year and were covered with snow. After the area was harvested, paint and ribbon marks were not updated. The map also had been drawn up three years earlier and did not have any boundary stations of GPS point coordinates on it, which Weyerhaeuser requires on its newer logging plans. The lack of GPS points contributed to the operator getting lost.

In addition, the Respondent maintains that the instruction that Red Hot's supervisor must walk the operator to Point A was given for reasons unrelated to preventing the operator from getting lost between the landing and Point A. It was given to ensure that the feller buncher could safely traverse the slope from Point A along the right-of-way. The Respondent notes that a meeting took place between Mr. Gunn, Weyerhaeuser's logging supervisor, and Mr. Bryan, Red Hot's owner, two days before the unauthorized harvesting occurred and several days after the January 3 on-site meeting attended by Messrs. Gunn and Redleback of Weyerhaeuser and Mr. Chase of Red Hot. Although Mr. Gunn could have followed up with Mr. Bryan to ensure that Mr. Chase carried out Mr. Gunn's instruction to him to walk the operator to Point A prior to harvesting, there were no procedures requiring the Weyerhaeuser supervisor to do so. There was no follow up. The Respondent argues that it was reasonable for Weyerhaeuser to oversee the actions of its logging contractor. It is Weyerhaeuser's responsibility to coordinate the work on its cut blocks. Failure to follow up to ensure the contractor carried out instructions shows that Weyerhaeuser did not take all reasonable care in these circumstances. In addition, Weyerhaeuser should have implemented more procedures to ensure that those employees working for its contractors had sufficient map reading skills.

The Respondent submits that the essential question in this appeal is whether verbal instructions to a contractor are enough to dispose of Weyerhaeuser's due diligence obligations.

In short, the Respondent argues that the District Manager applied the correct test and correctly decided that Weyerhaeuser had not established due diligence. Thus, the appeal should be dismissed.

(c) Forest Practices Board

The Forest Practices Board (the "FPB") asserts that Weyerhauser has both primary (direct) and vicarious liability for the contravention that occurred, and thus, must establish that both it and its contractors were duly diligent.

The FPB submits that, the Commission must consider whether Mr. Gunn – who the FPB refers to as "Weyerhaeuser's guiding mind" – was duly diligent.

The FPB asserts that even if Weyerhaeuser can establish that it exercised all reasonable care regarding its own actions, it must also establish that its contractor and its agent, namely, Red Hot and Mr. Glover, the feller bunch operator, exercised all reasonable care to prevent the contravention. The FPB maintains that Weyerhaeuser is responsible for their actions because of the vicarious liability provision in section 71(3) of the *Act*. Section 71(3) provides that, if a person's contractor, employee or agent contravenes a provision of the legislation in the course of carrying out the contract, employment or agency, the person also contravenes the provision. The FPB argues that, under this provision, Weyerhaeuser is the "person" and Red Hot and the operator are contractors or agents of Weyerhaeuser.

The FPB maintains that due diligence is determined by looking at the person's specific acts in the context of each particular event giving rise to the contravention, and not by looking at a more general standard of care: *R. v. Imperial Oil Ltd.,* [2000] B.C.J. No. 2031 (B.C.C.A.) (hereinafter *R. v. Imperial Oil*) at paragraph 23.

The FPB notes that due diligence is a complex defence involving a broad range of specific considerations and factors. When determining whether someone has been duly diligent, the courts have considered many factors including whether a person acted according to general industry practices and guidebooks, professional manuals, industry-related publications as well as relevant legislation, licences, permits or plans: *R. v. Gonder* (1981), 62 CCC (2d) 326 (Yukon Terr. Ct.)(hereinafter *R. v. Gonder*), at page 6; and *Hilton Canada Inc. v. S.N.C. Lavalin,* [1999] N.S.J. No. 188 (N.S.S.C.), at paragraphs 47, 55, and 76. The courts have also considered the use of preventative systems, such as EMS, training programs, internal and external audits, risk assessments and contingency plans designed to prevent the particular event: *R. v. Imperial Oil*, at paragraph 28. They have looked at the availability of alternate solutions to prevent the occurrence: *R. v. BC Hydro*, at paragraph 66, and *R. v. Rio Algom Ltd.,* [1988] O.J. No. 1810, at page 9; 66 O.R. (ed) 674 (Ont. C.A.). In *R. v. Fibreco Pulp Inc.,* [1997] B.C.J. No. 846 (B.C.C.A.), the party's promptness in responding to the problem and efforts to mitigate were considered, as were its responsiveness to suggestions by regulatory officials.

