Forest Appeals Commission

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DECISION NO. 2016-FRP-001(a)

In the matter of an appeal under section 82 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:	M.G. Logging & Sons Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Forest Appeals Commission, Alan Andison, Panel Chair Howard Saunders, Member Reid White, Member	
DATE:	Conducted by way of written submissions concluding on October 21, 2016	
APPEARING:	For the Board:	Mark Haddock, Counsel
	For the Respondent:	Mike Pankhurst, Counsel
	For the Third Party	Roy J. Stewart, Q.C., Counsel

APPEAL

[1] The Forest Practices Board (the "Board") appeals a February 15, 2016 Determination issued by Shawn Rice, Acting District Manager (the "District Manager"), Prince George Operations, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The Determination was addressed to "M.G. Logging & Sons Ltd. - Director Manuel Goncalves". In it, the District Manager found that M.G. Logging & Sons Ltd. ("M.G. Logging") had contravened sections 52(1) and 52(3) of the *Forest and Range Practices Act* (the "*Act*"), by cutting and removing Douglas-fir trees that were to be retained in accordance with Timber Sales Licence A89274 (the "TSL"). The District Manager levied a $3,500 penalty for the contraventions under section 71(2) of the *Act*, after considering the factors specified in section 71(5).

[2] The Forest Appeals Commission has the power to hear this appeal pursuant to section 83 of the *Act*. Subsections 84(1)(c) and (d) of the *Act* provide 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 Board has the right to appeal determinations under section 83(1) of the *Act*. The Board was established by the Legislature in 2005 as the public's "watchdog" on forest practices in British Columbia, and to represent the public interest. Among other things, the Board audits government and industry forestry practices, deals with complaints from the public regarding forest practices and government enforcement, and carries out special investigations. It was also given the authority to appeal enforcement decisions and penalties imposed by the government under the *Act*, and other specified forest-related legislation.

[4] The Board asks the Commission to vary the Determination by increasing the penalty "substantially" in order to reflect the seriousness of the contravention, particularly the environmental and non-timber values affected by the unauthorized harvest of the Douglas-fir trees. It submits that a proper consideration of the factors set out in section 71(5) of the *Act* and administrative justice goals of general and specific deterrence, will lead to the conclusion that an increased penalty is warranted in the circumstances.

[5] The Government takes no position on whether the penalty should be increased but states that, when considering the appropriateness of the penalty, the Commission should take into account all of the factors set out in section 71(5) of the *Act*, use the best evidence available, and consider:

- the purpose of an administrative penalty,
- the evidence regarding habitat damage and environmental loss experienced by the Crown and the public, and
- the costs incurred by the Third Party, including the costs of defending an appeal not initiated by itself.

[6] M.G. Logging adopts the Government's submissions on the appeal generally, but makes specific submissions on the issue of whether, when considering the penalty factors in section 71(5) of the *Act*, the District Manager can, and ought to, consider the history of contraventions by other companies related to M.G. Logging, and/or by the director of M.G. Logging, Mr. Goncalves, in his personal capacity.

BACKGROUND

The Contraventions

[7] The contraventions at issue relate to M.G. Logging's harvesting of Douglas-fir trees. There is no dispute that a significant portion of the total Douglas-fir volume on the TSL was cut and removed from the site, without authority, between

January 20 and April 17, 2013. These trees were "reserved" under Schedule B of the TSL as follows:

> **2.00 Reserved Timber**
>
> …
>
> 2.02 The following timber is specified as reserved timber:
>
> A89274 Leave tree specs
>
> Within block and riparian management zone, retain all deciduous (aspen, birch & cottonwood) and Douglas Fir stems. …. Retention will occur where it does not impede road building, felling, decking or safety. [Emphasis added]

[8] The TSL was issued to M.G. Logging on December 3, 2012. It was a cruise-based sale.

[9] At all relevant times, Manuel Goncalves was listed on the BC Corporate Registry as the sole director and officer of M.G. Logging.

The Determination

[10] On November 10, 2015, the District Manager wrote to "M.G. Logging & Sons Ltd.", to the attention of Mr. Goncalves, advising that there had been a potential contravention of sections 52(1) and (3) of the *Act* due to the cutting and removal of Douglas-fir timber that had been reserved by Schedule B of the licence. Sections 52(1) and (3) of the *Act* state, in part, as follows:

> **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 …
>
> [Emphasis added]

[11] The District Manager offered M.G. Logging an opportunity to be heard on the alleged contraventions, and provided a copy of the evidence package prepared by the Ministry's Compliance and Enforcement ("C&E") staff.

[12] The opportunity to be heard took place on December 18, 2015. Mr. Goncalves and representatives of the C&E Branch of the Ministry attended and gave evidence. The C&E Branch submitted a 324-page document as part of its evidence.

[13] Following the opportunity to be heard, but before the Determination, Mr. Goncalves provided the District Manager with a copy of a log purchase agreement and earnings statements from Quesnel-based West Fraser Mills Ltd., one of the purchasers of the logs harvested by M.G. Logging from the area of the TSL, including Douglas-fir logs.

[14] On February 15, 2016, the District Manager issued the Determination now under appeal. The District Manager concluded that M.G. Logging[1] contravened sections 52(1) and 52(3) of the *Act* by harvesting 253 m^3 of Douglas-fir that had been reserved from harvest by the TSL.

[15] Some of the District Manager's findings that are relevant to the appeal are summarized below:

- On December 11, 2012, Mr. Goncalves and Jill Nesbit (BC Timber Sales) attended a pre-work conference at which time the authorized timber harvesting specifications were discussed.
- Harvesting occurred between January 20, 2013 and April 17, 2013.
- In February of 2013, the skidder operator was reminded that Douglas-fir was reserved from harvest.
- Also in February 2013, Mr. Goncalves was reminded of the Douglas-fir reserve.
- Mr. Goncalves admitted that he instructed his logger to harvest Douglas-fir.
- A stump cruise was completed between June 4 and 6, 2013, and confirmed there were 522 Douglas-fir stumps resulting in a total volume of 281 m^3, of which 260 m^3 was merchantable volume.
- The stump cruise revealed that 135 of the 522 Douglas-fir stems were harvested after Mr. Goncalves was reminded of the Douglas-fir reserve.
- The total volume of unauthorized harvest is 253 m^3 (281 m^3 reduced by 10% to allow for "incidental harvest" or damage[2]).

[16] The District Manager concluded that M.G. Logging had not established any defence to the unauthorized harvest.

[17] The District Manager then considered whether to levy a penalty for the contraventions under section 71 of the *Act*, which states as follows:

Administrative penalties

71(2) After giving a person an opportunity to be heard under subsection (1), …, the minister,

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

---

[1] The Determination is addressed to M.G. Logging ***&*** Sons Ltd. and that (correct) form is used until the middle of page 3, where the letter switches to the (incorrect) form M.G. Logging ***and*** Sons Ltd. In the penultimate paragraph of the final page the determination letter reverts to the correct name. This decision uses the correct form of the company name throughout, except in direct quotes from the Determination.

[2] The District Manager states that this is an accepted industry standard for a stand with scattered or dispersed retention, as in the present case, since it is recognized that some unavoidable damage will occur when conducting ground based harvesting operations in a dispersed stand. (paragraph 91).

(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 a 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, …

…

(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.

[Emphasis added]

[18] The District Manager found as follows under the specific factors in section 71(5) of the *Act*:

(a) previous contraventions, if any, of a similar nature:

There is no evidence of a previous contravention of a similar nature by M.G. Logging and Sons Ltd.

(b) the gravity and magnitude of the contraventions:

The harvesting and removal of Crown timber without authority is a very serious matter in and of itself. …. I consider the magnitude of the harvesting significant as the Douglas Fir was reserved from harvest for biodiversity reasons. Also, this is a cruise-based sale; therefore, no stumpage was paid to the Crown on the harvesting of the Douglas Fir. ….

(c) whether the contraventions were repeated or continuous:

The contraventions were repeated because Mr. Goncalves was made aware during the pre-work and in the licence document and

warned on February 18th and 19th that he not harvest Douglas Fir and later instructed the logger to fall Douglas Fir for Timberspan.

(d) whether the contraventions were deliberate:

I find that the contraventions were deliberate. Both during the investigation and during the OTBH [opportunity to be heard], Mr. Goncalves stated that he instructed the logger to remove a truck load of Douglas Fir for Timberspan. He stated that Timberspan was experiencing a log shortage and potential layoffs, which does not justify removing Crown timber without authority.

(e) any economic benefit M.G. Logging and Sons Ltd. derived from the contraventions:

Based upon the evidence provided, I find that there has been an economic gain of $509.60. To determine this, I used the following numbers:

...

- Economic Gain = Total Revenue – Total Cost = $359.44 [sic].

(f) your cooperativeness and efforts to correct the contraventions:

Even though Mr. Goncalves cooperated with the investigation and admitted that he instructed his staff to cut and remove Crown timber without authority, he made no effort to correct the contravention when it was brought to his attention in February 2013. An additional 135 stems were harvested under his direction following the meeting in February.

(g) any considerations that the Lieutenant Governor in Council may have prescribed:

There are none.

[19] The District Manager noted that he could impose a penalty of up to $50,600 for each contravention of section 52(1) or 52(3) of the *Act* (253 m^3 x $200), pursuant to section 13(2) of the *Administrative Orders and Remedies Regulation*, B.C. Reg. 101/2005 (the "*Regulation*"). Section 13(2) of the *Regulation* establishes the calculation for the maximum allowable penalty, and will be set out later in this decision.

[20] The District Manager concluded that, "having regard to all of the facts of this case", a monetary penalty is required for both specific and general deterrence purposes. He levied a penalty of $3,500 for the contraventions of sections 52(1) and 52(3) of the *Act*, concluding that this was sufficient to deter similar activity in the future to both the company and others engaged in forestry in BC.

[21] The District Manager also advised M.G. Logging that he would be forwarding the file to the appropriate Ministry employee to determine a stumpage rate for the Douglas-fir.

The Appeal

[22] On April 13, 2016, the Board appealed the penalty portion of the Determination issued to M.G. Logging on the grounds that it is "far too low" given the circumstances of the contravention, and having regard to the considerations set out in section 71(5) of the *Act*. The Board argues that, when assessing the penalty, the District Manager erred by:

a. finding that there is no evidence of a previous contravention of a similar nature by the person named in the determination;

b. failing to perform, or to properly perform, all the calculations under subsections 13(2)(a) to (c) of the *Regulation* in order to determine the maximum penalty;

c. failing to fully assess the environmental loss of the Douglas-fir trees under subsection 71(5)(b) of the *Act* (gravity and magnitude of the contravention); and

d. determining that a penalty of $3,500 would be a sufficient deterrent to both the person named in the contravention, and to others engaged in forestry in BC.

[23] In its written submissions, the Board expands upon, and adds to, these grounds.

[24] In relation to "previous contraventions of a similar nature" the Board argues that the Determination appears to be issued to both M.G. Logging and Mr. Goncalves. The Board then notes that the C&E report that was before the District Manager included a "related client list" which includes five other BC Timber Sales' clients who are closely associated with M.G. Logging, and that there were C&E incidents recorded in the databases for some of those clients. Although the record before the District Manager indicated that there were C&E incidents, it appears that the District Manager did not request further information because, according to the Board, he believed that he lacked jurisdiction to consider them under section 71(5)(a) of the *Act*. The Board submits that the District Manager ought to be able to consider previous contraventions by Mr. Goncalves in his personal capacity, and that he should also be able to consider previous contraventions of related companies of which Mr. Goncalves is the controlling mind.

