No. 2004-FOR-005

FOREST APPEALS COMMISSION

IN THE MATTER OF THE *FOREST PRACTICES CODE OF BRITISH COLUMBIA ACT*, R.S.B.C. 1996, c. 159

AND IN THE MATTER 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

STATEMENT OF POINTS

OF

SIERRA CLUB OF CANADA

A. Relevant Background

1. In January 2002, the Appellant Weyerhaeuser's subcontracting feller-buncher operator ("feller") illegally harvested trees outside of the approved cutting permit area.

2. The Appellant claims that it had instructed its Contractor (Red Hot Forestry Services Ltd.) to walk the cutblock with the feller before harvesting the trees in order to ensure that the buncher machine could negotiate the slope.

3. A Contractor staff person walked the slope without the feller, and satisfied himself that the machine could make it up the slope. However, as there had apparently not been specific instructions to walk the feller around the site for the purpose of locating boundaries, once satisfied that the machine could handle the slope, the Contractor never walked the slope with the feller for the purpose of locating boundaries.

4. As a result, the feller did not accurately understand the cutblock boundary locations, proceeded up the slope in the wrong place, and harvested trees outside the authorized cutblock boundary.

5. The subcontractor could not rely upon GPS locating to determine boundaries because the maps provided did not have GPS positions marked.

B. Defence of Due Diligence: Factors Supporting A Higher Standard of Care

6. The Appellant relies upon s. 72 of the *Forest and Range Practices Act*, claiming the defence that it exercised due diligence and should not be held accountable for the contravention.

7. However, the Appellant Weyerhaeuser did not meet the standard of taking all reasonable care to prevent the commission of the contravention, which is a prerequisite for establishing the defence of due diligence.

8. The standard of care required for Weyerhaeuser to meet the due diligence defence is very high – the Supreme Court of Canada has stated that to avoid liability the party must show that it exercised *all* reasonable care. The standard is not just a high one, but the highest achievable standard.

   R. v. Sault Ste. Marie (Book of Authorities Tab No. 1 at 15)
   Swaigen, *Regulatory Offences in Canada* (Book of Authorities Tab No. 2 at 93)

9. The Ministry of Forests described the applicable standard in the Government News Release issued when the Minister of Forests introduced the *Forest and Range Practices Act* in the legislature:

> Under the new regime, the onus is on companies to prove they did **everything reasonable** to avoid damage.
>
> (Book of Authorities Tab No. 31, emphasis added)

10. To determine the precise standard of care that must be met in order to establish the defence of due diligence, one must consider all the relevant circumstances. Whether due diligence has been exercised depends upon the nature of the offence, the specific industry involved and the individual circumstances of each case.

    R. v. Gonder (Book of Authorities Tab No. 6 at 4-5)

11. The circumstances of this case call for a higher than usual standard of care.

12. The standard of 'reasonable care' must be appropriate to the importance of the interests to be protected. The higher the importance of such interests, the greater the standard of care must be. When considering the standard of care applicable under environmental legislation such as the *Forest and Range Practices Act*, the level of care must be high enough to give due consideration to protection of the environment.

    R. v. Gonder (Book of Authorities Tab No. 6 at 5); *R v. Placer Developments* (Tab No. 7 at 51); *R. v. Panarctic Oils* (Book of Authorities Tab No. 9 at 391-92)

13. The Supreme Court of Canada has characterized environmental protection as being of "superordinate importance." The measures reasonably required to protect the environment must reflect that "superordinate importance."

    R. v. Hydro-Québec (Book of Authorities Tab No. 5 at para. 85)
    See also *Spraytech v. Hudson* (Book of Authorities Tab No. 11 at para. 1)

14. A higher standard of care has been recognized as applicable to the environment in areas considered to be particularly sensitive, valued or vulnerable.

