



Forest Appeals Commission

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DECISION NO. 2013-FRP-002(a)

In the matter of an appeal under section 83 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

BETWEEN:	Forest Practices Board	APPELLANT
AND:	Government of British Columbia	RESPONDENT
AND:	Douglas Lake Cattle Company	THIRD PARTY
BEFORE:	A Panel of the Forest Appeals Commission Gabriella Lang, Panel Chair	
DATE:	Conducted by way of written submissions concluding on February 13, 2014	
APPEARING:	For the Appellant: Guy Brownlee, Counsel For the Respondent: A.K. Fraser, Counsel For the Third Party: no appearance	

APPEAL

[1] The Forest Practices Board (the "FPB") appeals an October 15, 2013 determination made by Patrick Bryne, District Manager (the "District Manager"), 100 Mile House District, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). Under section 72 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "*FRPA*"), the District Manager determined that Douglas Lake Cattle Company ("Douglas Lake") was duly diligent in preventing the contravention of sections 52(1), 52(3) and 53(1) of the *FRPA*.

[2] The powers of the Commission in this appeal are set out in section 84 of the *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.

[3] The FPB asks the Commission to vary the District Manager's determination so that:

1. Douglas Lake is found not to have established the defence of due diligence to prevent the contraventions of sections 52(1), 52(3) and 53(1) of the *FRPA*; and,
2. a penalty is levied against Douglas Lake for the contraventions.

BACKGROUND

[4] Douglas Lake owns District Lot ("DL") 1092 in the Lillooet Land District in the province of British Columbia. Douglas Lake has a private timber mark, NDRHM, which gives it authorization to cut, mark and haul timber from DL 1092. In the late summer of 2010, Douglas Lake retained Westwood Fibre Ltd. ("Westwood") to harvest and sell timber from DL 1092. Douglas Lake had retained Westwood for similar services in the past, since at least September 2004.

The Incident and Investigation

[5] The Panel has summarized the following facts, which are not in dispute, from the information in the investigation and case file, and the parties' submissions on this appeal.

[6] On November 5, 2010, Mr. Russell Kempston, who worked for Westwood, phoned the Compliance and Enforcement Office of the Ministry's Central Cariboo Forest District to report that he believed that the timber harvesting on DL 1092 had trespassed onto Crown Land. Mr. Alex Norquay, the Resource Compliance Supervisor for the Ministry's Central Cariboo Field Unit, investigated this reported incident by interviewing Mr. Kempston, and by inspecting the area harvested. Mr. Norquay also received reports about the values of the area on Crown land where the harvesting occurred and the value of the timber harvested from Crown land.

[7] On November 8, 2010, Mr. Kempston met with Mr. Norquay to explain the incident and to review a traverse map of the area harvested. Mr. Kempston told Mr. Norquay that he was hired by Douglas Lake to oversee timber harvesting on DL 1092 under timber mark NDRHM. Mr. Kempston reported that on September 23, 2010, he roughly established the eastern boundary of DL 1092, which is adjacent to Crown land, by locating the NE and SE boundary pins and then ribboning from each pin. He stated that, when traversing between the two boundary pins, he discovered that he had strayed off what he felt was the legal lot line, and decided that he needed to go back with another person to correct the ribboned boundary location. Mr. Kempston reported that he then used a compass and ribbons to partially mark the eastern boundary of DL 1092, and that he planned to confirm that boundary at a later date.

[8] Mr. Kempston told Mr. Norquay that on October 4, 2010, he verbally instructed a logging contractor to begin harvesting on DL 1092, but to stay away from the boundary ribbons along the east side of DL 1092, adjacent to the Crown land. The logging contractor operated on DL 1092 between about October 5 and 10, 2010. On October 25, 2010, Mr. Kempston discovered that the logging contractor had, sometime between October 5 and 10, felled timber up to the boundary ribbons and also possibly on Crown land.