[25] Regarding maximum penalties under the *Regulation*, the Board makes a number of arguments. It argues that the District Manager failed to consider all three of the formulas set out in section 13(2), despite the fact that the section states that the maximum penalty is the "greatest" of the three possible amounts. The Board submits that the District Manager appears to have calculated the $50,600 maximum based only on the formula in subsection 13(2)(a) of the *Regulation*.

[26] Regarding subsection 13(2)(a), the Board further argues that the District Manager erred in not using the full cruise amount of 281 m^3 in his calculation. Instead, he deducted 10% from the total. If he had calculated the maximum under subsection 13(2)(a) using the full cruise amount, the Board submits that the

maximum penalty amount would have been $56,200 (281 m^3 x $200). Moreover, had the District Manager performed the calculations under the other two subsections (13(2)(b) & (c)), the "greatest" amount is found under subsection 13(2)(b). Depending on the data used, the "greatest" amount is either $190,000 or $1,366,000 under that subsection. The Board submits that this maximum ought to have been given greater consideration when determining the final penalty to be levied for the contraventions.

[27] Regarding the gravity and magnitude of the contraventions, the Board notes that the District Manager found the magnitude of the contraventions to be "significant" because the Douglas-fir was reserved for biodiversity reasons. The Board agrees that the magnitude is significant, but submits that there is new evidence to support an increase in the penalty due to the environmental impacts of the contraventions. The new evidence is contained in an expert report by Robert N. Thomson, M.Sc., RPBio., dated June 23, 2016, in which Mr. Thomson opines on the probable impacts of the unauthorized harvest on wildlife and biodiversity. This report was commissioned by the Board for the purposes of this appeal.

[28] Regarding deterrence, the Board submits that the $3,500 penalty levied in this case does not act as a deterrent. The Board submits that, although deterrence is not specifically enumerated in section 71(5) of the *Act*, it is a well-known common law principle, or objective, that is applied when deciding administrative penalties. It submits that the circumstances of the contraventions in this case are "egregious", and warrant significant sanction. It states that the penalty should "send a strong signal to the contravener and the regulated community". Based upon the deterrence aspect alone, the Board submits that penalty ought to be at least $10,000.

[29] The Board also submits that the penalty does not properly compensate the Crown for its loss. The Board explains that, for some time, it has been concerned that decision-makers are not ensuring that administrative penalties properly reflect environmental damage. In this particular case, the Board submits that the $3,500 penalty represents $6.70 per tree, which is far too low given the loss of 522 Douglas-fir trees intended to be reserved for biodiversity purposes. The Board submits that, to compensate the Crown for the ecological loss, a more appropriate penalty would be in the range of $50 to $150 per tree (i.e., $26,100 to $78,300), with an additional amount for deterrence.

[30] Finally, the Board asks the Commission to consider making a recommendation to the Minister in its annual report that "penalty determinations be published in order to meet the administrative justice goal of general deterrence."

AGREED STATEMENT OF FACTS

[31] In addition to the facts found by the District Manager in the Determination and identified earlier in this decision, the Board and the Government agreed that the facts in the 324-page document prepared by C&E Branch for the opportunity to be heard are correct, unless specifically contradicted by the Board or the

Government in this proceeding. They also agree that the following facts are correct:

- Determining the extent of the Douglas-fir harvested without authority by M.G. Logging involved field work by six Ministry staff over three days, and a seventh scaling supervisor to compile the cruise data.
- The entire investigation required approximately 340 hours of staff time between May 29, 2013 and September 8, 2016. Assuming an average hourly rate of $41 the cost was about $14,000.
- The reservation of Douglas-fir from a timber sales licence is not unusual in the Prince George District: it is consistent with the Douglas-fir Management Guidelines for the Prince George Forest Region developed in 1999.

[32] The position of M.G. Logging on these facts is unknown. However, it is noted that M.G. Logging did not dispute the facts.

ISSUES

[33] There is no dispute that sections 52(1) and 52(3) of the *Act* were contravened by M.G. Logging. The issues raised on this appeal relate solely to the quantum of penalty.

[34] The Panel has conducted this appeal as a "new hearing", whereby it has heard evidence that was not before the District Manager and has considered the matter afresh. Therefore, although the Board framed its issues as if this was a review of the Determination for errors, the Panel will not be considering the issues from the perspective of whether errors were made by the District Manager.

[35] The Panel has characterized the issues to be decided in this case as follows:

1. What are the overriding principles to be achieved and the factors to be considered when assessing an administrative penalty in the context of the *Act*?
2. Must the maximum penalty be determined under section 13(2) of the *Regulation* before a penalty is assessed under section 71(2) of the *Act*, and what is the relevance of the maximum penalty in the context of a penalty assessment under section 71(2) of the *Act*?
3. Can the previous contraventions by a sole director of a limited company and/or of a related, closely-held limited company, be considered as part of M.G. Logging's penalty assessment under section 71(2) of the *Act*?
4. If so, what contraventions may be considered in the penalty assessment against M.G. Logging?
5. Is an administrative penalty of $3,500 appropriate in the circumstances?

DISCUSSION AND ANALYSIS

1. What are the overriding principles to be achieved and the factors to be considered when assessing an administrative penalty in the context of the *Act*?

[36] The assessment of an administrative penalty is clearly an exercise of discretion. Section 71(2) of the *Act* states that a penalty "may" be assessed.

[37] In *Administrative Law in Canada,* 4th ed. (Markham: LexisNexis Canada Inc., 2006), Sara Blake notes that discretion is not absolute or unfettered. She states:

> All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act. These are gleaned from a reading of the statute as a whole using ordinary methods of interpretation. Conversely, discretion may not be used to frustrate or thwart the intent of the statute. ….
>
> All discretionary decisions must be based primarily upon a weighting of factors pertinent to the policy and objects of the governing statute. … It should consider all factors relevant to the proper fulfillment of its statutory decision-making duties. (pages 95-96) *[references not included]*

[38] The Board submits that the discretion to levy a penalty under subsection 71(2) of the *Act* is "structured", in that there are factors set out in section 71(5) which "must" be considered. However, when exercising the discretion, the decision-maker should also be mindful of the principles or objectives of administrative penalties in the *Act* which, although not specifically identified as factors to consider in section 71(5), ought to be given weight when assessing a penalty; specifically, the objectives of compensation to the Crown for the loss of any values, and deterrence.

[39] In terms of compensation, the Board and the Government agree that part of a penalty can include compensation to the Crown for losses related to the environmental values, such as wildlife forage and habitat.

[40] However, a compensatory penalty should not include the costs of the Ministry's investigation (*Canadian Forest Products Ltd. v. Government of British Columbia*, (Appeal No. 96/01, December 11, 1996), cited with approval in *Hayes Forest Services Limited v. Government of British Columbia*, (Appeal No. 1997-FOR-07, February 4, 1998)). The District Manager did not include any investigation costs in his penalty determination. Although the Board refers to these costs in its submissions, and there is evidence regarding investigation costs in the agreed statement of facts, the Board clarifies that it is not suggesting that the penalty ought to recover these costs as part of the penalty. However, it does suggest that they may be relevant to consideration of subsection 71(5)(b): the magnitude of the contravention.

[41] In terms of deterrence, all parties agree that an administrative penalty is intended to act as a deterrent to both the contravener, and to the regulated community (i.e., specific and general deterrence). The Government submits that, in both instances, the penalty should be large enough to emphasize that it is not simply "a cost of doing business". It states that "deterrence is thus future oriented as opposed to being aimed at penalizing, or seeking retribution for, past conduct."

[42] M.G. Logging agrees with the latter, noting that the purpose of penalties under section 71(2) of the *Act* is to enhance compliance and enforcement, not to punish a person, as would be the objective in criminal cases.

The Panel's findings

[43] In *Tolko Forest Products and Forest Practices Board v. Government of British Columbia*, (Appeal No. 95/02, November 12, 1996) [*Tolko*], the Commission considered the nature of an administrative penalty and whether such penalties were quasi-criminal, thus attracting the protection of section 11 of the Canadian *Charter of Rights and Freedoms*. The Commission concluded that these penalties are not quasi-criminal, they are a regulatory tool intended to encourage compliance with the legislation (page 6). In the words of the Court in *Wigglesworth v. The Queen*, [1987] 2 S.C.R. 541, the purpose of the penalty is "to regulate conduct within a limited private sphere of activity".

[44] In *Marilyn Abram v. Government of British Columbia*, (Appeal No. 2004-FOR-013(a), April 12, 2005) [*Abram*], the Commission considered the nature of administrative penalties levied under the *Code* for unauthorized timber harvesting. The *Code* sections at issue in *Abram* are the same as those now contained in the *Act*.

[45] After considering a previous decision of the Commission in *MacMillan Bloedel v. Government of British Columbia*, (Appeal No. 95/05(b), February 19, 1997), the panel in *Abram* found as follows:

> This panel of the Commission agrees with the analysis in *MacMillan*. Administrative penalties under the *Code* are linked to the remedial purpose of the Act, and the primary purpose of penalties under section 119 of the *Code* is not to punish wrongdoers, but rather to compensate the Crown for loss or damage suffered, and to protect public forest resources by deterring unauthorized harvesting. … the Ministry has discretion to levy a penalty that is lower than the maximum, and in levying a penalty under section 119, officials must consider several factors listed in section 117(4). Those factors relate to both the nature of the contravention and the person's motivations and conduct. (pages 15-16)

[46] In *Abram*, the Commission found that one of the purposes of the legislation is to protect public natural resources. It also found that compensating the Crown for loss or damage suffered to such resources is the primary purpose of administrative penalties section; the secondary purpose is to deter future

contraventions. All parties to this appeal agree that one of the purposes of a deterrent penalty is to encourage compliance with the legislation.

[47] Consistent with this analysis, and with the common law regarding the exercise of discretion as described in the quote from *Administrative Law in Canada*, the Panel finds that, when making a decision under section 71(2) of the *Act*, a decision-maker is not limited to considering only those factors enumerated under section 71(5). The proper exercise of discretion allows, if not requires, consideration of "all factors relevant to the proper fulfillment of its statutory decision-making duties." This includes consideration of compensation to the Crown for lost values, including lost environmental values, and both specific and general deterrence. It may also include consideration of other factors that, likewise, are not enumerated in section 71(5), but are relevant to "promote the policies and objects of the governing Act", and the "proper fulfillment of its statutory decision-making duties" (*Administrative Law in Canada*, supra).

2. Must the maximum penalty be determined under section 13(2) of the *Regulation* before a penalty is assessed under section 71(2) of the *Act*? What is the relevance of the maximum penalty in the context of a penalty assessment under section 71(2) of the *Act*?

[48] When assessing the administrative penalty against M.G. Logging in the Determination, the Government notes that the *Regulation* authorizes a penalty of up to $50,600 for each contravention of section 52(1) or 52(3) of the *Act* (253 m^3 x $200).

[49] The Board asserts that the District Manager erred by only considering the maximum penalty under subsection 13(2)(a) of the *Regulation,* rather than determining the "greatest" amount of the three formulas set out in subsections 13(2)(a) to (c). The Board submits that it is important for decision-makers to consider each of the enumerated categories as they represent different means of considering how serious the Lieutenant Governor in Council ("Cabinet") considers a contravention to be.

[50] The relevant portions of the *Regulation* are as follows:

13(2) The maximum amount that the minister may levy against a person under section 71(2) of the *Forest and Range Practices Act* for a contravention of section 52(1) or (3) of that Act is the **greatest** of the following amounts:

(a) an amount equal to the product of

(i) the volume, expressed in cubic metres, of the Crown timber that was the subject of the contravention, and

(ii) $200 per m^3;

(b) an amount equal to the product of

(i) the area, expressed in hectares, that contained the timber that was the subject of the contravention, and

(ii) $100 000 per ha;

(c) an amount equal to the sum of

(i) the stumpage and bonus bid that in the opinion of the minister would have been payable if the volume of timber that was the subject of the contravention had been sold under a BC timber sales agreement at the time of the contravention,

(ii) twice the market value of logs and special forest products that in the opinion of the minister were, or could have been, produced from the timber that was the subject of the contravention,

(iii) the costs that have been or will be incurred by the government in re-establishing a free growing stand on the area, and

(iv) the costs that were incurred by the government for silviculture treatments to the area that were rendered ineffective because of the contravention.

