



Province of  
British Columbia

## Forest Appeals Commission

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### DECISION NO. 2005-FOR-009(a)

In the matter of an appeal under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

<b>BETWEEN:</b>	Ronald Edward Hegel and 449970 B.C. Ltd.	<b>APPELLANTS</b>
<b>AND:</b>	Government of British Columbia	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Forest Appeals Commission Alan Andison, Chair	
<b>DATE:</b>	May 29, 30 & 31, 2007, concluding in writing on July 20, 2007	
<b>PLACE:</b>	Kamloops, BC	
<b>APPEARING:</b>	For the Appellants: Ronald Hegel For the Respondent: E.W. (Heidi) Hughes, Counsel	

### APPEAL

Ronald Edward Hegel and 449970 B.C. Ltd. appeal against a July 29, 2005 determination by Tom Volkers, District Manager, Headwaters Forest District, Ministry of Forests and Range (the "Ministry"). The District Manager found that the Appellants had contravened sections 96(1) and 97(2) of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "Code"). Specifically, he found that 449970 B.C. Ltd. had contravened the *Code* by failing to properly ascertain the boundaries of Mr. Hegel's property, and harvesting Crown timber without authority. The District Manager further found that Mr. Hegel, as president of 449970 B.C. Ltd., also contravened those sections of the *Code* pursuant to section 71(4) of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "Act").

The District Manager assessed a total penalty of \$132,897.40 for the contraventions, and stated that the Appellants are jointly and severally liable for the penalty.

This appeal is heard pursuant to Division 4 of the *Act*. The powers of the Commission on an appeal are set out in section 84 of that *Act*, which states:

- 84** (1) On an appeal
- (a) by a person under section 82(1), or

- (b) by the board under section 83(1),  
the commission may
- (c) consider the findings of the person who made the determination or decision, and
- (d) either
  - (i) confirm, vary or rescind the determination or decision, or
  - (ii) with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration.

The Appellants appeal on the grounds that they exercised due diligence, were under a mistake of fact in attempting to locate the property boundary, that their actions were the result of an officially induced error and that the penalty is excessive. They ask the Commission to rescind the District Manager's determination. Alternatively, they ask that the determination be varied or rescinded to the extent that it imposes a penalty.

## **BACKGROUND**

The following facts are not in dispute.

Mr. Hegel is the president of 449970 B.C. Ltd., which owns property near Avola, B.C. That property is legally described as District Lot 2535, Kamloops Division, Yale District, except Plan B122 and H 8060 ("Lot 2535"). The south and east boundaries of Lot 2535 are not in dispute in this appeal. However, the west and north boundaries are disputed in this appeal. The shape of Lot 2535 may be described as similar to a trapezoid, in that it has four sides, of which the north and south sides are parallel while the east and west sides are not parallel.

In August 1911, a surveyor named T. Beauchamp surveyed Lot 2535 for the purpose of a Crown land grant. He measured the west boundary of Lot 2535 as 50.22 chains long<sup>1</sup> (3315 feet or 1010 metres). He measured the south boundary as 7.15 chains, and the north boundary as 40 chains. The east boundary of Lot 2535 is adjacent to the North Thompson River. The north boundary is a straight line that proceeds from the North Thompson River along the southern boundary of Lot 546. That Lot was established and surveyed in 1902. The north boundary then continues to proceed west and is bounded on the north by Crown Land.

A Crown grant for Lot 2535 was issued on March 5, 1912, by which "one hundred and thirty acres, more or less, more particularly described on the map or plan hereto annexed..." was conveyed.

After 1911, several surveys in or about Lot 2535 were conducted for the purposes of determining rights of ways. Surveys were conducted for the CNP Railway (1912 and 1922), Trans Mountain Pipeline (1953), B.C. Hydro's Vavenby-Avola

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<sup>1</sup> A chain is a unit of length that consists of 100 links, and equals 66 feet or 20.1168 metres.

transmission line (1966), North Thompson Highway (1967) and BC Tel (1990). Rights of ways for those utilities or transportation corridors pass through Lot 2535.

In March 2000, 449970 B.C. Ltd. purchased Lot 2535. At that time, Mr. Hegel obtained a copy of the original Crown grant of Lot 2535. He later obtained a copy of T. Beauchamp's original survey notes regarding Lot 2535 from the Surveyor General's office.

In March 2000, timber mark NBQIT was issued to 449970 B.C. Ltd.

Prior to logging Lot 2535, Mr. Hegel tried to locate its boundaries, using the surveyor's original notes, a compass, and a laser for measuring distances. He relied on a fence as the south boundary of Lot 2535. He did not locate a corner pin for either the southwest or southeast corners of Lot 2535, nor did he measure the length of the southern boundary. Starting at a wooden fence post that he believed was at the southeast corner of Lot 2535, he walked 50.22 chains to the north. While traveling northward, he followed a survey cut line and encountered brass and metal survey pins, and several wooden stakes. At the north end of the cutline, he located a wooden post which he believed marked the northwestern boundary of Lot 2535. He did not measure the length of the north boundary. He used flagging tape to mark what he believed were the west and north boundaries of Lot 2535.

In or about 2002, the Appellants harvested timber from Lot 2535.

On May 10, 2002, Rob Martin, an employee of the Small Business Enterprise Program of the Ministry, was advised at an open house that there may have been unauthorized harvesting of Crown timber in relation to Lot 2535.

On August 14, 2002, Richard Freeman, a Compliance and Enforcement Officer with the Ministry's Headwaters District office, flew over Lot 2535 in a helicopter and took aerial photographs of the area. When his aerial photographs of the harvested areas were overlaid with cadastral information, there appeared to be some variance between the north boundary of Lot 2535 and the area that had been harvested.

