



Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

DECISION NO. 2011-FOR-004(a)

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

BETWEEN: Cindy Ling **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Gabriella Lang, Panel Chair

DATE: Conducted by way of written submissions
concluding on August 4, 2011

APPEARING: For the Appellant: William E. Whyard, Counsel
For the Respondent: David J. Hatter, Counsel

APPEAL

[1] Cindy Ling sought to appeal two decisions:

- a determination issued on March 14, 2007 by Greg Hemphill, at that time the District Manager, Sunshine Coast Forest District, Ministry of Forests and Range. Mr. Hemphill determined that Ms. Ling had contravened section 96(1)(a) of the *Forest Act*, R.S.B.C. 1996, c. 157. Section 96 of the *Forest Act* applies to scaling requirements.
- a review decision issued on March 23, 2011 by Brian A. Hawrys, District Manager (the "District Manager"), Sunshine Coast Forest District, Ministry of Forests, Lands and Natural Resource Operations.¹ The District Manager reviewed the March 14, 2007 determination made against Ms. Ling by Mr. Hemphill and decided that the March 14, 2007 determination should be upheld.

¹ In 2010, the responsibilities of the Ministry of Forests and Range relevant to this appeal were placed with the newly created Ministry of Forests, Lands and Natural Resource Operations. For the purposes of this decision, the Panel will refer to the two Ministries responsible for scaling operations, investigations and determinations as "the Ministry".

[2] Whether the Commission has the jurisdiction to hear an appeal of both the 2007 and 2011 decisions is an issue that will be addressed later in this decision.

[3] The appeal is filed pursuant to section 84 of the *Forest and Range Practices Act* ("FRPA") which provides that, on an appeal, the Commission may:

- (c) consider the findings of the person who made the determination or decision, and
- (d) either
 - (i) confirm, vary or rescind the determination or decision, or
 - (ii) with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration.

[4] The Appellant asks the Commission to:

1. rescind the determinations and direct the Respondent to clear her scaling records;
2. make a determination that the District Manager erroneously interpreted her new evidence in making his review decision, and
3. such further and other relief as the Commission deems appropriate.

BACKGROUND

General

[5] Under the *Forest Act* all timber harvested from both Crown and private land under provincial jurisdiction must be scaled to determine the volume and quality of timber harvested. Scaling accuracy is important to ensure that the Province collects the appropriate amount of stumpage revenue from the harvest of Crown timber. Scaling accuracy is also important to the forest industry which relies on scale data as the basis for many transactions.

[6] Under section 94 of the *Forest Act*, Ministry employees carry out periodic check scales on the scales originally performed by independent timber scalers. Such check scales involve remeasuring loads of logs scaled by the original scaler and then comparing the scale results in terms of volume and value. If the volume or value of the check scale varies by more than 3 percent from the original scale (the amount prescribed by the *Scaling Regulation*, B.C. Reg. 446/94), then section 97(4) of the *Forest Act* stipulates that the check scale will replace the original scale. Also, under section 99(3) of the *Forest Act*, if an original scale is replaced by a check scale, the original scaler may request a second check scale if he or she disagrees with the first check scale. If the volume or value of the second check scale is between 0 and 3 percent of the original scale, the original scale is confirmed.

[7] The Appellant holds a timber scaling licence issued under section 100(2) of the *Forest Act* and she works as an independent timber scaler in the Powell River area of the province. She has been a scaler for about 20 years.

[8] Between April and October 2006, the Ministry check scaled ten separate parcels of timber that the Appellant had scaled at a scale site the parties referred to as Lois Lumber. The Ministry's check scaling resulted in six of the Appellant's original scales being cancelled and replaced by the Ministry's check scales. Five of the original scales were cancelled and replaced by Mr. David McCreery, a Ministry scaler, and one of these original scales was cancelled and replaced by Mr. Ellis Merry, a Scaling Supervisor with the Ministry.

[9] In November 2006, the Ministry advised the Appellant, in writing, that she was being investigated for alleged contraventions of section 96(1)(a) of the *Forest Act* and the *Scaling Regulation*. The Ministry alleged that some of the volume and grade differences between the Appellant's scales and the check scales were significant.

