



Forest Appeals Commission

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APPEAL NO. 2002-FOR-010(a)

In the matter of an appeal under section 130 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN: Steve Noel **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

AND: Forest Practices Board **THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
James S. Hackett, Panel Chair

DATE: April 10, 2003

PLACE: Kamloops, B.C.

APPEARING: For the Appellant: Lyle Noel
For the Respondent: Guy Brownlee, Counsel
For the Third Party: Ben van Drimmelen, Counsel

APPEAL

This is an appeal brought by Steve Noel against a September 11, 2002 determination issued by Ken Waite, R.P.F., District Manager, Lillooet Forest District (the "District Manager"). The District Manager determined that Steve Noel had contravened section 96 of the *Forest Practices Code of British Columbia Act* (the "Code") by harvesting timber without authorization. The District Manager levied a penalty of \$22,000 against Steve Noel for the contravention. This determination was confirmed in a decision dated November 28, 2002, by Dwayne Clark, R.P.F. (the "Review Panel").

This appeal is brought before the Forest Appeals Commission (the "Commission") pursuant to section 130 of the *Code*. The powers of the Commission on an appeal are set out in section 138:

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.

Mr. Noel asks the Commission to either reduce or rescind the Review Panel's decision.

BACKGROUND

Steve Noel is a registered member of the provincial Small Business Forest Enterprise Program. On March 22, 2001, he was granted the right to harvest timber under Timber Sale Licence ("TSL") A65705 in the Cadwallader Creek area of the Lillooet Timber Supply Area.

A pre-work meeting was held between Mr. Noel and Ministry of Forests' staff on or around the same day that he was issued the TSL.

In April of 2001, Mr. Noel proceeded to harvest timber under his TSL. He harvested approximately 450 cubic meters before realizing that he was not harvesting within the boundaries of TSL A65705, but was actually within the boundaries of TSL A50118, located approximately one-half kilometer past TSL A65705. There is no dispute that the unauthorized harvest occurred.

In a determination dated September 11, 2002, the District Manager found that 450 cubic meters of Crown timber had been harvested by Mr. Noel without authorization, contrary to section 96 of the *Code*. In his determination, the District Manager noted that one of Mr. Noel's arguments "could give rise to officially induced error." Specifically, Mr. Noel's evidence "that he was given verbal directions from ministry staff as to the location of TSL A65705 and this led him to start falling in the wrong area." The District Manager concluded that, on a balance of probabilities, an officially induced error did not cause the contravention to occur.

The District Manager levied a total penalty of \$22,000 pursuant to section 119(1) of the *Code*. Of this penalty, \$7,000 was assessed as compensation to the Crown for the loss of forest resources and \$15,000 was levied as a deterrent penalty. In relation to the \$15,000 penalty, the District Manager considered the factors set out in section 117(4) of the *Code*, and found as follows:

- There had been a previous, similar contravention by Mr. Noel in the Chilliwack Forest District in 1998.
- The gravity and magnitude of the contravention was serious because it impacted the management and award of TSL A50118, and Mr. Noel's actions impacted the successful licensee on TSL A50118 as the felled timber was partly skidded, improperly bucked and decked, and logging debris required clean-up by the licensee.
- The contravention was not repeated or continuous.
- There was insufficient evidence to determine whether the contravention was deliberate. Mr. Noel relied on verbal information from Ministry staff that resulted in falling in the wrong area. However, there was ample information (e.g., maps and the pre-work meeting held before operations began on TSL A65705) to allow Mr. Noel to properly locate his authorized area. It was therefore unreasonable and lacking due diligence on Mr. Noel's part to begin falling when facts indicate he was confused on the actual location of TSL A65705.
- No economic benefit was gained by Mr. Noel as the timber was not removed from the site.
- Mr. Noel was cooperative once Ministry of Forests' staff discovered the contravention.

Mr. Noel sought an administrative review of the determination. Mr. Noel's grounds for the administrative review are summarized as follows:

- (a) he should not be found liable due to inaccurate information that he received from an official of the Ministry of Forests; and
- (b) the penalty should be reduced because,
 - i. the felled timber was not improperly bucked,
 - ii. the Government received stumpage for the sale of the timber,
 - iii. he incurred a financial loss as a result of the contravention, and
 - iv. he lost his market opportunity for balsam saw logs due to delays caused by a suspension of his TSL and the involvement of the Worker's Compensation Board.

