Province of British Columbia

Forest Appeals Commission

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APPEAL NO. 2004-FOR-006(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

BETWEEN:	Louisiana-Pacific Canada Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Graham's Farms Ltd.	**THIRD PARTY**
AND:	Downie Timber Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Forest Appeals Commission Katherine Lewis, Chair Cindy Derkaz, Member Gary Robinson, Member	
DATE:	September 29 and 30, 2004; concluding by way of telephone conference call October 29, 2004	
PLACE:	Kelowna, BC	
APPEARING:	For the Appellant: Brook Greenberg, Counsel For the Respondent: Gareth Morley, Counsel For the Third Parties: Eileen Vanderburgh, Counsel	

APPEAL

Louisiana-Pacific Canada Ltd. ("Louisiana-Pacific") appeals a March 26, 2004 determination made by Bruce Hutchinson, Acting Manager, Fire Management, Northwest Fire Centre (the "Fire Centre Manager"). In his determination, the Fire Centre Manager found that Louisiana-Pacific contravened sections 13(2) and 4(1)(a) of the *Forest Fire Prevention and Suppression Regulation*, B.C Reg. 169/95 (the "*FFPSR*"). He also denied claims of compensation for fire suppression costs under section 95(1) of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Code*"), assessed costs of $149,354 against Louisiana-Pacific under section 162 of the *Code* for fire suppression activities undertaken by the Crown, and levied a penalty of $345 against Louisiana-Pacific for each contravention of the *FFPSR*.

The appeal was brought before the Commission pursuant to section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69. Under section 84(1)(d) of the *Forest and Range Practices Act*, the Commission may confirm, vary or rescind the determination, or refer the matter back to the person who made the determination, with or without directions.

Louisiana-Pacific seeks an order rescinding the findings in the determination and the assessed penalties.

BACKGROUND

The determination at issue in this appeal relates to a forest fire that was spotted on August 21, 2000, within cutblock 3 ("Block 3") of cutting permit ("CP") 150, forest licence ("FL") A-17645, in the Columbia Forest District.

Louisiana-Pacific holds FL A-17645. At the time that the fire occurred, FL A-17645 was held by Evans Forest Products Ltd., a corporate predecessor of Louisiana-Pacific. Between the time when the fire occurred and the time when the Fire Centre Manager issued his determination, Louisiana-Pacific became the holder of FL A-17645.

Block 3 is on a steep slope leading up from the Kinbasket River. Louisiana-Pacific had an oral agreement with Downie Timber Ltd. ("Downie") that permitted Downie to conduct logging operations. Downie entered into an oral agreement with Graham's Farms Ltd. ("Graham's") to conduct a helicopter logging operation on Block 3. The falling operation was sub-contracted by Graham's to Bill Walker by means of an oral agreement.

A fire was spotted on Block 3 on August 21, 2000, in the southerly portion of the block, to the west of a ridge. [Where the fire started and the cause of the fire are matters of dispute in this appeal.] On that day, employees of Graham's were on the block rigging chokers for helicopter yarding, and on the landing performing bucking, log sorting and loading. Employees of Mr. Walker were also on the block performing bucking operations on logs too heavy for the helicopter to lift, and one person was falling timber in the southwest corner of the block.

According to the Wildfire Investigation Report, the fire was reported to the Southeast Fire Centre at 22-0257 Zulu (19:57 Pacific Daylight Time ("PDT")) by Steve Neill, owner/operator of Alpenglow Aviation, who was flying in the area. Signs of fire were also noticed from the logging camp located on Kinbasket Lake, and crew from the logging camp drove up to the block that evening to inspect the situation.

In a letter dated August 23, 2000, the Ministry of Forests wrote to Evans Forest Products [now Louisiana-Pacific], advising that "With reference to the fire currently burning within 1 km of your area of operation on Forest Licence A17645…. Pursuant to Part 5, Division 3 Section 92 of the *Forest Practices Code of British Columbia Act*, you are obligated to carry out initial fire suppression on this fire."

Fire suppression activity had already commenced on August 22, 2000, and the fire was under control by August 29, 2000. Downie, Graham's and the Ministry of Forests were involved in fire suppression activities.

Schedule 1 of the *FFPSR* classifies various industrial activities according to their risk of fire. Risk classifications A, B, and C correspond to high, moderate, and low forest fire risk, respectively. Class A activities include "bucking - power saw" and

"tree felling." Class B activities include "bucking - at landing" and "log yarding - helicopter." Schedule 4 of the *FFPSR* lists fire danger classes that may be assigned to an area. Fire danger classes are rated at roman numerals I (low) through V (extreme). In general, the higher the fire danger class, the greater the ease of ignition, the rate of fire spreading, the difficulty of control, and the potential impact of the fire.

On the day that the fire was reported, and on the three days prior to that day, the area was rated at fire danger class III (moderate). Schedule 5 of the *FFPSR* contains the following restriction for activities in fire risk class A or B:

> After 3 consecutive days of DGR III maintain a fire watch after work for 1 hour

Section 4(1) of the *FFPSR* states that "If a fire watcher is required to be present by this regulation, the fire watcher must… watch for sparks and fires."

In the present appeal, the parties do not dispute that the requirement under the *FFPSR* for a fire watcher was in effect on the day that the fire was reported. However, the parties disagree on the probable cause of the fire, and the extent to which the requirement for a fire watcher was met.

An investigation of the fire was conducted by Norm Koerber and Dan Rehill, Forest Protection Assistants with the Ministry of Forests. During that investigation, five chainsaws and four chainsaw mufflers were recovered from the burned area. Two of those mufflers had been modified or had a damaged exhaust screen. Section 13(2) of the *FFPSR* prohibits the operation of "a small engine if the ability of the muffler to reduce hot carbon emissions has been lessened by modification of the muffler or by redirection of the emissions."

On August 8, 2001, letters were sent to Louisiana-Pacific, Downie and Graham's by a forest official acting on behalf of Mr. Schmidt (the Fire Centre Manager at that time), advising them that the investigation indicated that the fire was caused by operations on the site and that the crew may have violated the *Code* or the *FFPSR*. Representatives of Louisiana-Pacific, Downie and Graham's were invited to provide evidence and information at an "Opportunity to be Heard" that was held on October 16, 2001. All parties attended.

On March 26, 2004, the Fire Centre Manager issued the determination. He determined that:

1. There has been a contravention of Sec 13(2) of the Forest Fire Prevention and Suppression Regulations "*A person must not operate a small engine if the ability of the muffler to reduce hot carbon emissions has been lessened by modification of the muffler or by redirection of the emission*."

…

2. There has been a contravention of Sec 4(1)(a) of the Forest Fire Prevention and Suppression Regulations "*If a fire watcher is required to be present by this regulation, the fire watcher must (a) watch for sparks and fires*."

...

The penalty applied to the contraventions must be reasonable and act as a deterrent. With the costs of fire suppression action being as expensive as they are, the provisions of the *Code*, specifically Section 95(5) which states "*the government is not liable to compensate a person for carrying out initial fire suppression activities under Section 92 if a designated forest official has determined under subsection (2) of this section that the person or the person's employee*

(a) caused the fire

(b) failed to comply with section 92 or

(c) failed to comply with the regulations and that failure contributed to the cause or spread of the fire"

will act as sufficient deterrent. As there have been contraventions, I have decided that there can be no compensation for the costs ($99,046.04 approximate) incurred by the licensee in suppressing this fire.

Section 162 of the *Code* states in part "*A person is liable to the government for costs incurred by the government in (a) controlling or suppressing a fire if the costs are incurred as a result, directly or indirectly of the person's failure to comply with ... (d) a requirement of a regulation or standard made under this act respecting fire use, prevention or suppression*". As costs were incurred by the government in the amount of $149,354 according to the Fire Suppression Billing Information dated 2000/11/10 by Archie McConachie, this amount becomes a debt due the Crown.

For the above reasons I conclude that an administrative penalty for the violation of Section 4(1)(a) of the FFPSR's in the amount of $345 is warranted.

I also conclude that an administrative penalty for the violation of Section 13(2) of the FFPSR's in the amount of $345 is warranted.

As the tenure history of this block is not simple, in that the Forest Licence was issued to Evans Forest Products, but a verbal agreement existed with Downie Timber Limited to conduct the logging operation on this block and Graham Farms was the contractor used by Downie Timber Ltd to conduct the logging operations, I find that the principle of vicarious liability should apply and the penalties and fire billing are the responsibility of Evans Forest Products Ltd and/or its successor Louisiana-Pacific ....