In the context of determining whether Weyerhaeuser has established due diligence for its own actions, the FPB asks the Commission to consider that the unauthorized harvesting was not authorized by a permit. Furthermore, Weyerhaeuser could have done a better job of flagging and painting the block boundaries and checking whether such marks were still visible. It could have supplied clearer maps to its contractors. It could have removed confusing boundary markers such as the split line. It also could have more closely supervised the actions of Red Hot to ensure

that Red Hot's supervisor actually walked the area with the operator before allowing him to start working. The FPB also maintains that Weyerhaeuser's EMS was inadequate because it did not prevent the contravention in this case and could not test whether its contractors and their employees applied the training correctly. In addition, it asserts that Weyerhaeuser had a high level of control over the actions of its contractors and their employees.

The FPB maintains that Weyerhaeuser's contractors or agents were not duly diligent for the following reasons. Red Hot could have taken steps that would have prevented the contravention, but it failed to do so. It failed to confirm whether the paint and flag markers were clear. Red Hot's supervisor did not walk the operator to the place where he was to start and did not closely supervise the operator's work. Nor did Red Hot seem to have its own EMS. In addition, the operator could have asked for a better map, or confirmed the starting point by walking to it before starting up his machine. He also could have used the map and compass to orient himself before starting to cut. Since Red Hot and the operator were not duly diligent, the FPB submits that Weyerhaeuser's due diligence defence should fail because it can be vicariously liable for their actions under section 73 of the *Act*.

The FPB relies on *R. v. Weyerhaeuser*, B.C. Prov. Court, Masset Registry, File No. AG42557788, August 25, 2004, Krantz, J. (unreported), which turned on whether Weyerhaeuser had been duly diligent in detecting and fixing a large pothole on its main haul road. Weyerhaeuser had an EMS training program in place for its contractors and required everyone who used the road to report a problem needing fixing, to ensure it would be fixed. Despite the training and a considerable amount of traffic over the road by logging truck drivers, grader operator and supervisors, no one reported the problem. So the training was not applied in the field because the people carrying out the work did not do what they were trained to do. It didn't matter that Weyerhaeuser was prompt in fixing the pothole once it was reported. Judge Krantz considered road problems of this nature to be foreseeable, and that was why there was training to prevent or respond to such problems. Weyerhaeuser was not able to rely on a due diligence defence in that case.

Similarly, the FPB maintains that, in the present case, the unauthorized cutting was foreseeable, as there were a number of EMS components designed to prevent those problems. The training did not work to prevent the contravention because the people actually carrying out the work, Red Hot's supervisor and the operator, did not do what they were trained to do. Accordingly, Weyerhaeuser should not be able to rely on a due diligence defence.

Finally, the FPB asserts that the public interest requires that the conduct of Weyerhaeuser and other licensees operating on public lands, must meet a "high level of care". Forest practices have evolved from a prescriptive regime, with much government oversight, to a results-based regime where licensees decide for themselves how to meet the objectives specified by the government. Effective enforcement of a results-based regime requires that licensees be held to a high standard of diligence. However, the standard must not be set so high as to be unachievable. Rather, cases where licensees can establish due diligence should be very rare. The FPB asserts that the present case is not one of those very rare situations where the appellant's conduct can be excused by a due diligence defence.

(d) Sierra Club of Canada

Sierra argues Weyerhaeuser should be held to a higher than ordinary standard of care because the Supreme Court of Canada has characterized environmental protection to be of "superordinate importance", as stated by the majority if the Court in *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 219, at paragraph 85. This higher standard of care is necessary when the environment to be protected is particularly sensitive, valued or vulnerable having regard to "delicate physical or ecological characteristics and valued habitat for flora and fauna": *R. v. Placer Developments Ltd.* (1984), at 53; see also *R. v. Panarctic Oils* [1983] 44 A.R. 385, at 391-92; *Canada Tungsten Mining Corporation Limited v. R.* (1976), 1 Fisheries Pollution Report 75, at 79. Although environmental harm was negligible in the present case, Block C was adjacent to a stream, which might have been sensitive and ecologically valuable. Improper logging in such areas could have disproportionate impacts on wildlife and lead to sedimentation in water, which may cause problems to fish or community watersheds.

In addition, Sierra maintains that Weyerhaeuser should be held to a higher standard of care because it is exploiting public resources on public land, and not merely logging its own private property. Important values are at stake when logging takes place on public lands. Logging can potentially impact fisheries, wildlife and tourism interests. In choosing to exploit public resources, Weyerhaeuser should bear the costs of putting public interests at risk. Weyerhaeuser is in the best position to control the harm that may result from its activities. Therefore, its actions should be held to a high standard of care.