The Review Panel upheld the District Manager's determination in a decision dated November 28, 2002.

Mr. Noel appealed the Review Panel's decision to the Commission on or about December 17, 2002. He does not dispute the unauthorized harvest or the amount of the unauthorized harvest (450 cubic meters). His grounds of appeal are essentially the same as those raised in the review. In general, Mr. Noel argues that the penalty of \$22,000 is excessive given that he made an honest mistake, lost a significant amount of money on this sale and, therefore, did not benefit financially from the unauthorized harvest. Moreover, he has been a member in good standing

of the Small Business Forest Enterprise Program and he says that this fact should be considered in the penalty decision.

The Forest Practices Board (the "Board") requested Third Party status in this appeal pursuant to section 131(7) of the *Code*. The Board limited its involvement in the appeal solely to the issue of whether Mr. Noel should be "excused" from the contravention due to inaccurate information that he received from an official of the Ministry of Forests, i.e., whether there was an officially induced error.

ISSUES

The Commission has identified two main issues to be decided in this appeal.

1. Whether the facts of this case support a finding of officially induced error.
2. Whether the quantum of the penalty is appropriate in the circumstances.

RELEVANT LEGISLATION and POLICY

A person harvesting Crown timber in B.C. must have the legal authority to do so under section 96 of the *Code*. Section 96 states:

- 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*,
- ...
- (2) Without limiting subsection (1), a person must not remove Crown timber unless authorized to do so
- (a) under an agreement under the *Forest Act* or under a provision of the *Forest Act*,
- ...

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.

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 20 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.

DISCUSSION AND ANALYSIS

1. Whether the facts of this case support a finding of officially induced error.

At the hearing, Mr. Noel was represented by his father, Lyle Noel ("Mr. Noel Sr."). Mr. Noel Sr. also gave evidence at the hearing.

Mr. Noel Sr. provided some background to this matter. He testified that Steve Noel had contacted the Ministry of Forests' District Office and obtained a pre-bid package for TSL A65705, which included a number of maps. Steve Noel was later granted the TSL on March 22, 2001. Steve Noel confirmed these facts in his evidence.

Mr. Noel Sr. testified that they both reviewed the package, including the set of maps that identified the location of the timber sale. At a pre-work meeting at the District office, the Noels spoke with Ron Letham, the Ministry of Forests' Small Business Forester, regarding various aspects of the TSL including its general location. Mr. Noel Sr. states that, in order to locate the sale in the field, the Noels relied heavily on a statement from Mr. Letham. Specifically, that the sale was located "...at the end of the ploughed road."

Mr. Noel Sr. explained that the area of the TSL was still covered in snow so, in order to facilitate the field review, the Ministry ploughed the Kingdom Lake Forest Service Road (the "FSR"). Mr. Noel Sr. states that the FSR was ploughed to TSL A50118, which the Noels thought was TSL A65705, based upon the District Manager's previous statement. He reiterated that they applied very significant weight to this statement. Mr. Noel Sr. submits that as a consequence of Mr. Letham's statement, which the Noels believed was correct, the Noels commenced harvesting the wrong TSL.

Steve Noel testified that Mr. Letham told him at the pre-work meeting the road was ploughed to "the middle of the sale," which he took to mean the middle of TSL A65705, but which turned out to be TSL A50118. He also testified that he did have general knowledge of the TSL because he had reviewed maps from the pre-bid package. Yet, at the hearing, he repeatedly answered that he had relied on Mr. Letham's statement that the FSR was ploughed to the middle of his timber sale. Mr. Noel also testified that he did not see the boundary markers for TSL A50118, yet the TSL was ribboned and marked.

During his evidence in chief, the District Manager stated that he had ordered the ploughing of the FSR past TSL A65705 in order to facilitate its sale. He also

testified that a series of maps showing the location of the sale were included in the pre-bid package. These maps included the Exhibit "A" map for the timber sale, two general location maps, the logging plan map, and the cruise map.

Under cross-examination, the District Manager agreed that two of the maps, the cruise map and one of the general location maps, may have been confusing, but that he would have explained them to any of the timber sale participants if asked. The Noels did not ask him any questions regarding these maps.

