BRITISH COLUMBIA

File: 23060-20 – DHW - 29215
00135624

April 14, 2014

McBride Community Forest Corporation
c/o Marc von der Gonna, General Manager
100 Robson Center
P.O. Box 519
McBride, British Columbia, V0J 2E0

Dear Marc von der Gonna:

Re: Contravention Determination and Notice of Penalty Levied under Section 71 (2) (a) of the *Forest and Range Practices Act* (FRPA)

This is further to my letter dated November 25, 2013 and the McBride Community Forest Corporation's (MCFC) opportunity to be heard (OTBH) on January 16, 2014 respecting the alleged contraventions of sections 21(1), 52(1) and 52(3) of the *Forest and Range Practices Act* (FRPA). I have now made my determination in this matter, as described below.

Authority

The Minister of Forests has delegated to me, under section 120.1 of FRPA, the authority to make determinations with respect to administrative contraventions and penalties under section 71 of FRPA and remediation orders under section 74 of FRPA.

Legislation

Forest and Range Practices Act.

Compliance with plans

21 (1) The holder of a forest stewardship plan or a woodlot licence plan must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

Ministry of Forests
Prince George Natural Resource District
2000 South Ospika Blvd.
Mailing Address:
2000 S. Ospika Blvd.,
Prince George, British Columbia,
V2N 4W5
Tel: (250) 614-7400
Fax: (250) 953-0413

Unauthorized timber harvesting

52 (1) A person must not cut, damage or destroy Crown timber unless authorized to do so

(a) under this Act, the *Forest Act* or an agreement under the *Forest Act*,

(b) by the minister, for silviculture, stand tending, forest health, abating a fire hazard related to wildfires or another purpose,

(b.1) under the *Wildfire Act*,

(c) under a grant of Crown land made under the *Land Act*,

(d) under the *Park Act*, or

(e) under the regulations, in the course of carrying out activities

(i) under an authorization referred in section 51 or 57, or

(ii) that are incidental to or required to carry out activities authorized or approved under this Act, the *Forest Act*, the *Range Act* or another prescribed enactment.

(3) A person must not remove Crown timber unless authorized to do so

(a) under the *Forest Act* or an agreement under the *Forest Act*,

(b) under a grant of Crown land made under the *Land Act*, or

(c) under the *Park Act*.

Result or Strategy in MCFC's FSP

6.1.1.2 Landscape Units

Legal Reference:	Established under FPC 4(1) and (2) Order to Establish Crescent Spur, Lower Morkill Cushing, Forgetmenot, Upper Morkill, North Trench and Goat Landscape Unit Objectives, January 30, 2006

Result or Strategy

The holder of this FSP will conduct forest practices consistent with the objectives set out in this order within the FDU of this FSP.

Scale of Measurement:	Each OGMA
Map Reference:	OGMA identified on FSP content maps.

Issues

The following issues are relevant to this case:

1. Has there been a contravention of section 21(1), 52(1) or 53(3) of FRPA?
2. Do any of the defences of due diligence, mistake of fact or officially induced error apply?
3. If there has been a contravention, what amount of penalty, if any, is appropriate?
4. If there has been a contravention, is a remediation order appropriate?

After considering all the evidence presented to me, and for the reasons presented below, it is my determination that:

1. MCFC did contravene sections 21(1), 52(1) and 53(3) of FRPA;
2. None of the defences apply;
3. It is appropriate to levy a penalty in the amount of $3,000.00 under section 71(2)(a)(i) of FRPA, which, subject to the stay referred to below, must be paid by June 16, 2014.
4. It is appropriate to order remediation.

The rationale for my contravention determination and the decisions to levy a penalty and order remediation is set out below.

Summary of the evidence and findings of fact.

Based on the evidence, I am satisfied that the following facts are **not** in dispute:

- MCFC is the holder of Community Forest Agreement K1H and holds exclusive harvesting rights for the area in question.
- The area in question is included in Community Forest Agreement K1H.
- MCFF was issued the cutting authority for Cutting Permit (CP) 993 on December 23, 2010.
- MCFC was actively logging in Cutting Permit 993 Block 5.
- Contractor Norm Goodell was harvesting timber with the authorization of MCFC in CP 993 Block 5.
- The timber in question was harvested and removed by Contractor Norm Goodell on behalf of MCFC in CP 993 Block 5 and an adjacent area in March and April 2011.

- Legal Old Growth Management Areas (OGMAs) have been established in the Robson Valley.
- The MCFC has an approved Forest Stewardship Plan (FSP) which acknowledges the location of OGMAs throughout their tenure area.
- A Site Plan was produced by MCFC that clearly identifies the OGMA in question and its boundary.
- Approval was not granted to alter this OGMA boundary.
- The OGMA area boundary was not flagged in the field.
- The total size of the OGMA is 1,111 ha.
- A total of 2.4 ha of Crown timber was harvested; of this amount, 0.9 ha was harvested from within the OGMA.
- The harvested area was partial cutting, not clearcut.
- A total of 458.34 m3 of wood was removed from CP 993 block 5 and the area of alleged contravention to processing facilities.

With respect to the facts that **are** in dispute, Ministry staff presented the following evidence:

- The OGMA value was known and was not altered or amended throughout the planning, authorization and harvesting period in question.
- A GPS survey and stump cruise was under taken by Ministry staff and 176 stumps were surveyed within the 0.9 ha area outside the area authorized by CP 993 Block 5.
- The volume of unauthorized Crown timber removed as a result of the alleged contravention was determined by trained, experienced and qualified ministry staff to be 238.0 m3.

In turn, you presented the following evidence on behalf of MCFC:

- MCFC has proposed that the legal description of the OGMA line work does not provide the level of detail necessary to determine boundaries with sufficient accuracy.
- MCFC provided evidence in other areas that indicate the OGMA line work can vary.
- OGMA boundary marking is not a requirement under legislation.
- The contractor authorized by MCFC to undertake harvesting operations was knowledgeable of the area and experienced and therefore it was not necessary to flag the OGMA boundary in the field.

- The OGMA was only partially harvested and therefore retains a portion of its ecological and biological value.

- MCFC provided volume, cost and economic benefit estimates for the alleged contravention area which challenges the volume estimate for the contravention area made by FLNRO staff. Marc von der Gonna presented calculations based on the fact that the area of the potential contravention was 0.9 ha out of a total 2.4 ha harvested. Therefore the volume associated within the contravention area would be a comparable fraction of the total volume, which was estimated by MCFC to be approximately 158.75 m3.

Having regard to all of the foregoing evidence, I have made the following findings with respect to the facts in dispute:

- Having reviewed the OGMA boundaries for the alleged non compliance areas, I can see no evidence that the boundaries are incorrect in the area in question on any applicable maps.

- The site plan map signed and sealed by the Marc von der Gonna on December 16, 2010 clearly identifies all block boundaries and the OGMA boundary in the correct locations.

- An OGMA is a unique area and that while it was not completely harvested its function as an Old Growth area which conserves a multitude of values has been seriously compromised.

- During the hearing there was some discussion concerning the total volume harvested from CP 993 Block 5 and the alleged contravention area. It was agreed by all parties at the Hearing that the total volume harvested was the FLNRO determined volume of 423.34 m3 plus 35 m3 delivered to TRC for a total of 458.34 m3.

- The area affected by the contravention was 0.9 ha and a total of 176 stumps were identified by FLNRO staff. Therefore a volume of wood associated with 176 stumps was harvested and removed without authority. The volume associated with those 176 stumps was determined by trained, experienced and qualified professionals to be 238 m3. I prefer and give greater weight to this evidence than to the argument MCFC presented regarding the proportion of the contravention area relative to the total area harvested. I therefore find that the total volume of Crown timber harvested without authority was 238 m3 and that this volume of timber was removed from the site for processing.

- I find that the harvesting of the 0.9 ha within the OGMA was partial cutting and, based on the uncontradicted evidence of the investigating officer, greater than 50% of the volume was removed from that area.

- I find that in harvesting 0.9 ha of the OGMA, MCFC failed to achieve the result specified in its FSP that required it to ensure the integrity of OGMAs identified on FSP content maps consistent with the objectives set out in the Order to Establish Crescent Spur, Lower Morkill Cushing, Forgetmenot, Upper Morkill, North Trench and Goat Landscape Unit Objectives, dated January 30, 2006.

I conclude that the facts set out above support findings of contravention of sections 52(1) and (3) and section 21(1) of FRPA, provided the defences set out in section 72 of FRPA do not apply.

Do any defences apply?

MCFC raised the defence of due diligence, which is one the defences provided for in section 72 of FRPA. I conclude that the facts set out above do not support this defence for the following reasons:

For the defence of due diligence to succeed, the person raising it must have taken all reasonable care to avoid the contravention. This does not require achieving a standard of perfection or doing everything that could possibly be done to prevent a contravention, but it does require the person to take all measures that would reasonably be expected in the circumstances to avoid contraventions.

The due diligence of a corporation will turn on whether or not the acts or omissions that led to the contravention were directed or approved by the corporation, and, if not, whether the directing or controlling mind of the corporation established a proper system to prevent the contravention and whether the corporation took reasonable steps to ensure the effective operation of that system.

The question of whether a person is a directing or controlling mind of a corporation turns on whether the discretion conferred on the person amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy, rather than to simply follow or implement such policy. In this case, I find that Marc von der Gonna, the General Manager of MCFC was the directing mind of MCFC with the authority to design and supervise the implementation of corporate policy.

