Forest Appeals Commission

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APPEAL NO. 1998-FOR-04

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:	Safe Enterprises D.L.S. Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Toby Vigod — Panel Chair
David Ormerod — Member
David Walkem — Member

HEARING DATE: October 6, 1998

PLACE: Kamloops, B.C.

APPEARING:
For the Appellant: Darren Blois, Counsel
For the Respondent: Sarah Macdonald, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal brought by Safe Enterprises D.L.S. Ltd.("Safe Enterprises") of the January 22, 1998 decision of a Review Panel. The Review Panel confirmed the decision of Ron Racine, District Manager, dated October 21, 1997, that the Appellant contravened section 96(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*") by the unauthorized harvest of 335 m^3 of timber. Safe Enterprises was assessed a penalty of $39,339.00 for this contravention pursuant to section 119 of the *Code.* Safe Enterprises was also found to have contravened section 54(2) of the *Code* by using a Forest Service Road without authorization and assessed a penalty of $150.00.

Safe Enterprises is not appealing the determination of a contravention of section 54(2) of the *Code* or the penalty assessed for that contravention. It is also not appealing the determination of a contravention of section 96(1) of the *Code*. It is, however, seeking an order that the penalty assessed by the Review Panel for the contravention of section 96(1) of the *Code* be significantly reduced.

The appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code.*

BACKGROUND

At the hearing before the Commission, the Appellant and Respondent agreed to the following Statement of Facts:

1. Crown timber was harvested without authority during the harvesting of adjacent private land owned by the Appellant.
2. The boundaries of the private land were established prior to logging.
3. The Crown timber was cut and removed in February 1996. The timber was sold mixed with private timber bearing Timber Mark EABUQ.
4. The Crown timber was removed by the Appellant from the area under the private land Timber Mark EABUQ held by the Appellant.
5. There was no written or verbal authority given to remove the cut Crown timber from the area.
6. The logging was done by John Stuart, a subcontractor of the Appellant.
7. The *net* volume of Crown timber cut was established by stump cruise to be 335 m^3.

During the fall of 1995, the Appellant was engaged in harvesting timber from private land located near Shuswap Lake (that portion of legal subdivision 9 and 10 of Section 9, Township 26, Range 7, west of the 6th Meridian, Kamloops Division, Yale District as shown on a plan of survey of the southwest quarter of said township which is not included within the limits of timber berth 241 in block 4). The land had been surveyed by the Appellant and its boundaries marked earlier that year. The Appellant had contracted with Joe Deleeuw to harvest the timber. Mr. Deleeuw stopped harvesting that fall due to wet conditions. In February 1996, Murray Campbell offered his services to Mr. Deleeuw to complete the harvest of the area. Shane Fraser, the president of Safe Enterprises, was contacted by Mr. Deleeuw and agreed that Mr. Campbell should complete the harvesting. Mr. Fraser hired Rick Kendall for one day to go and show Mr. Campbell where to log. Mr. Fraser did not go to the property and did not personally give Mr. Campbell any instructions. Mr. Campbell subcontracted the work to John Stuart.

On February 14, 1996, in the course of logging the private land owned by the Appellant, Mr. Stuart harvested timber on Crown land, across the south boundary of the Appellant's private land. The unauthorized harvesting took place in an area that was physically separated from the boundary of the private property.

On that day, Mr. Fraser testified that he received a call from John Shantz, of B.J. Carney Pole, who "said something to him about cedar poles". The reference to cedar poles did not sound right to Mr. Fraser, as he knew that his property did not contain cedar poles. He went out to the site the next day, February 15, 1996. Mr. Fraser confirmed that a trespass had occurred and he instructed the crew to stop harvesting immediately. While some of the "trespass" timber had been piled with the timber that had been legally harvested, Mr. Fraser also testified that some of the trespass timber remained on the trespass area.