When questioned about his ploughing instructions, Mr. Letham testified that his instructions were to plough the FSR to the second bridge, which, according to the cruise map, was located just past the southern boundary of TSL A65705. In Mr. Letham's view, this meant that the road was ploughed to the timber sale, but he did not take it to mean that the ploughed road ended at TSL A65705.

The Commission has considered the law relating to officially induced error, and its application to administrative penalties under the *Code*, on at least two previous occasions (see *Atco Lumber Ltd. v. Government of B.C.* (Appeal No. 97-FOR-04, January 8, 1998) (unreported), and *Arnold and Julie Hengstler v. Government of British Columbia* (Appeal No. 97-FOR-19, February 24, 1998) (unreported)). Each time, the Commission has applied the reasoning of Chief Justice Lamer in a decision of the Supreme Court of Canada in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (hereinafter *Jorgensen*). In that case, the Chief Justice outlined the policy rationale underlying officially induced error as follows:

Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule that encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat* (pp.77-78).

In *Jorgensen*, the Chief Justice set out the specific requirements for officially induced error. The requirements are concisely set out in the headnote of the case as follows:

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 situation.

The Chief Justice affirmed that the elements of officially induced error are to be proven by the accused on a balance of probabilities (p. 82). Once officially induced error of law is successfully raised, it functions as an excuse rather than a full defence. The Chief Justice explained the appropriate remedy as follows:

As this excuse does not affect a determination of culpability, it is procedurally similar to entrapment. Both function as excuses rather than justifications in that they concede the wrongfulness of the action but assert that under the circumstances it should not be attributed to the actor (pp. 81-82).

The Government argues that the facts in this case do not support a finding of officially induced error. It notes that for this excuse to apply, the appellant must be mistaken as to the law and not the facts. In this case, it argues that Mr. Noel's mistake was one of fact, not law, because he harvested a portion of the wrong timber sale.

In addition, the reliance of the official's advice must be reasonable. The Government submits that Mr. Noel appears to have relied solely on the verbal instructions of Mr. Letham as to the location of the timber sale in relation to the snow ploughed FSR. It argues that this was unreasonable, given that Mr. Noel is an experienced logger within the Small Business Forest Enterprise Program, and had significant opportunity to verify the location of the timber sale by consulting various maps and boundary markers within the field.

The Board also argues that Mr. Noel's error was an error of fact - not an error of law or mixed law and fact. It provided a detailed analysis of requirements set out in *Jorgensen*. However, given the Commission's findings on this issue, there is no need to set out the Board's submissions further.

The Commission finds that the facts of this case do not support a finding of officially induced error such that Mr. Noel should be "excused" from the contravention or the penalty. For this excuse to apply, it is clear that there must be an error of law or mixed fact and law - not an error of fact alone.

The Commission finds that the error in this case was that Mr. Noel thought that TSL A50118 was, in fact, TSL A65705, and started harvesting the wrong timber sale. It

is a mistake as to the facts. There is no error in law. For the excuse of officially induced error to apply, the error must contain some material legal error. The Commission finds that Mr. Noel did not seek legal information or advice from Mr. Letham regarding the legal boundaries of the TSL, no legal information or advice was provided to Mr. Noel by Mr. Letham regarding the legal boundaries of the TSL, the error was Mr. Noel's alone and was purely factual. The Commission finds that Mr. Letham's statement was a general one regarding access to the TSL, i.e., the extent to which the FSR was ploughed. It was not to advise Mr. Noel about the legal boundary of the TSL. Given all of the maps and information Mr. Noel had before him to determine those boundaries, his attempt to rely on this general statement by Mr. Letham is unreasonable in any event. Accordingly, there is no need to consider the other requirements set out in *Jorgensen*.

Finally, the Commission notes that the Board asked this Panel to provide some general guidance on the application of officially induced error to contraventions under the *Code*. In particular, the Board seeks to have the Commission limit the availability of the "excuse" at this time, noting that amendments to the *Code* make it a full defence.

The Commission is not prepared to provide further guidance on this matter beyond what has been said above. Full argument on how to interpret the statutory defence will be addressed in the future when that defence is at issue in an appeal.

2. Whether the quantum of the penalty is appropriate in the circumstances.

A deterrent penalty of \$15,000 and a compensation penalty of \$7,000 were assessed against Mr. Noel, for a total penalty of \$22,000. The compensatory penalty covers the Crown's costs for reconfiguring the remaining timber in TSL A50118 for sale at a later date.

