



Forest Appeals Commission

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APPEAL NO. 1997-FOR-23

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN:	Slocan Forest Products Ltd.	APPELLANTS
AND:	Government of British Columbia	RESPONDENT
AND:	Forest Practices Board	THIRD PARTY
BEFORE:	A Panel of the Forest Appeals Commission Rob Kyle, Panel Chair Kristen Eirikson, Member Monty Mosher, Member	
DATE OF HEARING:	May 25-27, 1998	
PLACE OF HEARING:	Prince George, B.C.	
APPEARING:	For the Appellant: Clifford Proudfoot, Counsel For the Respondent: Jeff Loenen, Counsel For the Third Party: Calvin Sandborn, Counsel	

MAJORITY DECISION OF PANEL MEMBERS ROB KYLE AND MONTY MOSHER

APPEAL

Slocan Forest Products Ltd., Valemount Division ("Slocan") appeals the December 13, 1996 determination of John Griffin, Acting District Manager of the Robson Valley Forest District, as varied by a Review Panel in its decision of August 12, 1997. In his determination, the District Manager concluded that Slocan was in contravention of sections 62(1), 63(1), 63(2)(c), and 64(1) of the *Forest Practices Code of British Columbia Act* (the "Code") and of sections 12(1)(c), 13, 17(1) and 20(c) of the *Forest Road Regulation*. In its variance of that determination, the Review Panel rescinded the contraventions of sections 62(1) and 63(2)(c) of the *Code* and rescinded the contraventions of sections 12(1)(c) and 13 of the *Forest Road Regulation*. The Review Panel confirmed the contraventions of sections 63(1) and 64(1) of the *Code* and of sections 17(1) and 20(c) of the *Forest Road Regulation*.

The District Manager levied an administrative penalty of \$14,000.00, which was upheld by the Review Panel.

The appeal was filed with the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*. Slocan seeks to have the remaining contraventions, as upheld by the Review Panel, rescinded and the penalty set aside.

BACKGROUND

There is no material dispute between the parties regarding the following facts underlying this appeal, except where noted.

This appeal concerns events that occurred in the Morkill River Valley, northwest of McBride, B.C., during the spring breakup period in March of 1996. Breakup occurs when the cold winter weather, which causes the ground to freeze, is replaced by a sufficiently sustained rise in temperature that the ground begins to thaw. The silty nature of the soil which constitutes much of the road material in this area, as in many interior B.C. locations, is such that it becomes at times a slurry during this thawing process and will not support vehicle traffic. Logging operations such as those carried out by Slocan in the Morkill area must cease during this period, as in most areas of the B.C. interior. Breakup is usually a relatively gradual process, extending in many areas over a two-month period.

The Morkill Forest Service Road is the main access into the Morkill River Valley. One of the spur roads accessing a side drainage of the Morkill is referred to as the 501 road. The 501 road was built in the early 1950s and was substantially upgraded by Slocan in about 1990 to provide access to several cutblocks. It is classed as a "winter road"; that is, a road used exclusively or primarily between the time the ground freezes in the fall and the time it begins to thaw and breakup the following spring.

The 501 road has a small creek flowing beside it. This creek originates in a swampy area near the 1.5 km point on the 501 road. Near its beginning, it crosses the 501 road through a culvert, runs a short distance before again crossing under the 501 road, flows down the hill adjacent to the 501 road, and crosses under the main Morkill Forest Service Road near its junction with the 501 road. The creek water then disperses in an unorganized fashion and eventually disappears into the ground several hundred metres from the Morkill River. It is an ephemeral creek that primarily collects groundwater runoff from the surrounding area. This creek is a primary focus of this appeal.

To carry out this 1990 upgrade of the 501 road, Slocan was provided with the full appraisal allowance for road construction, which allowed Slocan to reduce its stumpage payments to the Crown by an amount equal to the road construction cost estimate as allowed for by the Interior Appraisal Manual. The 501 road was extended sometime before 1996 to provide access to the cutblocks that were being harvested at the time of the events leading to this appeal

Road access by forest tenure holders into areas in which harvesting activities will be carried out is governed, as detailed in Part 8 of the *Forest Act*, by the specifications contained in road permits and road use permits. A road permit is required to construct, modify or maintain a road on Crown land. A road use permit is required

before one industrial user may use a road for which there is an active road permit held by another industrial user.

At the material time to this appeal, Slocan was allegedly operating harvesting and road maintenance equipment on the 501 road under the authority of Road Permit R03387. Amendment #10 to Road Permit R03387, which replaced the previous Road Permit R03387 and all amendments to it, was issued December 4, 1995. Amendment #11 to Road Permit R03387 was issued to Slocan on January 24, 1996. It consisted of several charts, a schedule with utilization standards, and a schedule containing three "special provisions". Amendment #10, which was actually the replacement Road Permit R03387, contained all of the general written specifications to which Slocan was obligated. Amendment #11, which formed an "...integral part..." of Road Permit R03387, contained the design criteria and road specifications for an additional section of road to be built by Slocan, which was highlighted with a highlighter pen on the attached Exhibit "A" map.

Both of these documents were in effect at the time of the alleged contraventions. Slocan disputes that any of the road, other than that connected with Cutting Permit 508, was under permit to Slocan at the material times.

In January of 1996, a "Licensee Liaison Meeting" took place in Valemount. Representatives of Slocan and the Ministry of Forests ("MOF"), among others, attended this meeting. Issues surrounding road deactivation and deactivation prescriptions were discussed. The minutes of the meeting indicate that licensees were cautioned to ensure that natural drainage patterns were maintained and were urged to adopt a pro-active approach to road deactivation. Licensees were also told that in the case of roads that were scheduled for temporary seasonal deactivation, a letter outlining deactivation requirements as specified in the regulations accepted as the normally required deactivation prescription.

On February 8, 1996, two of Slocan's logging contractors began harvesting operations on separate cutblocks (CP 511, block 1 and CP 511, block 2) at or near the end of the 501 road. The contractors operate under the names of Happy Hooker Logging and Baggett Logging. The harvesting operations proceeded until the early part of March, at which time the weather began to warm to the point where breakup became considerably advanced over a period of several days.

Slocan submitted its Deactivation Plan for the road in question on March 1, 1996. It consisted of a one-page letter that provided general descriptions of deactivation measures to be taken. The District Manager approved the Plan on March 8, 1996.