I find that Mr. von der Gonna did not direct or approve the acts that led to the contraventions. However, I find that Mr. von der Gonna did not establish a proper system to prevent the contraventions or take reasonable steps to ensure the effective operation of any preventative system.

MCFC has maintained that boundary marking of the OGMA was not necessary as the contractor was experienced, knowledgeable and familiar with the area in question. The results, however, suggest otherwise. Despite the experience, knowledge and familiarity with the area of its contractor, the contractor nevertheless harvested 0.9 ha of the OGMA. To rely solely on the experience, knowledge and familiarity of a contractor to protect Crown resources, especially the unique values associated with OGMAs, without any markings on the ground, is a highly risky approach to operations that is bound to fail sooner or later. It should not come as a surprise that the OGMA was breached given the lack of boundary markers and given that there are no other clearly identified features, such as a road, stream, power or rail line delineating, or providing guidance as to the whereabouts of, the OGMA's boundaries.

I note that MCFC did not provide any indication that it intended to adopt a different policy or approach to marking OGMAs in the future.

MCFC maintains that it provided their contractor with a map clearing identifying the OGMA. While Norm Goodell could not specifically remember if he received a map or not during an interview with Ministry staff in October 2013, I accept that he probably was provided with a map with the contract documents signed on March 11, 2011, since a map is a typical component of a logging contract. However, the fact that Mr. Goodell could not recall whether or not he was given a map suggests that MCFC did not take the time to review the map with him, and, in particular, the location of OGMAs on the map.

Further, there is no evidence of any pre-work meetings having taken place in either the field or in MCFC's office in which the location of OGMAs was reviewed, or of any inspections having been carried out during harvesting to ensure that harvesting only occurred outside the boundaries of the OGMA.

I conclude that all reasonable care was not taken by MCFC to prevent the contraventions in this case and that the defence of due diligence must fail.

MCFC raised the defence of Mistake of Fact in relation to the location of the OGMA boundary. I conclude the facts set out above do not support this defence for the following reasons:

For a reasonable mistake of fact defence to be successful, a person must prove on a balance of probabilities that they reasonably believed in a mistaken fact that, if true, would establish that they did not contravene the provision.

While OGMA maps can be printed at small scales which could prevent the accurate determination of boundaries, there is no indication that the map source for this data was incorrect. This is confirmed by the fact that the site plan map signed and sealed by Marc von der Gonna on December 16, 2010 clearly identifies all block boundaries and the OGMA boundary correctly and in a form which could be flagged in the field.

While Mr. von der Gonna presented evidence that OGMA map line work can vary, there is no indication that any of the OGMA boundaries in the contravention area in this case have varied during the planning, authorization or harvesting stages.

I find that there was no mistaken belief with respect to the OGMA boundaries, and accordingly, the mistake of fact defence must fail.

MCFC did not raise the defence of Officially Induced Error in relation to the alleged contraventions and I find that the facts do not support the application of that defence.

Is a penalty appropriate and if so how much?

Under section 71(2)(a)(i) of FRPA and section 13(2) of the Administrative Orders and Remedies Regulation, I am authorized to impose a penalty of up $90,000 for each of the contraventions of sections 52(1) and (3). The maximum amount is calculated by multiplying the area affected (0.9 ha) by $100,000.

Under section 71(2)(a)(i) of FRPA and section 12(c) of the Administrative Orders and Remedies Regulation, I am authorized to impose a penalty of up to $50,000 for the contravention of section 21(1).

Alternatively, under section 71 (2) (a) (ii) of FRPA, I may refrain from levying a penalty if I consider the contravention to be trifling and that it is not in the public interest to levy a penalty. If I do levy a penalty, I must consider the following factors in FRPA section 71 (5) (a) (ii):

(a) MCFC's previous contraventions, if any, of a similar nature;

MCFC has not had any contraventions of a similar nature of which I am aware.

(b) the gravity and magnitude of the contraventions;

The fact that 238 m3 of Crown timber was cut and removed without authority is exacerbated by the fact that the timber was cut and removed from an Old Growth Management Area. OGMAs are unique features which protect ecological and biological values that cannot be replaced in the short or medium term through silviculture treatments. The value of OGMAs is clearly identified at all levels of planning, where they, along with other special values, are accorded priority status. In this case, 0.9 ha of an OGMA with an overall size of 1,111 ha, was impacted. While the magnitude of the contraventions is small, and the 0.9 ha of the OGMA that was affected retains some of its ecological and biological value because it was subject to partial cutting only, that portion has nevertheless been compromised. I find that breaching an OGMA even by this small amount is not a trivial matter.

While it is within the authority of a district manager to approve planned minor amendments to OGMA boundaries. A request specific to this area was not made by MCFC or granted and there is no indication at this time that an planned amendment would have been considered to allow harvesting had an application been made by MCFC.

Further, it is noteworthy that the harvesting occurred adjacent to a public highway and, as a result of its profile, has been the subject of considerable public comment and complaint.

It concerns me that the damage could easily have been prevented if more care had been taken to protect the OGMA. This is not a case where the licensee barely missed reasonable expectations of diligence; rather, this is a case where the licensee fell far short of any reasonable expectations of diligence. MCFC takes the position that it is reasonable to expect an unflagged OGMA boundary that was not identifiable through other features such as streams, roads, power or rail lines, to have been identified by an experienced and locally knowledgeable contractor in the field. I consider that not only to be inconsistent with normal forestry practices of identifying values in the field that are potentially at risk, but inconsistent with the taking of reasonable care to protect public resources and avoid contraventions. Further, I note that MCFC did not provide any indication that it intended to adopt a different policy or approach to marking OGMAs in the future.

I consider the gravity of these contraventions to be quite significant owing to the standard of care demonstrated by the licensee, the fact that an area that is supposed to be given special protection was somewhat compromised, and the fact that it occurred in a highly visible area.

(c) whether the contravention was repeated or continuous;

The contraventions were not repeated or continuous.

(d) whether the contraventions were deliberate;

I find that the contraventions were not done deliberately but resulted from taking insufficient care.

(e) any economic benefit MCFC derived from the contraventions;

MCFC would have benefitted from some savings by not having to mark the OGMA or taking the time to properly review the maps with the contractor or carry out monitoring of the contractor's work. MCFC paid stumpage on the Crown timber but would have profited from the sale of the timber on the market. Evidence submitted by the investigating officer, which I accept, indicated that the timber had a market value of $10,145.94, that logging costs would have amounted to $6,961.51, and that stumpage of $192.78 had been paid on the timber, for a total benefit of $2,991.65 to MCFC.

Assuming that MCFC complies with the remediation order, which accompanies my determination letter, to establish an 0.9 ha area from within its harvesting landbase with comparable stand composition and elevation to the impacted OGMA, to make up for the lost 0.9 ha of OGMA, MCFC should incur equivalent costs and losses that reduces the economic benefit derived from these contraventions to zero. On the strength of this assumption, I estimate MCFC's economic benefit to be zero.

(f) MCFC's cooperativeness and efforts to correct the contravention;

MCFC failed to provide documentation requested by FLNRO staff on a number of occasions.

(g) any other considerations that the Lieutenant Governor in Council may have prescribed.

There are none.

Having regard to the facts of this case and the above factors, I feel it is appropriate to levy a total penalty in the amount of $3,000.00 in relation to sections 52(1) and (3) and section 21(1) of FRPA. My reasons are as follows:

While the magnitude of the contraventions is very small, they are significant in terms of the standard of care demonstrated by MCFC, the fact that an OGMA was breached, and their negative impact on visuals.

MCFC was less than cooperative with investigators, and the penalty amount would have been higher if MCFC had any previous contraventions of a similar nature, if the contraventions had been repeated or continuous, if they had been deliberate, or if a larger portion of the OGMA had been harvested.

Finally, the fact that MCFC did not provide any indication that it intended to adopt a different policy or approach to marking OGMAs in the future suggests that MCFC does not fully appreciate the level of risk inherent in the approach it took in this case.

It is important to levy a penalty that will raise MCFC's level of performance to a standard that should reasonably be expected of licensees operating on Crown land, and to make others in the industry aware that the results achieved in this case are not acceptable.

Is it appropriate to issue a remediation order?

Having found MCFC in contravention of sections 52(1) and (3) and section 21(1) and in light of my findings of fact, I have decided that it is appropriate to issue a remediation order requiring MCFC to set aside an equivalent portion of land for an OGMA and to replant the harvested portion, for the following reasons:

Although only a very small part of the OGMA was harvested and that part retains some of its ecological and biological value, the effectiveness of that portion of the OGMA has nevertheless been compromised. That should be rectified by adding an equivalent area, with a similar stand composition and elevation, to an existing OGMA and replanting the harvested area.

A remediation order accompanies my determination.

Determination does not forestall other actions that may be taken.

Please note that this determination does not relieve MCFC from any other actions or proceedings that the government is authorized to take with respect to the contraventions described above.

Opportunity for correcting this determination.

For 15 days after making my contravention determination and penalty determination under section 71, I am authorized under section 79 of FRPA to correct certain types of obvious errors or omissions. I may do this on my own initiative or at your request. If you think there are valid reasons to correct the determination, you may contact me at (250) 614 - 7400 within this 15 day period.

Opportunities for review and appeal.

