Forest Appeals Commission

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APPEAL NO. 2001-FOR-003

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:	Lloyd Bentley	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
BEFORE:	Panel of the Forest Appeals Commission David Ormerod, Chair Katherine Lewis, Member Lorraine Shore, Member	
DATE OF HEARING:	October 3 and 4, 2001	
PLACE OF HEARING:	Prince George, B.C.	
APPEARING:	For the Appellant: Phillip Scarisbrick, Counsel For the Respondent: Jeffrey M. Loenen, Counsel For the Third Party: Calvin Sandborn, Counsel	

APPEAL

This is an appeal by Lloyd Bentley of a decision dated March 12, 2001, by a Review Panel under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Code*"). The Review Panel upheld the July 15, 1999 determination of the Fort St. John Forest District Manager that Mr. Bentley was responsible for contravening sections 96(1) and 97(1) of the *Code*. Specifically, the District Manager determined that Mr. Bentley caused the harvesting of 10.52 hectares of Crown timber without authority. The District Manager assessed a penalty of $2,500 for the contravention of section 97(1) of the *Code*; a penalty of $234,837.36 for the contravention of section 96(1) of the *Code*, and a penalty of $30,297.60 for silvicultural rehabilitation as sanctioned by section 119(3)(a) of the *Code*. The Review Panel upheld the findings of contravention, but sent the determination of penalties back to the District Manager, with directions.

The 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. The

Commission may also refer the matter back to the person who made the determination, with or without directions.

The unauthorized harvest at issue in this case, is located primarily in the north half of the SE ¼ of Section 16. Mr. Bentley believed that his family owned both the north and south half of the SE ¼, and argues that government officials confirmed this belief. He requests that the review decision be set aside and the penalty reduced on the basis of officially induced error.

BACKGROUND

In April 1995, Lloyd Bentley, a rancher from west of Fort St. John, submitted an application for a timber mark for portions of Section 16, Township 84, Range 21, west of the 6th Meridian, Peace River Land District. In the application Mr. Bentley described the geographic location of the sites he wished to log as:

NW 1/4 Rang: 21 Twp: 84 Sec. 16

and

Lot. 1,2,3 Rg: 21 Twp: 84 Sec. 16

Mr. Bentley, together with other family members, owns and operates a ranch near the confluence of Cache Creek and the Peace River, which Mr. Bentley's paternal grandfather began acquiring in the 1940's.

The privately owned portion of the ranch is comprised of most of Sections 9, 10, 15, 22, and 27, and parts of the southern half of Section 16. Additionally, the Bentleys have held grazing leases for forty years or more over parts of Sections 16, 17, 18, 20, 21, 28 and 29. The timber mark NAOQN was issued on May 9, 1995 for Legal Sub-divisions 1, 2, and 3 of Section 16. At that time, these properties were owned by Irie Bentley, Mr. Lloyd Bentley's father.

When Mr. Bentley applied for the timber mark NAOQN, he had several discussions with Graham Anderson of the Ministry of Forests' Fort St. John District office, for assistance in completing the application.

As a result of one of his discussions with Mr. Anderson regarding the location of the property boundaries, Mr. Bentley attended the Peace River Regional District office in Fort St. John and spoke with Cindy Hope, who served at the front counter of that office.

In March 1996, another timber mark application was made by the Bentleys for parts of Section 15. On March 19, 1996, the timber mark EATAU was issued for the S 1/2 of Section 15.

In response to Mr. Bentley's enquiries about logging in the grazing lease area of Section 16, he was visited by John Hanemaayer, of the Fort St. John Forest District, on February 28, 1996. Mr. Hanemaayer was shown the area that the Bentleys

intended to log in Section 16, and made file notes to this effect on February 28 and December 10, 1996.

The file notes included an aerial photograph, upon which Mr. Hanemaayer may have marked the northern extent of the area shown to him by Mr. Bentley as being that part of the SE ¼ of Section 16 that the Bentleys owned, and which they intended to log. The file notes refer to photographs shown to him in the field by Mr. Bentley, and to photographs marked-up and filed with the notes. It is not clear where these photographs originated, or who marked them up. The northern boundary marked on the photograph on file, and referenced by Mr. Hanemaayer as the "green" line, roughly corresponds with a section of Cache Creek running in a west to east direction, that marks the northerly extent of a section of the creek marked by old channel depressions and alluvial flats. Mr. Bentley believed that this creek section also marked the northerly extent of the Bentley's own land in Section 16.

In the spring of 1996, approximately 3949.4 m^3 of timber was logged under timber marks NAOQN and EATAU by Pioneer Logging of 150 Mile House, a subsidiary of 532364 B.C. Ltd., and delivered to mills in Williams Lake and Prince George. The scale of this volume was conducted by load weighings and sample load scaling, and there is statistical uncertainty about the exact scale volume. The Bentleys received no cash payment for this wood. Instead, Pioneer Log Homes Ltd., a Lac La Hache business associated with Pioneer Logging, built a log house for the Bentleys. The logging was conducted by David Chevigny, owner of Pioneer Logging. Prior to and during the logging operations, Mr. Chevigny was shown the areas to be logged by Lloyd and Irie Bentley.

In July 1996, Al Colburne, an employee of the Ministry of Forests' Fort St. John office, conducted a fly-over of private and agricultural lease lands where logging had taken place during the previous winter. The logging in the SE 1/4 of Section 16 was noted as being a possible trespass on Crown land. The fly-over was followed up with land title status checks and a second fly-over in August 1996, and subsequently with a ground traverse survey of the NE 1/4 of Section 16 and the N 1/2 of the SE 1/4 of Section 16, by Ian Lloyd, British Columbia land surveyor, of Waberski Darrow Land Surveyors, in October 1996. The survey contract cost was $4,443.

