Government Enforcement and the Due Diligence Defence

Complaint Investigation 070764

FPB/IRC/132

December 2007

Table of Contents

Introduction

The Board received a complaint in late April 2007, from the Sierra Club of Canada (B.C. Branch). The complainant asked the Board to investigate how the defence of due diligence is being implemented throughout the entire government enforcement system, in a forest practices context.

The defence of due diligence applies when a person demonstrates that he or she exercised due care to avoid contravening legislation. Since December 2002, due diligence has been a defence to administrative penalties levied by Ministry of Forests and Range officials (it has long been a defence to court prosecutions). The due diligence defence is set out in Section 72 of the *Forest and Range Practices Act* (FRPA).

The complainant points to its experience with two appeals to the Forest Appeals Commission (FAC), which it says indicate problems with how the due diligence defence is being approached. It questions whether:

> disproportionate weight is given to the presence of standard operating procedures and an environmental management system. As a result, investigations into the specific facts of the contraventions are not as thorough as they should be, and the most important witnesses are not being presented to the decision makers, to explain what actually went wrong.

This investigation assessed whether there is a systemic problem and whether recommendations can be made for improvement.

Findings

The Board examined 15 enforcement cases from the two-year period, June 1, 2005, to May 31, 2007. Appendix 1 provides information on the 15 cases, Appendix 2 describes the sample selection, and Appendix 3 describes 11 cases, illustrating the range of circumstances encountered.

Generally, the process of making a determination that could result in an administrative penalty begins with an investigation by compliance and enforcement (C&E) staff who are employees of the Ministry of Forests and Range (MFR). After the investigation is complete, and when they are ready to take a case to the MFR district manager, C&E staff prepare a package of information in a presentation binder. The district manager then holds a hearing, known as an opportunity to be heard (OTBH), at which the licensee has an opportunity to present its side of the case. Then, the district manager completes a written determination

that summarizes the evidence—making findings of fact, deciding whether there has been a contravention, and imposing a penalty if required.

For each of the 15 files (as well as the two appeals referred to in the complaint—*Weyerhaeuser* and *L and M*), the Board examined the presentation binders, conducted telephone interviews with the C&E staff that investigated the files[i], and reviewed the district managers' determinations. All investigators interviewed said that they always consider the potential for a "due diligence" defence from the outset of an investigation.

The Board also interviewed government lawyers involved in the *Weyerhaeuser* and *L and M* cases.

Interviewing Individuals With First-hand Knowledge

The Board examined whether all of the C&E looked at in this study included interviews with the individuals that had first-hand knowledge of the asserted contravention. In most cases analyzed, this individual was the machine operator or faller who actually carried out a suspected unauthorized harvest.

The Board found that, in the 15 cases examined (see Appendix 1), MFR investigators interviewed the individual with first-hand knowledge in five cases. In two of the five cases, the district manager decided that the licensee had exercised due diligence; in another two of the five the district manager decided that the licensee contravened the legislation and did not exercise due diligence; and, in the fifth case, the regional manager found the BC Timber Sales Program (BCTS) in to be in contravention of the due diligence legislation.

There were ten cases where the individual with first-hand knowledge was <u>not</u> interviewed:

- In two cases the district manager decided that the licensee had exercised due diligence.
- In six cases the district manager decided that the licensee had not exercised due diligence.
- In two cases in the BCTS program the district manager determined that the licensee had exercised due diligence, and the fault lay with BCTS.

In one of the two cases in which the question of whether BCTS was in contravention arose, the file was turned over to the regional office to investigate. At the time of the Board investigation, that investigation was not concluded. In the other case, no action was taken against BCTS.

This information is summarized in the following table:

	Licensee due diligence	Licensee contravention	BCTS	Total
Individual not interviewed	2	6	1 TSL holder due diligence; BCTS under investigation. 1 TSL holder mistake of fact; no action taken on BCTS.	10
Individual interviewed	2[ii]	2	1 BCTS in contravention.	5
Total	4	8	3	15

As well, the Board found that the C&E investigation in *Weyerhaeuser* took place in 2002, before the due diligence defence was in effect, and the *L and M* investigation occurred shortly after the defence came into effect—but C&E staff were not aware of that fact when they investigated. It is clear that C&E staff are now aware of the need to consider due diligence in their investigations.