    R. v. Placer Developments (Book of Authorities Tab No. 7 at 53); *R. v. Panarctic Oils* (Book of Authorities Tab No. 9 at 392); *Canada Tungsten Mining Corp. v. R.* (Book of Authorities Tab. No. 12 at 79);

15. The identification of such areas is to be determined having regard to the "delicate physical or ecological characteristics and valued habitat for flora and fauna."

R. v. Placer Developments (Book of Authorities Tab No. 7 at 53)

16. Areas adjacent to streams, such as the cutblock in this case, are particularly sensitive and ecologically valuable. Improper logging in such areas can have disproportionate impacts on wildlife, and can lead to sedimentation in water and related dangers to fish. Special precautions must be taken in such areas to ensure due diligence.

17. It is well accepted that persons who engage in activities involving potential danger to public health, safety or morals may be subject to a higher standard of care. Such persons may be required to:

> "take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care."

Canada Tungsten Mining v. R., citing *Sweet v. Parsley* (Book of Authorities Tab No. 12 at 79)

18. Because of the superordinate importance of the public purpose of protecting the environment, this higher standard should also apply to activities that put the environment at risk. It should be noted that the Supreme Court of Canada has identified environmental protection as a fundamental value in Canadian society.

R. v. Hydro-Québec (Book of Authorities Tab No. 5 at para. 85); *Spraytech v. Hudson* (Book of Authorities Tab No. 11 at para. 1)

19. In addition, in determining the level of care that is reasonable, it should be recognized that a higher standard applies in circumstances where a person is doing business on public land than if the person were doing business on their own land. Those who are granted the privilege of doing business on publicly owned land should owe a higher duty than those who are conducting business on their own private property.

MacMillan Bloedel v. Government of British Columbia, Appeal No. 96/05(b) at 11 (untabbed)

20. Companies that choose to exploit public resources put social interests at risk and should bear the costs of doing so.

Roy c. École D'Escalade la Haut, cited in Saxe (Book of Authorities Tab No. 15 at 163)

21. The minimum standard of care required by corporate actors such as the Appellant is high, as it is understood that they are in the best position to control the harm that may result from their activities and should therefore be held responsible for it.

Keefe (Book of Authorities Tab No. 30 at 488-89)

C. Application of the Due Diligence Test in this Case

22. To establish a due diligence defence to avoid vicarious liability for the contravention by the subcontracting feller and the contractor, Weyerhaeuser must show that it used all reasonable care in the way that it dealt with these parties who were acting on Weyerhaeuser's behalf. It had a responsibility to ensure that its contractors and subcontractors adopted their own systems to prevent a contravention.

R. v. Placer Developments (Book of Authorities Tab No. 7 at 54); *Aurora Quarrying v. Catherwood* (Book of Authorities Tab No. 17 at para. 9)

23. Weyerhaeuser had a duty to do everything reasonable to ensure that the feller himself was given adequate information and instructions regarding block boundaries. As the court pointed out in *R. v. MacMillan Bloedel Industries Ltd.*,

> "due diligence … requires successful communication of adequate information and instructions from the company **right down to the man on the job**."

(Book of Authorities Tab No. 18 at 4, emphasis added)

24. It has been commonly acknowledged within the forest services sector that site walks with harvesters are necessary – because map reading and instructions are not reliable enough to ensure that boundaries are not transgressed. Because trespasses commonly occur when fellers have not been walked around the cutblock to locate boundaries, due diligence requires that a system be in place to ensure such a site walk by the "man on the job".

MacMillan Bloedel Ltd. v. Government of British Columbia (Book of Authorities Tab No. 19 at 9)

25. In fact, in a previous case the Forest Appeals Commission summarized the testimony of present Appellant's own operations supervisor to the effect that forest industry officials commonly acknowledge that all cutting areas should be walked.

MacMillan Bloedel Ltd. v. Government of British Columbia (Book of Authorities Tab No. 19 at 9)

26. The Appellant must demonstrate the setting up of a proper efficient system for the avoidance of contraventions, and the proper operation of that system to deal with the need for site walks.