The Determination, Review and Appeal

[10] On February 2, 2007, the District Manager at the time, Mr. Greg Hemphill, provided the Appellant with an opportunity to be heard pursuant to section 71(1) of the *FRPA*. Mr. Hemphill heard from witnesses for both the Appellant and the Ministry, and considered the submissions of both parties regarding the cancelled check scales.

[11] Mr. Hemphill issued his written determination on March 14, 2007 pursuant to section 71(2) of the *FRPA*. Mr. Hemphill determined that the Appellant had contravened section 96(1)(a) of the *Forest Act* by not following the scaling procedures in section 6 of the *Scaling Regulation*. In that determination, Mr. Hemphill stated, in part, that the record showed six cancelled scales and, on two other occasions, the check scaler confirmed the Appellant's scales despite concerns about load separation and grading. Mr. Hemphill also noted that two of the cancelled scales involved a missed log.

[12] Mr. Hemphill noted that the Appellant requested a second check scale on one occasion, and that it confirmed the cancellation of her original scale. The Appellant also hired two retired forest service scalers to independently scale two of the check scales: the July 17, 2006 and October 27, 2006 check scales. Mr. Hemphill reviewed their results but found that he could not draw any conclusions from their results "as they indicate variance from both your original scales and the check scale results." He then states that the checked scale on October 27, 2006 was "obviously difficult timber to scale and there was significant variation between all the scalers, particularly in the grading of the timber."

[13] After considering the factors set out in section 71(5) of the *FRPA* and the Appellant's long term performance, Mr. Hemphill decided not to assess a monetary penalty or to issue a short term suspension of her scaling licence. Instead, Mr. Hemphill made several recommendations, including that the Appellant participate in scaling logs at an annual scaling exam as a scaling refresher.

[14] In June 2007, the Appellant filed a civil action in the Supreme Court of British Columbia against Mr. McCreery and the Province. That suit was dismissed by the Supreme Court on March 13, 2008.

[15] On August 21, 2008, the Appellant appealed the March 14, 2007 determination to this Commission and, at the same time, asked the Commission to exercise its discretion to extend the three-week deadline for filing that appeal. In its decision dated November 13, 2008, the Commission declined to extend the time for filing the appeal. It found insufficient justification for the Appellant's delay in filing the appeal (see *Cindy Ling v. Government of British Columbia* (2008-FOR-008(a))). Consequently, the appeal was rejected for being filed out of time and the Appellant lost her ability to appeal that March 14, 2007 determination.

[16] By letter dated May 22, 2008, the Appellant requested a review of the March 14, 2007 determination pursuant to section 80 of the *FRPA*. That request was out of time, but an extension was granted.

[17] The District Manager held a hearing on August 5, 2010 and issued his review decision on March 23, 2011. The Appellant then filed a notice of appeal, dated April 20, 2011, with the Commission appealing both Mr. Greg Hemphill's March 14, 2007 determination and the District Manager's March 23, 2011 review decision.

[18] The Chair of the Commission wrote to the Appellant in response to her appeal on April 27, 2011. Among other things, he addressed her request to appeal both the 2007 and 2011 decisions. The Chair referred to section 82(1) of the *FRPA* which states:

Appeal to the commission by a person who is the subject of a determination

82 (1) The person who is the subject of a determination referred to in section 80, other than a determination made under section 77.1, may appeal to the commission **either of the following, but not both:**

- (a) the determination;
- (b) a decision made after completion of a review of the determination.

[Emphasis added]

[19] The Chair then states:

The Commission notes that the Appellant has previously appealed the March 14, 2007 determination and that appeal was rejected as out of time by the Commission on November 13, 2008 (2008-FOR-008(a) *Cindy Ling v. Government of British Columbia*). However, the Commission notes that the review decision was made subsequent to the Commission's earlier decision. Accordingly, the Commission is now prepared to accept the appeal of the review of the determination under Section 82(1)(b) of the Act.