Reliance on Environmental Management Systems

The Board examined whether environmental management systems were central to due diligence defences. In four of the 15 cases analyzed (DCR 2004-0009, DQU 24272, DQU 24426, and DQU 24859), licensees made submissions at the OTBH stressing the existence of an EMS and standard operating procedures. In all four cases, the district manager concluded that the licensee had exercised due diligence, but in two of these cases, although the licensee's defence was successful, a contractor or machine operator was penalized.

Training, Policy and Procedures

The MFR provides a number of training courses to its staff on dealing with due diligence. As part of this investigation, the Board examined this training, policy and procedure advice for its efficacy.

In general, C&E staff interviewed by the Board felt that the training they received was adequate to equip them to deal with the due diligence defence. They also felt they had received sufficient policy advice and guidelines from the ministry, and that the branch and regional offices were helpful.

One MFR training manual, *Introduction to Investigations 2006*, provides the following information on due diligence, on p.148 (underlining added):

> The circumstances of each case will dictate whether or not the defence of due diligence can be raised. For the accused to follow common practices or the industry standards may not be enough. Those practices or standards may be

> insufficient generally, or insufficient in the specific circumstances. As investigators, therefore, we should always gather evidence from the accused and its employees about due diligence as part of our investigation.

Another manual, *Legislation Basics Training* states as follows (emphasis in the original):

> As these defences should always be considered, C&E's role is to gather evidence. If there is **good, clear** evidence that one of the defences applies, then it might not be worth your while to pursue the case further. You should be prepared to rebut the defences during an Opportunity to be Heard (OTBH). Remember however, that **proving** one of the defences is the responsibility of the person accused of the contravention. Ensure you understand what it takes to prove a defence.

The MRR also offers a course called *Law and Enforcement for C&E Managers*. On p.42, at the end of the chapter regarding the three statutory defences, the manual makes clear that managers are responsible for, "ensuring that staff investigate evidence or lack of evidence of these defences."

In addition, the MFR has published several bulletins discussing due diligence. A September 2007, C&E advice bulletin, *Due Diligence Defence Update*, describes two recent appeals and offers the following advice to enforcement staff:

> If a person is found to have contravened, the person may escape liability by proving due diligence. The burden of proof rests with the person. However, C&E staff can assist the [district manager] by providing evidence of a lack of due diligence in relation to each person alleged to have contravened.

The Board also examined whether the information packages prepared by C&E investigators for district managers addressed due diligence. Nine out of 15 OTBH packages did so. These were: DMK 22502, DQU 23305, Coast Region BCTS, DSC 23666, DVA 23754, DCH 24064, DQU 24272, DQU 24426, and DQU 24859.

The nature and amount of information presented in the packages—and the extent to which the evidence was summarized in relation to due diligence criteria—varied. One particularly thorough example was DVA 23754, where a five-page analysis was presented, which summarized evidence in relation to 12 key questions.

Discussion and conclusions

This complaint highlighted two important issues. First, it is important to interview all necessary witnesses in order to find out what actually went wrong in cases of suspected contraventions; and, second, licensees who rely on an EMS as proof of due diligence must demonstrate that the system is suitable for preventing the contravention, and that the licensee has taken reasonable steps to ensure the effective operation of the system.

As the Board investigated only a sample of all determinations—just enough to examine the issues raised by the complainant—it is important to remember that, while due diligence is almost always considered, is not a significant factor in all determinations. Obviously, care must be taken in generalizing the observations from 15 files.

Are the appropriate witnesses being interviewed in C&E investigations?

It is important for C&E staff to conduct a thorough investigation for several reasons; first, to present complete information to the district manager; second, evidence gathered by C&E staff becomes part of government's case if an appeal arises; and, third, investigation notes provide parties to an appeal with a summary of available evidence, and also serve as a memory aid for witnesses, as often a great deal of time has elapsed before an appeal is heard.

This investigation found that in 10 of the 15 cases, the individual with first-hand knowledge about the incident was not interviewed. Reasons given for not interviewing these individuals included:

- the licensee appeared to be accepting responsibility;
- the cause of the contravention was obvious;
- the investigation took place shortly after the due diligence defence was introduced, before interviews of individual workers became standard procedure;
- the individual was not on site when the investigator was there; and,
- the individual had moved out of the area.