(3) For a contravention of section 52 of the *Forest and Range Practices Act*, the minister, in a penalty levied under section 71(2) of that Act, may not include any amount for the value of the timber, if any, that is recoverable under section 103 of the *Forest Act* [stumpage].

[Emphasis added]

[51] The Board provided the Panel with detailed calculations and analysis under each of the three subsections (a) to (c), to determine which of the three produced the "greatest" penalty. It also included alternate calculations when it thought there may be differing interpretations of the language in the particular subsection. The results of the Board's calculations under subsections 13(2)(a) to (c) are as follows:

13(2)(a)	$56,200
13(2)(b)	$190,000 to $1,366,000
13(2)(c)	$36,802

[52] Based upon these calculations, the Board submits the penalty ought to be increased as the "greatest" of the three amounts is (b), ranging from $190,000 to $1,366,000, far exceeds the District Manager's calculation of $50,600.

[53] The Board submits that failing to determine, and to give adequate consideration to, the maximum penalty can have unintended consequences. It refers to a special investigation report published by the Board in October 2014, in which the Board examined 146 determinations. The Board states that 91% percent of the penalties levied in those determinations were less than 10% of the maximum authorized penalty prescribed by regulation, suggesting that decision-makers are not treating contraventions as seriously as the provincial Cabinet intended.

[54] In terms of the District Manager's calculation of the maximum in this case, the Board submits that the District Manager erred by deducting a volume of timber

from the total volume of unauthorized Douglas-fir harvested (281 m^3) when he calculated the maximum penalty under subsection 13(2)(a). The District Manager deducted 10% of the total volume to cover "incidental harvesting", arriving at a volume of 253 m^3. Thus, he only included "merchantable" timber in the calculation.

[55] The Board submits that the District Manager wrongfully assumed that the administrative penalty could only include the "merchantable" timber. It submits that section 13(2) of the *Regulation* does not distinguish between merchantable and non-merchantable Crown timber. Although the volume of merchantable timber is a relevant consideration when it comes to determining the economic benefit derived from the contravention under section 71(5)(e) of the *Act*, the Board submits that it is not a relevant consideration for determining the maximum penalty under subsection 13(2)(a) of the *Regulation*. The Board submits that the full volume of 281 m^3 should be used to determine the maximum penalty.

[56] The Board also suggests that the 10% deduction for incidental harvest to cover things such as road building, decking, felling and safety may be excessive, given that Douglas-fir only represented 16% of the stand (i.e., other species would have been cut in greater quantities for the incidental harvest). The Board also notes that the stump cruise carried out did not include the roadside work areas, so some of the permissible fir harvesting due to road building, decking and safety was already "netted out of the stump cruise calculation."

[57] The Government agrees with the Board that the calculation of the maximum allowable penalty should be based on the total volume of Crown timber cut, damaged, destroyed or removed without authority. However, it submits that the amount of Crown timber "that was the subject of the contravention", specified in each of paragraphs (a), (b) and (c) of the *Regulation*, is subject to the statutory decision-maker's determination of the volume of unauthorized harvest. In this case, the District Manager reduced the total volume by 10% to take into account "incidental damage".

[58] The Government also agrees that a statutory decision-maker must consider the application of the three options in section 13(2) to arrive at the maximum allowable penalty that is appropriate in each case, but submits that it is not necessary for the decision-maker to include his or her written analysis describing the manner in which those options were considered in a determination. He submits that it would only be necessary if the maximum allowable amount played a significant role in how the decision-maker arrived at the actual penalty amount.

[59] The Government also submits that the equations in section 13(2) provide the decision-maker with some flexibility and discretion when determining the maximum amount that can be levied. In his view, the "likely object" of this three tier mechanism is to allow the statutory decision-maker to choose the calculation that most aptly fits the circumstances of the case, and ensure that at least one of the calculations will provide for a maximum penalty large enough to achieve the regulatory objectives of compensation and deterrence.

[60] Further, the Government states that there is no longer any need to ensure that the maximum penalty is high enough to ensure that the Crown is properly

compensated for lost timber values as, since 2004, the Crown is now compensated through the stumpage collected under the *Forest Act*, and that amount is no longer allowed to be included in the penalty (per section 13(3) of the *Regulation*). The District Manger notes that, previously, the largest compensatory component of a monetary penalty was compensation for the value of the timber to the Crown that was captured in an "equivalent to stumpage amount or upset rate plus bonus bid amount". With the 2004 enactment of the *Act* and the *Regulation*, this compensatory aspect of the penalty is no longer included in the penalty.

[61] In the present case, the Government states that the District Manager selected, as the maximum, the amount calculated under subsection 13(2)(a) of the *Regulation* after considering all of the options available to him. His decision was based primarily on the fact that the unauthorized harvest was dispersed over a large area of partial retention, so the cubic metre calculation in subsection (a) seemed more appropriate than the area-based calculation in subsection (b), and produced a greater number than the calculation in subsection (c).

[62] The Government also points out that the maximum allowable penalty applies to each contravention. Applying the maximum calculated by the Board of $1,366,000, M.G. Logging would be liable for a maximum penalty of $2,732,000 for the two contraventions. In the Government's view, such a maximum possible penalty provides "very limited guidance to the decision-maker" in this case.

[63] The Government states that the maximum allowable penalty amount "may provide some guidance to the statutory decision-maker in some cases", but suggests that, rather than starting with the maximum allowable penalty, a more suitable approach to determining an appropriate penalty amount is to adopt an approach that "serves and focuses on the regulatory purposes of compensation and deterrence, after considering the penalty factors" in section 71(5) of the *Act*.

The Panel's findings

[64] Section 71(2) of the *Act* states that, after giving a person an opportunity to be heard, 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,
>
> ...
>
> [Emphasis added]

[65] Section 13(2) of the *Regulation* establishes that "prescribed amount".

[66] Both the Board and the Government agree that section 13(2) of the *Regulation* provides guidance to a decision-maker in setting a penalty. However, they differ on how this section should be used, and the numbers that ought to be inserted into the equations in this case.

[67] In the Panel's view, the purpose of section 13(2) of the *Regulation* is simply to establish the maximum penalty that can be levied for a contravention of section 52(1) or (3) of the *Act*, which cannot be exceeded. Rather than establishing a single dollar value as the maximum, the government decided to provide three equations, and require the equation that produces the highest dollar value to be the maximum penalty for a contravention of section 52(1) or (3) of the *Act*.

[68] However, there is no statutory requirement for a decision-maker to go through each of the three subsections and determine the maximum penalty before assessing an administrative penalty under section 71(2) of the *Act*: i.e., it is not a required factor to be considered under section 71(5) of the *Act* or a precondition to levying a penalty. Nevertheless, as noted in Issue 1, it could still be a relevant consideration under section 71(2). This will be discussed next.

[69] From a practical point of view, a decision maker will often choose to perform the calculations in order to ensure that the penalty being contemplated will not exceed the maximum. If so, the Panel agrees with the Government that those calculations need not be included in the determination unless determining the maximum amount plays a significant role in how the decision-maker arrived at the actual penalty amount.

[70] In other cases, the Panel accepts that an experienced decision-maker may know that the penalty being contemplated is nowhere near the maximum, in which case he or she may not need to perform the calculations under section 13(2) of the *Regulation*.

[71] Even if calculating the maximum is not required, the Board submits that there is value in doing so as it gives some indication of how high a penalty could go in the right circumstances. It also submits that the three equations represent different means of considering how serious Cabinet considers a contravention to be.

[72] Although the Panel agrees that it may be of interest to both the decision-maker and the recipient of a determination to know how high the penalty could be as it suggests an absolute worst case scenario, the Panel finds that, given the particular wording of the three subsections in this *Regulation*, the results of the three equations may not provide a useful perspective on how the government views the seriousness of the particular contravention at issue. This is because the equations are a "blunt" tool; they are not tailored to the particular circumstances of the contravention. For example, using the formula in subsection (b), at $100,000 per hectare, the maximum penalty is the same for one hectare of poor quality beetle-killed lodgepole pine in the Chilcotin as for one hectare of old growth coastal forest with spotted owls present.

[73] Similarly, using the formula in subsection (a), the $200 per m^3 maximum would apply the same per m^3 penalty to a prime cedar area on the coast, as to the poor quality beetle-killed lodgepole pine in the Chilcotin. The maximum penalty would be different on a per hectare basis because of lower volume in the pine stand than in the cedar stand, but the maximum penalty would not provide useful guidance when deciding the penalty for contraventions in two such situations.

[74] Only subsection (c) of the *Regulation* considers factors that would produce different results for different regions, timber types and timber quality. However, the maximum levy under subsections 13(2)(a) and (b) would frequently be greater than under subsection 13(2)(c), and would determine the applicable maximum, i.e., "the greatest of the following amounts". This is apparent in the calculations provided by the Board that show widely divergent maximums under the three calculations, with subsection (b) producing a dollar value that is five to 37 times the dollar value calculated under subsection (c).

[75] Thus, the Panel finds that the dollar values calculated under the equations cannot be relied upon to provide perspective on the actual seriousness of the contravention at issue, which may be why the Board's 2014 special report found that 91% of the penalties reviewed were less than 10% of the maximum. More information and analysis would have to be done in order to determine whether a particular equation, or the ultimate maximum penalty, provides any useful basis upon which to assess the appropriate penalty in a particular case. This is highlighted by the Board's calculation of the maximum under subsection (b).

[76] As the Government points out, applying the highest penalty calculated by the Board under subsection (b) results in a maximum penalty of $2.7 million for the two contraventions. This amounts to more than $10,000 per m^3 of timber cut and removed in this case, which is out of all proportion to the value of the timber at issue. Given that this equation is insensitive to major differences in circumstances, the Panel finds that it is of no value when assessing either the penalty, or the government's view of the seriousness of the harvest, in this case; it is simply too unconnected to the facts to be of assistance.

[77] For these reasons, the Panel agrees with the Government that a more suitable framework for assessing the quantum of penalty is consideration of the factors in section 71(5) of the *Act* and the objectives of compensation and deterrence.

[78] Although both the Board and the Government made extensive submissions on the data that should, or should not, be included in the three equations, the Panel need not address their arguments in this decision. The $3,500 penalty at issue in this case is well below the maximum calculated by the District Manager, and nowhere close to the maximums calculated by the Board under subsections (a) to (c). Further, as will be discussed under a separate issue in this decision, the Panel's decision does not exceed any of the three maximums calculated by the Board.

[79] In summary, there is no legal requirement for the maximum penalty to be determined under section 13(2) of the *Regulation* before a penalty is assessed under section 71(2) of the *Act*, and deciding whether to perform the calculations in the three equations is simply one of the many decisions that go into the general exercise of discretion under section 71(2) of the *Act*. However, it is clear that the penalty ultimately assessed cannot exceed the maximum.

[80] In addition, the Panel finds that the maximum penalty is of questionable relevance, and value, to determining how serious the government considers a particular contravention to be, and is of questionable relevance and value to

assessing the quantum of penalty given that most the equations do not take the particular circumstances of the contravention into account. Moreover, the maximum penalty may well have the least connection to the particular facts of the harvest, as is evident from the maximum assessed by the Board in this case.

3. Can the previous contraventions by a sole director of a limited company and/or of a related, closely-held limited company, be considered as part of M.G. Logging's penalty assessment under section 71(2) of the *Act*?

