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The Kalesnikoff Lumber Co. Ltd. Decision of the Forests Appeals Commission –

Environmental Damage After the Plan is Approved

On August 2, 2006, the Forest Appeals Commission (the “Commission”) released its long-awaited decision with respect to Kalesnikoff Lumber Co. Ltd.’s (“KLC”) appeal of various determinations that the Ministry of Forests and Range (“MoF”) made against KLC under the *Forest Practices Code of British Columbia Act* (the “Code”). In addition to KLC and the MoF, the Forest Practices Board was also a party to the appeal, and various industry associations intervened in the proceedings. The appeal consumed over 10 days of hearings, and involved voluminous evidence, numerous expert witnesses, and extensive submissions from legal counsel for each of the participants on a multitude of issues. The financial penalties at issue were relatively small, and KLC obviously pursued its appeal as a matter of principle. For smaller licensees, this case demonstrates how principle can sometimes carry a high price.

The decision was released over two years after the Commission’s hearing of the appeal began. Given the importance that its decision could have on compliance and enforcement under the *Forest and Range Practices Act* (“FRPA”), the Commission seems to have taken even more care than usual with this appeal. The result is a 72-page decision that provides helpful guidance to the Commission’s approach towards the future application of FRPA. However, certain important questions are left unsettled.

Overview

KLC’s appeal concerned two separate administrative determinations that the MoF made with respect to KLC’s construction of a mainline forestry road. KLC built the road to access timber in the Schroeder Creek drainage near Kaslo.

Determination # 1

“Determination #1” concerned what became known as “Slide 3” on a portion of road that was designed by a professional engineer. Slide 3 occurred just below a portion of road where there was a fill and spoil site. The MoF determined that KLC should reasonably have known that its construction of the road might cause a slide contrary to s-s.45(3) of the Code, and was not in general conformance with the road layout and design (“RLAD”) contrary to s-s.12(1)(b) of the former *Forest Road Regulation* (the “Road Regulation”).

This article provides a general overview and does not constitute legal advice. Persons requiring further information or advice should contact Jeff Waatainen at 250.758.9485 or jeff@bcforestrylaw.com.

Critical to both findings of contravention was the MoF's conclusion that the volume of material placed beside the road as fill or spoil exceeded the "designed capacity" as specified in the RoadEng profiles. According to the MoF, KLC should reasonably have known that the excess material might cause a slide (contrary to s-s.45(3) of the Code), and was not in general conformance with the RLAD (contrary to s-s.12(1)(b) of the Road Regulation). According to the MoF, whether a slide occurred was irrelevant--s-s.45(3) was concerned with whether a licensee knowingly created a "risk" of a slide.

Even more troubling was the MoF's position that causation was irrelevant--that a licensee was liable under s-s.45(3) regardless of the particular cause of a slide (or, presumably, the potential cause of a hypothetical slide):

[T]he Government argues that it is not relevant whether Kalesnikoff knew or ought to have known the "precise hazard" which materialized; they knew or ought to have known that a slide ***might result, whatever the cause*** of the slide. The Government submits that a contravention will occur if a person knows there is ***any "possibility of a slide"***, even if it is not probable, unless the possibility of a slide is so remote that one can discount it altogether. [emphasis added]

In the case of Slide 3, the expert evidence was—and the MoF acknowledged—that the cause of Slide 3 was a previously unknown "slippery" layer of diamicton. The MoF further acknowledged that neither KLC nor its experts knew, or ought to have known, of this material prior to the slide. Nevertheless, the MoF maintained that KLC should have known that the volume of material it placed on the side of the road would create the "possibility of a slide ... whatever the cause" and, therefore, that KLC had contravened s-s.45(3) of the Code.

Determination #2

"Determination #2" concerned what became known as "Slides 4, 5 and 6". All three slides were of a trivial nature, and occurred in an area below the road that was assessed as potentially unstable, and characterized by numerous natural slides. In fact, KLC's evidence was that one of the three slides was a natural event. The other two slides, according to KLC, were caused when a malfunctioning ditch block, on the one hand, and a windfall tree, on the other hand, that had unexpectedly increased the volume of water that flowed over the two respective slide locations.

