

**Discipline Case:** 2010-07

**Subject Members:** Registered Professional Forester

**Referred to:** Complaints Resolution Committee

**Date of Decision:** January 2012

## Allegations

This case resulted from a complaint from a member of the public about the conduct of an ABCFP member. The complaint was with respect to comments made at meetings and an agreement that the subject member developed to allow for access across private land. The allegations are that the member subject to the complaint engaged in conduct unbecoming a member and may have contravened the following bylaws:

- 1) Bylaw 11.3.3: To have regard for existing legislation, regulation, policy and common law; and to seek to balance the health and sustainability of forests, forest lands, forest resources, and forest ecosystems with the needs of those who derive benefits from, rely on, have ownership of, have rights to, and interact with them.
- 2) Bylaw 11.3.6: To work to extend public knowledge of forestry, and to promote truthful and accurate statements on forestry matters.
- 3) Bylaw 11.3.9: To express a professional opinion only when it is founded on adequate knowledge and experience.
- 4) Bylaw 11.4.1: To inspire confidence in the profession by maintaining high standards in conduct and daily work.
- 5) Bylaw 11.4.4: Not to misrepresent facts.

The allegations included;

- (i) that the subject member made untruthful and inaccurate statements regarding the hauling of logs and other forestry activities through private land;
- (ii) that these statements were made to members of the public and at a public meeting;
- (iii) that the subject member through actions and statements inspired worry and confusion with regards to commonly held notions of private property rights, and the scope of the power of government, and forest licensees, to promote the public interest when it may conflict with private interest;
- (iv) that the subject member threatened expropriation or purchase of access through private land;
- (v) that the subject member knowingly sanctioned the hauling of logs across private property without a signed access agreement;

- (vi) that the subject member's actions did not inspire confidence in the profession;
- (vii) that appropriate due diligence was not done, since the subject member was not careful enough to get the landowner's signature on the access agreement prior to starting the log hauling across private property, and;
- (viii) that the subject member continues to mislead the public about what happened regarding the lack of an access agreement across private property.

## Decision

The Registrar reviewed the complaint with the Complaints Resolution Committee (CRC), who recommended to the Registrar that the complaint should be investigated. An Investigation Committee was formed and proceeded to investigate the complaint. After a review of the investigation report and conferring with the Complaints Resolution Committee, the Registrar has determined that the evidence presented regarding this complaint does not warrant the issuance of a citation in respect to the conduct of the subject member. In coming to this conclusion the Registrar addressed a number of specific concerns.

### **Concern #1: Is there sufficient evidence to support the allegations that the subject member failed to be duly diligent in his/her practices and failed to inspire confidence in the profession by maintaining high standards in conduct and daily work?**

The subject member initiated negotiations for the use of an existing road across several parcels of private land for log hauling. The subject member relied on one of the landowners to act as a representative of the other landowners in the negotiation of the access agreement. This landowner (the negotiator) had represented the other landowners in a previous negotiation of a similar nature. The negotiator has submitted a statutory declaration stating that she believed she had the approval of the other landowners for the use of the road across their property. In this declaration she states that; she previously represented all landowners in connection with a previous land use agreement with in 1995; she resumed her role as representative of the landowners, that each landowner indicated "by action or words" their consent to her role as their representative with the subject member, and that she advised the subject member of this fact and carried on negotiations; she met with the landowner who is the main subject of the complaint (the landowner) in November 2009 to discuss the proposed Road Use Agreement, that they discussed and agreed that the negotiator would request a 10 cent per metre increase to the proposed fees under the Agreement, and that the negotiator then proceeded to discuss that requested change with the subject member; that the subject member agreed to the increased fee requested and provided the negotiator with an amended Agreement that included the increased fee; that the negotiator then met again with the landowner to review the amended Agreement, that the landowner

confirmed verbally that she was content with the amended Agreement, and that the negotiator told the landowner that she would advise the subject member of her consent to the amended form of Agreement (subject to correcting the spelling of the parties' names); and that the negotiator discussed the 2009 Road Use Agreement with the landowner in the same manner as she had discussed the 1995 Agreement with the landowner's late husband, and that the landowner never stated or implied or acted as though she were not her representative or that the negotiator did not have her consent to act as her representative.

When the landowner felt that she had not agreed to allow access across her property complained about this, the subject member apologized and no access was given until the landowner subsequently agreed to further access. The landowner continues to believe that she did not agree to allow the initial access. This is in conflict with the negotiator who says that there was an agreement to allow for access. These opposing statements are given equal weight in our opinion since there is no clear evidence that either one of them has more credibility than the other.