Sierra asserts that Weyerhaeuser did not meet the required standard of care to establish due diligence in this case. Due diligence requires that adequate information and instructions are communicated right down to the person on the job. It must show that it used all reasonable care in dealing with Red Hot and Red Hot's feller buncher operator, who were acting on Weyerhaeuser's behalf, and that they had adopted their own systems to prevent the contravention. Accordingly, Weyerhaeuser should have done everything reasonable to ensure that the operator was given adequate information and instructions regarding block boundaries. All reasonable care involves taking proactive and preventative measures. Weyerhaeuser could have avoided the contravention by simply ensuring that the person cutting the trees actually knew where he was to cut, by ensuring that he was walked around the boundaries of the cutblock. Ensuring a "site walk" with the person on the job ought to have been standard practice.

Sierra maintains that it was reasonably foreseeable that there would be a breakdown of communications between Red Hot and the operator, and that such a breakdown would likely lead to a contravention. Thus, Weyerhaeuser should have ensured that Red Hot conducted a site walk with the operator for the purpose of locating the cutblock boundaries so that the operator would know where to cut. However, Weyerhaeuser's instruction that Red Hot walk the operator up to the starting point of the slope where he was to begin cutting was made for the purpose of ensuring that the feller buncher could make it up the slope. The instructions were not given for the purpose of ensuring that the operator would know where the cutblock boundaries were and would not get lost. Red Hot's supervisor apparently walked the slope himself and concluded that the machine could traverse the slope.

He never walked the operator to the starting place of the slope, as he had been instructed to do.

In addition, Sierra maintains that Weyerhaeuser could have given specific, enforceable and verifiable directions that the operator be walked around the site to determine the location boundaries. It could have implemented a notification system to ensure that the operator was properly supervised and oriented. It could have required, in its contract with the contractor, that the contractor notify Weyerhaeuser when a site walk with the operator had been completed and give notice if the contractor was not going to supervise the actual harvesting and site walks. In addition, Weyerhaeuser could have more diligently inspected the subcontracted work for compliance.

Finally, Sierra urges the Commission not to set the standard of care at such a low level that the due diligence defence becomes a "sweeping shield" that may be easily used to avoid responsibility. A narrower definition of due diligence would ensure a proper level of corporate responsibility towards, and regulatory protection of, public interests, especially in a results-based regime when enforcement is crucial to ensure that the regime is complied with.

(e) Council of Forest Industries

COFI notes that the due diligence defence came into force on January 31, 2004. The defence was part of the "wholesale" change of the provincial forestry regulatory regime from a prescriptive to a results-based system. Prior to this date, there was no due diligence defence for contraventions that resulted in administrative proceedings. The Legislature made a specific decision to add the due diligence defence.

COFI maintains section 72 is a codification of the due diligence defence as first articulated by Justice Dickson in *R. v. Sault Ste. Marie* at paragraphs 59 and 60:

> In this doctrine it is not up to the prosecution to prove negligence. Instead it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.
>
> … the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. <u>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.</u>
>
> [COFI's emphasis]

Only the second branch of the test is relevant in this case.

COFI asserts that whether a licensee is duly diligent in any given case depends on the circumstances of the case. It is a fact driven exercise. The question of whether a licensee took "all reasonable steps" must be considered in the specific context of the "particular event" which comprised the contravention in each case. Whether a licensee is duly diligent is a contextual standard that must be answered regarding the specific event in question, not in respect of any overarching broader standard or duty of care: *R. v. MacMillan Bloedel*, at paragraph 48; *R. v. Imperial Oil*, at paragraphs 23-26; *R. v. Bata Industries*, at paragraph 71; *R. v. Gonder*, at page 5.

In the context of a licensee-contractor relationship, COFI cites *R. v. Sault Ste. Marie*, at paragraph 72, for the proposition that the licensee must demonstrate:

(a) that 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.

Furthermore, COFI maintains the lengths to which a licensee must go in supervising, overseeing or training its contractors depend on the nature and magnitude of the potential harm foreseeable in the event of a contravention and the likelihood of there being a contravention: *R. v. Gulf of Georgia Towing Co.*, at paragraph 13; *R. v. Canadian Tire Corp.* (2004), 9 C.E.L.R. (3d) 248, at paragraph 87.

COFI submits that *R. v. Placer Developments Ltd*., at 51, and *R. v. Gonder*, at paragraph 19, establish that the following factors determine the standard of care required of a licensee in each case:

(a) gravity of the potential harm,

(b) available alternatives to protect against the harm,

(c) likelihood of the potential harm,

(d) skill required and the extent the accused could control the causal elements of the offence.