At this point, the evidence becomes murky. Mr. Fraser testified that he phoned in on his Autotel (truck phone) to Harry Drage, the then District Manager of the Salmon Arm Forest District. He claims that he left a message for Mr. Drage to call back. He also claims that he wrote a note asking Mr. Drage what he should do with the wood and had Robbie Thurston hand-deliver the note to the Forest District office. He further claimed that he had his son, who was going to the office on another matter, leave a message at the front desk. (In the earlier proceedings, Mr. Fraser claimed he had asked his son to telephone the District office). Mr. Fraser says he received no response from the District office. He indicated that his next contact with the District office was when he went into the office a month after the trespass occurred and had a discussion with Mr. Drage about the ownership of the property where the trespass occurred. The Respondent says that there is no record of any message being received at the District office and that it did not know that a trespass occurred until June 12, 1996, when it was reported by Federated Co-op, the holder of timber berth 241 (Timber Licence TO635). E-mails from Mr. Drage indicate that he did not receive any note from Mr. Fraser and was not aware of the trespass until he met briefly with Mr. Fraser on June 14, 1996, to discuss the ownership of the property where the trespass occurred. On that date, he referred Mr. Fraser to the Timber Officer to discuss the issue further.

Mr. Fraser testified that on February 15, 1996, he was faced with the dilemma about what to do with the cut timber. He said break-up was fast approaching and that he was worried about the timber deteriorating if it was left for four months until he could haul it out. He also said that he was concerned about a looper infestation of the hemlock. Under cross-examination, Mr. Fraser admitted that looper was not a concern then, but that he did not like to leave decked timber lying around.

Mr. Fraser then decided to haul the timber out of the area and gave instructions to Mr. Stuart to haul it out on February 15, 1996. The timber was hauled under the private timber mark EABUQ, and sold with the timber harvested from the private land. After the Forest Service was notified of the unauthorized harvest on June 12, 1996 by Federated Co-op, a stump cruise was conducted to determine the volume of timber on Crown land that was cut. The stump cruise compilation for the trespass area amounts to 473 m^3 "gross" volume, or 335 m^3 "net volume".

Mr. Fraser was given an Opportunity to be Heard on this matter on April 10, 1997, and the determination was issued by the District Manager on October 21,1997. Mr. Fraser appealed to a Review Panel, which held a hearing on January 15, 1998. The Review Panel decision, upholding the determination, was issued on January 28, 1998.

ISSUES

There is no dispute that the unauthorized harvesting of timber occurred. There is also no dispute that the *net* volume of timber cut was 335 m^3. The Appellant does not dispute that it contravened section 96 of the *Code* but submits that the penalty is excessive and should be significantly reduced. Therefore, the main issue to be

determined in this appeal is whether the quantum of penalty is appropriate in the circumstances.

The Appellant's grounds of appeal as set out in its Notice of Appeal and Statement of Points are summarized as follows:

1. Whether the District Manager erred in his assessment of the amount payable pursuant to section 119 of the *Code* by failing to consider the factors set out in section 117 of the *Code*.

2. Whether the District Manager erred in his determination of the species mix of the Crown timber removed and consequently his determination of the stumpage and market value for the timber based on such species mix.

3. Whether the District Manager erred in considering contraventions which occurred prior to the enactment of the *Code*.

4. Whether there was a reasonable apprehension of bias on the part of the District Manager.

5. Whether the District Manager breached any rule of procedural fairness.

6. If there was a breach of the rules of procedural fairness or a reasonable apprehension of bias in the determination, was the breach cured as a result of the hearing before the Review Panel?

RELEVANT LEGISLATION

The relevant legislative provisions are as follows:

Unauthorized timber harvest operations

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

(a) under an agreement under the Forest Act or under a provision of the Forest Act,

(2) If a person cuts, removes, damages or destroys Crown timber contrary to subsection (1), at the direction of, or on behalf of, another person, that other person also contravenes subsection (1).

Penalties

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

(2) If a person's employee, agent or contractor, as that term is defined in section 158.1 of the Forest Act, contravenes this Act, the regulations or the

standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.

(3) If a corporation contravenes this Act, the regulations or the standards, a director or officer of it who authorized, permitted or acquiesced in the contravention also commits the contravention.

(4) Before the senior official levies a penalty under subsection (1) or section 119, he or she

(a) must consider any policy established by the minister under section 122, and

(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.

Penalties for unauthorized timber harvesting

119. (1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, he or she may levy a penalty against the person up to an amount equal to

(a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 16 of the Forest Act, and

(b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.

DISCUSSION AND ANALYSIS

1. Whether the District Manager erred in his assessment of the amount payable pursuant to section 119 of the *Code* by failing to consider the factors set out in section 117 of the *Code*.