[20] This Panel has considered section 82 of the *FRPA*, the Commission's November 13, 2008 decision declining to extend the time for filing the Appellant's appeal of the March 14, 2007 determination, and the Commission Chair's April 27, 2011 letter. The Panel has determined that it will consider only the Appellant's appeal of the District Manager's March 23, 2011 review decision. Section 82(1) of the *FRPA* makes it clear that both the determination and review decision cannot be

appealed, and the review decision is the only decision appealed within the statutory appeal period.

Review Decision under Appeal

[21] In his review decision, the District Manager cited section 80(2) of the *FRPA* for the extent of his review authority. He determined that his review was limited to considering the evidence that the Appellant submitted to him that was not available at the time of the original determination, as well as the record of that original determination.

[22] The District Manager indicated that the new evidence he considered consisted of the following:

- copies of e-mail exchanges between Ministry staff;
- emails between Ministry staff and the Appellant; and
- a “summary of the new information” that was set out in an August 4, 2010 letter from the Appellant.

[23] The various findings made by the District Manager regarding the Appellant’s evidence and arguments are considered by the Panel later in this decision in its discussion and analysis. However, in summary, the District Manager determined that at least one scale by the Appellant was correctly cancelled and replaced by check scales. Therefore, the District Manager upheld the original determination that the Appellant contravened section 96(1)(a) of the *Forest Act* and, as in the determination, the District Manager did not impose any penalties.

THE PARTIES’ POSITIONS

[24] The Appellant submits that the District Manager’s review decision should be rescinded based on several grounds for appeal which the Panel has summarized as follows:

1. Although the District Manager considered the Appellant’s new evidence about the incompetency, alleged bias and procedural errors by the Ministry check scalers, the District Manager erred in not finding that such evidence supported her position; and
2. The District Manager did not consider the due diligence by the Appellant which, under section 72(a) of the *FRPA*, is a defence to the alleged contraventions.

[25] The Government submits that the District Manager’s review decision should be upheld because that review decision demonstrates that the District Manager considered all of the issues raised by the Appellant, all of the new evidence submitted by the Appellant, and that, based on his finding of at least one section 96(1)(a) contravention, the District Manager correctly upheld the determination decision.

[26] The Government also submits that this appeal should be limited to a review of the record of the review proceeding rather than a hearing *de novo*.

ISSUES

[27] The Panel will consider the parties' positions under the following issues:

1. Whether the appeal hearing should be conducted as a review of the record of the District Manager's proceeding or as a hearing *de novo*.
2. Whether the District Manager reasonably determined that the Appellant contravened section 96(1)(a) of the *Forest Act*.

RELEVANT LEGISLATION

[28] The Panel has cited the applicable provisions of the *FRPA* in the body of this decision.

[29] The following provisions of the *Forest Act* also apply to the subject matter of this appeal:

Part 6 – Timber Scaling

94 (4) Each of

- (a) the owner of a scale site,
- (b) the operator of a scale site, and
- (c) the person whose timber is scaled under this Part

must ensure that the parcel or lot of timber that has been most recently scaled by each of the scalers employed at the site is retained at the site and made accessible for check scale by a licensed scaler who is a forest officer.

96 (1) A person who scales or purports to scale timber under this Act

- (a) must carry out the scale according to the prescribed procedures, and
- (b) must express the scale in cubic metres or another unit of metric measure required by the minister for special forest products.

97 (4) Subject to section 99(5), if, according to a check scale referred to in section 94(4), the volume or value of the parcel or lot of scaled timber computed from the check scale details varies by more than a prescribed percentage from the volume or value computed from the original scale details, then the check scale governs for all purposes of this *Act* and the regulations.

- (5) The minister may order that subsection (4) does not apply in respect of a check scale if satisfied that the original scale was performed in accordance with good scaling practices and the differences between it and the check scale are attributable to the condition of the timber.

99 (3) A scaler whose scale has been replaced by a check scale under section 97(4) may request a second check scale, by notice served on the regional manager, district manager or forest officer.

(4) The minister must have a second check scale performed, if feasible.

DISCUSSION AND ANALYSIS

1. Whether the appeal hearing should be conducted as a review of the record of the District Manager's proceeding or as a hearing *de novo*.