While this segment of the road did not require a professionally engineered design given the road itself was on flat and stable terrain, KLC's terrain assessor had prescribed various "extraordinary construction techniques" in the design to address drainage issues. The MoF's position was that KLC did not construct the road in accordance with these extraordinary construction techniques, and ought reasonably to have known that its failure to do so "may" result in a landslide contrary to s-s.45(3) of the Code. Similarly, the MoF's position was that KLC's failure to use extraordinary construction techniques resulted in the direction or water onto the potentially unstable slope in contravention of s-s.13(1)(c)(iv) of the Road Regulation.

Again, with respect to s-s.45(3) of the Code, the Government's position was that a finding of contravention did not require an actual slide, and did not require that the licensee knew or ought to have known of the specific cause of a slide. All that was necessary was to establish

a contravention of s-s.45(3) was that KLC ought to have known that a slide—any slide—might result from its construction of the road.

The Decision

The Commission rescinded both determinations including all findings of contravention and penalty assessments made against KLC—a complete exoneration of KLC’s forest practices. The Commission determined that, in the case of both determinations, KLC did not encounter any site conditions that would have reasonably indicated to KLC that its construction of the road might result in a slide as contemplated in s-s.45(3) of the Code.

In the case of the alleged contravention of s-s.12(1)(b) of the Road Regulation in Determination #1, the Commission determined that the RLAD had not specified any volume or other limitations with respect to the amount of fill KLC could use in its construction of the road, or the amount of spoil KLC could place on the spoil site at the side of the road. The Commission found that the placement of an amount of material that exceeded the fill volumes predicted in the RoadEng profiles did not mean that KLC was not in general conformance with the RLAD.

In the case of the alleged contravention of s-s.13(1)(c)(iv) of the Road Regulation in Determination #2, the Commission determined that, in the context of the overall structure of the Road Regulation, s-s.13(1)(c)(iv) prohibited the construction of a drainage system that directed water onto unstable slopes contrary to an approved design. As the Commission found that KLC had constructed its drainage structures in accordance with the “extraordinary construction techniques” contemplated in the approved design, the Commission determined that KLC had not directed water onto potentially unstable slopes contrary to s-s.13(1)(c)(iv) of the Road Regulation.

Why it Matters

The Commission’s decision in the KLC appeal is important for a number of reasons:

Commentary on s-s.45(3) of the Code, and its Implications for s-s.46(1) of FRPA

The Commission has provided a clear articulation of the scope and intent of s-s.45(3) of the Code:

[T]he purpose of this section is to ensure that the licensee continues to be alert for indications that field conditions have changed or are not what they thought (i.e., weather conditions or site factors). [Licensees] ... are to monitor the actual conditions and if they know or should reasonably know that significant damage may occur, then despite their permit or plans, a new course of action may be required. In this context, the Commission agrees with the [Forest Practices] Board that the inquiry must focus on whether the licensees made reasonable inquiries to reconcile apparent discrepancies between new information and previous information/plans/assumptions. These inquiries may or may not require the involvement of additional professionals.

In other words, s-s.45(3) says to a licensee that it cannot simply barge ahead in reliance upon its plans and approvals. Once in the field, a licensee must monitor its operations to ensure that there are no previously unknown site or weather conditions that may cause significant environmental damage even if the licensee complies with its approved plans. If the

conditions a licensee encounters once operations commence are different than those contemplated in its plans and approvals, and the licensee should foresee that its forest practices have the potential to cause significant environmental damage in light of those conditions, then the licensee must investigate and resolve the discrepancies between the existing plans and approvals and the previously unforeseen conditions.