If you have new information that was not available at the time I made this determination, you may request a review of my determination on the basis of this new information. A request for review must be in writing, must be signed by you, or on your behalf, and must contain:

a. your name and address; and the name of the person, if any, making the request on your behalf;
b. the address for serving a document to you or the person acting on your behalf;
c. the new evidence that was not available at the time this determination was made; and
d. a statement of the relief requested.

This request should be directed to me, at Prince George Natural Resource District, 2000 South Ospika, Prince George, British Columbia, V2N 4W5 and I must receive it ***no later than three weeks*** after the date this notice of determination is given or delivered to you. If you request a review, you may appeal the decision made after the completion of the review to the Forest Appeals Commission.

The provisions governing reviews are set out in section 80 of FRPA and in the Administrative Review and Appeal Procedure Regulation. Please note the **3 week time limit** for requesting a review.

Alternatively, if you disagree with this determination, you may appeal directly to the Forest Appeals Commission.

The appeal request must be signed by you, or on your behalf, and must contain:

a. your name and address; and the name of the person, if any, making the request on your behalf;
b. the address for serving a document to you or the person acting on your behalf;
c. the grounds for appeal;
d. a statement of the relief requested; and
e. a copy of this determination.

The Forest Appeals Commission must receive the appeal ***no later than three weeks*** after the date this notice of determination is given or delivered to you.

The provisions governing appeals are set out in sections 82 through 84 of FRPA, in sections 131 through 141 of the *Forest Practices Code of British Columbia Act*, and in the Administrative Review and Appeal Procedure Regulation. To initiate an appeal, you must deliver a notice of appeal, together with the requisite supporting documents, to the Forest Appeals Commission. A notice of appeal may be delivered to the following address:

The Registrar, Forest Appeals Commission
PO Box 9425, Stn. Prov. Govt.
Victoria, BC V8W 9V1

Please note the **3 week time limit** for delivering a notice of appeal.

Determination is stayed pending review or appeal.

Under section 78 of FRPA, my contravention determination and penalty determination under section 71, and remediation order under section 74, are stayed until you have no further right to have this determination reviewed or appealed, after which time they take immediate effect.

Performance Record.

As you are the holder of an agreement under the *Forest Act*, my determinations under section 71 will become part of your performance record, pursuant to section 85 (2) of FRPA, subject to decisions made on review or appeal.

Payment of Stumpage.

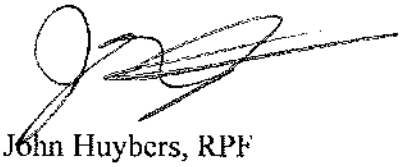
Under section 103 (3) of the *Forest Act*, a person who cuts, damages, destroys or removes Crown timber without authorization must pay stumpage. The amount of stumpage is based on:

- a determination under section 103 (3) of the *Forest Act* of the volume or quantity of timber that has been cut, damaged, destroyed or removed; and
- a stumpage rate determination under section 105 (1) of the *Forest Act*.

As the Minister's designate, I am authorized to make a determination of volume or quantity under section 103 (3) of the *Forest Act*. I determine that MCFC cut and removed 238 m3 without authorization. Please note that the *Forest Act* does not provide for review or appeal of my determination under section 103 (3), however, you may wish to consult your legal counsel with respect to other options that may be available to you, such as judicial review.

I will now forward this file to the appropriate Ministry employee in the Omineca Region to determine a stumpage rate under section 105 (1) of the *Forest Act*. Please note that the determination of a stumpage rate is subject to appeal under the *Forest Act*. It should be noted that MCFC paid stumpage on this 238 m3 at the rate prescribed for the area of CP 993 Block 5.

Yours truly,



John Huybers, RPF
District Manager
Prince George Natural Resource District

pc: Ian Brown, Compliance Leader, Prince George Natural Resource District
Compliance and Enforcement Branch
Forest Practices Board

BRITISH COLUMBIA

File: 23060-20 – DHW - 29899
00135624

March 26, 2015

McBride Community Forest Corporation
c/o Marc von der Gonna, General Manager
100 Robson Center
P.O. Box 519
McBride, British Columbia, V0J 2E0

Dear Marc von der Gonna:

Re: Contravention Determination and Notice of Penalty Levied under the *Forest and Range Practices Act*

This is further to my letter dated November 18, 2014 and the McBride Community Forest Corporation's (MCFC) opportunity to be heard (OTBH) on January 22, 2015 respecting the alleged contraventions of sections 51(1) and 50(1) of the Forest Planning and Practices Regulation (FPPR), and sections 52(2) and 52(3) of the *Forest and Range Practices Act* (FRPA). I have now made my determination in this matter, as described below.

Authority

The Minister of Forests, Lands and Natural Resource Operations has delegated to me, under section 120.1 of FRPA, the authority to make determinations with respect to administrative contraventions and penalties under section 71 of FRPA and remediation orders under section 74 of FRPA.

Legislation

Forest Planning and Practices Regulation

Restrictions in a riparian management area

50 (1) A person must not construct a road in a riparian management area, unless one of the following applies:

Ministry of Forests, Lands and Natural Resource Operations
Prince George Natural Resource District
2000 South Ospika Blvd.
Mailing Address:
2000 S. Ospika Blvd.,
Prince George, British Columbia,
V2N 4W5
Tel: (250) 614-7400
Fax: (250) 953-0413

(a) location the road outside the riparian management area would create a higher risk of sediment delivery to the stream, wetland or lake to which the riparian management area applies;
(b) there is no other practicable option for locating the road;
(c) the road is required as part of a stream crossing.

Restrictions in a riparian reserve zone

51 (1) An agreement holder must not cut, modify or remove trees in a riparian reserve zone, except for the following purposes:

(a) felling or modifying a tree that is a safety hazard, if there is no other practicable option for addressing the safety hazard;
(b) topping or pruning a tree that is not wind firm;
(c) constructing a stream crossing;
(d) creating a corridor for full suspension yarding;
(e) creating guyline tiebacks;
(f) carrying out a sanitation treatment;
(g) felling or modifying a tree that has been windthrown or has been damaged by fire, insects, disease or other causes, if the felling or modifying will not have a material adverse impact on the riparian reserve zone;
(h) felling or modifying a tree under an occupant licence to cut, master licence to cut or free use permit issued in respect of an area that is subject to a licence, permit, or other form of tenure issued under the *Land Act*, *Coal Act*, *Geothermal Resources Act*, *Mines Act*, *Mineral Tenure Act*, *Mining Right of Way Act*, *Ministry of Lands, Parks and Housing Act* or *Petroleum and Natural Gas Act*, if the felling or modification is for a purpose expressly authorized under that licence, permit or tenure;
(i) felling or modifying a tree for the purpose of establishing or maintaining an interpretive forest site, recreation site, recreation facility or recreation trail.

(2) An agreement holder who fells, tops, prunes or modifies a tree under subsection (1) may remove the tree only if the removal will not have a material adverse effect on the riparian reserve zone.

(3) An agreement holder must not carry out the following silviculture treatments in a riparian reserve zone:

(a) grazing or broadcast herbicide applications for the purpose of brushing;
(b) mechanized site preparation or broadcast burning for the purpose of site preparation;
(c) spacing or thinning.

Forest and Range Practices Act

Unauthorized timber harvesting

52 (1) A person must not cut, damage or destroy Crown timber unless authorized to do so

(a) under this Act, the *Forest Act* or an agreement under the *Forest Act*,
(b) by the minister, for silviculture, stand tending, forest health, abating a fire hazard related to wildfires or another purpose,
(b.1) under the *Wildfire Act*,

(c) under a grant of Crown land made under the *Land Act*,
(d) under the *Park Act*, or
(e) under the regulations, in the course of carrying out activities
(i) under an authorization referred in section 51 or 57, or
(ii) that are incidental to or required to carry out activities authorized or approved under this Act, the *Forest Act*, the *Range Act* or another prescribed enactment.

(3) A person must not remove Crown timber unless authorized to do so
(a) under the *Forest Act* or an agreement under the *Forest Act*,
(b) under a grant of Crown land made under the *Land Act*, or
(c) under the *Park Act*.

Forest Planning and Practices Regulation.

Stream riparian classes

47 (1) In this section, "**active flood plain**" means the level area with alluvial soils, adjacent to streams, that is flooded by stream water on a periodic basis and is at the same elevation as areas showing evidence of
(a) flood channels free of terrestrial vegetation,
(b) rafted debris or fluvial sediments, recently deposited on the surface of the forest floor or suspended on trees or vegetation, or
(c) recent scarring of trees by material moved by flood waters.

(2) A stream that is a fish stream or is located in a community watershed has the following riparian class:
(a) S1A, if the stream averages, over a one km length, either a stream width or an active flood plain width of 100 m or greater;
(b) S1B, if the stream width is greater than 20 m but the stream does not have a riparian class of S1A;
(c) S2, if the stream width is not less than 5 m but not more than 20 m;
(d) S3, if the stream width is not less than 1.5 m but is less than 5 m;
(e) S4, if the stream width is less than 1.5 m.

(3) A stream that is not a fish stream and is located outside of a community watershed has the following riparian class:
(a) S5, if the stream width is greater than 3 m;
(b) S6, if the stream width is 3 m or less.