[9] Mr. Kempston then retained Integrated Pro Action Corporation to traverse the east property line of DL 1092 and the harvested area to ascertain the extent of any potential unauthorized harvest on Crown land. The company concluded that

1.1 hectares of Crown land along the east property line of DL 1092 was harvested without authority. Also, some of the harvested Crown timber was mixed with the harvested private timber, and had been removed from the site and taken to a processing facility.

[10] Mr. Norquay sent Douglas Lake a letter dated January 25, 2011, regarding the province's inspection of timber harvesting on DL 1092 and the adjacent Crown land. The letter referred to the information received from Mr. Kempston about the harvesting on Crown land. Mr. Norquay wrote that on November 10, 2010, he visited the site and confirmed that it appeared that Crown timber had been harvested without authority. The letter noted that these activities may have contravened sections 52(1), 52(3) and 53(1) of the *FRPA*. Sections 52(1) and 52(3), respectively, prohibit a person from harvesting and removing Crown timber unless authorized to do so. Section 53(1) of the *FRPA* requires that, before an owner or occupier of private land that is adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land.

[11] A similar letter was sent to Westwood, to Mr. Kempston's attention, although this letter referred to section 53(2) of the *FRPA* instead of section 53(1).

[12] Michael C. Pedersen, District Manager of the Central Cariboo and Chilcotin Forest Districts, then sent Douglas Lake and Westwood separate letters, dated March 25, 2011, which provided each of them with an Opportunity to Be Heard ("OTBH") prior to a determination of any contraventions of the *FRPA* relating to Crown timber that was harvested without authority, that was marked with Douglas Lake's private timber mark and then shipped to a mill. Douglas Lake and Westwood were given the opportunity to provide written submissions by April 22, 2011, or to request an oral hearing. In that letter, Mr. Pedersen also stated that it was the Ministry's intention to consider both companies as joint clients, and to have both attend the OTBH prior to a determination of whether there was a contravention of the *FRPA*.

[13] In an April 6, 2011 letter to the District Manager, Mr. Joe Gardner, Vice President and General Manager of Douglas Lake, stated as follows:

Please be advised that there is a contract of authorization between Westwood Fibre Ltd. and Douglas Lake Cattle Company. Douglas Lake Cattle Company authorizes Westwood Fibre Ltd. to act on their behalf in matters pertaining to management, harvesting and marketing of Douglas Lake Cattle Company's private timber. Therefore it is our authorization to have Russell Kempston of Westwood Fibre Ltd. represent Douglas Lake Cattle Company on matters of Case File DCC-28998.

[14] The Panel notes that no other information or correspondence was provided by Douglas Lake with respect to the incident and investigation described above. No other submissions or information from Douglas Lake are in the binder of evidence that Mr. Norquay provided to the District Manager, in the submissions to the District Manager, or in the submissions for this appeal.

The Determination

[15] In his determination dated October 15, 2013 regarding Douglas Lake (the "Determination"), the District Manager determined that the eastern boundary of Douglas Lake's private land, DL 1092, which adjoins Crown land, was not properly

identified, resulting in an October 2010 unauthorized harvest of 111 m³ of undersized timber and 37 m³ of merchantable timber on 1.1 hectares of Crown land. That timber was removed from Crown land and sold under Douglas Lake's private timber mark.

[16] In the Determination, the District Manager referred to his letter of March 25, 2011 to Douglas Lake, which had offered it an opportunity to be heard. The District Manager noted that there were two parties involved in the determinations – Douglas Lake and Westwood, and Westwood had been provided with the authority to represent Douglas Lake.

[17] In the Determination, the District Manager set out his reasons for finding that the facts would support a finding of contraventions of sections 52(1), 52(3) and 53(1) of the *FRPA*, if the defence of due diligence in section 72 of the *FRPA* did not apply. His reasons are as follows:

