Forest Appeals Commission

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APPEAL NO. 96/08

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act,* S.B.C. 1994, c. 41.

BETWEEN:	Rustad Bros. & Co. Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Barbara Fisher — Panel Chair
Rob Kyle — Member
Kristen Eirikson — Member

DATE OF HEARING: December 5, 1996 and January 10, 1997

PLACE OF HEARING: Victoria, B.C.

APPEARING:
For the Appellant: Peter Voith, Counsel
For the Respondent: Bruce Filan, Counsel
Jeff Leonen, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal by Rustad Bros. & Co. Ltd. ("Rustad") from a review decision of the Ministry of Forests (the "Ministry") dated February 20, 1996 that varied a determination by the Acting District Manager made December 13, 1995.

GROUNDS FOR APPEAL

Rustad objects to the Ministry's decision on two grounds:

1. The Ministry interpreted section 96(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*") in a manner that would make a licensee liable for any

unauthorized "damage" that may occur to Crown timber as a result of that licensee's harvesting operations, regardless of whether that "damage" had a consequence on the volume of timber available to the Crown or the amount of revenue available to the Crown on account of that timber. While Rustad's processor did scrape/rub Crown timber, it cannot yet be said to have caused the loss of any Crown timber or revenue. Alternatively, there has been no damage to Crown timber in any real or meaningful terms.

2. The nature of the harm arising from the incident is *de minimis* and does not warrant administrative sanction.

The sections of the *Code* relevant to this appeal are as follows:

96 (1) A person must not cut, remove, damage or destroy Crown timber unless authorized to do so
- (a) under an agreement under the *Forest Act* or under a provision of the *Forest Act*,
- (b) under a grant of Crown land made under the *Land Act*,
- (c) under the *Mineral Tenure Act* for the purpose of locating a claim,
- (d) under the *Park Act*,
- (e) by the regulations, in the course of carrying out duties as a land surveyor, or
- (f) by the regulations, in the course of fire control or suppression operations.

119 (1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, he or she may levy a penalty against the person up to an amount equal to
- (a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 16 of the Forest Act, and
- (b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.

(2) A penalty may not be levied under both section 117 and subsection (1).
(3) In addition to a penalty under section 117 or subsection (1), a senior official who determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, may levy a penalty against the person up to an amount equal to his or her 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.

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 an amount and in the manner prescribed.

(2) If a person's employee, agent or contractor ... contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.

...

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

(b) subject to any policy established by the Minister under section 122, may consider the following:

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

ISSUES

1. What is the proper interpretation of the word "damage" in section 96?

2. If there was damage within the meaning of section 96, was it of such an inconsequential nature in this case that the defence of *de minimus non curat lex* applies so as not to warrant any administrative action under section 96?

FACTS

In August 1995, during harvesting operations by Rustad at cutting permit 413, a Rustad processor operator scraped or rubbed approximately 32 trees located outside the authorized cut block. The logs were being skidded to a road that ran along one side of the cut block. The processor was being operated across the road. As the logs extended out the back of the processor approximately 10 metres, they hit the trees standing on the other side. As a result of the contact, the trees were scarred or gouged in numerous places.

This took place over an approximate three hour period when a supervisor was absent from the site. The 32 trees were spread out along a 200 - 400 metre stretch of the road. When the supervisor returned to the site and saw what was happening, he instructed the processor operator to run the equipment parallel to the road in order to avoid hitting more trees. Rustad then took steps to amend its Standard Operating Procedures to ensure that such an event would not happen again. These amendments were in place before any determination was made against the company.

Rustad has been in the forestry business for fifty years. In the first year of the *Code*'s operation it harvested approximately three quarters of a million cubic metres of timber. It employs up to 200 people, including contractors, and operates between 50 and 60 pieces of equipment in the bush on a daily basis. It logs from 50 - 100 blocks per year. This is the first and only determination made against Rustad under the *Code* to date. The company is very concerned about its public record, and the possible effects of a contravention on the application of the Performance Based Harvesting Regulation.

The Ministry set out to determine how much damage was done to the trees. Its evidence in December 1995 and again in February 1996 at the Review Panel hearing was that seven of the trees had sustained significant damage. This was based on the following criteria:

- exclusion of all trees with previous pathological indicators,
- exclusion of all trees with no evidence of wood fibre damage, and
- inclusion of only those trees with obvious visible fibre damage which would cause a reduction of one or more tree classes under a timber cruise conducted in accordance with Ministry standards.