(4) Subject to subsections (5) and (6), for each riparian class of stream, the minimum riparian management area width, riparian reserve zone width and riparian management zone width, on each side of the stream, are as follows:

Riparian Class	Riparian Management Area (RMA) (metres)	Riparian Reserve Zone (RRZ)(metres)	Riparian Management Zone (RMZ)(metres)
S1-A	100	0	100
S1-B	70	50	20
S2	50	30	20
S3	40	20	20
S4	30	0	30
S5	30	0	30
S6	20	0	20

(5) If the width of the active flood plain of a stream exceeds the specified width for the riparian management zone, the width of the riparian management zone extends to the outer edge of the active flood plain.

(6) The minister may specify a riparian reserve zone for a stream with a riparian class of S1-A if the minister considers that a riparian reserve zone is required.

(7) The riparian reserve zone for a stream begins at the edge of the stream channel bank and extends to the width described in subsection (4) or (6).

(8) The riparian management zone for a stream begins at

(a) the outer edge of the riparian reserve zone, or

(b) if there is no riparian reserve zone, the edge of the stream channel bank, and extends to the width described in subsection (4) or (5).

Issues

The following issues are relevant to this case:

1. Has there been a contravention of section 51(1) or 50(1) of the FPPR, or of section 52(2) or 52(3) of FRPA.

2. Do any of the defences of due diligence, mistake of fact or officially induced error apply?

3. If there has been a contravention, what amount of penalty, if any, is appropriate?

4. If there has been a contravention, is a remediation order appropriate?

After considering all the evidence presented to me, and for the reasons presented below, it is my determination that:

1. MCFC did contravene sections 51(1) and 50(1) of the FPPR, and sections 52(1) and 52(3) of FRPA.

2. None of the defences apply;

3. It is appropriate to levy a penalty in the amount of $4,000.00 under section 71(2)(a)(i) of FRPA, which, subject to the stay referred to below, must be paid by May 26, 2015 (60 days from date on determination).

4. It is not necessary to order remediation.

The rationale for my contravention determination and the decisions to levy a penalty is set out below.

Summary of the evidence and findings of fact.

Based on the evidence, I am satisfied that the following facts are **not** in dispute:

- MCFC is the holder of Community Forest Agreement K1H and holds exclusive harvesting rights for the area in question.
- The area in question is included in Community Forest Agreement K1H.
- MCFC was issued the cutting authority for Cutting Permit (CP) 993 on December 23, 2010.
- MCFC was actively logging in Cutting Permit 993 Block 9 (McKale) and Block 6 (Clyde).
- A Site Plan produced by MCFC and signed May 10, 2011 by Marc von der Gonna R.P.F., General Manager of MCFC, clearly identifies the riparian management areas for blocks 9 (McKale) and 6 (Clyde).

Block 9 (McKale)

- The stream classification completed by Marc von der Gonna in the Site Plan dated May 10, 2011 indicated the classification was S2, which prescribes a 30 meter Riparian Reserve Zone (RRZ).
- Contractor Crazy Horse Contracting Ltd. (Kevin Taphorn) was harvesting timber with the authorization of MCFC in CP 993 Block 9 (McKale).
- The RRZ boundary for block 9 was flagged by Kevin Taphorn based on an S2 classification at approximately 30 meters from the southern bank of the side channel. The distance from the southern bank of the side channel to the flagged RRZ boundary varied from 26.6 – 64 meters
- Harvesting occurred up to and along the flagged boundary.
- A total of 0.48 ha of Crown timber was harvested within the 50 m of the southern bank of the side channel.

Block 6 (Clyde)

- The stream classification completed by Marc von der Gonna in the Site Plan dated May 10, 2011 indicated the classification was S2, which prescribes a 30 meter RRZ. FLNRO C&E investigative staff agrees that an S2 classification and the associated prescription of a 30 meter RRZ is appropriate for this stream segment.

- Contractor Dore River Enterprises (Don Gordon) was harvesting timber with the authorization of MCFC in CP 993 Block 6 (Clyde).

- The CP area, wildlife tree patch (WTP) and RRZ boundaries were not flagged in the field for Block 6.

- The timber in question was harvested and removed by Don Gordon on behalf of MCFC in CP 993 Block 6 and an adjacent area during the summer of 2011 and in the winter of 2011/12.

- Harvesting occurred within the 30 meter RRZ, a WTP and outside the CP area. At its narrowest point only 7 meters of the RRZ was retained along Clyde Creek. Along a 200 meter section of the RRZ an average of 16 meters was retained.

- A logging road was constructed by Mr. Gordon down a slope across a small stream and through a planned WTP. Harvesting of the WTP was not identified because a compensating area was set aside and the Site Plan was revised in the summer of 2013.

- The logging road was constructed within the Clyde Creek RMA. The location of this access road was determined by Don Gordon.

- The access road crossed a water course (S6) without a crossing structure and altered the water flow. Drainage issues resulted from this action.

- Harvesting occurred within the 30 meters RRZ of Clyde Creek. 0.28 ha of Crown timber was harvested from within the RRZ. The volume estimated to be harvested from the 0.28 ha within the RRZ was 55 m3.

- In addition, 0.12 ha of Crown timber was harvested outside the CP boundary. The volume estimated to be harvested from this 0.12 ha outside the CP was 34 m3.

With respect to the facts that **are** in dispute, Ministry staff presented the following evidence:

Block 9 (McKale)

- A review by staff experienced in riparian classification (John Rex, North Area Regional Hydrologist within the Ministry) concluded that this segment of the McKale River should have been classified as S1–B with a 50 meter RRZ and a 20 meter RMZ. This was based on a site visit, field measurements and Google earth data. Mr. Rex also confirmed the investigator's impression that the RRZ width should be

measured from the southern bank of the side channel. Width measurements were taken of the McKale River (using a digital rangefinder) and of the side-channel (using a 50-metre measuring tape), and photographs were taken. Photographs 8 and 9 show the side-channel at the mid-upper (eastern) and middle sections and demonstrate its increasing width from the upstream eastern portion to the downstream western portion. It was estimated that the width of the McKale River exceeds 40 metres without inclusion of the side-channel and exceeds 50 metres when the side-channel is included.

- A stump cruise was undertaken by Ministry staff within the 0.48 ha area within the 50 meter of the southern bank of the side channel. The volume of Crown timber removed as a result of the alleged contravention was determined by ministry staff to be 141 m3.

- RMA's have a number of purposes. These include minimizing or preventing impacts of forest and range users on stream channel dynamics, aquatic ecosystems, and water quality of all streams, lakes and wetlands; maintain natural channel and bank stability; and retaining important wildlife habitat attributes including wildlife trees, large trees, hiding and nesting cover, nesting sites, structural diversity, course woody debris and food source characteristic of natural riparian ecosystems.

Block 6 (Clyde)

- Investigators submit that Don Gordon told them that there was no other location for building the road down to the lower bench area, other than the chosen location. This location resulted in harvesting in the RRZ and road construction within the RMA and an elevated risk of sediment delivery to Clyde Creek. In his initial discussion with NROs Brown and Tetrault, Mr. Gordon stated that he would not have built the road if he knew the WTP and reserve locations ahead of time.

- The road was constructed in order to access timber on a small, flat area adjacent to Clyde Creek at the northeast end of the cutting permit. The actual area available for ground-based harvest in this area was small - restricted by a steep slope to the south, the WTP to the east and the RRZ on the north. The WTP was not marked in the field and the logging contractor was unaware of its exact location. Because there was only a small volume of unrestricted timber available for harvest, constructing the road adjacent to Clyde Creek does not appear warranted. Investigators are of the view that there were other practicable options for the extraction of timber and road construction with one being to not to construct a road in this area at all, or to use another road/trail location or harvest method to extract the timber.

- The test for practicability for locating a road within a RMA needs to take into account and evaluate a full spectrum of potentially impacted values. This determination must be made by a trained, experienced individual fully aware of the range of impacts and consequences.

In turn, Mr. von der Gonna presented the following evidence on behalf of MCFC:

Block 9 (McKale)

- A debris torrent occurred in 2001 which altered this section of the McKale River.
- The wetted area has been altered due to this debris torrent and therefore the width is not fully representative of the stream's actual width.
- The Riparian Management Area Guidebook (the Guidebook) states that:

  "The normal channel width can be greatly altered by both natural and man-induced factors. Channel width can be enlarged beyond the natural undisturbed channel width by debris torrents or flows." and

  "Determination of stream riparian classes is based on normal, non-disturbed channel widths. Be careful not to use a disturbed or unnaturally wide channel to determine the RMA. Further, recent debris torrents may cause oversized channels, resulting in a higher classification than is required."

- The Guidebook statements support the contention that the McKale should be classified "based on normal, non-disturbed channel widths".
- In an affidavit, Mr. von der Gonna deposed that he determined that McKale Creek was an S2 stream based on his belief that in an undisturbed state, the "normal" channel width of McKale Creek would be less than 20m wide.
- The McBride Forest Industries completed a previous assessment which classified this water course segment as S2 with a 30 meter RRZ. MCFC incorporated this existing assessment as a component of their classification.
- MCFC provided evidence of other adjacent stream segments areas with highly variable width, wetted area and number of side channels.
- Mr. von der Gonna maintains that the classification he completed for McKale River remains appropriate.
- MCFC suggested that water quality values were not directly impacted at the time of their inspection.
- John Rex correctly states that a quantifiable description of habitat loss requires review by a professional biologist. No evidence has been presented that NRO Tetrault sought such a review.
- In relation to the stump tally to volume determination MCFC suggested that the diameter to height comparison used by FLNRO staff to determine the volume was not reflective of the area in question.