The Appellant argues that the District Manager did not consider a number of "mitigating" factors in making his penalty assessment. Specifically, the Appellant argues that it had spent a considerable amount of money having the boundaries surveyed and marked. The Appellant also submitted that the trespass was committed by a subcontractor whom Mr. Fraser had never met until February 15, 1996. It also says that the trespass was done inadvertently. In relation to the removal of the timber, the Appellant submits that when Mr. Fraser arrived at the scene on February 15, 1996, he was faced with a dilemma about what to do with

the cut timber. Mr. Fraser says he attempted to contact Mr. Drage himself by Autotel, and, as well, had his son leave a message, and Mr. Thurston leave a note, at the Salmon Arm District Office. Mr. Fraser claims that he never heard back from Mr. Drage. He also claims: that he did not try to hide the inadvertent trespass, but reported it immediately to the Ministry; that he sought advice from the Ministry as to what to do with the timber, but never received such advice; and finally that he hauled the timber out of a public concern for a possible looper infestation, and not with a profit motive.

The Appellant says that if one examines the factors set out in section 117 of the *Code*, most of them favour the Appellant and that the District Manager erred in his assessment of them. Specifically:

(a) previous contraventions of a similar nature. The Appellant argues that the District Manager can only take into account previous contraventions of the *Code*, of which there were none. This factor is dealt with as a separate issue below.

(b) gravity and magnitude of the violation. The Appellant says that the trespass area was only 335 m^3, which the District Manager himself found was small.

(c) whether the violation was repeated or continuous. The Appellant notes that the violation only occurred on one discrete occasion and was stopped as soon as the Appellant became aware of it.

(d) whether the contravention was deliberate. The Appellant argues that it was inadvertent and that the District Manager made this finding.

(e) economic benefit. The Appellant claims it was negligible. The Appellant also argues that the District Manager erred in his estimates of both bonus bid and market value. This is dealt with as a separate issue below.

(f) cooperativeness and efforts to correct. The Appellant says that the District Manager found that the Appellant was cooperative throughout the investigation. It also claims that it reported the violation as soon as it learned of it, and that when the Ministry did not give instructions in a timely manner, the Appellant took steps to prevent what it believed to be a looper infestation.

The Respondent submits that the District Manager properly considered the matters set out in section 117 in his determination, including the fact that the harvest area was small, that the Appellant co-operated in the Ministry's investigations, that it was not a repeat or continuous violation and that the Appellant profited from the contravention. The Respondent says that while the cutting of the timber was inadvertent, the District Manager specifically took into account the fact that the removal and sale of the Crown timber was done deliberately and without authorization, and that the Appellant's actions were not adequate to restrict its operations to its private land. The District Manager determined that a deterrent penalty was required to ensure that such actions do not occur in the future.

The Commission finds that the District Manager properly considered the factors set out in section 117 of the *Code*, except for the issue of previous contraventions which is dealt with below. It does not find Mr. Fraser credible on the issue of notifying Mr. Drage of the trespass on February 15, 1996. First of all, no Autotel records were ever produced before the District Manager, Review Panel, or Commission. While Mr. Fraser explained that he had given the original of the note to Mr. Thurston, he also indicated that there would have been a duplicate carbon copy. However, only a photocopy of the note that Mr. Fraser purported to give to Mr. Thurston was ever filed with the Commission. It had the fax number of Mr. Fraser's lawyer on the top of the copy. While Mr. Fraser claims the original duplicate might be in his office, he made no effort to locate it and file it with the Commission. Under cross-examination by the Forest Practices Board, Mr. Fraser said that he had no idea how the copy got to the lawyer's office. He also admitted that he had a fax machine, but did not fax any request for instructions to the District Office.

Mr. Fraser's son did not testify before the Commission, and there remains some discrepancy in Mr. Fraser's testimony before the Commission and the earlier proceedings as to whether his son telephoned or went into the Salmon Arm District Office with a note. Further, in an e-mail filed at the Opportunity to be Heard, the Review Panel and the Commission hearings, Mr. Drage says that he has no recollection of discussing the situation with Mr. Fraser until June 14, 1996, two days after the trespass incident was reported to the District Office by Federated Co-op.