- WF [Westwood] acting on your [Douglas Lake's] behalf, as an agent for DLCC [Douglas Lake], did harvest and remove Crown timber without authorization from an area adjacent to your [Douglas Lake's] private lot DL 1092.
- [Douglas Lake] authorized [Westwood] to act on [Douglas Lake's] behalf in matters pertaining to management, harvesting and marketing of [Douglas Lake's] private timber.
- Some Crown timber was removed and sold using [Douglas Lake's] private land timber mark.
- The facts outline that [Westwood] was not diligent in ensuring that the exact location of the private land boundary was located prior to the harvesting operator cutting trees up to the established ribbon line. It is likely that the operator would have concluded that the revised boundary had been established by the time he got to that point and started removing trees.
- No evidence was presented that [Douglas Lake was] involved, even indirectly, with the harvesting or affairs in this incident, and I cannot find [that Douglas Lake] informed [Westwood] of the boundaries of [Douglas Lake's] private land as required under section 53(1) of the *FRPA*.
- In terms of procedural fairness, I am certain that [Douglas Lake was] fully aware of the offences [it] faced and how they may have applied to [its] defence at a hearing.
- I believe that the investigating official intended to cite the legislation wording relating to section 53(1) [of the *FRPA*] vs. the incorrect reference [to the language in section 53(2)] noted in the letter of March 25, 2011.

[18] The District Manager concluded that the facts did not support a finding that Douglas Lake had contravened section 53(2) of the *FRPA* for the following reason:

- As [Douglas Lake] is the owner/occupier (not person) of private lot DL 1092, section 53(2) of the *FRPA* does not apply to the facts in this case.

[19] The District Manager then considered the defence of due diligence under section 72 of the *FRPA*, as it applied to Douglas Lake. Based on the facts he recited above, the District Manager determined that Douglas Lake had exercised due diligence in preventing the contraventions. His reasons are as follows:

- [Douglas Lake] has had a long standing business relationship and reliance on [Westwood] as their agent and forestry manager to manage timber on

[Douglas Lake's] private holdings. This trusted relationship dates back, at least to 2004, and I have given it weight in this matter.

- I believe it would be reasonable to conclude [that Douglas Lake was] aware of the liabilities associated with private land harvesting and the potential for a trespass and would engage a reputable firm to prevent these types of incidents – as was the case here.
- [Westwood] has a good “track record” as a forestry firm and has been very cooperative with officials when these infrequent incidents do happen.
- In spite of [Douglas Lake's] reliance on [Westwood] in this matter, [Westwood] let [Douglas Lake] down and a contravention occurred.
- [Westwood] has admitted they were responsible for this contravention and any actions arising should accrue to them.

[20] In a separate determination, also dated October 15, 2013, the District Manager determined that Westwood contravened section 53(2) of the *FRPA*, because Westwood did not establish the boundary between DL 1092 and Crown land before cutting and removing the timber. The District Manager also determined that Westwood contravened sections 52(1) and 52(3) of the *FRPA* by harvesting and removing timber from Crown land without authority. A penalty of \$3,300 was levied against Westwood, because the District Manager determined that the Government should be compensated for the partial loss of the habitat values relating to an old growth management area, a mule deer winter range, and the loss of a travel corridor for deer.

The Appeal

[21] The FPB submits that the appeal should be allowed because:

1. Douglas Lake did not establish that it exercised due diligence to prevent the contraventions; and,
2. a penalty should be levied against Douglas Lake.

[22] The Respondent does not oppose allowing the appeal, but submits that the matter should be referred back to the District Manager for further consideration of whether Douglas Lake established that it exercised due diligence.

[23] The Third Party, Douglas Lake, made no submissions. It should be noted that, on February 11, 2014, staff at the Commission's office contacted Joseph Gardner of Douglas Lake by telephone. At that time, Mr. Gardner confirmed that Douglas Lake had received the information sent to it, which included the other parties' submissions, and Douglas Lake would not be providing submissions on the appeal. The Commission advised the other parties of this in a letter dated February 13, 2014.

ISSUES

1. Whether, on a balance of probabilities, Douglas Lake has established that it exercised due diligence with respect to the contraventions of sections 52(1) and 52(3), and 53(1) of the *FRPA*.
2. If that defence has not been established, whether a penalty should be levied against Douglas Lake.

RELEVANT LEGISLATION

[24] The following sections of the *FRPA* apply to this appeal:

Unauthorized timber harvesting

52 (1) A person must not cut, damage or destroy Crown timber unless authorized to do so

...

