Citation: ☼ R. v. Gwaii Wood Products Ltd. et al 2015 BCPC 0292

Date: ☼20151019
File No: 6089-1
Registry: Masset

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

AND:

GWAII WOOD PRODUCTS LTD.
HOWE SOUND FOREST PRODUCTS LTD.
I. CROSBY CONTRACTING LTD.

REASONS FOR JUDGMENT
OF THE
HONOURABLE REGIONAL ADMINISTRATIVE
JUDGE M. J. BRECKNELL

Agents for the Director of Public Prosecutions (the Crown):	A. Switzer and Dr. L. Reynolds
Counsel for Gwaii Wood Products Ltd. (May 26 - 30, 2014 Only):	K. Russ
Appearing for Gwaii Wood Products Ltd.:	A. Bellis and F. Collinson
Appearing for Howe Sound Forest Products Ltd.:	No Appearance
Appearing for I. Crosby Contracting Ltd.:	No Appearance
Place of Hearing:	Masset, B.C.
Dates of Hearing:	May 26 - 30, 2014 and April 27 - May 1, 2015
Date of Judgment:	October 19, 2015

INTRODUCTON

[1] The three Defendants:

1. Gwaii Wood Products Ltd (Gwaii),
2. Howe Sound Forest Products Ltd. (Howe Sound), and
3. I. Crosby Contracting Ltd. (I. Crosby), (collectively the Defendants)

face 20 Counts on Information 6089-1 arising from logging and related activities carried out on District Lot 413, Queen Charlotte District, P.I.D. 015-696-286, (DL 413) located adjacent to Highway 16 approximately 3.5 kilometres northeast of the Village of Port Clements, in the Province of British Columbia, between June 24 and October 20, 2010.

[2] The 20 Counts allege that the Defendants did unlawfully carry on a work or an undertaking, to wit: logging and road construction that resulted in the harmful alteration, destruction or disruption of fish habitat to wit: riparian vegetation, wetlands, three tributaries which flow into the Kumdis Bay Estuary, three tributaries which flow into Mallard Creek and Mallard Creek itself all in violation of Section 35(1) of the *Fisheries Act* and thereby did commit an offence contrary to Section 40(1) of the *Fisheries Act* (the *Act*).

THE EVIDENCE

Identification of the Defendants

[3] The Defendants were identified in the initial phase of the investigation by Fisheries Officer (F/O) Rahier. Their identities were subsequently confirmed by the Registrar of Companies for the Province of British Columbia as:

a) Gwaii Wood Products Ltd.,

b) Howe Sound Forest Products Ltd., and

c) I. Crosby Contracting Ltd.

[4] The corporate documents for each of the Defendants identifying them as incorporated British Columbia companies and listing their directors were entered as evidence.

Gwaii

[5] Gwaii Wood Products Ltd. was incorporated as a British Columbia company on March 2, 1994. Its directors are Mr. Arnie Bellis (Mr. Bellis) and Mr. Frank Collison (Mr. Collison). Gwaii appeared at the trial, through counsel on May 26 - 30, 2014 and by agent (the directors) for the other trial dates.

Howe Sound

[6] Howe Sound Forest Products Ltd. was incorporated as a British Columbia company on February 16, 1984. Its directors were Mr. Derik Ram Pallan (Mr. D. Pallan) and Mr. Bhagat Ram (Tom) Pallan (Mr. T. Pallan). It was dissolved on December 23, 2013. Until February 18, 2014, it was represented by Mr. David Butcher, Q.C., who appeared before the Court as counsel on several occasions before his withdrawal. The directors were delivered letters by priority post from the Crown (which they signed for) dated May 7, 2014 advising of the May 26, 2014 trial commencement date. Howe Sound did not appear at the trial.

I. Crosby

I. Crosby Contracting Ltd. was incorporated as a British Columbia company on March 1, 1993. Its directors are Ms. Irene Minnie Crosby (Ms. Crosby) and Mr. Rob Pineault (Mr.

Pineault). On August 23, 2012 Mr. Pineault was served with a Summons for the first appearance of this matter on September 13, 2012. Mr. Pineault attended Court on behalf of I. Crosby on some appearances in February and March 2013. I. Crosby was delivered a series of three letters by priority post from the Crown dated May 23, 2013, June 13, 2013 and May 7, 2014 (each of which were signed for by Mr. Pineault) advising of upcoming court dates and in the case of the last letter advising of the May 26, 2014 trial commencement date. On April 17, 2015 F/O Zimmerman served further disclosure personally on Mr. Pineault and confirmed with him the continuation date of the trial on April 27, 2015. It did not appear on any dates of the trial.

Location of DL 413

[7] DL 413 is located on Graham Island in Haida Gwaii (formally the Queen Charlotte Islands). It is approximately 62.5 hectares in size. It is approximately 3.5 kilometres from the Village of Port Clements and is situated on the estuary of Kumdis Slough which is at the south-eastern reach of Masset Inlet. Masset Inlet runs north and opens into Dixon Entrance at the north end of Graham Island near the communities of Masset and Old Massett.

[8] Most of the lands in close proximity to DL 413 have been set aside either as Land Act Reserve for Conservation or are owned by a nongovernmental organization or the Nature Conservancy of Canada.

[9] Prior to the activities undertaken by the Defendants, DL 413 consisted of a second growth mixed forest transected by several small streams, interspersed with wetlands, all eventually draining into the Kumdis Slough estuary which flows into

Kumdis Bay and connects to Masset Inlet. It was, at some time in the past, a homestead and had been partially cleared at that time.

Maps and Photographs

[10] In order to properly orient the Court to the location of DL 413 the Crown entered as evidence a number of very large maps, satellite photographs, aerial photographs and field based ground photographs.

[11] Some of those documents included overlays indicating landmarks, the road accesses to DL 413, roads and equipment trails that previously existed or were constructed by I. Crosby, wetlands, and the variously identified streams that were examined by the investigators and the fisheries biologists.

[12] Other photographs depicted signage indicating that I. Crosby was the prime contractor on the site, the nature and type of road and stream crossing construction, fish samples collected by the fisheries biologists during their field tests, and extensive tree felling and wind throw (blowdown) near or into various streambeds and wetlands near and in the adjacent estuary.

The Contracts

[13] On June 25, 2010 Gwaii purchased DL 413 from Gwaii-QCI Ventures Ltd. for $124,000.00 and the adjacent DL 418 from the same vendor for $13,500.00. At the same time an easement was also granted by Gwaii.

[14] A “Log Sales Agreement” (the Agreement) dated June 10, 2010 was entered into between Gwaii Wood Products as “Seller” and Howe Sound Forest Products Ltd. as

"Purchaser". Although the letters "Ltd." were not included in Gwaii's name in the Agreement, Mr. Collison acknowledged to the Court that that was due to an inadvertent oversight and the Agreement was between Gwaii and Howe Sound. The Agreement provided for the sale of harvested logs from DL 413.