[30] The Government submits that this appeal should not be a *de novo* hearing because, in this case, the Commission is in the same position as the District Manager was when he conducted the review of the original determination.

[31] Reviews are authorized under section 80(2) of the *FRPA*. According to this section, a District Manager "may only consider":

(a) evidence that was not available at the time of the original determination; and

(b) the record pertaining to the original determination.

[32] As the District Manager could consider only the evidence that was not available at the time of the original determination, together with the record of the original determination, the Government submits that an appeal of the review decision should, by its very nature, be limited to a consideration (a review) of whether or not the new evidence considered by the District Manager require a different result.

[33] The Government acknowledges that a panel of this Commission in *Weyerhaeuser Company Limited v. Government of British Columbia (Forest Practices Board, Third Party)* (2004-FOR-005(b), January 17, 2006) [*Weyerhaeuser*], held that the Commission was given broad discretion in how it hears appeals. At page 23 of the decision, the Commission found as follows:

The Commission may, in its discretion, choose to conduct a narrower review of the decision below, or, alternatively, it may opt to conduct a hearing *de novo* and take a fresh look at what it considers to be the relevant issues and evidence.

[34] In that case, the Commission proceeded with a *de novo* hearing.

[35] The Government argues that the *Weyerhaeuser* decision is distinguishable from this appeal because, in *Weyerhaeuser*, the appeal was from a determination whereas this case is an appeal from a review decision. It submits that, as noted above, a review decision is limited in its scope to a review of the record of the determination and any evidence that was not available at the time of the determination. The Government also points out that the Legislature provided two types of reconsiderations from a determination, either an appeal to the Commission or a review hearing.

[36] In the alternative, the Government submits that this Panel should limit its review of the review decision to a consideration of whether or not the District Manager erred in not finding that a different decision was warranted, especially based on the new evidence. The Government also submits that, if the Panel conducts a *de novo* hearing, it will undermine the Commission's earlier decision denying the Appellant's request for an extension of time to appeal the March 14, 2007 determination. The Government asserts that this would allow the Appellant to now appeal the determination, not just the review decision.

[37] The Appellant submits that she is appealing the review decision and, in addition to the issues identified in the review decision, the Panel must also consider her defence of due diligence under section 72 of the *FRPA*. The Appellant asserts that this defence was not considered in either the original determination or the review determination, even with the new evidence that she provided to the District Manager. The Appellant also submits that the Commission is obligated to conduct its hearings in a manner that assures procedural fairness for the parties.

The Panel's findings

[38] Section 84(1) of the *FRPA* sets out the Commission's powers on an appeal. Of particular note, it states that the Commission "may" consider the findings of the person who made the determination or decision, and "either (i) confirm, vary, or rescind the determination or decision, or (ii) with or without directions, refer the matter back to the person who made the determination or decision for reconsideration."

[39] This Panel agrees with the Commission's finding in *Weyerhaeuser* that the Commission has broad discretion in how it conducts its hearings and, specifically, with that panel's articulation of the Commission's discretion at pages 21-22:

The Panel finds that the relevant provisions of the *Act* and the *Code* clearly demonstrate the Legislature's intention to give the Commission flexibility in how it handles appeals. The provisions allow the Commission to hear new evidence or to consider the findings of the decision-maker below, thus allowing it to effectively conduct a new hearing of the matter if it considers it appropriate to do so.

[Emphasis added]

[40] This Panel has reviewed other Commission decisions and is familiar with how the Commission has exercised its discretion in its hearing practices.

[41] Generally, the parties to an appeal wish to present evidence and separately argue their positions. To effectively hear and decide the issues in such appeals, the Commission may decide that it is not appropriate to confine its procedure to a hearing on the basis of the record, and will hold a *de novo* hearing.

[42] This, however, is not an ordinary appeal. For the reasons cited above, the Panel has already determined that it will only consider the Appellant's appeal of the review decision. If the Panel now holds a *de novo* hearing it would, in effect, be allowing the Appellant to appeal both the determination of March 14, 2007 and the review decision of March 23, 2011, even though the Commission has already ruled that the Appellant cannot appeal the March 2007 determination. This Panel has no

authority to reverse the Commission's 2008 decision refusing to extend the time to appeal the determination, nor does it intend to contradict the preliminary ruling made by the Chair of the Commission in this case.