However, even if the attempts at notification did take place, the Commission finds that Mr. Fraser, first of all, did not instruct Mr. Stuart to leave the trespass timber (some of which, Mr. Fraser admitted was still in the trespass area), but rather instructed Mr. Stuart to haul all of it away with the private timber. While Mr. Fraser claimed, for the first time at the hearing before the Commission, that he had asked Mr. Stuart to keep track of the trespass timber, there was no evidence that this occurred. On the contrary, the timber was scaled and sold under the private timber mark. Further, Mr. Fraser did not either fax or send a registered letter to Mr. Drage, both of which would have provided a record of notification. Perhaps most compelling is the fact that Mr. Fraser ordered the timber hauled out on the very day he first went out to the site-February 15, 1996. He did not wait even 24 hours to see if he would get instructions or authorization from the Ministry. While Mr. Fraser claims he was concerned about a looper infestation, he admitted under cross-examination that this may have not initially been a concern on February 15, 1996. The District Manager testified that looper feeds on the foliage of live trees and that he is not aware of any infestation in the Salmon Arm District. Mr. Fraser also admitted that he did not raise the looper issue at the Opportunity to be Heard. The Commission agrees with the Respondent that Mr. Fraser's prime purpose in removing the timber on the day he discovered the trespass was not based on a public concern, but was to ensure that he could get it out before break-up and not lose any money.

Mr. Fraser also did not take any other follow-up action with the Ministry after the timber was hauled out on February 15 until a month later when he claims he spoke to Mr. Drage. While this visit is itself disputed by the Respondent, even Mr. Fraser

admits he took no follow-up steps until at least that time. The Commission finds that the removal and sale of the Crown timber without authorization was deliberate and that a deterrent penalty was clearly warranted. The Commission also finds that Mr. Fraser has taken a cavalier attitude to the entire proceedings. Under cross-examination, Mr. Fraser testified that he did not even know if he read the District Manager's decision as "he knew what it was going to be before it came out."

2. Whether the District Manager erred in his determination of the species mix of the Crown timber removed and consequently his determination of the stumpage and market value for the timber based on such species mix.

While there is no dispute over the total *net* volume at issue (335 m^3), and the base stumpage rate of \$0.25/m^3, the Appellant argues that the distribution attributed to the various sorts was done incorrectly. The Appellant says that the species mix of the trespass timber, as determined by the stump cruise, was 52% cedar and 48% hemlock, that Mr. Fraser's evidence was that the hemlock was all of very poor quality and only used for pulp, and that his evidence was uncontroverted. The Appellant says that in making his findings of fact, the District Manager made an assumption of the species mix of the cut timber based on a total absence of evidence. The Appellant submits that stumpage should have been calculated based on 50% hemlock pulp and 50% cedar and that no bonus bid should be attached to the pulp. The Appellant also argues that the market value was calculated in error and should be based on the market value of 50% hemlock pulp and 50% cedar. The Appellant contends that a more accurate estimate of stumpage and bonus bid would be to multiply the base stumpage (\$0.25) and average bonus bid of \$36.27 by 174 m^3 and just apply the base stumpage rate and no bonus bid to the remaining 161 m^3. The total stumpage and bonus bid would be \$6,394.73 rather than the \$12,234 as calculated by the District Manager.

In calculating market value, the Appellant submits that the District Manager erred in estimating that only 20% of the timber was pulpwood. The Appellant argues that the market value should be the average price of cedar (\$90 x 174 m^3) and the average price of hemlock pulp (\$45/MT x 161 m^3 x conversion factor of 1) for a total of \$22,905.

The Appellant also says that the "Crown cannot levy a quasi-criminal sanction like a fine except when the material facts have been proven beyond a reasonable doubt." The Appellant also alleges a breach of the rule of *audi alteram partem*, in that any evidence used by the District Manager in his calculation of bonus bid and market value was not put to the Appellant at the Opportunity to be Heard. The claims of breaches of natural justice will be dealt with as a separate issue below.

The Respondent submits that the determination of both the stumpage rate and market value was reasonable given that the Crown timber and private timber were mixed and sold together and in light of the fact that the stump cruise to determine the *net* volume of Crown timber harvested cannot provide an indication of log qualities.

Mr. Racine testified as to the rationale for his determination of stumpage, bonus bid and market value. He indicated that there was no evidence provided to him at the Opportunity to be Heard of the distribution of the trespass logs into various sorts. He needed this information to calculate market value and profit. However, Mr. Racine testified that he did have evidence from Mr. Fraser that cedar poles went to B.J. Carney Pole, cedar shakes went to Meekers, pulp went to Cache Creek , sawlogs went to Pope and Talbot, and some cedar sawlogs went to Evans Forest Products. He had information from all the companies except Evans Forest Products on the price they had paid for the logs. Mr. Racine also had the harvest billing information compiled for all timber scaled under mark EABUQ between January and April 1996. He calculated a grade 4 (pulp) component of 36% for all timber combined from both the private land and the Crown land trespass.