(See Review Panel Decision, February 20, 1996.)

At the Commission hearing, the Ministry's evidence was that more than seven trees suffered damage. Approximately 14 trees had a total of 19 deeper scars where both layers of bark had been removed and the sapwood fibre had been gouged. Approximately 26 trees had a total of 47 scars where the inner and outer bark had been removed, in various sizes.

For the purposes of timber cruise compilation and timber appraisals, trees are classified into risk groups, on the basis of external indicators of decay. Risk Group 1 consists of healthy trees, Risk Group 2 trees with some kind of damage, such as scars, and Risk Group 3, trees showing multiple indicators of decay. Rustad's evidence was that before the incident, about 24 of the trees were classified in Risk Group 2. As a result of Rustad's actions, between 7 to 12 of the trees had moved from Risk Group 1 to Risk Group 2. The Ministry's evidence was that about 20 trees changed from Risk Group 1 to 2. In essence, all the 32 trees are now classified in Risk Group 2.

A change in Risk Group classification has implications for the volume of timber projected to be produced from that tree and for the actual stumpage that must be paid to the Crown. Calculated at today's rates, the evidence from both Rustad and the Ministry was that there was at most a 0.9 cubic metre loss of volume as a result of the processor damage. The stumpage rate to be paid for the scarred trees was reduced by $1.71 per cubic metre.

Rustad led evidence that little decay development would likely occur due to the nature of the scars and the fact that most of the trees were of the type that are

very decay resistant. Further, it was unlikely that any of the trees would die as a result of the damage.

It was acknowledged in the evidence that scarring of a tree places it under some stress. The degree of impairment and stress depends on the number of scars, and their size, depth and position. This can make a tree more susceptible to attack by insects or disease. The Ministry led evidence that the scarring and increased stress also makes a tree more susceptible to bark beetle infestation or attack. However, there was no evidence of any beetle infestation on the 32 trees, or any of the trees surrounding them. They have so far withstood two seasons of beetle flights, and the risk actually diminishes with time. This potential risk was not raised by the Ministry at the pre-determination hearing or the Review panel hearing.

On reviewing the evidence, the Commission concludes as follows:

- the damage to the trees was minor,
- the potential loss of volume was no higher than 0.9 cubic metres,
- it is unlikely that there will be any significant decay development as a result of the scars, and
- it is unlikely that there will be any bark beetle infestation to these trees as a result of greater susceptibility from the scarring.

DETERMINATION BY THE (ACTING) DISTRICT MANAGER - DECEMBER 13, 1995

The Acting District Manager determined that Rustad contravened section 96 of the Act and levied an administrative penalty under section 119. The amount of the penalty was $304.14, calculated as the amount of the stumpage and the average district bonus bid for the Small Business Forest Enterprise Program that may have been payable for the timber had it been harvested.

It was his opinion that the bark removed in this case constituted damage under section 96 because (a) the pictures and description suggested that the seven trees included in the recommended penalty billing were severely damaged and likely would lose volume through decay or wind damage, and value, and (b) the remaining 25 trees which were also damaged to a lesser degree, would also sustain some degrading losses and contribute to the overall loss. Although he conceded that the contravention was minor in nature, the Acting District Manager determined that some penalty was in order to provide a future deterrent.

REVIEW PANEL DECISION - FEBRUARY 20, 1996

The Review Panel Chair varied the Acting District Manager's determination by rescinding the penalty. He reviewed the evidence and concluded that it was insufficient to support a conclusion of the need for future deterrence. Although he agreed that this was a minor contravention of an inconsequential nature, the

Review Panel Chair was of the view that it would be inappropriate to rescind the District Manager's determination of a contravention of section 96. He said:

> Some record of the contravention must remain for future considerations much the same as a warning letter would remain, had one been issued instead. I am not prepared, therefore, to remove this incident from the company's record by rescinding the district manager's determination. It is appropriate that the contravention remain on the company's record for consideration when the district manager contemplated future incidents when levying a penalty on future determinations.
>
> I do not believe, however, that it is appropriate for this contravention to accrue to the licensee's performance records with respect to performance based harvesting provisions as I do not consider this incident to be a severe enough contravention. As there appears, at present, to be no "tolerance" in the performance based harvesting regulation with respect to the size or consequence of a contravention, I instruct the district manager to not consider this contravention with respect to any future application of the performance based harvesting provisions of the act or regulations against Rustad Bros. & Co. Ltd.

