



Forest Appeals Commission

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APPEAL NO. 2001-FOR-006

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: Takla Development Corporation **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

AND: Forest Practices Board **THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Katherine Lewis, Panel Chair
David Ormerod, Member
Brenda Milbrath, Member

DATE OF HEARING: April 17, 2002

PLACE OF HEARING: Victoria, B.C.

APPEARING: For the Appellant: Gary Page
For the Respondent: Karen Tannas, Counsel

APPEAL

This is an appeal brought by Takla Development Corporation ("Takla") against a Review Panel decision dated September 28, 2001. The Review Panel upheld the determination of the District Manager that Takla had contravened section 67(1)(e) of the *Forest Practices Code of British Columbia Act* (the "Code") by harvesting timber contrary to a silviculture prescription.

Pursuant to section 117 of the *Code*, the District Manager levied a \$48,498.69 penalty (less a \$10,620.69 credit for stumpage paid), which was varied by the Review Panel to \$35,919.38.

Sections 67(1)(e) and section 117 of the *Code* state:

- 67** (1) A person who carries out timber harvesting and related forest practices on
- (a) Crown forest land,

...
must do so in accordance with

...
(e) any silviculture prescription,

...

Penalties

117 (4) Before the senior official levies a penalty in 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:

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

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.

Takla seeks an order reducing the penalty.

BACKGROUND

Takla was in transition between Forest Licences in 1995/96 and requested a sufficient volume of timber from the Ministry of Forests ("MOF") to ensure the

continuation of employment and cash flow during the transition. Takla was directly awarded a Timber Sale Licence A-52987, dated December 15, 1995, under the Small Business Forest Enterprise Program in response to this request. The sale consisted of two blocks; Block 1 of A-52987 is the subject of this hearing. This block was a mountain pine beetle salvage.

The Logging Plan for Block 1 of A-52987 was approved on December 15, 1995. The Silviculture Prescription was approved on December 19, 1995, and the Cutting Permit was approved on December 21, 1995. The Logging Plan approval letter stated that the MOF must be notified at least two days prior to commencement of harvest operations.

A pre-work conference between the MOF and Takla was scheduled to be held on the site on January 9, 1996.

Prior to the pre-work conference on the 9th, Takla began harvesting. Whether proper notification was given to the MOF as required in the Logging Plan is a matter in dispute between the parties.

When Jim Burck, MOF Small Business Zone Supervisor, and Shane Smith, MOF Resource Technician, traveled to the site for the pre-work conference with Takla, they found that the Riparian Management Zone ("RMZ") and Riparian Reserve Zone ("RRZ") within and adjacent to Standards Unit ("SU") 4 along the eastern edge of the block had been clearcut. According to the Silviculture Prescription, only mountain pine beetle attacked trees, non windfirm trees, and trees damaged by harvest operations were to be harvested within the RMZ.

On February 9, 1996, MOF staff discovered that a landing had been constructed 25 meters inside the RMZ and RRZ, and that a section of SU4 was clearcut behind the landing. According to the Silviculture Prescription, SU4 was to have only beetle attacked trees removed.

Finally, on March 6, 1996, Jim Barnes, Woodlands Manager for Takla, contacted Jeff Jones, Resource Technician with the MOF, and informed him that a portion of SU3 had been clearcut. The amended Silviculture Prescription stated that only beetle attacked, non windfirm, or trees damaged by harvest operations were to be removed from SU3. (On January 19, 1996, an amendment to the Silviculture Prescription had been approved in relation to SU3.) The unauthorized clearcut was confirmed by Jeff Jones on March 7, 1996.

The total area clearcut without authority was assessed as 2.82 ha:

1.57 ha in the RMZ;

0.75 ha in the RRZ; and

0.5 ha in SU3.

The MOF estimated that from this total area, 784 trees (389.75 m³) were harvested without authority. Takla does not dispute the estimates of timber volume.