Investigators also noted that in some cases individuals may not be cooperative.

In most cases, decisions not to interview the individual with first-hand knowledge were based on reasonable considerations. However, even in situations where a licensee appears to be accepting responsibility, or the cause of the problem appears obvious, the Board believes investigators should usually interview the individual with first-hand knowledge to more effectively determine what went wrong and why. A licensee may well decide to assert

a due diligence defence only once the OTBH hearing is scheduled, which may be months, or even years after the event, so it is important that this information be collected expediently. In cases where the individual with first-hand knowledge has not been interviewed, the due diligence defence can be used to the advantage of the investigatee. For example, in one case that C&E staff investigated, and considered to be straightforward, at the OTBH the licensee was able to demonstrate due diligence, and in the end no one was found to be in contravention.

In another case to do with a mapping error, the licensee appeared to be admitting responsibility, so the investigator did not interview the mapping contractor. At the OTBH, however, the licensee argued the statutory defence of mistake of fact, based on the contractor's error. While in this case the defence was not successful, it still illustrates the need to anticipate the due diligence defence as part of the initial investigation.

The Board concludes that, for most of the cases examined, C&E staff adequately investigated with an eye to possible due diligence defences. It notes, however, that while the decision not to interview individuals with first-hand knowledge was understandable, it is better practice to conduct these interviews so as to more thoroughly determine what went wrong and whether the EMS, or other preventive measures, are working. This essential information is required for informed determinations by district managers.

Is it too Easy to Establish Due Diligence by Simply Pointing to the Existence of an Environmental Management System (EMS)?

The complainant questions whether disproportionate weight is being given to the existence of an EMS and standard operating procedures as proof of due diligence. This discussion examines that issue.

Many forest companies have adopted an EMS. These systems are designed to prevent contraventions of legislation and subsequent environmental problems, and incorporate plans to respond effectively if environmental problems occur. Licensees require their supervisors, employees and contractors to take training in the company's EMS and its standard operating procedures.

However, for a due diligence defence to succeed, it is not enough to simply have an EMS in place; the system must also be adequate and must operate effectively. This is clear from court decisions; for example, in *Sault Ste. Marie*, the 1976 decision that sets the precedent for the due diligence defence, the Supreme Court of Canada said:

> Where an employer is charged in respect of an act committed by an employee in the course of employment, the question will be whether the act took place without the

> accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. (emphasis added)

In the Board's investigation into 15 cases, 4 cases of 15 had an EMS as a factor. In three of these, the district manager found that the EMS was appropriate under the circumstances. However, there was little or no discussion in the determinations of whether the system was operating effectively.

However, EMS figured significantly in the two appeals referred to in the complaint (*Weyerhaeuser* and *L and M*), and also in one recent appeal (*Pope and Talbot*[iii]). In the *Weyerhaeuser*, *L and M*, and *Pope and Talbot* determinations, the district managers found that the EMS in place was either not adequate, or was not operating effectively.

On appeal, in the *Weyerhaeuser* case, the majority of the Forest Appeals Commission (FAC) panel disagreed with the district manager, while one panel member agreed with the district manager that Pope and Talbot had not exercised adequate diligence. In the *L and M* case, the issue was not addressed by the FAC, as the appeal was settled by consent of the parties.

The Board concludes that government staff (C&E investigators, government lawyers and district managers) are generally aware that the existence of an EMS is not enough to establish due diligence—the system must be able to prevent legislative contravention, and the licensee must take reasonable steps to ensure that it is effective for the due diligence defence to apply. However, not all investigations and determinations explicitly addressed this. The Board therefore encourages C&E investigators and district managers to continue to take note of these requirements when investigating suspected contraventions and making determinations.

Training, Policy and Procedures

The Board concludes that training, policy and procedures are adequate. In most of the cases examined, district managers had adequate information concerning due diligence when they made their determinations. However, there were cases where no information was presented, or the information presented was minimal.

Recommendations

The Board has three recommendations. The MFR may wish to consider incorporating these recommendations into its training and procedures. Due to the nature of the recommendations, the Board is not requesting a response from MFR within a specific time. However, it is the Board's normal practice to follow up on recommendations after one year.