(3) A person must not remove Crown timber unless authorized to do so

...

(4) 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 (3),

that other person also contravenes subsection (1) or (3).

Private land adjacent to Crown land

53 (1) Before an owner or occupier of private land that is adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land.

(2) Before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land.

Administrative penalties

71 (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.

(2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,

(a) if he or she determines that the person has contravened the provision,

(i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or

(ii) may refrain from levying an administrative penalty against the person if the minister considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty, or

(b) may determine that the person has not contravened the provision.

(3) Subject to section 72, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.

(4) If a corporation contravenes a provision of the Acts, a director or an officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

- (5) Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:
- (a) previous contraventions of a similar nature by the person;
 - (b) the gravity and magnitude of the contravention;
 - (c) whether the contravention was repeated or continuous;
 - (d) whether the contravention was deliberate;
 - (e) any economic benefit derived by the person from the contravention;
 - (f) the person's cooperativeness and efforts to correct the contravention;
 - (g) any other considerations that the Lieutenant Governor in Council may prescribe.

Defences in relation to administrative proceedings

72 For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the

- (a) person exercised due diligence to prevent the contravention,

...

DISCUSSION AND ANALYSIS

1. Whether, on a balance of probabilities, Douglas Lake has established that it exercised due diligence with respect to the contraventions of sections 52(1) and 52(3), and 53(1) of the *FRPA*.

[25] The Panel has reviewed all of the submissions of the parties, and the legal authorities cited by them. The Panel summarizes their respective positions as follows.

The FPB's Submissions

[26] The FPB noted that in *Atco Wood Products Ltd. v. Government of British Columbia* (Decision No. 2010-FOR-001(a), February 28, 2012) [*Atco*], the Commission posed two questions to determine whether the defence of due diligence was proven: (1) what is the "particular event" or "contravention" at issue? and (2) did the person take all reasonable care to avoid the contravention? In addition, the FPB noted that, at para. 256 of *Atco*, the Commission summarized the defence of due diligence as follows:

... can the accused establish that it is innocent of the contravention under the second branch of the test (due diligence); specifically, did the accused take all reasonable care to avoid the particular event (contravention)?

[27] The FPB submitted that Douglas Lake did not establish that it took all reasonable care to prevent the contraventions of the *FRPA*, and further, it is Douglas Lake that has the burden of proving that it exercised due diligence in the circumstance described above. The FPB argued that the District Manager lacked the evidence necessary to make the findings of due diligence in his Determination.

[28] According to the FPB, under section 53(1) of the *FRPA*, Douglas Lake was obliged to inform Westwood of the boundary location between DL 1092 and the adjacent Crown land, before authorizing Westwood to harvest timber from Douglas Lake's private land. By not taking the steps, which a reasonable person would have taken, to inform Westwood of the boundary location, Douglas Lake did not exercise due diligence to prevent the contraventions, and therefore, Douglas Lake is directly liable for those contraventions.

[29] The FPB argued that the factors commonly considered when assessing whether all reasonable care was taken include the gravity of the potential harm, the available alternatives to protect against the harm, the likelihood of the potential harm, the skill required, and the extent that the accused could control the causal elements of the harm: *Pope and Talbot Ltd. v. Government of British Columbia*, Forest Appeals Commission (Decision No. 2005-FOR-004(b), April 19, 2007).

[30] In regard to the gravity of the potential harm, the FPB submitted that the District Manager had evidence that the unauthorized harvest location was within a topographic buffer linking a plateau area to ridge features along the Fraser River. These buffers are generally used as travel corridors for deer. There was also evidence before the District Manager that on October 13, 2004, an ungulate winter range unit (the Chimney-Alkali unit) and general wildlife measures were established by an order of the Deputy Minister of Water, Land and Air Protection under the authority of section 12(1) of the *Government Actions Regulation*. That order was amended on February 2, 2007. The evidence before the District Manager also indicated that the area was within an old growth management area. In that regard, the FPB referred to the establishment, on June 7, 2010, of an old growth management area under section 93.4 of the *Land Act*, which took effect on June 24, 2010.