APPELLANT'S CASE

1. Interpretation of "damage" in section 96

Section 96(1) of the *Code* provides in part: "A person must not cut, remove, damage or destroy Crown timber unless authorized to do so...". Rustad submits that the word "damage" in this section includes only the kind of damage related to economic loss.

It argues that the word should be interpreted in accordance with the associated words rule:

> ...courts will often use the associated words rule to restrict the meaning of words in an "and/or" phrase to the broadest common denominator. In the case of s. 96(1), the broadest common denominator of the verbs contained in the provision is the fact that they can all represent a method of deleting Crown timber. Consequently, the more general terms contained in the phrase—"damage" and "destroy"—are restricted to a sense that is consistent with the broadest common denominator among all four terms—that is, the deletion of Crown timber.

Rustad also argues that this interpretation is consistent with an interpretation of section 96 in the context of other related provisions in the *Code*. First, section 119 is one of the penalty provisions that can be applied for a contravention of section 96. Section 119 indicates that the purpose of a penalty assessed is to compensate the Crown for a loss of revenue on account of the contravention. Even if a penalty is assessed under section 117, the Administrative Penalties Regulation, B.C. Reg. 166/95, Amended B.C. Reg. 244/95, indicates that such a penalty should be

calculated on volume, thus supporting an interpretation that there must be some economic loss in order for there to be a finding of damage under section 96.

Second, section 22(4) of the *Code* provides that the "holder of a major licence must prepare and obtain the district manager's approval of a silviculture prescription for an area where the holder has cut, removed, damaged or destroyed Crown timber in contravention of section 96." This contemplates a threshold of damage having been exceeded that would necessitate the preparation of a silviculture prescription. In this case, Rustad has not, and it is submitted can not, prepare a silviculture prescription with respect to the damage to the trees in this case.

Finally, Rustad argues that section 96 should be interpreted in a manner that will avoid an absurdity. The rule against absurdities should be applied if one interpretation of the provision will bring about "a more workable and practical result ...if the words invoked by the Legislature can reasonably bear it." It submits that its interpretation of "damage" brings about a more workable and practical result, giving as an example unavoidable damage to standing trees during a selective harvest, which could not reasonably be contemplated as a contravention of section 96.

In Rustad's submission, the minor nature of the damage that occurred in this case does not constitute "damage" as that word is used in section 96(1). Rustad emphasizes that this interpretation of section 96 does not mean that the *Code* generally protects only economic interests; some provisions protect broader values and others are more connected with specific values, including economic loss.

2. *De minimis*

Alternatively, Rustad submits that if there was damage within the meaning of section 96(1), it was of such a minor and inconsequential nature that does not warrant any administrative action. It cites several authorities supporting an application of the principle of *de minimis non curat lex* to minor breaches of provincial regulatory statutes (*R.* v. *Canadian Pacific Ltd.* (1995) 99 C.C.C. (3d) 97 (S.C.C.), *Reward* (1818), 2 Dods. 265, *R.* v. *G. (T)* [1990] A.J. No. 39, *R.* v. *Webster* (1981) 15 M.P.L.R. 60).

In Rustad's submission, the imposition of a record of contravention of the *Code* is a consequence far too severe considering the minor nature of the infraction, particularly taking into account Rustad's overall performance.

RESPONDENT'S CASE

1. Interpretation of "damage"

The Ministry submits that the restrictive interpretation urged by Rustad is inconsistent with the legislative values, principles and purposes contained in the *Code* as a whole. It cites the preamble to the *Code*, which states that its purpose is to seek sustainable use of forests. A more appropriate definition of damage is that

contained in the Shorter Oxford Dictionary: "loss or detriment caused by hurt or injury affecting estate, condition or circumstance."

Its position is that the associated words rule must be balanced against all other sources of legislative meaning: "In particular general words should not be restricted to their more specific analogous meaning where to do so would be contrary to the clear intention of the statute as a whole. ... the clear intention of the Act as a whole is to promote and conserve a wide variety of values derived from the forests, not merely economic values."