Recommendation 1

In 10 of 15 cases, C&E investigators did not interview the individual or individuals who had direct knowledge of the contravention. There will undoubtedly be times when it is not necessary to conduct such an interview; however, evidence from these individuals can form an important part of the information that is eventually presented to a district manager or the Forest Appeals Commission, so it is prudent to collect this evidence.

Accordingly, the Board recommends that C&E investigators who are investigating a suspected contravention should, in most cases, interview the individuals who have first-hand knowledge of the contravention as soon after the incident as is practical. This may include fallers, machine operators, or others.

Recommendation 2

C&E investigators and district managers are generally aware that the mere existence of an EMS does not meet the requirements for a due diligence defence. However, not all of the investigations and determinations examined in this investigation explicitly addressed this.

Therefore, the Board recommends that in situations where there is a potential for the due diligence defence to be used based on the existence of an EMS or standard operating procedures, C&E investigators and district managers bear in mind that due diligence also requires the licensee to:

- establish a proper system to prevent commission of the offence; and,
- take reasonable steps to ensure the effective operation of the system.

Recommendation 3

In most of the cases examined, district managers had adequate information concerning due diligence when they made their determinations. However, there were cases where no information was presented, or the information presented was minimal.

Accordingly, the Board recommends that C&E investigators who are preparing information for an OTBH routinely consider including an analysis of due diligence and mistake of fact, as well as all relevant information from any first-hand witnesses.

Appendix 1: Files analyzed

ERA # *(Enforcement, Review and Appeal Database)*	Licensee/contractor	Description[1]	Interview?	Result
DCR 2004-0009	WFP Western Lumber Ltd.	Overblast	N	Licensee due diligence.
DQC 21997	Weyerhaeuser Company Limited, Graham Island Forest Products Ltd and Westwood Ventures Ltd.	UH	N	Licensee, contractor and subcontractor all in contravention.
DMK 22502	K and D Logging Ltd. (BCTS program)	UH	N	Licensee mistake of fact. BCTS said to be at fault but no determination in case of BCTS.
DQU 23305	Botland Feeds Ltd.	UH	N	Licensee contravention. Under appeal.
Coast Region	BCTS QCI	Fish stream diversion	Y[2]	BCTS contravention.
DSC 23666	Terminal Forest Products Ltd.	UH	N	Licensee contravention.
DVA 23754	Michael Morley	UH	Y	Licensee contravention.
DOS 24273	Carl Matthew McLennan, dba Cabin Forestry Resources	UH	N	Licensee contravention.
DCH 24064	Tolko Industries Ltd. and Westline Harvesting Ltd.	Fire start	Y	Licensee and contractor contravention.
DQU 24272	Canadian Forest Products Ltd.	UH	N	Licensee due diligence.
DRM 24296	Tembec Industries Inc.	UH	N	Licensee contravention.
DQU 24426	West Fraser Mills Ltd and Gary Collins Logging Ltd.	UH	Y	Licensee due diligence. Contractor contravention.
DVA 24438	B and T Forest Products Ltd.	Machinery near watercourse	N[3]	Licensee liable. Under appeal.
DVA 24520	Aspen Ridge Consulting Ltd. (BCTS program)	UH	N	Licensee due diligence. Fault said to be with BCTS. Region investigating.
DQU 24859	Canadian Forest Products Ltd	UH	Y	Licensee due diligence. Violation ticket for machine operator.

[1] UH = unauthorized harvest.

[2] This case was investigated by the MFR regional office. The equipment operator was not interviewed but the field superintendent, who was on site when the work was carried out, was interviewed.

[3] Main issue was definition of stream.

Appendix 2: Sample Selection

The Board routinely receives copies of all district manager determinations from district offices. Cross-checking the number of determinations received by the Board with the number recorded in the Ministry of Forests and Range's *Enforcement, Review and Appeal* database for the same time period confirmed that the Board received close to 100 percent of all determinations.

Of these, the Board selected the 15 sample cases after reviewing all determinations for a two-year period – beginning June 1, 2005 and ending May 31, 2007 – during which there were a total of 231 determinations. Of the total, there were 166 determinations in the "industrial forestry" category. These files involve holders of agreements under the *Forest Act*. The remainder of the 231 determinations were mainly cases involving range practices, trespass from private land onto Crown land, or other matters.