[31] The FPB argued that those protective measures and areas were established before the unauthorized harvest on Crown land adjacent to DL 1092. Therefore, Douglas Lake could reasonably be expected to know of those designated areas, and to understand the gravity of the potential harm to habitat values from an unauthorized harvest of Crown timber next to its private land.

[32] The FPB acknowledges that there is no evidence that Douglas Lake directed Westwood to cut and remove Crown timber without authority. However, the FPB submitted that it is clear that Westwood acted on behalf of Douglas Lake, and that Douglas Lake benefitted from the unauthorized harvest and removal of timber from Crown land. The FPB notes that section 52(4) of the *FRPA* provides that, if a person, at the direction of or on behalf of another person, cuts or removes Crown timber, that other person also contravenes the *FRPA*. The FPB submitted, therefore, that Douglas Lake is liable under section 52(4) for Westwood's contravention of sections 52(1) and 52(3) of the *FRPA*.

[33] In regard to the defence of due diligence for an employer, the FPB argued that, based on the test set out in *Atco*, Douglas Lake had to prove that it had a proper system in place to ensure that Westwood's harvesting activities would be carried out so as to not cut or remove Crown timber. Douglas Lake also had to prove the effective operation of the system. A proper system would have been one that provided a reasonable degree of oversight of Westwood's harvesting activities, commensurate with the known risk to the habitat values on the adjacent Crown land. The FPB further submitted that the Commission previously concluded, based

on similar reasoning, that the defence of due diligence failed in regard to a company that was responsible for the oversight and supervision of its contractors: *A&A Fibre Ltd. v. Government of British Columbia*, (Decision No. 2005-FOR-008(a), August 9, 2007).

[34] The FPB referred to a January 8, 2007 determination which found that Douglas Lake contravened section 52(1) of the *FRPA* by harvesting timber on Crown land without authority. In that case, the same contractor, Westwood, directed the harvesting activities that resulted in the contravention. According to the FPB, this previous contravention increased the likelihood of potential harm during the harvest at issue in the present appeal. Because of both companies' previous involvement in unauthorized harvesting on Crown land, the contraventions in October 2010 were reasonably foreseeable, and it was important for Douglas Lake to take all reasonable care to inform Westwood of the boundary's location.

[35] Regarding the other factors commonly considered when assessing whether all reasonable care was taken, the FPB submitted that Douglas Lake had alternatives available to it to prevent harm on Crown land. Douglas Lake could have identified its property boundary's approximate location, and it could have had Westwood harvest away from that location by, for example, hanging ribbons well away from that boundary to clearly mark the line up to which harvesting could occur. Douglas Lake also could have identified the exact location of the boundary before authorizing Westwood to cut or remove timber. The length of the boundary, 1.6 kilometers, suggests that it would be a challenge for anyone to establish the boundary accurately using only a compass. A reasonable person in Douglas Lake's position, given the length of this boundary and the planned harvest up to that boundary, would have informed Westwood of the boundary's exact location using the services of a BC Land Surveyor, or instructed Westwood to use such services on its behalf.

[36] The FPB also submitted that Douglas Lake was in a position to control the causal elements of the offence, but it did not take all reasonable care in the circumstances. It did not take the steps that a reasonable person would have taken, such as clearly marking the line up to which harvesting could occur, or using a BC Land Surveyor to mark the boundary's exact location. Therefore, Douglas Lake did not establish that it exercised due diligence to prevent the contraventions.

[37] The FPB submits that it is open to the Panel to vary the District Manager's determination by finding that Douglas Lake was not, on a balance of probabilities, duly diligent with respect to the contraventions.

The Respondent's Submissions

[38] The Respondent submitted that, in this case, the timber on Crown land was cut, damaged or destroyed contrary to section 52(1) of the *FRPA*, and was removed from Crown land contrary to section 52(3), by employees of a logging contractor who was instructed by Westwood, who in turn was instructed by the owner of the adjacent land, Douglas Lake. Under section 52(4) of the *FRPA*, if a person cuts timber or removes timber at the direction of another person, or on behalf of another person, the other person also contravenes section 52(1) and (3).