The traverse survey determined that there were 10.519 hectares of Crown land logged within the area surveyed. Within this area of the survey, three separate areas of essentially clear-cut logging were mapped as being logging trespass. The largest part, Area 1 (7.29 hectares), comprises a part of the NE 1/4 of Section 16. It extends down the west side of the Cache Creek from the west-east river section that Mr. Bentley believed was coincident with the northern extent of their family property, to just into the south half of the SE 1/4. The second part, Area 2 (2.66 hectares), is east of the present creek channel opposite Area 1, and straddles the boundary between the NE 1/4 and the SE 1/4. The third part, Area 3 (0.569 hectares), is close to the creek near the southeast corner of the N 1/2 of the SE 1/4.

Additionally, the fly-overs indicated that there were two small areas of logging between Areas 2 and 3, and that a small amount of logging extended from Area 1 into the S 1/2 of the SE 1/4, and possibly also extending over the western boundary of Section 15. Consequently, the Ministry of Forests conducted a stump cruise of the logged area below the southern boundary of the north half of the SE 1/4 of Section 16. This stump cruise estimated that 379 m^3 of wood, on a net merchantable basis, had been taken from this area, all of which was within the south half of the SE 1/4 of Section 16.

The land title status checks carried out in conjunction with the survey of the logged areas had shown that the Bentleys owned Legal Sub-division lots 1 and 2 which comprise the south half of the SE 1/4 of Section 16. The sub-division scheme of a Section into 16 Legal Sub-division lots is shown on Dominion Land Survey maps of the Canadian Department of the Interior, 1916. These Legal Sub-division lot lines were not marked on the cadastral reference maps used by the Ministry of Forests at the time the timber mark applications were made.

An official with the Ministry of Forests', Fort St. John District office, wrote to Lloyd Bentley in November 1996, advising him that the logging in Section 16 may have contravened the *Code* and the *Forest Road Regulation*. A similar letter was sent to Irie Bentley in March 1997. Irie Bentley died in December 1998.

Following investigations by the Ministry of Forests and the Royal Canadian Mounted Police, Lloyd Bentley was charged with trespass, but the charge was subsequently stayed. In April 1999, Lloyd Bentley was advised by the District Manager, David Lawson, that the Ministry of Forests' investigation was complete, and that a determination would be made as to possible contraventions of sections 96(1) and 97(1) of the *Code* by Lloyd Bentley, David Chevigny, and Pioneer Log Homes Ltd. They were extended an invitation to make representations at a meeting to consider the matter.

In July 1999, the District Manager made separate determinations against Lloyd Bentley, David Chevigny and Pioneer Log Homes Ltd. The District Manager determined that Lloyd Bentley had failed to inform a person of the boundaries of private land before authorizing the person to harvest an area adjacent to Crown land, and was responsible for the unauthorized harvesting of 10.52 hectares of Crown timber, amounting to 3912 m^3 of timber, according to the delivery volume estimates made by Lignum Limited, and the gross merchantable volume estimate of the stump cruise of the private land logged. The District Manager assessed a penalty of $2,500 against Mr. Bentley for the contravention of section 97(1) of the *Code*. For the contravention of section 96(1) of the *Code*, the District Manager levied penalties of $234,837.36 for stumpage and $30,297.60 for silvicultural costs against Mr. Bentley.

Mr. Bentley requested an administrative review of this determination. The review was carried out by the Prince George Forest Region in December 2000.

Mr. Bentley was represented at the administrative review by Mr. Scarisbrick, counsel, who made written and verbal submissions, including a claim that the

defence of "officially induced error" applied in the circumstances. The substance of this claim was that Mr. Bentley believed that the land logged was owned by his father, Irie Bentley. Mr. Bentley's belief was based on information provided by his father. Mr. Bentley submitted that his belief was reinforced by the actions of officials in the Ministry of Forests and the Peace River Regional District, whom he had consulted when the timber mark applications were made and the logging was planned.

The Review Panel upheld the District Manager's determination that Mr. Bentley was responsible for the unauthorized timber harvesting, and found that a defence of officially induced error was not available to him. The Review Panel overturned the determinations against David Chevigny and Pioneer Log Homes Ltd., on the grounds that Mr. Bentley had confidently and unequivocally pointed out the Bentley's private property to Mr. Chevigny, that the logging had taken place within the area shown to Mr. Chevigny, and that Pioneer Log Homes Ltd. had no involvement other than being obligated to build a log house from the proceeds that Mr. Chevigny realized from the logging.

Further, the Review Panel sent the determination of penalty back to the District Manager for recalculation, with directions to remove the silvicultural costs in the upset stumpage appraisal, and re-consider the economic gain Mr. Bentley received from the contravention.

This review decision was appealed to the Commission on the grounds that the Review Panel erred by:

1. holding that the doctrine of officially induced error did not apply; and

2. referring the question of penalty back to the District Manager.

At the commencement of the hearing before the Commission, counsel for Mr. Bentley requested that the hearing proceed as an appeal on the record, and that no new evidence be entertained. The Commission ruled that there was no legal basis for this position and the hearing would proceed as a hearing *de novo*.

The Government submits that the appeal should be dismissed because the defence of officially induced error is not available to Mr. Bentley, or alternatively, because Mr. Bentley has not established that defence on the evidence.

The Forest Practices Board made written submissions in this appeal, principally on the issue of whether the defence of officially induced error should, as a matter of law, be available as a defence to an alleged contravention of section 96 of the *Code*. The Board did not address whether the defence of officially induced error was established by the facts in this case.

It should be noted that Mr. Bentley also appealed on the grounds that the Review Panel ignored and/or failed to address his argument that the doctrine of contributory negligence applied as between himself and the Government. Neither party made any substantive submissions to the Commission on this matter.