[81] The District Manager concluded that there was no evidence of a previous contravention by M.G. Logging. The Board and the Government agree with this finding. However, the Board submits that there are past contraventions by Mr. Goncalves personally, and by a company closely related to him, that ought to be considered when determining M.G. Logging's penalty.

[82] The Board states that, prior to making his Determination, the District Manager was given a report from the C&E Branch showing the compliance and enforcement history of M.G. Logging, as well as a "related client list". Five other BC Timber Sales' clients who are closely associated with M.G. Logging were on that list. For three of those clients, Mr. Goncalves is the sole director. The fourth client is a family member of Mr. Goncalves, and the fifth client is Mr. Goncalves personally.

[83] The Board submits that previous contraventions of Mr. Goncalves, and closely related companies of which Mr. Goncalves is the controlling mind, should be considered for the purposes of subsection 71(5)(a) of the *Act*, "previous contraventions of a similar nature by the person". The previous contraventions at issue are as follows:

- a violation ticket issued to Mr. Goncalves in his personal capacity on January 30, 2013, for a contravention of section 52(1) of the *Act* (the "Violation Ticket"); and
- a 2010 compliance notice for mismarking timber that was issued to M.G. Logging Ltd., another company for which Mr. Goncalves is the sole director (the "Compliance Notice").

[84] In terms of the previous contravention of Mr. Goncalves, the Board suggests that, because the Determination was addressed to "M.G. Logging & Sons Ltd. – Director Manuel Goncalves" and was sent to the Director's address, the Determination was issued to both of them; therefore, any previous contraventions by Mr. Goncalves, and arguably other companies closely related to him, would be relevant as previous contraventions.

[85] However, even if the Panel does not accept that the Determination was issued to Mr. Goncalves as director of M.G. Logging, the Board submits that the Panel should still consider any previous contraventions by him, in his personal capacity, for policy reasons.

[86] Referring to other sections of the *Act* and the *Forest Act*, the Board notes that there are provisions that "if a corporation commits an offence, a director or

officer of the corporation who authorized, permitted or acquiesced in the offence also commits the offence." Given that contraventions of sections 52(1) and (3) of the *Act* are offences under section 87 of that enactment, the Board states, "When compliance action could have been taken against the very same individual who was the sole director of both closely held corporations, it makes little policy sense to erect a corporate veil when it comes to considering previous contraventions."

[87] The Board makes this same argument in support of considering the contraventions by closely held, closely related corporations. The Board refers to section 29 of the *Interpretation Act* to argue that "person" in subsection 71(5)(a) (i.e., previous contraventions of a similar nature by "the person"), can include closely held, related companies to M.G. Logging. Section 29 provides that "person" includes "a corporation, partnership or party, and the person or other legal representatives of a person to whom the context can apply according to law" [Emphasis added]. The Board submits that, for the purposes of subsection 71(5)(a) of the *Act*, Mr. Goncalves, as the sole director of both small corporations, may be considered the "legal representative" of both companies, and any previous contraventions of those companies may be considered in the context of another one of his companies.

[88] The Board admits to being unable to "find case law authority for this argument that is directly on point for the 'corporate veil' aspect that presents itself here." However, it refers to criminal law cases where certain courts have concluded that a large corporation does not avoid large fines by establishing a network of small corporations: *R. v. Canadian Marine Drilling Ltd.* (1983), 51 A.R. 359 (N.W.T. Terr. Ct.). The Board submits that:

> The law concerning sentencing corporations in the criminal court setting therefore should be seen as providing ample authority for a decision maker under s. 71(5)(a) of FRPA [the *Act*] to consider previous contraventions by closely held, closely related corporations when levying an administrative penalty. Criminal law rules are generally far more rigid than those in the administrative regulatory environment due to the strong sanctions available to criminal courts. …. The goals and objectives of administrative justice suggest a strong policy rationale for considering the 2010 compliance notice recorded in CIMS [Compliance Information Management System] for M.G. Logging Ltd. when determining an appropriate administrative penalty. (para. 80)

[89] The Government rejects the suggestion that the Determination was issued to both M.G. Logging and the Director, Mr. Goncalves. It states that the Determination was only issued to M.G. Logging.

[90] The Government takes no position with respect to the issue of piercing the corporate veil in order to "attribute to M.G. Logging enforcement or compliance actions against other persons with separate legal personalities but closely related to M.G. Logging." The Government advises that, traditionally, statutory decision-makers under the *Act* have not pierced the corporate veil when determining previous contraventions of a similar nature. While not expressly advocating that this past practice be changed, the Government refers the Panel to *Trans-Pacific*

Shipping Co. v. Atlantic & Orient Trust Co., [2005] F.C.J. No. 416 [*Trans-Pacific Shipping*], a case which suggests that courts may be applying the doctrine of the corporate veil in a less restrictive manner than in the past.

[91] In *Trans-Pacific Shipping*, the Federal Court quoted from certain cases where the courts resisted "attempts to import into modern administrative law the theory of the corporate veil". In one case, the court held that the CRTC was not lifting the corporate veil when it inquired into the identity of a corporation's shareholders, or even of the shareholders of corporate shareholders: *CIBM-FM Mont-Bleu Ltée v. Canadian Radio-television and Telecommunications Commission and the CION-FM Inc.* (1990), 123 N.R. 226 (F.C.A.).

[92] In another case, the court found that the corporate veil may be lifted where the corporation is under the control of another person or entity to such an extent that they constitute a common unit, or where one company is in fact the agent or puppet of the other or is being used as a cloak for the actions of the other: *Syntex Pharmaceuticals International Ltd. v. Medichem Inc.*, [1990] 2 F.C. 499.

[93] A final example is where fraud or improper conduct is alleged.

[94] While the Government does not take a position on whether the previous contraventions of a director or closely-related company can be considered under subsection 71(5)(a), it does take a position on whether the particular contraventions referenced by the Board ought to be considered. The Government states that, if previous contraventions of directors or related companies can be considered, then the incident that resulted in a Violation Ticket to Mr. Goncalves is the only previous contravention relevant to this appeal: the Compliance Notice is not a "previous contravention" for the purposes of subsection 71(5)(a), and should not be considered.

[95] The Government submits that a "previous contravention", as referenced in section 71(5)(a) of the *Act*, is a reference to:

- an admitted or successfully prosecuted offence (including a violation ticket), or
- a determined contravention,

but not to a compliance action. This is because a compliance action is not backed by the force of law, and is not accompanied by any type of formal proceeding that would allow a person to challenge the assertion of non-compliance. The Government states: "[a]lthough a compliance action certainly suggests that a contravention has occurred, it is more akin to an allegation than a determined contravention, offence, or an undisputed, or disputed and upheld, violation ticket."

[96] The Government refers to the "determined contravention, offence, or an undisputed, or disputed and upheld, violation ticket" as enforcement actions. It explains that they consist of alleged contraventions that are brought forward to the minister's delegate for a determination of contravention, and that a determination is not made until the person is first offered an opportunity to challenge the alleged contravention in an opportunity to be heard. Violation tickets are a type of enforcement action: they are issued by forest officials and can be challenged in the courts. If a violation ticket is not challenged, the offence is

deemed to have been admitted, after which the ticket constitutes a formal contravention.

[97] While the Government agrees that a compliance notice may be relevant to certain aspects of a contravention determination, such as in the consideration of the defences under section 72 of the *Act* (as an indication of what a person knew or ought to have known), the Government states that there are valid reasons for only considering "contraventions" in the context of subsection 71(5)(a). In particular, it submits that decision-makers place significant weight on "previous contraventions of a similar nature by the person" because:

> This factor speaks to progressive deterrence as a means of raising a person's level of performance and achieving compliance. Previous findings of contravention of a similar nature are very likely to suggest the need for a significantly more convincing monetary penalty in order to convey an effective message of deterrence. [Emphasis added]

[98] For this reason, "contravention of a similar nature" ought to be interpreted as "admitted or successfully prosecuted offence (including a violation ticket), or a determined contravention."

[99] M.G. Logging responded to the Board's arguments on this issue. It notes that the Board "did not find case law authority" for its argument that previous contraventions of Mr. Goncalves, in his personal capacity, can be considered if he is named in the Determination as a director of M.G. Logging, nor for its argument that contraventions of related companies of which Mr. Goncalves is the controlling mind can be considered for the purposes of section 71(5)(a) of the *Act*. M.G. Logging submits that, "if you cannot find case law authority, you generally do not have a case to put forward." It submits that the purpose of penalties under section 71(2) of the *Act* is to enhance compliance and enforcement, not to punish a person, as would be the objective in criminal cases.

[100] M.G. Logging submits that there is no justifiable basis to "pierce the corporate veil" in this case, either based on legal precedent or public policy. In support, it refers to cases involving the imposition of costs and special costs on non-parties.

[101] The Board replied to both parties' submissions.

[102] In reply to the Government's distinction between enforcement and compliance actions, the Board submits that compliance notices require an "official" - someone with training, exercising delegated authority – to make a "finding" that a contravention has occurred. The Board submits that it would be inappropriate for officials to deliver compliance notices for mere allegations.

[103] The Board submits that, although compliance notices do not result in a formal sanction, they are recorded incidents of non-compliance. The fact that it is made by an official without the benefit of a formal opportunity to be heard merely reflects that a compliance notice is not seen as significant enough in terms of sanction against the person to warrant hearing rights under the administrative law rules of procedural fairness.

[104] The Board submits that there should be no issue with the appropriateness of considering incidents that result in compliance notices, as opposed to other enforcement action. The particular circumstances of the non-compliance, e.g., whether the non-compliance is set out in a formal determination of contravention or a compliance notice, should simply go to the weight that the prior contravention carries when it comes to determining the amount of penalty.

[105] Finally, the Board submits that the focus of subsection 71(5)(a) of the *Act* is the previous contravention itself, not whether there are hearing or appeal rights that flow from the choice of compliance or enforcement action. The discretionary choice of action should not determine whether it can be considered under subsection 71(5)(a) of the *Act*.

The Panel's findings

[106] The Board argues that both the Violation Ticket issued to Mr. Goncalves, and the Compliance Notice issued to M.G. Logging Ltd. ought to be considered under subsection 71(5)(a): "previous contraventions of a similar nature by the person".

[107] The Board's arguments raise two preliminary interpretation questions:

1) Does previous "contravention" in subsection 71(5)(a) of the *Act* mean a previous *finding* of contravention in a determination?
2) Does "the person" in subsection 71(5)(a) include an entity other that the one that is the subject of the enforcement action at issue?

The meaning of "contravention" in subsection 71(5)(a) of the Act

[108] The meaning of "contravention" in this subsection is important for the reasons set out by the Government: significant weight is placed on this factor when assessing the deterrent aspect of a penalty.

[109] There appears to be no dispute, and the Panel agrees, that a violation ticket is a "contravention" for the purposes of this subsection. The dispute in this case is whether a compliance notice is a "contravention" for the purposes of subsection 71(5)(a).

[110] "Contravention" is not defined in the *Act*, and the Panel has been unable to find any previous Commission cases where the meaning of "contravention" in this subsection has been discussed in any depth. Nor are there any previous Commission decisions where a compliance notice has been considered in the context of this subsection. However, the Commission has considered whether a warning ticket was a previous contravention in *Klaus Orleans v. Government of British Columbia* (Appeal No. 2000-FOR-006, April 2, 2001) [*Orleans*].