[15] In the Agreement under the heading: **1. VOLUME ESTIMATE and TERM** the approximate harvest volume of 28,000 to 35,000 m^3 and the duration of the logging operation from June 25, 2010 to December 31, 2010 were set out. In addition, the following specific terms provided:

a) 1.3 Harvesting must reflect the standards contained in the Harvesting Agreement (see example Appendix B here in). Best practices must be utilized at all times to ensure the integrity and value of the land.

b) 1.4 The seller designates Tyler Bellis, in his absence, to undertake random inspections of the harvest site.

[16] Under the heading **13. PROPER LAW** the following specific terms provided:

a) 13.1 This Agreement and all matters arising hereunder will be governed by and construed in accordance with the laws of the Province of British Columbia, which will be deemed to be the proper law hereof.

b) 13.2 The purchaser assumes the responsibility to ensure that all legal requirements, permits, laws, regulations are adhered to under this agreement, including subcontractors and service providers.

[17] A "Contract Agreement" (the Contract) dated July 6, 2010 was entered into between Howe Sound Forest Products Ltd. as the "Company", signed by Mr. D. Pallan, and I. Crosby Contracting Ltd. as the "Contractor", signed by Mr. Pineault. The Contract dealt with timber harvesting to be performed by the Contractor on DL 413.

[18] Under the heading **TERM OF AGREEMENT** a commencement date of July 5, 2010 and an end date of the earlier of September 5, 2010 or the completion of the work were specified.

[19] Under the heading **INTERPRETATION AND MATTERS AFFECTING AGREEMENT** various provincial and federal acts are defined including the *Fisheries Act.*

[20] Under the heading **OPERATING REQUIREMENTS** the following specific terms provided:

> a) **4.9 Environmental Protection:** Without limiting any other provision of this Agreement, the Contractor will:
>
> 3. In carrying out its operations, not permit any harmful substances (which include silt, sediment and other debris and related runoff or deleterious substances as defined inthe *Fisheries Act*) to be spilled or deposited in any stream or other body of water or in a place or in circumstances whereany such harmful substances may enter a stream or other body of water.
>
> 5. Comply with the *Canadian Environmental Protection Act*, the *Environmental Management Act*, the *Fisheries Act*, *FRPA,* the *Species at Risk Act* and the *Wildlife Act.*

[21] The Contract also included a **Schedule 'A' Full Phase Timber Harvesting** document which set out the rates and payments Howe Sound would pay to I. Crosby for various aspects of the work required to complete the timber harvesting.

[22] On July 7, 2010 Gwaii was issued a registered Timber Mark certificate and designation to permit the harvested timber from DL 413 to be marked and scaled as required and to permit the scaled wood data to be submitted to the Harvest Billing System.

The Investigation

[23] On October 19, 2010 a citizen filed a complaint with F/O Ben Rahier at the Fisheries and Oceans Canada (FOC) office in Queen Charlotte about the logging being done on DL 413 that had caused damage to Mallard Creek. Later that day F/O Rahier attended at DL 413, observed what he determined to be logging activity that may have caused harmful alteration, destruction or disruption of fish habitat. The investigation began at that point and F/O Rahier became the lead investigator.

[24] F/O Rahier brought other people into the investigation who also gave evidence in this matter including:

1. F/O Shaun Tadei;
2. Fisheries Biologist Mr. Renny Talbot (Mr. Talbot); and
3. Fisheries Biologist Mr. Al Cowan (Mr. Cowan).

[25] F/O Rahier's involvement in the investigation included:

a) making numerous visits to DL 413 including:

   1) making observations of logging activity impacts on fish habitat;

   2) assisting in setting and retrieving fish traps;

   3) observing fish in those traps and elsewhere on the site; and

   4) conducting meetings and discussions with Mr. Pineault and others.

b) arranging for the involvement of fisheries biologists and forestry biologists;

c) arranging and attending meetings involving the Defendants and others to discuss the logging activity impacts and possible remediation steps;

d) conducting numerous telephone conversations with representatives of Howe Sound;

e) participating in the preparation of and execution of Search Warrants and Inspector's Directions; and

f) preparing documents and reports for the Crown.

[26] F/O Tadei's involvement in the investigation included:

a) at the request of F/O Rahier:

1) making numerous visits to DL 413 to make observations of logging activity impacts on fish habitat;

2) assisting in setting and retrieving fish traps;

3) observing fish in those traps and elsewhere on the site; and

4) attending meetings and discussions with Mr. Pineault and others.

[27] Mr. Talbot, a fisheries biologist employed by FOC, was called in by F/O Rahier to assist and to employ his expertise in the investigation. He later provided a Habitat Impact Assessment (the Assessment) which was an exhibit in the trial.

[28] Mr Talbot's involvement in the investigation included:

a) numerous visits to DL 413 over a period of almost a year to direct and coordinate the study of the impacts of logging activity on the fish habitat on the site including:

1) setting and retrieving fish traps;

2) observing fish in the traps and elsewhere on the site; and

3) attending meetings and discussions with Mr. Pineault and others.

b) attending meetings and engaging in telephone conversations with other FOC officials and representatives of the Defendants; and

c) tabulating the various measurements and collection data from the studies done on fish habitat at DL 413, reviewing applicable literature on the impacts of logging activity on fish habitat and preparing the Assessment.

[29] Mr. Cowan is a retired fisheries biologist with extensive experience in logging activities and fish habitat on Haida Gwaii. He was brought in by Mr. Talbot's supervisor to assist in the investigation.

[30] Mr. Cowan's involvement in the investigation included:

a) eight visits to DL 413 to assist in the study of the impacts of logging activity on the fish habitat on the site including:

1) the setting and retrieval of fish traps; and

2) observing fish in the traps and elsewhere on the site.

b) acting as a mentor and guide to Mr. Talbot during the site studies and collecting of data;

c) assisting in the development of a habitat restoration plan; and

d) reviewing and commenting on the Assessment prepared by Mr. Talbot.

Experts and Their Reports

[31] Mr. Talbot was qualified to give expert evidence in the areas of:

a) fish biology;
b) fish identification;
c) assessment of fish habitat; and
d) assessment of impacts to fish habitat.

[32] He has an academic background in fisheries biology from Northwest Community College, Vancouver Island University and Royal Roads University.

[33] He has been employed by FOC since 2000 in a variety of capacities. He has extensive experience in the management of fish habitat on the North Coast of British Columbia including positions as a coordinator and manager (his position at the time of his involvement in this matter) for the Habitat Monitoring Program which included responsibility for monitoring projects to ensure compliance with the *Act.* He has directly conducted or supervised several hundred fish habitat assessments. He is currently a Senior Fisheries Protection Biologist for the Fisheries Protection Program of FOC presently engaged in supervising fish habitat with respect to oil and gas development within British Columbia.

[34] Mr. Cowan was also qualified to give expert evidence in the areas of:

a) fish biology;
b) fish identification;
c) assessment of fish habitat; and
d) assessment of impacts to fish habitat.

[35] He has a science degree from the University of Victoria in 1975. He was employed in a variety of capacities by the Department of Fisheries and Oceans (the predecessor to FOC) from 1977 until his retirement in 2009.