This unauthorized harvest led to a series of determinations, reviews and appeals leading to the one presently before the Commission.

The first determination resulting from the MOF's findings occurred on September 14, 1998. George Davis, then District Manager, Fort St. James Forest District, determined that Takla contravened section 67(2)(d) of the *Code* (harvesting or damaging trees which the silviculture prescription requires to be left standing or undamaged) and levied a penalty of \$32,000. Takla requested a review of this decision. In a decision dated November 26, 1999, which was later revised on January 10, 2000, the Review Panel concluded that a contravention of section 67(1)(e) and (f) (harvesting contrary to "(e) any silviculture prescription" and "(f) any logging plan") was a more appropriate finding than section 67(2)(d). The Review Panel also set out a method for calculating the value of the administrative penalty. It recommended a penalty of \$8,000, derived by calculating the economic benefit Takla gained and then reducing it by two-thirds after factoring in the relevant section 117(4)(b) considerations. The Review Panel then referred the decision back to the District Manager with instructions to consider the Review Panel's interpretation of section 67(2)(d), and its rationale and method for calculating the value of the penalty.

On January 17, 2000, the Forest Practices Board (the "Board") appealed that decision to the Commission arguing that the Review Panel erred in the method and its rationale for calculating the value of the penalty. The Board argued that the Review Panel should have followed the principle that the penalty should remove *all* economic benefit, and that a penalty should have been levied for environmental damage as well. In an April 10, 2000 decision (*Forest Practices Board v. Government of British Columbia (Takla, Third Party)*, (Appeal No. 99-FOR-05) (unreported)), the Forest Appeals Commission rescinded the directions of the Review Panel and referred the matter back to the District Manager with directions to:

- 1) determine whether a violation of section 67(1) or (2) was more appropriate;
- 2) assess a penalty to remove all economic benefit; and
- 3) consider all relevant factors in section 117(4)(b) of the *Code*, including the ecological impact, in determining the appropriate penalty.

Takla did not appear at the hearing of that appeal.

In accordance with the Commission's decision, Janine Elo, current District Manager of the Fort St. James Forest District, made the new determination dated November 6, 2000. After considering the factors under section 117(4)(b), she found that there was a contravention of section 67(1)(e) and determined that:

- 1) the Crown should be compensated for loss of resources in the amount of \$10,620.69 (the amount of stumpage paid);
- 2) a penalty should be levied to remove all economic benefit in the amount of \$14,678.00 (calculated by taking the market price paid less costs for logging, hauling, rail, stumpage, and silviculture); and
- 3) a deterrent penalty should be levied based on the estimated loss of quality to wildlife habitat valued at \$23,200.

The penalties levied by the District Manager totaled \$48,498.69. However, the District Manager indicated that Takla would first be credited with \$10,620.69 for the stumpage that it had already paid, so the net penalties payable were \$37,878.

Takla requested a review of the District Manager's decision. On September 28, 2001, the Review Panel issued its decision. It agreed that the Crown should be compensated for the loss of a resource value calculated at \$10,620.69. It also considered the factors under section 117(4). Under subsection 117(4)(b)(ii), the gravity and magnitude of the contravention, the Review Panel agreed that the unauthorized harvest had an impact on the environment. However, it determined that the ecological impact should be calculated by using the amount the Crown was prepared to forego in stumpage revenue to protect the area, namely, \$10,620.69.

Under subsection 117(4)(b)(v), it found that all economic benefit should be removed in the amount of \$14,678. Considering the deliberateness of the contravention under subsection 117(4)(b)(iv), the Review Panel held there was no compelling evidence to support Takla's claim that it was duly diligent. However, it also found that no additional deterrent penalty was warranted in the case. The total penalties levied by the Review Panel were \$35,919.38. The Review Panel was silent with respect to whether Takla should be credited with the amount of stumpage already paid, as stated by the District Manager.

