

DETERMINATION

1. Authority

The Executive Director of the Council has alleged that Stephen Garrod and Barbara Coward, owners of Managed Forest #167 on Galiano Island, contravened section 31 of the Private Managed Forest Land Council Regulation 2007 B.C. Reg 182/2007 (the regulation) by not restocking a disturbed area within 5 years of the completion of timber harvesting activity in 2001.

The Private Managed Forest Land Council (the Council), after giving a person who is alleged to have contravened a provision of the *Private Managed Forest Land Act* (the Act) or the regulations an opportunity to be heard, is authorized under section 26 and 27 of the Act to determine whether the person contravened the provision. If the Council determines that a contravention has occurred, the Council may levy an administrative penalty and may issue a remediation order.

2. Opportunity to be heard

On March 5, 2009 the Council provided the owners with the investigation report,¹ the inspection summary report² and a stocking survey report³. On April 20 and 21, 2009 Stephen Garrod, owner representative, provided the Council with a written submission in respect of the allegation⁴. Finally, on April 23, 2009, the Council provided Stephen Garrod and Barbara Coward with an oral opportunity to be heard in respect of the allegations.

This determination is based on information and evidence provided to the Council in the investigation report, the inspection summary report, the stocking survey report and the written submissions of the owner's representative. The Council has also carefully considered the oral evidence provided by the owners and the Executive Director at the hearing.

¹ The investigation report, dated March 5, 2009, was prepared by Stuart Macpherson, RPF, Executive Director of the Council and was entitled "Investigation Report: MF 167 Galiano Island Restocking".

² The inspection summary, dated January 2009, was prepared by Steve Lackey, RPF, of Sutil Forestry Consulting Ltd. and was entitled "Managed Forest Inspection Summary".

³ The stocking survey, dated March 5, 2009, was prepared by Nancy Pezel, RPF and entitled "Stocking Survey on Harvested Area of Managed Forest 167".

⁴ The submission, dated April 20 and 21, 2009, was prepared by Stephen Garrod.

3. Issues to be Determined

There are three primary issues to be determined:

1. Did Mr. Garrod and Ms. Coward contravene section 31 of the regulation as alleged?
2. If a contravention did occur, what, if any, administrative penalty should be levied?
3. If a contravention did occur, what, if any, remediation order should be given?

4. Did the owner contravene section 31 of the regulation as alleged?

In determining whether or not there has been a contravention the Council must consider

1. if each of the elements of the alleged contravention of section 31 of the regulation have been established on the balance of probabilities, and
2. if the person who is the subject of the allegation establishes on the balance of probabilities that one of the defences available under section 29 of the Act is applicable in the circumstances.

4.1 Restocking

It has been alleged that Mr. Garrod and Ms. Coward have contravened section 31 (3) (a) of the regulation. Section 31 states:

Reforestation of areas where timber harvested or destroyed

31 (1) In this section:

“completion of timber harvesting” means the date that timber harvesting within a cutblock is concluded and is determined by

- (a) the date the area is declared as a cutblock in an annual declaration, or
- (b) if an area is not included in a declaration, a date that does not exceed two consecutive operating seasons from the commencement of harvesting in the cutblock;

“crop tree” means a tree that

- (a) is of a commercial species that is consistent with the species of trees specified in the management commitment for use in reforestation, and
- (b) is unencumbered by pathogens;

“disturbed area” means all or part of private managed forest land where

- (a) timber harvesting has been completed within a cutblock, or
- (b) timber was destroyed

but does not include an area occupied by roads referred to in section 13 or logging trails referred to in section 14 (1);

“restock” means to establish a stand of trees that contains at least

- (a) 400 crop trees per hectare reasonably well distributed across the disturbed area if the stand is on the Coast, and
- (b) 600 crop trees per hectare reasonably well distributed across the disturbed area if the stand is in the Interior;