On August 20, 2002, Mr. Freeman met with Bill Ehlers, the owner of Lot 2514 which is the parcel immediately south of Lot 2535, to try to determine a common boundary between the properties. They were unable to locate any surveyor's pins. However, Mr. Freeman found orange ribbons hanging along the west edge of the harvested area. The ribbons extended northward from a brass marker in the ground, and then eastward from the northwest corner of the harvested area. Mr. Freeman entered points along the ribbon into a hand held global positioning system ("GPS") unit. He then compared the latitude and longitude of those points to points on reference maps. He concluded that the northern edge of the harvested area appeared to be outside of the north boundary of Lot 2535.

In October 2002, the Ministry contracted Integrated Woods Services to survey the boundaries of Lot 2535 using an electronic distance metre. In the course of that survey, an iron survey pin was found at the northwest corner of the harvested area, 127 metres north of the brass marker that had previously been located. The survey indicated that there appeared to have been logging outside of the boundaries of Lot 2535.

In November 2002, Delibo Contracting conducted a 100 percent stump cruise on behalf of the Ministry, to collect data to determine the volume of timber harvested without authority.

In December 2002, Bartell, Fiedrich and Underhill, a firm of B.C. Land Surveyors, was hired by the Ministry to investigate and survey the boundaries of Lot 2535. In February 2003, they met with the Surveyor General's Office to discuss discrepancies in the information found in old surveys.

During late April and early May, 2003, Ivan Royan, a B.C. Land Surveyor with Bartell, Fiedrich and Underhill, conducted a survey of Lot 2535. While that survey was in progress, Ministry investigators noticed that the iron pin that had been in the northwest corner of the harvested area was gone, and a hole remained where it had been.

In June 2003, Mr. Hegel was interviewed by a member of the Forest Crimes Unit of the R.C.M.P. George Buis, a member the Ministry's Special Investigations Unit, was present and participated in the interview.

In September 2003, Bartell, Fiedrich and Underhill submitted a report to the Ministry outlining difficulties associated with the survey of Lot 2535, due to discrepancies between previous surveys and the original surveyor's notes, and what Mr. Royan found in the field.

In December 2003, further advice was received from the Surveyor General's Office, which recommended that the boundaries of Lot 2535 be placed giving "due consideration to natural features".

On September 7, 2004, Mr. Royan submitted a final survey report to the Ministry. That report states as follows, in part:

... we have concluded that the perpendicular distance between the north and south boundaries of DL 2535 was never 50.22 chains (1010.26 metres). In actual fact, there is a shortage of approximately 136 metres in this distance which was discovered as far back as 1912 when Mr. H. R. M. Christie B.C.L.S. did the first survey of the R/W [right of way of the C.N.P. Railway] through DL 2535.

The position of the north west corner of DL 2535 (Pt #218) should be fixed by holding the angle and distance that [G.M.] Christie shows on Plan CG171 [which was surveyed in 1922]. This position is within 36ft of where the original field notes which [sic] indicates where the NW corner post for DL 2535 was placed in 1911.

...

The Crown Grant document states that the area of DL 2535 is 130 acres more or less. As a result of our investigation survey, the area of DL 2535 excluding the areas of highway and railway rights-of-way is now down to approximately 88 acres.

[underlining added]

In November 2004, Mr. Freeman prepared an "Investigation Summary Report", in which he recommended that Mr. Hegel and 449970 B.C. Ltd. be found to have

contravened sections 96(1), 96(2), 97(1) and 97(2) of the *Code*. He also stated as follows:

The contravention area may have its overall productivity and desirability as a forest site compromised. Drainage patterns in the north end of the unauthorized harvest area have been changed by the construction of skid trails. The extent of the impact on the [fish] rearing habitat in the wetlands below the unauthorized harvest has not been determined. Full pullback rehabilitation of the trails and restoration of the natural drainage patterns is recommended on this site...

In or about 2005, the Appellants hired Michael Kidston, a B.C. Land Surveyor, to survey the boundaries of Lot 2535.

On May 8, 2007, Plan KAP83777 was deposited in the Kamloops Land Title Office, and was certified by Mr. Kidston to be a true copy of the official plan of Lot 2535. The notes on Mr. Kidston's plan state that he re-established the northwest corner of Lot 2535 "as per tie shown by G.M. Christie, B.C.L.S. on Plan CG-171".

#### *The Determination*

On July 4, 2005, the District Manager held an "opportunity to be heard" with Mr. Hegel. Mr. Royan appeared as a witness for the Ministry. A map titled "Investigation Reference Map" was submitted by the Ministry.

The Investigation Reference Map shows boundaries for Lot 2535 and the areas of unauthorized harvesting, based on the information gathered by the Ministry. In particular, it delineates several polygons, including a clear-cut area depicted as being north of Lot 2535. That area is labeled "Area A", and is the focus of this appeal. Area A is on Crown Land. The Map's notes indicate that the northwest corner of Lot 2535 was located "based on bearings and distances as determined by Mr. G.M. Christie BCLS in June 1922 as shown on Plan CG171".

On July 29, 2005, the District Manager issued his determination. On August 12, 2005, the District Manager re-issued the determination, to correct a minor typographic error in the original determination letter. The District Manager's determination states, in part:

Based on the expert evidence and analysis provided by Ivan J. Royan and applying language in the *Land Survey Act*, the location for the boundaries of L. 2535 is the area defined as "Area C" on the Investigation Reference Map...

I conclude that the facts set out above support a finding of contravention of Sections 96(1) and 97(2) of the *Forest Practices Code of British Columbia Act*, provided the defences set out in Section 72 of the *Forest and Range Practices Act* do not apply. My reasons are as follows:

The evidence is clear that "Area A" was harvested on Crown land outside of L. 2535...

... Based on the evidence presented that you did not find any of the corner pins of your property prior to harvesting, located your believed property line with a hand held compass, and that you did not seek any professional assistance in identifying your property boundaries, I find that the defence of due diligence does not apply.

... since you did not locate any of the corner pins of your property prior to harvesting, I find that the defence of mistake of fact does not apply to "Area A" as shown in the Investigation Reference Map...