Takla appealed the Review Panel's decision to the Commission. It does not specifically dispute that it contravened section 67; however, it disagrees with the penalty assessed. It argues that the unauthorized harvesting occurred because of poor maps and ribboning by the MOF. Takla also maintains that the MOF did not complete field work prior to the issuance of the cutting permit documentation. Further, Takla says that it exercised due diligence by contacting the MOF to provide better quality maps and walking the cut block. In these circumstances, Takla disputes the amount of the penalty assessed against it.

The Government argues that the only issue to be decided in this appeal is whether the District Manager followed the Commission's directions in setting a new penalty. In other words, this Panel of the Commission should not consider the facts and "defences" in relation to the contravention itself.

The Board accepted Third Party status in this appeal. It did not attend the hearing but provided written submissions on the issues of due diligence and officially induced error. The Board also states that the Commission should fashion its

decision in a manner consistent with the directions previously given by the Commission to the District Manager.

ISSUES

There are three issues to be decided in this appeal:

1. Given that the Commission already made a decision relevant to this case in a previous hearing, what aspects of Takla's appeal are properly before this Panel?
2. Are the defences of due diligence and officially induced error available and should they be applied in the circumstances of this case?
3. Is the penalty appropriate in the circumstances of this case?

DISCUSSION and ANALYSIS

1. Given that the Commission already made a decision relevant to this case in a previous hearing, what aspects of Takla's appeal are properly before this Panel?

The Government argues that because the Commission ruled once on this case already, and in that ruling gave directions to the District Manager, the role of the current Panel is limited to determining whether those directions were followed. Takla did not provide any argument on this matter.

The previous hearing related to this case was between the Board (Appellant) and the Government of B.C. (Respondent). Although Takla was a Third Party, it did not attend the hearing. Consequently, this hearing is the first opportunity that Takla has had to present its evidence to an impartial body. However, Takla *could* have appealed the contravention, as confirmed by the Review Panel, at the same time that the Forest Practices Board appealed. Takla could also have made submissions, as a Third Party before the Commission, on some of the issues that it now seeks to raise for the first time. By failing to do so at that time, the Commission finds that Takla has lost its right to appeal the contravention, or to raise a defence that goes to the heart of the contravention. If the Commission allowed Takla to challenge the contravention itself at this time, it would effectively be granting an extension of the 3 week limitation period for filing an appeal set out in section 131 of the *Code*. The Commission has no authority to extend this time period.

Accordingly, the Commission agrees with the Government that the role of the current Panel is limited to determining whether the directions of the previous panel of the Commission were followed. However, the Commission finds that this Panel must also determine whether the new penalty that was assessed based on those directions is reasonable since this is the first time that it has been considered by the Commission. In considering the appropriateness of the new penalty based on the factors listed in section 117(4)(b), Takla's argument that others contributed to contravention and its diligence may be taken into consideration.

Should the Commission be incorrect on these findings, it will consider the next issue.

2. Are the defences of due diligence and officially induced error available and should they be applied in the circumstances of this case?

Takla has argued that it is not to blame for the unauthorized harvest, but rather, it was the fault of the MOF who provided inadequate maps and failed to ensure that the layout was complete. Takla also states that it demonstrated due diligence and that the contraventions were a direct result of the MOF's substandard fieldwork and poor maps.

The issue of whether due diligence and/or officially induced error can be raised as defences in an administrative penalty regime has been the subject of many previous decisions of the Commission and the Courts. The Commission has found in a number of cases that due diligence is not a defence to the administrative penalty regime under the *Code* (see *MacMillan Bloedel Ltd. v. Government of British Columbia* (Appeal No. 96/05(b), February 19, 1997) (unreported); *Canfor v. Government of British Columbia* (Appeal No. 97-FOR-06, October 10, 1997) (unreported), and *Repap British Columbia Inc. v. Government of British Columbia* (Appeal No. 97-FOR-02, January 9, 1998) (unreported)). The Commission has also repeatedly stated that where an administrative penalty is being levied pursuant to section 117 of the *Code*, there is considerable discretion as to the quantum of the penalty, and that section 117(4)(b) provides for some "due diligence-like" factors in assessing the quantum of the penalty.