For the purposes of our investigation, the Board targeted the industrial forestry determinations that seriously considered the defences of due diligence, mistake of fact, or officially induced error. This involved an element of subjectivity, because almost all determinations at least mention these defences. Ultimately the Board identified 49 industrial forestry determinations where these defences were seriously engaged.

From the 49 cases, the 15 sample cases were selected. These 15 were the closest in fact pattern to the files referred to in the complaint, typically involving unauthorized harvesting and the use of contractors.

The 15 cases involved nine different districts and one regional office.

Appendix 3: Illustrative cases

The following is a brief description of 11 cases, illustrating the range of circumstances encountered in the 15 files analyzed.

Individual not interviewed; licensee duly diligent

There were two files in this category: DVA 23754 and DCH 24064, one of which is described below.

1. *DCR 2004-0009* was investigated in late April and early May, 2003. This was in the period just after the statutory defences were brought in, and the investigators, following the investigation protocol in place up to that time, did not interview the individual with direct knowledge. In this case, that individual was the blaster who conducted the overblast. However, MFR staff did obtain copies of the blaster's logbook notes.

   The district manager found that the licensee had exercised due diligence, based in part on appropriate standard operating procedures, training in the EMS, and an experienced crew with an excellent track record. The district manager commented to C&E staff that in future they should investigate further, rather then interviewing only licensee representatives. We were told that this is now considered standard practice.

2. *DQU 24272* was a 2005 case of unauthorized harvest. One buncher operator had completed the site and left. Another operator, not recognizing the boundary, crossed over from where he had been working and bunched out the trespass area. The licensee's supervisor had done a site pre-work with the contractor's supervisor. The supervisor had walked the area with the first buncher operator, and tied extra ribbon on the corner to emphasize the common boundary. The licensee reported the incident.

   MFR compliance and enforcement staff did not interview the buncher operator who committed the contravention. Staff believed the case to be straightforward, based on information provided by the licensee's supervisor and the logging foreman. The district manager found that the licensee had exercised due diligence, based on a number of factors, including a functioning EMS, qualified staff, and the boundary marking. No action was taken against the contractor or machine operator.

Individual not interviewed; licensee not duly diligent

There were six cases in this category. These were DQC 21997, DOS 24273, DRM 24296, DQU 23305 (under appeal) and DSC 23666. Three of these cases are described below.

1. *DRM 24296* involved an unauthorized harvest around a landing. MFR investigators gathered information by e-mail and letter from the licensee representative, licensee general manager, and the contractor's representative. The licensee had told the contractor to clear enough room to accommodate slash plus a buffer. The contractor said he overestimated the required area.

   The investigator did not interview the buncher operator. The crew was no longer on site and the licensee appeared to be accepting responsibility. An agreed statement of facts was presented to the DM in lieu of an OTBH. The DM found that the licensee had primary responsibility to ensure that the actions of its contractor are adequately planned and supervised. He found the licensee in contravention.

2. *DSC 23666* was a 2004 case of unauthorized harvest. The map that had been submitted with the cutting permit application did not accurately reflect the layout on the ground, which was the intended harvest area. The cutting permit map had been created by a contractor. The investigator asked the licensee to describe the reason for the wrong maps, the process for reviewing cutting permit applications, whether there were any standard operating procedures or checklists, and what could be done to prevent the situation happening in future.

   The investigator did not interview the mapping contractor because the licensee appeared to admit responsibility. There was an agreed statement of facts which the investigator believed was an admission of that responsibility. However, at the OTBH, the licensee argued the statutory defence of mistake of fact, based on the licensee's belief that the trespass area was within the block as mapped. The district manager accepted that the licensee honestly and mistakenly believed the map to be correct, but rejected the defence. The district manager said that the circumstance had arisen due to a lack of care on the part of the licensee.

3. *DVA 24438* was a 2005 case of alleged contraventions in connection with operation of machinery close to a watercourse. The licensee had treated the drainage area as "seepage," rather than as an S6 (small) stream. The investigation centred on whether the drainage area was in fact a stream. Although the defence of due diligence was not raised, the district manager considered it, and concluded that the licensee should not have, in effect, re-classified the stream without taking proper measures.