... Since you provided no evidence that anyone in a position of authority directed you to mark your purported property boundary in the manner and location in which you did, I find that the defence of officially induced error does not apply.

In his determination, the District Manager considered the factors set out in section 71(5) of the *Act*, and concluded that:

- the contravention was substantial;
- the contravention was neither repeated nor continuous;
- the evidence does not indicate that the contraventions were deliberate; and
- the only evidence regarding the Appellants cooperativeness and efforts to correct the contravention was the efforts taken to place concrete bags to control fish movement.

The District Manager levied a total penalty of \$132,897.40. The penalty consisted of \$5,000 for the contravention of section 97(2), and \$127,897.40 for the contravention of section 96(1). The latter included \$111,163.14 (1815 cubic metres at an appraisal value of \$61.25 per cubic metre) for the revenue foregone by the Crown as a result of the unauthorized harvesting of Area A, and \$16,734.30 for the estimated costs to reforest Area A. The District Manager concluded that the penalty for the section 96(1) contravention "also removes the economic benefit that [the Appellants] would have derived from the unauthorized harvesting."

#### *The Appeal*

In a Notice of Appeal dated September 16, 2005, the Appellants appealed the determination.

The Appellants list several grounds in their Notice of Appeal, as amended, and in their Statement of Points, as amended. Those grounds of appeal may be summarized as follows:

- the District Manager erred in determining that the Appellants were not acting with due diligence, under a mistake of fact or officially induced error, in locating what they believed to be the north boundary of Lot 2535; and
- the penalty imposed for the contravention of section 96(1) is excessive.

The Appellants have also asked the Commission to order the Respondent to pay their costs in respect of the appeal.

The Appellants' Notice of Appeal and Statement of Points were submitted by legal counsel. However, the Appellant appeared at the hearing, and prepared his written closing submissions, without assistance from legal counsel.

The Government submits that the determination should be confirmed, but the penalty should be varied to reflect an appraisal value of \$63.32 per cubic metre and a volume of 1749 cubic metres, for a total penalty of \$132,480.98.

## **ISSUES**

The issues raised in this appeal are as follows:

1. Whether the limitation period in section 75 of the *Act* prevents the imposition of a penalty in this case.
2. Whether the Appellants contravened the *Code* by failing to ascertain the boundaries of Lot 2535 and harvesting Area A.
3. Whether the Appellants have established a defence of due diligence, mistake of fact, or officially induced error.
4. Whether the penalty is appropriate in the circumstances.
5. Whether the Commission should order costs in favour of the Appellants.

## **RELEVANT LEGISLATION**

The sections of the *Act* that are relevant to the District Manager's decision-making powers are set out below. Other relevant legislation is set out in the "Discussion" portion of this decision, as needed.

*Forest and Range Practices Act*

### **Applicability of certain provisions of Part 6 of this Act for the *Forest Practices Code of British Columbia Act***

**58.2(1)** Sections ...71 (1), (2), (5) and (6), ... of this Act apply to and in respect of

- (a) the *Forest Practices Code of British Columbia Act*, and
- (b) the regulations or standards under that Act

in relation to the period that ended at midnight on January 30, 2004.

### **Administrative penalties**

- 71** (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.
- (2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,
- (a) if he or she determines that the person has contravened the provision,

- (i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or...

...

- (4) If a corporation contravenes a provision of the Acts, a director or an officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.
- (5) Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:
  - (a) previous contraventions of a similar nature by the person;
  - (b) the gravity and magnitude of the contravention;
  - (c) whether the contravention was repeated or continuous;
  - (d) whether the contravention was deliberate;
  - (e) any economic benefit derived by the person from the contravention;
  - (f) the person's cooperativeness and efforts to correct the contravention;
  - (g) any other considerations that the Lieutenant Governor in Council may prescribe.

### **Defences in relation to administrative proceedings**

- 72** For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the
- (a) person exercised due diligence to prevent the contravention,
  - (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or
  - (c) person's actions relevant to the provision were the result of an officially induced error.

### **Limitation period**

- 75** (1) The period during which an administrative penalty may be levied under section 71 (2) or 74 (3) (d) or an order may be made under section 74 (1) is 3 years beginning on the date on which the facts that lead to the determination that the contravention occurred first came to the knowledge of an official.

## **DISCUSSION AND ANALYSIS**

### **1. Whether the limitation period in section 75 of the *Act* prevents the imposition of a penalty in this case.**

This issue was raised by the Panel during the appeal hearing. Section 75 of the *Act* specifies a three-year time limit for levying an administrative penalty against a person who has contravened a provision of the Acts. By virtue of section 58.2 of

the *Act*, section 75 of the *Act* applies to contraventions of the *Code* that occurred before January 30, 2004.

The Appellants submit that they did not waive their right to rely on the limitation period in section 75. They further submit that the limitation period applies in this case because the District Manager's determination was issued more than three years after the facts that lead to the determination first came to the knowledge of a Ministry official. Specifically, they submit that those facts first came to the knowledge of a Ministry official on May 10, 2002, when Mr. Martin was advised at an open house that there may have been unauthorized harvesting related to Lot 2535. The administrative penalty was not issued until July 29, 2005, which exceeds the three-year limitation period.

The Government provided extensive written arguments on this issue. In summary, the Government submits that section 75 does not apply in this case because: (1) Mr. Hegel expressly waived the Appellants' right to rely on it before the District Manager held the opportunity to be heard, and the Appellants are estopped from relying on it now; and (2) the date on which a Ministry employee first had knowledge of the facts that led to the determination was August 14, 2002, less than three years before the District Manager issued his determination.

In support of those submissions, the Government provided copies of correspondence between the District Manager and the Appellants' then legal counsel prior to the opportunity to be heard. The Government also cited several judicial decisions in support of the proposition that, where a provision of a statute is enacted for the benefit of an individual or group of individuals rather than the public at large, that provision may be waived by those individuals.