[39] The Respondent also submitted that both Westwood and Douglas Lake contravened section 52(1) and (3) by virtue of section 71(3) of the *FRPA*, which provides that if a person's contractor contravenes the *FRPA* in the course of

carrying out the contract, the person also contravenes the *FRPA*. The Respondent submits that it makes no difference how many persons are 'in the chain' between the person holding authority over the timber and the person who actually cuts and removes the timber. The Respondent posed the issue this way: did the directing mind of Douglas Lake take sufficient steps, usually by way of establishing policies and procedures, training and supervision, to reduce the risk of contravention; that is, was its system adequate?

[40] The Respondent acknowledged that the District Manager did not identify who the directing mind of Douglas Lake was, nor did he go on to consider whether the directing mind was duly diligent. The Respondent also acknowledged that Douglas Lake did not make submissions on who the directing minds of Douglas Lake were, and what steps they took to ensure that unlawful cutting and removal would not take place.

[41] The Respondent submitted that, to establish due diligence, Douglas Lake needed to produce evidence to the District Manager regarding who the directing mind or minds were, their position in the company, the size and nature of the company's operations, its familiarity with logging operations, its knowledge of the boundaries, the contract between Douglas Lake and Westwood, any other papers or communications which would define who was intended to do what, what Westwood was expected to do in relation to ascertaining the boundaries, and whether Westwood was effectively an "occupier" of the relevant land (for the purposes of section 53(1)) and had complete control of the harvesting operation. The skills and experience of Westwood and its history of performance for Douglas Lake would also be key considerations. In this case, Douglas Lake appears to have placed complete reliance on Westwood. Whether this was reasonable will depend on a range of factors which were not placed before the District Manager, or at least which he was not referred to.

[42] For these reasons, the Respondent does not oppose the appeal being allowed. However, it submitted that if the appeal is allowed, the Panel should remit the issue of determining whether the defence of due diligence was established back to the District Manager, with directions as to its application in this case. The Respondent submitted that there is insufficient evidence for the Panel to substitute a finding that Douglas Lake was not duly diligent.

[43] Alternatively, the Respondent submitted that the Commission could convene an oral hearing, if Douglas Lake so requested, at which time it would be open to Douglas Lake to present evidence regarding whether it was duly diligent. However, the Respondent acknowledged that it was open to Douglas Lake to put in evidence with written submissions (in the context of the written appeal hearing).

[44] In any event, the Panel notes that Douglas Lake did not request an oral hearing.

The FPB's Reply Submissions

[45] In reply, on the issue of an appropriate remedy, the FPB submitted that referring the matter back to the District Manager would unnecessarily prolong the resolution of the matter, given that Douglas Lake did not intend to file written submissions on the appeal. Thus, the FPB submitted that the Commission may decide the appeal based on the evidence that is before it.

The Panel's Findings

[46] Section 72 of the *FRPA* provides a person with the defence of due diligence in relation to a determination under sections 71 or 74, if that "person establishes that" the person exercised due diligence to prevent the contravention. The Panel notes that the verb "establishes" in the legislation is in the active tense, which means that the onus is on the person seeking that defence to actively establish or prove its due diligence. This is not a passive defense. Also, in cases involving administrative penalties, unlike cases involving criminal actions, there is no presumption that a person is innocent until proven guilty.

[47] Regarding how to establish the defence of due diligence, the Panel notes that this Commission has reviewed the application of this defence in its previous decisions, in which a number of judicial decisions were also reviewed. In *Atco*, the Commission articulated the test at para. 272, as follows:

As stated by the Supreme Court of Canada in *Sault Ste. Marie*, the question in the context of an employer is "whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system.

[48] The Panel adopts this test as articulated in *Atco*, and applies it to this case. The onus, therefore, is on Douglas Lake to prove that it took all reasonable care to prevent the contraventions of the *FRPA*.