Block 6 (Clyde)

- MCFC suggested that the access road was constructed in the only logical and practicable corridor to access the harvest area adjacent to Clyde Creek. In addition Mr. von der Gonna maintains that Don Gordon was an experienced logging contractor and was capable of making the determination of the most appropriate road location.

- At the same time, Mr. von der Gonna deposed that Bob Elliott, Operations Supervisor at MCFC, informed him that Don Gordon s.22 built the road one gully over from where they had discussed, potentially encroaching into the RRZ on Clyde Creek and definitely into the WTP at the north east corner of the block.

- Mr. von der Gonna further deposed that during an inspection to assess whether or not MCFC had encroached into the RRZ for Clyde Creek, he also considered whether or not the road location was in the most practicable location as per section 50(1)(b) FPPR. Given the narrow width between the toe of the slope and Clyde Creek, he determined that the road was in fact located in the most practicable location. Locating the road out of the RRZ of Clyde Creek would have resulted in a road location cutting across the toe of the slope which would have necessitated cut and fill construction resulting in greater mineral soil exposure and a risk of slope failure, both of which would have created a greater risk of sediment delivery to Clyde Creek.

- Bob Elliott also swore an affidavit. In it, he deposed that during inspections of Block 6 before Mr. Gordon had constructed the road, Mr. Gordon discussed putting the road down into the lower portion of the block towards the centre of the block, well away from Clyde Creek. Mr. Elliott marked a Site Plan map with this change, discussed it with Marc von der Gonna, and put it on file. Mr. Elliott further deposed that on November 29, 2011, when he went to check the new lower road, he was surprised by its location. He said that it appeared Mr. Gordon had s.22 built the road one gully over from where they had discussed, too close to the RRZ on Clyde Creek and the WTP.

- Harvesting of a WTP identified within a Site Plan is not an offence. The location and area of the WTP in the Site Plan were amended during the summer of 2013.

- MCFC maintains that the water quality and other riparian values where not directly impacted.

- MCFC maintains that Department of Fisheries and Oceans (DFO) staff and Forest Practice Board staff had no specific concerns with these areas during their inspections of MCFC operations.

- The contractor (Don Gordon) authorized by MCFC to undertake harvesting operations was knowledgeable of the area and experienced and therefore it was not necessary to flag the RRZ boundary in the field.

Having regard to all of the foregoing evidence, I have made the following findings with respect to the facts in dispute:

Block 9 (McKale)

- I accept that a debris torrent occurred in 2001, which altered this segment of the McKale River. The resulting wetted area is confusing due to the braided nature of the multi channels. Consequently, I believe that the determination of stream classification is not straightforward in this segment of the McKale River.

- At the same time I do not believe that these stream characteristics are unique to the McBride Community Forest. The examples provided by Marc von der Gonna of neighboring streams in the Robson Valley indicate that increased braiding and the formation of multi-channels in the floodplain is common among rivers, streams and creeks which flow off the steep hillsides to the flatter valley bottom.

  Mr. von der Gonna deposed that he determined that McKale Creek was an S2 stream based on his belief that in an undisturbed state, the "normal" channel width of McKale Creek would be less than 20m wide. He had done "a quick review of Google Earth" that confirmed his assessment that the stream reach within Block 9 was in a disturbed state as a result of the debris torrent that had occurred in 2001. He felt that he was qualified to classify streams based on his experience and training received throughout his career, and on his knowledge of the Fish Stream Identification Guidebook. McBride Forest Industries had completed an assessment some years earlier which had also classified this stream section as S2. It is my understanding that Mr. von der Gonna based his classification of this stream for the Site Plan he developed in May, 2011, in part on information developed by the previous forest licensee for this area. This information was approximately 10 years old at the time and he was not aware of how that stream classification had been developed or by whom. Mr. von der Gonna could have obtained the advice of other professionals knowledgeable in riparian classification to deal with the braided multiple channel structure but chose not to even though the stream segment he was dealing with was complicated and probably beyond his level of expertise. While I accept that Mr. von der Gonna was familiar with this area as a result of other activities he had engaged in over the years, I was provided with no information to suggest that he completed a meaningful assessment of the area while developing the Site Plan to determine the stream width and associated reserve and management requirements. My understanding, based on all the evidence, is that in developing the Site Plan, Mr. von der Gonna did not utilize direct field measurement to confirm if McBride Forest Industries, the previous licensee, had determined the appropriate stream and reserve widths.

- Contrary evidence submitted by the Ministry suggests that this segment of the McKale River should be classified as S1 B with a 50 meter RRZ and a 20 meter RMZ. This opinion was offered by Ministry staff experienced in riparian classification (John Rex, North Area Regional Hydrologist), who conducted a site visit, carried out field measurements and utilized Google earth data. Mr. Rex's

opinion confirmed the impressions of the NRO investigator. Width measurements were taken of the McKale River (using a digital rangefinder) and of the side-channel (using a 50-metre measuring tape), and photographs were taken. Photographs 8 and 9 show the side-channel at the mid-upper (eastern) and middle sections and demonstrate its increasing width from the upstream eastern portion to the downstream, western portion. It was estimated that the width of the McKale River exceeds 40 metres without inclusion of the side-channel and exceeds 50 metres when the side-channel is included.

- Despite the debris torrent that occurred in 2001, which likely had the effect of widening this segment of the stream/river, I find that the appropriate classification of this segment in 2011 when the Site Plan was developed is S1–B, which requires a 50 meter RRZ and a 20 meter RMZ. I give Mr. Rex's greater weight because he has greater expertise and experience in classifying streams and he conducted a site visit and carried out field measurements.

- The area affected by the contravention was 0.48 ha. The volume associated with the contravention was determined by trained, experienced and qualified professionals to be 141 m3. I considered Mr. von der Gonna's concern regarding the diameter to height comparison used but give that little weight since no documentation was provided to support an alternate methodology to determine a volume estimate. I give greater weight to C&E's evidence on volume than to the argument MCFC presented. I therefore find that the total volume of Crown timber harvested without authority was 141 m3 and that this volume of timber was removed from the site for processing.

- I find that harvesting 0.48 ha of the 50 meter RRZ took place.

Block 6 (Clyde)

- The allegations with respect to Block 6 are that MCFC constructed a road in the riparian management area (RMA) contrary to FRPA section 50(1), and harvested Crown timber from both within the RRZ and outside the cutblock boundary without authority, and removed that timber, contrary to FRPA sections 51(1), 52(2) and 52(3) respectively.

- An inspection was conducted in May 2012 by C&E on Block 6, adjacent to Clyde Creek, which revealed that a logging road had been constructed down a steep slope, crossed a small stream, and then followed a narrow flat area adjacent to and within the RMA of Clyde Creek. Harvesting continued into and through a planned WTP at the north-east end of the block. A small area outside of the cutting permit boundary was also harvested.

- MCFC submits that the road was placed in the most practicable location given the geography of the area and that locating it outside the riparian area would have created a higher risk of sediment delivery to Clyde Creek.

- Both MCFC and the Ministry agree that the road was constructed on MCFC's behalf by logging contractor Don Gordon, agree that the stream is S2, and agree on the area of Crown timber harvested in the RRZ and outside the block.

- The affidavit evidence submitted by MCFC indicates that Mr. Gordon discussed putting a road down into the lower portion of the block towards the centre of the block, well away from Clyde Creek. Mr. Elliott marked a Site Plan map with this change, discussed it with Mr. von der Gonna, and put it on file. Mr. Elliott deposed that when he checked the new lower road he was surprised at its location. He said that "it appeared that Mr. Gordon had gotten confused and built the road one gully over from where they had discussed, too close to the Riparian Reserve Zone on Clyde Creek and the wildlife tree patch".

- C&E's evidence is that during the investigators' initial on-site discussion with Mr. Gordon on July 11, 2012, Mr. Gordon told them that "there was no oversight from MCFC during the development phase, and while he appreciated being able to develop the block, he would have appreciated more oversight regarding the wildlife tree patch, the streams and their locations." According to C&E, Mr. Gordon said "he was unaware of the WTP until he cut into it" and "that no reserves were laid out when he developed and logged the block". Further, the investigator said that Mr. Gordon said that "he was limited where the road was to go and he only built the road to access the best timber on the block at the bottom of the hill." C&E's evidence is that "GORDON stated that he wouldn't have built the road if he knew that the WTP was there. GORDON said that when he was building the road he saw he might be too close to Clyde Creek (within 30 metres) but that he hoped if he was too close in places it would be OK because he was farther away in other places". C&E's evidence is also that "GORDON said that he was not comfortable stating how many times ELLIOTT had been on site, but he did say that he wished he was on site more often and wished there was better communication when ELLIOTT came on site."

- In reviewing the Site Plan map signed and sealed by Marc von der Gonna on May 10, 2011, I find that all block boundaries, WTP and RRZ boundaries are clearly identified. If Mr. Gordon only became aware of the WTP when he cut into it, perhaps he had neglected to give proper consideration to the Site Plan map that MCFC had given him. s.22
s.22 it also calls into question the quality of the communications between MCFC and its contractor. I find that there was inadequate communication between MCFC and Mr. Gordon.