[43] Therefore, in the specific circumstances of this case, the Panel will exercise its discretion under section 84(1) of the *FRPA* to conduct this appeal hearing as a review of the findings of the District Manager in his March 2011 decision, including the new evidence he considered and his assessment of that new evidence.

2. Whether the District Manager reasonably determined that the Appellant contravened section 96(1)(a) of the *Forest Act*.

[44] The Appellant provided several grounds for rescinding the District Manager's review decision. The Appellant asserts that the District Manager did not consider, or did not give sufficient weight, to evidence that she provided about the competency and alleged bias of the Ministry check scalers, and about alleged errors made by the Ministry check scalers. In her reply submissions on this appeal, the Appellant also raises the defence of due diligence which she maintains the District Manager did not consider.

[45] The Government submits that the District Manager did consider and assess all of the new evidence provided by the Appellant, as well as the findings and record of the determination decision. The Government further submits that the District Manager did address the Appellant's allegations about the competency and alleged bias of the Ministry check scalers, about any procedural errors purportedly made by the Ministry check scalers and, therefore, the District Manager's review decision should be confirmed.

[46] The Panel will consider the grounds of appeal under the following headings:

- (a) Ministry Check Scaler competence, bias and procedural errors in conducting the check scales; and
- (b) the defence of due diligence under section 72 of the *FRPA*.

[47] To begin with, the Panel will summarize the District Manager's findings on these matters, in particular his findings in relation to the new evidence before him. The headings used are the Panel's heading; they are not found in the review decision.

1. Ministry scalers were not competent

As part of her new evidence, the Appellant submitted to the District Manager various internal Ministry emails and emails between the Appellant and Ministry staff. She submitted that emails about which parcels to scale, about how to interpret grading rules, how to scale timber affected by powder worm, and email exchanges about the grade value for the October 27, 2006 check scale demonstrated that the Ministry check scalers were incompetent. The Appellant also submitted that the Ministry's scalers were incapable of interpreting or applying the grading rules for powder worm or of performing accurate check scales.

The District Manager was not prepared to find, on the basis of the emails submitted by the Appellant, that the Ministry check scalers were

incompetent. The District Manager found that the evidence illustrated the difficulties that the Ministry check scalers had with interpreting some of the grading rules for rot and for similar kinds of degradation. However, he also noted that Mr. Hemphill stated in his determination that none of the cancelled scales were solely as a result of value differences related to deductions for powder worm.

2. Discrepancy between the check scales conducted by two Ministry scalers on June 21, 2006

The District Manager found that the range of timber check scaled suggests that the timber that was check scaled was difficult to scale. He also found that there was no new evidence to suggest that the scale the Appellant performed was sufficiently accurate or was carried out in accordance with prescribed procedures, and none of the check scale results supported her results.

3. There were differences of opinion about how to conduct a scale, including which loads should be check scaled based on Ministry policy

The District Manager found that some of the emails provided by the Appellant indicate that Ministry policy was not followed in respect of two or three of the Appellant's cancelled loads and, in particular, there was a January 17, 2007 email which acknowledged that a Scaling Manual policy requirement to check scale the last scaled parcel was not followed. However, he also found that three or four of the check scales were done in accordance with Ministry policy; that is, they were done on the most recently scaled parcel and thus were valid. The District Manager wrote that a section 96(1)(a) contravention only requires proof that a single scale was not performed in accordance with prescribed procedures (that is, in accordance with the *Scaling Regulation*). He found that there was evidence that three or four check scales were done according to Ministry policy and, therefore, section 96(1)(a) was contravened. He was not persuaded that the determination should be rescinded.

4. Pre-existing Ministry staff bias towards the Appellant which affected how her case was handled

The District Manager found that a more cooperative approach by all parties would have been desirable; however, he also found that the evidence did not suggest a personal, pre-existing bias against the Appellant that would offer an alternative explanation for the check scale results. The District Manager found that the new information provided by the Appellant did not impact the Ministry check scalers' findings about her scaling accuracy and whether she performed her scaling in accordance with prescribed procedures.