In the Ministry's submission, the language of section 119 does not support a limited interpretation of "damage" in section 96: "The fact that a senior official has a discretionary power to award a penalty based on the value and volume of timber affected by a section 96 contravention cannot be used to place a limit on or circumscribe the definition of 'damage' in that section." Section 119 is not the only penalty provision applicable; section 117 may be more a appropriate provision where loss of timber volume or economic value is not representative of the damage to Crown timber. With respect to section 22(4), subsection 1(b), (5) and section 30(5) are indications of an acknowledgment that a silviculture prescription will not be appropriate in every circumstance.

The Ministry argues that Rustad's interpretation of section 96 is not a "more workable and practical result" because economic revenue is not the only consideration. Many selective removal silviculture prescriptions are developed in order to conserve biological diversity, wildlife, wildlife habitat, scenic diversity and other forest resources: "... the Legislature clearly intended 'damage' to mean more than mere economic loss."

2. *De minimus*

The Ministry submits that non-economic loss is not a "mere trifle" and that section 96 was intended to include minor violations. The effect of applying the *de minimus* principle in this case would have significant effects for the conduct of forest practices in B.C.: "If the harm caused by the Appellant were continued in practice it would clearly be a matter which would weigh significantly in the public interest."

The *de minimis* principle has been applied in circumstances where a party faces imprisonment or the application of inflexible sentencing options. In this case, the Ministry argues that there is flexibility in the *Code* to assess whether a penalty is warranted at all. And where no penalty is levied under sections 117 or 119, the effect of the contravention for the purposes of the Performance Based Harvesting Regulation is minimal. The Ministry also referred to several case authorities that indicate the law on the application of this principle is neither settled nor clear: *Re Keiser and the Queen* (1990) 59 C.C.C. (3d) 440 (N.S.S.C.), *Regina* v. *Li* (1984) 16 C.C.C. (3d) 382 (Ont. H. C.).

Finally, the Ministry submits that the facts of this case are not so inconsequential as to support the application of the *de minimis* principle.

THE THIRD PARTY'S CASE

1. Interpretation of "damage"

The Forest Practices Board concurs with the views of the Ministry in this case. Essentially, it submits that "damage" in section 96 is used broadly, and encompasses injury to non-economic as well as economic values. Counsel also referred to the *Code*'s preamble, which "clearly shows that a purpose of the *Code* is to go beyond the historical view of forests as primary economic entities, and to 'respect the land', including 'ecological values'."

It says that if Rustad's interpretation of damage were adopted, the government would be faced with more proceedings like this case, where expert evidence is led to determine whether or not Crown revenues will be impacted:

> Clearly this undermines the goal of having simple and clear rules that are easily understood by all involved in the industry. Under the Appellant's interpretation, an official could not simply use section 96 as a basis for a stop work order when a person was damaging trees. Instead the official would have to determine whether the official had reasonable grounds to believe that a quantifiable loss of timber volume or revenue would be caused....This would be contrary to the preventable approach of the *Code* Act. The *Code* is meant to prevent and deter ecological damage to timber, not only to compensate the Crown for economic loss.

The balance of the Board's submission on this point was consistent with that of the Ministry.

2. *De minimis*

While the Board conceded that the *de minimis* principle might be appropriate in some cases, it was its view that:

> It would not be in the "public interest" to overlook a breach that took place over a period of some three hours, and involved injury to 35 trees, a number of which would likely lose some volume or value by the time of the harvest. The breach required repeated actions, and was not a momentary lapse.

The Board urged the Commission to consider the impact of not enforcing section 96 in this case: "In effect, the industry would be told that minor damage could be done to a public resource, and nothing - not even a finding of contravention with zero penalty - would be done."

DECISION

1. Interpretation of damage in section 96

Section 96 is one of the more general provisions of the *Code*. It falls under Part 5 (Protection of Forest Resources: General), Division 4 (Unauthorized Timber Harvesting and Trespass).

The *Code*'s broad purpose, as reflected in the Preamble, is to provide for the sustainable use of the forest resources in the province. Sustainable use is stated to include:

(a) managing forests to meet present needs without compromising the needs of future generations,

(b) providing stewardship of forests based on an ethic of respect for the land,

(c) balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations,

(d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and

(e) restoring damaged ecologies...