The Commission's guidance with respect to s-s.45(3) of the Code is likely relevant to the approach the Commission will take towards s-s.46(1)(b) of FRPA (indeed, this is probably one of the reasons the Commission took as long as it did to render a decision in KLC's appeal). While the two sections are structured somewhat differently, the language and function of each is similar: both serve to prevent environmental damage from "weather conditions or site factors" in circumstances where the licensee "reasonably" ought to have known that those conditions "may result, directly or indirectly" in specified environmental damage.

Commentary on the Role of RoadEng Profiles

The significance of cross-section profiles generated through RoadEng software has raised some controversy in the past. Typically, the issue is whether the data generated through RoadEng in the design of a road is in the nature of mandatory requirements and, therefore, whether a failure to construct a road in conformance with that data constitutes noncompliance.

As noted, the MoF argued that the cut and fill volumes reflected in the RoadEng cross-section profiles constituted capacity limitations on the volume of material that KLC could place at the side of the road. The difficulty with this approach is that a RoadEng cross-section profile is merely a "snapshot" of the terrain at the precise location of the cross-section - it is not necessarily reflective of the ground between cross-sections. RoadEng data does not account for variations and micro terrain features that exist between cross-sections, and will use averages between profile stations. Moreover, RoadEng results can vary depending upon the frequency of the intervals. For example, the cut and fill estimates that RoadEng generates based on 15 metre cross-section intervals will differ from the cut and fill estimates generated with cross-sections at 20 metre intervals. Accordingly, if RoadEng were used to assess compliance, then a finding of compliance or non-compliance might simply come down to the frequency of cross-sections chosen in the design of the road.

In its decision, the Commission minimized the role of RoadEng as a measure of compliance; indeed, the Commission went so far as to say that RoadEng cross-sections were not part of a road design at all, but were merely a design "tool":

[I]n the Commission's view, the RoadEng cross sections are more in the nature of a design tool, than the design *per se*. The cross sections are primarily used to create the design as opposed to being the actual design. This is because they produce a small slice of information and nothing in between. On a flat stretch, information may be extrapolated to fill in the gaps. However, where the stretch is curved or has creeks in between those "snapshots", the information is incomplete. ... The cross sections are only "snap shots". In this case, the cross sections for this section of road do not constitute the primary design for this section of road.

Accordingly, the fact that the amount of material that KLC had actually used as fill and deposited as spoil at the location of the slide exceeded the RoadEng estimates was not

relevant to the Commission's determination of whether KLC should have known that its construction of the road may cause a slide, or whether KLC's construction of the road was in general conformance with the design.

Commentary on the Role of the MoF in the Planning and Construction Process

Licensees are sometimes frustrated when the MoF makes a finding of contravention even though the MoF, itself, was extensively consulted in the planning process, observed the ongoing work, and knew exactly what the licensee was up to. The MoF's concerns with what a licensee "ought to have done" sometimes seem tainted by 20/20 hindsight, and may appear unfair when the MoF also did not manage to foresee the problem.

Such was the case in KLC's circumstances:

- The MoF knew this was a difficult drainage when it assigned it to KLC, and was actively involved in the drainage's development for this reason.
- The MoF knew in advance that KLC intended to develop a spoil sight at the location of Slide 3.
- The MoF never suggested in advance that further investigation of the site associated with Slide 3 was necessary, and had even suggested at one point that a double switchback at this location as an alternative design possibility.
- The District Manager approved the design of the road, including the drainage design that directed water into natural water courses on potentially unstable ground.

The MoF knew what the plan was, knew what the site conditions were, and knew what KLC was doing. Presumably, if the slides were reasonably foreseeable then the MoF would also have foreseen the possibility and done something about it (rather than approve the plans and not express any concerns in its inspections of KLC's work). The MoF's silence in this respect seems to have undermined the MoF's position. Hopefully, this decision will serve as a reminder that compliance and enforcement should not come from a perspective of 20/20 hindsight.