In *R. v. Placer Developments Ltd.*, at 52, and *R. v. Canadian Pacific Ltd.*, [2001] B.C.J. No. 447 (B.C. Prov. Ct.), at paragraphs 20-21, the courts held that a lesser standard of due diligence is required where:

(a) there is little likelihood that harm will occur, or

(b) the foreseen risk eventuates but causes "minimal", "very small" or "insignificant" harm:

COFI maintains that the contextual standard is consistent with the practical realities of the industry where contractors are routinely engaged to conduct harvesting, road building and other activities. Section 35(1)(j) of the *Forest Act* mandates that all tree farm licences contain a provision requiring a certain percentage of the

harvesting performed under the licence be done by contractors. The licensee clearly has certain obligations to supervise, implement management systems and train those whom it contracts with to perform activities. However, these obligations cannot amount to a guarantee of the contractor's behaviour. It is not reasonable to expect a licensee to directly supervise the day-to-day operations of its contractors. *R. v. Sault Ste Marie* and *R. v. Pacifica Papers Inc.*, at paragraph 136, establish that it is sufficient to have reasonable systems in place.

Finally COFI maintains that the stricter tests for due diligence advanced by the Respondent, FPB and Sierra are inconsistent with the judicial authorities on due diligence, the plain language of section 72 and the legislative intention underlying section 72.

Regarding the Respondent's support of the due diligence test applied by the District Manager, COFI maintains that the District Manager's test was fundamentally flawed in that it required a standard of perfection, not of reasonableness. The error arose because of the following way the District Manager described the due diligence test:

> 1. Was the event that led to the contravention reasonably foreseeable?
>
> 2. Did the person exercise a *sufficient amount of care* to avoid the event from occurring?
>
> [COFI's emphasis]

COFI asserts that the District Manager incorrectly articulated the second branch of the test because the answer to the second question will always be "no" unless the event (i.e. the contravention) would not have occurred.

COFI submits that *R. v. Northwood Pulp and Paper* (1992) 9 C.E.L.R. (N.S.) 289 (B.C. Prov. Ct.), as cited with approval in *R. v. BC Hydro*, illustrates the distinction between the Respondent's position and the proper application of the due diligence defence. At paragraph 54 of *R. v. BC Hydro*, the Court cites the reasoning of the B.C. Provincial Court on page 293 of *R. v. Northwood Pulp and Paper*:

> The court must not lose sight of the fact that it is examining the circumstances of the incident in April 1990 after the fact with the benefit of careful consideration by experts. The accused had to approach the problem without the benefit of clear vision that hindsight brings.
>
> In my view, it is not sufficient to speculate on what might have been done, what controls might have been in place, but rather to examine what was done, what controls were in place, what was the state of technology that existed through the evidence of lay and expert witnesses to determine if the accused acted reasonably in the circumstances.

Accordingly an accused must take all reasonable steps to avoid harm, not all conceivable steps: *R. v. BC Hydro*, at paragraphs 55, 66; and *R. v. Bata Industries*, at paragraph 71.

COFI also maintains that the FPB's assertion – that a licensee cannot establish due diligence unless it can demonstrate not only that it was duly diligent but also that its contractor was duly diligent – is inconsistent with the clear and plain language of section 72 of the *Act*. It is the diligence of "the person" who is being accused of contravening the statute, not the diligence of some other person (e.g. a contractor) that is relevant to the defence. The FPB, in COFI's opinion, also misconstrues the *Sault Ste. Marie* decision. In that decision, Justice Dickson clearly stated as follows in paragraph 72: "[t]he due diligence that must be established is that of the accused alone." [See also *R. v. Midland Transport*, at paragraph 22.] To hold a licensee to the strict standard advocated by the FPB would effectively raise the burden of regulatory offences contemplated in section 71 of the *Act* to a level tantamount to absolute liability. This was not what the Legislature intended.

Finally, COFI asserts that the higher standard of care advocated by Sierra is predicated on the notion that the *Code* and the *Act* are environmental legislation. COFI submits that Sierra's test fails to account for the long line of jurisprudence following *R. v. Sault Ste. Marie* which establishes that the due diligence standard is variable and focuses on reasonableness in the context of the particular event in question, not on a broader examination of whether there may be environmental implications for some contravention which would fall under the ambit of section 72 of the *Act*. Whether there is a significant or material risk of environmental harm is a relevant consideration of a particular case. However, in COFI's submission, it is not an overriding concern. The test is always one of reasonableness in the circumstances of the particular case. Sierra's characterization of the facts of this particular case also, according to COFI, blatantly ignores the fact that only minor damage was done as a result of the unauthorized harvest in this case.

In conclusion, COFI submits that the Commission should adopt an interpretation of the due diligence defence consistent with *R. v. Sault Ste. Marie*; namely, that the standard of due diligence to be applied is that of a reasonable licensee in the particular circumstances of each case, and the standard will be shaped by the following factors:

(a) the 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.

1. Whether an appeal under the *Code* and the *Act* is a hearing *de novo* or merely an appeal on the record of the administrative decision maker below.