The Commission is of the view that the interpretation of damage as urged by Rustad is not consistent with the above stated values. While economic interests are important, damage to Crown timber may not necessarily include economic loss.

The Commission is not satisfied that the associated words rule (*noscitur a sociis)* is of much assistance in interpreting the meaning of "damage" in the context of this case. A restrictive interpretation may defeat the true intention of the Legislature. The Commission agrees with the cautions expressed by Cote in *The Interpretation of Legislation in Canada (Second Edition)* at page 163:

> *Noscitur a sociis* helpfully draws attention to the fact that a statute's context can indicate a meaning far more restrictive than that found in the dictionary. But its importance should not be exaggerated. Legal interpretation entails the consideration of numerous factors, and it may be necessary to ignore the restrictive view suggested by the immediate context if a more liberal approach is dictated by the legislator's overall environment. Although a good servant, *noscitur a sociis* may be a poor master. It can be misleading and should be handled with care.

Nor does the Commission agree that a broader interpretation results in an absurdity. Such a restrictive interpretation of damage in this section could in fact bring about a less workable and practical result, as illustrated by the Board in its submission. A broader meaning of damage does not include consequences that contradict values or principles considered important by the Commission. (See *Driedger on the Construction of Statutes*, Third Edition, pp. 85-86.)

The Commission also disagrees with Rustad's interpretation of section 96 in the context of sections 119 and 22(4) of the *Code*. While it is apparent that the amount of a penalty issued under section 119 is based on a calculation of economic loss, a penalty for a section 96 contravention is not necessarily issued under that section. An administrative penalty may be levied under section 117, and in serious cases, a

fine may be imposed under section 143. In minor cases, such as this one, no penalty need be levied at all.

The Administrative Remedies Regulation (B.C. Reg. 166/96, Amended B.C. Reg. 244/95) sets out maximum penalties which may be levied under section 117(1). In most cases, the amount is set out as a dollar figure. In a few cases, the maximum is described by a formula based on area or volume. (As well as section 96, see sections 67(2)(d) (harvesting or damaging trees that are required to be left standing or undamaged), 80 (failure to abate and remove fire hazards), 82 (failure to comply with a notice to abate or remove fire hazard), 100 (cut, remove, damage or destroy hay).)

The main purpose of a penalty levied under either section 117 or 119 is to ensure compliance with the *Code* (See *Canadian Forest Products Ltd.* v. *Government of B.C.* (Forest Appeals Commission Appeal No. 96/01, December 11, 1996)(unreported). While the amount of a penalty may compensate the Crown for economic loss, such a loss is not the only factor in determining the amount, nor is such loss a prerequisite for finding a contravention of section 96. It makes sense that the amount of a penalty bear some relationship to a loss of value, if any, suffered by the Crown in a particular case. However, all of the factors set out in section 117(4) should be considered by a senior official in determining whether a penalty is warranted under either section 117 or 119 and if so, the amount.

With respect to section 22(4), the district manager may exempt a person from this requirement under section 30(5).

Accordingly, the Commission agrees with the submissions of the Ministry and the Board in this case. The word "damage" in section 96 means damage in the ordinary sense of the word, and is not restricted to damage related to economic loss. While the damage to the trees in this case was minor, the Commission concludes that Rustad did contravene section 96.

2. Application of *De minimis*

The *de minimis* principle is based on the proposition that the Legislature does not intend to attach penal consequences to trivial or minimal violations of a provision (*R.* v*. Canadian Pacific Ltd*. (1995) 99 C.C.C. (3d) 97 (S.C.C.) at 134). This common law principle stems from early English authority:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex* - Where there are irregularities of very slight consequence it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked. (*Reward* (1818), 2 Dods. 265 at 269-70, 165 E.R. 1482 at 1484.)

The maxim was held to apply to a provincial or municipal offence of absolute liability in *R. v. Webster* (1981) 15 M.P.L.R. 60 at 68.

Most of the cases that have applied the principle outside of the criminal context have done so where there is no discharge provision in a provincial statute, and a person can incur a record of a provincial offence. Where a record is found to be disproportionately severe in relation to the nature of the offence, the courts have found that

> No better public good would be achieved by a finding of guilt.... Indeed, in my view, such a finding would trivialize the law and attract contempt and ridicule." (*R. v. G. (T)* [1990] A.J. No. 39)

The Commission is of the view that the principle of *de minimis* should not be applied in this case for the following reasons. First, while the damage was minor, it was not so inconsequential so as to amount to a "mere trifle". If the actions of Rustad were continued in practice, it cannot be said that this would "weigh nothing on the public interest."