Mr. Racine testified that he then had to determine whether this mix best reflected the trespass timber. He indicated that he looked at a 1994 aerial photograph that had been filed at the Opportunity to be Heard, which had been taken before the trespass occurred. He said it was clear that while the private land had been logged before, the trespass area had not been previously logged, and that therefore the timber from the trespass area would have been better quality than the timber taken from the private land. He said that he considered the stump cruise and scaling information, and had some discussion with staff familiar with timber quality generally. Mr. Racine said he had to make an estimation of distribution between sorts and that he estimated that 20% of the total trespass net volume of 335 m^3 were cedar sawlogs, 10% cedar poles, 20% hemlock pulp, and 50% hemlock sawlogs. The Respondent argued that the Appellant provided no evidence of the distribution of logs at the Opportunity to be Heard and that the first time Mr. Fraser suggested that all the hemlock was pulp was made before the Review Panel, and that this was not accepted by the Panel.

Mr. Racine testified that after he made his estimation of the distribution of the sorts, he examined the information on price that his staff had provided to him from the mills that had taken the timber. He also assumed weight to volume conversion rates based on his experience and came up with a figure for market value of $27,105. He then proceeded to calculate economic benefit. He used the same distribution of logs per sort as he used in his calculation of market value and used the logging and trucking rates provided by Mr. Fraser, which were $40 per tonne ($33 per m^3) for the logging rate, $20 per tonne for trucking cedar and $24 for trucking pulp and sawlogs. He testified that he used the rates provided to him by Mr. Fraser even though he thought that the logging rate was “excessively” high based on his experience. He testified that he would have thought that even $20 per m^3 would have been high for logging costs. Mr. Racine also took into account the fact that Mr. Fraser had said at the Opportunity to be Heard that he had lost money on the pulp. In his opinion, the profit of $8,763.95 that he calculated was very low. Mr. Racine indicated that he also did some calculations based on information his staff gave him about the Ministry Lumby log yard and came up with a profit of $18,000. However, he used the figure of $8,763.95 in his determination.

The Commission finds that Mr. Racine's calculations were appropriate. While the timber cruise clearly established that the trespass timber consisted of 52% cedar and 48% hemlock, it is not disputed that a cruise does not estimate the distribution of the logs in sorts (i.e. pulp, sawlogs, poles, etc.). There is also no dispute that the trespass area had not been logged, while the Appellant's private land had been previously logged. The Commission finds that it was reasonable for Mr. Racine to conclude that the timber on the trespass area was more valuable than that on the private land. The Commission finds that there is no basis for assuming, as the Appellant urges, that the trespass hemlock was all pulp and should therefore not be subject to a bonus bid, and should be assessed at a lower value per tonne than assessed by Mr. Racine in his calculation of market value. Mr. Racine did have a harvest billing report by species, grade and distribution for the total amount of timber taken from both the Crown and private land from the period of January 1996-April 1996. The harvest billing report had been provided to Mr. Fraser at the Opportunity to Be Heard. This report indicated that poles, cedar sawlogs, hemlock sawlogs, and pulpwood were delivered from the area. The Commission finds that Mr. Racine's estimation that the trespass timber consisted of 20% cedar, 10% cedar poles, 20% hemlock pulp and 50% hemlock sawlogs (Pope & Talbot) was reasonable. The Commission also finds it reasonable for Mr. Racine to have concluded that pulplog hemlock would be sold as a competitive species where a bonus bid would apply.

In addition, the Commission finds that the deliberate mixing and removal of the trespass and private timber by the Appellant, was the reason why evidence of the exact distribution of the sorts was unavailable. The Commission finds no merit in the Appellant's claim that "the Crown cannot levy a quasi-criminal sanction like a fine except when the material facts have been proven beyond a reasonable doubt". First, the penalty imposed was an administrative penalty and not a quasi-criminal fine that would arise in a prosecution under the *Code*. As the Respondent points out, the courts have long distinguished between criminal and quasi-criminal proceedings where the standard of beyond a reasonable doubt applies, and administrative proceedings where it does not (see *R.* v.*Wigglesworth*, [1987] 2 S.C.R. 541). Second, as noted above, it was the Appellant's deliberate action in mixing and removing the timber, that led to evidence of the exact distribution of the sorts being unavailable.