#### *Commission's findings*

The Commission has reviewed the correspondence between the District Manager and the Appellants' former legal counsel. It is apparent from that correspondence that the Appellants, through their counsel, requested several adjournments of the opportunity to be heard before the District Manager. After being granted an initial adjournment, the Appellants' counsel requested a further adjournment. The District Manager was reluctant to grant that request, and a series of e-mails were exchanged between the District Manager and the Appellants' counsel, Mr. Waatainen. In the course of seeking the second adjournment, Mr. Waatainen sent an e-mail to the District Manager on March 2, 2005, stating as follows, in part:

We confirm that our client agrees to waive the limitation period under the *Forest and Range Practices Act*... You have indicated that your advice is that you cannot waive a statutory limitation period. With respect, I disagree with that advice – limitation periods are intended for the sole benefit of those who are subject to investigations... and, therefore, those subject to an investigation can waive the benefit. There is no prejudice to any other party.

[underlining added]

The District Manager granted the adjournment. The hearing was then postponed a third time at the Appellants' request.

Based on this evidence, the Commission finds that Mr. Hegel, through his counsel, expressly waived his right to rely on the limitation period in section 75 of the *Act*, and notified the District Manager of his waiver, on March 2, 2005.

The Commission further finds that section 75 was enacted for the benefit of those who are subject to administrative action under the *Act*, to ensure that investigations proceed in a timely manner. As such, those persons may waive that limitation period: *Kammins Ballrooms Co. Ltd. v. Zenith Investments*, [1970] 2 All ER 871 (H.L.), at page 893. Moreover, once a person has knowingly proceeded in a manner which indicates that they are forgoing reliance on the limitation period, the doctrine of estoppel prevents them from relying on it at a later date: Graeme Mew, *The Law of Limitations* (2<sup>nd</sup>. Ed.), Butterworths, at pages 126-127.

Accordingly, the Panel finds that the Appellants' waived their right to rely on the limitation period in section 75 of the *Act*. Therefore, section 75 does not prevent the imposition of a penalty in this case.

## **2. Whether the Appellants contravened the Code by failing to ascertain the boundaries of Lot 2535 and harvesting Area A.**

The Appellants submit that the Government has failed to prove where the boundaries of Lot 2535 are located. They further submit that the District Manager erred by favouring the opinion of Mr. Royan over the official plan for Lot 2535 that is filed with the Land Title Office. The Appellants submit that Mr. Royan's evidence should not be relied on because it is merely based on his opinions and assumptions. The Appellants submit that, when Mr. Hegel attempted to ascertain the boundaries, the original survey of T. Beauchamp in 1911 was the only legal plan on Lot 2535, and his survey and notes were determinative of the boundaries. The Appellants further submit that the Crown grant document should be relied on.

Additionally, the Appellants submit that the Ministry has no authority to "go against" the *Land Title Act*, *Land Survey Act*, or the *Land Title Inquiry Act*. They submit that this matter is governed by the *Land Title Act*, and not the *Act*.

In support of their submissions, the Appellants provided a copy of the plan filed in 2007 by Mr. Kidston. The Appellants submit that Mr. Kidston's survey was registered at the Land Title Office as a posting plan. The Appellants submit that Mr. Kidston's survey indicates that the southwest corner of Lot 2535 is where Mr. Hegel thought it was, and that the distance from the southwest corner to the northwest corner is 50.22 chains.

The Appellants also referred to: section 7 of the *Land Survey Act*, section 17 of the *Land Title Inquiry Act*, and section 20(1) of the *Land Title Act*.

The Government submits that Mr. Royan's evidence establishes that Area A is Crown land and not part of Lot 2535. In addition, the Government submits that the survey prepared by Mr. Kidston on behalf of Mr. Hegel only differs from Mr. Royan's opinion in respect of the location of the west boundary. In particular, the Government submits that Mr. Kidston located the north boundary of Lot 2535 in the same place as Mr. Royan, except that the western end of the north boundary extends further to the west in Mr. Kidston's survey. The Government maintains,

therefore, that even on the Appellants' own evidence, as provided by Mr. Kidston, Area A is Crown land.

Additionally, the Government submits that the acreage shown in the original Crown grant is not determinative, because the grant states that the acreage is 130 acres "more or less", thereby placing the risk of a shortfall on the grantee, not the Crown.

The Government submits that the provisions of the *Land Survey Act*, *Land Title Inquiry Act* and the *Land Title Act* cited by the Appellants are irrelevant to this appeal.

Mr. Royan testified in support of the Government's submissions. The Commission accepted him as an expert in the area of land surveying British Columbia. Mr. Royan referred to T. Beauchamp's notes, which state that he began the survey on the north boundary of Lot 2535, as determined based on the south boundary of Lot 546, which was surveyed in 1902 and is located immediately north of Lot 2535. Mr. Royan testified that this approach to determining the north boundary of Lot 2535 is consistent with the surveying principle that a boundary fixed earlier in time will usually govern the location of a contiguous boundary surveyed later. Mr. Royan testified that, when he reconstructed the boundaries of Lot 2535, he also located the north boundary of Lot 2535 based, most significantly, on the south boundary of the adjoining Lot 546. He also found pins from a right of way survey that bisected the north boundary of Lot 2535, and a metal post in the northeast corner of Lot 2535 that Mr. Leggatt had placed in 1968 while surveying the highway right of way. Mr. Leggett had indicated that he placed the metal post as a replacement for an old pipe post that was there. Mr. Royan testified that, in his opinion, the metal post marked the northeast corner because T. Beauchamp's notes state that he placed a wooden post in the northeast corner.

Mr. Royan stated that Mr. Beauchamp's notes also indicate that the northwest corner of Lot 2535 was about 11 chains past the toe of a steep slope that is still present.

He further stated that Mr. Beauchamp's notes do not indicate that he placed any bearing trees or markers at the southwest corner of Lot 2535, but they indicate that the southwest corner was about 29.77 chains from the toe of the slope, and the length of the west boundary was 50.22 chains, while the distance from the southwest corner to the River was 7.15 chains.