This Panel of the Commission finds no reason to depart from these prior decisions and accepts that the defence of due diligence is not available in administrative penalty situations; however, it may be taken into account when assessing the quantum of the penalty.

While the defence of due diligence is not available to excuse an individual or company from liability for an administrative penalty, the Commission has found that the defence or excuse of officially induced error is available (see *Atco Lumber Ltd. v. Government of British Columbia* (Appeal No. 97-FOR-04, January 8, 1998) (unreported); *Hengstler v. Government of British Columbia* (Appeal No. 97-FOR-19, February 24, 1998); and *Lloyd Bentley v. Government of British Columbia (Forest Practices Board, Third Party)*, (Appeal No. 2001-FOR-003, April 9, 2002) (unreported)).

The leading case on the defence of officially induced error is a decision of the Supreme Court of Canada, *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (hereinafter *Jorgensen*). In *Jorgensen*, Lamer, C.J.C. set out the specific requirements for a successful defence of officially induced error. These were summarized in the headnote of the case:

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.

Given that officially induced error can be a defence, have all the criteria been met in this case?

Mr. Barnes, Woodlands Manager for Takla, testified that he contacted the MOF on December 21, 1995 to determine the status of the layout on Block 1. He states that he was advised by Pete Valk, Operations Manager, that layout was essentially complete. He further testified that on two other occasions he requested MOF staff to attend the site to ensure layout was complete. He also noted that on several occasions, Takla and the MOF staff could not find ribbons, or they were out of place compared to the map. He suggests that the MOF did not ensure that the layout of the Riparian Management Areas ("RMAs") was timely and accurate, and that the unauthorized harvest was a consequence.

The Government submits that there was no evidence presented showing that a Government official provided advice to Takla. It further argues that, given all the confusion regarding maps and RMA boundaries that Takla claims to have experienced, any reliance on statements provided by the Government was not reasonable. Takla argues that it did rely on a December 21, 1995 statement by an operations manager that he "thinks layout is complete."

By January 4, 1996, Takla discovered that layout was not complete and contacted the MOF to request that field staff visit the site to ensure that layout was complete. From the evidence provided, this request was not fulfilled until January 9, when MOF staff traveled to the site for a pre-work conference and an opportunity to check on the layout. It was on this date that the unauthorized harvest was first observed.

In *R. v. Cancoil Thermal Corporation and Parkinson* (1986), 27 C.C.C. (3d) 295, the Ontario Court of Appeal held that:

The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is

responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend on several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave him the advice, and the clarity, definitiveness and reasonableness of the advice given.

Does the operation manager's statement that he "thinks the layout is complete" constitute "a legal opinion or advice from an appropriate official?" and, if so, did Takla rely on that advice? If it did rely on his opinion, was its reliance reasonable under the circumstances?

The Commission finds that a statement or opinion as to whether layout is complete or not is more likely a statement of fact, not a legal opinion. It is something that a visual inspection would reveal. Have the boundaries, the RMAs and the machine free zones, etc. been ribboned? Once the layout is complete, it may be open to question as to whether it accurately identifies the correct boundaries; however, the actual determination of whether layout is complete is not a legal determination. More importantly, given that Takla discovered for itself that, in fact, the layout was not complete, it appears that it did not rely on the operation manager's opinion in any event. It made at least two more calls requesting the MOF to attend the site to finish the ribboning and complete the layout. Once Takla realized that the layout was not complete, it would have been unreasonable for it to rely on that opinion knowing that it wasn't correct. From the evidence, it appears that the machine free zones had not yet been marked nor had some of the RMAs, yet, despite that knowledge, Takla chose to commence logging operations. The MOF staff did not attend at the site to check and complete the prework until January 9, 1996, which is when it discovered the first of three incidents of unauthorized harvest.