Without specific argument on the applicability of this legal concept to the administrative penalty regime under the *Code* and on the evidentiary basis for his claim, the Commission will not make any findings on this ground of appeal.

ISSUES

The issues in this appeal are summarized as:

1. Whether the defence of officially induced error applies to administrative penalties under the *Code*.

2. Whether the contraventions in this case were the result of an officially induced error.

3. Whether the penalty for unauthorized timber harvesting in these circumstances is reasonable.

RELEVANT LEGISLATION

Sections 96 through 119 of the *Code* are from the legislation in force in February 1996. Section 138 is from the current legislation.

Unauthorized timber harvest operations

96 (1) A person must not cut, 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*,

(b) under a grant of Crown land made under the *Land 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).

Private land adjacent to Crown land

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

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

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

(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.

...

(6) For the purposes of subsection (1) the Lieutenant Governor in Council may prescribe penalties that vary according to

(a) the area of land affected by the contravention,

(b) the volume of timber affected by the contravention,

...

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.

(2) A penalty may not be levied under both section 117 and subsection (1).

(3) In addition to a penalty under section 117 or subsection (1), a senior official who determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96 may levy a penalty against the person up to an amount equal to the senior official's determination of

(a) the cost that will be incurred by the government in re-establishing a free growing stand on the area, and

(b) the costs that were incurred by government in applying silviculture treatments to the area that were rendered ineffective because of the contravention.

Powers of commission

138 (1) On an appeal of a determination or of the confirmation, variance or rescission of a determination, the commission may consider the findings of

(a) the person who made the determination that is being appealed, or

(b) the reviewer.

(2) On the appeal, the commission may

(a) confirm, vary or rescind the determination appealed from, or

(b) refer the matter with or without directions back to the person

(i) who made the initial determination, or

(ii) in the case of a determination made under section 129(5)(c), the reviewer who made the determination.

...

DISCUSSION AND ANALYSIS

1. Whether the defence of officially induced error applies to administrative penalties under the *Code*.

Mr. Bentley does not dispute that the contraventions took place, and that the Bentleys do not own the land where the unauthorized harvesting occurred. However, Mr. Bentley understood that the land to be logged under timber marks NAOQN and EATAU was owned by his family, and was located to the south and east of the northern boundary of the SE 1/4 of Section 16. He believed that Cache Creek followed this boundary. He submits that staff in the Ministry of Forests and the Peace River Regional District verified the Bentleys' ownership of the land before logging commenced.

Specifically, Mr. Bentley submits that he relied on the advice of two government employees, Graham Anderson of the Ministry of Forests, and Cindy Hope of the Peace River Regional District, regarding the boundaries of his family's property. He further submits that, as a result of this reliance, he logged on property which he did not own. He argues that the defence of officially induced error should be applied to relieve him of liability for the contraventions and penalties.

The Government argues that the defence should not be available for administrative penalties levied for contraventions of sections 96 or 97 of the *Code*. It submits that the defence applies only to criminal or quasi-criminal offences, and not to administrative remedies because they are different in character from offence proceedings. The Government submits that the rationale underlying the defence is that it would be unjust to convict a person of an offence when there is no moral blameworthiness. The Government argues that, in this case, the administrative penalty for the contravention of section 96(1) has two primary purposes: encouraging compliance, and compensating the province for timber cut without proper authority. Therefore the penalty does not include the element of moral blameworthiness.

The Government points out that the *Code* provides for both administrative remedies and quasi-criminal prosecutions of contraventions, and submits that the Legislature clearly intended these to be distinct processes with separate remedies. For example, the Government notes that section 157(2) of the *Code* expressly provides a defence of due diligence in relation to offences, and submits that the Legislature chose not to make this defence, or the defence of officially induced error, available with respect to administrative remedies. Rather, section 117 of the *Code* provides a list of factors that may be considered when a senior official exercises his or her discretion to impose an administrative penalty.

The Forest Practices Board submits that the defence of officially induced error ought to be available, assuming the elements of the defence are established. It submits that the administration of justice could be brought into disrepute by denying the defence to a person who is misled by a government official. Further, the Board points out that, if a defence of officially induced error is successful, it would not necessarily mean that the appellant would receive a windfall in timber obtained through the trespass, as the Crown could seek compensation in a civil action.

The Commission has recognized the availability of the defence of officially induced error in two cases: *Atco Lumber Ltd.* v. *Government of British Columbia* (Appeal

No. 97-FOR-04, January 8, 1998) (unreported) (hereinafter *Atco*) and *Arnold and Julie Hengstler* v. *Government of British Columbia* (Appeal No. 97-FOR-19, February 24, 1998) (unreported) (hereinafter *Hengstler*). In *Atco*, the Commission said at page 11:

> The Commission finds that government officials should not be insulated where clear erroneous legal advice has been given and where the requisite elements of the defence of officially induced error has been made out.

In that case, the Commission found that the requirements necessary to satisfy the definition of officially induced error were not present.

However, in *Hengstler*, the Commission not only found the defence was available, but that an officially induced error occurred in that case. The Commission cited the headnote from the Supreme Court of Canada decision in *R.* v. *Jorgensen*, [1995] 4 S.C.R. 55 as summarizing the requirements of the defence:

> In order for an accused to rely on an officially induced error as an excuse, he must show, after establishing he made an error of law (or of mixed law and fact), that he considered his legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in his actions. When considering the legal consequences of his actions, it is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that his conduct was permissible. The advice came from an appropriate official if that official was one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. If an appropriate official is consulted, the advice obtained will generally be presumed to be reasonable unless it appears on its face to be utterly unreasonable. The advice relied on by the accused must also have been erroneous, but this fact does not need to be demonstrated by the accused. Reliance on the official advice can be shown by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation.

The Commission finds no reason to depart from those earlier decisions. The Commission accepts that the defence is available in the administrative law, as well as in the criminal law, context.