The events leading to the finding of multiple contraventions by Mr. Griffin, the Acting District Manager, span the period of March 7 to 28, 1996. On March 7, with breakup imminent, Slocan's contractors completed falling operations from the two active cutblocks at the end of the 501 road. On that day, a lowbed unit traversed the 501 road and was loaded with heavy equipment at a logging site near the end of the road. The 501 road that day was described as in excellent winter condition.

Full logging activities continued on the cutblocks until March 10, by which time the condition of the road had deteriorated significantly and the contractors were told by Slocan to cease operations. Logs were skidded from within the cutblocks to the landings and from there loaded onto logging trucks, which then proceeded to the Slocan sawmill in Valemount. The final load transported from these cutblocks reached the Valemount mill at 12:45 a.m. on the morning of March 11. Between March 7 and the last load leaving the cutblocks late on March 10, 125 loads of logs were removed from the Cutting Permit 511 cutblocks. While hauling on the roads was completed on March 10, work within the cutblocks continued.

Between March 12 and 14, Hooker stopped logging operations within the cutblocks and began removing equipment from the area. During this time, the contractors state that they carried out some deactivation activities on the road, including the installation of additional waterbars, cross ditches, and smoothing of the road surface through a practice called back blading. Baggett continued operations within its cutblock until March 14, at which time it ceased operations and carried out deactivation activities.

On March 13, Stuart Philpott, a MOF employee, carried out a routine inspection of the two cutblocks in CP 511, which are located at or near the end of the 501 road.

On March 14, Mr. Philpott carried out an inspection on part of the road at the junction of the Morkill Forest Service Road and reported pooling of silty water on a flat portion of the road near a creek. A further inspection on March 15 of the first 0.5 km of the 501 road indicated that the road was, in the opinion of Mr. Philpott, severely rutted and saturated with water running down the centre of the road, with the road impassable even to a four wheel drive truck.

Mr. Philpott returned on March 18 and traversed the entire road with an all terrain vehicle. He made several observations that he considered to be indicative of the need for deactivation measures; Mr. Philpott stated that there was no indication that deactivation measures had been carried out.

The road surface was again frozen between March 22 and 28 because of a return of freezing temperatures. On March 28, Mr. Philpott again returned to inspect the road and made observations that further indicated to him that deactivation measures had not been carried out.

A Road Inspection Report, which is the MOF report sent to Slocan and which detailed the MOF compliance concerns, was drafted by Mr. Philpott on March 18, and was signed off by the MOF Field Operations Supervisor on April 16. Presumably it was sent to Slocan sometime shortly after that.

In a Determination Notice dated December 13, 1996, Mr. Griffin, the Acting District Manager, found that Slocan was in contravention of sections 62(1), 63(1), 63(2)(c), and 64(1) of the *Code*, and sections 12(1)(c), 13, 17(1) and 20(c) of the *Forest Road Regulation*. He levied a penalty of \$14,000.00.

On review, a Regional Review Panel confirmed contraventions of sections 63(1) and 64(1) of the *Code* and sections 17(1) and 20(c) of the *Forest Road Regulation*. The Review Panel rescinded the other contraventions found by the District Manager. The \$14 000 penalty was upheld.

Slocan appeals that decision to the Commission.

RELEVANT LEGISLATION

The legislative provisions applicable to this matter are found in several sections of the *Code* and *Forest Road Regulation*.

The Code

62 (1) A person who constructs or modifies a road on Crown land

- (a) within a Provincial forest, or
- (b) outside a Provincial forest if the road is constructed or modified for the purpose of providing access to timber,

must do so in accordance with all of the following:

- (c) this Act, the regulations and the standards;
- (d) any forest development plan, access management plan or logging plan;
- (e) any cutting permit, road permit or special use permit;
- (f) any road layout and design;
- (g) a road construction survey.

63 (1) Subject to subsection (5) a person who uses a road under the authority of a road permit, ... a cutting permit ... must maintain it until

- (a) the road is temporarily, semi-permanently or permanently deactivated,
- (b) a road permit or special use permit for the road is issued to another person, or
- (c) the road is declared a forest service road under section 115(5) of the *Forest Act*.

64 (1) Subject to subsection (11), a person who uses a road under the authority of a road permit, cutting permit, ... must deactivate the road temporarily, semi-permanently or permanently, or a combination of temporarily, semi-permanently or permanently, as required by and in accordance with

- (a) any forest development plan or access management plan,
- (b) the Act, regulations and standards, and
- (c) the cutting permit, road permit, timber sale licence that does not provide for cutting permits, road use permit or special use permit.
- (d) any road deactivation prescription.

Forest Road Regulation

17 (1) A person who maintains a road under section 63 of the Act must inspect the road and repair the road to ensure that

- (a) the structural integrity of the prism and clearing width are protected,

- (b) the drainage systems of the road are functional,
- (c) the transport of sediment from the road prism and its effects on other forest resources are minimized, and
- (d) the road can be safely used by industrial users, even if industrial use has been temporarily suspended.

20 A person who carries out temporary deactivation of a road must, in accordance with a deactivation prescription prepared or approved by the district manager, do all of the following:

- ...
- (c) if there is a risk of adversely affecting the road and other forest resources through erosion, construct waterbars or cross-ditches along the road, or inslope or outslope the road, as appropriate;

ISSUES

1. Whether the Review Panel and the District Manager erred in deciding that the portion of the 501 road on which the alleged contraventions took place was a section of that road under permit to Slocan through Road Permit R03387.
2. Whether the Review Panel and the District Manager erred in finding contraventions of the *Code* and the *Forest Road Regulation*.
3. Whether the Review Panel and the designated District Manager erred in finding multiple contraventions for what Slocan submits is one incident.
4. Whether Slocan is entitled to a defence of due diligence.
5. Whether the quantum of penalty, as levied by the District Manager and upheld by the Review Panel, is excessive when all of the factors in section 117(4) of the *Code* are considered.

ANALYSIS

1. Whether the Review Panel and the District Manager erred in deciding that the portion of the 501 road on which the alleged contraventions took place was a section of that road under permit to Slocan through Road Permit R03387.

Slocan argues, as a preliminary question, that the portion of the 501 road on which the contraventions allegedly took place was not a section of road included as part of the Permit Area pertaining to Road Permit R03387. In issuing Amendment #10 to Road Permit R03387, which became effective December 4, 1995 and which the accompanying cover letter states "... replaces the existing Road Permit Number R03387..." Slocan submits that the MOF method of highlighting portions of the road with a coloured felt tip marker should be determinative of which portion of the road pertains to Amendment #10. Exhibit "A" of Amendment #10 is a map showing, among other roads, what is referred to as the 501 road as it existed at the time.

