

# Forest Practices Code

## Advice to Statutory Decision Makers and Their Staff from Compliance & Enforcement Branch

Number 2

December 04, 1998

### Forest Appeals Commission's Decision Regarding Small Business Silviculture Prescriptions Fab-Co Forest Products (1989) Ltd.

#### Introduction

On August 27, 1998 the Forest Appeals Commission (the "Commission") released its reasons for decision in Appeal No. 97-FOR-33. This was an appeal by Fab-Co Forest Products (1989) Ltd. ("Fab-Co") from an administrative review decision which had confirmed the district manager's finding of a contravention of section 67(1)(f) of the Forest Practices *Code* of British Columbia Act (the "Act"), and slightly varied the terms of a remediation order for rehabilitation of excess soil disturbance.

The end result of this appeal was that the district manager's determination and remediation order and the subsequent variation by the review panel were rescinded. The Ministry of Forests ("MOF") was ordered to refund any money paid by Fab-Co in respect of the remediation order.

#### Background

Fab-Co's logging contractor harvested the subject Small Business timber sale license area in June, 1998, after attending a pre-work meeting on May 27. The silviculture prescription ("SP"), which had been prepared by MOF staff, limited skidding to dry soil conditions, with maximum soil disturbance restricted to 10% in treatment unit ("TU") #1. The logging plan ("LP") was also prepared by MOF and reflected the soil disturbance limits in the SP, but the SP was amended by MOF to agree with the LP in authorizing skidding in June. Harvesting Inspection Reports resulting from inspections conducted by MOF staff early in the harvesting process (June 6), and after completion of harvesting (July 22 and August 7) made no mention of soil disturbance.

A soil disturbance survey conducted by the MOF on September 25 indicated a level of soil disturbance in TU #1 that was in excess of the 10% prescribed in the SP. At an opportunity to be heard on June 3, 1997, Fab-Co did not dispute the results of the soil survey, but maintained that they had followed the LP to the letter. The district manager determined that Fab-Co had contravened section 67(1)(f) of the Act, in that the 10% maximum site disturbance level specified for TU #1 was exceeded, and made a sec. 118 remediation order requiring remediation of compacted soil areas.

Fab-Co contested the determination and remediation order. The review panel concluded its findings on October 17, 1997, confirming the district manager's determination but varying the terms of the remediation order slightly to give Fab-Co the benefit of the doubt with respect to the lower limit of the confidence interval for the soil disturbance

survey. Two days before the review panel released its reasons for decision, the remediation work was completed by a contractor for MOF at a cost of \$2,525.39. This amount was paid by Fab-Co on December 9, 1997.

Fab-Co appealed the findings of the review panel. The review panel proceeded with the appeal by way of written submissions, concluding in June, 1998.

The Commission dealt with the following issues:

1. Whether Fab-Co contravened section 67(1)(f) of the Act.
2. If there was a contravention, whether Fab-Co had a defence.
3. Whether MOF erred in completing the remediation order while the matter was before the administrative review.
4. Whether a finding of a contravention of section 67(1)(f), if upheld, should be dropped from Fab-Co's record.

### **1. Did Fab-Co Contravene Section 67(1)(f) of the Act ?**

There was no dispute that the soil disturbance survey was done correctly and showed that the actual disturbance on TU#1 exceeded the 10% allowed in the LP. Fab-Co, as a joint signatory to the LP, and as the holder of the timber sale licence, was held to be in contravention of section 67(1)(f) of the Act.

### **2. Did Fab-Co have a Defence ?**

The Commission found that the original SP would have prevented harvesting in June due to soil concerns, and the MOF later amended the SP to allow it without negotiating a change in harvesting methods with Fab-Co. A MOF regional soils specialist, in inspecting the cutblock after harvesting, reported that "in hindsight, it is probably inadvisable to allow random ground skidding to take place on moderate to high compaction areas during the May-June period. Although there may be periods in May and June when the soils are dry enough, it is probably unrealistic to expect the licensee to monitor and correctly interpret soil moisture conditions on his own behalf during this period." The Commission accepted this statement as evidence that there were deficiencies in the MOF's operational planning and monitoring of this timber sale license.

There was no evidence that Fab-Co had not confined its skidding to the designated trails. Fire weather station records showed low levels of precipitation in June. There was no evidence that Fab-Co had operated in anything other than "dry" soil conditions, in accordance with the LP, yet the soil conservation objectives of the LP could not be met. The Commission found that Fab-Co could not have known that this would be the case and that Fab-Co had conducted the logging operations in accordance with the soil moisture restrictions of the LP.