- Taken together, the evidence suggests that there was no genuine consideration of practicable options for locating the road. That could not occur without clear knowledge as to where the reserve areas were located. MCFC submits that it was reasonable to delegate the responsibility for locating the road to Don Gordon. But even if circumstances were such that a delegation of authority to a contractor were reasonable, a decision by the contractor as to the location of the road could only be reasonable if the contractor is properly qualified, if all relevant information is shared with the contractor *and* if the contractor actually considers that information. That was

not the case here. Mr. Gordon was probably not qualified to determine the location of the road and did not consider all the relevant information. C&E's notes indicate that Mr. Gordon stated that "he wouldn't have built the road if he knew that the WTP was there". At least one other practicable option had been considered, which was to put a road down into the lower portion towards the centre of the block, well away from Clyde Creek. No explanation was offered as to why that option was not pursued. s.22 Based on this evidence, I find that there was at least one other practicable option for locating the access road and that was outside of the RMA.

- Mr. von der Gonna submitted that locating the road outside the RMA would have increased the risk of sediment delivery to Clyde Creek, which would constitute a lawful reason for constructing the road inside the RMA. His reasoning is that by locating the road out of the RRZ of Clyde Creek, the road would have cut across the toe of the slope, which would have necessitated cut and fill construction, resulting in greater mineral soil exposure and a risk of slope failure, both of which would have created a greater risk of sediment delivery to Clyde Creek. I might be prepared to give this submission greater weight if it had been the product of a well-considered inquiry into the optimal placement of the road outside the RMA; however, without more substantial evidence to support Mr. von der Gonna's assertion, I am not persuaded that locating the road outside the RMA would have created a higher risk of sediment delivery to the stream. Evidence presented by C&E indicates that locating the road *within* the RMA did increase the delivery of sedimentation to the creek. I find, therefore, that this exception to the prohibition in FPPR section 50(1) against constructing roads in RMAs is not satisfied.

- I further find that harvesting took place within the RRZ, as well as outside the CP boundary.

- The area harvested within the RRZ was 0.28 ha. The volume associated with this area was determined by trained, experienced and qualified professionals to be 55 m3.

- The area harvested outside the CP boundary was 0.12 ha. The volume associated with this area was determined by trained, experienced and qualified professionals to be 34 m3.

Determination

I conclude that for Block 9 McKale, the facts set out above support the conclusion that MCFC cut and removed trees in a RRZ contrary to section 51(1) of the FPPR, provided the defences set out in section 72 of FRPA do not apply.

I also conclude that the facts for Block 6 Clyde Creek set out above support the conclusion that MCFC cut and removed trees in a RRZ contrary to section 51(1) of the FPPR, that the construction of the road within the RMA of Clyde Creek constitutes a contravention of section 50(1) of the FPPR, and that harvesting and removal of Crown timber from outside the cutting permit boundary contravenes section 52(1) and 52(3) of FRPA, provided the defences set out in section 72 of FRPA do not apply.

Do any defences apply?

MCFC raised the defence of due diligence, which is one the defences provided for in section 72 of FRPA. I conclude that the facts set out above do not support this defence for the following reasons:

For the defence of due diligence to succeed, the person raising it must have taken all reasonable care to avoid the contravention. This does not require achieving a standard of perfection or doing everything that could possibly be done to prevent a contravention, but it does require the person to take all measures that would reasonably be expected in the circumstances to avoid contraventions.

The due diligence of a corporation will turn on whether or not the acts or omissions that led to the contravention were directed or approved by the corporation, and, if not, whether the directing or controlling mind of the corporation established a proper system to prevent the contravention and whether the corporation took reasonable steps to ensure the effective operation of that system.

The question of whether a person is a directing or controlling mind of a corporation turns on whether the discretion conferred on the person amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy, rather than to simply follow or implement such policy. In this case, I find that Marc von der Gonna, the General Manager of MCFC, was the directing mind of MCFC with the authority to design and supervise the implementation of corporate policy. His acts and omissions, therefore, are the acts and omissions of MCFC.

I find that Mr. von der Gonna did not direct or approve the acts that led to the contraventions. However, I find that MCFC did not establish a proper system to prevent the contraventions or take reasonable steps to ensure the effective operation of any preventative system.

<u>McKale</u>

I have found as a fact that this segment of the McKale Creek should have been classified as an S1 stream rather than S2, based on the expert opinion of Mr. Rex, the Ministry's

North Area Regional Hydrologist, who conducted a site visit, carried out field measurements and utilized Google earth data to arrive at his opinion. I was provided with no information to suggest that Mr. von der Gonna completed a meaningful assessment of the area for the purpose of determining the stream width and associated reserve and management requirements during his preparation of the Site Plan. The evidence indicates that Mr. von der Gonna did not undertake direct field measurements to determine the stream and reserve widths or to confirm the previous licensee's classification of the stream.

Given the heightened challenge of classifying streams in the context of braided stream channels, the standard of care reasonably required of a person in this situation demanded more of Mr. von der Gonna. He should have taken measurements or, better yet, sought the advice of another professional with greater expertise in stream classification. The "system" used by MCFC to avoid this kind of contravention was not appropriate to the circumstances. For this reason, the defence of due diligence cannot succeed.

MCFC also raised the defence of Mistake of Fact in relation to the determination of the stream width and resulting stream classification and RRZ and RMA widths. I conclude the facts set out above do not support this defence for the following reasons:

For a reasonable mistake of fact defence to be successful, a person must prove on a balance of probabilities that they reasonably believed in a mistaken fact that, if true, would establish that they did not contravene the provision.

Mr. von der Gonna submits that if he misclassified the stream as S2, that was based on his honest and reasonable belief that the stream was an S2 stream, which, if true, there would not have been a contravention.

For a mistake to be considered reasonable, another person in the same situation acting prudently would have been similarly mistaken. I find that a prudent person in the same situation would have done more to inform himself about the stream and its proper classification by taking measurements and seeking the advice of another professional with greater expertise in stream classification. Mr. von der Gonna used classification information developed by others approximately 10 years previously partly as the basis for his riparian classification without identifying how or who determined that classification.

The testimony of Regional Hydrologist, John Rex, during the OTBH indicated that determining stream width and the associated RRZ width can be challenging in areas like the one in this case. That is particularly so in areas containing multiple channels resulting from debris torrents, and seasonal and storm flooding. These conditions are not unique to the McBride Community Forest or the Robson Valley. While Mr. von der Gonna believed he had correctly classified the stream, in my view, that was not a reasonable belief. In my judgment, it fell short of the industry standard and is not sufficient to form the basis of a reasonable mistake of fact.

Clyde

MCFC raised the defence of due diligence with respect to the location of the logging road. MCFC retained an experienced contractor and provided him with a Site Plan map that indicated where the various boundaries were located. MCFC maintains that for Clyde, boundary marking was not necessary as the contractor was experienced, knowledgeable and familiar with the area in question. C&E's evidence, on the other hand, is that Mr. Gordon felt he required more in the way of guidance and oversight regarding the location of the RRZ and WTP and wished MCFC's supervisor had been on site more often and communicated more effectively.

MCFC delegated responsibility for locating the road to Mr. Gordon, who Mr. von der Gonna was confident could carry out the task based on the fact that Mr. Gordon had harvested two Small Scale License areas for MCFC since 2003 without incident and was familiar with the area.

There is no evidence of any pre-work meetings having taken place in either the field or in MCFC's office in which the location of values were reviewed to ensure that harvesting only occurred outside the boundaries of the RRZ or to discuss the location of access corridors. To rely solely on the experience, knowledge and familiarity of a contractor to protect Crown resources, especially the unique values associated with riparian areas, without any markings on the ground, is a highly risky approach to operations that is bound to fail sooner or later. It should not come as a surprise that the riparian area and CP boundary were breached given the lack of boundary markers.

Under FRPA, road construction can be allowed within a RMA when "there is no other practicable option for locating the road". "Practicability" requires balancing all the relevant circumstances. It is clear that the location of the access road corridor was determined by Don Gordon, not MCFC. While I have every reason to believe that Don Gordon is an experienced and knowledgeable logging contractor, I was provided no indication that he has the training or experience to determine the riparian values at risk or balance all the relevant circumstances. The access corridor was within 30 meters of Clyde Creek and, in addition, crossed a small stream without a water crossing structure. Leaving the access road location completely to Mr. Gordon, particularly in circumstances in which the oversight of operations by MCFC and communication between MCFC and Mr. Gordon were weak further increased the level of risk of non-compliance.

A pre-work field inspection by Don Gordon and MCFC might have identified the values at risk and areas of concern and helped provide the basis for an informed determination of practicability.

I conclude that all reasonable care was not taken by MCFC to prevent the contraventions on Block 6 and the defence of due diligence must fail.

MCFC did not raise the defence of Officially Induced Error in relation to any of the alleged contraventions and I find that the facts do not support the application of that defence.

Is a penalty appropriate and if so how much?

McKale

Count 1 - Section 51(1) Harvesting within a RRZ

Under section 71(2)(a)(i) of FRPA and section 14 of the Administrative Orders and Remedies Regulation, I am authorized to impose a maximum penalty of $50,000.

Clyde

Count 2 - Section 51(1) Harvesting within a RRZ

Under section 71(2) (a)(i) of FRPA and section 14 of the Administrative Orders and Remedies Regulation, I am authorized to impose a maximum penalty of $50,000.

Count 3 - Section 50(1) Construction of a road within an RMA

Under section 71(2) (a)(i) of FRPA and section 14 of the Administrative Orders and Remedies Regulation, I am authorized to impose a maximum penalty of $20,000.