In general, the nature of an appeal to a tribunal is determined by interpreting the relevant provisions of the tribunal's enabling statute. The Panel finds that the relevant provisions of the *Act* and the *Code* clearly demonstrate the Legislature's intention to give the Commission flexibility in how it handles appeals. The provisions allow the Commission to hear new evidence or to consider the findings of

the decision-maker below, thus allowing it to effectively conduct a new hearing of the matter if it considers it appropriate to do so.

The Commission's hearing *de novo* powers are confirmed by the express language of section 84 of the *Act* and sections 131 through 137 of the *Code*. Those provisions give the Commission expansive powers to hear evidence and receive submissions, including evidence that may or may not have been before the initial decision-maker. In addition, subsections 131(13) and (14) allow the Commission to hear submissions from intervenors on particular issues in the appeal, and such submissions would not have been available to, or have been considered by, the initial decision-maker.

The flexibility regarding how the Commission chooses to handle an appeal is clear from the language of paragraphs 84(1)(c) and (d) of the *Act*, which provide that on an appeal:

> the commission may
>
> (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.

Subsections 131(12)(a) through (d) of the *Code* allow a party to the appeal to:

> (a) be represented by counsel,
>
> (b) present evidence,
>
> (c) where there is an oral hearing, ask questions, and
>
> (d) make submissions as to facts, law, and jurisdiction.

In addition, subsection 131(15) provides that "[a] person who gives oral evidence may be questioned by the commission or the parties to the appeal".

There is no practical purpose in giving the Commission the power to hear fresh evidence, hear legal submissions, and summons, call and hear witnesses, and allow intervenors, if the Commission's role is limited, as proposed by the Respondent, to examining the record below and determining whether the District Manager's decision was in error.

In short, the procedure and powers set out in the *Code* clearly include powers that are normally indicative of *de novo* jurisdiction.

On the other hand, subsections 84(1)(d)(i) and (ii) of the *Act* which permit the Commission to either confirm, vary or rescind the determination or decision, or, with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration – are powers more akin to that of a "true appeal" that a court would perform on judicial review. Essentially, therefore,

the Legislature has given the Commission hybrid powers. The Commission may, in its discretion, choose to conduct a narrower review of the decision below, or, alternatively, it may opt to conduct a hearing de novo and take a fresh look at what it considers to be the relevant issues and evidence.

The Commission recently considered this issue in *Forest Practices Board v. Government of British Columbia*, Appeal No. 2000-FOR-009(d), November 20, 2003. In that case, the Commission concluded as follows at pages 11 through 14:

> The Commission finds that the relevant provisions of the *Code* indicate that the Legislature intended to allow the Commission to be flexible in how it handles appeals, and that it is open to the Commission to both hear new evidence and consider the findings of the decision makers below, thus allowing the Commission to effectively conduct an appeal as a hearing *de novo*.
>
> …
>
> In section 138(2) of the *Code*, as in section 149(2) of the *Forest Act* cited above, the Commission has retained the power to "confirm, vary or rescind" the decisions below. The language "confirm, vary or rescind" in that section can be contrasted with the language employed in section 141(1) of the *Code*, which provides for a statutory appeal to the courts from a decision of the Commission "on a question of law or jurisdiction" only. Clearly, the Legislature intended the Commission to have much broader powers on appeal than a court on a subsequent statutory appeal. The Commission finds that a purposive interpretation of the *Code* leads to the conclusion that the Legislature intended for appeals of specialized questions of forestry to come before the Commission, that the Commission would have an opportunity, should it so desire, to consider those questions from its own specialized perspective…

The Commission notes that the powers listed under the versions of sections 131 through 138 of the *Code* that were in effect at the time of that appeal are virtually the same as the powers now listed under sections 131 through 137 of the *Code* and section 84 of the *Act*.

The Panel finds that the appeal structure in the *Act* and *Code* is designed to strike a balance between

(i) the powers given in this case to a district manager to issue orders to prevent, protect or repair damage to the forests and the environment in an efficient, expert and effective manner, and

(ii) the counterbalance provided by establishing a specialized tribunal, the Commission, with full *de novo* powers so that affected individuals have an opportunity to present evidence, define issues, present legal argument and otherwise assert their rights.

Accordingly, the Commission is not limited to a narrow review of the record below to determine whether a director or manager was correct or in error. The

Commission has the authority to conduct a hearing *de novo*, and in so doing, may also review the record below, as it has done in this case.

2. What is the correct test to apply when considering whether a person can rely on the statutory defence of due diligence in section 72(a) of the *Act*?

