



Forest Appeals Commission

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APPEAL NO. 2001-FOR-002

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:	Forest Practices Board	APPELLANT
AND:	Government of British Columbia	RESPONDENT
AND:	Zeidler Forest Industries Ltd.	THIRD PARTY
BEFORE:	A Panel of the Forest Appeals Commission Kristen Eirikson, Chair Bruce Devitt, Member Jim Hackett, Member	

DATE OF HEARING: September 20, 2001

PLACE OF HEARING: Victoria, B.C.

APPEARING:	For the Appellant:	Calvin Sandborn, Counsel
	For the Respondent:	Karen Tannas, Counsel
	For the Third Party:	Tanya Punjabi, Counsel Alan Blair, Counsel

APPEAL

This is an appeal by the Forest Practices Board ("Board") against the February 9, 2001 decision of a Review Panel to vary the August 25, 1999 determination of a District Manager. The Review Panel confirmed that Zeidler Forest Industries Ltd. ("Zeidler") contravened section 64(1)(b) of the *Forest Practices Code of British Columbia Act* (the "*Code*") by failing to temporarily deactivate part of a forest road as required by the *Code* and regulations, and contravened section 20(c) of the *Forest Road Regulation*, B.C. Reg. 172/95 (the "*Regulation*"), by failing to carry out temporary deactivation to the required level. The Review Panel rescinded the determination that Zeidler had contravened section 64(2) of the *Code* and section 20(d) of the *Regulation*. The Review Panel also reduced the total penalty from \$80,000 to \$5,000.

This appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*. Under section 138 of the *Code*, the Commission may confirm, vary or rescind the determination appealed from, or refer the matter back to the person who made the determination, with or without directions.

The Board requests that the Commission refer the matter back to the District Manager to reconsider the penalty for the two contraventions that were confirmed by the Review Panel. Alternatively, the Board requests that the Commission set an appropriate penalty.

BACKGROUND

Zeidler held a forest licence and Road Permit R03407 in the Robson Valley Forest District. On June 2, 1997, a landslide occurred in section "U" of the Road Permit, along the Forget-Me-Not Creek mainline logging road. The slide was triggered when two culverts became blocked and water was diverted over the road, causing erosion of the road prism and underlying sub-grade material. Under a temporary deactivation prescription which was approved before the landslide occurred, Zeidler was responsible for temporarily deactivating that portion of road.

The slide involved approximately 4000 cubic metres of soil, and washed out sections of the road for approximately 500 metres. Extensive damage was done to the road, which had initially been built under the Small Business Forest Enterprise Program, including the erosion of large amounts of silty sand from the road, ditch-line and cut slope. The slide smothered a small sedge wetland, which was covered with sand deposits greater than 50 centimetres in depth. Most of the slide material was deposited on a bench in a riparian reserve zone above Forget-Me-Not Creek. This material deposition was estimated to cover approximately 0.35 hectare to an average depth of 0.3 metres. As well, eroded material entered Forget-Me-Not Creek, which is classified as an "S2" stream and is, potentially, salmon bearing. A number of trees were killed by the slide, and regeneration of commercial and non-commercial vegetation was affected.

On August 25, 1999, the District Manager issued his determination and imposed a total penalty of \$80,000, calculated as follows: \$50,000 for contravening section 64(1)(b) of the *Code*; \$20,000 for contravening section 64(2) of the *Code*; and \$10,000 for contravening sections 20(c) and (d) of the *Regulation*. In imposing the penalty, the District Manager noted that Zeidler had paid \$70,654.55 to repair the substantial damage to the road, but this amount had been remitted back to Zeidler as a stumpage appraisal cost allowance for a subsequent cutting permit (CP 812). The District Manager stated that it was inappropriate for the Crown to assume liability for the \$70,654.55 cost of repairing the road. He stated that the penalty removed any economic benefit that Zeidler received from failing to take the prescribed deactivation measures, and also imposed a deterrent component of \$9,345.45.

In its February 9, 2001 decision, the Review Panel found that Zeidler had carried out seasonal deactivation of the road, but failed to comply with requirements of its

deactivation prescription in contravention of section 64(1) of the *Code* and section 20(c) of the *Regulation*. The Review Panel stated that it "considered the need for both compensatory and deterrent penalties", and concluded that:

...the Crown was "made whole" as a result of the road being repaired under the appraisal for CP 812. In addition, in spite of the fact that there was extensive damage to the Forget-Me-Not mainline, there was no evidence to suggest that there was consequential damage to valuable forest values. In keeping with these findings, the panel concluded that there is no need to exact a compensatory penalty for either contravention.