“successfully regenerated stand” means a stand of trees

- (a) that contains at least
 - (i) 400 crop trees per hectare reasonably well distributed across the disturbed area if the stand is on the Coast, and
 - (ii) 600 crop trees per hectare reasonably well distributed across the disturbed area if the stand is in the Interior, and
 - (b) where the crop trees exceed the height of competing vegetation within 1 m of the crop tree by
 - (i) 50% if the area is on the Coast, and
 - (ii) 25% if the area is in the Interior.
- (2) This section does not apply to an owner of a disturbed area if
- (a) the area where the timber was harvested or destroyed is a contiguous area that is under 1 ha in size, or
 - (b) the trees remaining on the area meet the definition of a successfully regenerated stand.
- (3) If all or part of private managed forest land becomes a disturbed area after the area becomes an owner’s land, the owner must reforest the disturbed area by
- (a) restocking the disturbed area within 5 years of the completion of timber harvesting activity on the cutblock, or the date the timber was destroyed, as applicable, and
 - (b) establishing a successfully regenerated stand on the disturbed area within 15 years of the completion of timber harvesting activity on the cutblock, or the date the timber was destroyed, as applicable.
- (4) Subject to subsection (5), if all or part of private managed forest land became a disturbed area before the area became an owner’s land, the owner must reforest the disturbed area by
- (a) restocking the area within 10 years of the area becoming the owner’s managed forest land, and
 - (b) establishing a successfully regenerated stand on the area within 20 years of the area becoming the owner’s managed forest land.
- (5) If, in relation to a disturbed area, the council determines that
- (a) the present owner is a corporation,
 - (b) the previous owner is a corporation and was the owner of the area when the area became a disturbed area, and
 - (c) the present owner is
 - (i) a subsidiary of the previous owner, or
 - (ii) has control of the previous owner,

the council may order that the present owner reforest the disturbed area in accordance with subsection (3).

- (6) Nothing in this section requires an owner to reforest a disturbed area if the timber on the area was
- (a) destroyed and the disturbed area is not sufficiently productive to support a successfully regenerated stand, or
 - (b) harvested or destroyed and the disturbed area becomes occupied by buildings or other structures or installations.

For there to have been a contravention, it must be established that:

- (a) The disturbed area is private managed forest land;
- (b) That Mr. Garrod and Ms. Coward are owners of Managed Forest #167;
- (c) That the area was disturbed at least 5 years before the allegation was made;
- (d) That the post harvest stocking is less than 400 crop trees per hectare reasonably well distributed across the disturbed area;
- (e) That the circumstances described in section 31 (2) are not applicable.

Relevant evidence

The Executive Director provided Council with evidence that

- the area on which the alleged contravention occurred is within Managed Forest #167 on Galiano Island and that Stephen Garrod and Barbara Coward are the owners of the property
- in 2001 approximately 3 400 m³ of timber was harvested from an area of 10.6 ha (the cutblock) within Managed Forest #167 (which totals 48.16 ha)
- a stocking survey of the cutblock was conducted in February 2009 and indicated that
 - 9.4 ha of the total harvested area is the disturbed area (after considering roads, skid trails and non-productive areas)
 - of the 9.4 ha identified as the disturbed area,
 - 3.7 ha (Treatment Unit 4) averaged 575 crop trees, and
 - 5.7 ha (Treatment Unit 1 to 3) averaged 212 crop trees

Mr. Garrod and Ms. Coward have acknowledged that at all material times they have been the owners of the land that is the subject of the allegation and that the land is contained in Managed Forest #167. Mr. Garrod and Ms. Coward did not dispute any of the substantive evidence presented in the investigation report, inspection summary report and the stocking survey report as the evidence relates to describing the events which occurred in the affected cutblock.

Analysis

Mr. Garrod and Ms. Coward (the Owners) acknowledge that they own Managed Forest #167 and that in 2001 they harvested timber from approximately a 10.6 ha cutblock. The cutblock consisted of roads and trails (1.0 ha), a bouldered area (0.6 ha) from which few trees were harvested, and a balance of 9.4 ha of growing site. The stocking survey report, on page 3, described the bouldered area as follows:

“On the east side of the cutblock, large boulders dominate the base of the slope and the small portion northeast of GPS #300. Although scattered stumps are evident in these areas, many of the western red cedar and Douglas-fir were (and are) growing on and around the boulders. The size of the boulders, air pockets between the boulders and lack of suitable planting medium make the area unplantable. The area has been netted out of the disturbed area (see map).”