Outstanding Questions

For all the guidance that the Commission provided in the KLC decision, there is still work to do:

Professional Reliance and Due Diligence

KLC raised a defense of due diligence as provided for under the Code (and as is now provided for under FRPA), and much of the debate before the Commission in KLC's appeal related to the applicability of this defense in KLC's circumstances. The basis of KLC's defense was that it had constructed the road in reliance upon the advice of qualified registered professionals. The MoF and the Board took the position that KLC's reliance on experts was "unreasonable" in the circumstances, and that KLC should have conducted further investigations before proceeding with the recommendations of its QRPs. KLC and the interveners countered that a licensee is not obliged to obtain a "second opinion" of its professional advice or otherwise second guess its QRPs.

As the Commission determined that KLC did not commit the substantive contraventions at issue in any event, the Commission did not need to decide whether KLC had satisfied a defense of due diligence. While the Commission offered some general guidance on the role of expert advice in a due diligence defense, it did not provide any meaningful resolution of the issue. On one hand, the Commission recognized that it is neither feasible nor practical to expect a licensee to obtain a second opinion on a matter when it already has an expert opinion. On the other hand, the Commission indicated that licensees should not expect to satisfy due diligence simply on the basis of expert advice in the face of obvious hazards or significant concerns.

So it seems that due diligence may require a second opinion depending upon the obviousness or significance of a concern. The critical question not addressed in the Commission's reasons is where the threshold of obviousness or significance lies before a licensee is no longer entitled to rely upon its expert. Given that licensees rely upon experts to determine these very matters (whether and to what extent a hazard exists), there is definitely a conundrum within this issue that remains for the Commission to sort out more fully.

And this issue is of some significance—more so than may immediately meet the eye. If the Commission or courts determine that a high degree of obviousness and significance is required with respect to a potential problem before due diligence would require a licensee to question its expert's advice to the contrary then, by default, professional associations will assume greater responsibility for enforcement of forest practices in BC. If licensees are able to rely on appropriate expert advice to satisfy due diligence except in the most obvious cases, the focus of public policy will turn to the quality of the professional advice and the enforcement of professional standards (rather than those who retain the professionals). These are matters squarely within the domain of professional associations. Conversely, if reliance on expert advice is rarely a basis to satisfy due diligence, then the defense is largely neutered given that licensees depend upon expert advice to foresee problems and ensure that their operations avoid those problems. Typically, a licensee has no other means to exercise reasonable care other than through the advice of its experts.

Industry and forestry professionals should pay close attention to the Commission's search for the appropriate middle ground on this issue.

Foreseeability and Causation in Subsection 45(3)

The most confusing part of the Commission's decision is its treatment of causation in relation to the requirements of s-s.45(3) of the Code. Subsection 45(3) says that a person must not carry out a forest practice if that person "knows or should reasonably know that, due to weather conditions or site factors" the forest practice may result in a slide or other environmental damage.

The MoF argued that causation was irrelevant and that the question was simply whether the licensee knew or ought to have known that a slide might result from its forest practices "whatever the cause". According to the MoF, the evidence before the Commission as to the cause of the slides at issue--and that fact that KLC could not have reasonably have foreseen that cause--was irrelevant.

Unfortunately, the Commission also appears to have agreed with the MoF that the "actual cause" is not of concern, so long as the "type" of damage was foreseeable:

[T]he Commission agrees with the Government that, if a significant damaging event occurs, its actual cause is of less interest under this section than whether this type of damaging event was, or could have been, foreseen in light of the site and weather conditions.

* * *

[A]s was the case with section 45(3) of the *Code*, neither a damaging event nor its cause must be established for there to be a contravention of section 13(1)(c) of the *Regulation*.

The Commission appears to endorse the MoF's position but, in reality, it does not. The Commission goes on to discuss the question of an "evidentiary threshold", and that discussion is really about whether the cause of a slide, or potential slide, was foreseeable. In the case of Slide 3, the cause of the slide was the diamicton layer of colluvium. KLC did not know about it and, as the MoF conceded, there was no reason for KLC to know about it. But, instead of simply saying that the cause of the slide was not foreseeable (given that no one knew or could reasonably have known about the diamicton layer), the Commission discusses the matter in terms of an evidentiary threshold, and concluded there was no evidence that KLC knew or ought to have known that its forest practices would cause a slide.