The Government argued that, because due diligence is specifically stated to be a defence in section 157(2) of the *Code*, the omission of any reference to the doctrine of officially induced error should mean that the doctrine is not available.

If the doctrine of officially induced error had been specifically provided as a defence in the offence section of the *Code* but not in the administrative remedy section, then it may be possible to argue that this was a deliberate omission. However, the Commission does not accept that the inclusion of one defence (due diligence) in one

part of the *Code* means that the Legislators intended that another defence (officially induced error) is not available in another part of the *Code*. Further, section 117 does not assist the Government. That section deals with penalties and factors that may mitigate penalties after a contravention has been found. By contrast, when it is determined that there has been an officially induced error, that finding dictates that the remedy will be that no contravention has occurred (*Hengstler*, page 9).

Accordingly, this Panel finds that defence or excuse of officially induced error applies to administrative penalties under the *Code*.

2. Whether the contraventions in this case were the result of an officially induced error.

The Commission notes that Lamer, C.J.C. concluded in *Jorgensen* that "an officially induced error of law argument will only be successful in the clearest of cases."

The Commission agrees that all of the elements of the defence must be made out before it can be successful. Thus, a person seeking the benefit of the defence must establish that he or she:

1. made an error of law, or mixed law and fact;

2. considered his legal position;

3. consulted an appropriate official;

4. obtained reasonable (but erroneous) advice from that official; and

5. relied on that erroneous advice in carrying out his actions.

If those elements are made out, then the defence is available. The question then becomes whether, on the facts of this case, Mr. Bentley has established the required elements.

The evidence given by Mr. Bentley and Mr. Anderson about their mutual knowledge of the property boundaries is contradictory, but has been consistent through the review hearing and this appeal.

Mr. Bentley's evidence focuses on his recollection of conversations relating to the location of lots 1, 2 and 3. He says that he was given a photocopy of an aerial photograph by Mr. Anderson, on which Mr. Anderson had indicated lot lines, and had also given him a clear acetate photocopy of a section of a reference map, which showed these lot lines. Further, Mr. Bentley says that Mr. Anderson encouraged him to go to the Peace River Regional District office to confirm which lots were his family's property. Mr. Bentley submits that Ms. Hope, of the Peace River Regional District office, marked a "1" and a "2" in ball point pen on the acetate photocopy, and Mr. Bentley believed that this marking corresponded with the Bentley's ownership of the *entire* SE 1/4 of Section 16.

Mr. Anderson's evidence is that his discussion with Mr. Bentley related mainly to the NW 1/4 of Section 16. Mr. Anderson said that the property ownership verification for the first timber mark application showed that the NW 1/4 was Crown land. He testified that he advised Mr. Bentley of this. Mr. Anderson said that Mr. Bentley was fairly sure his family had a right to use this timber on the NW 1/4 based on the fact that his family received a B.C. Assessment or tax notice for this property.

In regard to the location of lots 1, 2 and 3, Mr. Anderson's recollection of the discussion was vague, but he said that he had no way of verifying exactly where those lots were. He said that he looked at a status map and may have viewed an aerial map, but said that boundaries could not be ascertained from an aerial photo. Mr. Anderson denied seeing the acetate overlay with the "1" and "2" marked on it until preparation for this hearing. Mr. Anderson said that, because of his difficulty identifying the boundary, the high likelihood of trespass, and the severity of a trespass, he advised Mr. Bentley to get a legal survey done and mark the boundaries prior to harvesting.

In an interview with the Ministry of Forests in May 1999, Ms. Hope was asked if she recalled Lloyd Bentley bringing in an "air photo" and whether she would have marked an aerial photograph with sub-division lines, to which she replied "no." She was not asked about the reference map acetate overlay upon which Mr. Bentley says she marked a "1" and a "2" (over the north and south halves of the SE 1/4 of Section 16). Consequently, this interview neither confirms nor contradicts Mr. Bentley's claims. In that interview, Ms. Hope further said that her job duties were office assistant/reception with the Regional District. Ms. Hope was not called to testify at this appeal hearing.

The evidence concerning the misleading acetate photocopy is incomplete and inconclusive. However, the Commission accepts Mr. Bentley's evidence that he was given this overlay by some government official, and that, on the face of it, the overlay supported his belief that his family owned the entire SE 1/4 of Section 16, with the northern half being Lot 1, and the southern half being Lot 2.

In February 1996, before logging commenced, Mr. Hanemaayer was shown where Mr. Bentley intended to log. Mr. Hanemaayer visited the ranch in connection with Mr. Bentley's request to log the NW 1/4 of Section 16, which was one of the areas included in the first timber mark application. After this visit, on February 28, 1996, Mr. Hanemaayer provided a memorandum and annotated photograph to Roger St. Jean, the Timber Harvesting Specialist, to which Mr. St. Jean added his own comments. On March 7, 1996, Mr. St. Jean wrote to Mr. Bentley advising that he would not grant Mr. Bentley's request to log a small area on the agricultural lease (NW 1/4 of Section 16), and thanking him for assisting the forest officer who made the field inspection.

Mr. Hanemaayer wrote another memorandum about this visit on December 10, 1996, again including an annotated photograph. These memoranda include the following comments:

> …look at the area he wants to log .. area is flat .. 4 to 5 loads .. marked on air photo .. no problem on flat ground .. Logging plus/minus 90/95 loads on private land adjacent to this area
>
> Also at this time he showed me approximately where his property ran marked in Green.

Therefore, the Commission finds that the Ministry of Forests was aware of the extent of Mr. Bentley's intended logging and did not raise any issues regarding the boundaries.