However, the Review Panel found that a "significant deterrent" was warranted "given the extensive damage that resulted and the licensee's lack of due diligence." The Review Panel levied a total penalty of \$5000 "primarily as a deterrent to encourage adherence to the practice elements of the [*Code*]."

The Board appealed on the basis that the penalty imposed by the Review Panel was inappropriate. The Board submits that the Review Panel failed to properly take into account all of the evidence and all of the relevant factors stipulated in section 117(4)(b) of the *Code*. The Board did not dispute the Review Panel's decision to rescind the determination that Zeidler contravened section 64(2) of the *Code* and section 20(d) of the *Regulation*.

The Government requests that the Commission either vary the penalty to appropriately reflect the economic benefit Zeidler received as a result of the contraventions as well as the environmental factors at risk in this case, or refer the matter back to the District Manager for a new determination.

Zeidler submits that the penalty imposed by the Review Panel is appropriate and should be confirmed.

ISSUES

1. Whether the penalty imposed against Zeidler should include an amount that reflects the actual value of the road rebuilding costs remitted back to Zeidler as a stumpage appraisal cost allowance.
2. Whether the penalty imposed by the Review Panel is appropriate, taking into account the relevant factors enumerated under section 117(4)(b) of the *Code*.

RELEVANT LEGISLATION

The following provisions of the *Code* are relevant to this appeal:

Road Deactivation

- 64.** (1) Subject to subsection (11), a person who uses a road under the authority of a road permit, cutting permit, timber sale licence that does not provide for cutting permits or special use permit, or the government for a forest

service road, 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

...

(b) this Act, the regulations and standards,

...

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.

...

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

The following portions of the *Regulation* are relevant to this appeal:

Temporary deactivation

20 A person who carries out temporary deactivation of a road must, in accordance with a deactivation prescription prepared or approved by the district manger, 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 *Administrative Remedies Regulation*, B.C. Reg. 166/95, sets out the following maximum penalties in relation to specific contraventions:

Schedule

Column 1	Column 2	Column 3
	<i>Forest Practices Code of British Columbia Act</i>	
64(1)	Failure to deactivate a road as required.	50 000
	<i>Forest Road Regulation</i>	
20	Failure to carry out temporary deactivation of a road, to the required level, as appropriate	10 000

DISCUSSION AND ANALYSIS

1. Whether the penalty imposed against Zeidler should include an amount that reflects the actual value of the road rebuilding costs remitted back to Zeidler as a stumpage appraisal cost allowance.

The Government presented evidence that the \$ 70,654.55 in road rebuilding costs remitted back to Zeidler as an appraisal allowance amounted to an actual economic benefit of \$44,157 to Zeidler. The difference was explained to be due to the fact that the applicable appraisal volume of timber harvested by Zeidler under CP 812 was 26,294 m³, significantly lower than the net timber cruise volume of 44,115m³. This evidence, which was not before the District Manager or the Review Panel, was not disputed by the parties. At issue is whether the penalty should at all account for the road reassessment costs reimbursed to Zeidler.

The Board argued that an appropriate penalty should, in accordance with the factors listed in section 117(4)(b) of the *Code*, take into account the road rebuilding costs included in the appraisal for CP 812, because such costs constituted an economic benefit to Zeidler and are indicative of the gravity and magnitude of the contravention.

The Board also argued that the Review Panel erred in dismissing consideration of the road reimbursement costs on the basis that the Crown had been “made whole” as a result of the road being repaired. It argued that it is not clear that the Crown was reimbursed for these costs through the appraisal system, that is, by other licensees through the “waterbed effect,” discussed below. It further argued that it

is not appropriate for the Crown to assume liability for damage caused by a licensee in violation of the *Code* or *Regulation*, and that a basic principle is that whoever caused the damage must pay the costs of fixing it.

The Government submitted that the Review Panel did not err in establishing a \$5,000 penalty, as the setting of an administrative penalty under the *Code* is completely in the discretion of the decision-maker. However, it submitted that an appropriate penalty should consider the \$44,157 economic benefit received by Zeidler through the road reappraisal allowance, together with the economic benefit Zeidler received from its initial failure to deactivate the road. In his determination, the District Manager estimated the latter amount to be \$1000 to \$1500. The Government agreed with the Board's submission that the amount of road rebuilding costs is indicative of the gravity and magnitude of the contravention, and that the Crown should be compensated for damage to the environment and forest resources.