At the material times to this appeal, Amendment #11 to Road Permit R03387 was in effect. That amendment was issued January 24, 1996. The cover letter to Amendment #11 makes it clear that this amendment is an "... integral part..." of Road Permit R03387 (which is called Amendment #10 but which in effect is an amendment in name only). Amendment #11 also contains an Exhibit "A" map showing the roads pertaining to the permit. Exhibit "A" of Amendment #11 is a map showing, among other roads, what is referred to as the 501 road with a significant extension added to the 501 road as shown in the Exhibit "A" map of Amendment #10. This significant extension is highlighted with a coloured-highlighting pen.

The roads on these Exhibit "A" maps are normally marked in two distinct ways. The mainline Morkill Forest Service Road is marked in the standard manner for a forest road on a MOF map. That standard manner is a double dashed line (====). The roads on the map pertaining to Road Permit R03387 (the Permit Area) are distinguished from non-permitted roads through identification of the permitted road right of way with a solid black line. In addition and as a third method of identification, some portions of the permitted roads are also marked with a broader line applied with a coloured highlighter pen. These coloured markings have been applied on over top of the solid black line markings.

Slocan argues that the method of highlighting a road on the map attached to a road permit should be determinative of whether a road is part of the Permit Area properly pertaining to the Road Permit in question. Slocan disputes the applicability in this matter of the Road Permit in effect at the time of the alleged contraventions because of the use of the coloured highlighter pen. Slocan claims that the portion of the road on which the contraventions took place was not under permit to Slocan at the time of the contraventions. As such, Slocan submits it should not have been cited for any contraventions related to Road Permit R03387.

The MOF argument on this issue is succinct. If, as Slocan claims, the portion of the road upon which the contraventions allegedly took place were not under permit to Slocan at the relevant times, then Slocan is in a technical trespass. The MOF also submits that Slocan did not raise any concerns regarding the extent of the 501 road that was under permit in Amendment #10 and the attached Amendment #11 until this appeal.

The Commission heard oral evidence and examined several exhibits in relation to highlighting. Robert Mitchell, the MOF Engineering Officer in the Robson Valley Forest District at the time the disputed Road Permit documents were issued, testified that the coloured highlighting found on some of the road permit amendment maps was meant to signify roads approved in the amendment to which the maps were attached. The black solid line on the Exhibit A map was meant to illustrate all of the roads pertaining to the permit to which the Exhibit A map was attached.

The Commission accepts that explanation and finds it preferable to the interpretation offered by Slocan. That explanation is consistent with the manner in which permitted roads have been marked on the Exhibit "A" maps in Amendments 10 and 11. The black solid line used to emphasize the roads under permit is, in our

opinion, the primary determinant to be used in associating a portion of road on the Exhibit "A" map to the attached and associated road permit. The marking of some or all of the road with a coloured highlighter pen is meant to be a method of additional emphasis that may relate to a new section of road added to the road under permit since the last amendment, or for some other purpose. It does not denote the *only* section of road in the Permit Area.

This ground of appeal, therefore, does not succeed. The Commission finds that the portions of the 501 road on which the alleged contraventions took place were sections of the road covered by Road Permit R03387, as amended.

2. Whether the Review Panel and the District Manager erred in finding contraventions of the *Code* and the *Forest Road Regulation*.

The MOF claims that Slocan used the 501 road past the point where it would be reasonable to do so, given the shutdown indicators present through the March 10, when operations ceased, to 28 time period.

Slocan submitted a Deactivation Plan on March 1, 1996 to the MOF; it was approved by the MOF on March 8, 1996. The Plan was meant to describe deactivation measures for roads "... on portions of the R03387 road permit..." The Plan states, in part:

Seasonal deactivation will follow logging operations out of this area. Natural drainage patterns will be maintained. Wooden culverts will be removed. Any oversteeped fills will be pulled back. And (sic) crossdrains and waterbars will be created where required.

All roads will be monitored during snowmelt and heavy rainfall events to ensure deactivation measures were effective and to catch any problems if they arise. Monitoring will be conducted using pickups and quads where access permits and helicopter flights where there is no access.

Snow roads will have the outside berms broken down and natural drainage ensured. Snow landings will be ditched around and/or outsloped if necessary. Oversteeped sections to be pulled back.

Slocan presented evidence from its logging contractors who were working in the Cutting Permit 511 area at the material times. Danny Cuddyback was a falling and skidding contractor for Slocan at the time. He stated that he traveled the 501 road daily from March 1, 1996 through to the 14th. Around March 12th, he began deactivation activities by "breaking berms", where snow banks on each side of the road are breached with a bladed machine such as a skidder or cat, to allow water accumulated on the road to flow through the breaches and away from the road.

He continued this activity on March 13, at which time he also carried out "back blading", in which the machine is driven backward with the blade lowered to smooth the surface over which the machine has just traversed. These activities were continued on March 14, and some waterbars were installed in addition. Mr.

Cuddyback stated that he spent about two hours on the 14th constructing cross ditches and waterbars.

Glen Hooker, owner of Happy Hooker Logging, stated that he carried out the same type of activities as Mr. Cuddyback starting on March 12. He stated that the waterbars installed by him were four to six inches deep because he wanted to avoid cutting the waterbar so deep as to completely penetrated the existing frost layer, for to do so would make the road impassable.

Clarence Baggett, a road building and logging contractor for Slocan, established waterbars and carried out back blading on March 13, 18 and 22. Baggett Logging had seven pieces of equipment on the cutblock and removed that equipment to the start of the 501 road on March 13 and 14. At that time, he described the road condition as "frozen ground over slippery clay". On March 18 and on March 22, he stated that he spent a total of about 4.5 hours installing waterbars and back blading.

Mr. Baggett stated that he had not examined either the Deactivation Plan or the cutting permit document. He stated that all the instructions he received from Slocan were verbal and that he received no instructions from Slocan regarding deactivation measures on the 501 road. He further stated that he had carried out considerable deactivation work for Slocan in the past.

Len McClinton, Slocan's Road Supervisor at the time, stated that he drove the Morkill Forest Service Road during March 1996 but did not travel the 501 road during that period. He stated that Joe Turner, Slocan's Logging Supervisor in the Morkill operating area, had traveled the road during that period.

Mr. Turner stated that he was in charge of the condition of the roads during breakup. He traveled the 501 road on March 6, 7, 8, and 12 to inspect the ongoing logging operations along the road. Mr. Turner kept a personal journal in which he recorded weather information and noted activities related to the ongoing harvesting. On March 15, Slocan held a meeting attended by woodlands staff at which staff were allocated responsibilities for patrolling roads during the breakup period, with Joe Turner assigned to patrol the 501 road.