This appears to be due, in part, to some confusion within the Ministry of Forests regarding the location of the property boundaries. This confusion may have existed within the Ministry for some time. It is significant to note that the Crown Lands Branch map, which the Ministry of Forests used as a cadastral reference, did not show the Legal Sub-division lot boundaries that corresponded with the convention of the 1916 Dominion Surveys map. Further, that reference map was not consistent with the 1950 provincial crown grant of Legal Sub-division 1, 2, and 3. Specifically, the Crown Lands' map showed a division of the SE 1/4 into north and south halves. Consequently, to the average reader, this map could be read as showing two subdivided lots comprising the SE 1/4, not the four Legal Sub-division lots as defined by the Crown grant and the 1916 Dominion Surveys map. There is, therefore, a factual basis for confusion about the lots.

It is also significant that, although the grazing leases held by the Bentleys generally covered the flood plains of Cache Creek and its tributaries, they did not cover the north half of the SE 1/4 of Section 16, despite the fact that this land is a continuance of the flood plain area. Further, although the Bentleys had been using the flood plain area all along Cache Creek for grazing for several decades, and the grazing lease areas had been inspected by personnel from the Ministry of Forests several times, there is no evidence that the Bentleys were ever told that they had no right to use the north half of the SE 1/4.

The Commission finds that the Ministry of Forests, at least amongst range staff, had a working understanding that the Bentley's had either ownership of, or grazing rights to, the north half of the SE 1/4 of Section 16.

The Commission notes that, in the first application for timber mark (NAOQN), the Bentleys applied for the NW 1/4 of Section 16, which is part of the grazing lease, and for Lots 1, 2 and 3 of Section 16 (in the SE 1/4 and SW 1/4 of Section 16). Three Land Title parcel identifier numbers (PIDs) were referenced: 010-706-577, 593 and 623. Further, two Assessment Authority folio numbers were referenced: 11927.000 and 11926.00, with areas respectively of 120.39 and 156.75 hectares. The Commission finds that something is clearly wrong in either the application or the data sources. A Section of land is nominally 640 acres, approximately 256 hectares. A quarter section would therefore be approximately 64 hectares and a Legal Sub-division lot approximately 16 hectares (40 acres). If the application were to be read as acres instead of hectares, it could be read that the NW 1/4 was folio

11926.000 at 156.75 acres, and lots 1, 2 and 3 were folio 11927.000, at 120.39 acres. This interpretation would then be consistent with what was actually surveyed and crown granted. If read this way, it should have been obvious to Mr. Bentley that their three lots (1, 2 and 3) could not have been the whole of the SE 1/4, plus some of the SW 1/4, as the area would have to be more than 160 acres (a 1/4 Section).

Despite this possible interpretation of his timber mark application, Mr. Bentley held on to the belief that his family's ownership included the entire SE 1/4 of Section 16. From his evidence, this belief was reinforced by what he understood were indications from government personnel that the SE 1/4 comprised lots 1 and 2 that were described in their title. There is nothing in Mr. Bentley' s actions throughout the entire course of events preceding the discovery of the unauthorized harvesting, that would lead to the conclusion that he understood any differently. Although the Ministry of Forests' range staff should have known the true ownership and grazing rights status, there is no evidence that they turned their minds to this matter. In fact, they appeared to have accepted the Bentley's use of the range without questioning their ownership or status. To this extent, the Ministry of Forests' range staff did nothing to disabuse Mr. Bentley of his mistaken assumption.

The Commission finds that while the indefinite, and possibly equivocal, actions of staff in the Ministry of Forests, and at other government agencies, may have contributed to Mr. Bentley's mistaken beliefs about the location of the boundaries of his family's private lands, these actions do not constitute officially induced error. The information provided to Mr. Bentley about the private property location was sketchy, and by Mr. Anderson's account, was couched in warnings to him that he should have the boundaries surveyed.

If such advice was given, it was ignored by Mr. Bentley who unquestioningly accepted his father's and grandfather's beliefs that the family properties started on a line coincident with the south bank of that particular west-east section of Cache Creek. Ultimately, his failure to question these assumptions led to the contraventions.

The Commission concludes that, while the defence of officially induced error is available to an appellant in a matter before the Commission, such an appellant must satisfy all the requirements of the defence. In this case, although Mr. Bentley has demonstrated that he satisfied some of the requirements of the defence, he has not satisfied all of them. The Commission's findings on each of the elements are as follows.

1. Made an error of law, or mixed law and fact

Mr. Bentley has established that he made an error of law, or mixed law and fact, in that he believed that the logging was taking place on land owned by his family. The Commission has found that the land was actually Crown land, and Mr. Bentley acknowledges that there was a trespass.

In *Hengstler*, the Commission held that it was an error of law when the Hengstlers determined that the road was a "bank to bank" road and not the wider 40 foot highway. In the instant case, Mr. Bentley was similarly wrong in determining the boundaries of the lots in question and in being mistaken as to the ownership of the land on which the trees were cut. As such, Mr. Bentley made an error, which was one of mixed law and fact.

2. Considered his legal position

Mr. Bentley did consider his legal position; at least to the extent that he appreciated he had to demonstrate, to the Ministry of Forests, his ownership of the lands for which he sought the timber mark. Further, it is Mr. Bentley's evidence, uncontradicted by any other direct evidence, that he attended the Regional District office to make further inquiries as to the boundaries of the lots on which he intended to log.

3. Consulted an appropriate official

Mr. Bentley started out by consulting an appropriate official in regard to determining the procedure for obtaining a timber mark. This official was Graham Anderson, who worked for the Ministry of Forests. There is no question that Mr. Anderson is an appropriate person to provide information about the timber mark process. However, the issue which has initiated this proceeding concerns the location of the lots which Mr. Bentley wished to log, their boundaries and ownership; it is not one related to forestry, which a reasonable person would expect Mr. Anderson to know about. Thus, the question is whether Mr. Anderson was an appropriate official to consult in regard to those boundary and ownership matters.