Mr. Royan also testified that, when surveying a right of way, a surveyor is primarily concerned with marking the boundaries of the right of way, and is only incidentally concerned with the boundaries of the dominant parcel. Consequently, it is a surveying principle that right of way surveys are subject to surveys done for the purpose of creating title interests.

Mr. Royan stated that he determined the northwest corner of Lot 2535 based on the bearings and distances that G.M. Christie shows on Plan CG171, which he surveyed in 1922 for the C.N.P. Railway right of way. Mr. Christie's Plan CG171 indicates that he found posts at the northeast and northwest corners of Lot 2535, and the southwest corner of Lot 546. It also indicates the angle and distance from the southwest corner of Lot 546 to the northwest corner of Lot 2535. Mr. Royan stated that he used that angle and distance to determine the northwest corner of Lot

2535. That method places the northwest corner of Lot 2535 approximately 36 feet short (east) of where Mr. Beauchamp's notes indicate that he placed the northwest corner post for Lot 2535. Mr. Royan stated that an extensive search was carried out to find the wooden northwest corner post, which G.M. Christie found in 1922, but the area had been disturbed due to logging.

Additionally, Mr. Royan stated that he submitted a preliminary report to the Surveyor General's office on the inconsistencies between Mr. Beauchamp's notes, later surveys, and field observations regarding Lot 2535. He stated that, in a letter dated December 29, 2003, the Surveyor General's office provided comments as well as TRIM<sup>2</sup> maps showing the creeks and rights of ways running through Lot 2535. Mr. Royan stated that, based on those maps, and the information on creek positions shown in the original survey notes for Lots 2535, 546, and 2514 (immediately south of Lot 2535), he confirmed the locations of the north and south boundaries of Lot 2535.

#### *Commission's findings*

The Commission has reviewed all of the parties' evidence, and particularly the evidence provided by Mr. Royan and Mr. Kidston.

Mr. Beauchamp's notes indicate that he started his survey of Lot 2535 by locating the south boundary of the parcel immediately to the north, Lot 546, which was surveyed in 1902. Mr. Royan testified that this approach to locating the north boundary of Lot 2535 is consistent with surveying principles. The notes from the 1902 survey of Lot 546 indicate that one wooden post and one bearing tree were set at the southeast corner of Lot 546, and one wooden post and two bearing trees were set at the southwest corner of Lot 546. Mr. Beauchamp's notes of his survey of Lot 2535 indicate that he found a wooden post at the northeast corner of Lot 2535, and he appears to have found a post at the southwest corner of Lot 546. He set a wooden post and two bearing trees at the northwest corner of Lot 2535. In 1922, G.M. Christie found a post at the northwest corner of Lot 2535, and took a distance and bearing to that point from the southwest corner of Lot 546. However, the original posts and bearing trees fixed by Mr. Beauchamp no longer exist.

Mr. Royan testified that he ascertained the north boundary of Lot 2535 based primarily on the south boundary of Lot 546, as Mr. Beauchamp had done, as well as the bearing and distance indicated by G.M. Christie from the southwest corner of Lot 546. He placed the northwest corner of Lot 2535 approximately 36 feet short (east) of the position noted by Mr. Beauchamp. Mr. Kidston placed the northwest corner slightly further to the west than Mr. Royan. However, Mr. Kidston's plan states that he, like Mr. Royan, fixed the northwest corner of Lot 2535 based on G.M. Christie's 1922 survey. Moreover, both Mr. Royan and Mr. Kidston used the same capped pipe post, set by surveyor S. Leggett in a 1967 right of way survey, as the marker for the northeast corner of Lot 2535. Mr. Leggett indicated that he

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<sup>2</sup> TRIM is an acronym for the Terrain Resource Information Management program, which includes maps of British Columbia that are based on data derived from aerial photos. The TRIM program is administered by the Integrated Land Management Bureau, Ministry of Agriculture & Lands.

placed the pipe post as a replacement for an old wooden post that he found there, which suggests that it may have been one of the original wooden posts placed by Mr. Beauchamp.

The Commission finds that, although Mr. Royan and Mr. Kidston disagree on how far to the west the north boundary of Lot 2535 extends, they agree on how far to the north the northern boundary extends. The Commission notes that the question of the western extent of the north boundary of Lot 2535 is not relevant to this appeal. The question of whether Area A is within Lot 2535 is determined by the northern extent of the north boundary. If Area A is entirely north of the legal northern boundary of Lot 2535, as both Mr. Royan's and Mr. Kidston's surveys indicate, then the Appellants' harvesting of Area A occurred entirely on Crown land.

The Commission accepts the expert evidence of Mr. Royan that one of the principles of surveying is that a boundary fixed earlier in time will usually govern the location of a contiguous boundary surveyed later. The Commission can find no reason to deviate from this principle in this case. As the southern boundary of Lot 546 was surveyed in 1902, and Lot 2535 was not surveyed by Mr. Beauchamp until 1911, the boundary of Lot 546 will determine the northern boundary of Lot 2535. As such, the Commission finds that the north boundary of Lot 2535 cannot go farther north, than the south boundary of Lot 546.

The next question is whether the northern boundary of the Lot 2535 proceeds in a straight line beyond its shared boundary with Lot 546, or proceeds on an angle. This makes a difference as, if the northern boundary angles up to the north, it will reduce the size of Area A, and therefore reduce or eliminate the extent of trespass alleged by the Respondent.

The Commission finds the evidence of Mr. Royan and the survey provided by Mr. Kidston are persuasive on this point. Both of these surveyors fixed the northern boundary, by holding the angle shown by G.M. Christie on his 1922 survey. The northern boundary determined by these surveyors is below, or south of, Area A.

The Commission accepts the evidence of Mr. Royan and the survey prepared by Mr. Kidston with respect to the northern boundary of the Appellants' property. This means that, based on their surveys, Area A is located completely outside of Lot 2535 and on Crown land. The Commission finds that the Appellants' investigation of the boundaries was incomplete, and resulted in an unauthorized harvest of Crown timber from Crown land.