[36] He was a member of two professional fish biology associations during his career and a member of various technical working groups dealing with the interaction of forest harvesting and road construction on fish habitat. He was involved in over 30 Coastal Watershed Assessment Procedures, hydrological assessments on past forest harvesting and road construction of fish habitat, water quality and stream channel

morphology. He has studied hundreds of streams on Haida Gwaii and prepared over one thousand timber harvest reviews during his career.

[37] Mr. Talbot and Mr. Cowan were primarily responsible for the planning and implementation of the necessary investigating, measuring, sampling, trapping, testing and photographing of the log harvesting area and associated road construction on DL 413. They had the assistance of various fisheries officers in completing this work.

[38] Based on the work he undertook with Mr. Talbot on DL 413 and his extensive experience and expertise in the field, Mr. Cowan was of the opinion that the logging, road construction, stream crossing installations and timber harvesting including those activities adjacent to streams and in the wetlands resulted in harmful alteration, disruption and, in many areas, destruction of fish habitat.

[39] Mr. Cowan's view of the impact upon fish habitat within DL 413 arising from the timber harvesting and related activities was succinctly captured in his evidence when he said:

> Well for me this area is, you know I can't remember the term that I came up for but it's -- I called it a fish factory at one point but I think it was something more than a fish factory. I was just overwhelmed with the productivity of that area. That would have been a phenomenal area prior to logging. It kind of breaks my heart yet. I have never seen anything like this before, I've -- I've seen lots of streams, I've seen lots of Mallard Creeks, I've seen lots of tributaries, but I have not seen such an intense suprient imposition of all the streams, wetland features in such a small area, with an estuary on it for the fish to move back and forth.

[40] Mr. Talbot's opinion was set out in the Assessment prepared on October 19, 2011 which was entered as an exhibit. The Assessment set out the background, site description, methodology, results, discussion, conclusions and references resulting from

the studies undertaken by him and Mr. Cowan and the qualitative and quantitative impacts on fish habitat resulting from the logging activities on DL 413.

[41] The Assessment described the methodology utilized which included measuring stream length, photographing the site, stream habitat characteristics and fish that were trapped, fish sampling throughout the impacted streams and wetlands, recording fish count and species type and measuring and recording water temperature as an indicator of fish mobility and habitat suitability.

[42] The Assessment results included the following findings:

a) 4630 lineal meters of stream riparian vegetation (2590 lineal meters of stream habitat) deemed to comprise fish habitat were harmfully altered, disrupted or destroyed;

b) additional stream alterations occurred along eight distinct streams identified in the Assessment as Mallard Creek, MT#1, MT#1.1, MT#2, MT#3, KS#1, KST#1, and KS#2 occurred as a result of four logging associated activities including:

1) timber falling across streams and wetlands;

2) timber skidding across and through streams and wetlands;

3) increased wind throw exposure for riparian trees along streams and the estuary; and

4) road and bridge construction.

c) the traps set in the streams and wetlands captured a variety of fish including Coho salmon, Dolly Varden (char) , Sclupin and Stickleback;

d) all streams studied had introduced sediment and logging debris in them; and

e) stream crossings were improperly constructed and made from impermissible materials.

[43] The Assessment discussion dealt with the following topics:

a) Coho salmon rearing habitat and small streams;

b) the function of the riparian zone including:

1) large woody debris input;
2) organic matter input;
3) bank stabilization; and
4) shading.

c) impact of harvesting effects on the riparian zone including:

1) large woody debris input changes;
2) organic matter input changes;
3) bank stabilization changes and shading changes, and

d) other habitat impacts resulting from logging activities including:

1) habitat impacts associated with stream crossing structures;
2) alteration to wetland function; and
3) alteration to the estuary of Kumdis Bay.

[44] In the Assessment's conclusions Mr. Talbot said the following:

> Fisheries and Oceans Canada investigations revealed that the streams flowing through or adjacent to Queen Charlotte Islands District Lot 413 were harmfully impacted by logging (harvesting) practices and that seven of the streams contained juvenile salmonids including Coho salmon and the Dolly Varden char.…
>
> Pre-harvest, one of the impacted streams supported Coho salmon spawning with recorded annual escapements of 150 to 300 adults. These adults had been used to seed nearby streams. Pre-harvest, the additional six steams, found to support juvenile samonids, would have been highly productive feeding and rearing habitats. Harvesting activities have removed and altered important feeding and rearing habitat features, thus resulting in stream productivity degradation and reduced capacity to support salmonid growth.…
>
> Unfortunately the majority of the harmful alterations, disruptions and destructions (HADDs) to fish habitat will take centuries to fully restore. After restoration, the eight impacted streams are likely to still function as fish habitat providing rearing territory for juvenile Coho salmon and Dolly Varden char. The residual impacts, however, will undoubtedly reduce the

> productive capacity of the streams and wetlands resulting in the reduction in adult Coho salmon production thus impacting the fisheries resource in the area. Without substantial restoration effort it will take centuries for the impacted streams and wetlands to achieve pre-harvest productive capacity.

Timber Harvesting Practices and Values

[45] Mr. Lawrence Musgrave (Mr. Musgrave), a registered Forest Technician was qualified as an expert in the following areas:

a) timber harvesting practices in relation to provincial statutes, legislation, regulations and policy; and

b) timber evaluations and production estimates.

[46] In his over 25 year career Mr. Musgrave has been employed in a variety of areas including timber scaling, log grading, timber harvesting, road construction inspections, timber tracking and auditing, checking and monitoring timber transport and scaling activities and ensuring compliance with applicable acts, regulations and policies. His present position is Scaling Officer, Haida Gwaii Natural Resources District, Province of British Columbia.

[47] Mr. Musgrave described that private land timber harvesting was subject to most of the same provincial legislation and regulatory requirements as Crown land and was also subject to most of the applicable federal statutes and regulations particularly the *Act*.

[48] He described that logging usually involves two main steps:

a) logging planning which includes assessing timber and non-forest resources, collecting data on the logging area and noting any environmental concerns and mitigations; and

b) log harvesting which includes falling timber, timber marking the logs, removing merchantable timber to landings or the roadside, hauling the logs to the scale site for scaling and, after scaling sorting and bundling logs for shipment.

[49] Once a logging plan is approved by the Province a cutting permit is issued to permit the logging to occur. That permit usually lasts for an extended period of time permitting logging to occur at a time that is appropriate based on such things as log values and the owner's business model.

[50] Mr. Musgrave described stumpage as being based on the timber cruise valuation and current market values and that it is the money a company pays to the Province based on the value of the timber sold.

[51] Mr. Musgrave described printed and online resource materials available to land owners and log harvesters on such topics as species at risk, archaeological sites, fisheries matters including fish bearing streams and the Forest Practices Code.

[52] He noted that fish bearing streams are classified by the value of the fishery resource and stream size and such streams must be protected by buffer zones to ensure protection of shaded areas and to reduce the impact of silting and erosion. He stated that stream classification should be done before log harvesting begins to ensure appropriate buffer zones which are often determined by consulting a fisheries biologist but is typically between 20 and 50 meters in width depending on the stream size and value.

[53] He said that once timber is harvested it must be timber marked to indicate its origin and ownership and then be taken to an authorized scaling facility. All aspects of scaling is regulated by the Province.