The Government noted that section 4.2 of the Interior Appraisal Manual states that "Costs will not be recognized if the licensee has been negligent or has not followed approved plans or standards as defined under the Forest Practices Code and Regulations." The Board referred to the crediting of the road rebuilding costs to Zeidler as an error, in view of section 4.2. However, the Government did not characterize it as such. Rather, the Government submitted that, if a determination concerning a contravention is appealed, the contravention cannot be determined to have occurred under section 4.2 until the appeal is concluded.

The Government presented evidence from Steven Fletcher, an employee of the Revenue Branch of the Ministry of Forests. His testimony established that the initial road reappraisal credit of \$70,564 amounted to an actual benefit to Zeidler in the amount of \$44,157.

Mr. Fletcher also presented evidence to show that it was unlikely that the road reappraisal amount remitted back to Zeidler had been reimbursed to the Crown by increasing stumpage rates to other licensees through the "waterbed effect". Mr. Fletcher described the waterbed effect as an inherent characteristic of the Comparative Value Pricing system of stumpage appraisal. Mr. Fletcher explained that the "waterbed effect" derives from the Crown setting a target rate for stumpage collected from all licensees in the Interior region of B.C., for every business quarter. In theory, when a particular stumpage rate is decreased because the timber within a cutting permit has decreased in value or appraised logging costs have increased, the appraisal system increases stumpage rates for all other cutting permits within the system, in an attempt to collect the target.

The mechanics of the stumpage appraisal system necessitates that the target rate be adjusted to account for timber sold at the statutory minimum rate of \$0.25/m³. For example, assume that the target rate is \$10.00/m³, but the Crown is selling 10 percent of its timber at \$0.25/m³. In order to collect the \$10.00/m³ target rate, the Crown must charge some amount greater than \$10.00/m³ for the remaining 90% of the timber in order to collect the \$10.00/m³ overall. This adjustment

produces the "base rate", which is greater than the target rate. Thus, the waterbed effect increases or decreases the base rate to compensate for situations when higher or lower stumpage is collected than initially targeted.

In this case, additional road reconstruction costs recognized in the appraisal for Zeidler's CP 812 would theoretically result in increased stumpage rates to all other licensees in the Interior. However, Mr. Fletcher stated that, in practice, stumpage rates to other licensees are not increased unless there is at least a 1 cent per cubic metre difference in the base rate, because the base rate is rounded to the nearest 1 cent per cubic metre. In this case, because the Zeidler cutting permit volume was so small (i.e. 26,000 m³ compared to approximately 30 million m³ within the appraisal system), the adjustment did not increase the base rate by 1 cent per cubic metre. Consequently, stumpage rates for the rest of the Interior were not increased, and it is unlikely that the Crown was reimbursed through the waterbed effect.

Counsel for Zeidler argued that the \$44,157 road rebuilding costs were revenue neutral, that is, that the Crown was effectively reimbursed by this amount from other licensees, and that it is not appropriate for the Crown to be unjustly enriched by penalizing Zeidler for these costs. However, Zeidler presented no evidence to counter Mr. Fletcher's evidence.

Counsel for Zeidler also argued that this was the wrong forum and procedure in which to recover these costs if, in fact, they were owed. He argued that penalizing Zeidler for road rebuilding costs under the *Code* and *Regulation* carries more of a stigma, akin to a criminal code conviction, than recovering these costs under processes such as the reappraisal provisions contained in section 2.3 of the Interior Appraisal Manual. Concern was also expressed that Zeidler could repeatedly be assessed these costs if, for instance, they were recovered as part of the penalty established by the Commission, and then collected again and again under the reappraisal provisions in section 2.3 or by other means.

Based on the parties' submissions, the Commission concludes that the road reappraisal costs remitted back to Zeidler resulted in an economic benefit to Zeidler of \$44,157. The Commission further concludes that, pursuant to section 117(4)(b)(v) of the *Code*, it is appropriate to consider this economic benefit in determining the administrative penalty to be levied against Zeidler. In *Forest Practices Board v. Government of British Columbia* (Appeal No. 99-FOR-05, April 10, 2000)(unreported), the Commission previously considered the economic benefit derived from a contravention as a factor in levying penalties under section 117(4)(b). In that case, the Commission held that:

...where a factor in section 117(4)(b) is relevant to a particular situation, it must be "considered." The Commission accepts that "consider" in section 117(4) means to "contemplate" or "take into account."...