[italics in original]

Louisiana-Pacific appealed the determination on the grounds that the Fire Centre Manager erred in finding that there had been contraventions under sections 13(2) and 4(1)(a) of the *FFPSR*, finding that Louisiana-Pacific was vicariously liable for the alleged contraventions, assessing fire suppression costs under section 162 of the *Code*, and denying compensation under section 95(5) of the *Code*.

At the commencement of the hearing, the Commission questioned the Fire Centre Manager's jurisdiction, and therefore the Commission's jurisdiction, to make a determination pursuant to section 162 of the *Code*, that the government's fire suppression costs of $149,354 are a debt due to the Crown.

Counsel for the Government acknowledged that the Fire Centre Manager, and therefore the Commission, does not have the jurisdiction to make a finding of liability under section 162 of the *Code*.

In addition, counsel for the Government conceded that the two administrative penalties of $345 levied by the Fire Centre Manager were statute barred due to the expiry of a limitation period in section 4(1) of the *Administrative Remedies Regulation*, B.C. Reg. 182/98 (the "*ARR*") and should be rescinded by the Commission. However, he asked the Commission to confirm the Fire Centre Manager's findings of contravention of the *FFPSR*, which had led to those penalties, on the grounds that a determination of contravention is not subject to the limitation period in the ARR. Louisiana-Pacific and the Third Parties disagree with this latter point. They argue that if the penalty is statute barred, the determination is likewise statute barred. This is one of the issues to be decided in this appeal.

The Commission proceeded with the hearing on the basis that the Fire Centre Manager's "determination" of liability under section 162 of the *Code*, and the penalties he levied under section 117 of the *Code*, were not properly before the Commission.

During closing statements, the Government requested that the Commission confirm the determination that Louisiana-Pacific, Downie and Graham's contravened sections 4(1), 13(1)(a) and 13(2) of the *FFPSR*, and that they either caused the fire or their contraventions contributed to the cause or spread of the fire. However, the Commission notes that, in addition to a finding of contravention against section 4(1)(a), the determination referred only to a contravention of section 13(2) - not 13(1)(a). Therefore, the Commission cannot contemplate confirming a contravention under section 13(1)(a), but the Commission may, given its jurisdiction under section 131(12)(d) of the *Code* to hear submissions as to facts, law, and jurisdiction, consider whether there was a contravention of section 13(1)(a).

The Government also requested an award of its costs in the appeal.

Louisiana-Pacific requested that the Fire Centre Manager's decision as a whole be rescinded because there is no evidence that any of the Third Parties caused the fire or contravened any statutory obligation. Alternatively, Louisiana-Pacific requested

that the Commission rescind the Fire Centre Manager's finding of vicarious liability as moot, or in the further alternative, rescind that finding as wrong in law on the basis that none of the Third Parties were contractors of Louisiana-Pacific.

The Third Parties also requested an award of costs against the Government.

Finally, an issue arose during the hearing about the admissibility of a memorandum. The Commission marked the memorandum as exhibit 23 and advised that it would not consider its contents until the parties had an opportunity to provide legal argument during their closing submissions. The Commission will rule on the admissibility of this exhibit in this decision.

ISSUES

The Commission has characterized the issues to be decided in this appeal as follows:

1. Whether the memorandum marked as exhibit 23 should be admitted as evidence before the Commission.

2. Whether, like the penalties, the findings of contravention of section 4(1)(a) and 13 of the *FFPSR* are statute barred and, if so, whether this renders as moot the finding that Louisiana-Pacific is vicariously liable for those contraventions.

3. If the answers to issue #2 are "no", whether the Third Parties are "contractors" of Louisiana-Pacific within the meaning of section 117(2) of the *Code* such that Louisiana-Pacific is vicariously liable for their actions.

4. Whether there was a contravention of section 4(1)(a) of the *FFPSR*.

5. Whether there was a contravention of section 13 of the *FFPSR*.

6. Whether the Fire Centre Manager was correct in denying compensation for the fire suppression costs, pursuant to section 95(5) of the *Code*.

7. Whether the Government or the Third Parties should be awarded their costs in the appeal.

RELEVANT LEGISLATION

The fire occurred in August 2000, when the *Code* was in force. On January 31, 2004, the *Forest and Range Practices Act* took effect and much of the *Code* was repealed. The determination was issued after the *Forest and Range Practices Act* came into effect. Therefore, the issues in this appeal were considered based on the legislation in effect at the time of the fire and the hearing before the Fire Centre Manager. However, the appeal process was conducted in accordance with the requirements of the legislation in effect when the determination was issued.

The following sections of the *FFPSR* and the *Code* are relevant to this appeal. For convenience, other relevant legislation is set out in the "Discussion and Analysis" section of this decision.

The *FFPSR* states as follows:

Definitions

1 (1) In this regulation:

...

"fire watcher" means a person at worksite who provides surveillance for forest fires;

...

"hot work" means any work generating significant amounts of heat and includes the cutting, grinding, welding and heating of metals;

...

"worksite" means

...

(b) in the case of timber harvesting, an area of land within which an operation relating to timber harvesting is performed.

Fire watcher

4 (1) If a fire watcher is required to be present by this regulation, the fire watcher must

(a) watch for sparks and fires,

(b) report any fires to the designated forest official, a peace officer or the person carrying out an industrial activity at the worksite at which the fire watcher is engaged, and

(c) assist in fighting any fire that occurs in the area being watched by the fire watcher.

Small engines

13 (1) A person must not operate a small engine unless

(a) the muffler on the small engine is maintained in good repair, and

...

(2) A person must not operate a small engine if the ability of the muffler to reduce hot carbon emissions has been lessened by modification of the muffler or by redirection of the emissions.

...

Schedule 1
[am. B.C. Reg. 6/98, s. 18.]
Forest Fire Risk Classification
(section 10)

1 The activities of industrial operations have the risk classifications assigned to them in Table 1.
2 If an industrial operation includes more than one component activity, each activity is subject to this regulation.
3 An activity not specifically listed in Table 1 is deemed to be risk classification A.

Table 1 — Risk Classification by Activity

Risk Classification A (High)	Risk Classification B (Moderate)	Risk Classification C (Low)
Blasting Bucking — power saw Bucking — tree processor Log barking Log skidding — ground system Log yarding — cable logging Metal cutting, grinding or welding Rail grinding Road right of way grass mowing Sawmilling Silviculture — using small engines Silviculture — using large engines Trail building — using small engines Tree felling Wood chipping Wood processing	Bucking — at landing Firewood cutting Land clearing Log forwarding Log yarding — helicopter Mining exploration Right of way clearing or maintenance Trenching	Bitumen processing — portable plant Bridge building Drilling Equipment transportation Excavating Fencing Gas or oil well operation Gravel processing, loading and hauling Guiding, packing or trapping Log sorting or reloading Log hauling Log loading Log scaling Log dumping Mining operations Pipeline construction Plant harvesting Power line construction Prospecting Quarrying Railway construction or maintenance Ranch operation Road construction or maintenance Silviculture — using hand tools Surveying or engineering Timber cruising Tourist resort operation Trail building — using hand tools

Schedule 5
[am. B.C. Reg. 6/98, s. 20.]
Restrictions on Industrial Operations
(section 20(1))

Column 1 Fire Danger Class (DGR)	Column 2 Risk Classification	Column 3 Restriction	Column 4 Duration

III (moderate)	A or B	After 3 consecutive days of DGR III maintain a fire watch after work for 1 hour	Until the fire danger class falls below DGR III
…	…	…	…

The *Code* states as follows:

Compensation for fire control or suppression operations

95 (1) Subject to subsections (2), (4), (5) and (7), a person who carries out initial fire suppression under section 92 or who complies with an order issued under section 94 must be compensated by the government in an amount determined by a designated forest official in accordance with the regulations.

(2) Despite subsection (1), a designated forest official may make a determination that a person, or that person's employee,

(a) caused a fire,

(b) failed to comply with section 92, or

(c) failed to comply with the regulations and that failure contributed to the cause or spread of a fire.

(3) If a designated forest official makes a determination under subsection (2), a designated forest official must give the person a notice of determination under section 120.

(4) The government is not liable to compensate a person who is determined under subsection (2) to have caused a fire or failed to comply, for an expense incurred in complying with an order issued under section 94 for

(a) equipment brought to a forest fire from within 30 km by road of the person's area of operation, including, for example, crawlers, tractors, trucks, excavators and skidders,

(b) any facilities or vehicles that serve the person's area of operation including, for example, camps, first aid offices, warehouses, machine shops, trucks and crew buses,

(c) wages payable to employees referred to in section 94 (1) (a) (ii), and

(d) prescribed expenses.