The Commission also finds that Mr. Racine, in his calculation of economic benefit, used the logging and trucking rates provided by the Appellant, even though he felt that the logging rate was excessively high. He also used the figures provided from the firms that Mr. Fraser sold logs to as the market value of the logs, rather than other locations, including the Vernon Log Yard which had higher values. Mr. Racine also used the upset stumpage rate of $\$0.25/m^3$, even though he indicated that he could have used a higher rate. Finally, the Commission notes that the penalty assessed was stumpage plus one times market value rather than two times the market value which was the maximum penalty provided for under section 119 of the *Code*. In summary, the Commission finds the penalty assessed, which was both compensatory and a deterrent, to be appropriate in all the circumstances.

3. Whether the District Manager erred in considering contraventions which occurred prior to the enactment of the *Code*.

The Appellant submits that the District Manager should not have considered information that the Appellant had been involved in previous trespasses in levying the penalty. Specifically, the Appellant had been involved in 4 previous trespasses in the Salmon Arm District, plus an additional 4 in the Kamloops Forest District and 1 in the Clearwater Forest District. Eight of these trespasses occurred during 1987-91, and one in 1993. There were no previous contraventions of the *Code*. The Appellant submits that the Forest Appeals Commission has ruled that only previous contraventions of the *Code* can be considered in assessing a penalty under section 117 of the *Code*, and urges the Commission to follow its previous ruling. It says that the statute is clear and if the legislature wanted to make it retroactive it would have specifically said so. It submits that the statute can not be read to give contraventions under another statute everlasting life. The Appellant also argues that this was an important factor considered by the District Manager and Review Panel and that the penalty must be reduced due to the improper consideration of past trespasses under the *Forest Act*.

The Forest Practices Board agrees with the Appellant that it would be improper for a senior official to consider former trespass violations of the *Forest Act* in calculating a penalty under the *Code*. It also submits that it is important for decisions of the Commission, senior officials and Review Panels to be consistent. It says that the Commission decision should be highly persuasive, and should be followed by review panels unless there are exceptional and compelling reasons not to do so. It raises concerns that the Commission's decision was not being followed by the Review Panel. The Forest Practices Board asks the Commission to make a statement about the need for consistency in decision-making under the *Code*.

The Respondent submits that the District Manager properly considered violations that occurred prior to the enactment of the *Code*. It submits that the Forest Appeal's Commission decision in *MacMillan Bloedel Ltd*. v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/05(c), September 4, 1997)(unreported) as it relates to this issue was wrongly decided, is not binding on the Commission, and should not be followed. The Respondent argues that it would not be reasonable to consider that all history of past trespasses under the *Forest Act* would be erased and considered irrelevant under the *Code*.

Section 117(4) of the *Code* permits the senior official who levies a penalty under section 119 to consider "previous contraventions of a similar nature by the person." In *MacMillan Bloedel*, the Commission found that "previous contraventions" only referred to contraventions under the *Code*. It held:

> "Contravention(s)" is a term used throughout the *Code*. Section 117 authorizes a senior official to levy a penalty against a person who "has contravened the Act, regulations, standards or an operational plan." While section 96 of the *Code* has a predecessor section in the *Forest Act*, many of the other contraventions are unique to the *Code*. All the provisions under

> subsection 117(4)(b) refer to "contravention" and not "contravention of the Act", although it is clear that the contravention of the Act is what is being referred to.
>
> The Commission finds that "previous contraventions of a similar nature" refers to contraventions under the *Code*. The *Code* is a comprehensive statute dealing with the regulation of forest practices in British Columbia. Had the legislature intended that contraventions of other legislation, including the predecessor sections of the *Forest Act,* would be considered in a penalty determination, it could have referred to that legislation. Other sections of the *Code* refer specifically to other statutes when they are to be considered. For example, the Stopwork Order power under section 123 refers to contraventions of "this Act, the *Forest Act* or the *Range Act* ...". Therefore, the Commission has considered this contravention as if it was MB's first contravention of this nature.

The Commission finds no reason to alter its decision. Further, it appears to be sound policy that in creating a new regime for forest practices in British Columbia, the legislature determined that previous violations of another *Act* not be used in calculating penalties under the *Code*. A person would have had no way of knowing that a violation under the *Forest Act* could count in assessing a penalty under the new regime for forest practices and might have appealed earlier penalties had he or she known this to be the case. Had the legislature intended otherwise, the Commission finds that a specific reference to the *Forest Act* would have had to have been made in section 117(4)(b)(i) .