> *R. v. Sault Ste. Marie* (Book of Authorities Tab No. 1 at 18).

27. To determine what a proper system must entail, this Commission must first consider the general standard common to the particular industry. Second, one must consider any special circumstances that give rise to a different standard of care from the general industry standard.

> *R. v. Gonder* (Book of Authorities Tab No. 6 at 4)

28. Ensuring a site walk *with the 'man on the job'* is, or ought to be, industry practice. Even if it were not commonly practised, the circumstances of forest harvesting require a reasonable person to take all reasonable steps to ensure that fellers do site walks before cutting. For compliance with an industry standard that is itself in some way negligent cannot provide a due diligence defence.

> *MacMillan Bloedel Ltd. v. Government of British Columbia* (Book of Authorities Tab No. 19 at 9); *R. v. Hall's Refrigeration Ltd.* (Book of Authorities Tab No. 24 at 250)

29. Taking all reasonable care involves proactive and preventative measures.

> Meadows (Book of Authorities Tab No. 3, discussing *R. v. Bata Industries Ltd.*, at 271 and 290)

30. It should also be pointed out that a corporation cannot meet its due diligence responsibilities simply by contracting them out. The principal must do everything reasonably within its power to ensure that independent contractors it retains do not commit an offence.

> *R. v. Placer Developments* (Book of Authorities Tab No. 7 at 52, 54); *Aurora Quarrying v. Catherwood* (Book of Authorities Tab No. 17 at para. 9); *R. v. Sault Ste. Marie* (Book of Authorities Tab No. 1 at 17)

31. For example, the principal must:
    (a) choose a properly qualified consultant;
    (b) include appropriate provisions in the contract requiring respect for environmental requirements;
    (c) give the consultant/contractor full and complete instructions;
    (d) ensure that the contractor has all necessary information; and
    (e) **supervise and inspect the contractor's work** – at a minimum the principal must make periodic inquiries into what is being done.

Saxe (Book of Authorities Tab No. 15 at 174)

D. Appellant's Failure to Exercise Due Diligence

16. The facts in this case indicate that Weyerhaeuser could have avoided this contravention by simply ensuring that the person cutting the trees actually knew where he was cutting – by ensuring that he was walked around the boundaries of the cutblock.

17. Weyerhaeuser failed to ensure that full instructions and information were given to the 'man on the job.' It failed to do so even though it was reasonably foreseeable that there would be a breakdown in communication from the contractor to the subcontractor, and that such a breakdown would very likely lead to a contravention.

18. Weyerhaeuser should have ensured that its Contractor conducted a site walk with the feller *for the purpose of locating cutblock boundaries* so that the feller would know where – and where not – to cut.

19. However, the facts indicate that Weyerhaeuser only told the Contractor to walk with the feller for the purpose of determining whether the machine could safely make it up the slope.

20. The contractor apparently walked the slope himself and concluded that the feller-buncher machine could indeed get up the slope. The subcontractor was never walked around the site.

21. This sequence indicates that Weyerhaeuser never required the type of boundary-locating site walk contemplated by *MacMillan Bloedel Ltd. v. Government of British Columbia* (Appeal No. 96/05 (c)). In that case, the Commission found that the Appellant company, which had not conducted a site walk, had not exercised all reasonable care because "the standard of walking the block was one that could easily have been met."

(Book of Authorities Tab No. 19 at 9-10)

22. As noted above, the person that should be walked around the site is the "man on the job." A site walk with the feller for the express purpose of determining the boundaries could clearly have been carried out in this case. There was nothing in the circumstances to justify a departure from the reasonable practice of walking the site.