This is a case where the licensee, who is alleged to be liable for the contravention, did not direct, authorize or directly cause the contravention. Weyerhaeuser maintains that the actions of its contractor and subcontractor caused the convention. Nevertheless, the Respondent and the FPB argue that Weyerhaeuser may be liable for the contravention due to the vicarious liability provisions in section 71(3) of the *Act*. However, the Commission notes that section 71(3) is expressly subject to the due diligence defence in section 72(a) of the *Act*. Section 71(3) states as follows:

> (3) **Subject to section 72**, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.
>
> [emphasis added]

In addition, the plain language of section 72(a) makes it clear that it is only the due diligence of "the person" held liable that is being considered in this defence. Section 72(a) states:

> 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**
>
> (c) **person** exercised due diligence to prevent the contravention.
>
> [emphasis added]

Thus, section 72(a) does not require that the due diligence of others involved in the contravention also be considered. The contractor's due diligence becomes an issue only if the contractor is also held liable, and is then assessed in terms of whether the contractor can itself rely on the due diligence defence. Weyerhaeuser's actions alone are to be examined in the context of whether the statutory due diligence defence has been made out. As stated by Justice Dickson in *R. v. City of Sault Ste Marie* at paragraph 72: "The due diligence that must be established is that of the accused alone." Due diligence is determined by whether the person charged has exercised reasonable care in view of the particular circumstances. Exercising reasonable care implies taking reasonable actions to prevent things the particular accused can reasonably be expected to control, which depends on what the accused has knowledge of or can reasonably be expected to foresee.

Hence, 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.

The Panel takes guidance from the following statement *R. v. Placer Developments Ltd.*, at page 54:

> A balance must be sought between the obligations imposed to exercise reasonable care and the freedom required to pursue financially viable contractual obligations in developing northern resources. The tolerable range of contractual flexibility must not encourage maneuvering to avoid reasonable obligations to influence law abiding conduct of persons within a sphere of influence or control. Equally, legitimate business objectives cannot be precluded by the undue imposition of responsibilities for the activities of business associates or partners. Discovering the appropriate balance between responsibility for the conduct of others and freedom to contract, requires sensitivity to both perspectives.

The Legislature has codified the due diligence defence, and it should be applied in its natural and ordinary sense as defined by the case law discussed above so as not to impose a higher standard tantamount to "absolute liability". The standard articulated above is already variable in that the weight given to different factors depends on the circumstances of a particular case. It already balances between what is reasonable in terms of responsibility for the conduct of others and takes

into account sensitive environmental or other values that may be relevant in the context of a specific case.

The next question is whether, applying the standards discussed above, Weyerhaeuser's conduct was duly diligent in the circumstances of this case.

3. Whether Weyerhaeuser's conduct, in the context of the events that led to the section 96(1) *Code* contravention, amounts to due diligence for the purpose of section 72(a) of the *Act*.

Under the legal tests articulated above, the panel must first determine whether the contravention was reasonably foreseeable.

Weyerhaeuser's employee, Mr. Gunn, clearly gave Red Hot's foreman, Mr. Chase, a specific direction to walk Mr. Glover to the point he was to begin cutting. If the direction had been carried out, no violation of section 96(1) of the *Code* would have occurred. Weyerhaeuser's employee had no way of foreseeing that Mr. Chase would ignore his specific direction.

While it may be foreseeable in a general sense that machine operators working in the bush on winter days may become disoriented, it was not foreseeable on the facts of this case, given the specific instruction to walk Mr. Glover to Point A where he was to start cutting, that he would misread the map and start cutting on the wrong side of Block C. Thus, the unauthorized harvesting that occurred on January 16, 2002, was not reasonably foreseeable.

The law is clear that Weyerhaeuser cannot be held accountable for failing to prevent what it could not reasonably have foreseen. In the words of the Court of Appeal in *R. v. MacMillan Bloedel* at paragraph 52:

> It is irrational to say that an accused may escape liability for an event that was not reasonably foreseeable by taking all reasonable steps to avoid it. One cannot consciously take steps to avoid an event that one cannot foresee. A reasonable step is one for which a reason can be assigned. No reason could have been assigned for a plan that would have satisfied the second branch of the defence of due diligence in the circumstances here. One could not say, without the benefit of hindsight, that a plan to replace the pipes at any specific time would have been a reasonable step to avoid the escape of fuel into the creek on May 16, 1997, because no one could reasonable foresee the happening of that event.

The majority of the panel finds that Weyerhaeuser has made out a due diligence defence under section 72(a) of the *Act*, under the first branch of the test set out in the case law.

The majority finds that this case is similar to the *R. v. Pacifica Papers* and *R. v. Columbia Bitulithic* cases, where the courts held that a company cannot be liable after it gave a reputable contractor a specific instruction, which would have prevented the offence from occurring, and nevertheless the contractor understood but ignored the instruction, which was not reasonably foreseeable. The courts in those cases also held that it is not reasonable to expect a company, which hires a

contractor to carry out work, to personally supervise or double check everything that a contractor and its employees are hired to do.

