Comments on Bill 47
Forest Statutes Amendment Act, 1997
Proposed Changes to Enforcement and Compliance Provisions: Addendum to July 24th, 1997 comments on Proposed Changes to Part IV, Division 3 - Administrative Remedies in the *Forest Practices Code of British Columbia Act*

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INTRODUCTION

This brief is an addendum to West Coast Environmental Law Association's July 24th brief on proposed amendments to the administrative remedies provision in the *Forest Practices Code of British Columbia Act*. In that brief, West Coast Environmental Law Association raised concerns that the proposed amendments in Bill 47, the *Forest Statutes Amendment Act, 1997* will significantly diminish effectiveness of the current compliance system while at the same time making the compliance system more cumbersome and costly to administer.

A number of other significant concerns with regard to Bill 47 have been raised by the BC Environmental Network Forest Caucus in their brief on Bill 47. West Coast Environmental Law Association shares those concerns.

This brief discusses several issues relevant to enforcement and compliance that have not been fully discussed in either the BCEN Forest Caucus brief or the West Coast Environmental Law Association July 24 brief. The following concerns are

addressed in this brief:

- Section 121 of Bill 47 changes section 154 of the *Forest Practices Code* -- the section which prohibits intentional interference with, or misleading, of enforcement staff and Forest Practices Board staff -- from an offence provision to an administrative penalty provision. This is not only a highly inappropriate use of administrative penalty provisions, but it may be unconstitutional.
- Section 108 of Bill 47 deletes section 119 of the *Forest Practices Code*. This removes important guidance to Ministry of Forest staff in making determinations as to the quantum of fines for unauthorized harvesting.
- Not allowing the Forest Practices Board to request reviews of determinations made under section 116.3(1) is inappropriate given the degree of discretion involved in these determinations.
- Section 130 of Bill 47 appears to limit the ability of the Board to appeal determinations if it has not requested a review of the determination. This restricts the effectiveness of the Board and will likely increase the frequency of appeals.

Section 121, Amendments to Intentional Interference and Intentional Misleading Provisions

Currently, section 154 of the *Forest Practices Code* prohibits intentional interference with enforcement officials, members of the Forest Practices Board, members of the Forest Appeals Commission or forest practices auditors. Anyone who violates this section is guilty of an offence. Section 154 also makes it an offence to without lawful excuse, intentionally fail to comply with requirements made by any of the above persons, or to intentionally mislead them.

Section 121 of Bill 47 amends section 154 so that these prohibited acts are no longer offences, triable through the criminal court system, but instead contraventions for which penalties can be imposed under the administrative penalties sections of the *Forest Practices Code*. While we believe administrative penalties can be very effective in deterring minor violations, they are completely inappropriate for violations that are intentional and involve a degree of moral culpability. Use of the administrative penalty system is inappropriate in these cases because it does not reinforce the gravity of an offence in the same way as offences tried through the criminal courts.

The justification that section 121 is needed to ensure uniformity is ridiculous. If this were true, why were other offences such as tree spiking not made into contraventions? Clearly tree spiking was kept as an offence because the legislature believes it should be treated as unacceptable, morally culpable behavior punishable through the criminal court system. Why is the same not true for intentional interference or intentional misleading?

Section 121 may also be unconstitutional. Under section 11(d) of the *Canadian Charter of Rights and Freedoms*, any person charged with "an offence" has various rights, including a right "to be presumed innocent until proven guilty ... in a fair and public hearing by an independent and impartial tribunal". Although I have not had an opportunity to fully research this, making section 154 a contravention for which District Managers can impose penalties may be contrary to section 11 if section 154 is "an offence" for the purposes of the constitution. District managers are not independent or impartial.