(5) The government is not liable to compensate a person for carrying out initial fire suppression activities under section 92 if a designated forest official has determined under subsection (2) of this section that the person or the person's employee

(a) caused the fire,

(b) failed to comply with section 92, or

(c) failed to comply with the regulations and that failure contributed to the cause or spread of the fire.

Division 3 - Administrative Remedies

Penalties

117 (1) If a senior official determines that a person has contravened this Act, the regulations, the standards, or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed .

...

(5) The senior official who levies a penalty against a person under this section, section 118 (4) or (5) or 119 must give a notice of determination to the person setting out all of the following:

(a) the nature of the contravention;

DISCUSSION AND ANALYSIS

1. Whether the memorandum marked as exhibit 23 should be admitted as evidence before the Commission.

During the hearing, the Third Parties sought to admit a two-page memorandum into evidence. The Government objected on the grounds that the memorandum is a legal opinion that is subject to solicitor-client privilege. Counsel for the Government stated that the memorandum was inadvertently included in the documents provided to the Commission and the other parties.

The memorandum is on the letterhead of British Columbia Ministry of Attorney General, Criminal Justice Branch, Crown Counsel, Kamloops BC. It is headed:

> June 24, 2002
> Memo to file
> RE: Evans, Downie, Graham Farms

The memorandum consists of six paragraphs ending with the initials “SB”.

In his closing submission, counsel for the Government describes the memorandum as:

> a rationale for the decision by Criminal justice branch lawyers not to prosecute and to defer to administrative action by the Ministry of Forests. The memo discusses the “charge approval standard”: the

> public interest in prosecution and the substantial likelihood of conviction test. (page 3 paragraph 8)

The memorandum was included in a binder of documents that counsel for the Government provided to the parties to the appeal and to the Commission. In his covering letter to the Commission, counsel stated that he enclosed "copies of all documents that were considered by the forest official who made the March 26, 2004 determination."

The Third Parties submit that the memorandum is not subject to solicitor-client privilege and, therefore, is admissible evidence that should be considered by the Commission. They argue that the memorandum was in the decision-maker's file and that it is reasonable to assume that he had the memorandum when making the determinations at issue in this appeal.

In addition, the Third Parties submit that, if the memorandum is privileged, the Government waived that privilege when it included it in the documents provided to the Commission and the other parties.

The Third Parties further submit that the principles of procedural fairness require that legal opinions provided to a tribunal or decision-maker must be disclosed to the parties and are not privileged.

In support of their submissions, the Third Parties rely on the following cases:

> *Melanson v. New Brunswick (Workers Compensation Board)* (1994), 25 Admin L.R. (2d) 219 (N.B.C.A.) (hereinafter *Melanson*).
>
> *Carlin v. Registered Psychiatric Nurses' Assn. (Alberta)*, [1996] 8 W.W.R. 584 (Alta. Q.B.) (hereinafter *Carlin*).

The *Carlin* case dealt with a complaint alleging unprofessional conduct and a breach of professional ethics by Ms. Carlin, a registered psychiatric nurse. The Court found that the Registered Psychiatric Nurses Association had failed to hold a hearing within the time limit set out in section 15.1(2) of the *Health Disciplines Act*, R.S.A. 1980, and issued an order of *certiorari* and *prohibition* quashing the Association's decision.

Binder J. stated at page 589:

> I point out that I would have based my decision solely on the non-compliance by the Respondent with the provisions of the Act, and in particular s. 15.1(2).
>
> At the request of counsel I have however dealt with all of the other issues raised or perceived, with the view to hopefully providing some guidance as to the process which should be followed in the case of complaints under the Act.

The Court went on to find that counsel to the Conduct and Competency Committee not only acted in a consulting role, but in effect dominated the hearing as to the issue of jurisdiction, drafted the reasons and relied on materials and case law not provided to Ms. Carlin. Binder J. stated at page 606:

> In my view, one of the rules of natural justice is that an "investigated person" such as the Applicant, must be given the opportunity to first know and then address, comment, make and give full answer and representation as to all arguments, authorities, information and materials which may be considered or relied upon by the hearing tribunal.

The Commission notes that the Court in the *Carlin* case did not consider the issue of solicitor-client privilege. Therefore, *Carlin* is not relevant to the issue of whether the document in this appeal should be excluded on the basis of solicitor-client privilege.

The Commission has also considered the *Melanson* case. The Commission finds the comments in that case with respect to solicitor-client privilege are also *obiter dicta*. Furthermore, the Commission notes that the recent Supreme Court of Canada decision in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (hereinafter *Pritchard*), also discounted the applicability of *Melanson* regarding when legal opinions may be subject to solicitor-client privilege. The *Pritchard* case dealt specifically with the issue of whether legal opinions are protected by solicitor-client privilege.

The Court in the *Pritchard* case reviewed the legal authorities and the rationale for solicitor-client privilege within our legal system, and discussed the *Melanson* decision, stating as follows at paragraph 26:

> The appellant relied heavily on the decision of the New Brunswick Court of Appeal in *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294. In that case, the court ordered a new hearing based on a failure by the Worker's Compensation Board to observe procedural fairness in the processing of the appellant's claim. The court held that several significant errors were made at the review committee level, negating the review committee's duty to act fairly. Among these errors were the failure to provide the appellant with its first decision, the decision to turn the appellant's claim into a test case without her knowledge and partly at her expense, and the introduction of new evidence not disclosed to the appellant. For these reasons the court, in its *ratio*, concluded "the taint at the intermediate level of the Review Committee has irrevocably blemished the proceedings" [para. 31]. Other comments made by the Court of Appeal, pertaining to the production of legal opinions, were *obiter dicta*. <u>The proper approach to legal opinions is to determine if they are of such a kind as would fall into the privileged class.</u> If so, they are privileged. To the extent that *Melanson* is otherwise relied on is error.

> [emphasis added]

With respect to the issue of procedural fairness, the Court held as follows at paragraph 31:

> Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and the administrative law context. In neither area does it affect solicitor-client privilege; both may coexist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.
>
> [emphasis added]

The Court went on to find, at paragraph 36, that the communication between the Ontario Human Rights Commission and its in-house counsel was protected by solicitor-client privilege. It was a communication from a profession legal advisor, the Commission's in-house counsel, in her capacity as such, made in confidence to her client, the Commission.

The Commission finds that the *Pritchard* decision is on point in the present appeal. The Commission finds that the memorandum is legal advice from the Ministry of the Attorney General, Criminal Justice Branch, to its client, the Ministry of Forests, regarding whether to prosecute the matter that was also before the Fire Centre Manager in his capacity as an administrative decision-maker within the Ministry of Forests. As such, it was a confidential communication between a lawyer and its client, and is subject to solicitor-client privilege. Furthermore, the Commission finds that the Third Parties were aware of the case to be met in this appeal, without the production of the memorandum. Therefore, there is no prejudice to the Third Parties if the memorandum is inadmissible.

Moreover, the Commission finds that the inclusion of the memorandum in the materials provided by the Government does not amount to a waiver of solicitor-client privilege. The Commission finds that clear language is required to waive solicitor-client privilege. In this case, the Government has expressly stated that it is not waiving the privilege.

The Commission finds that the memorandum marked as exhibit 23 is not admissible as evidence in the appeal hearing. Accordingly, the Commission has disregarded the memorandum in its deliberations.

2. Whether, like the penalties, the findings of contravention of section 4(1)(a) and 13 of the *FFPSR* are statute barred and, if so, whether this renders as moot the finding that Louisiana-Pacific is vicariously liable for those contraventions.

Both Louisiana-Pacific and the Third Parties submit that the only issue properly before the Fire Centre Manager was Downie's claim for reimbursement of its fire

suppression costs amounting to $99,046.04. Their argument turns on the interpretation of section 117 of the *Code* and the limitation period established in section 4(1) of the *ARR*.

In general, section 117(1) of the *Code* provides that, if a senior official determines that a person has contravened the *Code* or its regulations, the senior official may levy a penalty against the person. However, section 117(1) is subject to the limitation period in section 4(1) of the *ARR*:

Limitation period

4 (1) For the purposes of section 117(1) of the Act, the time period for levying a penalty against a person is 3 years after the facts on which the penalty is based first came to the knowledge of a senior official.