Red Hot was a reputable contractor. Its owner, Mr. Bryan, had previously worked as a logging supervisor at Weyerhaeuser. It had been a contractor of Weyerhaeuser for some years when the event occurred. Although Red Hot had had another non-compliance event, it concerned a matter entirely different than the current incident and was in no way indicative of a company unconcerned with compliance issues or with a compliance problem. Rather, what led to the contravention in this case was a decision by one person to disregard clear instructions, and then the operator's confusion about where he was on the cut block and his failure to get out of his machine to confirm his location before he started cutting.

It is not practical for Weyerhaeuser to be managing every action by its contractor's employees on a daily basis. The contractor is in the field every day and is the best person to do that. This is particularly true given the requirement in section 35(1)(j) of the *Forest Act* that a certain percentage of harvesting under a licence must be done by contractors. It is not reasonable in the circumstances for Weyerhaeuser to directly supervise the field activities of a contractor's crew or "second guess" that a contractor would ignore a specific direction that may have prevented the unauthorized harvesting which occurred in this case.

Mr. Gunn's specific direction to walk the operator to Point A, taken together with Weyerhaeuser's training, audits, by-weekly site visits, and the comprehensive EMS discussed in the background section of this decision, demonstrate that Weyerhaeuser took all reasonable care in the circumstances of this particular case.

DECISION

In making this decision, this panel of the Forest Appeals Commission has carefully considered all of the material before it, whether or not specifically reiterated here.

For the reasons set out above, the majority of this panel finds that, in the circumstances of this particular case, Weyerhaeuser has established that it exercised due diligence under section 72(a) of the *Act* and, thus, is not liable for the contravention of section 96(1) of the *Code*.

"Margaret Eriksson"

Margaret Eriksson, Panel Chair
Forest Appeals Commission

"Stephen Willett"

Stephen Willett, Panel Member
Forest Appeals Commission

January 17, 2006

MINORITY DECISION OF PANEL MEMBER RICHARD CANNINGS

I agree with the findings of the majority on issues 1 and 2. I respectfully disagree with their findings on issue 3.

I find that COFI has correctly set out the standards to apply when considering the defence of due diligence. Standards vary with the potential harm, alternatives available, likelihood of harm, degree of knowledge and skill of operators, and the extent the underlying causes are beyond the control of the accused.

I also agree with Sierra Club on the emphasis on *all* reasonable care.

I find that the contravention was foreseeable, given the evidence of previous unauthorized harvesting incidents and the testimony regarding operators who did not know where they were in cut blocks, despite having maps. It should also have been foreseen that a feller-buncher operator may have been reluctant to physically walk 400 metres across the uneven ground of a cutblock, through snow that was 2 feet deep, to find the correct starting point, when he could do the same from his machine.

In this case, the potential harm was high, since the cutblock was located along a major creek that was part of a community watershed. Weyerhaeuser clearly acknowledged this when it decided on the method to install the bridge. Although the unauthorized harvesting did not occur in a Riparian Management Zone, it was in an area specifically excluded from the cutblock, probably because of its proximity to the steep gully of the creek. The fact that little environmental damage occurred is irrelevant to the appeal except in the area of penalty.

Weyerhaeuser placed much emphasis on its EMS standards, documentation and database. Unquestionably, the EMS system is comprehensive and appears to cover just about every possibility. However, any system is only as good as the follow-up to assure what is intended in the plan gets translated into practices on the ground. Reliance on the EMS may have led to some complacency on Weyerhaeuser's part, as evidenced by a lack of checking on the walk-through.

Furthermore, I am not convinced the training aspect of the EMS is accomplishing the objectives on the ground. There were 111 attendees at Weyerhaeuser's June 1, 2001 Forest Workers' Training School, including the contractor's staff and the subcontractor in this case. The course seemed to be primarily a slide show highlighting the EMS standards, to raise awareness of those working in the woods. While presentations to large groups may convey a certain amount of information, follow-up in the field is essential to ensure that the system functions as predicted and the EMS objectives are actually implemented. Weyerhaeuser has the personnel, including Mr. Gunn and Mr. Salm, to carry out the necessary follow-up. From the evidence, it appears that Weyerhaeuser's pre-work meetings are essentially what Weyerhaeuser relies upon as the follow-up. The rest of the "training" is left to the contractors to do the follow-up walk-throughs with their employees and subcontractors. Given their time constraints and the pressures to meet their contractual obligations, I am not satisfied that follow-up by contractors is a priority. In this particular case, Mr. Chase on behalf of Red Hot did not follow-up on a commitment he had agreed to at the pre-work meeting. Undoubtedly,

whether contractors comply with directions given to them by Weyerhaeuser depends on the attitude of each particular contractor or individual acting on behalf of the contractor. In this instance, Mr. Gunn put too much faith in Mr. Chase.