Second, the infliction of a record in this case is not "inflexibly severe." No penalty was issued, and the Commission agrees with the Review Panel in this case that no penalty was justified. Finally, the Commission is of the view that there is some flexibility in the application of the Performance Based Harvesting Regulation so as not to prejudice licensees with a record of a minor contravention.

The Performance Based Harvesting Regulation , B.C. Reg. 175/95, Amended B.C. Reg. 243/95 ("PBH Regulation").

Rustad argued before the Review Panel, and before the Commission, that a contravention of such a minor nature, as occurred here, could jeopardize future cutting permits if the Performance Based Harvesting provisions of the *Code* and Regulations were applied. The Review Panel Chair was concerned enough about this issue that he instructed the district manager not to consider this contravention by Rustad in any future application of this regulation. In the Commission's view, the Review Panel Chair did not have the authority to instruct the district manager in this way, as to do so would fetter the district manager's discretion in a possible future matter.

However, the Commission is of the view that this contravention by Rustad, with no penalty levied, would have very little, if any, effect on its ability to obtain future cutting permits.

If a licensee has contravened a requirement of the *Code*, in certain circumstances the district manager may refuse to issue a cutting permit (section 63.1(1) of the *Forest Act)*. Section 3(2) of the PBH Regulation permits the regional or district manager to reject an application for a permit under the Act or *Code* or for an agreement where the applicant has, inter alia,

> (iii) within the previous 2 years, failed to comply with a requirement of the *Code*, regulations or standards referred to section 63.1(1)(b)(iv) of the [Forest] Act, and that failure has resulted in the applicant
>
> (A) causing damage to the environment or forest resources,

(B) being convicted under section 143(1), (2) or (3), or section 145(2) of the *Code*, or
(C) being penalized under section 117 or 119 of the *Code* on more than one occasion.

When read in its entirety, this provision does not appear to contemplate the consideration of minor contraventions such as occurred in this case, particularly where a penalty has not been levied. The application of section 3(2) is discretionary and unlikely to be applied where contraventions are minor. Subparagraph (C) limits the application of the regulation to situations where an applicant has been penalized on more than one occasion, which is not the situation before this Panel. Further, the provision is time limited. It allows only contraventions within the previous 2 years to be taken into account. Thus we disagree with the Review Panel Chair's conclusion that there appears to be no tolerance in this regulation with respect to the size or consequence of a contravention. In the Commission's view, it is highly unlikely that Rustad will be prejudiced in future applications of the PBH Regulation as a result of this contravention.

Future penalties under the Code and the public record

Rustad also argued that its record is now available to Ministry officials to increase penalties for future determinations, and to any member of the public to use for any purpose he or she may see fit.

With respect to the possibility of increased future penalties, a contravention may be considered by a senior official when deciding on an appropriate monetary penalty for a subsequent contravention. Under section 117(4)(b)(i), this must be previous contravention *of a similar nature.* Thus there is protection afforded to the licensee, as this provision appears to be directed towards repeat offenders. The nature of the contravention should determine whether it is a relevant consideration in determining a penalty for a subsequent contravention.

What is generally available to the public is the simple fact of the record, with no details describing the incident giving rise to a contravention. See Exhibit "B", a portion of the Annual Report of Compliance and Enforcement Statistics for the Forest Practices *Code*. It lists licensees by name, the number of contraventions over the reported period, whether or not a penalty was issued and whether the matter is under review or appeal. Evidence in this case showed that the description of the contravention for Rustad in Exhibit "B" was incorrect.

Notwithstanding this, the Commission does not consider this last concern to be paramount in deciding whether or not the *de minimus* rule ought to be applied in this case.

For these reasons, the Commission considers that the provisions of the *Code* and the PBH Regulation allow some flexibility in their application to take proper account of minor contraventions.

Under section 138(1)(a) of the *Code*, the Commission confirms the decision appealed from and upholds the determination of a contravention of section 96 with no penalty.

Barbara Fisher, Panel Chair
Forest Appeals Commission

March 26, 1997