...the Commission agrees that in most, if not in all cases, it will be appropriate to remove the entire economic benefit derived from the contravention at issue... The Commission agrees that the primary purpose of

the *Code* is to ensure the sustainable use of British Columbia's forests. It also agrees with the Respondent that the main purposes of administrative penalties are compensation to the Crown for the loss of any values, and deterrence. In most cases, it would be contrary to these purposes to assess a penalty that is less than the economic benefit drawn from a contravention. However, the Commission is not prepared to find that it will never be appropriate to assess such a penalty.

The Panel also finds that the other factors listed in section 117(4)(b) of the *Code* are not "mitigating factors" which are then applied to the factor of "economic benefit" set out in section 117(4)(b)(v). Rather, they are all factors which must be considered, and depending on the particular circumstances of each case, each factor may result in an increase or decrease in the penalty.

The Commission finds that this reasoning applies to the present appeal.

In this case, the Commission accepts the evidence of Mr. Fletcher that it is unlikely that the road reappraisal costs credited to Zeidler, in effect, formed part of the "waterbed," resulting in reimbursement of this amount to the Crown from other licensees. As well, even if the Crown was reimbursed these costs through stumpage charged to other licensees, the factor which must be considered pursuant to section 117(4)(b) of the *Code* is whether the licensee received an economic benefit, not whether the Crown would or could effectively also recover this penalty from other licensees. Counsel for Zeidler did not present any evidence to counter the conclusion that it was unlikely that the Crown recovered these amounts from other licensees, and there is no doubt that Zeidler received an economic benefit in being reimbursed these costs.

The Commission also accepts that Zeidler received an economic benefit of at least \$1000 by failing to initially construct waterbars or cross-ditches along the road.

With respect to the submission by Zeidler's counsel that there are other forums and processes by which the Crown could or should recover these road reassessment costs, the position of the Commission is that it has the statutory authority to levy an administrative penalty that takes into account the economic benefit to Zeidler. With respect to the argument that the section 2.3 reappraisal provisions of the Interior Appraisal Manual should apply to this situation, counsel for Zeidler was unable to identify a specific section of the reappraisal provisions that would offer an appropriate alternative method for recovery of these funds. Moreover, a review of section 2.3 of the Interior Appraisal Manual indicates that none of them apply.

With respect to the argument that a stigma attaches if the road reappraisal costs are considered in establishing a penalty under the *Code* and the *Regulation*, the Commission accepts the position of the Board and the Government that the penalties in this case are administrative penalties. They are not akin to sanctions under the *Criminal Code*, and do not therefore carry the same stigma.

For these reasons, the Commission finds that Zeidler received a stumpage reduction it would not have received if it had not committed the contraventions, and that this resulted in an economic benefit of \$44,157 to Zeidler. While Zeidler made efforts to correct the damage that resulted from the contraventions, Zeidler only paid for those repair costs that exceeded the \$44,157 cost allowance it received. For these reasons, the Commission finds that an appropriate penalty should take into account the road repair cost allowance of \$44,157.

2. Whether the penalty imposed by the Review Panel is appropriate, taking into account the relevant factors enumerated under section 117(4)(b) of the Code.

Gravity and magnitude of the contravention: damage to the environment and timber resources

All parties took the position that the environmental impacts of the landslide were generally not severe. However, the Board submitted that the loss of a number of trees in the riparian zone, the smothering of an area in coarse sand, and short-term impacts on fish-bearing waters were still significant.

The Board and the Government both argued that the significant road rebuilding costs and the environmental impacts are indicative of the gravity and magnitude of the offence. These parties also took the position that the penalty should be sufficient to ensure that the Crown is compensated for damage to the environment and timber resources, and that a deterrence component would also be appropriate.

Counsel for Zeidler argued that there was minimal environmental damage, that forest productivity would be increased over the very long term, and that only 10 trees of commercial value were lost. Zeidler further argued that no actual economic loss resulted from the loss of these trees because they were situated in a riparian zone and were, therefore, reserved from harvesting.

Damage to trees and habitat adjacent to Forget-Me-Not Creek

The expert witnesses presented by the Board and Zeidler stated that they were in substantial agreement with respect to the environmental impact of the landslide, and stated that they had only minor variations in their analyses.

Steve Chatwin, a Professional Agrologist and Professional Geologist, testified as the Board's expert witness. Mr. Chatwin determined that 20 mature spruce and balsam trees and 40 to 60 immature trees in the reserve zone of the Creek, as well as most of the understory, died as a result of the landslide.