Mr. Noel seeks relief from both of these penalties. The Government requests that the appeal be dismissed and the review decision confirmed.

Section 119(1) of the *Code* sets out a formula for assessing the maximum penalty that may be levied under this section: stumpage + the bonus bid that would have been payable had the timber been sold under section 20 of the *Forest Act* + two times the market value of the timber + reforestation costs.

The District Manager found the stumpage and bonus bid calculation for TSL A50118 to be \$7,407. He found that two times the market value of the logs produced from this timber was \$50,625, or \$56.25 per cubic meter based on a trespass volume of 450 cubic meters. (Reforestation costs were included as part of the stumpage rate within TSL A50118.) Thus, the District Manager determined that the maximum penalty for this contravention would be \$58,032.

After evaluating the situation, the District Manager levied a penalty of \$22,000, less than half of the maximum penalty authorized under section 119. He based this

penalty, in part, on a consideration of the factors identified in section 117(4)(b) of the *Code* which included consideration of Mr. Noel's due diligence in determining the boundaries, and the gravity and magnitude of the contravention.

Other issues the District Manager considered included the fact that the contravention was not repeated or continuous, was not deliberate, there was no economic gain by Mr. Noel, and he was co-operative with Ministry of Forests officials once the contravention had been determined. The District Manager summarized his assessment of the disciplinary penalty as follows:

My reasons relate to Steve Noel's lack of planning and the practice of due diligence on his authorized timber sale. These facts coupled with the previous infraction and Steve Noel's lackadaisical attitude towards the opportunity to be heard offer, lead me to believe future contraventions could occur.

Mr. Noel Sr. argues that the penalty of \$22,000 is too high given the circumstances of this case. He states that the trespass was a mistake caused by an officially induced error and not the independent actions of his son. He also noted that:

- this was Steve Noel's first infraction under the *Code*,
- he did not receive any economic benefit from the contravention, and
- he was very cooperative with Ministry of Forests officials once the trespass had been discovered.

Mr. Noel Sr. argues that Steve Noel made an honest mistake, lost a significant amount of money on this sale and, therefore, did not benefit financially from the unauthorized harvest. Moreover, he has been a member in good standing of the Small Business Forest Enterprise Program and says that this fact should be considered in the penalty decision.

The Government submits that most of the timber harvested without authority was located within TSL A50118. The sale contained a riparian management zone, three special management zones and two no harvest zones. Mr. Noel's unauthorized harvesting activity occurred partly within one of the special management zones, the riparian management zone, and both no harvest zones, all of which compromised the forest management objectives inherent in the preservation of these zones.

The Government also argued that the felled timber on TSL A50118 became less valuable because it was bucked to specifications mandated by Mr. Noel's log buyer. Moreover, logging slash left on the site had not been cleaned up, further complicating disposition of this timber through a subsequent sale.

The Board took no position on the size of the penalty.

With regard to the penalty assessment, the District Manager and the Review Panel considered both the need for the Crown to be compensated for its loss of forest resources as well as the need for a deterrent penalty.

Compensatory Penalty

The Government argues that a penalty levied under section 119(1) of the *Code* should fully compensate the Crown for its loss. It submits that to be fully compensated, the Crown must recover the market value of the timber, which in this case is \$56.25 per cubic meter, less any operating costs. The Government notes that this is not the approach that was taken by the District Manager but, if it had been, the Crown would have recovered \$25,313 (i.e. \$56.25 per cubic meter x 450 cubic meters) less a specified operating cost of \$17.50 per cubic meter. This would "net" the Crown receipts totaling \$17,438.

The Commission finds that there was clearly a loss of a forest resource and that the Crown should be compensated. However, the Commission does not agree with the Government's argument. First, the Government seems to have changed course in structuring the penalty from one of a deterrent (\$15,000) plus compensation (\$7,000) to the "selling price compensation" argument, as above.

In terms of compensation, the Commission notes that had the unauthorized harvest not occurred, TSL A50118 would have proceeded as a normal timber sale and, presumably, sold for \$16.46 per cubic meter. The Crown would have received \$7,407 for the 450 cubic meters.

The District Manager did not consider compensation for silviculture costs to be significant and the Commission agrees.