Additionally, the Commission finds that the Crown grant for Lot 2535 did not guarantee that Lot 2535 was actually 130 acres. Rather, it was "more or less" 130 acres.

The Commission finds that the legislation referred to by the Appellants is irrelevant. The *Land Title Inquiry Act* addresses judicial inquiries into land title. Under section 1 of that Act, such inquiries are initiated by a petition to the Supreme Court. To state the obvious, the Commission is not the Supreme Court of B.C., and there is no evidence that such a petition has been filed by the Appellants. Similarly, section 20(1) of the *Land Title Act* addresses the passing of estates or interests in land, and section 7 of the *Land Survey Act* addresses how to divide lots if no posts have been placed, neither of which are issues in this case.

The Commission also rejects the Appellants' assertion that this appeal is not within the jurisdiction of the *Act*. This is an appeal of an administrative penalty and a determination of unauthorized harvesting of Crown timber and the failure to ascertain private property boundaries. Those matters are expressly addressed in the *Act*, and the Commission is expressly empowered to hear appeals of this nature. In carrying out its mandate under the *Act* to hear the present appeal, the Commission is required to make findings of fact regarding the locations of legal boundaries between Crown land and Lot 2535.

For all of these reasons, the Commission finds that Area A is Crown land, and is not within the boundaries of Lot 2535. There is no dispute that Area A was harvested by the Appellants. Consequently, the Commission finds that the Appellants contravened sections 96(1) and 97(2) of the *Code* by failing to ascertain the boundaries of Lot 2535 and harvesting Area A, subject to the application of the defences discussed below.

**3. Whether the Appellants have established a defence of due diligence, mistake of fact, or officially induced error.**

*The legal tests*

The legal test for establishing the defence of due diligence under section 72(a) of the *Act* was considered by the Commission in *Weyerhaeuser Company Ltd. v. Government of B.C.* (Decision No. 2004-FOR-005(b), January 17, 2006), at pages 24-25:

Due diligence is determined by whether the person charged has exercised reasonable care in view of the particular circumstances. Exercising reasonable care implies taking reasonable actions to prevent things the particular accused can reasonably be expected to control, which depends on what the accused has knowledge of or can reasonably be expected to foresee.

Hence, the test for due diligence has two branches, as described in *R. v. MacMillan Bloedel Ltd.* Accordingly, the Panel must ask itself:

- (1) whether the event was reasonably foreseeable; and
- (2) if so, did Weyerhaeuser take all reasonable care to establish a defence of due diligence.

...

The determination of whether a licensee is duly diligent depends on the circumstances of the case. Whether a licensee took "all reasonable steps" must be considered in the specific context of the "particular event" which comprised the contravention in question, and not in the context of a broader duty of care.

The standard to be applied is that of a reasonable licensee in the particular circumstances of the particular case, and will be shaped by the following factors discussed in *R. v. Placer Developments Ltd.* and *R. v. Gonder*:

- (a) gravity of the potential harm,

- (b) the available alternatives to protect against the harm,
- (c) the likelihood of the potential harm,
- (d) the skill required, and
- (e) the extent the accused could control the causal elements of the offence.

This Panel of the Commission agrees that this is the appropriate test for the statutory defence of due diligence in section 72(a) of the *Act*. Although the present appeal does not involve a licensee, the principles set out above can be applied equally to this appeal. Thus, the Commission has considered whether the Appellants took "all reasonable steps" in the specific context of the "particular event" that comprised the contraventions in question.

The defence of mistake of fact is set out in section 72(b) of the *Act*, which provides that no person may be found to have contravened the Acts "if the person establishes that the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision...".

Thus, in determining whether the defence of mistake of fact applies in the present appeal, the question is whether the Appellants reasonably (but mistakenly) believed in the existence of facts which, if true, would establish that they did not contravene sections 96(1) and 97(2) of the *Code*.

The defence of officially induced error is set out in section 72(c) of the *Act* which provides that no person may be found to have contravened the *Act* "if the person establishes that the person's actions relevant to the provision were the result of an officially induced error. The Commission has considered the question of officially induced error in *Arnold and Julie Hengstler v. Government of British Columbia (Forest Practices Board, Third Party)* Appeal No. 97-FOR-19, February 24, 1998 (unreported), which adopted the following test as set out in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 by Chief Justice Lamer as he then was:

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.

That test is similarly adopted by this Panel of the Commission.

*Parties' submissions*

The Appellants submit that Mr. Hegel took reasonable steps and operated under a mistake of fact in ascertaining the boundaries of Lot 2535. They submit that Mr. Hegel took the same approach that Michael Pagdin, a Forestry Consultant who gave evidence on behalf of the Ministry, said he would have taken in ascertaining the boundaries.

The Government submits that the Appellants did not take "all reasonable care" based on the test set out in *Weyerhaeuser*. It submits that the Appellants could have taken reasonable steps to prevent the contraventions from occurring. In particular, the Government argues that Mr. Hegel:

- relied on a fence post instead of locating a corner pin for the southwest corner of Lot 2535;
- did not locate corner pins for the northeast or southeast corners of Lot 2535;
- did not measure the length of the north or south boundaries of Lot 2535;
- did not use a GPS; and,
- did not hire a BC Land Surveyor to ascertain the boundaries of Lot 2535.

In support of those submissions, Mr. Pagdin testified as a witness for the Government. Mr. Pagdin is a forestry consultant who ascertains cut block boundaries prior to harvesting. He testified regarding the standard practices of small and medium sized logging operations for determining such boundaries and was qualified as an expert to provide this evidence. Mr. Pagdin testified that, when trying to locate the boundaries of a lot, he looks for corner pins. He stated that, if he had used a fence post as the southwest corner of Lot 2535, as Mr. Hegel did, he would have compared Mr. Beauchamp's field notes regarding the length of the south boundary to what Mr. Pagdin observed in the field. Mr. Pagdin stated that, in doing so, it would have become apparent to him that the distance from the fence post to the North Thompson River was more than twice the distance specified in the survey notes. Mr. Pagdin testified that, given the inconsistencies between his field observations and Mr. Beauchamp's notes, he would have sought an opinion from a BC Land Surveyor.