Mr. Turner stated that he was not familiar with the Deactivation Plan for the 501 road and that he did not provide any direction to Baggett Logging or Happy Hooker Logging regarding deactivation requirements in that Plan.

On March 12, Mr. Turner found the 501 road to be passable to vehicles, although by that time the road had thawed to a depth of about four to six inches, with a solid running surface remaining underneath. After March 12, he did not return to the road until March 18. He explained that while he directed Mr. Hooker to install waterbars, he gave no such similar instructions to Mr. Baggett.

The MOF evidence surrounding the events on the 501 road during this period was provided by Stuart Philpott, an Engineering Assistant with the Robson Valley Forest

District. At the relevant times, Mr. Philpott was responsible for compliance inspections for all permits and prescriptions in the Morkill River operating area.

Mr. Philpott stated that he discussed the road condition and shutdown indicators with Mr. Turner on March 13, although Mr. Turner had no recollection of such a conversation. Mr. Philpott's notes of that site visit, contained in the MOF Non-Compliance Report, indicates that shutdown was discussed, but there was no indication of a discussion of compliance concerns.

Mr. Philpott described the conditions on the 501 road between March 13 and 21 as muddy with surface thawing. The road was in a deteriorating condition, with water and mud running, rutting and snow melt flowing onto the road. There were no quantitative measurements taken by Mr. Philpott related to his road observations.

Mr. Philpott states that, by March 15, the road was impassable to his four wheel drive truck. Water was flowing on the road to the extent that his boots were covered with flowing water when he stood in the ruts. He stated that the flow of water was causing erosion at that point. Because of cooler temperatures, the water was flowing in lesser volumes by March 18.

A series of photographs taken by Mr. Philpott and entered as evidence show the condition of portions of the road and surrounding area, including the creek described above, during the period in question. While some of the photos indicate significant pooling of water and some rutting, others show the road in a condition that indicates minimal or no rutting. In these cases, the road has thawed somewhat, but the presence of clearly defined tire treads in the photo indicates that the road had only thawed slightly, that the road surface remained generally frozen, and that the road was passable at the time.

The photos of the creek were accompanied by some quantitative measures of silt depth adjacent to culvert outlets and in the creek bed.

Assessing Impacts to the Road and Surrounding Areas During the Breakup Period

For purposes of assessing the evidence presented, it is convenient to divide the allegedly affected areas of the 501 road and area adjacent to the Morkill River into three sections. The first is the area west of the Morkill Forest Service Road where a creek drains through a culvert under that road and onto a gently sloping area leading to the Morkill River several hundred metres away. The second is the section of the 501 road and adjacent areas starting at the Morkill Forest Service Road junction and extending to the top of the hill at approximately 1.2 kilometres, at the point where the 501 road branches with the road leading to cutblock 501-8. The third is the remainder of the 501 road ending at cutblock 511-2. The whole of the 501 road is approximately nine to ten kilometres long.

The first section, that west of the Morkill Forest Service Road, is an area of some concern as that is the area into which the surface drainage from the 501 road and adjacent watercourses flows. In his determination, the District Manager found that

it was "... not unreasonable to assume that if much more water had arrived on the flat area at 4.4 km (of the Morkill Forest Service Road) that it could have easily reached the Morkill River." The Review Panel makes no mention of this area in its decision.

Slocan provided expert evidence from Dr. Tom Watson, whose field of expertise is fisheries biology. Dr. Watson carried out two site examinations of this first section adjacent to the Morkill River, which is classed as an S1 stream for the purposes of the *Code*. The creek referred to above crosses under the Morkill Forest Service Road through a culvert at a point about 500 meters from the Morkill River.

Dr. Watson's evidence was that once the creek crossed under the culvert, there was a defined channel for a distance of about 65 metres, and then there was no defined creek channel in which the runoff could flow. The water entered onto the flat from the defined channel and dispersed. He stated that there was no hydraulic connection between the water in the creek, once it had flowed onto the flat area about 800 meters from the river, and the river itself.

He stated that the creek was ephemeral, could not support a fish population, and was formed and sustained from the groundwater runoff from the area within a relatively short distance of the creek bed. He further concluded that there was "...no evidence of sediment deposition extending anywhere near the Morkill River and none seems possible."

Dr. Watson described the potential impacts in the area in which the creek water dispersed as localized and not limiting to forest productivity, but with the possibility of some short term limitations to the establishment of some species. He described the amount of sediment deposit as the equivalent of about "... 10 wheelbarrows..." The MOF presented no evidence to contradict that of Dr. Watson. There is also no evidence to conclude that any deposition of silt caused any significant adverse effects to the area in which it was deposited.

The Commission accepts Dr. Watson's evidence and concludes that any excess material from that normally deposited through runoff from this creek was unlikely to cause any damage to the Morkill River or its fish population. The normal runoff from this creek would result in some deposit of sediment, but even with the amounts specified by Dr. Watson in 1996 and which the Commission finds were excessive, the impact and amount of those deposits is not such as to raise compliance issues with the Commission.

With respect to the second section, that part of the road immediately east of 4.4 km on the Morkill Forest Service Road and extending from the start of the 501 road to about 1.2 kilometres up the 501 road, the oral evidence is contradictory as to whether the Deactivation Plan, the *Code* and the *Regulation* were complied with. Slocan claims that it carried out the required deactivation activities, while the MOF claims that several inspections showed no evidence of the waterbars, cross ditches and back blading required to provide the necessary drainage structures and road maintenance to ensure the impacts from the runoff from the road were minimized and to provide adequate resurfacing of the road.

The photographs provided by the MOF were of some assistance to the Commission. One photo (Tab 2, photo set 3, photo 12), taken in the vicinity of the junction of the 501 road and the spur road leading to cutblock 501-8, among others, shows water flowing on the road in a channel that was not deliberately cut with a machine, but rather was cut in a disorganized fashion from the flow of the water.

The MOF relied heavily on the photo evidence to illustrate the degree of silt deposition in the creek. While there was considerable sediment deposits shown, the Commission notes that the road and associated drainage structures have been in use since 1990. Much of that period is prior to the time the *Code* came into effect on June 15, 1995, so it is reasonable to conclude that at least some of that sediment, and likely most of it, was deposited before the *Code* was in effect.