Deterrent Penalty

In assessing the total penalty appropriate in the case, the following factors set out in section 117(4) of the *Code* are relevant:

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

Previous contraventions of a similar nature by the person

Mr. Noel maintains that this was his first infraction under the *Code* and that he is a member in good standing with the Small Business Forest Enterprise Program.

Evidence presented during previous opportunities to be heard led the District Manager and the Review Panel to conclude that Mr. Noel had contravened the *Code* on a previous occasion. The Ministry of Forests' Enforcement, Review and Appeal system database included a record dated July 24, 1997, which was provided to the

Commission. The record pertained to the unauthorized harvesting of Crown timber by Mr. Noel.

In his determination, the District Manager placed considerable weight on this contravention when he assessed the disciplinary penalty of \$15,000. However, at the hearing before the Commission, the District Manager noted that the investigation resulted in "no action." The District Manager advised the Commission that he was unaware of this until now.

The District Manager testified that "no action" is tantamount to concluding that there was no contravention of the *Code* at all. He said that approximately one-half of the deterrent penalty, or \$7,500, was based upon this previous infraction. Given the new information, the District Manager acknowledged that that portion of the penalty was a mistake.

The gravity and magnitude of the contravention

The Commission accepts the District Manager's conclusion that the gravity and magnitude of the contravention was serious because it impacted the management and award of TSL A50118. The District Manager also found that Mr. Noel's actions impacted the successful licensee on TSL A50118 because the felled timber was partly skidded, bucked to a different set of log specifications, and logging debris required clean up by the licensee. Mr. Noel takes issue with this finding because it was bucked correctly for his log sale.

The Commission agrees with the District Manager that there was an impact on the successful licensee. Although the timber was bucked correctly for Mr. Noel's log sale, the fact is that these were not Mr. Noel's logs. Therefore, it is appropriate to consider the impact of the skidding and bucking on the Crown when assessing the gravity and magnitude of the contravention.

Whether the violation was repeated or continuous

The Commission accepts the District Manager's conclusion that the violation was not repeated or continuous.

Whether the contravention was deliberate

The Government argues that if Mr. Noel was mistaken about the facts arising from this case, then he could raise a defence of mistake of fact. It notes that the Supreme Court of Canada has held that a mistake of fact may be considered within the defence of due diligence if the person "reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent...." (*R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299). However, the Commission notes that for mistake of fact to allow a person to avoid liability in a regulatory context, the mistake must have been made in the course of a duly diligent effort to obey the regulatory measure. Mr. Noel made no submissions on this issue.

The Commission has held on previous occasions that due diligence is not available as a defence to a contravention under the *Code*. However, the Commission has also concluded that when considering the deliberateness of the contravention under section 117(4), evidence of the person's due diligence is relevant (see for example, *MacMillan Bloedel v. Government of British Columbia* (Appeal No. 96/05(c), September 4, 1997) (unreported)).

The Government argues that Mr. Noel did not take reasonable care in locating the timber sale. It submits that Mr. Noel did not rely on pre-bid information and maps that provided clear, accurate information regarding the location of the sale. Nor did he rely on physical references such as boundary markers, the bridge crossing at 25 kilometers of the FSR, the proximity of the TSL to previously logged areas, or key physical characteristics of the area harvested that were very different from TSL A65705.

The Government further argues that Mr. Noel failed to recognize that the timber he was harvesting was adjacent to the FSR, but the timber in TSL A65705 was not. Moreover, he did not recognize the need for cable yarding in TSL A65705 and he did not stop falling timber when he saw boundary markers for the special management zone, riparian management zone and two no harvest zones in TSL A50118.

Brad Bushell, the Compliance and Enforcement technician with the Ministry of Forests, testified before the Commission that he received a telephone call from Mr. Noel Sr. on April 19, 2001. One of the topics discussed during that conversation was the location of the riparian management zone within the TSL. Mr. Noel did not report or relate any concerns regarding unauthorized harvesting of timber to Mr. Bushell.

In his evidence, Mr. Noel Sr. repeatedly told the Commission that Steve Noel relied on Mr. Letham's statement that TSL A65705 was located at the end of the ploughed road. He then acted on the strength of that statement by proceeding to harvest the timber, which mistakenly turned out to be located on TSL A50118.

There is no dispute that Steve Noel is an experienced logger under the Small Business Forest Enterprise Program. As such, he has a basic ability to read and understand forestry maps in the field, coupled with an ability to locate timber sale boundaries with the aid of those maps.