In this regard, it does not matter whether the *Forest Practices Code* labels section 154 as an "offence" or a "contravention". The determination of whether section 154 is an offence for the purpose of the constitution is a matter for the courts to decide. The Supreme Court of Canada has said a prohibition combined with penalty will be treated as an offence if "by its very nature, it is a criminal proceeding" or if it may lead to "true penal consequences". A law sanctioned by penalty will be, by its very nature, an offence if the law is "intended to promote public order and welfare within the public sphere of activity". These criminal ends are distinct from "private, domestic or disciplinary matters which are ... primarily intended to maintain discipline, professional integrity and professional standards which regulate conduct within a limited private sphere of activity".[1] One of Canada's leading experts in this area has tried to give some guidance as to when a prohibition and penalty will be treated as a penalty. According to L.S. Fairbairn of the Department of Justice

"In Canada, an offence is more likely to be characterized as criminal to the extent that it has the following characteristics:

- the activity in question is bereft of social utility;
- the offence is contained in the *Criminal Code*;
- the act or actions in questions constitute conduct that is, in itself, so "abhorrent to the basic values of human society that it ought to be prohibited completely";
- that the mental element of the offence is expressed in terms of intention, recklessness, a marked departure from reasonable standard care, or willful blindness, rather than "mere negligence";
- there is a significant social stigma associated with a conviction for the particular offence and/or with the severity of the available punishment; ...[2]

Given these distinctions, it seems very likely that section 154 would be treated as an offence for the purposes of the *Charter of Rights and Freedoms*. It is distinct from provisions which courts have held to be non-criminal in nature (for instance, police conduct codes aimed at maintaining discipline among police, or professional conduct codes aimed at maintaining integrity within a profession). Instead it applies to all people. It is an offence which is similar to the offence of interfering with a peace officer in the *Criminal Code*. It is bereft of social utility. It is an intentional offence, and it involves significant social stigma.

Given all the above, it is our belief that section 154 as amended by section 121 of Bill 47 may be unconstitutional. We urge your government to consider this issue. The amendments contained in section 121 are both bad policy and may be unconstitutional. We urge the government to not amend section 154.

Section 108 of Bill 47 Removes Useful Guidance as to the Quantum of Penalties Imposed for Unauthorized Timber Harvesting

Under section 119 of the *Code*, if a senior official determines that a person has harvested or damaged Crown timber without authorization, the senior official can levy a penalty against that person in an amount that includes up to two times the market value of the timber that has been harvested or removed. Section 119 is important in that it provides guidance to senior officials in administering penalties for unauthorized timber harvesting.

Section 119 is deleted by Bill 47. Although new sections 116.3 and 117 do not prohibit an official from levying a fine in the quantum suggested by section 119, they remove the guidance that 119 provides. We are concerned that the deletion of this section and its replacement with the section 116.3 and 117 will reduce the likelihood of penalties being imposed for unauthorized timber harvesting that have a significant deterrent effect.

Limitation on Forest Practices Board Jurisdiction

Amendments to section 128 of the *Code* remove the Forest Practices Board's ability to request reviews for penalties involving compensatory damages (i.e. those imposed under section 116.3(1)). Although the penalties that can be imposed by section 116.3 are limited, section 116.3(1) still involves significant discretion. Senior officials must still make judgment calls as to whether to fully recover profits from unauthorized logging and damages for affecting governments ability to manage resources. These are important judgements. Given this discretion, it is appropriate that the Forest Practices Board retain a role as the public watchdog reviewing how senior officials exercise their discretion to impose penalties for unauthorized harvesting, etc.

The Forest Practices Board jurisdiction is also affected by amendments to section 130 of the Code. These amendments appear to be contradictory and potentially damaging to the Forest Practices Board's effectiveness. Read together, sections 130(2)(a) and (b) and 130(3) appear to limit the Board to appealing determinations for which it has requested a review. On the other hand, section 130(2)(d) appears to allow the Board to review any determination for which a review decision has been rendered.

Bill 47 should be amended to clarify the ability of the Board to appeal all determinations. If the Board were to interpret its jurisdiction as being limited, the

effect would be to encourage companies to appeal all determinations (because they would not have to be concerned about the Board intervening) and encourage the Board to review all determinations (so that it retains a right to intervene on an appeal of the determination by a forest company).

Summary

We urge the government to give full consideration to the above comments. In recognition that Bill 47 may have already passed third reading by the time these comments are received, we urge the government to delay royal assent or not proclaim those sections of Bill 47 which will weaken environmental protection and weaken the enforcement regime.

Endnotes

1. *R. v. Wigglesworth*,[1987] 2 SCR 541.
2. L.S Fairbairn, QC Department of Justice, Administrative Law Section, *Crime? or Regulatory Offence? - A Working Distinction* (Ottawa: Department of Justice, February 16, 1995) at 17 - 18.