23. In order to establish the defence of due diligence, a party must show that it considered all reasonable alternative ways of doing things in order to avoid a contravention. In this case, alternatives were available that would have prevented the contravention. Among other things, Weyerhaeuser could have:

- given specific, enforceable and verifiable directions that the man on the job be walked around the site *to determine the location of boundaries*. If that had been done, the Contractor could not have thought that he had fulfilled the Appellant's instructions by walking the slope himself to determine whether the machine could make it up the slope;

- implemented a system of notification in place in order to ensure that the feller was being properly supervised and oriented;

- included a contractual provision requiring the contractor to notify Weyerhaeuser that a site walk with the feller had been completed before any trees could be cut;

- included a contractual provision requiring that it be notified if a contractor was not going to be present to supervise the actual harvest and site walks;

- more diligently inspected the subcontracted work for compliance;

- employed any number of other alternative approaches to establish a more nearly fail-safe system to avoid such an error.

It is reasonable to require someone in Weyerhaeuser's position to put their mind to such alternatives.

24. By not implementing reasonable alternative practices to avoid the very common and serious problem of fellers mistaking boundaries, the Appellant's practice falls short of due diligence and cannot therefore be relied upon as a defence.

> *R. v. Hall's Refrigeration* (Book of Authorities Tab No. 24 at 250); *R. v. Rio Algom Ltd.*(Book of Authorities Tab No. 26 at 8)

25. This is particularly so because the Contractor Red Hot had a previous similar contravention in its work with Weyerhaeuser. Knowing this, Weyerhaeuser was obliged to increase its efforts to prevent another contravention.

E. Conclusion

26. Important values are at stake when logging takes place. The potential impacts on the fishing industry, wildlife, tourism and the potential for trespass to public land are all substantial.

> Appellant's Book of Documents, Tab No. 9; Swaigen, *Regulatory Offences in Canada* at 122-23 (untabbed)

27. If the Commission does not require licensees to take all reasonable care, proactively, to ensure that "people with the chainsaw know where the boundaries are," then more of these contraventions will take place and significant damage will result.

28. Moreover, in a results-based regulatory framework such as the *Forest and Range Practices Act*, enforcement is critical and the standard for due diligence should be high.

29. Section 72(a) of the *Act* provides a sweeping defence where a person succeeds in establishing due diligence, stating that "no person may be found to have contravened a provision of the Act if the person establishes that the person exercised due diligence to prevent the contravention."

30. Therefore, care must be taken not to establish the standard of care at such a low level that this sweeping shield is easily obtained. If this were to happen, the results-based legislative regime could not function. Moreover, it must be remembered that when the defence of due diligence prevails in a case concerning damage to public resources such as water, fisheries, timber or wildlife, it is the public that bears the loss – without compensation.

31. When the government introduced the *Forest and Range Practices Act* it noted that a results-based code would require companies to do "everything reasonable to avoid damage." The whole purpose of the results-based regime would be undermined if the scope of the due diligence defence were expanded. As Kehoe has stated:

> "Corporate compliance with environmental standards is thus determined on a cost-benefit basis. The vigilance with which corporations will ensure their own compliance with environmental regulations will decrease if they see that there is less benefit to be gained from the maintenance of detailed records. A shift to less stringent burden of proof [or a broader scope for the due diligence defence] could clearly be a significant factor precipitating such a change, and might encourage potential law breakers to turn a blind eye to environmental standards."
>
> Kehoe (Book of Authorities Tab No. 28 at 1108)

32. On the other hand, a narrower definition of the due diligence defence would encourage corporate responsibility towards, and regulatory protection of, public interests.

33. In interpreting this legislation, the Commission must take a purposive approach. As the court noted in *Northwood Inc. v. Forest Practices Board*, "the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" [citing *Re Rizzo & Rizzo Shoes Ltd.*].

(Book of Authorities Tab No. 29 at para. 37)

34. Applying this principle of interpretation to the *Forest and Range Practices Act* it is clear that the purpose of the legislation, as emphasized in the news release cited above, is to ensure stringent enforcement of a results-based statute. A broad interpretation of the due diligence defence would have the opposite effect.

Respectfully Submitted,

Jeanette Ettel
For the Sierra Club of Canada

January, 2005