He stated that, based on the information provided, he could not make a reliable finding of the boundaries of the property, which would result in the risk of a trespass. This was especially so if one relied on the use of a compass to determine the boundaries rather than set pins.

*The Commission's findings regarding due diligence*

According to the test set out in *Weyerhaeuser*, the Commission must first determine whether the contravention was reasonably foreseeable. The Commission finds that it was reasonably foreseeable that the boundary of Lot 2535 may not be properly ascertained, and that this could result in unauthorized harvesting of Crown timber.

The second question focuses on the actions taken by the Appellants to prevent the reasonably foreseeable problem from occurring. As stated in *Weyerhaeuser*:

Due diligence is determined by whether the person charged has exercised reasonable care in view of the particular circumstances. Exercising reasonable care implies taking reasonable actions to prevent things the particular accused can reasonably be expected to control, which depends on what the accused has knowledge of or can reasonably be expected to foresee.

Did the Appellants exercise all reasonable care by taking all reasonable steps to ensure that the contraventions did not occur? In this regard, the Commission notes that whether they took "all reasonable steps" must be considered in the specific context of the particular circumstances of the "particular case", as informed by the following factors: the gravity of the potential harm, the likelihood of the potential harm, the available alternatives to protect against the harm, the skill required, and the extent the accused could control the causal elements of the offence.

In terms of the "gravity of the potential harm", the Commission notes that the Appellants were aware that there was Crown land above the northwest boundary of Lot 2535. They were also aware of the streams and wetland located in and around that area, which contained fish and fish habitat. Accordingly, a failure to properly determine the boundaries could have serious consequences.

Regarding "likelihood of potential harm", the Commission found Mr. Pagdin to be a credible witness who was experienced in ascertaining boundaries for small and medium harvesting operations. His testimony indicated that based on standard and reasonable practices for operations of this kind, Mr. Hegel should have realized that there was significant uncertainty as to the locations of the boundaries, and that, without further clarification, the likelihood of potential harm was high.

Additionally, the Commission finds that having a professional survey by a BC Land Surveyor was an "available alternative" to protect against the potential harm to Crown timber (and possibly the environment). The Commission acknowledges that being duly diligent may not require a survey by a BC Land Surveyor in every case. It depends on the circumstances. In this case however, it should have been apparent to Mr. Hegel that there was uncertainty over the boundaries when he was unable to locate all of the corner pins. The Commission finds on the facts of this case that a professional survey would have been reasonable in the circumstances, and would not have been an unreasonable cost compared to the potential harm to the Crown, and penalties facing the Appellants, associated with erring in ascertaining the boundaries.

Thus, although Mr. Hegel made an effort to ascertain the boundaries, the Commission finds that his actions were inadequate to establish the defence of due diligence, given his failure to locate corner pins and measure all boundary distances against Mr. Beauchamp's survey notes, and the serious consequences that can flow from erring in ascertaining the boundaries.

Accordingly, the Commission finds that the Appellants have not established that the defence of due diligence applies to the contraventions.

*The Commission's findings regarding mistake of fact*

The Commission concludes that the defence of mistake of fact has not been established by the Appellants. While there is evidence that the Appellants mistakenly believed in a set of facts regarding the boundaries, the Commission finds that the Appellants did not act reasonably. Specifically, it was not reasonable for Mr. Hegel to conclude that he had properly ascertained the boundaries of Lot 2535. The Commission finds that a reasonable person in his circumstances would have looked for corner pins and would have measured all of the boundaries of Lot 2535, instead of relying on a fence post and then measuring only some of the boundaries. If Mr. Hegel had taken those steps, he would have realized that there were discrepancies between his observations in the field and Mr. Beauchamp's survey notes. He could have obtained a professional survey, but he did not do so.

Accordingly, the Commission finds that the Appellants have not established that the defence of mistake of fact applies to the contraventions.

*The Commission's finding regarding officially induced error*

The Appellants' original notice of appeal cited officially induced error as a defence. That defence was subsequently withdrawn in the Appellants' amended notice of appeal. The defence was then abandoned but finally raised again in the Appellants' closing argument.

The Commission has, accordingly, considered the test as set out in *Jorgenson* and is not satisfied that the Appellants have shown that their error was officially induced. The simple acquisition of the original Crown grant is not adequate to comply with the test of officially induced error. Specifically, it is clear that the Appellants did not seek, and then rely upon, official advice at any time when attempting to ascertain the boundaries of Lot 2535. They simply proceeded without any official direction, erroneous or otherwise.

Accordingly, the Commission finds that the Appellants have not established that the defence of officially induced error applies to the contraventions.

**4. Whether the penalty is appropriate in the circumstances.**

The Appellants submit that the penalty is excessive in the circumstances. They submit that, according to the Government's witness, Ken Chantler, Timber Pricing Coordinator for the Ministry, the Ministry would have sold the timber from Area A for \$8.00 to \$10.00 per cubic metre in the open market to recover their costs, and there would have been no extra costs for replanting the area. The Appellants also submit that they incurred significant costs in logging Area A because they used high lead logging, as opposed to skidders.

The Appellants also submit that the Ministry's scaling information is inaccurate because it includes more valuable wood from a second parcel of land that was harvested under the same timber mark. The Appellants argue that the timber from Lot 2535 was not worth as much as the Government claims.

The Government submits that an appraisal value of \$63.32 per cubic metre should be applied to the volume of 1749 cubic metres of timber harvested from Area A, based on the best available data. The Government further submits that the Commission should confirm the portion of the penalty for the cost of replanting Area A (\$16,734.30), and the \$5,000 penalty for contravening section 97(2).