Photos 1 through 10 of photo set 1 also show conditions along this second section of the road. Photos 1 and 2, which show the start of the 501 road and were taken on March 14, indicate that breakup is becoming considerably advanced, with ruts and pooling of water on the road surface. Photo 3 shows the creek with a sediment deposit in the middle although it is not clear from the evidence if all of that sediment was deposited as a result of the 1996 breakup runoff. Photos 4 and 5 show a point where sediment is leaving the 501 road and flowing into the creek. Photos 3 to 5 were taken on March 18.

Photos 7 through 10, taken on March 28, indicate sediment deposits beside the road and in a small waterway flowing away from a wooden culvert passing under the road. While these deposits are considerable, there is no evidence before the Commission to indicate whether these deposits occurred exclusively during the 1996 breakup period, or were the sum totals of deposits occurring over a longer period of time.

There was sufficient material deposited during the 1996 break up period because of the lack of adequate drainage structures and sediment control measures that continued to be deposited from the flow of water, that Slocan should have recognized these deposits as excessive. A remedial course of action should have been undertaken to minimize the flow of sediment from the road. There is no evidence that Slocan undertook inspections for this purpose or undertook such remedial action as required.

Photos 17 to 24 are of the third section, which extends from the spur road (leading to cutblock 511-2) to the end of the 501 road. The photos indicate that while there is some rutting present, it is generally not severe. In several of the photographs, tire treads are clearly visible, which indicates that the mud in which the treads are visible is on top of a still frozen road surface. Such a condition does not indicate to the Commission that the road was in such a condition that vehicle traffic should not have traversed it.

Several of these photos show water pooling on the road surface. This is not an unusual occurrence during breakup on a winter road, especially in a situation where the road surface is level with or even below the adjacent ground on each side of the road, as is apparent in some of these photographs. The addition of ditches or other

drainage structures in these particular areas would do little or nothing to alleviate this pooling or drain the water.

There is a considerable gap between the evidence of Slocan and that of the MOF as to whether deactivation measures were carried out. While there was evidence from Slocan's contractors that waterbars and cross ditches were constructed, the evidence of Mr. Philpott is that he found no evidence of such drainage devices. Mr. Hooker stated that the waterbars he constructed were only four to six inches deep so as not to penetrate the remaining frost layer. Such a construction technique may have been appropriate at the time of installation, but would not account for the eventual thawing of the whole of the frost layer. With the evidence before the Commission, the most likely conclusion is that the road continued to thaw and any waterbars and cross ditches installed while the road was frozen, and which were structurally formed from the frost remaining in the road, simply melted away with the rest of the frost which had provided a firm road surface over the winter period.

Contraventions

Section 17(1) of the *Forest Road Regulation* and sections 63(1) of the *Code*

The evidence establishes that Slocan did not carry out sufficient deactivation measures to meet the requirements of its Deactivation Plan, and that Slocan supervisory personnel did not carry out inspections to determine the adequacy of the deactivation activities. The only evidence that supervisory personnel were on the road during the relevant period was from Mr. Turner, Slocan's Logging Supervisor. Mr. Turner stated that he was not familiar with the Deactivation Plan nor did he provide any direction to the logging contractors regarding deactivation specifications. He also did not provide evidence of any deactivation inspections.

There is no evidence of an organized and systematic plan or attempt to channel the flow of water through a system of waterbars, crossditches, ditches and culverts in a way that would have minimized the likelihood of excessive sediment flows from the road. There is no evidence that Slocan personnel monitored this area to determine the adequacy of any deactivation measures designed to minimize the transport of sediment, assessed the risk of erosion, or prescribed further measures to ensure minimization of the sediment impacts of the runoff as required by the Deactivation Plan and by section 17(1) of the *Regulation*.

The Commission concludes that Slocan did not inspect the adequacy of deactivation measures on the road, nor did it take appropriate remedial action along the more sensitive first 1.2 km of the 501 road, but also along the rest of the length of the 501 road and, therefore, the Commission finds that Slocan contravened section 17(1) of the *Forest Road Regulation*.

Section 17(1)(c) of the *Regulation*, provides that:

17 (1) A person who maintains a road under section 63 of the Act must inspect the road and repair the road to ensure that

- (c) the transport of sediment from the road prism and its effects on other forest resources are minimized...

The photographic evidence shows water flowing in an unorganized channel on the 501 road near the 1.2 km point (Tab 2, photo set 3, photo 12). There is no evidence in that area of the presence of a ditch, water bar or any other drainage structure designed to keep the water drained from that area of the 501 road surface. The MOF evidence, which the Commission accepts, is that this was one of the sources of the sediment flowing off the road and into the creek.

The Commission accepts the photographic evidence provided by Mr. Philpott, and his evidence that erosion was occurring during the period in question in the first 1.2 km section of the 501 road surface. Tab 2, photo set 1, photo 8 shows the outlet of a wooden culvert crossing under the 501 road at approximately 0.75 km on the 501 road. A considerable amount of sediment has flowed through the culvert and has been deposited. The most likely source of that sediment is the road surface.

In *International Forest Products Limited v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/02(b), March 19, 1997) (unreported), the Commission held on page 6 that:

...it is not necessary to quantify the amount of sediment. The obligation is to 'ensure the transport of sediment and its effects on other forest resources are minimized'. The Concise Oxford English Dictionary defines minimize as 'reduce to, or estimate at, smallest possible amount or degree.'

This Commission Panel adopts the approach of the panel in the *International Forest Products* case. The nature of the breakup period is such that the Commission recognizes that the almost fluid nature of the road surfaces will result in some flow of sediment material into watercourses. However, in this matter there is no evidence that the erosion and deposition of silt from the road into the creek channel was even recognized, much less minimized. The evidence leads the Commission to conclude that Slocan neither "... inspected the road..." to assess the transport of sediment, nor "... repaired the road..." Repairing the road, in our opinion, would include the installation of silt control measures in order to ensure that the transport of sediment from the road surface and its effect on other resources was minimized.

Also in the *International Forest Products* case, is the following finding:

The Commission finds that once a contravention of section 17(1) is found, by operation of statute, section 63 of the *Code* is also contravened. No independent determination of a contravention is required. (page 8)

Section 63(1) states:

63 (1) Subject to subsection (5) a person who uses a road under the authority of a road permit ... must maintain it until

- (a) the road is temporarily, semi-permanently or permanently deactivated,
- (b) a road permit or special use permit for the road is issued to another person, or
- (c) the road is declared a forest service road under section 115(5) of the *Forest Act*.

The Commission finds that Slocan failed to adequately maintain the road prior to temporary deactivation by failing to minimize the transport of sediment from the portion of the road specified above, which resulted in the contravention of section 63(1) of the *Code*.