[54] At the scaling facility all logs are offloaded and the scaler measures the timber for volume and grade. Grading includes both species type and wood quality. That information is inputted by the scaler into a handheld computer which is linked to the Harvest Billing System (HBS).

[55] Mr. Musgrave reviewed the HBS documents for the timber harvesting on DL 413 and from that information, including the timber volumes from data supplied from the scale reports, performed several calculations to estimate timber volumes, timber values, the cost of harvesting including road construction and market conditions.

[56] He said that he calculated timber value by utilizing the Ministry of Forests accepted Vancouver Average Log Market Value for the years 2010, 2011 and 2012. Based on those calculations he estimated the gross value of the timber purchased from Gwaii by Howe Sound in the following amounts:

a) 2010 - $2,256,756.66;
b) 2011 - $2,890,049.93; and
c) 2012 - $2,563,042.58.

[57] He based his calculations on roadbuilding and ancillary costs, such as falling, hoe chucking and trucking, from the Contract and not site measurements. From that document and his calculations Mr. Musgrave concluded that I. Crosby's contracted amount to harvest the timber from DL 413 to be $613,808.53.

[58] Mr. Musgrave also determined that Howe Sound paid to Gwaii $596,805.29 but that Gwaii would have been responsible for any additional roadbuilding not contemplated in the Agreement or the Contract.

[59] Utilizing the 2010 gross timber values Howe Sound would have had received $1,046,142.84 after the payments to Gwaii and I. Crosby.

[60] Mr. Musgrave also noted that there is no way to estimate any other costs that may have been incurred by any of the Defendants.

Defendants' Culpable Admissions

[61] Section 78.3 of the *Act* and several of the cases provided by the Crown confirm that offences committed by an employee or agent of an accused are sufficient proof of the offence by the employer/principal/owner and that statements made by an employee or principal are attributable to the corporate accused.

Gwaii

[62] Gwaii has acknowledged that as the owners of DL 413 they entered into the Agreement with Howe Sound although their initial discussions were with a representative of the Pallan Group.

[63] Mr. Collison and Mr. Bellis acknowledged to the Court that any utterances they made to any of the fisheries officers or other representatives of FOC were voluntary and made on behalf of Gwaii.

Howe Sound

[64] Evidence was presented of a facsimile document sent from Howe Sound to Gwaii attaching the signed Agreement. That document indicated an address for Howe Sound of 303 - 871 Island Highway, Campbell River, B.C., with a telephone number of 250-287-9201 and a facsimile number of 250-286-3868.

[65] F/O Rahier said he had telephone discussions with various people who indicated to him that they were principals or managers of Howe Sound including Mr. Steve Mitchell (Mr. Mitchell) and Mr. D. Pallan. He also personally met with Mr. Mitchell who confirmed his identity and position with Howe Sound with a business card which had on it the telephone and facsimile numbers which matched those that F/O Rahier used to contact Howe Sound's offices at various times and the facsimile sent to Gwaii by Howe Sound.

[66] In a series of telephone calls with F/O Rahier, Mr. Mitchell, on behalf of Howe Sound, said that he would provide documents and would cooperate with FOC in drawing up and implementing a remediation plan for DL 413 saying at one point in a telephone conversation he was having with F/O Rahier on December 13, 2010, that if Howe Sound made a mess they would pay to have it cleaned up.

[67] Mr. Mitchell also advised F/O Rahier that Howe Sound had retained a consultant, D.C. Hearn, to prepare a logging plan for DL 413 but that document was never provided to F/O Rahier.

[68] On a subsequent attempt to contact Mr. Mitchell by telephone on February 9, 2011 F/O Rahier spoke to a person identifying himself as Mr. D. Pallan who advised that he would now become the contact for Howe Sound. In that conversation Mr. D. Pallan indicated to F/O Rahier that Howe Sound would do what was necessary to clean up the situation. At that point Mr. D. Pallan provided F/O Rahier with a contact telephone number.

[69] On February 15, 2011 when F/O Rahier contacted that number and spoke to a person who identified himself as Mr. Dave Jones (Mr. Jones) and who described himself as a representative of Howe Sound and the Pallan Group. In that conversation Mr. Jones stated that his company was willing to do whatever it took to repair the damage that had been done. In a further subsequent telephone conversation on March 4, 2011 the person identifying himself as Mr. Jones said to F/O Rahier that in future operations under his company's control would be more closely monitored and assessed so that something of this nature would never happen again.

[70] On April 17, 2015 a Search Warrant was executed by F/O Zimmermann at 302 – 304 – 871 Island Highway, Campbell River, B.C. The nameplate on the door to those suites indicated Pallan Group and Howe Sound Timber Products Ltd. F/O Zimmermann was directed to that location after a telephone conversation with a person identifying himself as Mr. D. Pallan, attending at the residence listed on Howe Sound's corporate documents to be that of Mr. D. Pallan and meeting there with a woman who identified herself as Tanya Pallan, Mr. D. Pallan's spouse.

[71] Tanya Pallan and a person who identified himself as the lawyer for the Pallan Group then met F/O Zimmermann at the Pallan Group offices and Ms. Pallan provided a key to him to allow entry to the offices. No relevant evidence was seized during the search.

I. Crosby

[72] F/O Rahier said he observed, and there were photographs in evidence of, signs posted on the north and south access roads to DL 413 from the adjacent highway indicating that I. Crosby was the Prime Contractor.

[73] F/O Rahier said he had several contacts with a person identifying himself as Mr. Pineault and that Mr. Pineault provided his driver's license to confirm his identity. He also confirmed to F/O Rainer that he was the owner of I. Crosby. F/O Rahier also said that he had some incidental contact with Irene Crosby at the FOC office when she identified herself as a principal of I. Crosby and picked up some documents relating to the investigation.

[74] Most of the contact between F/O Rainer and Mr. Pineault occurred at DL 413 and on one occasion Mr. Pineault accompanied both F/O Rainer and other fisheries officers and fisheries biologists on a walk through the log harvesting area of DL 413 explaining what was occurring at that location.

[75] On other occasions Mr. Pineault was observed by F/O Rahier and others operating heavy equipment as part of the logging activity on DL 413.

[76] When confronted about the issue of I. Crosby's logging practices Mr. Pineault told F/O Rahier that D.C. Hearn's fishery expert had told him that the correct amount of vegetation had been left along the creeks and streams.

[77] Two Inspector's Directions were served on I. Crosby by service on Mr. Pineault after the investigation had commenced. Although Mr. Pineault advised F/O Rahier he would comply with the Directions, he later continued to violate the Directions advising F/O Rahier and Mr. Talbot that he would continue to remove logs from the site and would take remediative steps once that work was completed.

[78] When remediation steps started they were not effectively implemented and in some circumstances caused further damage despite Mr. Pineault advising F/O Rahier that he had done over 200 miles of road deactivation and knew what he was doing.

Other Proceedings Involving the Defendants

[79] On December 4, 2014 Mr. Bellis, on behalf of Gwaii, provided a bundle of documents to F/O Rahier. Those documents were filed by the Crown as an exhibit. Contained within those documents were transcripts from the Provincial Court proceeding of *R. v. Gwaii Wood Products Ltd. and I. Crosby Contracting Ltd.,* Masset Registry No. 6207.