Brian Churchill, a Registered Professional Biologist, testified as Zeidler's expert witness. He indicated that there were 40 dead trees over 4 metres in height, 16 of which would have been of commercial value. In his analysis, 5 or 6 of these had been affected by bark beetle, leaving approximately 10 trees of commercial value in the riparian zone. It was not known, however, whether bark beetle infestations may have affected some of the 16 trees after the road washout and prior to his field

visit in May 2001, nearly 4 years later. Mr. Chatwin only noted very minor bark beetle impacts on 1 or 2 trees during his May 2001 site visit.

According to Mr. Chatwin, the burial of the 0.35 hectare site with approximately 1/3 metre of coarse sand resulted in the immediate smothering of a small sedge meadow which had waterfowl and moose forage value, as well as a reduction in soil productivity in the forested riparian zone above the Creek. The loss of soil productivity was attributed to the nutrient loss resulting from the burial of a nutrient-rich site with coarse, sterile sand.

Michael Badry, a Wildlife Specialist with the Ministry of Water, Land and Air Protection, testified that he attended the site shortly after the landslide occurred. Mr. Badry presented a video of the site that was taken during his site visit. He indicated that the affected wetland areas had been the most productive habitat in the area, in terms of the number of plants and invertebrate species that inhabited the wetland.

Mr. Churchill agreed that the areas affected by the landslide would no longer provide habitat for invertebrates, but stated that over the very long term, the sand could enhance the site's suitability for tree growth by aiding drainage and elevating the site. However, Mr. Churchill agreed with Mr. Chatwin's opinion that soil productivity would be negatively affected.

Mr. Chatwin stated that, in his opinion, little benefit would be derived from the site being elevated as a result of the landslide, since drainage was not a problem before the slide, and the non-productivity of the sand blanketing the site would limit future productivity. The Board also argued that, if Mr. Churchill's opinion regarding the long term benefits of the slide was accepted, then any damage could be characterized as a mere change over the very long term, rather than damage to the present environment.

Based on the evidence, the Commission accepts that at least 20 to 40 mature trees and 40 to 60 immature trees were killed by the slide. It appears that, at the time of the slide, 10 to 16 of the trees would have been of commercial value if situated outside the riparian reserve zone. However, as discussed below, the loss of all of the trees should be a factor when considering the gravity and magnitude of the contravention, rather than only those trees of commercial value. The immature trees that were lost were part way to maturity, and the mature and immature trees together formed part of a protective riparian buffer zone. The Commission also finds that the decrease in soil productivity and the loss of moose forage and invertebrate habitat which resulted from the slide are factors that should be taken into account in considering the gravity and magnitude of the contravention, and determining an appropriate penalty.

Damage to aquatic habitat

The Commission notes that the riparian zone adjacent to Forget-Me-Not Creek had been set aside from harvesting on the basis that Forget-Me-Not Creek was classified as an "S2" stream, and that streams classed as S1 through S4 are

considered to be fish-bearing streams. Forget-Me-Not Creek is a tributary to the Morkill River, which feeds into the Fraser River. The Morkill watershed was described as being of fairly major importance to salmon habit. However, fish distribution data with respect to all of the tributaries in the Morkill watershed is limited. Studies that could conclusively verify the presence of Chinook salmon or other fish species have not been conducted for the portion of Forget-Me-Not Creek in issue.

Mr. Badry and Mr. Churchill both indicated that bull trout would very likely be present in the portion of Forget-Me-Not Creek in question. Mr. Chatwin presented evidence that the area where the sediment was deposited was characteristic of good quality Chinook habitat. He estimated that a minimum of 400 m³ of sediment would have entered the Creek, and that the sediment would have affected egg survival and feeding behavior if fish were present in this reach. Mr. Chatwin testified that, although he did not observe fish in the stream, the federal Department of Fisheries and Oceans ("DFO") informed him that Chinook salmon were present in the lower reaches of the Creek, and that a cataract downstream from the slide site probably was not a barrier to fish migration. However, Mr. Chatwin's report states that there will not be significant ongoing fish habitat damage as a result of the slide.

A Stream Inventory System fish distribution report prepared by DFO was presented to the Commission. This report indicates that Chinook salmon have been observed spawning in the lower reaches of Forget-Me-Not Creek, near the mouth of the Creek. The report also indicates that a 1-metre high and 57-metres long cascade is present downstream from the site. Mr. Churchill indicated that this would not be an impediment to bull trout, and could not rule out the presence of Chinook salmon above it. However, based on his aerial observations of the Creek, Mr. Churchill was of the opinion that a hidden canyon located downstream from the site, over an area of increasing gradient, would likely cause a sustained high velocity of the stream in this area, and make the upstream presence of Chinook salmon quite unlikely.