Section 20 of the *Forest Road Regulation* and section 64(1) of the *Code*

The District Manager and the Review Panel found that Slocan also contravened section 20(c) of the *Regulation*. Section 20(c) states:

20 A person who carries out temporary deactivation of a road must, in accordance with a deactivation prescription prepared or approved by the district manager, do all of the following:

- ...
- (c) if there is a risk of adversely affecting the road and other forest resources through erosion, construct waterbars or cross-ditches along the road, or inslope or outslope the road, as appropriate;

The Commission finds that some deactivation work was carried out, but finds that subsequent inspections were not carried out as required by Slocan to determine the appropriateness of this work, and that the construction of waterbars and cross ditches was inadequate, and therefore not appropriate, given that the ground was thawing. The onset of breakup should have triggered an inspection process to track the effects of the thawing on the deactivation measures carried out to determine the need for further measures later in the breakup process. The lack of supervision and remedial action is not in accordance with the Deactivation Plan submitted by Slocan and approved by the District Manager, which states, in part:

All roads will be monitored during snowmelt and heavy rainfall events to ensure deactivation measures were effective and to catch any problems if they arise. Monitoring will be conducted using pickups and quads where access permits and helicopter flights where there is no access.

That failure to comply also leads to a contravention of section 64(1)(d) of the *Code*:

64 (1) Subject to subsection (11), a person who uses a road under the authority of a road permit, cutting permit, ... must deactivate the road temporarily, semi-permanently or permanently, or a combination of temporarily, semi-permanently or permanently, as required by and in accordance with

- ...
- (d) any road deactivation prescription.

The Commission finds that Slocan failed to act in accordance with an approved road deactivation prescription (the Deactivation Plan) and, therefore, also contravened section 64(1)(d) of the *Code*.

3. Whether the Review Panel and the designated District Manager erred in finding multiple contraventions.

In *R. v. Kienapple* (1974), 44 D.L.R. (3d) 351 (S.C.C.), the Court held that multiple criminal convictions cannot be entered upon conviction of the accused for one criminal act. Slocan relies on *Kienapple* to advance the same argument in the context of a finding of multiple administrative contraventions for the same set of circumstances.

This argument has been made to the Commission in a number of appeals. The Forest Practices Board submits that the approach to multiple contraventions and penalties for the same act or omission should be consistent with previous Commission decisions, two of which it included in its submission: *International Forest Products Limited* (as above); *Hayes Forest Services Limited v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-07, February 4, 1998) (unreported). In both of those decisions, the Commission held that the common law rule against multiple convictions for the same act is not applicable to administrative contraventions under the legislative scheme encompassing the *Code* and its regulations. This scheme encompasses prohibitions against particular acts and/or omissions that sometimes overlap.

As was held by the Commission in the *Hayes* decision, which this Panel adopts:

In our view, this scheme was created in an effort to create consistency in the determination process and a "gapless" regulatory scheme. Thus, there is evidence that the Legislature intended to allow the government officials to find a person to be in contravention of two or more sections of the *Code* and its regulations for a single action, even though it may constitute a single legal prohibition. (page 7)

The Commission further held in *Hayes* that even though a finding of multiple contraventions for the same circumstances may be acceptable, unfairness may result from the manner in which penalties are levied and reported in those circumstances:

Having said that, the Commission also recognizes that this scheme may result in an unfairness if two separate penalties are assessed for what is essentially one wrongful action having one legally prohibited effect (e.g. cross stream yarding). However, the place for any unfairness to be remedied is at the penalty assessment stage. Section 117 provides government officials with significant discretion in assessing a penalty. Where it is clear that the contraventions arise out of a single action and are for a single legal prohibition, these circumstances should be factored into the penalty assessment. (pages 7-8)

The Commission finds that there were four contraventions leading to two distinct and independent legal prohibitions. The first legal prohibition is the failure to inspect and repair the road to minimize the transport of sediment from the road, which in our opinion is included in the definition of maintenance, and so is contrary to section 17 of the *Regulation* and section 63 of the *Code*. The second is the failure to appropriately deactivate in accordance with the deactivation prescription, contrary to section 20 of the *Regulation* and section 64 of the *Code*. While the Commission agrees that the licensee, Slocan, should not be penalized more than once for the what is essentially the same act or omission, the Commission finds that on the facts, and the law, there are two distinct legally prohibited omissions which are at issue in this case.

After the Review Panel findings, the MOF recorded the contraventions and penalties separately - as independent contraventions. In the *International Forest Products* decision, the Commission endorsed the manner in which the MOF recorded the contravention in that case:

MOF has in fact recorded the contravention in a manner that does not show as two independent contraventions. (See MOF Annual Report of Compliance and Enforcement Statistics for the Forest Practices Code, June 15, 1995-June 15, 1996.) Provided the method of reporting continues in this fashion, and the Commission recommends that it does, there is no public unfairness. (pages 8-9)

While the *Hayes* and *International Forest Products* decisions were made after the Review Panel decision in this matter, the Commission agrees with, and adopts, the reasoning of the Commission in those decisions and will assess the contraventions and penalty on that basis.

4. Whether Slocan is entitled to a defence of due diligence.

It is well-established in decisions of the Commission that administrative contraventions for which an administrative penalty is levied are not open to a defense of due diligence. Those found to have contravened the *Code*, except for the offense provisions, will be absolutely liable. It is rare that a licensee can avoid the finding of a contravention where the section imposes absolute liability. In the circumstances of this case, no defense has been made out by Slocan that would allow it to avoid the finding of the contraventions as specified above. The Commission has consistently held that the nature and extent of a licensee's due diligence efforts, if any, are properly considered at the penalty assessment stage under section 117(4)(b)(iv).

5. Whether the quantum of penalty, as levied by the District Manager and upheld by the Review Panel, is excessive when all of the factors in section 117(4) of the *Code* are considered.

Administrative penalties are designed primarily to ensure that the Crown is compensated for damage to a valuable forest resource that, in this case, was not managed according to the requirements of the *Code* and the *Forest Road*

Regulation. Another no less important purpose is to encourage compliance with the *Code*.

Section 117(1) of the *Code* states that if a senior official determines that a person has contravened the Act, the senior official may levy a penalty against the person.

In assessing the appropriate penalty, both the District Manager and the Review Panel examined the factors set out in section 117(4)(b) of the *Code*. The Commission will review those factors to assist it in deciding the appropriate penalty. Section 117(4)(b) states:

117(4) Before the senior official levies a penalty under subsection (1) ... he or she

...