[80] In that proceeding Gwaii and I. Crosby were charged by the Provincial Crown with violations of the *Heritage Conservation Act* for allegedly removing culturally modified trees. Based on the contention of Gwaii that they had a contractual arrangement with I. Crosby on the issue of protecting culturally modified trees, the Provincial Crown entered a Stay of Proceeding to that charge.

[81] Also contained in that bundle of documents was a letter addressed to the Crown from Gwaii dated November 23, 2014 which detailed Gwaii's dealings with the Provincial Crown. That letter also said in part the following:

> We are requesting you as the Crown Prosecutor in the court case that is coming up January 5, 2015 in Masset whereas the Department of Fisheries are laying charges against ourselves and Howe Sound-Pallan Group and I. Crosby Contracting Ltd. We are requesting we be dismissed from these proceedings based on the same rationale that was applied in the CMT court case.
>
> We are requesting that the Crown and the courts use the legal tools to have Pallan-Howe Sound and I. Crosby Contracting appear in Masset on January 5 2015 to take responsibility for their actions on D.L. 413 in relationship to the charges set forward by D.F.O. And if found to be in violation with any applicable acts that the courts use its authority to pierce whatever legal maneuvering that they have undertaken to hide from the legal and binding contractual obligations. And that we Gwaii Wood Products would have a clear legal path to remedy the devastation to our land and reputation and the very difficult financial situation we are in, because of their clear and conscientious decisions.
>
> In closing we have diligently took the position of cooperation have attended all meetings and court appearances to clarify our roles and situation. The above-mentioned companies have been devastating to us personally and from Gwaii Wood Products perspective but more importantly from the perspective of our salmon and our land.

Evidence of the Defendants

[82] Howe Sound and I. Crosby did not attend the trial by counsel or agent and called no evidence.

[83] Gwaii attended the trial through counsel on some days and by the company directors, Mr. Bellis and Mr. Collison, on others. Despite being invited to do so by the Court at the end of the Crown's case Gwaii declined to call any evidence.

THE LAW

Legislation

[84] The following sections of the *Fisheries Act* R.S.C. 1985, c. F-14 which were in force at the relevant time period apply to this case:

a) **34(1)** For the purposes of sections 35 to 43,

"fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes,

35(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

40(1) Every person who contravenes subsection 35 (1) is guilty of

(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both;

b) **78.3** In any prosecution for an offence under this Act, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused.

c) **78.6** No person shall be convicted of an offence under this Act if the person establishes that the person,

(a) exercised all due diligence to prevent the commission of the offence; or

(b) reasonably and honestly believed in the existence of facts of that, if true, would render the person's conduct innocent.

[85] The following sections of the *Business Corporations Act* S.B.C 2002 Chapter 57 apply to this case:

a) **1(1)** In this Act

"company" means

(a) a corporation recognized under this Act or a former *Companies Act* that has not , since the corporation's most recent recognition or restoration as a company, ceased to be a company

b) **23(1)** Subject to section 51.21 (1), a company must have the word "Limited", "Limitee", "Incorporated", "Incorporee" or "Corporation" or the abbreviation "Ltd.", "Lte.", "Inc.", or "Corp", as part of and at the end of its name.,

c) **24(1)** A person must not use in British Columbia any name of which "limited", "limitee", "Incorporated", "incorporee" or "corporation", or any abbreviation of them, is a part unless

(a) the person is a corporation entitled or required to use the words,

d) **346(1)** Despite the dissolution of a company under this Act,

(a) a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and

(b) a legal proceeding may be brought against the company within 2 years after the dissolution as if the company had not been dissolved.

(2) Unless the court orders otherwise, records related to a legal proceeding referred to in subsection (1) may be

(a) delivered to the company at its address for delivery in the legal proceeding, or

(b) if the company does not have an address for delivery in the legal proceeding, served on the company

(i) by personal service of those records on an individual who was a director or senior officer of the company immediately before the company was dissolved or

(ii) in the manner ordered by the court.

[86] The following sections of the *Criminal Code* apply to this case:

a) **2** In this Act, "organization" means

   a) a public body, body corporate, society, company, firm, partnership, trade union or municipality,

b) **800 (3)** Where the defendant is an organization, it shall appear by counsel or agent and, if it does not appear, the summary conviction court may, on proof of service of the summons, proceed *ex parte* to hold the trial.

Case Law

[87] The Crown relied on the following cases in the following subject areas.

Admissibility of Statements

a) *R. v. Syncrude Canada Ltd.* 2010 ABPC 123,

b) *R. v. Evans* [1993] 3 S.C.R. 653

c) *R. v. Strand Electric Ltd.* [1969] O.R. 190 (Ont. C.A.)

Strict Liability Offences and Due Diligence

a) *R. v. St. Paul (Town)* A.J. 953 at 1 (Alta. Prov. Ct.).

b) *R. v. High et al.* 2003 BCSC 1723,

c) *R. v. Larsen et al*. 2014 BCSC 2084,

d) *R. v. Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299,

e) *R. v. MacMillan Bloedel Ltd*., (2002) 220 DLR (4th) 173 (BCCA).

f) *R. v. Kurtzman* (1991) 66 C.C.C. (3d) 161 (ONCA).

g) *R. v. Gonder* (1981) 62 C.C.C. (2d) 326 (YTC).

h) *R. v. Commander Business Furniture Inc.*, (1992), 18 W.C.B. (2d) 298 (Ont. Prov. Div.),

i) *R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 (Ont. Ct. Prov. Div.),

j) *R. v. Heinrich and Heinrich* unreported, November 23, 1995, No. 45270, Kamloops Registry, (BCSC),

k) *R. v. Geo-Analysis Inc.* (1993) 13 C.E.L.R. (N.S.) 71 (Ont. C.J.).

l) *R. v. Abitibi Consolidated Inc. et al.* (2000), 1398A-0467(08) (NFLD Prov. Ct.).

m) *R. v. Northland Properties Corporation et al.* 2014 BCPC 0251.

[88] Gwaii did not provide any case law for the Court's consideration.

SUBMISSIONS

The Crown

[89] The Crown provided an 80 page Written Argument of Her Majesty The Queen in Right of Canada which attached as 18 appendices extensive case law and applicable legislation in support of its position.

[90] The Crown's submissions can be summarized as follows:

a) through the Crown's witnesses concerning their dealings with various individuals over the course of the investigation and the documentary evidence the identity of each of the Defendants has been proven,

b) the Defendant's culpable admissions made by their employees or principals have been shown to be voluntary,

c) based on the observational evidence of the witnesses involved in the investigation and the expert evidence of Mr. Talbot and Mr. Cowan the fact that a work or undertaking took place on DL 413 has been proven,

d) based on the expert evidence of Mr. Talbot and Mr. Cowan the work or undertaking has been shown to cause harmful alteration and/ or disruption and/or destruction of fish habitat in all of the identified streams, the wetlands and the riparian vegetation in DL 413,

e) based on the evidence of Mr. Musgrave the value of the timber harvested from DL 413 and the reasonable estimate of which each of the Defendants received under the Agreement and the Contract has been proven,

f) none of the Defendants has established, on a balance of probabilities, the defence of due diligence, and

g) given the totality of the evidence the Crown has proven, beyond a reasonable doubt, that each of the Defendants has breached section 35 of the *Act* and is liable under section 40 of the *Act.*

Howe Sound and I. Crosby

[91] Howe Sound and I. Crosby did not appear at trial and made no submissions to the Court.