With respect to fish habit, the Commission finds that the slide likely had a negative, short-term impact on any resident fish and fish eggs in the Creek. While there is conflicting evidence over whether Chinook salmon would likely be present in these reaches of the Creek, the Commission finds that, on a balance of probabilities, Chinook salmon are very likely present in these reaches. There is clear evidence that DFO has identified Chinook salmon spawning in the lower reaches of Forget-Me-Not Creek, and the Commission finds that Mr. Churchill's single aerial observation of the Creek channel is not sufficient to rule out the possibility of Chinook salmon traveling upstream and reaching these waters. This finding is consistent with the approach taken in classifying the Creek as an S2 stream and protecting the riparian zone, in that fish are assumed to be present in streams of this nature until evidence to the contrary can be validated. The Commission also finds that bull trout would very likely have been present in the waters adjacent to the slide site, based the evidence presented by the expert witnesses of both the Board and Zeidler.

Other factors considered

The Commission, in determining the penalty amount, reviewed and considered each of the factors in section 117(4)(b). The Commission has considered that the violation was not repeated or continuous, and that Zeidler has no previous contraventions of a similar nature. It also considered that Zeidler cooperated with the Ministry of Forests and took immediate efforts to correct the situation and that the contravention was not deliberate.

Penalty amount

The Commission notes that the maximum total penalty in this case is \$60,000, based on the \$50,000 maximum penalty for contravening section 64(1) of the *Code* plus the \$10,000 maximum for contravening section 20 of the *Regulation*.

The Commission has already found that an appropriate penalty must take into account the fact that Zeidler received an economic benefit of \$44,157 as a result of the contravention, due to the stumpage reduction it received for the road repair. The Commission has also found that Zeidler received an economic benefit of at least \$1000 as a result of its failure to take deactivation measures. Therefore, a penalty of \$45,157 is required to remove the economic benefit to Zeidler and compensate the Crown for the portion of the road repairs that Zeidler ultimately did not pay for.

In addition, the Commission has determined that a further penalty of \$10,000 is appropriate considering all of the relevant factors enumerated under section 117(4)(b). The Commission agrees with the Review Panel's finding that a significant deterrent penalty is warranted, given the extensive damage that resulted from Zeidler's lack of due diligence. However, with respect to the gravity and magnitude of the contravention, the Commission disagrees with the Review Panel's conclusion that "there was no evidence to suggest that there was consequential damage to valuable forest values", and that "In keeping with these findings... there is no need to exact a compensatory penalty for either contravention." The Commission finds that the Review Panel asked itself the wrong question in considering only damage to "valuable forest values", instead of the wider question of damage to all environmental and forestry resources, including both commercial and non-commercial values, in determining a penalty that is appropriate to the gravity and magnitude of the contravention. The evidence before the Commission indicates that there was damage to both commercial and non-commercial environmental values and forest resources.

Therefore, in determining the \$10,000 penalty, the Commission considered the need for a significant deterrent, Zeidler's cooperativeness and efforts to correct the contravention, and the gravity and magnitude of the contravention as was apparent from the significant damage to the road, the loss of mature and immature trees in the slide area and the protective riparian zone, the decreased soil productivity, the loss of moose forage and invertebrate habitat in the affected areas, as well as the short term impacts on fish habitat. However, because detailed values were not presented by the Board or the Government, no specific values were awarded to

compensate the Crown for these environmental and economic losses resulting from the slide.

In these circumstances, the Commission finds that a total penalty of \$55,157.00 is appropriate. A penalty of \$45,157.00 is levied under section 64(1) of the *Code* in consideration of the economic benefits Zeidler received, and a penalty of \$10,000 is levied for the contravention of section 20(c) of the *Regulation*.

DECISION

In making its decision, the Commission has considered all of the evidence and submissions before it, whether or not specifically reiterated here.

For the reasons given above, the Commission varies the penalty levied by the Review Panel, and determines that an appropriate total penalty for the contraventions of section 64(1)(b) of the *Code* and section 20(c) of the *Regulation* is \$55,157.00 in this case.

The appeal is allowed.

Kristen Eirikson, Panel Chair

Forest Appeals Commission

January 24, 2002