The definition of “disturbed area” in section 31 (1) provides for the netting out of roads and trails from the area that was harvested. All other portions of the cutblock that were harvested remain within the disturbed area. This would include the 0.6 ha bouldered area identified in the stocking survey report. The Council finds that the disturbed area that must be reforested is 10.0 ha and not the 9.4 ha identified in the stocking survey report or the Investigation Report. As the disturbed area exceeds 1 ha and the area was harvested using a modified clearcut silvicultural system, section 31 (2) of the regulation does not apply in the circumstances related to the cutblock.

The 10.0 ha disturbed area is comprised of

- 3.7 ha (Treatment Unit 4) averaging 575 crop trees,
- 5.7 ha (Treatment Unit 1 to 3) averaging 212 crop trees, and
- 0.6 ha (bouldered area) with few crop trees.

The Council finds that within the disturbed area, the 5.7 ha (Treatment Units 1 to 3) and the 0.6 ha (bouldered area) were not sufficiently restocked within 5 years of completion of harvesting on the area. Subject to consideration of defences available to the Owners, the Council finds that the Owners have contravened the requirements of section 31 (3) (a) of the regulation.

4.2 Available defences

Under section 29 of the Act, the Council cannot find that a person has contravened a provision of the Act or the regulations if the person establishes that

- (a) the person exercised all due diligence to prevent the contravention,
- (b) the person reasonably and honestly believed in the existence of facts that if true would establish that the person did not contravene the provision, or
- (c) the person’s actions relevant to the provision were the result of officially induced error.

The Owners did not specifically state that they intended to establish any of the defences available under section 29 of the Act. However, the Owner’s written submission and oral testimony contains some evidence that would contribute to the establishment of a defence of due diligence. Of particular note are:

- The Owners retained the services of a professional to prepare a forest management plan within the context of the applicable management commitment, and
- The management commitment contained a reforestation strategy that was generally followed.

The test for due diligence has two branches:

- (1) was the event reasonably foreseeable in the particular circumstances?
- (2) if so, did the person take all reasonable care to prevent the event from occurring?

Foreseeability

People are only expected to take preventative action in respect of harmful events which they can reasonably foresee. In the present case, the Council must assess whether or not, in the particular circumstances relating to this case, it is reasonably foreseeable that by relying on natural regeneration the stocking within the cutblock would not meet those required by section 31 of the regulation by the time frames specified in that section.

There was a potential that using natural regeneration in the specific biogeoclimatic ecosystem classification within the cutblock could have been successful. However, there was also a considerable risk that due to brush concerns and fluctuating seed source there would be insufficient regeneration established. Other owners on Galiano Island with similar growing sites have utilized artificial regeneration and have been successful.

The Council finds that by relying on natural regeneration in the particular ecological circumstances applicable to the cutblock it was reasonably foreseeable that the restocking requirements of section 31 of the regulation may not be achieved.

Reasonable care

If an event is reasonably foreseeable, then a duty arises to prevent the event from occurring. Being duly diligent does not mean that a person must eliminate all risk of anything going wrong. The person must, however, eliminate what in the normal course of business would objectively be seen as unacceptable risks. The test is an objective one and relies on what other people engaged in the same activity, looking at the same situation, would have prudently done. Generally this means that the greater the gravity of potential harm or the greater the likelihood of the potential harm, the higher the degree of care that would be expected.

The cutblock was harvested in 2001. An audit report prepared in 2002 by the Agricultural Land Commission, who was then administering private managed forest land, expressed concern with the natural regeneration regime for the cutblock. In particular, the audit report noted:

“Garrod/Coward

The owner is relying on natural regeneration to achieve restocking within the five year period following harvest. It is therefore too early to determine reforestation effectiveness on this property. The owner was very interested in reforestation and understood the auditors’ specific

concerns about achieving successful natural regeneration on the property where extensive animal browse and vegetative competition may be significant challenges to achieving successful reforestation.”