Gwaii

[92] The submissions of Mr. Collison on behalf of Gwaii can be summarized as follows:

a) when Gwaii acquired DL 413 there was no intent at first to log it because he and Mr. Bellis were not loggers but their buyer wanted the property cleared;

b) they knew of Mr. Pineault who had contact with the Pallan Group;

c) they checked them out and they seemed to be respectable;

d) Pallan said it was aware that there were fish bearing streams on the property which was a re-assurance to Gwaii;

e) the contract they entered into with Howe Sound was the first one they had ever done and they were assured that Howe Sound would adhere to all permits and regulations so they signed the contract;

f) they checked on the Howe Sound and I. Crosby contract and it was typed to ensure that a proper job would be done; and

g) Gwaii's due diligence is based on the contracts with Howe Sound and I. Crosby but the actions of those companies became fuzzy and they moved away from their obligations under the contract.

DISCUSSION

Identity and Culpable Admissions of the Defendants

[93] The evidence of the investigation and the corporate documents in evidence satisfies me that they are the same companies that either own DL 413 (Gwaii), were parties to the Agreement (Gwaii and Howe Sound) or the Contract (Howe Sound and I. Crosby) and their identities have been proven beyond a reasonable doubt.

[94] In a ruling made near the end of the trial I found beyond a reasonable doubt that the statements and admissions made by representatives of the Defendants were made on behalf of the respective Defendants and were made voluntarily and further established their involvement. That decision can be found at 2015 BCPC 0248.

General Findings

[95] Based on the timber mark, the scaling site and HBS data in evidence I find that all of the wood at issue was harvested from DL 413.

[96] I accept the valuations prepared by Mr. Musgrave as being a well-founded estimate of the amounts received by each of the Defendants arising from the logging of DL 413 namely:

a) Gwaii - $596,805.29,

b) Howe Sound - $1,046,142.84, and

c) I. Crosby - $613,808.53.

Other Proceedings Involving the Defendants

[97] Gwaii raised the issue of the other proceeding concerning culturally modified trees brought against it by the Provincial Crown under the *Heritage Conservation Act*. Mr. Collison suggested in his letter to the Crown, which is evidence in this case, that Gwaii should be excused from legal liability in this matter as a result of the Provincial Crown staying the proceedings against the Gwaii under the *Heritage Conservation Act*.

[98] Although Mr. Collison may not have realized it at the time the letter was written he was, in some respects, asking the Crown, and now the Court, because the letter is evidence, to consider Gwaii's situation to be analogous to the special pleas of *autrefois acquit, res judicata* and perhaps even abuse of process so as to relieve Gwaii from legal jeopardy.

[99] If that was his intention it has no foundation in law. The nature of the charges under the *Heritage Conservation Act* and the prosecutorial independence of the Provincial Crown in deciding to enter a stay of proceedings in the other case do not bring into play the legal maxims *autrefois acquit* or *res judicata.* The Crown has charged Gwaii, Howe Sound and I. Crosby based on a much different set of evidentiary circumstances and under a completely different type of regulatory legislation which addresses a much different legal purpose than the *Heritage Conservation Act*.

[100] Finally, there is no indication that in laying these charges the Crown took any advantage of Gwaii, Howe Sound or I. Crosby or in any way acted in a fashion to suggest an abuse of process

The Elements of the Offences

[101] It is important to keep in mind that the *Act* is resource protection legislation and not environmental protection legislation. Environmental protection is the necessary result of protecting the fisheries resource. In order to survive and thrive fish require a healthy environment. To protect the fish their habitat, the environment, must be protected.

[102] In this case the Crown must prove beyond a reasonable doubt the *actus reus* of each of the charges which are characterized by three elements which constitute the offence. Did one or more of the Defendants:

a) carry on any work or undertaking;
b) which harmfully altered, disrupted or destroyed;
c) fish habitat.

[103] The case law provided indicates that courts consider forest harvesting, the removal of vegetation from fish bearing stream banks, and other related activities to constitute a “work or undertaking” as contemplated by section 35.(1) of the *Act*. I find that the timber harvesting and related removal and destruction of vegetation conducted on DL 413 was both a ‘work’ and an ‘undertaking’.

[104] The *Act* does not define the terms “alteration” or “disruption” or “destruction” of fish habitat, leaving it to the courts to define these terms on a case by case basis. On

those points I agree with most of the Crown's submissions on the law which is discussed below.

[105] The Supreme Court of British Columbia discussed the burden of proof in *High* clarifying that the term "harmfully" only applied to the term "altered" and not to the terms "disrupted" or "destroyed". The Court determined that the Crown was not required to establish the requirement of "harm" with respect to the required elements of "disturb" or "destroy" fish habitat, when it said at paragraphs 11 through 13:

> "[11] The appellants take the position that the learned trial judge erred when she concluded that a person can be convicted of disrupting fish habitat without proof that the disruption was harmful. The Crown answers by saying that disruption is ipso facto harmful, so to require proof of harm when there has been disruption is unnecessary.
>
> [12] In my view the appellants and the Crown are arguing about semantics and that the decision of K.J. Smith J. (as he then was) in *R. v. Posselt*, *supra*, nicely resolves the question. Smith J. considered the Crown's appeal of an acquittal of charges laid under s. 35(1). The Crown alleged the *actus reus* of the offence was the accused's removal of a number of trees bordering fish habitat. Smith J. said:
>
> > 23 I do not think that harm to fish is an element of the offence. What is prohibited by s. 35(1) is the harmful alteration, disruption, or destruction of fish habitat, not the alteration, disruption, or destruction of fish habitat that results in harm to fish. In my view, the *actus reus* of the offence is established if the Crown proves beyond a reasonable doubt that the accused interfered with the fish habitat in a way that has impaired the value or the usefulness of the habitat for one or more of the purposes described in the definition of "fish habitat" in s. 34(1). Thus, neither proof of actual harm to fish nor the assumption of such harm is necessary, as that fact is not material."
>
> [13] I note that Smith J. did not differentiate between alteration, disruption, or destruction when he observed that the offence was made out when the accused impairs the value of the fish habitat. In order, therefore, for a person to be guilty of an offence under s. 35(1) he must be shown to have effected a negative impact on the fish habitat. He may effect that negative impact by harmfully altering it, by disrupting it, or by destroying it."

[106] In *Larsen* the court, set out the following guidelines for satisfying the burden of proof with respect to section 35 (1) of the *Act* in paragraph 101:

> "[101] Considering these cases leads me to conclude that proof of the harmful alteration, disruption or destruction of habitat may be founded, as it was in *High*, on the opinion of expert witnesses if the court is satisfied that such evidence is reliable. Some cases may require empirical data, testing, and so on for conviction, while others will not. In my view, the trial judge correctly reached that very conclusion; that in every case, the evidence must prove beyond a reasonable doubt that the accused's actions harmfully altered, disrupted or destroyed fish habitat, impairing its usefulness or value more than trivially."