[49] Based on all of the submissions and documents filed in this appeal, the Panel finds that there is no evidence that Douglas Lake submitted anything to the District Manager to indicate that it was relying on the defence of due diligence when it was notified by Mr. Pedersen of an OTBH prior to a determination of contravention of the *FRPA*. Mr. Pedersen stated that it was the Ministry's intention to consider both companies, Douglas Lake and Westwood, as joint clients and to have both attend the OTBH prior to determination of the contravention. The only response from Douglas Lake was the letter dated April 6, 2011, which basically said that Westwood was representing it in the matter of these contraventions. That April 6, 2011 letter said nothing about establishing the defence of due diligence.

[50] It is not clear to the Panel why, or how, the District Manager decided to consider the due diligence defence for Douglas Lake, and then conclude that Douglas Lake had established the defence. The Panel notes that the District Manager's findings and conclusion in his Determination made no reference to any submissions by Douglas Lake, or by Westwood on Douglas Lake's behalf, to establish a defence of due diligence.

[51] In summary, no defences regarding Douglas Lake were raised by Westwood or Douglas Lake, or supported by evidence, in the proceedings before the District Manager.

[52] The Panel also notes that Douglas Lake did not make any submissions in this appeal, despite the fact that Mr. Gardner confirmed that Douglas Lake had received the information provided in the appeal proceedings. Given that Douglas Lake committed a previous contravention of this nature arising from similar circumstances in 2004, and received a fine of \$1,814.40 in that case, it cannot be said that Douglas Lake was unaware of the potential consequences to it from a finding of contravention. Even if Douglas Lake was previously unaware (and there

is no evidence that it was unaware) of the test for due diligence or the onus on Douglas Lake to establish the defence, Douglas Lake either was aware, or should have been aware, after it received the other parties' appeal submissions. The Panel also points out that, in appeal hearings before the Commission, new evidence can be submitted and considered.

[53] The Panel finds that Douglas Lake had ample opportunity, both before the District Manager and now before the Commission, to provide evidence to demonstrate that it took reasonable care, to establish that it exercised due diligence to prevent unauthorized harvesting on Crown land. It chose not to do so.

[54] Silence does not establish this defence, nor does putting the matter in the hands of a contractor without demonstrating what instructions were provided to the contractor, and/or what systems were in place for locating boundaries and preventing unauthorized harvesting. Douglas Lake had its chances and chose not to use them, and therefore, the Panel sees no reason to send the matter back to the District Manger.

[55] The Panel now turns to the question whether Douglas Lake, as the owner of DL 1092 and the company responsible for hiring Westwood to harvest the timber, established the defence of due diligence under section 72 of the *FRPA*.

[56] The Panel notes that the District Manager made a number of findings regarding Douglas Lake in relation to the defence of due diligence. For example, the District Manager stated that he could not find that Douglas Lake informed Westwood of the boundaries of its private land as required under section 53(1) of the *FRPA*. The District Manager also stated that he was certain that Douglas Lake was fully aware of the offences it faced and how they may have applied to its defence at a hearing. Nevertheless, the District Manager determined that Douglas Lake had exercised due diligence to prevent the contraventions, because it hired a reputable firm based on a long standing business relationship from 2004.

[57] The Panel finds that none of the District Manager's findings, and certainly none of the facts referred to by him or submitted in this appeal, support a defence of due diligence. As an owner of private land hiring a contractor to carry out harvesting on its behalf, hiring a reputable firm and having good relationships with a contractor have little bearing on a specific incident, unless there is evidence that some kind of system was in place or operational instructions were provided to prevent contraventions. There is no such evidence here. In fact, there is evidence that Douglas Lake and Westwood were involved in a similar contravention in the past. In these circumstances, there was all the more reason for Douglas Lake to provide evidence regarding what it did with Westwood to make sure unlawful harvesting on Crown land was not repeated.

[58] The Panel finds that there was no information before the District Manager, and there is no evidence before the Commission, that Douglas Lake exercised reasonable care in these circumstances, which at a minimum would have involved correctly marking the boundary of DL 1092 for the whole 1.6 kilometres, or making sure that Westwood or someone else, such as a BC Land Surveyor, did that on its behalf. There is no evidence that Douglas Lake had any kind of system in place for locating its property boundaries.