[111] In *Orleans*, the Commission considered a penalty levied against Mr. Orleans under section 117 of the *Code*, which contained identical factors to those now found in section 71(5) of the *Act*. When considering contraventions of a similar nature, the district manager in that case found that Mr. Orleans did not have a record of official contraventions, but that a warning ticket had been issued for

possession of cedar logs that had been harvested above the high water mark. The district manager considered this ticket as it indicated that Mr. Orleans had been engaged in at least one prior unauthorized harvesting activity. He stated that "Based upon the above evidence, I believe that a penalty to this contravention of $1,824.08 is appropriate to ensure that you clearly understand that timber cannot be cut or removed from above the high water mark without authority." When assessing the penalty, the Commission addressed the warning ticket as follows:

> In the Panel's view, 'previous contraventions' means an 'official' contravention as set out in a determination where the person has had the benefit of all of the associated procedural protections of notice, an opportunity to be heard, and so on. A warning ticket does not fit within this category and, therefore, is not an appropriate consideration under section 117(4)(b)(i). (pages 6-7)

[112] However, the panel in *Orleans* did not provide any analysis of the legislation in support of this finding: there is no review of the *Code*, and it is unclear how much argument was heard on this particular issue. In contrast, this Panel has received argument on this point. The Panel has also reviewed every reference to "contravention" in the *Act*, and has reviewed some of the regulations made under the *Act*. Based upon this review, the Panel can find no rational basis to find that "contravention" means anything other than the fact of contravening the legislation. There is no indication that "contravention" means "finding" of contravention in a determination. Such an interpretation simply does not work in many sections. For instance, section 93 states:

> **93** If a contravention of section 46 (1), 50 (1) and (2), 54 (1), 55, 57 (1) or 111 (2) continues for more than one day, the offender is liable to a separate penalty, without notice and without a separate count being laid, for each day that the contravention occurs. [Emphasis added]

[113] From its review of the legislation, the Panel notes that, when the Legislature wants to distinguish between the fact of a contravention occurring and an official decision regarding that contravention, specific language is used, such as the language found in section 75 of the *Act*:

> **Limitation period**
>
> **75**(1) The period during which an administrative penalty may be levied under section 71 (2) or 74 (3) (d) or an order may be made under section 74 (1) is 3 years beginning on the date on which the facts that lead to the determination that the contravention occurred first came to the knowledge of an official.
>
> (2) A document purporting to have been issued by an official referred to in subsection (1), certifying the date the facts that lead to the determination that the contravention occurred first came to the knowledge of the official,
>
> …
>
> [Emphasis added]

[114] Thus, in the Panel's view, a previous "contravention" would include any enforcement or compliance actions shown on the person's record with the Ministry.

[115] Despite the Government's concerns, this finding makes sense from a policy perspective. It is clear that official warnings and compliance notices are an important piece of information for a decision-maker. If this was not the case, then a licensee could have multiple warnings or compliance notices for relatively minor incidents of a similar nature, yet be assessed a penalty that did not reflect this history of non-compliance. Ignoring such a history, even if that history has not been the subject of a full "official" opportunity to be heard, cannot be consistent with the overall objectives of managing and protecting the Province's forests. Further, ignoring such information is not fair to licensees with a history of complying with their licences and the legislation.

[116] The Panel has carefully considered the Government's concern about the absence of a process to challenge a warning or compliance notice, and finds that this concern has some merit. However, there are other ways for this concern to be addressed within the decision-making process itself.

[117] First, the person who is the subject of the determination must be given clear notice of the previous contraventions that will be considered by a decision-maker before the opportunity to be heard.

[118] Second, the person must be given an opportunity to make submissions on the applicability and relevance of those contraventions before a determination is made.

[119] Further, the weight given to warnings and/or compliance notices in a subsequent determination will, of course, depend on their number, how long ago they occurred, how similar they are to the subject matter of the determination, and the seriousness of the non-compliance which resulted in the warning or notice.

[120] In the present case, although M.G. Logging did not have clear notice that the Violation Ticket and the Compliance Notice may be considered and, in fact, the District Manager did not consider them when he made his Determination, M.G. Logging has had clear advance notice that the Board is seeking to have them considered by this Panel of the Commission, and M.G. Logging has had a full opportunity to address their relevance in its submissions, although it chose not to do so.

[121] The Panel finds that, for the purposes of subsection 71(5)(a) of the *Act*, a violation ticket and a compliance notice may be considered as a previous contravention, despite the lack of a formal proceeding to challenge the latter before, or after, it is issued. These contraventions of the legislation are relevant to the objectives of administrative penalties under the *Act*.

The meaning of "by the person" in subsection 71(5)(a) of the Act

[122] Subsection 71(5)(a) of the *Act* requires consideration of a previous contravention of a similar nature "by the person".

[123] First, the Board argues that "the person" in this case includes the director, Mr. Goncalves, as the Determination was addressed to both him and M.G. Logging, and it was sent to the director's address.

[124] The Board also argues that "the person" is not restricted to exactly the same person that is the subject of a particular determination. Rather, person, as defined in section 29 of the *Interpretation Act*, includes "a corporation, partnership or party, and the person or other legal representatives of a person to whom the context can apply according to law" [Emphasis added].

[125] The Board submits that, for the purposes of subsection 71(5)(a), this broad definition opens the door to considering the previous contraventions of, for instance, the sole director of a corporation as the "legal representative", and any previous contraventions of the companies which the sole director also controls.

[126] The Government made no submissions on the meaning of the words "the person" in this subsection, but does maintain that the Determination was only issued to M.G. Logging, and provided lengthy submissions in support of this position.

[127] On the question of who is the contravener in this case, the Panel finds that the Determination was only issued to M.G. Logging. From a careful review of the Determination, the Panel finds that there is no reason to believe that the District Manager was also finding a contravention, and levying a penalty, against Mr. Goncalves as the director of M.G. Logging. While the District Manager could have issued the Determination to Mr. Goncalves under section 71(4) of the *Act* as "a director or officer of a corporation who authorized, permitted or acquiesced in the contravention", the Panel finds that he did not, in fact, do so. The only person named as responsible for the contraventions and penalty is M.G. Logging.

[128] Further, since Mr. Goncalves was not given clear notice of an alleged contravention in his capacity as the director of M.G. Logging, or as an individual, adding him to the Determination would have breached his statutory rights, and would be contrary to the Commission's decision in *Darren Smurthwaite v. Government of British Columbia*, (Decision No. 2005-FOR-015(a), November 24, 2006) [*Smurthwaite*].

[129] Regarding the Board's argument that "the person" in subsection 71(5)(a) of the *Act* should be given the broad definition from section 29 of the *Interpretation Act*, the Panel disagrees. The Panel finds that the words chosen by the Legislature in this subsection are intended to refer to previous contraventions of the *specific* person at issue – the particular individual that is the subject of the Determination. While that person may be a corporation, partnership or other entity identified in the *Interpretation Act* definition, that general definition cannot be used to expand the particular, specific wording of "*the* person" used in subsection 71(5)(a) of the *Act*.

[130] In more recent legislation establishing administrative penalties, similar factors to those in section 71(5) of the *Act* have been adopted. However, the Panel notes that many of them have expressly required consideration of not only previous contraventions by "the person", but also those of directors, officers and agents of a contravening company, or, if the contravener is an individual, then the

corporation for which the individual is or was a director, officer or agent (see, for example, subsection 99(3)(a) of the *Water Sustainability Act*, S.B.C. 2014, c. 15; subsection 7(1)(c) of the *Administrative Penalties (Environmental Management Act) Regulation*, B.C. Reg. 133/2014; and subsection 6(a) of the *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation*, B.C. Reg. 248/2015).

[131] Accordingly, the Panel finds that under subsection 71(5)(a) of the *Act*, the minister "must" consider the previous contraventions of a similar nature, including contraventions that did not result in a determination or administrative penalty, of the person that is the subject of the determination – not directors, officers or other corporations. Therefore, the Violation Ticket and the Compliance Notice cannot be considered under this subsection.

[132] However, this does not mean that these previous contraventions cannot be considered at all. It only means that they should not form part of the mandatory consideration under subsection 71(5)(a) of the *Act*. The Panel will now turn to consider whether the previous contraventions of a director, officer or by closely – related companies may be considered under the general authority to levy a penalty under section 71(2) of the *Act*.

Previous non-compliance by a director, officer or by closely-related companies under section 71(2) of the Act.

[133] Many of the submissions on whether previous non-compliance by Mr. Goncalves and/or his other closely-held companies can be considered for the purposes of an administrative penalty, have characterized this as "piercing the corporate veil", and have focused on whether piercing the veil is lawful, or appropriate, in this regulatory context. However, such arguments misconstrue or misunderstand this legal concept. What the Board is really asking the Panel to do in this case is not to "pierce" M.G. Logging's "corporate veil"; rather, the Board is asking the Panel to *consider the past conduct* of the people and/or companies that are closely associated with M.G. Logging.

[134] Since the decision of the British House of Lords in *Salomon v. Salomon & Co*., [1897] A.C. 22, it is well established that a corporation is a separate legal entity from its shareholders. The "corporate veil" is a legal concept that separates the personality of a corporation from the personalities of its shareholders, and protects the shareholders from being personally liable for the company's debts and other obligations. Generally speaking, the officers and shareholders cannot, at common law, be found personally liable for the acts of a corporation. However, this protection is not ironclad or impenetrable. There are recognized exceptions or circumstances which will allow this corporate "veil" to be lifted or pierced, allowing its officers and shareholders to be found personally liable. Some of those well recognized circumstances are where:

1. a corporation is formed specifically for doing a wrongful act;
2. those in control specifically direct the doing of a wrongful act;
3. where a fraud is committed;
4. the corporation is the mere agent of another legal entity;

5. two separate entities are in fact, one enterprise or operation;
6. the corporation is a mere "alter ego" of the controlling shareholder.

[*Phillips v. 707739 Alberta Ltd.* (2000), 6 W.W.R. 280]

[135] The issue raised by the Board in this case, is not whether wrongs or liability of M.G. Logging should be borne by Mr. Goncalves or Mr. Goncalves' other companies. It is not going behind the corporate veil to penalize the shareholders or disregard the usual immunity. Rather, the question is whether any previous misconduct in BC's forests by Mr. Goncalves and/or the other companies is relevant to a penalty assessment against M.G. Logging on the basis of their association. There is no "piercing" that is taking place.

[136] Although section 71(5) of the *Act* does not expressly require the minister to consider the past contraventions of directors, officers and agents of a contravening company, or other corporations for which the individual is or was a director, officer or agent, this does not mean that these past contraventions are not relevant to an administrative penalty assessment under *Act*. To the contrary, it would defeat the purpose and objectives of the administrative penalty regime in this legislation if this information was ignored.

[137] The Board and the Government agree that one of the purposes of these penalties is to encourage compliance. As discussed in Issue 1, administrative penalties are a regulatory tool intended to encourage compliance with the legislation. The purpose of the penalty is "to regulate conduct within a limited private sphere of activity".

[138] While section 71(5) of the *Act* sets out the particular factors that *must* be considered when making a penalty determination, these are not the only considerations when exercising the discretion to levy a penalty. As found in Issue 1, when exercising the discretion provided in section 71(2), the minister may consider any information that is relevant to the assessment of an administrative penalty in accordance with the principles of administrative law.

[139] Illegal activities in BC forests, such as the unauthorized harvesting of timber, are to be discouraged. If a person can set up different companies to avoid escalating penalties or avoid detection of poor practices, and/or act in an individual capacity instead of in the company's name to avoid the same, this would defeat the above-noted goals and objectives of the administrative penalty system. It would allow bad operators to work around the system. This cannot be the intent.

[140] Indeed, this finding is supported by the Government's submissions regarding deterrence. It notes that, with respect to deterrence, consideration of previous contraventions of a similar nature is very important because it "speaks to progressive deterrence as a means of raising a person's level of performance and achieving compliance." The Government further states that such contraventions "are very likely to suggest the need for a significantly more convincing monetary penalty in order to convey an effective message of deterrence."