One of the main reasons there is a pre-work meeting on site is to minimize the chances of something going amiss. The pre-work meeting is designed to ensure that the EMS objectives are met – that is, that any environmental concerns are dealt with in the field. Given that the pre-work meeting is such a critical component, it is unacceptable that Mr. Gunn did not seek assurance from Mr. Chase that the walk with Mr. Glover, from the plowed road/landing to the corner where Mr. Glover was to start working, had taken place. One of Mr. Gunn's primary responsibilities is to oversee the logging operations. In requiring Mr. Chase to only call him if the feller buncher could not safely traverse the slope, rather than instructing him to call when he had completed the walk to the corner where the work was to be done, is deficient. After all, the walk could have identified some other concerns that no one had thought of at the time. It was reasonable for Mr. Gunn to follow up with Mr. Chase before operations started, given that there was a potential that the environment could be harmed. Granted, there was no real harm to the environment in this instance but the issue is the potential for environmental harm. For example, what would have been the order of business for Mr. Glover if he had not been able to walk his machine up the slope from point A on the proposed route? We are left to speculate what he would have done, but there could have been much more serious consequences.

In my view, there were alternatives available to Weyerhaeuser that would have prevented the contravention. Weyerhaeuser's staff could have checked whether the walk-through took place with Mr. Chase and Mr. Glover, for example during Mr. Gunn's meeting with Red Hot's owner, Mr. Bryan, on January 14, 2002. Weyerhaeuser clearly realized that walk-throughs were essential to prevent unauthorized harvesting. In my view, it is essential that Weyerhaeuser at least obtains assurance from its contractors that the contractor did indeed walk the site with those individuals carrying out harvesting and other work, before the work begins.

Moreover, although Weyerhaeuser's staff may have felt that instructing Red Hot's staff to make sure the feller-buncher operator would walk the site with Mr. Chase would make a contravention essentially impossible, the instruction was given primarily to ensure that the machine could safely traverse the slope. The instruction was not given to ensure that the operator would know where to start cutting.

The various blocks on this licence area required considerable boundary marking with the split line, blocks to be logged by different methods, riparian areas and road locations. The plethora of marks – both paint and ribbon – could be confusing, which reinforces the need to walk the area with the machine operators. The proposed route that the feller-buncher should have taken across the cutblock should have been clearly ribboned so that it was visible from a feller-buncher. This could and should have been done during the walk through that Mr. Gunn made with Mr. Chase and Mr. Redelback. Ribboning and painting the cutline boundary inside Block C in the same manner as the outside boundary caused confusion, since the feller-buncher operator knew that he must cut through a ribboned and painted

boundary to get to the bridge site. He, therefore, may not have felt that he was in error when he began to cut through the wrong part of the boundary. I find that it would have been unnecessary to remove those marks, but they increased the need for a clear marking of the start of the proposed route.

The operator's confusion could have been exacerbated by the map provided to him, apparently a map of the adjacent cutblock 129-D. The map did not show in yellow (as is standard on logging plan maps) the previously logged part of Block C that the operator had to travel through, nor did it show the Riparian Management Zone. Considerable emphasis was placed upon maps and the skills necessary to use them effectively – both Mr. Gunn and Mr. Salm were firm on this issue and felt that the map was all that was necessary to assure everybody knew where they were at any given time. Although Weyerhaeuser does spot checks to ensure workers know where they are on the map, it is quite another matter to use a logging plan map (which seemed to be incomplete in this case), by oneself, on a winter's day with 2 feet of snow on the ground. Things look quite a bit different in these conditions. Given the time of year that logging was to take place, the chances of errors happening were increased.

I have also reviewed the other factors that affect the due diligence standard to be applied in this case. The likelihood of harm was relatively low, since a specific verbal instruction was given by Weyerhaeuser's Mr. Gunn, which, if carried out, would have almost surely avoided the contravention. In addition, the contractor and the operator appear to be knowledgeable and skilled. The causes of the contravention were beyond the direct control of Weyerhaeuser to the extent that the unauthorized harvesting was carried out by a subcontractor. However, because of the alternatives available discussed above, I find that Weyerhaeuser could have, and should have, prevented the contravention.

DECISION

For the reasons provided above, I find that Weyerhaeuser failed to apply all reasonable care to avoid the contravention, and that the appeal should be dismissed.

"Richard Cannings"

Richard Cannings, Panel Member
Forest Appeals Commission

January 17, 2006