[48] The Appellant submits that she provided compelling evidence and submissions to the District Manager about the Ministry check scalers and how they check scaled her scales. The Appellant submits that the evidence she provided to the District Manager for his review decision demonstrated that the Ministry check scalers were not competent because, for example, they did not have local knowledge about powder worm infestation and its impacts on timber values. The

Appellant submitted to the District Manager that the Ministry check scalers made procedural errors; for example, they did not follow scaling procedures or Ministry policy as set out in the Scaling Manual. She also maintained that the emails that she provided to him demonstrated that the Ministry check scalers had a pre-existing bias towards her and that there were breaches of procedural fairness by Ministry staff. The Appellant's position on the appeal is that the District Manager did not consider all of that evidence and/or made incorrect findings based on that evidence and the determination record. She therefore submits that all of the checked scales and scale cancellations should be set aside.

[49] The Government maintains that the District Manager considered all of the Appellant's new evidence and assertions in his review decision, as demonstrated by the District Manager's findings, and the District Manager did not err in making those findings or in upholding the determination.

[50] In terms of actual contraventions, the Government points out that the Appellant even conceded that she was in contravention of section 96(1)(a) on one occasion, and the Government points to the section of the review decision where the District Manager wrote that:

A section 96(1)(a) contravention only requires proof that a single scale was not performed in accordance with prescribed procedures.

[51] The Government submits that the District Manager correctly stated that only one contravention of section 96(1)(a) of the *Forest Act* was needed to uphold the March 14, 2007 determination, and that this is sufficient for the Panel to confirm the review decision.

[52] In addition to the April 24, 2006 scaling contravention conceded by the Appellant, the Government also refers to a number of other check scales establishing scaling contraventions by the Appellant. For example, the Government argues that two check scales on June 21, 2006 conducted by two different Ministry check scalers, and an additional check scale of the same scale conducted on June 27, 2011 by a Ministry scaler, establish that the Appellant, in her original scale, had underestimated the net volume and net values by more than the acceptable tolerance of 3 percent as set out in the *Scaling Regulation*. The Government further submits that the two separate Ministry checked scales were within the acceptable tolerance of 3 percent prescribed in the *Scaling Regulation*. The June 21, 2006 checked scales also were done on the most recent load and, therefore, conducted according to Ministry policy.

[53] Regarding the Government's submission that the Appellant admitted to a contravention, the Appellant advises the Panel as follows regarding the missed timber:

As to the missed log, the Respondent fails to state that the missed log the Appellant conceded was the April 24 scale where the Appellant was not on site for the check scale. Due to Mr. McCreery's failure to inform the site operator of the issue with the load, the load was picked up and not available for a review. The Appellant was left with no option but to concede to the cancellation of her scale, not knowing what was about

to happen further down the line that more of her scales would be cancelled and not made available for a review.

[54] Regarding the June 21, 2006 check scales, the Appellant submits that both she and the owner/operator of Lois Lumber witnessed these scales. She states that there was a difference in the Ministry check scales between the first and second scale of 8 percent, which is more than the 3 percent tolerance in value. However, she also acknowledged that the difference between two of the Ministry check scales was within the 3 percent tolerance requirements. The Appellant also repeated her criticisms about how the Ministry check scalers conducted their scaling.

The Panel's findings regarding the check scales

[55] The Panel has considered all of the parties' submissions even if not specifically referred to, the new evidence that the Appellant provided to the District Manager in August 2010, as well as the District Manager's findings in his review decision. The Panel first finds that the District Manager addressed the Appellant's issues and submissions about the competency and/or bias of the Ministry check scalers in his consideration of her evidence and in his findings. The District Manager also considered and addressed the Appellant's issues about procedural and other errors that she maintained the Ministry check scalers made. In fact, the Panel notes that the District Manager specifically acknowledged that the Ministry check scalers did not follow Ministry policy in 3 or 4 of the check scales.