[107] The burden of proof can be satisfied, in part, through admissible and reliable expert evidence. In *St. Paul(Town)* the court, in paragraph 36, stated the following on that point:

> 36. "It is incumbent on the Crown to adduce requisite evidence, which, of necessity shall include technical/scientific evidence where the nature of the charge requires such proof to meet the elements of the offence."

[108] The expert evidence of Mr. Talbot and Mr. Cowan, along with the photographs presented, with respect to the impacts of logging, road construction, and damage to riparian vegetation on each of the eight bodies of water, and to the site in general, establish beyond a reasonable doubt that logging and related activities carried out on DL 413 resulted in the "harmful alteration", and/or the "disruption" and/or the "destruction" to that location.

[109] The burden of proof relating to a charge under section 35 (1) of the *Act* regarding "fish habitat" as defined in section 34 (1) of the *Act*, was considered in *St. Paul (Town)* in

the context of a charge under section 31 (5) (now section 35 (1)) of the *Act* where the Court said at paragraph 33:

> "[33] The Crown's burden is to prove beyond a reasonable doubt that the temporary working had harmfully altered, disrupted, or destroyed any one of the four fish habitat set out in the definition criteria of s. 31(5) of the Fisheries Act, ie:
>
> 1) "… spawning grounds and nursery areas on which fish depend directly or indirectly in order to carry out their life processes."
>
> 2) "… rearing … areas on which fish depend directly or indirectly in order to carry out their life processes."
>
> 3) "… food supply … areas on which fish depend directly or indirectly in order to carry out their life processes."
>
> 4) "… migration areas on which fish depend directly or indirectly in order to carry out their life processes."

[110] Based, in part, on the expert evidence of Mr. Talbot concerning whether the eight bodies of water which he identified on DL 413 constitute fish habitat from his perspective as a fisheries biologist and, in part, the expert evidence of Mr. Cowan based on the same information, observations and perspectives I find that all eight bodies of water described in the Information and the Assessment constitute fish habitat as defined by section 35(1) of the *Act*.

Strict Liability Offences

[111] Offences under s. 35(1) of the *Act* constitute offences of 'strict liability'. The law with respect to strict liability offences and the defence of due diligence was set out by the Supreme Court of Canada in *Sault St. Marie* at pages 1325 and 1326:

"The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. …
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "willfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence.

> On the other hand, the principle that punishment should in general not be inflicted on those without fault applies to offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act.

The Due Diligence Defence

[112] Parliament has also clearly expressed its legislative intent in considering a charge under section 35(1) of the *Act* the courts are to consider the defence of due diligence as described in Section 78.6 of the *Act.*

[113] In *MacMillan Bloedel Ltd.* the court expanded on and summarized *Sault St. Marie* in paragraphs 48 and 49 in the following terms:

> 48. Thus, there are two alternative branches of the due diligence defence. The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event".
>
> …
>
> 49. The important point to be drawn from this discussion is that whether the accused's conduct was "innocent", under the first branch of the defence, or whether the accused took "all reasonable steps", under the second branch, must be considered in the context of the "particular event".

[114] In *Kurtzman* the court stated at page 173 "The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably."

[115] The courts have made it clear that where the defense of due diligence is *prima facie* available to an accused; the accused bears the burden of establishing the defence on a balance of probabilities.

[116] Cases post-*Sault St. Marie* have attempted to apply the defence of due diligence in a wide array of contexts. Each situation requires consideration of factors unique to that factual context.

[117] Due diligence does expect a high standard of awareness and action. *Courtaulds Fibres Canada* described it in paragraph 77 as:

> 77. Reasonable care and diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing actions.

[118] The "high standard of awareness and decisive, prompt and continuing actions" applies to land owners who undertake an activity that has a potential for causing harm in fact situations where they retain the services of third party contractors. A property owner will not be able to rely upon a due diligence defence solely on the basis that the owner retained a contractor to carry out a work or undertaking that results in harm.

[119] In *Heinrich* the court held that if a property owner undertakes a work or undertaking which has the potential to cause harm to fisheries habitat, the owner should be an expert in the activity or retain an expert to take over that responsibility when it said at paragraph 13:

> 13. Finally the appellants submit that Mrs. Heinrich cannot be found guilty of Count 1 because she was not a party to the commission of that offence. The evidence does not support such a conclusion. While she left the matter of construction of the dam to her husband and Mr. Pooley, she is an owner of the property and the case authorities are clear that, if an owner chooses to conduct himself or herself in a way that has a potential for causing harm, then that person had better be an expert in that activity or instruct an expert to take over that responsibility. I am not satisfied on the evidence that Mrs. Heinrich took the appropriate steps.

[120] In addition to the direction in *Heinrich* that a landowner who becomes involved in a work or activity that has a potential for causing harm must either be an expert or retain an expert to take over responsibility to ensure that no harm occurs, the courts have also made it clear that a corporation cannot escape a conviction by delegating the responsibility to an independent contractor, whether that contractor has the requisite expertise or not. The corporate landowner retains a legal responsibility to supervise the conduct of the contractors which it retains.

[121] In *Geo-Analysis Inc.* the court relied on the earlier decision *Aurora Quarrying Ltd. v. Catherwood* in stating in paragraphs 31 and 32:

> 31 As we saw above, a party which contracts out work may be found strictly liable for offences committed by a third party subcontractor in the performance of the contract. In Aurora Quarrying Limited v. Catherwood, the learned Judge Ferg found that: "A corporation cannot escape conviction merely by saying its mind and will was delegated to another, an independent contractor." However, the defendant can utilize the due diligence defence if it can prove that it acted reasonably in its control of the third party. The applicable test is a factual one. It is necessary to look at the activity that the defendant undertook to perform and the surrounding circumstances in which it was contracted out. As Judge Ferg stated: "a superior company may not avoid its duty of due diligence by simply contracting out, but can escape a finding of guilt if it is able to establish as a fact that it put in place a proper system for supervising its servants and its contractors."
>
> 32 The control system which the superior company put in place must be judged according to that company's ability to influence the conduct of the subcontractor. This ability will be measured by the powers which the superior company "may employ to affect the conduct in question. These powers may derive from legislation, financial control, executive control, expertise, ownership, or contractual or legal rights, and from any other factor creating an influential bargaining power, position of authority, or ability to control offending activities.

[122] This principle also applies to landowners who attempt to contract out of responsibility for environmental regulatory compliance by entering into a legally binding agreement with a third party contractor to carry out a work or undertaking on the property. The landowner cannot avoid conviction under environmental regulatory charges by relying on the defence of due diligence, even if the agreement *inter alia*, places responsibility on the contractor for environmental regulatory compliance in carrying out the work or undertaking.