[141] However, before considering such past contraventions, there must be certain protections in place to ensure procedural fairness. As outlined in the

Panel's findings regarding warnings and compliance notices, those protections require that specific notice be given that the decision-maker will consider the contraventions of directors and/or other related companies, and the person subject to the determination must be given an opportunity to be heard on the relevance and applicability of those contraventions. The weight to be given to such contraventions, if any, will depend on the facts.

[142] The Panel will now turn to consider whether the contraventions identified by the Board ought to be considered as part of the penalty assessment for M.G. Logging.

4. What are the contraventions that may be considered in the penalty assessment against M.G. Logging?

[143] The Board identifies the two types of records that are kept by C&E Branch and identified by the acronyms CIMS (Compliance Information Management System) and ERA (Enforcement Action, Administrative Reviews and Appeal Tracking System).

[144] The CIMS serves as the Ministry's record of inspection activities and compliance actions that are taken.

[145] The ERA serves as the Ministry's record of enforcement activities. It tracks the progress of cases that arise from alleged contraventions of the legislation enforced by the Ministry, including tickets that are issued and cases that are appealed.

[146] The C&E Branch report given to the District Manager showed evidence of three incidents that were recorded in the ERA and CIMS systems. Only two are ultimately identified by the Board as relevant to this case: the Violation Ticket issued to Mr. Goncalves, and the Compliance Notice issued to M.G. Logging Ltd.

[147] Although the District Manager did not consider these contraventions during his assessment of the penalty against M.G. Logging, the Panel finds that it may consider their relevance within the context of this appeal. M.G. Logging had clear notice that the Board sought to have these contraventions considered in the penalty assessment against M.G. Logging, was given full party status in the appeal and, therefore, had the opportunity to fully respond to the Board's arguments. M.G. Logging was represented by counsel and, despite full notice of the Board's arguments, did not address the relevance of, or weight to be given to, these contraventions. It chose only to make submissions on the corporate veil aspect of the Board's submissions.

[148] The evidence before the Panel regarding these two contraventions is as follows.

[149] The Violation Ticket was issued to Mr. Goncalves in 2013. Neither the Violation Ticket nor the original investigation materials were provided to the Panel. The only document submitted was a summary provide by Ian Brown, A/Regional Manager, C&E - Omineca Region. The summary states that the ticket was for an unauthorized harvest as well as mismarking of timber. The summary indicates that Mr. Goncalves had taken over the management of a small scale salvage

licence after the licence holder had a heart attack. It states that Mr. Goncalves was giving direction on behalf of the licence holder, that maps were provided to various parties, but there was poor communication between them and trees were cut without authority.

[150] There is no evidence regarding the fine associated with this Violation Ticket, but the Schedule 2 of the *Violation Ticket Administration and Fines Regulation*, B.C. Reg. 89/97, made under the *Offence Act*, sets the current total "ticketed amount" for a contravention of section 52 of the *Act* as $173.

[151] The Compliance Notice was issued in 2010 to M.G. Logging Ltd. (the related company) for mismarking of timber, contrary to section 84(1) of the *Forest Act*. The mismarking resulted when electronic resubmission of TSL A87309 resulted in it being reassigned as TSL A87512. Mr. Goncalves used the timber mark associated with TSL A87309, as designated on the map, rather than TSL A87512, the new licence number for the same block. Mr. Goncalves' forestry consultants made the resubmission, but had not updated the maps when the new TSL number was issued for the block. The error was discovered at the scale since the timber mark used was invalid. Because the incident was considered trivial, no violation notice was given that would lead to an opportunity to be heard, but the Ministry issued the Compliance Notice warning of consequences in the event of a recurrence.

[152] Although the latter incident occurred under a different timber sale issued to a different company (M.G. Logging Ltd.), the Board submits that it is relevant to M.G. Logging because the companies had only one director, Mr. Goncalves, who was also president and secretary for both companies.

[153] The Panel notes that Mr. Goncalves' Violation Ticket is for a contravention of section 52(1) of the *Act*, one of the same sections contravened by M.G. Logging in the present case. In the circumstances of the Violation Ticket, however, Mr. Goncalves was stepping in for someone else due to a health issue, and the summary indicates that there was poor communication between the parties. This is different from the present case in which Mr. Goncalves was directing the operation for M.G. Logging, and directed the harvesting of reserve trees contrary to the express wording of the TSL.

[154] Although all of the circumstances leading to the Violation Ticket are not known and there are differences in the circumstances, the Panel finds that the very fact that Mr. Goncalves had a previous experience with unauthorized harvesting has some relevance to the present case. It shows that he was not deterred from future non-compliance, and that he ought to know better.

[155] Regarding the 2010 Compliance Notice issued to M.G. Logging Ltd., the Panel finds that it is not sufficiently relevant to be considered in the penalty assessment in this case. The facts are quite different. Further, based on the evidence before the Panel, there is no indication that Mr. Goncalves' various companies were created as an attempt to minimize the effect of large penalties. Nor is there a pattern of unauthorized harvesting by other related companies, or a pattern of disregarding licence conditions by related companies that would warrant additional consideration in this case.

[156] For these reasons, the Panel does not find that the Compliance Notice warrants consideration in the assessment of an administrative penalty against M.G. Logging.

5. Is an administrative penalty of $3,500 appropriate in the circumstances?

[157] The Board submits that the penalty levied is unreasonably low.

[158] The Government submits that the penalties assessed to M.G. Logging were reasonable in the circumstances, but does not take a position on the Board's request to increase the penalty.

[159] The Panel has considered the following mandatory factors set out in section 71(5) of the *Act* based upon all of the evidence before it, as well as its findings on the Issues above.

(a) Previous contraventions of a similar nature by the person

[160] Despite the Panel's finding that "contravention" has a broader meaning than accepted by the District Manager and by the Commission in *Orleans*, the District Manager's previous conclusion under this subsection is still valid. M.G. Logging does not have any previous contraventions of a similar nature.

(b) The gravity and magnitude of the contraventions

[161] The District Manager found that unauthorized harvesting in and of itself is serious and that, in this case, the magnitude of the harvesting was significant as Douglas-fir was reserved from harvest for biodiversity reasons. However, there was no assessment of the wildlife and biodiversity values lost to the Crown by the contravention.

[162] Although the Board agrees that the magnitude was significant, it submits that the Determination would have benefited from a more fulsome consideration of the environmental impacts of the contravention. The Board notes that the Prince George Region has had Douglas-fir Management Guidelines since 1999, which recognize that Douglas-fir is "an important element of biodiversity (including structural and species diversity) in the Central Interior landscape." The Guidelines state that other benefits of conserving Douglas-fir as an element of forest diversity "are provision of distinctive timber products, heritage values, and aesthetics".

[163] The Guidelines set out two primary objectives for Douglas-fir in the area:

1) to achieve "no net loss" of Douglas-fir forest types, including where fir is a minor species; and

2) to retain a post-harvest range of Douglas-fir stand structure and age classes representative of the range present in the pre-harvest condition.

[164] The Board submits that the requirement in M.G. Logging's TSL to reserve Douglas-fir reflects, and is consistent with, these Guidelines. Thus, the contraventions frustrate that management objective.

[165] The Board tendered an expert report by Mr. Thomson as evidence of the loss of wildlife habitat and biodiversity from the contraventions. Mr. Thomson's report titled "The Wildlife Values of Douglas-fir in TSL A89274" provides a thorough review of the biodiversity and wildlife values impacted by the contravention.

[166] Mr. Thomson attended the site in June of 2016. He observed that "[t]he main effect of the loss of the larger tree component of the stand is the immediate loss of the habitat that the larger trees contributed to the area of the cutblock" (page 6).

[167] Mr. Thomson also states that an important consideration in this case is that the Douglas-fir were located close to the northern limit of their range in this part of BC. He states that "[l]osing the large Douglas-fir component on the landscape could effectively reduce the range of those species that rely on, or prefer, Douglas-fir to provide part or all of their life requirements – i.e., security/resting cover, foraging habitat, and nesting/breeding habitat" (page 6).

[168] Mr. Thomson states that these Douglas-fir trees would have benefitted a broad range of birds and mammals, and likely a large invertebrate and plant community.

[169] Mr. Thomson concludes at page 7 that:

> … the original forest in this cutblock may have contained the most significant amount of large Douglas-fir trees within the local landscape. Because of this, this block of forest likely provided habitat not as abundant elsewhere within the local landscape.

[170] On that same page, he also concludes that, "… it could take 50 to 100 years before this stand contains trees that are similar in size and number to what was in the pre-harvest stand", and "one of the stumps was from a Douglas-fir tree over 300 years old …".

[171] In addition to the impact on wildlife and the longevity of the harm, the Board submits that another impact of the contravention is the loss of immature fir and large limbs. The Board states:

> The immature fir trees harvested without authorization represent future potential wildlife trees and coarse woody debris. The loss of trees that were felled but left due to rot and lack of merchantability is a potential loss of standing wildlife trees and future snags. When assessed against the time frame of the environmental impact, the penalty levied of $3,500 represents $6.70 per tree ($3,500 ÷ 522) though the loss of ecological services will last over a 50 to 100-year time horizon. (paragraph 94)

[172] The Board submits that, when measured in this way, it is apparent that the $3,500 penalty does not properly reflect the gravity and magnitude of the environmental impact of the contravention.

[173] Finally, the Board refers to the agreed statement of facts which sets out the Ministry's investigation efforts and the costs of the investigation of the

contraventions. While investigative efforts and costs cannot be recovered in an administrative penalty, the Board submits that the unauthorized harvesting in this case required extensive investigation, and that this is relevant to an assessment of the magnitude of the contravention. The investigative efforts and costs are as follows:

- Determining the extent of the Douglas-fir harvested without authority by M.G. Logging involved field work by six Ministry staff over three days, and a seventh scaling supervisor to compile the cruise data.
- The entire investigation required approximately 340 hours of staff time between May 29, 2013 and September 8, 2016. Assuming an average hourly rate of $41 the cost was about $14,000.

[174] The Government submits that the District Manager arrived at the right conclusion based upon the evidence before him, but agrees that Mr. Thomson's report constitutes relevant new information that should be considered by the Panel in keeping with its *de novo* jurisdiction. The Government does not take issue with the opinions of Mr. Thomson that are relied upon by the Board (above).

[175] The Panel agrees with both parties that the gravity and magnitude of the contravention is significant. The Panel agrees that the investigation efforts and costs provide some additional evidence in support of this conclusion.

[176] The Panel further finds that the new expert evidence regarding the environmental impact to wildlife and biodiversity is helpful and ought to be given significant weight when assessing the penalty. It is clear from Mr. Thomson's report that the timber involved was locally important and that this stand will take a long time to recover. The unauthorized harvest of the Douglas–fir in this case defeats the management objectives for the species, which was the basis for the reserve clause in the TSL.

(c) Whether the violations were repeated or continuous

[177] The District Manager found that the contraventions were repeated because Mr. Goncalves was aware that Douglas-fir were reserved before harvesting began, and he was warned not to harvest Douglas-fir on February 18th and 19th. Nevertheless, Mr. Goncalves instructed the logger to fall Douglas-fir for Timberspan. The Government submits that the District Manager considered the correct issues in this portion of his Determination and arrived at the right conclusion based upon the evidence before him.

[178] The Board agrees with the District Manager's finding, and submits that Mr. Goncalves' direction to his contractor after being warned by the C&E officer is "a particularly aggravating factor that should attract a higher penalty."

The Panel agrees that the contraventions were continuous and repeated to the extent that each Douglas-fir tree that was harvested – particularly after the warning - represents an intentional contravention. The warning allowed for a change in behavior, but this was clearly ignored.