In *Jorgensen*, the Court said (in paragraph 30):

> In general, therefore, government officials who are involved in the administration of the law in question will be considered appropriate officials. That is, the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question.

It may well be that a reasonable person would assume that a forestry official would know the location of Crown land, but that assumption is rebutted on the facts of this case. Whether one prefers the evidence of Mr. Bentley or Mr. Anderson, it is not disputed that Mr. Anderson told Mr. Bentley to go to the Regional District to obtain further information. Whether this further information related to the location of lots 1 and 2 (Mr. Bentley's version) or the ownership of NW 1/4 (Mr. Anderson's version), both agree that Mr. Anderson gave advice to get more information. Mr. Bentley said that he followed that advice and did attend at the Regional District office. When the official who is initially asked for advice says to consult another official, it is not reasonable to conclude that the first official is an appropriate official from whom to obtain advice.

Mr. Bentley argues that because he was referred to the regional office, that makes Ms. Hope an appropriate official to consult. The Commission does not agree. First, Mr. Anderson did not designate Ms. Hope as the person to see – the referral was simply to the Regional District. Second, there is a real question as to whether Ms. Hope was qualified to provide the information, which Mr. Bentley needed. The evidence is unsatisfactory in this regard, but the interview with Ms. Hope suggests that her job function was in the nature of a clerical one. Given the importance of the information that Mr. Bentley was seeking, it would be reasonable to expect him to obtain information from someone who had greater expertise in the area. Applying the Court's reasoning in *Jorgensen*, a person in Ms. Hope's position would not normally be considered responsible for advice about the particular law in question (i.e., legal boundaries of private property).

Further, it was Mr. Anderson's evidence that he suggested that Mr. Bentley get a legal survey done. Mr. Bentley disputes this.

The Commission prefers Mr. Anderson's evidence. It would be reasonable for a person in Mr. Anderson's position to give that advice. Further, there is some support for this in that Mr. Anderson testified that Mr. Bentley later brought in an overlay with a red rectangle on it which had been supplied to Mr. Bentley by a surveyor friend.

The minimal consultation efforts by Mr. Bentley are in stark contrast with those of the appellants in *Hengstler*. In *Hengstler*, the family made numerous efforts to obtain information from various government officials. They started out contacting the Land Title Office, who provided some information and then referred them to the Ministry of Transportation and Highways. The Hengstlers spoke twice with Ministry officials, who then referred them back to the Land Title Office. They obtained further information from the Land Title Office, then spoke with an official at the Ministry of Forests who provided further advice. They then obtained an opinion from a land surveyor and finally had another land title search done.

4. Obtained reasonable (but erroneous) advice from that official

Even if Mr. Anderson and Ms. Hope were appropriate officials to consult, Mr. Bentley is required to demonstrate that the advice they offered was reasonable but erroneous.

The Commission accepts that Mr. Anderson told Mr. Bentley to get further information. That was reasonable advice, and there is nothing erroneous about it.

The crux of the "advice" which Mr. Bentley says is erroneous relates to the markings on the acetate overlay. Mr. Bentley, in his evidence before the Commission, said that he saw Ms. Hope make the markings with a pen when he attended the Regional District office. However, in a statement which Mr. Bentley gave to the Royal Canadian Mounted Police in 1998, Mr. Bentley said he left the map with the Regional District. When he picked it up later, the "1" and "2" were on the map. Not only is there this inconsistency, but there is a question as to whether the markings can be characterized as "reasonable advice."

The difficulty with accepting that these markings are reasonable advice, if indeed it can be accepted that they came from officials, stems from the manner in which lot numbers are designated, and Mr. Bentley's knowledge of the location of certain lots.

It is clear that the Ministry of Forests' and the Crown Lands' offices in Fort St. John were using cadastral reference maps that only showed the SE 1/4 of Section 16 divided into north and south halves, and not the original sub-division plan filed in the Land Title Office.

Significantly, Mr. Bentley's testimony displayed some knowledge of the location of certain lots. He described lot 3 as being farmland, located on the bench above the creek. He also knew the location of lot 5, which he described as being "the German property", which was not part of his family's holdings.

Further, when Mr. Bentley submitted the original timber mark application he, or someone assisting him, indicated areas that would have been consistent with an interpretation that "lots" 1, 2, and 3 were three quarters of a Section quarter. Therefore, Mr. Bentley should have known at that stage that lots 1 and 2 could not comprise a whole Section quarter. In the Commission's view, he should have been alerted to the fact that the reference maps used by the Ministry of Forests were not a reasonable basis to establish the location of his family's lots. If Mr. Anderson provided Mr. Bentley with the acetate overlay, he was not providing erroneous information. Although Mr. Bentley alleged that Ms. Hope erroneously marked the lots on this overlay, the Commission does not place any weight on this allegation. Even if she could be considered a "reasonable person to consult" on the boundaries, given the above, the advice would not be reasonable.

5. Relied on that erroneous advice in carrying out his actions

Finally, Mr. Bentley must demonstrate that he relied on the erroneous advice. Mr. Bentley's evidence, taken as a whole, does not lead to that conclusion. Mr. Bentley is not a sophisticated individual in terms of the legalities of boundaries and legal title. At various times in his testimony, Mr. Bentley described various parcels of property in terms of geography, without demonstrating any appreciation that a geographical feature (such as the creek) is not necessarily the legal boundary of that parcel. The Commission does not dispute that Mr. Bentley genuinely believed that the property he had logged was family property. However, rather than relying on any official, Mr. Bentley relied on what his grandfather had told him and the fact that his family had treated Crown land as being their land. His reliance was on an erroneous understanding in his family, not on erroneous advice from an official.