The Commission found the MOF responsible for the failure of the LP to achieve the soil conservation requirements of the SP. Further, the

Commission held that the MOF "ought to have known that this would be the case, as the LP was contrary to the original SP. In attempting to harvest the site in June, MOF officials should have made frequent visits to the operation to monitor soil compaction from random skidding. They were aware of the risks: they did not attempt to mitigate these risks. The [licensee] cannot be held accountable for inadequate operations management on the part of MOF's officials responsible, in this case, for the content and approval of the LP."

The Commission considered the effect of section 35 of the Act, which requires that a person who has an operational plan and knows, or reasonably ought to know, that performing the operations specified in the operational plan will not achieve the specified results, must request an amendment to the operational plan from the district manager, and must cease operations until the amendment or a new plan is approved.

The Commission held that Small Business Forest Enterprise Program ("SBFEP") licensees frequently do not have the expertise to develop operational plans and so the MOF undertakes the plan development work. Knowing the risks of soil compaction on this timber sale license, MOF should have provided a mechanism, within the LP, for closer on-site monitoring of the soil disturbance so that the licensee could be advised to request a LP amendment if a problem developed.

The Commission went on to find that since licence holders under the SBFEP have limited expertise they are forced to rely on the advice, instructions and requirements of the MOF. Fab-Co had done so in this case and had, as a result, committed a violation of the LP. Accordingly, the Commission held that Fab-Co was able to rely on the defence of "officially induced error".

### **3. Did MOF Err in Completing the Remediation Order Before the Review was Complete ?**

The Commission determined that a statutory stay was in place pursuant to section 127 of the Act. In the absence of an order from the Chief Forester under section 126(2) to vacate the stay of the remediation order, the stay should have remained in place until the conclusion of the review and the subsequent appeal.

#### **4. Should the Contravention of Section 67(1)(f) be Dropped from Fab-Co's Record ?**

The Commission held that the defence of "officially induced error" effectively meant that no contravention had occurred. Accordingly, no contravention should show on Fab-Co's record.

### **Commentary**

The Commission's decisions do not set precedent and are not binding on district managers or other statutory decision makers. However, its discussion of MOF planning

and inspection deficiencies in high risk situations has implications for the management of SBFEP timber sales licences.

### **Planning Deficiencies**

The decision indicates that where the MOF prepares an operational plan in an area of high risk to some forest resource, the MOF will have to take measures to expressly communicate that risk to the licensee. The MOF cannot rely on section 35 to make a Small Business licensee liable to recognize the deficiencies in the MOF's plan if the licensee lacks the expertise to do so.

Accordingly, any such high risk circumstances should be communicated to the licensee in writing either in or along with the operational plan, and should be addressed again at the pre-work meeting.

The decision in this case does not mean that a small business licensee cannot be held liable under section 67 for failure to follow a SP.

The Commission accepted Fab-Co's evidence that it had followed the SP and the LP to the letter, but it still was not enough to prevent the soil disturbance from exceeding the prescribed limit. In other words, the Commission found that it was impossible to conduct the operations prescribed in the SP and still meet the soil disturbance limits imposed by the SP, and it was unreasonable to expect an unsophisticated licensee to know that.

The bottom line is that a small business licensee is still subject to section 67, which provides that a person who carries out timber harvesting and related forest practices on Crown forest land must do so in accordance with the silviculture prescription. In Fab-Co, the licensee did follow the prescription, but the prescription itself was internally inconsistent.

### **Deficiencies in Inspections**

High risk situations require more frequent inspections. In this case, the MOF was aware of the high risk, but the licensee was not. More frequent inspections by both MOF and the licensee will increase the probability of a contravention being brought back into compliance before significant damage can occur.

The second point to note is that MOF should assess the level of risk associated with an operational plan, and base its number of field inspections accordingly. This does not relieve a small business licensee from conducting its own inspections. A small business licensee still has to demonstrate due diligence in following the terms of a SP.

### **Contact**

For any questions regarding this bulletin, please contact the following:

Dan Graham, Compliance and Enforcement Practices Forester, at  
[Dan.Graham@gems7.gov.bc.ca](mailto:Dan.Graham@gems7.gov.bc.ca)

Guy Brownlee, Statutory Decision Advisor at  
[Guy.Brownlee@gems6.gov.bc.ca](mailto:Guy.Brownlee@gems6.gov.bc.ca)