As a practical matter, as well as a legal requirement, a person who is awarded a timber sale must determine the boundaries of the timber sale prior to harvesting. This is done by a review of the relevant maps and generally through discussions with Ministry of Forests' officials.

The Commission finds that Mr. Noel had ample opportunity to determine the boundaries either through informal telephone discussions, the pre-work meeting of the timber sale or through subsequent consultations with Ministry of Forests

officials. Moreover, the Commission finds that both TSLs were identified properly in the field with industry standard flagging and point of commencement markings.

However, it is clear that Mr. Noel did not rely on maps provided in the timber sale pre-bid package. The Commission has reviewed the pre-bid package which included the following maps and documents: Exhibit "A" map, directions map, block locations map, block map, cruise map, and logging plan and road layout design. While some of these maps may have been confusing, the Commission is of the view that the key maps, showing the correct location of TSL A65705, were very explicit.

The location of timber sale boundary markers, a key bridge crossing, and the timber sale's proximity to previously logged areas were ignored as well. Mr. Noel attended a pre-work meeting with Ministry of Forests officials, the sole purpose of which was to discuss issues arising from the information provided in the pre-bid package. The Commission accepts Mr. Noel's evidence that the location of the timber sale was discussed at this meeting, but to no apparent avail. Mr. Noel did not use this information to locate TSL A65705 properly. Even after he had commenced harvesting, Mr. Noel did not refer to boundary markers to confirm that he was, in fact, logging in the right location.

Further, Mr. Noel should have been aware that he was logging the wrong timber sale because he started logging directly adjacent to the FSR. However, TSL A65705 is located on a spur road branching off of the FSR. It was physically impossible to log right next to this road and also be in TSL A65705.

Finally, the terrain (mainly side slope) of the two timber sales is very different and, consequently, harvesting methods also differ. Harvesting of TSL A65705 called for a cable yarding system, whereas Mr. Noel only used ground-based skidding equipment for the timber he logged.

In sum, the Commission finds that, as an experienced logger under the Small Business Forest Enterprise Program, Mr. Noel did not exercise reasonable care or due diligence when locating the timber sale. Further, considering the entire set of circumstances and all of the information in his possession, it was not reasonable for Mr. Noel to believe that TSL A65705 was located at the end of the ploughed road.

Any economic benefit derived by the person from the contravention

In assessing this penalty, the Commission has also considered benefits derived. The District Manager found that no economic benefit was derived by Mr. Noel as none of the timber was removed from the site.

Mr. Noel Sr. testified that Steve Noel lost approximately \$16,000 through the unauthorized harvesting of this TSL, \$11,000 for the harvesting operation itself, and \$5,000 for movement of logging machinery. Mr. Noel Sr. also stated that the Commission should take into consideration the fact that he also lost market opportunity for balsam saw logs due to a delay of three weeks before he was able

to continue logging TSL A65705. However, Mr. Noel Sr. did not present any supporting evidence regarding any of these losses to the Commission.

The Commission finds that Steve Noel did not derive any economic benefit from this TSL. Timber was not removed from the site, yet machinery was brought to the sale, timber was felled and yarded to roadside. Obviously, costs were incurred by Mr. Noel; however, there was no direct evidence on those costs presented to the Commission.

The person's cooperativeness and efforts to correct the contravention

There is no dispute that Mr. Noel was cooperative.

Conclusion on Issue #2

In light of the above, the Commission is of the view that it was appropriate for the District Manager to levy a penalty and that the maximum penalty under section 119 was not warranted.

The Commission finds that the District Manager's original assessment of \$22,000 was reasonable, but for the fact that he erred by including an assessment for a previous infraction. Therefore, the Commission finds that it is appropriate to reduce the penalty assessed to Mr. Noel by \$7,500; one-half of the deterrent portion of the penalty.

The total penalty assessed to Mr. Noel is, accordingly, \$14,500.

DECISION

In making this decision, the Commission has carefully considered all the evidence before it, whether or not specifically reiterated here.

The Commission upholds the finding of contravention but finds that the quantum of the penalty applied by the District Manager and upheld by the Review Panel, is incorrect and should be reduced. The penalty assessed to Mr. Noel has been reduced from \$22,000 to \$14,500.

The appeal is allowed, in part.

James Hackett, Panel Chair
Forest Appeals Commission

December 2, 2003