[56] The Panel notes that, at the time of both the review decision and the hearing of this appeal, the Appellant had a different opinion or interpretation from that of the District Manager regarding some of the evidence. The Appellant specifically questioned how the District Manager interpreted some of the emails she submitted. The Appellant also had different opinions than the Ministry about how some timber should be scaled, such as timber with powder worm or other rot, and she also had very strong personal opinions about some of the Ministry check scalers.

[57] The Panel finds that differences of opinion about the meaning or significance of emails, or other evidence, does not necessarily mean that there are errors in one opinion or the other. Some evidence may be ambiguous and can simply be interpreted in more than one way. In this case, the Panel finds that while a number of the emails can be interpreted in different ways, the District Manager's interpretation and application of that evidence, as demonstrated by his findings, was reasonable in the circumstances of this case. The Panel can find no error in his evaluation of the new evidence.

[58] As to the question of whether the Appellant admitted to a contravention, the Panel finds that the Appellant, in her reply submission, admits that she "conceded to the cancellation" of the April 24, 2006 scale, but states that she felt that she had no choice at that time. She also states that she was not on site for the checked scale.

[59] The Panel finds that, based on the Appellant's submissions, she was not a novice scaler and that she would have known the consequences of conceding to a scale cancellation. She would also have been familiar with Ministry scaling practices, such as conducting unannounced check scales.

[60] The Panel has also considered the District Manager's finding that:

A section 96(1)(a) contravention only requires proof that a single scale was not performed in accordance with prescribed procedures.

[61] The Panel notes that section 96(1)(a) states that a person who scales timber under this Act "(a) must carry out the scale according to the prescribed procedures, and (b) must express the scale in cubic metres ..." [Emphasis added]. The Panel finds that the District Manager was correct in determining that one scaling procedure contravention may be sufficient for a section 96(1)(a) *Forest Act* contravention. Based on all these factors, the Panel finds that the District Manager reasonably determined that there was at least one contravention of section 96(1)(a) of the *Forest Act*.

[62] In summary, the Panel finds that the Appellant has not established that the District Manager erred by not considering or applying the evidence she provided, or by not considering the record of the determination decision. Therefore, the Panel finds there is no basis or reason for rescinding or varying the District Manager's review decision on these grounds of appeal.

Due diligence

[63] In her reply submissions for this appeal hearing, the Appellant submits that the District Manager failed to consider her defence of due diligence and the evidence she submitted to him demonstrating that she exercised due diligence to prevent any contraventions. She submits that the Panel must consider her defence of due diligence under section 72 of the *FRPA* because this defence was not considered in either the original determination or the review determination, despite the new evidence she provided to the District Manager.

[64] Because the Appellant's assertion of a due diligence defence was submitted only in her reply in this appeal, there was no response from the Government on this issue.

The Panel's findings regarding due diligence

[65] The Panel has reviewed the Appellant's May 22, 2008 request for a review of the March 14, 2007 determination, which included her summary of the new information, and the Panel has reviewed the Appellant's notice of appeal and her initial written submissions for this appeal. In none of those documents did the Appellant specifically raise the defence of due diligence. For this appeal, the Appellant's first assertion of and submissions in support of that defence are found in her reply to the Government's submissions.

[66] As the Appellant did not specifically raise the defence in her appeal to the Commission until her reply submissions, the Panel finds that the Appellant has not properly raised or argued this point. Therefore, the Panel rejects it as a ground for her present appeal, especially given that this appeal is being conducted as a review of the review decision and not as a hearing *de novo*.

[67] Moreover, because the defence of due diligence was not raised until her reply submissions, the Respondent did not have the opportunity to properly address the

issue and, therefore, as a matter of procedural unfairness, the Panel will not consider it further.

Summary of the Panel's findings

[68] After considering the new evidence assessed by the District Manager for his review decision, the findings made by the District Manager in that decision, and all of the parties' submissions, the Panel finds that the District Manager reasonably determined that the Appellant contravened section 96(1)(a) of the *Forest Act*. Therefore, the Panel confirms the March 23, 2011 review decision.

DECISION

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

[70] For the reasons stated above, the Panel confirms the District Manager's March 23, 2011 review decision.

[71] The appeal is dismissed.

"Gabriella Lang"

Gabriella Lang, Panel Chair
Forest Appeals Commission

September 19, 2011