As a result of the 2002 audit, the Owners were aware of significant risks associated with implementing a natural regeneration regime within the cutblock. In particular, threats associated with brush establishment preventing potential further opportunities for seedling germination. However, it was noted on page 3 of Mr. Lackey’s January 2009 Inspection Summary that no regeneration or stocking surveys had been completed for the property. In addition, no brush control had been undertaken.

The Council is of the opinion that it would have been reasonable in the particular circumstances to reduce the risk of there being unsatisfactory natural regeneration across the cutblock to

- amend the reforestation strategy and plant the area, or
- if natural regeneration was to be pursued, implement a strategy that included
 - aggressive vegetative management
 - a diligent survey program to assess the rate of ingress, and
 - a fill planting regime as required.

As the Owners did not adopt either of these strategies, the Owners did not in the particular circumstances take all reasonable measures to prevent the event from occurring.

For these reasons, the Council finds that the defence of due diligence has not been established.

4.3 Findings

After considering all of the evidence, and after determining that no applicable defences have been established, the Council finds that the Owners have contravened section 31 of the regulation by failing to establish sufficient numbers and distribution of crop trees within a 6.3 ha portion of the disturbed area within the specified period. In particular, the 5.7 ha portion of the disturbed area identified as Treatment Units 1 to 3 contains only 227 crop trees/ ha (57% of the prescribed requirements). The 0.6 ha bouldered portion of the disturbed area supports very few trees. However, the Council acknowledges that very few trees were harvested from the bouldered area and that there are limited opportunities for restocking the area.

The Council notes that a 3.7 ha portion of the cutblock fully conformed with the restocking requirements under the regulation.

5. Should an administrative penalty be levied?

Under section 26 (2) of the Act, if the Council determines that a person has contravened a provision of the Act or the regulations, the Council may

- (a) levy an administrative penalty against the person in an amount that does not exceed \$25 000, or
- (b) refrain from levying an administrative penalty against the person if the person considers that the contravention is trifling.

The Council does not consider that the contravention of section 31 of the regulation is trifling. In making this assessment, the Council has considered both the nature of the deficiency itself and the circumstances which led to the event occurring.

Section 26 (5) of the Act requires that, before the Council levies an administrative penalty, the Council must consider all of the following:

- (a) any previous contraventions of a similar nature;
- (b) the gravity and magnitude of the contravention;
- (c) whether the contravention was repeated or continuous;
- (d) whether the contravention was deliberate;
- (e) any economic benefit derived by the person from the contravention;
- (f) the person's cooperation and efforts to remedy the contravention;
- (g) the person's efforts to prevent the contravention;
- (h) whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention.

These factors will be evaluated together with no one factor being given greater or less weight than another.

(a) any previous contraventions of a similar nature

The Owners do not have any previous contraventions of a similar nature.

(b) the gravity and magnitude of the contravention

The gravity of the contravention goes to the significance of the impact of the contravention. The magnitude of the contravention goes to the overall scope of the contravention.

The 5.7 ha portion of the disturbed area in Treatment Units 1 to 3 (57% of the total disturbed area) contained only 57% of the minimum stocking required by the regulation. The Council finds that the deficiency in the number and distribution of crop trees within portions of the cutblock was significant.

(c) whether the contravention was repeated or continuous

The Owners met or exceeded the reforestation requirements on all other areas within the cutblock. There were no areas outside of the cutblock on which the Owners had carried out timber harvesting activity and therefore the application of section 31 was limited to the area within the cutblock. Accordingly, the contravention was not repeated.

(d) whether the contravention was deliberate

There is evidence that the Owners intended to implement a reforestation regime that, in the circumstances applicable to the area, had a significant risk of not meeting the requirements of section 31 of the regulations. However, there is no evidence to suggest that the Owners in any way intended to contravene the regulation.

(e) any economic benefit derived by the person from the contravention

The Owners would have initially derived an economic benefit by not planting the 6.3 ha portion of the disturbed area that did not meet the requirements of section 31. However, it is very likely that brushing costs on the area will be greater now than if the area had been promptly planted. As a result any initial economic benefit will be removed.