Chief Justice Lamer in *Jorgensen* concluded that "an official induced error of law argument will only be successful in the clearest of cases." The Commission finds that the first incident of unauthorized harvesting does not constitute the "clearest of cases" for a finding of officially induced error. To the contrary, Takla had sufficient evidence of its own to conclude that all of the prework had not been completed. A "reasonable" licensee in that position would not have commenced harvesting until the confusion and uncertainty had been resolved.

With respect to the second incident of unauthorized harvest discovered on February 9, 1996, the evidence shows that Takla constructed a landing 25 metres inside a RMZ, with approximately 50% of the RMZ having been harvested. In addition, a section (SU4 in the Silviculture Prescription) was clearcut behind the landing which was only to have had beetle infested trees removed. The Government's evidence indicates that the RMZ was well ribboned in the field, as indicated by the incident report and accompanying photographs tendered as evidence to the Commission. The marking of the beetle infested trees was the responsibility of Takla. Based on

that evidence, the Commission finds that a defence of officially induced error with respect to this incident has not been established.

The third incident of unauthorized harvest involved the clear cutting of an area that was to have been selectively logged to remove beetle infested trees only. These trees were marked by Jeff Hughes of Takla after being trained by Barbara Harrison, Forest Health Technician. According to testimony of Jim Burck, the MOF Small Business Zone Supervisor, the area was properly marked with pink ribbon stamped with "Pest Management" and the beetle infested trees (59 in total) were painted with yellow paint (a ring around the circumference and a yellow line down the trunk) and ribboned with plain pink ribbon. The skid trails in the area were also marked by Takla with pink ribbon marked "Truck Road." The choice of colour of the ribbon was the licensee's. At the time of harvesting, the operator apparently, mistakenly thought the pink beetle infestation ribbons were marking the skid trail. In addition, the buncher operator, according to Mr. Burck's testimony, had the map upside down and ended up clear cutting right up to the creek. With regard to this incident, the Commission finds that the defence of officially induced error has not been established.

Accordingly, the Commission finds that the criteria required to establish a defence of officially induced error have not been met in any of the three incidents of unauthorized harvest.

3. Is the penalty appropriate in the circumstances of this case?

On the issue of the quantum of penalty, Takla made no argument with respect to the amount of stumpage and how it was calculated, the calculation of the economic benefit to Takla, or the amount assigned due to environmental damage. Its evidence was limited to responsibility for ribboning and quality of maps and layout. Takla submits that it exercised due diligence in its attempts to communicate with the MOF regarding block layout completion, and responsibility for marking of beetle attacked trees. Specifically, Mr. Barnes testified that:

- He prepared the Logging Plan for Block 1 of A-52987 that was approved on December 15, 1995. He met with John Alec (logging contractor) at the site on December 18 to discuss building on-block roads as per the Road Permit.
- On December 21, 1995, he contacted the MOF regarding layout on Block 1. He was told by Pete Valk that layout was complete. On January 4, 1996, he was told by Jim Burck, Small Business Zone Supervisor, that machine free zones were not yet ribboned. He requested staff to visit the site to ensure all ribboning was complete.
- According to his diary notes, he again called, or attempted to call Mr. Burck regarding layout on January 5. On the same day, he also provided John Alec with copies of the Silviculture Prescription and Logging Plan, and discussed RMAs and machine free zones on both blocks.