[59] This was Douglas Lake's property. The timber harvest occurred at its behest, for its benefit, and for its financial gain. Therefore, it had a duty to exercise

reasonable care to ensure that the harvest took place only on its property. In other words, this happened on Douglas Lake's watch, so Douglas Lake is responsible unless it can establish that it took reasonable care to prevent the contraventions. Douglas Lake did not do so.

[60] For the foregoing reasons, the Panel finds that, in the proceedings before the District Manager and in the present appeal proceedings, Douglas Lake failed to establish, on a balance of probabilities, that it exercised due diligence to prevent the contraventions under the *FRPA*.

[61] The Panel finds that, under section 84 of the *FRPA*, the determination of the District Manager should be varied to find that Douglas Lake did not establish the defence of due diligence for the purposes of the determination under section 71 of the *FRPA*.

2. Whether a penalty should be levied against Douglas Lake.

[62] The FPB's position is that Douglas Lake should be assessed a penalty for the contraventions of section 52(1), 52(3) and 53(1) of the *FRPA*, because the contraventions are not trifling and it is in the public interest to levy a penalty.

[63] The FPB cited section 71(5) of the *FRPA* which requires a consideration of several factors before a penalty is levied, including the gravity and magnitude of the contravention, and previous contraventions of a similar nature by the person, among other things. The FPB submitted that the basis for a penalty for contravening section 53(1) is that Douglas Lake was not diligent in preventing the contravention, and the gravity of the contravention was moderate. The FPB notes that the District Manager found that the gravity of the contravention was moderate, because the unauthorized harvest of Crown timber would have long term detrimental effects on both mule deer winter range and the old growth management area values.

[64] The FPB also submitted that the basis for a penalty for contravening sections 52(1) and 52(3), in addition to not being diligent and the gravity of the contraventions being moderate, is that Douglas Lake has a previous contravention of section 52(1).

[65] The Respondent submitted that the entire matter should be sent back to the District Manager.

[66] The Panel agrees with the FPB that a penalty should be assessed against Douglas Lake for contravening sections 52(1), 52(3) and 53(1). The Panel finds that the following circumstances, as noted in the parties' submissions, establish that it would be in the public interest to levy such a penalty: the contraventions were preventable, there was harm to habitat values, there was a financial gain from the harvest and sale of the Crown timber, there was a previous contravention of a similar nature which should have put Douglas Lake on notice to exercise reasonable care with its contractor and boundary locations, and there was no information provided by Douglas Lake about what it did to prevent reoccurrence of such a contravention.

[67] In its determination against Westwood for its contraventions during this harvest, the District Manager determined that the Government should be compensated for the partial loss of the habitat values relating to an old growth

management area, a mule deer winter range and the loss of a travel corridor for deer.

[68] The Panel finds that the Government should also be compensated by Douglas Lake. Therefore, the Panel refers the matter of the amount of the penalty back to the District Manager for determination, with instructions to consider all of the circumstances recited above and to ensure that the penalty levied under section 72 of the *FRPA* is no less than that levied against Westwood. In that regard, the Panel notes that the penalty levied against Westwood under section 72 was \$3,000 per hectare, multiplied by 1.1 hectare (the area of the trespass), resulting in a total penalty of \$3,300.

[69] Separate from that penalty, the District Manager ordered Westwood to pay stumpage on 110 cubic metres of Douglas Fir and 1 cubic metre of Aspen pursuant to section 103(3) of the *Forest Act*. Given that Westwood has already been ordered to compensate the Crown for the stumpage owing on the timber harvested without authority, it appears that Douglas Lake is not obliged to pay a second time for the stumpage owing on that timber.

DECISION

[70] In making this decision, the Panel has considered all of the relevant documents and submissions of the parties, whether or not specifically reiterated herein.

[71] For the reasons set out above, the appeal is allowed.

"Gabriella Lang"

Gabriella Lang
Panel Chair
Forest Appeals Commission

June 13, 2014