The Third Parties submit that the Fire Centre Manager's authority under section 117 of the *Code* to determine that a person contravened the *FFPSR* is linked to his authority to levy a penalty. They argue that once the time limit for levying a penalty expired, the Fire Centre Manager ceased to have the jurisdiction to make a determination under section 117 in respect to contraventions of the *FFPSR*.

The Third Parties submit that a senior official's (in this case, the Fire Centre Manager's) authority to issue a notice of determination under section 117 is found in subsection 117(5). They argue that unless a senior official has the jurisdiction to levy a penalty, he has no authority to issue a notice of determination. In the present appeal, once 3 years had elapsed from the time the facts on which the penalty could have been based first came to the knowledge of a senior official, the Fire Centre Manager no longer had any jurisdiction to issue a notice of determination under section 117.

Louisiana-Pacific argues that, due to the expiry of the limitation period, there was no live dispute between the parties. Therefore, the Fire Centre Manager's finding of vicarious liability with respect to the contraventions was academic and moot, and it is inappropriate for the Commission to make a decision with regard to the contraventions. Louisiana-Pacific cites *Borowski v. Canada (Attorney General)*, [1989] S.C.R. 342 in support of its argument. It submits that the Fire Centre Manager's determination should be rescinded as it pertains to Louisiana-Pacific.

The Government conceded that the two administrative penalties of $345 levied by the Fire Centre Manager were statute barred under section 4(1) of the *ARR*. However, the Government submits that the Fire Centre Manager's jurisdiction to determine whether there were contraventions of the *FFPSR* is unaffected by the limitation period. The Government submits that section 117 authorizes a senior official to make two types of determinations: first, whether a person has contravened the *Code*, the regulations, the standards or an operational plan; and second, whether to levy a penalty. If a senior official decides to levy a penalty, he or she must give a notice of determination containing the information set out in subsection 117(5).

The Government argues that a plain reading of subsection 117(5) does not support the Third Parties' submission that it is the source of the Fire Centre Manager's authority to make determinations under section 117.

In support of his submissions, counsel for the Government referred to the Commission's decision in *Weyerhaeuser Company Limited v. Government of British Columbia* (Appeal No. 2002-FOR-007(a), November 28, 2003) (unreported) (hereinafter *Weyerhaeuser*).

In *Weyerhaeuser*, a District Manager had issued a determination under section 117 of the *Code* that the appellant was responsible for two contraventions of the *Timber Harvesting Practices Regulation*. The Commission considered whether the District Manager's decision was issued within the limitation period established in section 4(1) of the *ARR*. The Commission found:

> [T]he time limit in section 4(1) of the *ARR* is intended to apply to the decision to levy a penalty under section 117 of the *Code*, and does not apply to determinations of contraventions. (page 13).
>
> … Accordingly, the Commission finds that the District Manager's decision to levy the penalties was made outside of the limitation period, and is therefore void for lack of jurisdiction.
>
> The Commission also finds that the limitation period under section 4(1) of the *ARR* only applies to monetary penalties as described under the *ARR*. An ordinary reading of section 4(1) of the *ARR* does not apply to findings of contravention. Under these circumstances, the Commission is without authority to rescind the findings of contravention as they are not subject to the limitation period found in section 4(1) of the *ARR*. As there was no other evidence or argument made that would justify the rescission of the District Manager's findings of contravention, the Commission confirms the determination of contravention under section 21(1) of the *THPR*. (page 15)

The Third Parties submit that *Weyerhaeuser* was wrongly decided and should not be followed by the Commission in the present appeal. While the Commission may be bound by the decisions of certain courts, it is not required to follow its past decisions. Each appeal to the Commission must be decided on its own merits.

The Commission has considered the submissions of the parties in this appeal, and has reviewed the *Weyerhaeuser* and *Borowski* decisions. The Commission finds the reasons in the *Weyerhaeuser* decision to be applicable to the present appeal. In particular, the Commission finds that, on a plain reading of section 117, the Fire Centre Manager had the authority to determine whether there were contraventions of the *FFPSR*, independently of any authority to levy a penalty. Although the Fire Centre Manager lost the jurisdiction to levy a monetary penalty for a contravention once the time limit in section 4(1) of the *ARR* had passed, he retained the jurisdiction to make a determination with respect to contraventions.

The Commission finds that the issue of the alleged contraventions of section 4(1) and (13) of the *FFPSR* were properly before the Fire Centre Manager when he made his determination, and that there is a "live dispute" between the parties in that regard. Therefore, the *Borowski* decision does not apply to the present appeal, the determination in respect to the contraventions is not moot and the Commission has jurisdiciton over these matters.

3. Whether the Third Parties are "contractors" of Louisiana-Pacific within the meaning of section 117(2) of the *Code* such that Louisiana-Pacific is vicariously liable for their actions.

Louisiana-Pacific submits that the Fire Centre Manager's determination in respect to contraventions of the *FFPSR* do not apply to Louisiana-Pacific and must be rescinded. Louisiana-Pacific argues that it is not vicariously liable for the acts of the Third Parties because neither is a "contractor" of Louisiana-Pacific within the meaning of section 117(2) of the *Code*.

Section 117(2) of the *Code* provides:

> If a person's employee, agent or contractor, as that term is defined in section 152 of the Forest Act, contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.

Section 152 of the *Forest Act*, R.S.B.C. 1996, c. 157, provides:

> **Interpretation for sections 152 to162**
>
> **152** In this section and sections 153 to 162:
>
> **"contract"** has a meaning corresponding to the definition of "contractor" below;
>
> **"contractor"** means a person who has an agreement with the holder of a forest licence, timber licence or tree farm licence to carry out one or more aspects of the holder's timber harvesting operations under the licence, and includes "person under contract" as defined by the regulations;

Louisiana-Pacific submits that its arrangement with Downie to harvest timber was not a contract, but rather, an assignment of the portion of Louisiana-Pacific's FL A-17645 in respect to Block 3 of CP 150.

Louisiana-Pacific argues that the timber harvesting operation being carried out on Block 3, on the day of the fire, was Downie's timber harvesting operation, **not** Louisiana-Pacific's timber harvesting operation.

Louisiana-Pacific submits that the issue to be decided by the Commission is whether Downie was a contractor of Louisiana-Pacific as defined in section 152 of the *Forest Act*. Louisiana-Pacific maintains that, if Downie was not a contractor within the

meaning of that section, then Louisiana-Pacific is not vicariously liable under section 117(2) for contraventions of the *FFPSR*.

Louisiana-Pacific submits that a "contractor" generally means a person who provides services in exchange for a fee. It argues that this ordinary meaning of contractor is reinforced by the scheme of the *Forest Act* and related legislation.

In support of its submission, Louisiana-Pacific refers to the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 109/98 ("*THCSR*"), and notes that the mandatory provisions of section 48 of the *THCSR* must be read into the contracts of all "contractors." Louisiana-Pacific submits that, in the case of an assignment of rights under a forest licence, the inclusion of the mandatory provisions of the *THCSR* leads to absurdities. It referred the Commission to the rule of statutory interpretation that includes a presumption against absurd consequences in interpreting legislation.

Louisiana-Pacific submits that the Commission should avoid interpreting section 117(2) of the *Code* to include "assignee" in the list of those for whom a person may be vicariously liable. It argues that to do so would be tantamount to an error of law.

Louisiana-Pacific submits that the following points support its argument that Downie is not a contractor:

- Downie was not conducting work for Louisiana-Pacific;
- Downie bore the opportunity and risk to profit or lose from the operations;
- Downie engaged a logging contractor to carry out the timber harvesting work;
- Decisions as to when and how much to harvest were made by Downie in consultation with its contractor;
- Downie supervised the harvesting operations, Louisiana-Pacific did not; and
- Downie performed the post-harvest silviculture and reforestation work.

No one from Louisiana-Pacific testified at the hearing. However, Barry Wagner, Woods Manager, for Downie was called as a witness for the Third Parties. Mr. Wagner stated that, in his position, he is responsible for all of Downie's activities relating to harvesting timber, and that he is one of several people with signing authority for Downie.

In 2000, Downie had an agreement with Louisiana-Pacific to harvest timber on FL A-17645, CP 150, Block 3. Mr. Wagner testified that it was a verbal agreement whereby Downie was entitled to take 50,000 m^3 of timber annually. Downie paid Louisiana-Pacific a lump sum for the right to harvest the timber based on the cost

per metre that Louisiana-Pacific had incurred in developing the area. Downie disposes of the timber as it wishes, and does not share any profit with Louisiana-Pacific. Downie also carries out the silviculture responsibilities in respect to the area harvested by Downie.