(f) the person's cooperation and efforts to remedy the contravention

The Owners have been very cooperative with the Council in respect of the contravention.

(g) the person's efforts to prevent the contravention

The Owners made some efforts to prevent the contraventions from occurring. For example, the Owners followed the management plan which had been prepared by a consultant. The Owners did not, however, adjust the management strategy employed even when warned of the significant risk of the reforestation requirements not being met within the time frame specified in the regulation.

(h) whether relevant forest management objectives specified in Division 1 of Part 3 of the Act are being achieved despite the contravention

The failure to meet the reforestation requirements for all of the disturbed area within the cutblock has had no detrimental impact on soil conservation, water quality of fish habitat. Accordingly, the achievement of government's forest management objectives will not be impacted by the contravention.

Having considered each of the factors set out in section 26 (5) of the Act, the Council chooses to levy an administrative penalty in the amount of \$1000.00.

6. Should a remediation order be given?

If the Council determines that a person has contravened a provision of the Act or regulations, the Council is empowered under section 27 of the Act to order the person to remedy the contravention by

- (a) carrying out a requirement of the Act or regulations that the person has failed to carry out, or
- (b) repairing or mitigating the damage to private managed forest land caused by the contravention.

The power of the Council under paragraph (b) is limited to damage to private managed forest land and does not extend to other lands that may have been affected by the contravention.

The Executive Director noted in his Investigation Report that unless steps are taken

- it is likely that any future recruitment of germinants will be minimal, and
- there is a significant risk that the requirements to establish a successfully regenerated stand on the cutblock will not be met.

The Executive Director asked the Council to consider the restocking and fill-planting recommendations in the stocking survey report. The Owners have submitted that they intend to implement the recommendations of the stocking survey report.

The stocking survey report provides a detailed regime for improving the stocking within each of the 4 identified treatment units. One of these treatment units was, in fact, the 3.7 ha portion of the cutblock that conformed with the restocking requirements in section 31 (3) (a) of the regulation.

While the stocking report provides useful information and recommendations for ensuring that the cutblock will be reforested, the Council does not adopt it as a remediation order. The reasons for this are twofold:

1. The Council has no jurisdiction to make a remediation order in respect of the 3.7 ha portion of the cutblock (treatment unit 4) that is not in contravention of the requirements of the regulation;
2. The Council declines to order the Owners to plant specific numbers and stock types of seedlings.

It is within the discretion of the Owners to choose to carry out the recommendations of the stocking survey report. However, it is important to understand that the recommendations in the stocking survey report do not form part of the Council's remediation order.

It is incumbent on the Owners to ensure that they are in compliance with the requirements of the Act and regulations. The Owners are now aware that the reforestation strategy contained within the management commitment for Managed Forest #167 carries significant risk. The Council encourages the Owners to consider promptly reviewing this strategy to recognize the potential for planting harvested areas as well as reviewing the commercial species that may be appropriate within the area.

The Council makes the following remediation orders in respect of the 5.7 ha of the disturbed area (Treatment Units 1 to 3) that is currently insufficiently restocked:

1. The Owners take appropriate steps to ensure that the area is sufficiently restocked with a minimum of 400 crop trees/ha as soon as practicable. (The Owners may establish a larger number of crop trees at their discretion.)
2. The Owners must provide to the Council, by May 31, 2010, a stocking survey detailing the stocking present on the area.

The Council makes the following remediation orders in respect of the 0.6 ha bouldered area identified in the stocking survey report:

1. The Owners take appropriate steps to ensure that the bouldered area is restocked with the number of crop trees that can be reasonably expected to grow within the bouldered area.
2. The Owners must provide to the Council, by May 31, 2010, a stocking survey detailing the stocking present on the area.

7. Reconsideration and Appeal:

Under section 32 of the Act, the Owners may request that the Council reconsider some or all of this determination. Under section 33 of the Act, the Owners may appeal this determination to the Forest Appeals Commission.

If you need clarification of any aspect of this determination, please contact the undersigned at the Private Managed Forest Land Council Office, at (250) 386-5737.

Yours truly,



Trevor Swan, Chair
Private Managed Forest Land Council
June 15, 2009