While the Commission appears to have reached the correct outcome, the path it chose to arrive at that outcome is, with respect, somewhat confusing. The only "evidence" that would suggest that a licensee knew or ought to have known that its forest practices might cause a slide or other environmental damage is evidence that the licensee knew, or ought to have known, of the potential cause of a slide. A licensee simply cannot foresee environmental damage if it cannot foresee the potential causes of that damage. Had KLC known of the diamicton layer that caused Slide 3, for example, it would have known that the placement of material on top of that layer might "cause" a slide above that layer. As KLC could not reasonably have known about the layer it had no reason to know that its placement of material at the side of the road might "cause" a slide. So, causation is critical, regardless of whether it is discussed in terms of an "evidentiary threshold" or otherwise.

What the MoF had in mind in its argument before the Commission, and what the Commission had in mind in its conclusion, are very different things. Again, using Slide 3 as an example, once the evidence of the diamicton layer surfaced the MoF was forced to take the extreme position that so long as the forest practices at issue could possibly result in any slide for whatever reason, there were still grounds to find KLC in contravention of s-s.45(3) of the *Code*. While this is not at all the effect of the Commission's decision, the Commission's apparent agreement with the MoF on the issue of causation appears to lend credibility to the MoF's extreme approach.

Closing Comment

KLC's victory resulted in some additional good news: on September 6, 2006, the MoF agreed to a consent order that dismissed another appeal KLC had commenced before the Commission. As a result, the Commission rescinded all contraventions at issue in the subsequent appeal. That appeal raised almost identical issues as those raised in KLC's successful appeal. The MoF's decision to abandon its defense of the subsequent appeal was undoubtedly due to KLC's earlier success.

Still, the message conveyed from KLC's experience is unfortunate. While KLC scored an unconditional victory, it obviously paid a high price to pursue an appeal on the basis of principle (as noted, the financial penalties were obviously not the issue). KLC's experience

demonstrates how the cost of principle can easily become very high—particularly for smaller operators.

One problem is the Commission's policy against awarding costs except in the most extraordinary circumstances. As a matter of practice, the Commission rarely, if ever, awards costs. The difficulty is that the Commission's policy removes an important limitation on the MoF's ability to impose contravention determinations that are without merit. For that matter, it also removes a powerful incentive for licensees to avoid appeals that have little chance of success. It also allows the Board to pursue novel legislative interpretations at licensee expense.

The Commission's restrictive policy with respect to costs means that, as a practical matter, the MoF does not have to concern itself with the possibility that it may actually have to account for the expense that a licensee must incur to appeal the MoF's mistakes. When the MoF makes a compliance and enforcement error, the licensee on the receiving end must either absorb the expense of an appeal from its own pocket to fix a mistake that was not of its making, or simply live with any reputational or financial consequences that flow from the mistake. This is hardly a fair set of alternatives. Given that the MoF is not, as a practical matter, financially accountable for its compliance and enforcement errors of judgment, and given the significant resources available to the MoF, small and medium sized operators are at a distinct disadvantage in any compliance and enforcement dispute with the MoF.

That is not to say that the Commission should necessarily take a court room approach towards costs whereby the loser pays in virtually all circumstances. The Commission could search out some middle ground and tailor a policy that accounted for circumstances where an appeal served some truly unique public interest, or where an appeal raised a particularly difficult issue. However, the MoF (or anyone else) should have some real prospect of an adverse costs award to think about before deciding upon compliance and enforcement action. As it stands, the MoF and the Board are free to send "test" cases up to the Commission at licensee expense almost at will.

This is also not to say that an award of costs was necessarily appropriate in KLC's circumstances. However, KLC's experience vividly illustrates the resources a licensee may have to commit to fix a compliance and enforcement mistake that was in no way attributable to its own conduct. While KLC's appeal may have benefited the public interest, KLC is undoubtedly wondering why it should have to pay for that public benefit when its own conduct was absolutely blameless.