According to Mr. Wagner, Downie had "an on-going" agreement that was evolving as discussions between the two companies took place. The terms of the agreement are vague. Mr. Wagner did not know how long the arrangement with Louisiana-Pacific had been in effect before the fire in August 2000. He stated that the agreement started "sometime in the spring" of 2000.

The Government submits that Downie was a "contractor" of Louisiana-Pacific with regard to Block 3, and therefore, is vicariously liable under section 117(2) of the *Code* for Downie's actions in relation to the logging operations on Block 3.

The Government referred the Commission to the following provisions of the *Forest Act*, which were in effect at the relevant time:

Form of agreements

12 Subject to this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations made under that Act, a district manager, a regional manager or the minister, on behalf of the government, may enter into an agreement granting rights to harvest Crown timber in the form of a

(a) forest licence,

Content of forest licence

14 A forest licence

…

(e) must provide for cutting permits to be issued by the district manager, within the limits provided in the forest licence and subject to this Act and the Forest Practices Code of British Columbia Act, to authorize its holder to harvest the allowable annual cut, from specified areas of land within the timber supply area specified in the forest licence; …

(g) may make provision for timber to be harvested by persons under contract with its holder; …

Interpretation and application

53 (1) In this Part:

…

"agreement" means an agreement entered into under this Act

Consent to transfer

54 (1) The minister's prior written consent must be obtained for

(a) the disposition of an agreement or an interest in an agreement,

…

The Government submits that, without the written consent of the Minister of Forests pursuant to section 54(1)(a) of the *Forest Act*, it was unlawful for Louisiana-Pacific to transfer rights under its forest licence. The Government further submits that the rights under CP 150 were not transferable at all under the *Forest Act*. If the agreement between Louisiana-Pacific and Downie is lawful, it must necessarily be a contract.

The Government further submits that the *Forest Act* is silent about how a contractor is paid. The Government submits that parties can structure deals to harvest timber in any way they choose, subject to the statutory and regulatory obligations in respect to harvesting of Crown timber.

The Government submits that section 117(2) of the *Code* creates broad vicarious liability for contraventions of the *Code*, and such liability is broader than vicarious liability at common law.

The Government submits that the definition of "contractor" in the *Forest Act* has two requirements. A person is a contractor of a forest licence holder if:

(a) the person has an agreement with the forest licence holder; and

(b) the agreement is to carry out one or more aspects of the timber harvesting operations under the licence.

The Government argues that there is no dispute that Downie had an agreement with Louisiana-Pacific. Nor can there be a dispute that part of the agreement was that Downie would carry out the timber harvesting operations described in Louisiana-Pacific's forest licence. In addition, there was no evidence of any notice of intention to dispose of FL A-17645, nor did the Minister of Forests consent to such a disposition. It follows that Downie is Louisiana-Pacific's contractor within the meaning of section 152 of the *Forest Act*, and therefore, Louisiana-Pacific is vicariously liable for contraventions within the meaning of section 117(2) of the *Code*.

The Commission has considered the *Code*, the *Forest Act*, and the relevant regulations as a whole. The Commission finds that the legislation provides a framework for the harvesting of a public resource (Crown timber) by private companies. Only a licence holder may harvest Crown timber, and in so doing, the licensee must comply with all statutory obligations. The Commission notes that, in response to a question from the Commission, Jim Graham, of Graham's Farms, testified that the timber mark used for timber harvested from Block 3 "belonged to

the block." The timber mark specified in the cutting permit for Block 3 is registered to Louisiana-Pacific.

Section 96 of the *Code* deals with unauthorized timber harvest operations:

> **96** (1) A person must not cut, damage or destroy Crown timber unless authorized to do so
>
> (a) under an agreement under the Forest Act or under a provision of the Forest Act
>
> …
>
> (2) Without limiting subsection (1), a person must not remove Crown timber unless authorized to do so
>
> (a) under an agreement under the Forest Act or under a provision of the Forest Act,
>
> …
>
> (3) If a person, at the direction of or on behalf of another person,
>
> (a) cuts, damages or destroys Crown timber contrary to subsection (1), or
>
> (b) removes Crown timber contrary to subsection (2), that other person also contravenes subsection (1) or (2).
>
> [emphasis added]

The licence and the cutting permit were in Louisiana-Pacific's name. Louisiana-Pacific gave permission to Downie to conduct timber harvesting in Block 3, therefore, Louisiana-Pacific's relationship with Downie must fall under "a provision of the *Forest Act*" (sections 96(1)(a) and 96(2)(a)). Otherwise, the Third Parties would be in breach of section 96 of the *Code*. From the evidence provided, this clearly was not the intent of the arrangement between Louisiana-Pacific and the Third Parties.

The Commission finds that Louisiana-Pacific had the sole authority to conduct timber harvesting operations on Block 3 in accordance with FL A-17645. Any timber harvesting operations carried on in that cutblock, with the approval of Louisiana-Pacific, were the forest licence holder's "timber harvesting operations," as referred to in the definition of "contractor" in section 152 of the *Forest Act*.

The Commission finds that, on a plain reading of the definition of "contractor" in section 152 of the *Forest Act*, Downie is a contractor of Louisiana-Pacific for the purposes of section 117(2) of the *Code*. Forests on Crown land in British Columbia are a public resource, and the tenure system that provides timber harvesting rights not only allocates cut, but also demands that licensees meet certain standards in the interest of protecting the public resource. The proposition that a licensee could

"assign" its rights and associated responsibilities to a person who has not had to meet these standards, defeats the intent of the legislation established to ensure responsible stewardship of the public resource.

Accordingly, the Commission finds that Louisiana-Pacific was properly found to be vicariously liable for the acts of the Third Parties under section 117(2) of the *Code*.

4. Whether there was a contravention of section 4(1)(a) of the *FFPSR*.

There is no dispute that, on August 21, 2000, the fire weather indices, as determined from the Tsar Creek weather station, had produced a fire danger class III (moderate) rating for more than 3 consecutive days. Schedule 1 of the *FFPSR* classifies tree felling and "bucking-power saw" in the "high" risk category (category A), while helicopter yarding and "bucking-landing" are classified as "moderate" risk (category B). Schedule 5 of the *FFPSR* states that, for activities with a risk classification of A or B, "[a]fter 3 consecutive days of DGR III maintain a fire watch after work for 1 hour."

The Third Parties submit that they complied with the fire watch requirements in the *FFPSR* and therefore, did not contravene section 4(1)(a) of the *FFPSR* as found by the Fire Centre Manager.

The evidence pertaining to this issue is as follows. At the time of the fire, the block had been felled with the exception of an area in the southwest corner. According to testimony of Jim Graham, of Graham's, a highlead yarding system was used in the northern portion of the block, and yarding had been completed. Helicopter yarding was used in the southern portion of the block and, at the time of the fire, approximately one third of the helicopter logging had been completed in the southeast corner of the block.

On August 21, 2000, Dave Carson, a faller employed by Bill Walker (a subcontractor of Graham's), was felling the remaining timber in the southwest corner of the block. Two other fallers, Dave Walker and Greg Banbury, were working with the riggers in the southeast section of the block. They were bucking logs that were too large for the helicopter to carry. They bucked logs during the 15 to 20 minutes that the helicopter was being refueled, and during the 60 to 70 minutes of active helicopter yarding, they assisted the riggers with setting chokers.

According to testimony by Dave Walker, he and Mr. Banbury completed their work sometime after 5pm, and had shut down their saws 60 and 70 minutes prior to that, during the last cycle by the helicopter. After the last cycle, Dave Walker, Mr. Banbury, and the two riggers on the block, left the block using a trail that ran along the east side of the block. It took approximately 30 minutes to walk down to the road. Dave Walker also testified that Mr. Carson had left the block approximately 2 hours before he and the rigging crew walked down.

The Commission finds that, based on the testimony presented, none of the "hill crew" (i.e. the fallers and riggers) were told that they had to perform a fire watch.

With regard to whether any of the landing crew were told to perform a fire watch, Mr. Wagner of Downie testified that Louisiana-Pacific had notified Downie by email that the fire danger class rating was III, and that this would have been communicated to the logging crew by a supervisor. Mr. Graham testified that Graham's had received notice from Downie that a fire watch was required. He testified that their normal practice was to have the landing crew stay for one hour after activities in risk class A or B had ceased. During that time, the landing crew would do normal clean-up, refuel and sharpen saws, and do other maintenance work.