The Commission believes Mr. Anderson when he says that he advised Mr. Bentley to have the property surveyed. The fact that Mr. Hanemaayer was on site, was apprised of exactly where Mr. Bentley intended to log, but did not warn Mr. Bentley that he was going to be in logging or grazing trespass, did not help matters. However, the Commission finds that the chain of events that led to the trespass was set in motion by Mr. Bentley's failure to properly locate the boundaries of the land to be logged. As the representative of the family who had initiated the timber

mark application, Mr. Bentley was responsible for properly locating the property boundaries. The Commission finds that Mr. Bentley did not really rely on any erroneous advice from an appropriate official, and is responsible for causing the unauthorized harvesting.

Given all of the above, the Commission finds that the defence of officially induced error is not available to Mr. Bentley.

3. Whether the penalty for unauthorized timber harvesting in these circumstances is reasonable.

Section 117(4)(b) of the *Code* states that, before a senior official levies a penalty under section 117 or section 119, the official may consider the following:

- previous contraventions of a similar nature,
- the gravity and magnitude of the contraventions,
- whether contraventions were repeated or continuous,
- whether the contraventions were deliberate,
- any economic benefits that may have been derived, and
- the co-operativeness of the contravenor.

The penalty for the section 96(1) contravention (unauthorized harvesting), and the penalty for silviculture costs were both assessed under section 119. The penalty for the section 97(1) contravention (failing to properly inform a person of the property boundaries before harvesting), was assessed under section 117. Each will be discussed in turn.

A) Section 119 penalties

The Commission has found that Mr. Bentley caused the unauthorized timber harvesting to occur. The Commission has also considered the factors set out in section 117(4)(b) as follows:

Previous contraventions of a similar nature

There are no known contraventions of a similar nature.

The gravity and magnitude of the contraventions

From the evidence presented, it is clear that Mr. Bentley did not intend to trespass. Mr. Bentley had never done any logging previously so he cannot be considered a sophisticated or experienced logger. However, the Commission agrees with the previous decision-makers that a significant trespass of Crown timber has taken place.

The loss of Crown timber through unauthorized harvesting deprives the province of stumpage revenue and some options for managing the land for a variety of uses or values. The area of unauthorized harvesting in this case is within "terrace flats" that have developed along a section of Cache Creek. Where the creek has meandered it has eroded the landscape into these "flats." This has resulted in several old overgrown channel sections and residual terraces or alluvial flats. The timber on these terrace and alluvial flats is predominantly spruce and cottonwood.

The unauthorized harvest also has land management implications for the Ministry of Forests. According to a letter to the District Manager from Rod Backmeyer, Forest Ecosystem Specialist, the area of unauthorized harvesting was considered to be critical winter ungulate range, supporting high numbers of moose, elk and deer. The loss of the mature spruce stands reduces the winter shelter for these animals. This particular site was an exceptional shelter belt being located in a deeply incised valley, with substantial forage availability, and such sites are very limited in the region. In addition to the concerns about the ungulates, such sheltered mature forest areas are important for the conservation of endangered or threatened warblers. The lower reaches of Cache Creek, within which this area is situated, also support grayling and whitefish, and possibly trout. Given these wildlife conservation values, it is unlikely that the Ministry of Forests would have allowed harvesting in this riparian area to be as extensive as it was, if at all. Therefore, some or all of this timber would not have been made available for harvest under the Small Business Forest Enterprise Program ("SBFEP").

For this reason, the Commission finds that the gravity and magnitude of the unauthorized harvesting is significant.

Whether contraventions were repeated or continuous

The contravention was not repeated or continuous.

Whether the contraventions were deliberate

There are indications that a general ignorance existed as to the boundaries of the private land tenured to the Bentley family as a grazing lease. For decades, the Bentley's had free use of the area where the unauthorized harvesting occurred. The Ministry of Forests' range officials who regularly visited the area apparently treated it as if it were private land, or at least they did not recognize that it was not included in the grazing lease area that they were administering. Further, the reference maps used by the Ministry of Forests and other provincial agencies did not show the Legal Subdivisions of Section 16, but instead showed the SE 1/4 split into a north half and a south half. It is only by looking at the legend of the 1916 Dominion Surveys map and the 1950 crown land grant, that the true location of the title conveyance is clear. It is therefore understandable that officials making a cursory check of their title status maps could be misled.

Second, Mr. Bentley contracted with, in the opinion of several testimonials from Ministry of Forests' staff, a knowledgeable and respected logger, David Chevigny. Mr Chevigny was hired to log the property in exchange for a log home to be built by

a business associate, Pioneer Log Homes Ltd. Under section 97(2) of the *Code*, Mr. Chevigny had a responsibility to locate the true boundaries of the property, under risk of penalty if there was a contravention of section 96(2). Apparently, Mr. Chevigny relied entirely on Mr. Bentley's assertion that the land to be logged was the family's private property. Had he determined the true location of the private land boundaries, the unauthorized harvesting may not have occurred.

Accordingly, it cannot be concluded that the contravention was deliberate.

Economic benefits that may have been derived

Mr. Bentley has benefited by the unauthorized harvest in that he obtained a log house.

The co-operativeness of the contravenor

From the evidence presented, it is evident that Mr. Bentley was co-operative.

Penalty assessment for contravention of section 96(1)

Section 119 states:

> **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*, …
>
> (emphasis added)

In consideration of the section 117(4) factors, particularly the gravity and magnitude of the unauthorized harvest and the economic benefit to Mr. Bentley, the Commission finds that the penalty should be an amount equal to the stumpage and bonus bid, not lower.

Based on the forest cover maps, photographs, narratives, log purchase price, and other data in the evidence before the Commission, it is apparent that the timber harvested was predominantly spruce of sawlog quality. Further, the favourable operating conditions on this flat ground facilitated logging at low cost, although a temporary bridge had to be installed. Pioneer Log Homes Ltd. received $\$63/m^3$ of the $\$120/m^3$ purchase price, with David Chevigny receiving the balance. This means that if this Crown timber had been sold at competitive auction, it may have realized a stumpage price similar to what Pioneer Log Homes Ltd. received.