Count 4 and 5 - Section 52(1) and 52(3) Unauthorized Timber Harvesting (.12ha or 34 m3)

Under section 71(2) (a)(i) of FRPA and section 13 of the Administrative Orders and Remedies Regulation, I am authorized to impose a penalty of up $100,000 per hectare, in this case, $12,000, for each of the contraventions.

Alternatively, under section 71 (2) (a) (ii) of FRPA, I may refrain from levying a penalty if I consider the contraventions to be trifling and that it is not in the public interest to levy a penalty. I do not consider any of the contraventions to be trifling and, as such, will consider the following factors in FRPA section 71 (5):

(a) MCFC's previous contraventions, if any, of a similar nature;

I am not aware of any previous contraventions of a similar nature.

(b) the gravity and magnitude of the contraventions;

The fact that Crown timber was cut and removed without authority (Clyde 0.12 ha) and cut within the RRZ (McKale 0.48 ha and Clyde 0.28 ha). RRZs are unique features that protect ecological and biological values that cannot be replaced in the short or medium term through silviculture treatments. The value of RRZ, RMZs and RMAs is clearly identified at all levels of planning, where they, along with other special values, are accorded priority status.

While the magnitude of the contraventions is small, and the RRZs that were affected retain a portion of their ecological and biological value, that portion has nevertheless been compromised. I find that breaching an RRZ even by this small amount is significant given that both the McKale River and Clyde Creek are salmon bearing and flow directly into the Fraser River.

Riparian reserve zones and riparian management zones have been developed and refined over the years in British Columbia by teams of professionals to protect a wide range of values. MCFC suggested that water quality values were not impacted at the time of inspection. While Marc von der Gonna is an experienced Professional Forester I am not certain that he has the knowledge or specialized expertise to determine if the full spectrum of riparian values has been impacted, and to what extent, by the harvesting of timber within the RRZs.

It concerns me that the damage could have been prevented if more care had been taken to determine the appropriate RRZ width and field marking of those boundaries had taken place MCFC takes the position that it is reasonable to expect an un-flagged RRZ and CP boundary that was not identifiable through other features, to have been identified by an experienced and locally knowledgeable contractor in the field. I consider that not only to be inconsistent with normal forestry practices of identifying values in the field that are potentially at risk, but inconsistent with the taking of reasonable care to protect public resources and avoid contraventions.

The classification of riparian reserve zones can be challenging in some areas and the McKale River is one of those areas. MCFC made a decision not to seek additional advice or guidance, when, in my judgment, that would have been the right thing to do.

I do note that MCFC provided a clear indication during the OTBH that it has adopted a different approach to marking boundaries in the field and that local C&E staff have confirmed that this boundary marking does now commonly take place. In addition, MCFC has committed to the use of specialists to assist in stream classification when required.

I consider the gravity of these contraventions to be quite significant owing to the standard of care demonstrated by the licensee, and the fact that areas that should have been given special protection were compromised.

(c) whether the contraventions were repeated or continuous;

The contravention of FPPR section 51(1) was repeated; however, the second incident is counted as a separate contravention, so the contraventions were not repeated or continuous.

(d) whether the contraventions were deliberate;

I find that the contraventions were not done deliberately but resulted from adopting a high risk approach to harvesting and taking insufficient care.

(e) any economic benefit MCFC derived from the contraventions;

MCFC would have benefitted from some savings by not completing a detailed survey to determine the riparian classification or hiring an expert in riparian classification.

Boundary marking has a cost and not marking boundaries, taking the time to properly review the maps with the contractor or carrying out more extensive monitoring of the contractor's work would have resulted in savings to MCFC.

In addition, although MCFC paid stumpage on the Crown timber, it would have profited from the sale of the timber on the market. C&E estimates that the profit on the Crown timber removed contrary to FRPA section 52(3) amounted to $66.98.

(f) MCFC's cooperativeness and efforts to correct the contravention;

I believe that Marc von der Gonna did not fully respond to C&E staff questions in relation to Block 9 (Clyde) during the period June – September 2013.

MCFC has confirmed that it will seek the advice of a suitable expert in riparian classification to assist with establishing appropriate riparian widths in the future.

MCFC has committed to boundary marking in the future. Local C&E staff have confirmed that boundary marking is now a standard practice for the MCFC.

MCFC completed the riparian rehabilitation as set out by the DFO staff, including planting the areas that were harvested and rehabilitating the access corridor.

(g) any other considerations that the Lieutenant Governor in Council may have prescribed.

There are none.

Having regard to the facts of this case and the above factors, I feel it is appropriate to levy a total penalty in the amount of $4,000.00 in relation to sections 51(1) and 50(1) of the FPPR, and sections 52(2) and 52(3) of FRPA. My reasons are as follows:

While the magnitude of the contraventions is small, they are significant in terms of the standard of care demonstrated by MCFC, and the fact that two RRZs were breached.

The penalty amount would have been higher if the contraventions had been repeated or continuous, if they had been deliberate, or if a larger portion of the RRZs had been harvested.

I have also taken into account the fact that MCFC has adopted a different approach to boundary marking and the use of professionals to assist with specialized riparian classification. This suggests to me that MCFC does appreciate the level of risk inherent in the approach it took in these cases.

It is important to levy a penalty that will bring home to MCFC the importance of sustaining its new approach to boundary marking and the use of professionals, eliminate any economic benefit derived from the contraventions, and make others in the industry aware that the approach taken and results achieved in this case are not acceptable.

Is it appropriate to issue a remediation order?

I have decided that it is not necessary or appropriate to issue a remediation order in this case. The areas harvested have been planted and the access corridor has been rehabilitated in accordance with DFO direction. I am not aware of any other remedial action which would help restore the areas impacted.

Determination does not forestall other actions that may be taken.

Please note that this determination does not relieve MCFC from any other actions or proceedings that the government is authorized to take with respect to the contraventions described above.

Opportunity for correcting this determination.

For 15 days after making my contravention determination and penalty determination under section 71, I am authorized under section 79 of FRPA to correct certain types of obvious errors or omissions. I may do this on my own initiative or at your request. If you think there are valid reasons to correct the determination, you may contact me at (250) 614 - 7400 or john.huybers@gov.bc.ca within this 15 day period.

Opportunities for review and appeal.

If you have new information that was not available at the time I made this determination, you may request a review of my determination on the basis of this new information. A request for review must be in writing, must be signed by you, or on your behalf, and must contain:

a. your name and address; and the name of the person, if any, making the request on your behalf;
b. the address for serving a document to you or the person acting on your behalf;
c. the new evidence that was not available at the time this determination was made; and
d. a statement of the relief requested.

This request should be directed to me, at Prince George Natural Resource District, 2000 South Ospika, Prince George, British Columbia, V2N 4W5 and I must receive it ***no later than three weeks*** after the date this notice of determination is given or delivered to you. If you request a review, you may appeal the decision made after the completion of the review to the Forest Appeals Commission.

The provisions governing reviews are set out in section 80 of FRPA and in the Administrative Review and Appeal Procedure Regulation. Please note the **3 week time limit** for requesting a review.

Alternatively, if you disagree with this determination, you may appeal directly to the Forest Appeals Commission.

The appeal request must be signed by you, or on your behalf, and must contain:

a. your name and address; and the name of the person, if any, making the request on your behalf;
b. the address for serving a document to you or the person acting on your behalf;
c. the grounds for appeal;
d. a statement of the relief requested; and
e. a copy of this determination.

The Forest Appeals Commission must receive the appeal ***no later than three weeks*** after the date this notice of determination is given or delivered to you.

The provisions governing appeals are set out in sections 82 through 84 of FRPA, in sections 131 through 141 of the *Forest Practices Code of British Columbia Act*, and in the Administrative Review and Appeal Procedure Regulation. To initiate an appeal, you must deliver a notice of appeal, together with the requisite supporting documents, to the Forest Appeals Commission. A notice of appeal may be delivered to the following address:

The Registrar, Forest Appeals Commission
PO Box 9425, Stn. Prov. Govt.
Victoria, BC V8W 9V1

Please note the **3 week time limit** for delivering a notice of appeal.

Determination is stayed pending review or appeal.

Under section 78 of FRPA, my contravention determination and penalty determination under section 71, and remediation order under section 74, are stayed until you have no further right to have this determination reviewed or appealed, after which time they take immediate effect.

Performance Record.

As you are the holder of an agreement under the *Forest Act*, my determinations under section 71 will become part of MCFC's performance record, pursuant to section 85 (2) of FRPA, subject to decisions made on review or appeal.

Payment of Stumpage.

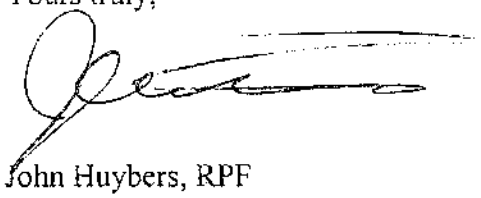
Under section 103 (3) of the *Forest Act*, a person who cuts, damages, destroys or removes Crown timber without authorization must pay stumpage. The amount of stumpage is based on:

- a determination under section 103 (3) of the *Forest Act* of the volume or quantity of timber that has been cut, damaged, destroyed or removed; and
- a stumpage rate determination under section 105 (1) of the *Forest Act*.

As the Minister's designate, I am authorized to make a determination of volume or quantity under section 103 (3) of the *Forest Act*. I determine that MCFC cut and removed 230 m3 of Crown timber (McKale 141 m3 and Clyde 89 m3 = 230 m3) without authorization. Please note that the *Forest Act* does not provide for review or appeal of my determination under section 103 (3), however, you may wish to consult your legal counsel with respect to other options that may be available to you, such as judicial review.