The landing crew on the day that the fire started consisted of Daniel Ife, Terry Hilton, Colin Pinotti, and Barry Glasgow. When Mr. Graham was asked if he had any recollection of a specific conversation with the landing crew regarding the fire watch, he replied, "I think so, but it was a long time ago and since then there has been lots of talk about this." He also stated that there is not one person designated as the fire watcher, but that the responsibility is assumed by the entire landing crew.

Two of the landing crew, Messrs. Ife and Hilton, were called as witnesses. Both testified that they were on the landing doing maintenance for at least one hour after the last turn from the helicopter had been dropped and bucked, although neither had a wristwatch. The length of time the crew spent on the landing before leaving for camp was not in dispute.

Testimony by Messrs. Graham, Hilton and Ife indicated that their view of the block from the landing was limited to the eastern side by a change in aspect just above the "leave patch" on the block. Site lines were marked by Messrs. Graham, Hilton and Ife on topographic maps of the block, and those witnesses were in agreement that they could not see the western part of the block, above a ridge and behind the leave patch, where timber was being bucked and rigged for the helicopter. They also indicated that the west side of the block was clearly visible from the road that they took to go back to camp. In response to a question from the Commission, Mr. Hilton testified that, on the day of the fire, they did not stop the truck on the way out at a spot where the west side of the block could be clearly seen. Both Mr. Hilton and Mr. Ife testified that they saw no signs of fire or smoke as they drove past the block at the end of the day when they were returning to camp.

The Third Parties submit that, in this case, the "worksite", as defined in the *FFPSR,* was Block 3, and included the landing where the helicopter delivered logs. The Third Parties submit the landing crew had been advised to keep a fire watch, and they did so while they were at the worksite. Therefore, a "fire watcher" as defined in the *FFPSR* was present, in that there was a person at the worksite who provided surveillance for forest fires.

The Third Parties also submit that the reference to "watch for sparks" in section 4(1)(a) of the *FFPSR* is related to the requirement to have a fire watcher present during "hot work", which is defined in the *FFPSR* as "any work generating significant amounts of heat and includes the cutting, grinding… of metals." The Third Parties maintain that, once hot work had ceased, the creation of sparks is not a concern,

and what remains is the requirement to watch for fires. They argue that Schedule 5 of the *FFPSR* does not require a fire watcher to be present during hot work, in contrast to section 14(2) of the *FFPSR*, which states that "The fire watcher required under subsection (1) must, in addition to the requirements of section 4(1), remain at the site of the hot work for 30 minutes after the hot work has ceased". The Third Parties also submit that the *FFPSR* does not contemplate that a fire watch under Schedule 5 will be located at each area of the worksite where hot work has taken place. The Third Parties submit that, because a fire watch is not expressly required "during operations" under section 4(1) and Schedule 5 of the *FFPSR*, and is simply required to be "present", the presence of the logging crew on the "worksite" during operations is sufficient to watch for fires.

The Government makes no distinction between different types of fire watch required under the *FFPSR*, and does not dispute the length of time that the landing crew remained on the block after the cessation of activities in risk class A and B. However, the Government submits that the proper interpretation of the *FFPSR* requires that a person be able to see the thing that they are watching, and that the fire watcher's attention must be directed to the area to be watched. The Government argues that, if the fire watcher is engaged in other activities, they are not able to perform the fire watch.

The Government argues that, in this case, the landing crew could not see the ground west of the ridge, as indicated by the witnesses' marks on the topographic map of the block, and therefore, half of the area where bucking and helicopter yarding took place on the day that the fire was reported was obscured from their view. Furthermore, the Government maintains that the landing crew was engaged in other activities while they were at the worksite, and they did not have their attention directed to the area where the risky activities had occurred. Therefore, they were not "fire watchers" as contemplated by the *FFPSR*.

The Commission has considered section 4(1)(a) of the *FFPSR* in context of the intent of the entire regulation, which is to prevent and suppress fires. Fire danger ratings are provided to those carrying out industrial activities in order to provide information for making required adjustments to operations as weather and fuel conditions change, so that the risk of fires starting and causing damage is minimized. The purpose of having a fire watch is to enable the early detection of fires, in order to minimize the damage caused by fires. It is expected, therefore, that when the requirement for a fire watch is brought on by more than 3 consecutive days of fire danger class III, some practices would be in place that do not occur during days when a fire watch is not required.

In addition, the Commission finds that the definition of "fire watcher" suggests that a specific individual or individuals should be designated to perform this duty, and that this should not be a general assignment that lacks a clear designation of responsibility. Further, periodic viewing of the visible portions of the hillside is not the same level of intensity as "surveillance", which is the word used in the definition of "fire watcher" in the *FFPSR*. The Commission finds that "surveillance" requires that the designated fire watcher be able to see all areas where a fire could start, and especially areas where high fire risk activities, such as helicopter yarding and

bucking with a chain saw outside of a landing, are being conducted. That was not done in this case.

The Commission finds on the evidence that, for those working on the block, a fire watch day was not materially different from any other day. No special instructions were presented, and no notes were kept regarding the length of time the landing crew stayed on the landing or how frequently they scanned the hillside. In response to a question from the Commission as to what was done differently during a fire watch day, Mr. Hilton of the landing crew replied that the day "was the same as any other day." The other landing crew witness, Mr. Ife, indicated that the difference on that day was that they sat around longer at the landing doing clean up work after the rigging work had ended for the day. Mr. Hilton could not recall if specific instructions regarding the fire watch had been provided, although Mr. Ife recalled that Mr. Graham had informed the whole crew of the fire watch requirement at the camp.

The witnesses' evidence clearly establishes that, from the landing, the crew was unable to see the western side of the block where a significant portion of that day's activities had taken place. The crew could only view the western side of the block when passing the base of the slope on the road back to camp. The Commission finds that, despite the statement by one landing crew witness that they were able to "watch the hill steadily" during and after maintenance work, they did not fulfill the requirements of a fire watch that come from a plain reading of the language in section 4(1) and Schedule 5 of the *FFPSR* and a logical interpretation of the intent of the regulation. One cannot effectively watch for fires when one cannot see a large portion of the worksite where high fire risk activities are being conducted, on a day where the fire danger class for the area is moderate.

Furthermore, the Commission notes that the licensee's Fire Preparedness Plan lists only a "Restrictions on Industrial Operations" requirement for a fire watch, and does not have any description or procedure regarding how to carry out an appropriate fire watch.

For all of these reasons, the Commission finds that there was a contravention of section 4(1)(a) of the *FFPSR*.

5. Whether there was a contravention of section 13 of the *FFPSR*.

Section 13(2) of the *FFPSR* states that "a person must not operate a small engine if the ability of the muffler to reduce hot carbon emissions has been lessened by modification of the muffler or by redirection of the emissions." Similarly, section 13(1) of the *FFPSR* states that "a person must not operate a small engine unless… the muffler is maintained in good repair."

The Third Parties submit that there is no evidence that establishes, on a balance of probabilities, that a chainsaw was used on the Block on August 21, 2000, that did not comply with the requirements of section 13 of the *FFPSR*. The Third Parties submit that the Fire Centre Manager erred in concluding that someone in Graham's

crew or the falling crew used a saw with a modified muffler in the area where the fire started.

The Government submits that the strongest evidence that there was a contravention of section 13 is the modified mufflers that were found at the site. The Government maintains that at least one of the mufflers had its spark arrestor screen removed, and that the removal of the spark arrestor screen lessened the muffler's ability to reduce hot carbon emissions, contrary to section 13(2) of the *FFPSR*. Alternatively, the Government submits that, even if the Commission concludes that the muffler had not been modified in a way that lessened its ability to reduce hot carbon emissions, the removal of the screen meant that the saw was not "in good repair", contrary to section 13(1)(a) of the *FFPSR*.

According to the testimony of Dave Walker, he used a Husqvarna model 288XP chainsaw. It was a few months old and all of its parts were intact. He also testified that the two other fallers, Messrs. Banbury and Carson, each used a Stihl model 066 chainsaw, but he was not aware of the condition of those saws. Dave Walker also stated that a saw belonging to Mr. Ife was on the block and that it was a Husqvarna 288XP. Dave Walker testified that the saw had been used the day before, although his testimony was unclear as to who had used the saw. Mr. Ife, in his testimony, confirmed the make of the saw, and indicated that it was in good condition and that he had just replaced the muffler the week before. He testified that the rigging crew moved his saw with them on the block, and that Dave Walker had used the saw, but Mr. Ife was not sure if any of the rigging crew had used it.