(d) Whether the contraventions were deliberate

[179] The District Manager found the contraventions to be deliberate. The Government submits that this was the correct finding on the evidence.

[180] The Board agrees, and submits that the degree of deliberateness in this case is "very high", is an aggravating factor, and should attract a much higher penalty.

[181] As is evident from the Panel's findings in the previous subsection, it agrees that the contraventions were deliberate. Mr. Goncalves told the contractor to cut the Douglas-fir trees knowing that they were reserved by the terms of the TSL, and knowing that this was an unauthorized harvest under the *Act*. Moreover, he gave this instruction after being reminded of the reserve trees requirement in the TSL.

[182] The evidence before the Panel is that Mr. Goncalves attended a pre-work conference in December of 2012 at which time the authorized timber harvesting specifications were discussed. Harvesting commenced at the end of January 2013. In mid-February, the skidder operator was reminded that Douglas-fir was reserved from harvest, and Mr. Goncalves was also specifically reminded of the Douglas-fir reserve.

[183] In these circumstances, the Panel finds that the deliberateness of the contravention is "high" in relation to the majority of the Douglas-fir harvest, but that it is "very high" with respect to the 135 trees cut after the reminders in February. The Panel agrees with the Board that the deliberateness of the contraventions in this case is very concerning and is an aggravating factor.

(e) Any economic benefit derived from the contravention

[184] The District Manager states in the Determination that the contraventions resulted in an economic gain to M.G. Logging of $509.60. However, his calculations showed a benefit of $359.44.

[185] Both the Board and the Government identified errors and shortcomings in the District Manager's estimate of economic benefit. The Government notes that the errors in the District Manager's calculation stem from the fact that, in the final version of the Determination, he reduced the volume of unauthorized harvest from 260 m^3 (which constituted the entire merchantable volume) to 234 m^3 after applying a 10% reduction for incidental harvesting. When he did so, he neglected to apply that change to his other calculations, leading to multiplication errors after which the District Manager finally arrived at the figure of $359.44 as M.G. Logging's economic benefit.

[186] Adding to the confusion on the calculation of economic benefit, the Government states that, while it was appropriate for the District Manager to calculate the volume of M.G. Logging's *unauthorized harvest* by including the 10% reduction for incidental harvesting (281 m^3 – 10% = 253 m^3), it was an error to take incidental harvesting into account when determining M.G. Logging's *economic benefit*, since M.G. Logging benefitted from the total volume of merchantable timber, including the incidental harvest. The Government submits that the correct

volume to be used for the purposes of determining the economic benefit to M.G. Logging is 260 m^3, which is the total volume of merchantable timber.

[187] The Government further notes that, since the District Manager's Determination, there is a new piece of information that may impact the economic benefit analysis; specifically, stumpage was billed to, and paid by, M.G. Logging for the unauthorized harvest pursuant to sections 103(3) and 105 of the *Forest Act*.

[188] The Government states that $5,321.58 in stumpage was paid by M.G. Logging, consisting of two invoices: $2,595.78 for stumpage on the unauthorized harvest of reserved Douglas-fir; and $2,725.80 as a stumpage adjustment on the entire stand to take into account the additional harvest of Douglas-fir. It points out that M.G. Logging was required to pay a higher stumpage rate on its "authorized" harvest due to the additional unauthorized taking of Douglas-fir, resulting in a higher stumpage rate on the entire stand. The Government then states:

> If the actual stumpage paid by M.G. Logging and the total merchantable volume [260 m^3] is used to calculate M.G. Logging's economic benefit, together with the District Manager's findings on the average amount paid for the logs, tree to truck costs and hauling costs, the company is estimated to have experienced a loss in the amount of $2,144.38 as a result of harvesting the reserved Douglas fir. [Emphasis added]

[189] The Government provided a table showing how it arrived at this loss.

[190] In reply, the Board submits that the recalculation of economic benefit incorporates unverified logging and hauling costs that were supplied by Mr. Goncalves, and that deducting certain expenses, such as the "tree to truck" cost from the revenue derived from the sale of the Douglas-fir logs unjustly rewards M.G. Logging's employees and contractors who received payment for logging that, in this case, they knew was illegal.

[191] Although the Board has questioned the accuracy of the logging and hauling costs, and raised policy issues related to deducting the tree to truck harvesting costs from the revenue derived from the sale of the Douglas-fir logs, the Panel will rely upon the best evidence available to it in order to determine the economic benefit to M.G. Logging from the contravention. While the Panel appreciates the Board's concerns about an indirect benefit to employees and/or contractors, such benefits are not relevant under this particular factor. As noted by the Board in its submissions, consideration of "any economic benefit derived from the contravention" incorporates, by implication, the administrative justice principle of "profit stripping"; the contravener should not receive an economic benefit from the contravention.

[192] Based upon the best evidence before the Panel, the Panel finds that, when the revised total of merchantable volume of timber is used and the total stumpage is included, the contraventions resulted in an economic loss to M.G. Logging of

$2,144.38. Thus, the contravention has not resulted in an economic benefit to M.G. Logging.[3]

(f) The persons' cooperativeness and efforts to correct the contraventions

[193] In the Determination, the District Manager found that:

> Even though Mr. Goncalves cooperated with the investigation and admitted that he instructed his staff to cut and remove Crown timber without authority, he made no effort to correct the contravention when it was brought to his attention in February 2013. An additional 135 stems were harvested under his direction following the meeting in February.

[194] The Panel agrees with this finding. While admission of fault is to be encouraged and is appreciated, the admission in this case does not overcome M.G. Logging's failure to prevent the continuing contraventions following the February warnings.

Any considerations that the Lieutenant Governor in Council may have prescribed

[195] There are none.

Penalty Assessment

[196] Considering all of the above-noted factors, the Panel finds that a significant penalty is warranted in these circumstances. The reserve tree requirement was specifically incorporated into the TSL to protect and maintain Douglas-fir trees. This requirement was consistent with the Douglas-fir Management Guidelines, and was included as a result of specific study and concern with protecting this important provincial resource. The evidence establishes that the contraventions resulted in a significant loss of Douglas-fir in the area, that the area will take a long time to recover, and the loss of the Douglas-fir will have an impact on wildlife and biodiversity.

[197] The Board submits that a compensatory penalty of $50 to $150 per tree is warranted in this case for the environmental values lost which, for 522 Douglas-fir trees, amounts to a compensatory penalty of between $26,100 and $78,300.

[198] In addition, the Board submits that a deterrent penalty of "at least" $10,000 is warranted to ensure that there is "effective deterrence", both specific and general. It submits that the penalty needs to reflect the pragmatic realities of the logging business and the economics involved. If a penalty is too low, it will simply be treated as a minor business risk. Accordingly, it submits that it is relevant to consider what the penalty amount will mean to a logging company active in the BC Timber Sales program.

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[3] The 260 m^3 "total merchantable volume" used by the Government is the gross volume which includes decay, waste and breakage. It is the net merchantable volume of 243 m^3 that should have been used in calculating stumpage and revenue and, therefore, the amount of the loss. The Panel has not corrected the calculation, since it has only a minor impact on the quantum of the loss and not on the existence of the loss.

[199] For M.G. Logging, the Board submits that the current penalty of $3,500 represents less than 2% of the sales for all of the wood delivered to West Fraser (not just the Douglas-fir), based upon the information provided by M.G. Logging to the District Manager after the opportunity to be heard. There is no evidence regarding the sale to Timberspan. In the Panel's view, the District Manager ought to have obtained the sales records to Timberspan as this information is relevant to the "profit stripping" aspect of the penalty assessment.

[200] For the regulated community, the Board submits that a deterrent penalty in the amount of $10,000 or more is needed in order to promote compliance.

[201] The Board refers to and relies upon a number of past Commission decisions to support a penalty increase.

[202] The Government does not take a position on whether the penalty should be varied, but does comment on the relevant considerations. It states that, when considering the appropriateness of the penalty, the Commission should take into account all of the factors set out in section 71(5) of the *Act*, use the best evidence available, and consider:

- the purpose of an administrative penalty,
- the evidence regarding habitat damage and environmental loss experienced by the Crown and the public, and
- the costs incurred by the Third Party, including the costs of defending an appeal not initiated by itself.

[203] The Government also points out that the principles of fairness require a measure of consistency in the size of the penalty in respect of similar fact patterns. While statutory decision-makers must exercise their discretion independently, and the circumstances of each case are unique, the Government submits that, generally, similar situations should lead to equivalent results. In support, the Government cites a decision of the Environmental Appeal Board, *MTY Tiki Ming Enterprises Inc. v. Director, Environmental Management Act*, (Decision No. 2016-EMA-120(a), September 1, 2016). When considering administrative penalties in the context of the *Environmental Management Act*, the Environmental Appeal Board states:

> [75] The Panel agrees with the proposition that an important principle of administrative fairness is that administrative penalties should be assessed on a consistent and transparent basis. <u>This is important not only to the person against whom the penalty is being assessed, but also to the public at large and particularly to those who are potentially subject to the regulatory framework in question</u>. [Emphasis added]

[204] The Government then referred to and relied upon previous Commission decisions for the purpose of highlighting the Commission's past approach to determining penalties, and to show that the $3,500 penalty is consistent with past penalty cases. Although the Government acknowledges that the assessed penalty is "at the low end of a range of reasonable and appropriate penalty amounts", it notes that the new evidence regarding M.G. Logging's stumpage payments is

appropriate to consider when assessing deterrence and the overall fairness of the administrative penalty. In this case, M.G. Logging paid $5,321.58 in stumpage for illegally harvested Douglas-fir. If this payment is added to the $3,500 penalty, the Government notes that the total cost to M.G. Logging is $8,821.58.

[205] M.G. Logging did not provide any specific submissions on the penalty amount.

Consideration of previous Commission decisions

[206] The Panel agrees that consistency and transparency in penalty assessments under the *Act* is important. However, comparing past cases to the present case is complicated by the fact that, in some of the past cases, the penalty included an amount to compensate the Crown for the lost timber (i.e., stumpage), whereas stumpage for an unauthorized harvest is now billed separately under the *Forest Act*, as was done in the present case.

[207] Both the Board and the Government discussed the Commission's decision in *Edward Reierson v. Government of British Columbia*, (Decision No. 2006-FOR-006(a), November 21, 2006) [*Reierson*]. This was an appeal against a determination issued by a district manager in the Okanagan Shuswap Region on April 19, 2006, for the unauthorized harvest of 48 large Douglas-fir leave trees in a timber sale licence.

[208] In *Reierson*, the district manager levied a penalty of $11,000 against Mr. Reierson, of which $7,000 was compensatory and $4,000 was for deterrence purposes. The district manager assessed the compensatory penalty as $146 per tree (or $30 per m^3) for the following reason:

> The fact that these trees were so large and scattered over such a large salvage harvesting area, they were intended to have significant value to biodiversity values in this area which is the reason they were prescribed to be left and is the reason I have prescribed a higher compensation value for them. (page 4)

[209] On appeal, the Commission confirmed the compensatory penalty for 46 of the 48 trees, finding that two of the trees were actually harvested with authority, and confirmed the deterrence penalty. In that case, the Commission heard expert evidence on the importance of retaining large diameter habitat trees in a harvested cutblock, and that, in that particular case, the large reserve trees "would not be replaced in the present silviculture retention system" and have attributes that will be eventually lost. The Commission concluded that the amount of the penalty was "not excessive" given "the importance of the reserve trees for wildlife habitat."

[210] The Board submits that this case has some strong similarities to the present case, although probably not for all 522 trees.