[123] In *Abitibi Consolidated Inc.* the court considered charges brought against a corporate accused under section 36(3) of the *Fisheries Act* for permitting the deposit of a deleterious substance (sediment) into water frequented by fish. While the charges were dismissed on the grounds that the Crown failed to establish that the sedimentary substance constituted a deleterious substance as defined by the *Act*, the court gave careful consideration to the issue of whether the corporate accused could avoid culpability on the basis that it had entered into an agreement with a contractor to complete the work in a manner compliant with environmental regulation. The court concluded that despite the fact that the agreement with the contractor placed responsibility upon the contractor to comply with environmental legislation, the property owner could not rely upon a defence of due diligence as the agreement also provided the property owner with the right to monitor and ensure compliance, which the property owner was not diligent in undertaking. The court said at paragraphs 33 and 66:

> [33] … Yes the contractor was responsible for directing and controlling the construction activity, but, also in my view, the accused, as owners, had the ability to monitor and influence the contractor in the prevention of such deposit.

> [66] I say this fully appreciating the onus on the accused to establish due diligence. I have applied the principles of this defence as are set out in the authorities referred to me by counsel. The accused were in a position to be aware of the conditions on the site and, as such, could reasonably have done more to ensure environmental compliance.

[124] What constitutes a "high standard of awareness and decisive, prompt and continuing actions," was recently discussed in *Northland Properties Corporation.* The court considered charges under s. 35(1) of the *Act* levied against a riparian property owner and a corporation of which he was a principal who hired a contractor to landscape a riparian vacation property. The work involved the removal of vegetation and placing of fill along a lake frontage thereby altering, disrupting or destroying fish habitat.

[125] The defendants conceded the *actus reus,* but they denied that the damage was intentional on their part or that the work was carried out as they directed, asserting that the project supervisor whom they retained for the work exceeded the directions he had been given. At trial the property owner gave evidence that he was very concerned about the environmental damage to the property, to the point of being apoplectic when he learned that an orchard on the property had been removed. However, the court found the property owner's 'after the fact' concern for the manner in which the work had been carried out to be disingenuous, noting that he did not dismiss the project supervisor who worked on the project for months after the destruction of the orchard, with the court stating "Despite his apoplexy, he was seemingly uninterested as to how this event could have come to pass."

[126] In convicting both the property owner and the corporation the court observed at paragraph 76:

> [76] I conclude that if Tom Gaglardi and Northland did not intend the harm to fish habitat that resulted with this project, they certainly did nothing to inform themselves of their obligations or to engage in processes that might have presented challenges or hampered progress. There was an element of willingness here, a desire to get the job done and, if necessary, to seek forgiveness later.

[127] Upon careful consideration of the evidence presented by the Crown and a dearth of evidence presented by the Defendants, I conclude the following on the due diligence defence with regard to each of them.

[128] *Sault St. Marie* clearly sets out that when a defence of due diligence is available a defendant bears the burden of establishing it on a balance of probabilities. Both Howe Sound and I. Crosby were properly served with the Information but chose not to be represented, participate in the proceeding, or appear at the trial. Neither Howe Sound nor I. Crosby claimed nor provided evidence establishing a due diligence defence and as such cannot expect the Court to find such a defence in this case.

[129] Gwaii has been represented at different times by legal counsel and by company directors Mr. Bellis and Mr. Collison during the trial. Early in the trial Gwaii's counsel advised the Court that there was active consideration being given to the nature of the evidence Gwaii would be calling on the defence of due diligence. Following the close of the Crown's case on April 28, 2015 when Mr. Collison advised that Gwaii would not be calling any evidence, the Court encouraged Gwaii to carefully consider the law of due diligence and provided the opportunity to Gwaii to introduce evidence in support of such

a defence. Gwaii declined, with Mr. Collison stating that while Gwaii may choose to make final submissions with respect to the evidence submitted by the Crown during the trial, it would not be introducing any evidence in support of the defence of due diligence.

[130] In *Gonder* the court considered the availability of the defence of due diligence when a defendant does not lead evidence and chooses to rely upon the Crown's evidence upon which to base such a defence in the following terms at page 329:

> *Onus on the accused* – Once the Crown has proven the necessary *actus reus* the accused must prove reasonable care was taken to avoid the offence. In some rare instances the necessary proof of reasonable care may be implied from the Crown's case, but usually the accused will be required to lead evidence of reasonable care.

[131] The Crown's evidence in this case does not imply or infer proof of reasonable care on the part of Gwaii. It is clear that a company accused of a strict liability offence cannot avail itself of a defence of due diligence by "contracting out" of its legal responsibilities. It is also clear that a landowner cannot contract out of responsibility for environmental regulatory compliance even when it enters into a contract that places the responsibility on the contractor for environmental regulatory compliance in carrying out the work or undertaking. The landowner retains a legal responsibility to supervise the conduct of the contractor. If the landowner ignores or is wilfully blind to activities on its land which constitute the *actus reus* of regulatory offences it is precluded from relying on the defence of due diligence.

[132] Since Gwaii did not call any evidence, the Court is unable to discern what actions, if any, it took to prevent or ameliorate the damage to fish habitat caused by the timber harvesting activities on DL 413. It is clear on the evidence that Gwaii had the

legal right to enter onto and inspect DL 413 to ensure that the harvesting activities were carried out in a manner compliant with all regulatory requirements, including section 35 (1) of the *Act*. There was no evidence presented that Gwaii did so at any time. Gwaii has not met the evidentiary requirements, on a balance of probabilities to allow it to rely upon the defence of due diligence.

[133] Furthermore, there was no evidence presented by Gwaii that Mr. Collison or Mr. Bellis had any reasonable or honest belief in the existence of facts that, if true, would render Gwaii's conduct innocent.

DECISION

[134] Based on the evidence presented, the Crown has satisfied me beyond a reasonable doubt that the Defendants, Gwaii Wood Products Ltd, Howe Sound Forest Products Ltd and I. Crosby Contracting Ltd., were each engaged in or responsible for a work or an undertaking including logging and road construction that resulted in the harmful alteration, destruction or disruption of fish habitat, including the creeks and streams identified in the evidence as Mallard Creek, MT#1, MT#1.1, MT#2, MT#3, KS#1, KST#1, and KS#2, wetland areas and riparian vegetation located on District Lot 413 located adjacent to Highway 16 and approximately 3.5 kilometres northeast of the Village of Port Clements, in the Province of British Columbia, in violation of section 35 (1) of the *Fisheries Act* and thereby did commit an offence contrary to section 40 (1) of the *Fisheries Act.*

[135] Howe Sound Forest Products Ltd. and I. Crosby Contracting Ltd. did not appear at or present any evidence at trial. Gwaii Forest Products Ltd. did appear at the trial but

presented no evidence. None of the Defendants have satisfied the Court, on a balance of probabilities, that they exercised due diligence in this matter or that they had a reasonable or honest belief that would render their conduct innocent.

[136] Therefore, I find each of Gwaii Forest Products Ltd., Howe Sound Forest Products Ltd. and I. Crosby Contracting Ltd., guilty on each of the 20 Counts on Information 6089-1.

_____

M. J. Brecknell
Regional Administrative Judge
Northern Region
Provincial Court of BC