According to the testimony of Jason Towns, a rigger working on the block, two other saws were on the block on the day of the fire. He was uncertain as to their make. However, according to a report submitted by the Ministry, which was prepared by Darryl Barrault, a chainsaw mechanic who examined several saws that were found on the block and the burnt mufflers that were recovered from the fire, both saws were Husqvarna model 272 or 371, and did not have parts missing or added to the mufflers, or modified parts on the mufflers.

The mufflers from two burnt saws that were recovered from the fire were provided to the Commission as evidence, and were marked as exhibits 10 and 26. Dave Walker testified that one of the burnt mufflers, exhibit 10, was from a Husqvarna 288XP, and that the deflector and screen were missing from that muffler. He agreed with the statement that the damage had occurred before the fire. Mr. Koerber, one of the Ministry's Forest Protection Assistants who investigated the fire, stated that exhibit 10, which was also referred to as "muffler #2" in Mr. Barrault's report, had no screen, the guard was flipped around and exhaust would be redirected straight out. In his report, Mr. Barrault stated that, regarding muffler #2, the "exhaust screen was removed; broken outside guard." Mr. Ife also examined exhibit 10 and confirmed that the muffler screen had been removed.

Another muffler, from a Stihl 066, was also reported damaged according to Mr. Barrault's report. In his report, he referred to that muffler as "muffler #6", and he stated that it was "damaged at exhaust outlet". Testimony from Mr. Ife indicated

that screens can be easily punctured by accident and that they are susceptible to damage from the heat of the emissions.

Mr. Koerber testified that the burnt muffler referred to as exhibit 26, and "muffler #1" in Mr. Barrault's report, and which was shown in photos of the fire site that were provided to the Commission, was a muffler from a Husqvarna 288 that had been modified by a hole punched in the screen. A bit of screen remained attached. In response to a question from the Commission, Mr. Koerber stated that he disagreed with Mr. Barrault's report, which indicated that muffler #1 was undamaged. Mr. Koerber testified that a metal piece had been removed from that muffler.

Mr. Walker testified that the saw in the photo at page 5 of the Wildfire Cause Investigation Report, which shows a saw on the ground next to a burned portion of the block, was a Husqvarna 288XP that had been "walkerized", whereby pipes are added to the muffler to facilitate exhaust emission and increase power (there is no connection between Mr. Walker's last name and the modifications to the saw known as "walkerization"). He testified that this saw was a spare one left in camp, and that it was brought to the site during the fire.

Based on the evidence, the Commission finds that at least one muffler recovered from the fire, namely, the muffler from the Husqvarna 288XP which was marked as exhibit 10, had been purposefully modified before the fire occurred. However, it is unclear from the evidence whether the second burnt muffler had been modified before the fire or, alternatively, damaged by accident.

Although a purposefully modified muffler was recovered from the area of the fire, section 13(2) of the *FFPSR* requires that, to be found in contravention, the saw must have been operated, and the ability of the muffler to reduce emissions must have been lessened. Therefore, to address the remainder of this issue, the Commission contemplated two questions: 1) whether there is sufficient evidence to find that the saw with a purposefully modified muffler was operated on the block; and, 2) whether there is sufficient evidence to find that the ability of that muffler to reduce hot carbon emissions had been lessened by the modification of the muffler.

The modified muffler came from a Husqvarna 288XP saw, and two of those types of saws were on the block on the day of the fire. One such saw belonged to Dave Walker, who was using the saw to buck logs. The second saw belonged to Mr. Ife, who testified that he had replaced the muffler the week before and had used the saw a week earlier on Block 3. Mr. Ife testified that Dave Walker used the saw belonging to Mr. Ife on the block, although his testimony was unclear regarding when the saw had been used.

It is apparent from this evidence that both of the Husqvarna 288XPs that were on the block on the day of the fire had been recently operated, although one of them, Mr. Ife's, may not have been operated on the day of the fire. Both Mr. Ife and Dave Walker testified that they had not modified their saws, yet the only undisputedly modified muffler was from a Husqvarna 288XP, and only Messrs. Ife and Walker had Husqvarna 288XPs on the block. Possible explanations are that

one of the witnesses was mistaken, other people working on the hill modified the saw, or there was another Husqvarna 288XP on the block that no one was aware of.

Based on the evidence, the Commission finds, on a balance of probabilities, that the Husqvarna 288XP with a modified muffler had been operated on the block during the logging operations. Although the evidence is unclear regarding whether the saw was operated on the day that the fire started, the Commission notes that that is not required for there to be a violation of section 13(2) of the *FFPSR*. The language in that section does not expressly state that a person must not operate, on the day that a fire starts, a small engine with a modified muffler that lessens the muffler's ability to reduce hot carbon emissions. It simply prohibits a person from operating such an engine, period.

With regard to the ability of the modified muffler to reduce hot carbon emissions, the Third Parties submit that Mr. Barrault's report was expert evidence, and it supports the position that the modification did not lessen the ability of the muffler to reduce hot carbon emissions.

The Government submits that the faller and buckers who testified (Messrs. Walker, Hilton and Ife) all stated that the muffler screens are meant to reduce the emission of sparks. The Government also referred the Commission to the Husqvarna 288XP manual, which contains the following statements at page 7:

> The exhaust fumes from the engine are hot and may contain sparks which can start a fire.
>
> In countries with a hot climate there is a high risk of forest fires. Our chain saws are therefore fitted with a SPARK ARRESTOR MESH. Check whether your saw is fitted with such a mesh.

The Government also submits that little weight should be given to Mr. Barrault's report because he did not testify at the hearing.

The Commission notes that Mr. Barrault's report consists of a rudimentary questionnaire, with circles around "yes" or "no" answers and a few brief comments completed by Mr. Barrault. The Commission finds that the report was not very helpful in determining whether the ability of the muffler in question to reduce hot emissions was lessened by removal of the screen. Question 4 addressed that issue, and reads as follows:

> In your opinion was the ability of this muffler to reduce hot carbon emissions lessened by any of the above modifications?

With regard to the modified muffler from the Husqvarna 288XP, Mr. Barrault answered "no" to question 4. However, no explanation of this question, and no elaboration beyond a simple yes or no, was provided. In addition, Mr. Barrault's credentials were not supplied and he was not called to testify, and therefore, there was no opportunity for cross-examination. Consequently, the Commission puts little weight on Mr. Barrault's report, and puts greater weight on the testimony of the fallers and buckers, and the information in the Husqvarna 288XP manual.

In summary, there is clear evidence that one muffler that had been purposely modified was recovered from the fire. The Commission finds that, on a balance of probabilities, this muffler was from a chainsaw that had been operated on the block, and that the ability of the muffler to reduce hot carbon emissions was lessened. The Commission therefore finds that section 13(2) of the *FFPSR* was contravened.

6. Whether the Fire Centre Manager was correct in denying compensation for the fire suppression costs, pursuant to section 95(5) of the *Code*.

Section 95(5) of the *Code* provides that the government is not liable to compensate a person for carrying out initial fire suppression activities if a forest official has determined under section 95(2) that a person, or that person's employee, "caused a fire … or failed to comply with the regulations and that failure contributed to the cause or spread of a fire" [emphasis added].

Louisiana-Pacific and the Third Parties submit that the issue of whether or not a fire watch was provided is moot with regard to section 95(2) of the *Code* because the Government abandoned the assessment of a penalty for the alleged violation due to expiry of the limitation period, and the Fire Centre Manager did not make a determination that any violation of section 4(1) of the *FFPSR* contributed to the spread of the fire. They submit that the Fire Centre Manager based his decision to deny fire suppression costs on his conclusion that there was a failure to comply with section 13 of the *FFPSR* and that this contravention caused the fire.

The Government submits that the Fire Centre Manager properly concluded that the contraventions by the licensee's contractors, Graham's and thus Downie, contributed to the cause or spread of the fire, and he properly denied fire suppression costs.

The Commission finds that the contravention of section 4(1) of the *FFPSR* is not moot with regard to section 95(2) of the *Code*, despite the fact that the Government abandoned the assessment of a penalty for the violation. The Commission has already found that the expiry of the limitation period with respect to administrative penalties under section 117 of the *Code* did not render moot the issue of the contraventions of the *FFPSR*. Furthermore, the Commission has already confirmed that there were contraventions of both sections 4(1)(a) and 13(2) of the *FFPSR*.