[211] The Government submits that, in *Reierson*, special significance was attached to the large diameter of the trees by the wildlife habitat ecologist, an expert witness in that case. Based upon the evidence of Mr. Thomson, many of the Douglas-fir trees harvested by M.G. Logging were much smaller than each of the

trees in *Reierson* and are, therefore, less valuable. In addition, the Government submits that the compensatory penalty in *Reierson* appears to include an amount to cover what is now billed as stumpage. However, given that the determination was made in 2006 and the changes to the legislation were made in 2004, this cannot be correct. As the Commission noted in *Reierson*, the penalty reflected the importance of the reserve trees for wildlife habitat.

[212] The Board also relies upon the Commission's decision in *Rick Bullen v. Government of British Columbia*, (Decision No. 2009-FOR-003(a), August 11, 2010) [*Bullen*]. It submits that this case is authority for the proposition that environmental consequences of a contravention "should be given considerable weight in assessing penalties."

[213] In *Bullen*, the district manager found that Mr. Bullen had cut and removed one cedar log and one Douglas-fir log without authority. She levied a penalty of $1,250 for each contravention, for a total of $2,500. When assessing gravity and magnitude, the district manager and the Commission considered a report by a Fisheries and Oceans Canada biologist. The trees were skidded within a portion of a creek and were said to have caused harmful alteration, disruption and destruction of Coho salmon habitat. When considering the gravity and magnitude of the contravention, the Commission agreed with the district manager at paragraph 51 that "although the volume of wood cut was small, the contraventions had serious environmental consequences that should be given considerable weight in assessing penalties."

[214] The Panel notes that both *Reierson* and *Bullen* clearly involved penalties for wildlife and biodiversity damages. The Panel agrees that *Reierson* has certain similarities to M.G. Logging, but the per tree value of $146 cannot be applied to the present case. The trees are very different in size and, presumably, age. The Panel also notes that the Board's recommended $50 to $150 per tree would result in a penalty equivalent to $93 to $279 per m^3, or three to nine times the per m^3 rate of the *Reierson* timber. It amounts to over $40,000 per hectare equivalent.

[215] However, the $4,000 deterrent penalty levied in *Reierson* does not suffer from the same issues, and provides some guidance in the present case.

[216] Regarding *Bullen* the Panel finds that, although that case involves a different kind of damage – damage to a fish stream – the principle that environmental consequences should be given considerable weight in assessing penalties is relevant to the Douglas-fir harvest by M.G. Logging.

Compensation

[217] Determining the appropriate compensation for environmental loss, other than the loss of timber values, is difficult. There is no objective way to value the loss of trees to wildlife and biodiversity. Nor is there currently a quantification or ranking of the values lost and their relative significance. The only practical way to assess the loss in this case is to compare it to losses discussed in past cases.

[218] In doing so, the Panel finds that a significant penalty is required for the loss of wildlife and biodiversity values. This recognizes the statement from *Bullen* that

environmental consequences of a contravention "should be given considerable weight in assessing penalties."

[219] The Panel finds that the most comparable case to this one is *Reierson*, in that it dealt with Douglas-fir leave trees, reserved for the same biodiversity reasons as the present case. However, as noted above, the $146 ($30 per m^3) per tree value attributed to the trees in *Reierson* is more than ought to be applied to the Douglas-fir trees cut in the present case given the difference in size of the trees. Having said that, the Panel also notes that there were significantly more trees cut in the present case, impacting a larger area and more wildlife values. Further, 135 of the trees cut in the present case attract an additional penalty for the aggravating circumstances. It is also to be noted that, in this case, the Douglas-fir trees were harvested at the northern edge of their natural habitat and, therefore, their ecological value far outweighs the ecological value of the trees in *Reierson*.

[220] The Panel finds that a per tree dollar value, or per m^3 value, to compensate for loss to wildlife and biodiversity will not, in the long run, provide any consistent or transparent way to assess this portion of a penalty assessment. The Panel has, instead, considered the stumpage value that the government was willing to forego had the Douglas-fir not been harvested. This approach builds upon the approach endorsed by Cabinet for determining the maximum penalty in section 13(2)(c) of the *Regulation*.

[221] The Panel has inserted the evidence provided by the Board into a formula to determine the value of the illegally harvested Douglas-fir that can be used to compensate the Government for the bio-diversity loss. This formula can be used to determine a baseline – or starting point – from which the compensation portion of a penalty may be increased or decreased depending on the relative importance of the biological and wildlife values at stake, and any other relevant facts.

[222] The Panel has reviewed the cruise summaries conducted by the Ministry to determine the total stumpage of merchantable Douglas-fir that was illegally harvested. One of the cruise summaries that was conducted on June 19, 2013 establishes a volume of 243 m^3, and best reflects the amount of merchantable Douglas-fir that was taken, as it meets the utilization standards required for stumpage rate determination.[4]

[223] The Panel notes that the total upset stumpage value (i.e., the minimum price that the Crown is willing to accept) of the originally approved volume of timber to be taken under the TSL (without Douglas-fir) was $7.98 per m^3 on 3,540 m^3 of net merchantable volume of timber, which equals a stumpage value of $28,249.20. However, the upset value of the timber harvested, including the Douglas-fir, was $10.26 m^3 on 3783 m^3 of timber, for a stumpage value of $38,813.58. The difference in volume between the two calculations is 3783 m^3 –

[4] This same cruise summary appears to be the source of the 260 m^3 figure used by the Government. The District Manager concluded that the volume of merchantable Douglas-fir was 260 m^3. However, that is the gross volume which includes decay, waste and breakage. 243 m^3 is the net volume which is the relevant volume for stumpage calculations, and does not include decay, waste and breakage.

3540 m^3 = 243 m^3. The difference in stumpage value between the two calculations is $38,813.58 - $28,249.20 = $10,564.38.

[224] The Panel finds that $10,564.38 is the shadow value of the merchantable Douglas-fir that was illegally taken. This is the amount of stumpage that the Government was willing to forgo to preserve the Douglas-fir leave trees. However, as noted above, this amount is only a base-line to work from. In addition to the volume of merchantable Douglas-fir that was taken, M.G. Logging also took 34 m^3 of un-merchantable Douglas-fir. This number is arrived at by subtracting the merchantable Douglas-fir from the total volume of Douglas-fir that was illegally harvested (281 m^3 – 243 m^3 = 34 m^3).

[225] Although the loss for bio-diversity values cannot be easily quantified by a mathematical formula, the Panel can say that, based on the evidence and past cases, in order to compensate the Crown and the public for these lost values, an amount is required that is greater than $6.70 per tree (based upon the $3,500 penalty). In addition, it must be higher than the minimum amount that the Crown was willing to forego, which was $10,564.38.

[226] The Panel considers the shadow value ($10,564.38) to be the very minimum that the Government should be compensated for the lost bio-diversity value. However, the shadow value only reflects the minimum bio-diversity value of the merchantable timber. It does not reflect the bio-diversity value of the un-merchantable Douglas-fir (34 m^3), nor does it reflect the extremely significant impact that this illegal harvest has had on a sensitive environment where these trees will not fully re-generate for up to a century from now. The bio-diversity value to the Government of retaining the Douglas-fir is clearly greater and, in this case, much greater, than the value of Douglas-fir that it was willing to forego as stumpage. Under these circumstances the Panel has concluded that compensation should be 200% of the shadow value.

[227] Accordingly, after a review of the previous decisions, and after carefully considering all of the evidence, particularly the new evidence from Mr. Thomson, the Panel assesses the compensatory penalty for lost biodiversity values as follows:

2 x $10,564.38 = $21,128.76

[228] Loss of timber values has not been included in this penalty, as that loss was addressed through the stumpage paid by M.G. Logging. Capturing stumpage and compensating the Government for the loss of other values are dealt with in separate proceedings, as has occurred in the present case.

Deterrence

[229] The Panel finds that a significant deterrent penalty is warranted.

[230] The Panel finds that an amount for both specific and general deterrence is required in this case. Both are warranted given the requirement in the TSL at issue in this case. In the Panel's view, violating a reserve tree requirement is more concerning than some other types of contraventions, as this requirement is protective in nature.

[231] The Panel has already found that the $4,000 deterrent penalty in *Reierson* provides some guidance in the present case. One difference between the two cases is the fact that Mr. Goncalves received a Violation Ticket in 2013 for contravening one of the same sections at issue in the present case. Further, he ignored the February warning about the reserve trees, and directed the contractor to cut the Douglas-fir trees for Timberspan. The contravention was deliberate in this regard, and Mr. Goncalves, personally, knew better. These facts support a higher deterrent penalty than assessed in *Reierson*. They are more akin to the facts in *Smurthwaite*, *supra*.

[232] In *Smurthwaite*, the district manager levied a penalty of $45,000 for failing to construct a road in accordance with a road permit, which resulted in damage to special karst features[5]. It is unclear from the Commission's decision what portion of the $45,000 was compensatory and what portion was assessed for deterrence. On appeal, the Commission rescinded the determination due to a lack of procedural fairness, so the quantum of penalty was not addressed. However, the Commission did say at page 28 that it "does not take the damage to the important resources involved in this case, or the financial loss to the Crown, lightly."

[233] When assessing the $45,000 penalty, the district manager noted that there were no previous contraventions of a similar nature by the person. However, of relevance to this case, the district manager found that the gravity and magnitude of the contraventions was substantial, and that it was impossible to compensate the Crown for the loss of the karst features (the damage was irreparable), and that the damage occurred on two separate occasions, and continued after Ministry staff had advised workers in the field of the sensitivity of the features and told them to correct problems. The company president was responsible for the operations, knew the requirements identified as part of the road permit to protect the karst features and "clearly failed to do so."

[234] In the circumstances of the present case, the Panel finds that a deterrent amount of $6,000 is appropriate. This is more than the deterrent penalty in *Reierson*, but far less than the total penalty in *Smurthwaite*, which involved the permanent loss of protected features and damage to adjacent watercourses. The Panel finds that a $6,000 deterrent penalty takes into consideration the practicalities of the logging business, and will be an effective deterrent to both M.G. Logging, and the regulated industry. The Panel is of the view that it will raise M.G. Logging's level of compliance and is sufficient to encourage future compliance with the legislation by M.G. Logging and the industry.

[235] Although the Government suggested that the Panel ought to consider the deterrent value of M.G. Logging having to defend an appeal not initiated by itself, the Panel finds that the impact of the appeal on M.G. Logging to date has been relatively low. Its participation in the appeal has been minimal.

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[5] "'Karst' is terrain underlain by solutional rocks such as limestone. Karst areas are characterized by sinkholes, disappearing streams, and caverns." *Smurthwaite*, footnote 1.

Total penalty

[236] Considering all of the evidence and the circumstances of the unauthorized harvest, the Panel finds that a penalty of $27,128.76 is appropriate in this case. ($21,128.76 compensation + $6,000 deterrence). This penalty does not exceed the results of any of the equations in section 13(2) of the *Regulation*.

[237] In making these findings, the Panel has considered all relevant information under section 71(2) of the *Act* and the mandatory factors under section 71(5) of the *Act*, including any economic benefit from the contraventions.

DECISION

[238] In making this decision the Panel of the Forest Appeals Commission has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated herein.

[239] For the reasons stated above, the Panel finds that the District Manager's decision should be varied. Pursuant to section 84(1)(d)(i) of the *Act*, the penalty is increased to $27,128.76.

[240] The appeal is allowed.

RECOMMENDATION REQUEST

[241] The Board asks the Commission to consider making a recommendation to the Minister in its annual report that "penalty determinations be published in order to meet the administrative justice goal of general deterrence."

[242] The Commission will consider this request during its annual review of the appeal process and its decisions.

"Alan Andison"

Alan Andison, Panel Chair
Forest Appeals Commission

"Howard M. Saunders"

Howard M. Saunders, Member
Forest Appeals Commission

"Reid White"

Reid White, Member
Forest Appeals Commission

February 10, 2017