- On January 23, 1996, the SU 5 RMA did not appear to be ribboned. On the following day, MOF staff (Jeff Jones) and Jim Barnes were unable to find RMA ribbons near landing 2.
- On February 5, 1996, he called the MOF office to discuss who was responsible for marking the beetle infested trees. He said that he was told to “use his best guesstimate as to what should be done.”
- On February 7, he still had not heard from the MOF regarding responsibility for ribboning RMAs.
- On February 9, MOF staff (Jeff Jones) and Mr. Barnes had difficulty locating RMA ribbons along the west side of the W1 (greater than 5 ha in size) wetland. His diary entry for February 28 states that he walked the RMA on the east boundary of the block with the MOF and found that the layout was different on the ground than indicated on the map.
- On March 6, 1996, he met staff from TDB Forestry Services Ltd. (“TDB”) on Block 1. (In November 1995, the MOF entered into a contract with TDB for block layout, timber cruise and Silviculture Prescription on A-52987.) He was told that TDB had been instructed by the MOF to submit a timber cruise with suggested locations for landings, RMAs, road layout and reserves. He was also told that the MOF had not notified TDB that the layout had to be completed prior to issuance of the Cutting Permit, Road Permit and Silviculture Prescription.

Mr. Barnes testified that he felt that Takla wasn't given proper credit for all the calls he made to the MOF regarding the inadequate ribboning of the blocks and streams. When asked why the logging activity didn't stop with all the confusion, he said that it was hard to get the MOF staff out in the bush.

Accordingly, Takla submits that the unauthorized harvest occurred, at least in part, because the MOF did not provide timely boundary marking and did not communicate adequately. It suggests that the original Review Panel's recommendation to reduce the calculated penalty of \$23,599.36 by two-thirds due to consideration of factors listed in 117(4)(b) of the *Code* is appropriate recognition of its diligence.

The Government argues that Takla's due diligence was considered by the District Manager and the Review Panel in assessing the penalty under consideration in this case. The Government further argues that Takla was not duly diligent, and that the evidence supports this as follows:

- Harvesting commenced prior to the pre-work conference.
- Although there was apparent confusion over maps, the licensee did prepare the Logging Plan and should have been familiar with it.
- When confusion arose the licensee should have looked for direction rather than continuing to harvest.

- Takla did not give the 2 days notice prior to the commencement of harvesting as required by the Logging Plan approval letter.

According to testimony and the contents of the Logging Plan and the Silviculture Prescription, both the MOF and Takla understood that the RMA boundary layout was the responsibility of the MOF. However, Takla had a copy of the Logging Plan map prior to harvest, and had actually prepared the Logging Plan. Therefore, it should have been aware of the general location of riparian reserves and zones, and should have been able to determine whether the boundaries were marked. In fact, Takla did ascertain that some of the ribboning had not been completed, and brought this to the attention of the MOF on numerous occasions. However, Takla chose to continue harvesting even when it apparently knew that some of the in-block layout had not been completed. When asked if he took steps to confirm Mr. Valk's statement that he "thinks layout is complete," Mr. Barnes testified that he "already knew there were problems in the bush." He testified that, at that date, Takla was only harvesting the road, but the Commission notes that the in-block road was not part of the Road Permit.

The evidence shows that Takla commenced harvesting without adequate notification as required by the Logging Plan approval letter. Takla submits that the fact that Mr. Barnes was in the MOF office to complete the Logging Plan was notification that it intended to begin harvest. In view of the lack of evidence that this intent was clearly communicated to the MOF, the Commission finds that harvesting commenced without proper notification.

The evidence also indicates that harvesting commenced prior to the pre-work conference that had been scheduled for January 9, 1996. Takla does not dispute that harvesting commenced before this date, but its position is that a pre-work conference had been held earlier between Mr. Barnes and the logging contractor. Although it is evident that the MOF intended to complete the in-block layout during the pre-work conference, it is not clear whether Takla was made fully aware of this intention.