(b) subject to any policy established by the minister under section 122, may consider the following:

- (i) previous contraventions of a similar nature by the person;
- (ii) the gravity and magnitude of the contravention;
- (iii) whether the violation was repeated or continuous;
- (iv) whether the contravention was deliberate;
- (v) any economic benefit derived by the person from the contravention;
- (vi) the person's cooperativeness and efforts to correct the contravention;
- (vii) any other considerations that the Lieutenant Governor in Council may prescribe.

(i) previous contraventions of a similar nature by the person

There is no evidence before the Commission of previous contraventions of a similar nature.

(ii) the gravity and magnitude of the contravention

The Commission finds that the magnitude and gravity of the contraventions are not as severe as described in the earlier District Manager decision. The Commission disagrees with the following statement in the original determination:

... if much more water had arrived on the flat area at 4.4 km. that it could easily have reached the Morkill River.

There is no evidence to support that statement.

In his determination, the District Manager also stated, in finding the gravity and magnitude of the contraventions significant, that "... no mitigative or corrective actions were taken and no deactivation measures taken during the period of March 13, to 18, 1996." The Commission accepts that Slocan's contractors undertook some deactivation measures during that period, but finds those measures to have been inadequate.

The Commission does agree, however, that there was a lack of adequate deactivation and supervision of deactivation activities and a failure to minimize the transport of sediment from the road surface. The Commission finds the gravity and magnitude of the contraventions to be moderate.

(iii) whether the violation was repeated or continuous

There is no evidence to indicate that the violation was repeated or continuous. The contraventions occurred over about two weeks, but were part of a single series of events that occurred over a relatively short period.

(iv) whether the contravention was deliberate

As stated above, in previous decisions the Commission has held that while a defense of reasonable care is not available as a defense to an administrative contravention, it is available in the context of section 117(4)(b)(iv) of the *Code* as a factor to be considered in assessing the quantum of penalty.

In this case, there is no evidence, either from written reports or from the oral testimony, to convince the Commission that Slocan actively supervised its contractors or actively monitored road conditions through this period. On the few occasions that Slocan personnel were in the 501 road area, there is little evidence of monitoring of deactivation activities or monitoring of sediment flows.

The Commission finds that reasonable care was not exercised by Slocan in ensuring compliance, but also finds that the contraventions were not deliberate.

(v) any economic benefit derived by the person from the contravention

There is no evidence of any economic benefit to Slocan. Slocan ordered a halt to logging truck traffic on the road late on March 10 or about two days after the onset of breakup. There is evidence that the condition of the road had deteriorated somewhat by that point, but no evidence that the logging truck traffic was causing damage at that point or contributed to the contraventions found here.

The continuation of skidding and other logging activities on the block at that time were not activities that provided economic benefit to Slocan. The timber skidded to the roadside during this period was not available to the Slocan mill for at least the period of breakup, which usually extends for about two months. Because the 501 road is a winter road, that timber skidded within the blocks would most likely remain on those blocks until the 501 road could support logging truck traffic the following winter.

(vi) the person's cooperativeness and efforts to correct the contravention

In a letter to the MOF dated September 2, 1997, and signed by Slocan's Engineering Supervisor, Slocan recognized that damage had been caused to sections of the 501 road during the run-off period in the spring of 1996. Slocan stated its intent to reconstruct a portion of the road:

Slocan has decided to design and reconstruct this section of road after reviewing the damage caused by runoff in the Spring of 1996.

The section referred to was from 0 km to 1.5 km of the 501 road. Slocan proposed to carry out relocation of the road and grade lines, the addition of retaining walls, and installation of additional culverts.

From that, the Commission concludes that Slocan recognized the problem, and was cooperating in efforts to correct it.

Quantum of Penalty

The maximum penalty for contravening section 63(1) of the *Code* is \$50,000.

The maximum penalty for contravening section 64(1) of the *Code* is \$50,000.

The maximum penalty for contravening section 17 of the *Forest Road Regulation* is \$20,000.

The maximum penalty for contravening section 20 of the *Forest Road Regulation* is \$10,000.

The Commission, while concerned with the non-compliance with a very general Deactivation Plan and the inadequate deactivation carried out, finds that the contraventions were not as serious as those found by the District Manager. The section of road on which a major portion of the contraventions occurred is relatively short, and there was no evidence to suggest that the Morkill River was adversely affected. The Commission also finds that some deactivation work was carried out, but that it was inadequate and the initial deactivation work was not followed up by Slocan inspections to determine its adequacy.

The Commission finds that an appropriate penalty in this case is \$4,000 for Slocan's failure to inspect and maintain the road and \$2,000 for Slocan's failure to properly deactivate the road in accordance with its deactivation prescription.

To ensure fairness, only two contraventions should show on Slocan's record.

DECISION

Section 138 of the *Code* provides that the Commission may confirm, vary or rescind the decision appealed from and make any decision that the person whose decision is appealed could have made.

The Commission upholds the finding of the Review Panel of a contravention of sections 17(1) and 20(c) of the *Forest Road Regulation*.

The Commission also upholds the finding of the Review Panel that Slocan contravened sections 63(1) and 64(1) of the *Code*.

However, the Commission varies the penalty assessed for the contraventions to \$6,000.

The appeal is allowed in part.

Rob Kyle, Panel Chair
Forest Appeals Commission

March 20, 1999

MINORITY DISSENT OF PANEL MEMBER KRISTEN EIRIKSON

I disagree with the decision of the majority for the following reasons:

GRAVITY AND MAGNITUDE OF THE CONTRAVENTIONS

In considering the gravity and magnitude of the contraventions, it is the gravity and magnitude of the contraventions themselves, not only the impacts of the contraventions that should be taken into account.

Slocan, a major forest company, was in serious breach of almost every element of its recently approved Deactivation Plan for the 501 road and failed to maintain or supervise the condition of the road prior to and during the 1996 spring break-up period.

The Commission heard testimony that established that the 501 road was identified on the 1995 Road Permit as Type IV and V terrain, with the hill portion composed of sensitive and highly erodable Type IV soil. We further heard testimony that the 501 road had not been used for logging purposes since the winter of 1993/94, prior to its being refrozen early in February 1996. In addition, evidence was provided that Slocan had received full stumpage allowances for the rebuilding of the road in sections from 1990. These allowances generally relate to road rebuilding in a more permanent manner that includes the installation of culverts and drainage works. However, the old 501 road was simply widened slightly and refrozen as a winter road during its several seasons of use since 1990; virtually no culverts or drainage systems were installed.