Individual interviewed; licensee duly diligent

There were two cases in this category:

1. *DQU 24426* was a 2005 case of unauthorized harvest. The licensee's contractor began logging before the required pre-work meeting had been held. At the OTBH, the

contractor said wet weather impeded his progress in other specified areas, and in order to keep harvesting, he moved to this area. All boundaries were painted except that one area

The licensee argued that it had a functioning EMS, which was understood and adhered to by itself and its contractors, and which required pre-work meeting. The licensee said that the contractor acted in direct contravention of standard operating procedures by starting without a pre-work meeting. The district manager found that the licensee had been duly diligent and that the contractor was in contravention.

2. *DQU 24859* was a 2006 unauthorized harvest. The MFR investigator interviewed the machine operator by telephone. The operator admitted that he hadn't walked the boundary and had simply made a mistake. The district manager found that the licensee had exercised due diligence, based on the existence of an EMS and the use of experienced, trained contract staff. A violation ticket was issued to the machine operator.

Individual interviewed; licensee not duly diligent

There were two cases in this category: DVA 23754 and DCH 24064.

1. *DVA 23754* was a 2005 case of unauthorized harvest, reported by the licensee. The buncher operator, working for a contractor, had seen markings from a previous layout that was not approved and had followed them. The investigator interviewed the licensee, the contractor and the machine operator.

   Although the defence of due diligence was not raised, the district manager considered it. He concluded that, although good, accurate maps had been provided, the ribbon lines for the previous, unapproved layout should have been removed or the operator should have been told about them. In addition, there was no pre-work meeting about that specific site.

BCTS

BCTS cases are reported in a separate category because this gives a more complete picture of their relation to the complaint issues. Three cases involved the BCTS program:

1. *DMK 22502* was a 2003 case of harvesting outside the approved licence boundary. The licensee was the holder of a TSL in the BCTS program. The area harvested had originally been included in the field layout and mapping for the TSL, done by BCTS. A decision was later made by BCTS to increase the buffer on a lake by moving the boundary to the

edge of a road. The original flagged and painted boundary was not changed in the field. Maps provided to the licensee by BCTS provided conflicting information.
The investigation included interviews and phone conversations with licensee representatives. The licensee representatives indicated that the machine operators followed the boundaries laid out on the ground. Licensee reps had walked the ground, using the road right-of-way map. The investigator interviewed a buncher operator working on the site, as well as several other equipment operators. However, the operator who carried out the unauthorized harvest was not on site at the time, and was not interviewed.

The district manager concluded that the timber sale holder had an honest and reasonable belief that the boundary marked in the field was the true legal boundary. Accordingly, the defence of mistake of fact succeeded. No action was taken against BCTS.

2. In September 2004, the Coast Region Special Investigation Unit investigated an alleged unauthorized diversion of a fish stream. BCTS had hired a contractor to carry out extensive road maintenance and construction work. The contractor in turn hired a sub-contractor.

   At the site in question, an old wooden box culvert had collapsed years ago, re-directing a stream. The sub-contractor mistakenly installed a new round culvert at the site. MFR regional investigators did not interview the equipment operator but did interview the field superintendent for the sub-contractor, who was present when the work was done.

   The interviews and documentation gathered examined in detail the circumstances leading to the installation of the metal culvert, contract supervision, communication, and understanding of risk by the various parties. BCTS argued due diligence but the regional manager rejected the defence.

3. The third case involving BCTS was *DVA 24520*. In this case, a road right-of-way had been relocated, but the flagging for the old road had not been removed. The machine operator followed the old line, resulting in the removal of Douglas fir, which was supposed to be reserved.

   The investigator relied on information provided by BCTS and the holder of the timber sale licence. The machine operator was not interviewed, although the licensee relayed information from him. The reason for not interviewing the machine operator was that it seemed clear that the problem was a layout problem.

   The district manager accepted the defence of due diligence on the part of the timber sale licensee. Investigation of BCTS was turned over to the regional office. This case was still under investigation when we did our interview.

[i] The Board did not interview MFR staff on one file, DQU 23305, because the determination was under appeal during the Board investigation.

[ii] In one case, the contractor was found in contravention. In the other, the machine operator was found in contravention.

[iii] *Pope and Talbot Ltd.*, FAC No. 2005–FOR-004(b), September 4, 2007. The *Pope and Talbot* decision was appealed to the BC Supreme Court on September 25, 2007.