In addition, the Commission disagrees that the Fire Center Manager did not link the contravention of section 4(1)(a) of the *FFPSR* with his denial of fire suppression costs. In his decision, the Fire Centre Manager states "As there have been contraventions, I have decided that there can be no compensation for the costs … incurred by the licensee in suppressing this fire." The Fire Centre Manager linked denial of costs under section 95(5) with more than one contravention, as he used the plural form of the term. Therefore, the Commission will turn to consider whether the Fire Centre Manager properly concluded that the "contraventions" caused or contributed to the spread of the fire.

Regarding whether the contravention of section 4(1)(a) of the *FFPSR* contributed to the spread of the fire, the Wildfire Cause Investigation Report estimates the time of ignition as approximately 5:00 pm Mountain Standard Time (4 pm Pacific Standard Time), and that the fire was reported at 19:57 PDT. Mr. Neill, who initially reported the fire, testified that he spotted the fire between 7:30 and 8:00 pm PDT, and that he had to fly south for approximately 10 minutes before he was able to report the fire. This suggests that he first saw the fire at approximately 7:45 pm PDT. The crew in the logging camp first saw the orange glow from the fire at approximately 8:30-9:00 pm PDT, according to testimony of Mr. Hilton. Mr. Hilton also testified that the landing crew were in camp by 6:30 pm PDT, and that it was a 5 to 15 minute drive to camp from the landing where they were working. Therefore, the landing crew would have left the block at approximately 6:15 pm PDT, driving past the west side of the block shortly afterwards.

If the estimated ignition time in the Wildfire Cause Investigation Report is accurate, the fire would have been underway by the time the landing crew left the block. Alternatively, the difference in time between when the landing crew left the block, and when Mr. Neill first spotted the fire, is approximately 1 hour, 15 minutes. Mr. Hilton testified that when they first drove to the block to investigate the glow (about 1 hour after the fire was spotted by Mr. Neill), the fire was 300 to 500 feet "around." Mr. Towns testified that when the crew first returned to report the fire, they said it was "big." Mr. Neill testified that when he first saw the fire, it had a column of smoke 500 to 1000 feet high.

Collectively, this evidence indicates that the fire had started by the time the landing crew left the block. Consequently, the Commission finds that, if a proper fire watch had been carried out, the fire could have been suppressed much earlier. Therefore, the contravention of section 4(1)(a) of the *FFPSR* contributed to the spread of the fire.

Regarding the probable cause of the fire, and whether the violation of section 13(2) of the *FFPSR* contributed to the cause of the fire, the Third Parties submit that the testimony from Messrs. Ife, Dave Walker, Hilton and Towns indicates that the fire started below the area where fallers and riggers had been working that day. The Third Parties submit that the testimony of these witnesses is important, as they were the first to see the fire. They indicated the fire started at a point were felled timber was still visible above the fire, and therefore the fire was not yet in the area where the logging had taken place that day. The Third Parties submit that the prevailing wind and the slope resulted in the fire spreading uphill from its point of origin, and that this was confirmed by reports from Graham's employees that the fire had spread uphill between the first and second time they visited the block.

The Third Parties submit that the testimony from the logging crew is more reliable than the testimony of Mr. Neill regarding the fire's point of origin, because his plane was flying quite high (1000 feet), traveling fast (100 mph), and he had a limited view and was not familiar with Block 3, so he was unable to distinguish between slash and felled timber. Therefore, the Third Parties submit that the evidence rules out the possibility that the fire started as a result of actions of the logging crew.

The Third Parties also submit that the logging crew in camp observed lightning that hit Kinbasket Lake and the glacier on the opposite side of the valley, during the week of August 21, 2000. Further, Mr. Ife testified that he had seen lightning 2 to 3 days before the fire, in the evening, and that the lightning had been up the Kinbasket Valley where the block was located.

The Government submits that Mr. Neill was familiar with the Kinbasket Valley and that he had a good view of the block, the fire, and some boulders that he used to landmark the fire. The Government also submits that the fire cause investigation by Mr. Koerber was conducted independently of previous reports of the fire's location, and used markers that indicate direction of spread to eliminate certain areas as being the point of origin. The Government submits that both Mr. Koerber's and Mr. Neill's evidence regarding the fire's point of origin indicate the fire originated within the area being worked by the buckers and riggers.

With regard to the theory that lightning caused the fire, the Government submits that a search of Environment Canada's Lightning Detection System found no strikes to the ground near Block 3 within 10 days prior to the fire. Further, Mr. Koerber found no evidence of a lightning strike on the block while conducting his investigation.

The Commission notes that the area that Dave Walker indicated he was working in, which he marked on topographic map of the block, overlaps slightly at the western end with the area of the fire origin location, which was marked by Mr. Towns and Mr. Ife on a copy of the same map. The Commission also notes that, although Mr. Ife and Mr. Hilton were in the first group of three that went up to check out the fire, and they both looked at the location of the fire from a point where they stopped the vehicle on the road below the fire, they each marked two different places on the topographic map to show where they had viewed the fire. It is possible that they stopped the vehicle twice, and that the points of reference were from two different locations, or that one or both were mistaken about the location of the vehicle when they viewed the fire, and, therefore, could be mistaken about the location of the fire itself. Both testified that they did not spend much time at the block during the first visit, and that they returned quickly to camp to relay information.

Based on the evidence, the Commission finds that lightning is an unlikely cause of ignition. Further, it is unlikely that the fire was caused by a person who was not part of the timber harvesting crew. The block was in a remote location, access to the block was limited to a single gravel road, and there had been no reports of other people besides the timber harvesting crews in the vicinity. Absent any other reasonable explanation for the cause of fire, the Commission finds that the most probable cause was related to the logging activities on the block. Circumstantial evidence to support that finding is strong. According to the Government's evidence, the fire originated in exactly the area where Dave Walker had been bucking logs and assisting with rigging for helicopter yarding. Two of the three witnesses tendered by the Third Parties indicated that the fire originated in an area that overlaps with the area where Dave Walker indicated that he was working that day. At least one chainsaw muffler had been modified such that the spark arrestor mesh was missing or damaged, and there was other evidence of "walkerized" saws

and saws with other types of muffler modifications in the general vicinity of the fire, suggesting that such modifications were not rare among the saws being used on the block.

The Commission finds that the lack of a fire watch as required under section 4(1)(a) and Schedule 5 of the *FFPSR*, and the finding that this contravention led to spread of the fire is, on its own, sufficient to uphold the Fire Centre Manager's decision to deny costs under section 95(2) of the *Code*. However, the Commission also finds that the most probable cause of the fire was the use of chainsaws with modified mufflers on the block.

For all of those reasons, the Commission confirms the Fire Centre Manager's denial of fire suppression costs under section 95(5) of the *Code*.

7. Whether the Government or the Third Parties should be awarded their costs in the appeal.

The Government requested that the Commission award it costs in the appeal against the Third Parties.

The Third Parties requested the Commission award them costs against the Government.

Under section 84(3) of the *Forest and Range Practices Act*, the Commission "may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal." The Commission has adopted a policy, as set out in its *Procedure Manual*, to award costs in special circumstances. Those circumstances may include situations where an appeal is brought for improper reasons or is frivolous or vexatious in nature, or where a party unreasonably delays the proceedings. The Commission has not adopted a policy that follows the civil court practice of the loser in a proceeding paying the winner's costs.

The Commission finds that there are no special circumstances in this case that warrant an order for costs for either the Government or the Third Parties.

DECISION

In making this decision, this panel of the Commission has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons provided above, the Commission confirms the Fire Centre Manager's determination as it pertains to the contraventions of sections 4(1)(a) and 13(2) of the *FFPSR*, and the denial of fire suppression costs under section 95(5) of the *Code*. Further, the Commission finds that Louisiana-Pacific is vicariously liable for the contraventions committed by Downie and Graham's.

However, the Commission rescinds the Fire Centre Manager's determination as it pertains to the two administrative penalties issued under section 117 of the *Code* and his assessment of fire suppression costs against Louisiana-Pacific under section

162 of the *Code*. Those aspects of the Fire Centre Manager's determination were beyond his jurisdiction, and therefore, are not properly before the Commission.

Accordingly, the appeal is allowed, in part. The applications for costs are denied.

Kathy Lewis, Panel Chair
Forest Appeals Commission

Cindy Derkaz, Member
Forest Appeals Commission

Gary Robinson, Member
Forest Appeals Commission

February 22, 2005