The Commission heard testimony that roads built on Type IV terrain require higher levels of deactivation, a matter that was addressed in the January, 1996 Licensee Liaison Meeting. These roads, as well, because they are not built to semi-permanent or all-season standards, require higher levels of maintenance and deactivation during spring melt, as permanent drainage structures are not in place to deal with the heavy runoff that occurs in this area.

Given these circumstances, it was incumbent upon Slocan to take proactive measures to continually inspect the road and ensure that all necessary maintenance and deactivation measures were carried out, as had been cautioned in the January 1996 Licensee Liaison Meeting. It is apparent from the evidence presented that little or no inspection, maintenance, or deactivation had taken place.

The filed and approved Deactivation Plan was simply ignored, and violated in almost all respects: natural drainage patterns were not maintained; wooden culverts, such as an old and apparently failing fir log drain or log bundle, were not removed; cross drains and waterbars were not created as and where required; and Slocan did not appropriately monitor or supervise the required maintenance and deactivation of the 501 road. In essence, the road was simply not "deactivated."

The evidence is that on the most sensitive hilly area of this road, where the creek crosses it twice, efforts were very minimal at best, especially efforts following the

very late removal of approximately 17 pieces of heavy equipment out of this rapidly softening road on March 13 and 14. Glen Hooker testified that he had taken his equipment out by March 13 and only cut one or two shallow cross drains on the hill, as he knew Baggett Logging was still coming out behind him. Mr. Baggett testified that he had moved nine pieces of heavy equipment out by 9:30 p.m. on March 14, and that the extent of his deactivation measures up to March 14 had been to make a rut on his way into the block with the wheel of his pickup truck that would allow the water to drain off the hill portion of the road and to install a cross bar at the top of the hill on March 13 and 14 on his way out. Mr. Baggett also testified that he was hoping to be able to get back into the block to retrieve 90 loads of logs that had been left behind.

No deactivation efforts were visible to MOF personnel viewing the road on March 14, 15, 18, 28 and several later occasions during the late spring and summer of 1996, and in fact on March 15, following removal of the heavy equipment, it was impossible to drive up the hill section of the road in a 4 wheel drive pickup. In the summer of 1996, potential tension cracking and some slumping of a steep cut slope in the hill portion were also visible to MOF personnel.

These failures to properly deactivate the road, maintain the road and supervise maintenance and deactivation are serious and flagrant contraventions of the Deactivation Plan, the *Forest Road Regulation* and the *Code*. The contraventions are of sufficient gravity and magnitude to warrant a \$14,000 penalty.

In my opinion the majority also placed undue consideration to a portion of the silt deposits in the creek having likely been deposited prior to the *Code* coming into effect. This is not an issue that was in dispute during the hearing **or addressed in the determination or the Review Panel Decision**. Slocan did not argue this point and, therefore, the Crown and Forest Practices Board have not been provided with an opportunity to argue or provide expert evidence or legal analysis of this issue.

Slocan's own expert, fisheries biologist Dr. Tom Watson, indicated that the silt that had traveled down the creek from the 1.2 km and .75 km sites on the hill, across a 500 metre flat area, through a culvert under the Morkill Forest Service Road. The silt, which was deposited approximately 65 metres into the flat area across the road indicated that the material had definitely been deposited within the last two to three years. MOF personnel provided evidence of ongoing siltation occurring during their site visits in March 1996, as well as the deposit of a .37 metre deep fan or delta near one of the creek crossings on the hill area of the road that altered the course of the flow of water in that area.

Regardless of the timing of the deposits, under ongoing maintenance and deactivation requirements contained in the Deactivation Plan, *Forest Road Regulation* and the *Code*, situations of this nature are to be actively monitored and corrected on an ongoing basis.

ECONOMIC FACTORS

It is apparent from the evidence that Slocan's contractors were extremely late in leaving the area, with the result that heavy equipment was being taken out under increasingly softening conditions. As an indication, from March 11 on, the main Morkill Forest Service Road was very nearly impassable due to a large mudhole near the junction of the Forest Service Road and the 501 road, which made it necessary to drive in the ditch to get around the mudhole. The late departure of the heavy equipment undoubtedly contributed to the siltation problems that arose and the "evaporation" of the minor deactivation measures that had been made. The late departure from the cutblocks represents an unquantifiable, but possibly quite significant, economic benefit to the contractors and Slocan.

There was further evidence before the Commission that Slocan spent no funds on maintenance and deactivation of the 501 road, apart from funds expended for routine snow-ploughing and sanding in order to accommodate road use. Despite presenting evidence that over \$373,000 was spent on maintenance and deactivation in the entire Morkill area, closer examination of the receipts and coding in question resulted in an acknowledgment by Slocan's Woodlands Manager that no accounts had been received or paid in respect of maintenance or deactivation work on the 501 road other than those relating to routine snow-ploughing and sanding to accommodate use of the road. This undoubtedly translates into an economic benefit for Slocan.

We further heard evidence that Slocan had received full stumpage allowance deductions for the 501 road, yet the road had not been built and maintained in a manner that included installation of culverts and drainage works. This, too, undoubtedly translates into an economic benefit for Slocan.

COOPERATIVENESS AND EFFORTS TO CORRECT

MOF personnel testified that during their several visits during March 1996, and several additional visits over the summer of 1996, no visible deactivation measures, cross drains or crossbars were apparent. During the 1998 hearing, Slocan made no acknowledgment of its liability for the damage to the road, and actively refuted its liability throughout the hearing. Nor did Slocan witnesses indicate that the damage had been corrected or that it intended to carry out any measures to correct damage to the road.

The September 2, 1997 letter from Slocan's engineering supervisor to the MOF District Manager does not contain an admission of liability. Instead, it attributes the damage to the "run-off in the spring of 1996" and refers to a funding proposal to rebuild the hill portion of the 501 road from the 0 km to 1.5 km points as an all-season road. It also refers to minor slumping on the road that needed to be corrected in order to continue to work in that area. Leonard McClinton, Slocan's Supervisor of Roads and Bridges, testified on cross-examination that he disagreed with the Chief Engineer's statement that the proposed reconstruction was related to the damage. Slocan's Woodlands Manager also acknowledged on cross-examination

that the request had subsequently been withdrawn and a decision made not to continue to operate in that area.

As such, this letter neither goes to cooperativeness nor efforts to correct the situation and should not be taken into account as a mitigating factor in reducing the penalty.

For these reasons, it is my opinion that the \$14,000 penalty levied by the District Manager, and upheld on review by the Review Panel, should stand, and I dissent from the majority opinion.

Kristen J. Eirikson, Panel Member

March 20, 1999