The official weigh scaling estimate of volume removed from the trespass area and the small adjacent area on private land was $3949.4m^3$. The stump cruise estimate of the volume removed from the private land was 379 m^3. Therefore, at $\$63/m^3$,

there was a stumpage potential of $224,935. In the District Manager's determination, the stumpage revenue loss was estimated from the calculated "upset" stumpage plus the average "bonus" of bids that had been received for SBFEP timber sales in the area at that time. This calculation of stumpage upset included the District Manager's assessment of silviculture costs. The upset stumpage rate was estimated at $44.59/m^3 and the average bonus bid was $15.44/m^3. By these latter rates, the Commission estimates a stumpage revenue loss of $214,331.

Apart from the substantial administrative costs of investigating the unauthorized harvesting and holding determination and review hearings, the Ministry of Forests also incurred a land surveyor's bill of $4,443 in determining the area of timber logged on Crown land.

The Commission was not provided with the details of the upset stumpage calculation for this trespass. The Review Panel directed that the silvicultural costs be removed from the calculation. By implication, these would have been the $30,297.60 that was assessed against Mr. Bentley for silvicultural rehabilitation. The winner of a SBFEP sale does not incur silvicultural costs, and this is reflected in the bonus bidding for the sale. However, as the average bonus bid is added to the upset specific to the timber harvested without authorization, the Commission can, in this case, adjust the upset without affecting the average bonus used. Accordingly, the Commission finds that the upset should be increased by $3/m^3 to reflect a more realistic silviculture cost.

The resulting upset plus stumpage rate to be used is therefore $63.03/m^3. Applying this to the estimated 3570.4 m^3 of timber removed results in an amount of $225,042.31 which should be paid to the province in compensation for the timber illegally removed.

In the course of investigating the contraventions, the Ministry of Forests spent $4,443 on the services of a professional land surveyor. There is no provision under section 119 of the *Code* to compensate the Crown for these costs. Further, the Commission finds that, had the area been harvested under a SBFEP timber sale, the Ministry of Forests would have incurred substantial costs in preparing the sale, and that these costs would have been recovered in the stumpage revenues.

Penalty assessment for silviculture rehabi1itation

The District Manager levied a penalty of $30,297.60 for silvicultural rehabilitation, pursuant to section 119(3) of the *Code*, which states:

> (3) In addition to a penalty under section 117 or subsection (1), a senior official who determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96 may levy a penalty against the person up to an amount equal to the senior official's determination of

(a) the cost that will be incurred by the government in re-establishing a free growing stand on the area, and

(b) the costs that were incurred by government in applying silviculture treatments to the area that were rendered ineffective because of the contravention.

The penalty imposed amounts to approximately $2,880/hectare, or $8.49/$m^3$. This cost was included in the calculation of the "upset stumpage" loss. It is not known whether the Ministry of Forests has carried out any such silvicultural rehabilitation work. Further, no evidence was entered as to what the Ministry of Forests has done about rehabilitating the area since the unauthorized harvesting was discovered in 1996.

The Commission finds that, due to the Crown receiving the equivalent of a bonus bid on an upset that allowed for silviculture costs, the Crown is already compensated for the silviculture costs in the stumpage penalty assessed. No evidence was placed before the Commission concerning the condition of the site following logging to justify additional compensation under this heading.

B) Section 117 penalty

The District Manager levied an administrative penalty of $2,500 for the section 97(1) contravention, pursuant to section 117(1), and this penalty was not varied by the Review Panel. The Commission agrees that an administrative penalty should be levied commensurate with the considerations required under section 117(4).

At the time of the contraventions the *Administrative Remedies Regulation* prescribed a maximum $10,000 penalty for a 97(1) contravention. The Commission has considered that Mr. Bentley had no prior history of this type of contravention, the contravention was not deliberate and Mr. Bentley was co-operative. However, the trespass was significant and will negatively impact an important ungulate winter range. Further, Mr. Bentley received a substantial economic benefit from the unauthorized harvest (the log house).

The Commission has also seriously considered whether the actions of the Ministry of Forests and its acquiescence in allowing the Bentley family to graze cattle on Crown land which they had not leased should mitigate against the penalty imposed below. While the Commission believes that the Ministry of Forests should have been more careful in enforcing the grazing boundaries, ultimately, it was Mr. Bentley's responsibility to accurately determine the boundaries and ownership of the property on which he intended to log.

The Commission has also weighed the Ministry's action or inaction against the magnitude of the contravention and the economic benefit obtained by Mr. Bentley. The Commission finds that the Ministry's involvement does not diminish the benefit received by Mr. Bentley.

Having regard to all of the above, the Commission finds that the section 117 penalty of $2,500, as assessed by the District Manager, should not be reduced.

DECISION

In light of the factors considered above, the Commission finds that Mr. Bentley caused the unauthorized timber harvesting to occur.

The Commission finds that Mr. Bentley should compensate the Crown for upset and bonus bid stumpage in accordance with section 119(1)(a) only, with some variation of the District Manager's determination of the amount of stumpage. Based upon its analysis, the Commission reduces the penalty for the unauthorized harvesting to $225,042.31, and rescinds the penalty assessed under section 119(3)(a).

The Commission finds that Mr. Bentley contravened section 97(1) of the *Code* and confirms the penalty of $2,500.

Pursuant to section 138 of the *Code*, the Commission varies the determinations appealed from. The total of the administrative penalties to be paid by Mr. Bentley is $227,542.31.

The appeal is allowed, in part.

David Ormerod, Panel Chair
Forest Appeals Commission

April 9, 2002