The Respondent argues, in the alternative, that should the Commission find that previous contraventions under the *Forest Act* do not count, the Commission should still uphold the penalty as it did in the *MacMillan Bloedel* case. The Respondent disagrees with the Appellant's characterization that the previous contraventions were a key factor in the penalty determination. The Respondent says that the District Manager addressed the weight to be given to the Appellant's previous trespasses under the *Forest Act* by stating that he was "cognizant of the fact that 8 of the 9 previous trespasses occurred more than 6 years ago."

The Commission notes that it has *de novo* powers in making its decision. While there may be a rationale to reduce the penalty somewhat for the improper consideration of the previous trespasses, in this case, the Commission has found that the District Manager and Review Panel applied lower estimations of profit and market value than might have been applied, that the Appellant deliberately mixed the trespass wood with the legally cut wood and deliberately removed the timber without authorization, all factors that warrant a significant deterrent penalty. It also notes that while the Review Panel accepted the position that the previous infractions could be taken into account, it noted that the District Manager had given consideration that 8 of the 9 past infractions occurred longer than six years ago and that "in giving consideration to this, the District Manager discounted the amount of weight put towards the penalty due to that fact." Therefore, the Commission finds that the penalty assessed is appropriate, given all the circumstances of this case.

4. Whether there was a reasonable apprehension of bias on the part of the District Manager.

The Appellant made some serious allegations of bias against the District Manager, Ron Racine, in its Notice of Appeal and Statement of Points. At the hearing, the Appellant said that it was not suggesting that there was an issue of jurisdiction involved or that there was a fundamental flaw in the proceedings, but rather that the facts "should be viewed through this prism" and that there was unfairness in the hearing procedure. In its Statement of Points, the Appellant said that there was a reasonable apprehension of bias on the part of the District Manager as he failed to extend the basics of natural justice by not calling Mr. Drage to give evidence, which the Appellant claims was in breach of Ministry of Forest's Policy on Determinations by putting the burden of disproving its guilt on the Appellant; by using the Appellant's failure to provide documentary evidence of Autotel calls from Mr. Fraser to Mr. Drage as evidence that no such calls were made; and by making findings of fact about species and quality mix of the cut timber in the absence of evidence from the Ministry and despite the contrary evidence of Mr. Fraser.

The Appellant also argues that there was a reasonable apprehension of bias when the Appellant made a request for documents under the *Freedom of Information and Protection of Privacy Act* and that it was Mr. Racine who made a determination that certain documents requested by the Appellant should not be disclosed to the Appellant.

Both the Respondent and Forest Practices Board note that allegations of bias should not be made lightly, and should only be made where there was substantial evidence of bias.

The Respondent argues that there was nothing in the District Manager's conduct that indicated that he had done anything but properly discharge his statutory obligations. The Respondent referred to the case of *Adams* v. *Workers' Compensation Board* (1989), 42 B.C.L.R. (2d) 228, in which the British Columbia Court of Appeal indicated:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

The Respondent submits that the first series of allegations the Appellant made at most amount to errors on the part of Mr. Racine, but cannot amount to establishing that he was biased against the Appellant. In regard to the issue of the *Freedom of Information* request, the Respondent notes that Mr. Racine's response of December 11, 1996, in which he refuses to release certain information, post-dates his determination and therefore cannot support a conclusion of a reasonable apprehension of bias. Further, the Respondent says that the Appellant does not allege that Mr. Racine's refusal to release certain information was other than in accordance with the relevant legislation.

The Commission agrees with the Respondent that there was no evidence put forward by the Appellant that indicated that the District Manager was biased or that there was any reasonable apprehension of bias. As the Forest Practices Board noted, the allegations were more properly characterized as breaches of natural justice or fairness. These will be dealt with below. There is no merit to the claim that the refusal by Mr. Racine, on December 12, 1997, to release certain information pursuant to the *Freedom of Information* legislation is evidence of bias in his determination made under the *Code*, that was issued on October 21, 1997.

5. Whether the District Manager breached any rule of procedural fairness.

The Appellant argues that Mr. Racine breached a number of the rules of procedural fairness. It claims that he did not follow Ministry Policy 16:10 - Determinations, which states on page 3 that all relevant evidence should be brought forward at the Opportunity to be Heard. The Appellant submits that Mr. Racine consulted with staff on the issue of the distribution of sorts, decided on conversion factors, and had his staff obtain a letter which provided an illustration of where the bonus bid was applied to pulp. None of this information was provided to Mr. Fraser, although it provided the basis for Mr. Racine's determination. The Appellant says that Mr. Racine's failure to provide any of this new information it received after the Opportunity to be Heard breached the rule of *audi alteram partem* (the right to be heard). The Appellant also claims that where there is an absence of evidence as there was on the actual distribution of the sorts of the trespass timber, there should be no penalty and that the onus should not be on the Appellant to provide this evidence. The Appellant also argues that the onus should not be on it to provide evidence of the Autotel calls Mr. Fraser says he made to Mr. Drage.