The Government submits that Mr. Freeman of the Ministry made inquiries with the saw mills that bought the Appellants' logs. The Government submits that, based on the actual prices paid by saw mills for the timber, weighted for the proportion of volumes scaled, the total weighted selling price would have been \$98.89 per cubic metre.

The Government further submits that, based on documentary evidence regarding the date on which the Appellants' timber mark was issued (March 27, 2000), and when it was amended to include the second parcel (July 19, 2001), it is unlikely that the Ministry's scaling information includes wood from the second parcel.

Additionally, the Government submits that, to conduct the stump cruise of the area of unauthorized harvesting, each remaining stump over a certain size was measured, and its size, species, and estimated height were recorded as well as any visible defects.

The Government agrees that high lead logging was used in about 70 percent of Area A, but it submits that there was evidence of logging using skidders in the remainder of Area A.

The Government provided calculations indicating that, based on data from the stump cruise and the weighted selling price for the timber (498.89 per cubic metre), and allowing for logging costs of \$44.21 per cubic metre, the estimated economic benefit that the Appellants derived from the contraventions was over \$260,000. The scale data obtained from saw mills shows that the majority of the timber sold was fir (67.1%), followed by lodgepole pine (15.6%), cedar (10.4%), and other species.

In support of the Government's submissions, Ken Chantler, R.P.F., a Timber Pricing Coordinator with the Ministry, testified regarding the total economic loss suffered by the Crown as a result of the unauthorized harvesting. The Commission qualified Mr. Chantler as an expert regarding stumpage calculations. Mr. Chantler explained how he concluded that a stumpage rate of \$63.32 applies in this case.

#### *The Commission's Findings*

From the evidence, it is clear that the Appellants harvested far beyond the northern extent of Lot 2535. The Appellants' failure to properly ascertain the northern boundary resulted in an area of 6.73 hectares being unlawfully clear-cut, with approximately 1800 cubic metres of Crown timber from Area A being cut without lawful authority. Included in the harvest was timber of significant value which will

be discussed further below. In addition, there is evidence that the contraventions may have caused harm to fish habitat below Area A.

In the determination under appeal, the District Manager assessed a penalty of \$132,897.40, consisting of \$5,000 for the contravention of section 97(2), and \$127,897.40 for the contravention of section 96(1). The latter included \$111,163.14 (1815 cubic metres at a stumpage rate of \$61.25 per cubic metre) for the revenue foregone by the Crown as a result of the unauthorized harvesting of Area A, and \$16,734.30 for the estimated costs to reforest Area A.

The Commission has considered the factors in section 71(5) of the *Act*, as follows:

- There is no evidence of previous contraventions of a similar nature by the Appellants.
- The Commission finds that the contraventions were substantial. In Area A, a large volume of relatively valuable Crown timber was clear-cut from an area of 6.73 hectares without authority, due to the Appellants' failure to properly ascertain the boundaries of Lot 2535. The contraventions also may have caused damage to fish habitat as a result of changes to drainage patterns, but the evidence is not clear in that regard.
- The contraventions were neither repeated nor continuous, and there is no evidence that the contraventions were deliberate.
- Regarding the Appellants cooperativeness and efforts to correct the contravention, the Commission notes that Mr. Hegel appears to have cooperated with the R.C.M.P. and the Ministry's Special Investigator when they interviewed him, and there is some evidence that he assisted fisheries staff in mitigating environmental damage.
- There is evidence that the Appellants derived an economic benefit from the contravention.

In these circumstances, the Commission finds that a significant monetary penalty is warranted to compensate the Crown for its losses and to remove the economic benefit that the Appellants derived from the contravention. A monetary penalty will also provide specific and general deterrence.

The District Manager noted that, in this case, the maximum potential penalties for the contraventions of sections 97(2) and 96(1) of the *Code* were \$10,000 and \$898,000, respectively. Taking those maximums into account, along with the evidence of the net economic benefit that the Appellants received from selling the timber, the Commission finds that the penalty imposed by the District Manager was not unreasonable.

However, based on the new evidence and submissions of the Government, the Commission finds that the penalty for the contravention of section 96(1) should be varied by applying an appraisal value of \$63.32 per cubic metre to the volume of 1749 cubic metres, resulting in a figure of \$110,746.68. That amount is slightly less than the amount calculated by the District Manager (\$111,163.14). The

Commission confirms the portion of the penalty for replanting costs in Area A (\$16,734.30), and the \$5,000 penalty for contravening section 97(2).

Accordingly, the Commission finds that the penalty for the contravention of section 96(1) should be varied to \$127,480.98, which is a slight reduction from the amount levied by the District Manager. The Commission confirms the \$5,000 penalty for contravening section 97(2). Consequently, the total penalty is varied to \$132,480.98.

**5. Whether the Commission should order costs in favour of the Appellants.**

The Appellants requested that the Commission order costs in their favour on the grounds that the District Manager erred, and that this matter is a land dispute that falls under the *Land Title Act*, and not under the *Act*.

As stated earlier in this decision, the Commission rejects those grounds. Furthermore, the Commission's *Procedure Manual* states that the Commission has adopted a policy that costs should only be awarded in special circumstances. The Commission finds that there are no circumstances in this case that would warrant an award of costs in favour of the Appellants.

Accordingly, the Appellants' application for costs is denied.

**DECISION**

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

For the reasons provided above, the Commission confirms the District Manager's findings that the Appellants contravened section 96(1) and 97(2) of the *Code* when they harvested Area A. As requested by the Government, the penalty for the contravention of section 96(1) is varied by reducing it from \$127,897.40 to \$127,480.98. The \$5,000 penalty for contravening section 97(2) is confirmed. Accordingly, the total penalty is varied to \$132,480.98.

The appeal is dismissed.

"Alan Andison"

Alan Andison, Chair  
Forest Appeals Commission

October 12, 2007