Furthermore, Mr. Burck testified that there was a general understanding that pre-work conferences were required, and that pre-work conferences were a normal practice, but that he did not know whether Takla was specifically informed about the importance and function of the pre-work conference. There was no evidence provided by the Government on what directions were given to the licensee regarding the conference. Mr. Barnes' diary entry for January 9, 1996, only indicates a meeting with Barb Harrison of the MOF to ribbon beetle-attack trees, and an inspection of the RMAs. There is a lack of evidence to convince the Commission that Takla was adequately informed regarding the pre-work conference. The Commission also believes that Takla commenced harvesting under the impression that block layout was complete or close to completion.

Takla contends that many of the problems with block layout arose because Block A-52987 was a "rush sale." The normal procedure, according to testimony by Mr. Burck, is to have the block layout completed and checked prior to advertising the

sale. In this case, much of the layout took place after the Timber Sale Licence had been issued (December 15, 1995) and the Cutting Permit approved (December 21, 1995). In response to a question from the Panel, Mr. Burck testified that a Cutting Permit does not give authority to cut. Harvest cannot begin until other plans and requirements are in place, including an approved Logging Plan and Road Permit. The Logging Plan was completed on December 15, 1995 at the MOF office, and was signed as approved by Mr. Shane Smith on the same day. A December 20, 1995 letter to Mr. Barnes from Shane Smith again stated the Logging Plan was approved and required two days notification prior to harvest. Takla was, therefore, in a legal position to begin harvesting after the Cutting Permit was issued (December 21, 1995), and after the required notification. Block layout was not complete even by February 28, the day that Mr. Barnes observed personnel from TDB Forestry Services Ltd. on the block.

The Commission agrees with Takla that the order of events was not normal, and apparently rushed. However, the Commission notes that this was in response to a request by Takla to provide prompt access to timber in order for Takla to maintain employment and cash flow. All of Takla's plans were in place at the time of the infraction, indicating that Takla had an understanding of the requirements for machine free zones, RMZs and RRZs. The Commission does note, however, that Mr. Burck's diary entry for January 9, 1996, suggests that there were communication problems within the MOF that resulted in delayed block layout, and lack of involvement in the sale.

Responsibility for marking beetle-attacked trees in the RMAs was apparently not clearly understood by Mr. Barnes. The Logging Plan states that joint training between the licensee and the MOF would be conducted to mark beetle-attacked trees. This training was conducted on January 9, 1996 with Barbara Harrison of the MOF. On February 5, Mr. Barnes sought clarification from the MOF regarding who was to mark the beetle trees and was apparently told to "use your best guesstimate based on discussions with us as to what should be done." Mr. Barnes did attempt to ribbon beetle trees on February 8, but encountered problems finding the RMA ribbon lines. From this, the Commission believes that Mr. Barnes eventually realized that it was Takla's responsibility, despite the lack of clear communication from the MOF.

In summary, the Commission finds that Takla did not comply with its responsibilities to ensure that it was well informed regarding regulations and requirements, did not adequately supervise operations, and did not cease operations and seek assistance when problems were identified. The Commission accepts that some of this may be due to the relatively new *Code* requirements, and confusion regarding stream classification and ribboning. The Commission also observes that communication from the MOF sometimes lacked clarity or was misleading. However, the *Code* is clear in placing responsibility for following approved plans on the shoulders of the licensee. No Government official advised Takla to depart from approved plans.

As Takla did not challenge the method used to calculate the penalty (as directed by the Commission in its previous decision), and did not provide compelling evidence to suggest that it was duly diligent, the Commission has no reason to vary the November 6, 2000 decision, as reviewed on September 28, 2001. The Commission, however, does wish to clarify that the stumpage of \$10,620.69 already paid by Takla to the Government, is firstly to be credited back to Takla, thereby reducing the balance owing on the \$35,919.38 penalty to \$25,298.69.

DECISION

In making this decision, the Commission has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons set out above, the Commission upholds the District Manager's determination as varied by the Review Panel, subject to the clarification noted above.

The appeal is dismissed.

Kathy Lewis. Panel Chair
Forest Appeals Commission

July 4, 2002