The Forest Practices Board also raised concerns about the fact that Mr. Racine gathered evidence following the Opportunity to be Heard and did not share it with the Appellant before making his determination. However, the Forest Practices Board noted that any breaches of procedural fairness were cured by the Review Panel hearing and the hearing before the Commission.

The Respondent submitted that there were no breaches of procedural fairness by Mr. Racine. It submits that there is a two-stage process contemplated by section 117 and 119 of the *Code*. The first involves a determination about whether there has been a violation of the *Code* and this is the stage to which the Opportunity to be Heard relates. The Respondent argues that the second stage, which is the

penalty stage, does not involve public input otherwise it would be a "revolving door". The Respondent says that once a determination is made, and the person against whom it is made is dissatisfied, he or she can request an administrative review before a Review Panel. The Respondent also submits that the wording in section 119(1)(a) and (b) refers to the *senior official's* determination of the stumpage and bonus bid and market value.

The Appellant submits that the Respondent's argument that the Opportunity to be Heard and considerations of natural justice only apply to questions of liability and not penalty is wrong. It refers to Policy 16.10 which states that *it* ~~him~~ covers the process and recording of determinations made by senior officials under sections 117, 118 and 119 of the *Code,* and that the purpose of the policy is to ensure that determinations are made in a fair and equitable manner, with due regard to the rules of administrative law. The Policy also provides on page 3 that "all relevant evidence that the senior official will base the determination on should be brought forward at the meeting and the person responsible be given the opportunity to present relevant evidence."

The Commission finds that it was clearly appropriate for the District Manager to analyze, weigh and interpret the evidence he had before him which was provided to the Appellant, make calculations and prepare spread sheets in coming to his decision without going back to the Appellant for his input. However, the Commission finds that the collection of additional evidence from the logging companies and letters dealing with the application of bonus bid to pulp should have been properly put to the Appellant for his submissions. In *Foisy* v. *Government of British Columbia* (Forest Appeals Commission, Appeal No. 97-FOR-35, June 30, 1998)(unreported), the Commission found that a telephone call by a review panel member to Mr. Foisy after the hearing asking for his confirmation of selling prices of logs that the review panel had obtained without an indication that this information might be used to vary the penalty, breached the rules of natural justice or procedural fairness. In that case, the review panel had recognized the need to contact Mr. Foisy with the new information, although they did so in an inappropriate manner. In this case, the Appellant was entitled to have the new evidence gathered by the District Manager put to him for his response.

In addition, the Commission finds that the reference to "senior official's determination", in section 119 of the *Code*, does not eliminate the need for the District Manager's determination to comply with the rules of natural justice or procedural fairness, including the right to be heard.

6. If there was a breach of the rules of procedural fairness or a reasonable apprehension of bias in the determination, was the breach cured as a result of the hearing before the Review Panel?

The Respondent and Third Party submit that if there was procedural unfairness in the manner the District Manager conducted his proceedings, the hearing before the Review Panel and the Forest Appeals Commission can remedy the situation. The Commission has dealt with this issue in *Tolko* v. *Government of British Columbia*,

(Forest Appeals Commission, Appeal No. 95/02, November 12, 1996)(unreported) at pages 16-17, in which the Commission found that, as it has *de novo* powers, it can cure any procedural deficiencies that occurred at the determination or review panel level below. In this case, the parties had a full opportunity to present their cases before the Commission.

The Appellant acknowledges that the Commission can cure any breaches of procedural fairness, but urges the Commission to apply the section 117 factors with a fresh look. The Commission has fully considered all the factors in section 117 of the *Code*, as discussed above, in reaching its decision.

DECISION

The Commission, pursuant to section 138 of the *Code*, upholds the decision of the Review Panel to assess a penalty of $39,339.00 to Safe Enterprises for the contravention of section 96(1) of the *Code*.

The appeal is dismissed.

Toby Vigod, Chair
Forest Appeals Commission

November 6, 1998