The question was asked whether there had been an unlawful trespass. A legal opinion was obtained that there had not been a trespass as defined under the law. This opinion was supported by the opinion of a second legal counsel. Our legal opinions indicate that in this case, express consent was not required under the *Trespass Act*. The evidence does not support the issuance of a citation against the subject member on the basis that he acted unprofessionally by failing to exercise due diligence before commencing the hauling of logs across unenclosed private property without taking further steps to confirm the landowners consent. This does not mean that we sanction the crossing of private land without an agreement with the landowners. It means that we believe that the subject member acted in good faith and had good reason to believe that the negotiator had consent from the landowners to cross the private land in question.

**Concern #2: Is there evidence to support that the subject member made untruthful and inaccurate statements regarding the hauling of logs and other forestry activities through private land?**

When the landowner met with the subject member to request that hauling cease, she mentioned her interest in obtaining legal advice to clarify her rights as a property owner. In response, the subject member advised her of the existence of *Forest Act* Sec. 121(1) (b), which states, "The minister, for the purpose of providing access to timber or for any other purpose consistent with this Act, the *Forest and Range Practices Act* or the *Wildfire Act* may ...enter on and take possession of private land, and of roads and trails on private land..." The subject member advised her that, if she hired a lawyer, she would learn of the various powers the *Forest Act* grants the minister to take and use private

land. The subject member stated in his interview, "I responded, 'If you ask a lawyer you'll find out that there is authority given to the ministry to get access.'" The landowner recalled that the subject member advised her to "be careful" about retaining a lawyer.

None of the parties present remember the subject member's exact words. The complainant recalls him saying, "I'd be very careful about seeking the advice of a lawyer." The landowner believes he recommended that she not proceed with obtaining a legal opinion. The subject member recalled that he was responding to a question the landowner posed, answering, "If you hire a lawyer you will find out..." He stated further, "She was wondering about hiring a lawyer. I think I advised her against hiring a lawyer."

While the landowner said she felt threatened by the subject member's cautionary comment about obtaining legal advice, we found no information indicating that the subject member's comments were explicitly threatening. Upon considering the testimony of all the persons interviewed we concluded that different hearers could have reasonably given two very different connotations to his comments, as described following:

1. "I would caution you about retaining a lawyer because I'm concerned you will incur significant legal expenses that are unwarranted in this situation. There is no intention of hauling across your property until we reach a mutually agreeable road use agreement."
2. "I would caution you about retaining a lawyer because the minister's authority to haul across your land is absolute and you have no legal grounds to resist the use of your property. "

The information presented did not support a conclusion that the subject member intended to threaten the landowner in accordance with the second connotation. Such an interpretation would be inconsistent with the effort he demonstrated to negotiate a fair road use agreement with all the landowners and to provide them with whatever information they requested. Accordingly, the information that was forthcoming did not indicate that the subject member wrongly exercised his professional authority in cautioning a member of the public against exercising her right to obtain legal advice.

**Concern #3: Is there evidence to support that the subject member misled members of the public about what happened regarding the access agreement across private property?**

The complainant stated in her complaint that it was the subject member's affirmative answer to a question at a meeting that led her to lodge the complaint. In reviewing the videotaped transcript of this discussion, we could not identify sufficient context to determine if the subject member's answer referred to planting access, the hauling that occurred while one landowner was out of the country, or the hauling that took place after she agreed to allow operations to be completed. Since the discussion did not mention either the road use agreement or the subsequent hauling agreement the subject member reached with the landowner, we consider it speculative to conclude precisely what the subject member meant to affirm.

There is not sufficient information to support the allegation that the subject member misrepresented facts, made untruthful and inaccurate statements, or misled the public regarding the written authorization to haul logs across the private property.

## **Conclusion**

The Registrar is satisfied that the subject member acted in good faith. He had good reason to believe that the negotiator acted as a representative of all of the landowners and had reached agreement to cross the required sections of private land. Although this practice was acceptable in this situation, it is not the best practice that could have taken place. Even though we obtained a legal opinion that some simple agreements need not be in writing in order to demonstrate that a contract exists, it is strongly recommend that a written agreement signed by each landowner or someone with clear authority to represent each landowner be in place before any access to private land is sanctioned by an ABCFP member. This complaint is now closed.