I will now forward this file to the appropriate Ministry employee in the Omineca Region to determine a stumpage rate under section 105 (1) of the *Forest Act*. Please note that the determination of a stumpage rate is subject to appeal under the *Forest Act*. It should be noted that MCFC paid stumpage on this 230 m3 at the rate prescribed for the area of CP 993 Blocks 6 and 9.

Yours truly,



John Huybers, RPF
District Manager
Prince George Natural Resource District

pc: Ian Brown, Compliance Leader, Prince George Natural Resource District
Compliance and Enforcement Branch
Forest Practices Board

BRITISH COLUMBIA

File: 23060-20 – DHW - 29215
00135624

Remediation Order No. 2014-001-DHW-29215

Issued under section 74 of the Forest and Range Practices Act

April 17, 2014

McBride Community Forest Corporation
c/o Marc von der Gonna, General Manager
100 Robson Center
P.O. Box 519
McBride, British Columbia, V0J 2E0

Dear Marc von der Gonna:

Section 74 of the *Forest and Range Practices Act* (FRPA), permits the Minister, or the Minister's delegate, to order the holder of an agreement under the *Forest Act* who is found in contravention under FRPA section 71 to do work reasonably necessary to remedy the contravention.

As the Minister's delegate under section 74 of FRPA, having found the McBride Community Forest Corporation (MCFC) in contravention under section 71 of FRPA of sections 52(1) and (3) and section 21(1) of FRPA, and having determined that MCFC is the holder of Community Forest Agreement K1II, I hereby order MCFC to carry out the work described below.

Sections 52(1) and (3) of FRPA prohibit persons from cutting or removing Crown timber without authority.

Section 21(1) of FRPA requires the holder of a Forest Stewardship Plan (FSP) to ensure that the intended results specified in the FSP are achieved and the strategies described in the plan are carried out.

Ministry of Forests
Prince George Natural Resource District
2000 South Ospika Blvd.
Mailing Address:
2000 S. Ospika Blvd.,
Prince George, British Columbia,
V2N 4W5
Tel: (250) 614-7400
Fax: (250) 953-0413

My rationale for finding contraventions of those sections is set out in my letter dated April 14, 2014, which accompanies this order.

One of the results or strategies in MCFC's FSP commits MCFC to conducting forest practices consistent with the objectives set out in the Order to Establish Crescent Spur, Lower Morkill Cushing, Forgetmenot, Upper Morkill, North Trench and Goat Landscape Unit Objectives, dated January 30, 2006, within the FDU covered by MCFC's FSP. The FSP cites Old Growth Management Areas (OGMAs) as the scale of measurement and identifies a number of OGMAs on FSP content maps. The intent of the result or strategy is to ensure the integrity of the OGMAs identified on the FSP content maps.

Pursuant to my determinations under sections 71 and 74, and subject to the stay referred to below, MCFC is ordered to carry out the following work by June 30, 2015:

1. Set aside, within MCFC's operating area and adjacent to an existing OGMA, an area 0.9 ha in size with a similar stand composition and elevation to the impacted OGMA referred to in my letter dated April 14, 2014, accompanying this order.

2. Carry out the necessary amendments to MCFC's FSP and to relevant site plans and maps to reflect the establishment of the new area.

3. Replant the 0.9 ha area that was harvested without authority to a level no less than the minimum well-spaced stocking standards required in the site plan for the adjacent area and conduct the necessary silviculture treatments in accordance with the site plan.

MCFC is responsible for the costs of carrying out this work and a penalty may be assessed for failure to carry out the work in compliance with this order.

Further, if MCFC fails to comply with this order by the date specified above, I am authorized under sections 74 (3) (b) and (c) of FRPA, to carry out the work described above and to recover, as a debt due the government, payable on demand, the sum of all direct and indirect costs incurred by the Ministry in carrying out the work. In addition, I am authorized under section 74 (3) (d) and (e) of FRPA to levy an administrative penalty up to the sum of the direct and indirect costs incurred in carrying out the work, and to realize any security MCFC has provided under the *Security for Forest and Range Practice Liabilities Regulation* to recover both the penalty amount and the government's costs incurred in carrying out the work. As well, pursuant to section 74 (6), MCFC will be required to immediately replace any security used to recover the costs of carrying out the work or the penalty amount.

Opportunity for correcting this order.

For 15 days after issuing this order, I am authorized under section 79 of FRPA to correct certain types of obvious errors or omissions. I may do this on my own initiative or at your request. If you think there are valid reasons to correct this order, you may contact me at (250) 614 - 7400 within this 15 day period.

Opportunities for review and appeal.

If you have new information that was not available at the time I made this order, you may request a review of my order on the basis of this new information. A request for such review must be in writing, must be signed by you, or on your behalf, and must contain:

(a) your name and address; and the name of the person, if any, making the request on your behalf;
(b) the address for serving a document to you or the person acting on your behalf;
(c) the new evidence that was not available at the time this order was made; and
(d) a statement of the relief requested.

This request must be directed to me, at Prince George Natural Resource District, 2000 South Ospika, Prince George, British Columbia, V2N 4W5 and I must receive it ***no later than three weeks*** after the date this order is given or delivered to you. If you request a review, you may appeal the decision made after the completion of the review to the Forest Appeals Commission.

The provisions governing reviews are set out in section 80 of FRPA and in the *Administrative Review and Appeal Procedure Regulation.* Please note the **three week time limit** for requesting a review.

Alternatively, if you disagree with this order, you may appeal directly to the Forest Appeals Commission.

The appeal request must be signed by you, or on your behalf, and must contain:

a. your name and address; and the name of the person, if any, making the request on your behalf;
b. the address for serving a document to you or the person acting on your behalf;
c. the grounds for appeal;
d. a copy of this order; and
e. a statement of the relief requested.

The Forest Appeals Commission must receive the appeal ***no later than three weeks*** after this order is given or delivered to you.

The provisions governing appeals are set out in sections 82 through 84 of FRPA, in sections 131 through 141 of the Code, and in the *Administrative Review and Appeal Procedure Regulation.* To initiate an appeal, you must deliver a notice of appeal, together with the requisite supporting documents, to the Forest Appeals Commission. The address for the Forest Appeals Commission is:

The Registrar, Forest Appeals Commission
PO Box 9425, Stn Prov Govt
Victoria, BC V8W 9V1

Please note the **three week time limit** for delivering a notice of appeal.

Order is stayed pending review or appeal.

Under section 78 of FRPA, this order is stayed until you have no further right to have the order reviewed or appealed, after which time it takes immediate effect.

John Huybers, RPF
District Manager
Prince George Natural Resource District

pc: Ian Brown, Compliance Leader, Prince George Natural Resource District
Compliance and Enforcement Branch
Forest Practices Board

BRITISH COLUMBIA

Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.fac.gov.bc.ca
E-mail: facinfo@gov.bc.ca

DECISION NO. 2014-FRP-002(a)

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

BETWEEN:	McBride Community Forest Corporation	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Jeffrey A. Hand, Panel Chair Les Gyug, Member Howard M. Saunders, Member	
DATE:	Conducted by way of oral hearing March 17 to 19, 2015	
APPEARING:	For the Appellant: Marc von der Gonna For the Respondent: Bobby M.S. Bandechha, Counsel	

APPEAL

[1] McBride Forest Community Forest Corporation ("McBride") appeals an April 14, 2014, Contravention Determination and Notice of Penalty made by John Huybers, District Manager (the "District Manager"), Prince George Natural Resource District, Ministry of Forests, Lands and Natural Resource Operations ("the Ministry"). The District Manager found that McBride, as the holder of Community Forest Agreement K1H and Cutting Permit 993, had contravened sections 52(1) and 52(3) of the *Forest and Range Practices Act* ("*FRPA*") as a result of the unauthorized cutting and removal of timber from Crown land carried out by a contractor of McBride, Norm Goodell. As the timber was within an old-growth management area ("OGMA"), the District Manager also found that McBride had contravened section 21(1) of the *FRPA*, by not ensuring that the intended results of its forest stewardship plan ("FSP") was achieved for the same timber harvesting and removal. The District Manager further found that McBride had failed to exercise due diligence to prevent the contraventions from occurring, and levied a total penalty of $3,000.

[2] The Forest Appeals Commission has the power to hear this appeal pursuant to section 82 of the *FRPA*. Sections 84(1)(c) and (d) of the *FRPA* provides that, on an appeal, 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.

[3] McBride asks the Commission to rescind the District Manager's determination or, alternatively, to vary the penalty levied against McBride for the contraventions. McBride does so on the grounds that:

- it "exercised due diligence appropriate under the circumstances and that it could not have reasonably anticipated the reckless and willful acts of Mr. Goodell";
- the Ministry "has not provided sufficient evidence that section 21(1) of *FRPA* was contravened";
- "determining a contravention of both 52(1) and 52(3) is an unnecessary piling on of charges"; and
- the "decision maker made several errors and assumptions in his rationale and that any penalty amount is not in the public interest."

BACKGROUND

[4] McBride is a corporation wholly owned by the Village of McBride. In 2007, McBride entered into a Long Term (25-year) Community Forest Agreement K1H with the Province of British Columbia. That Agreement granted McBride exclusive rights to harvest Crown timber on approximately 60,000 hectares in the Robson Valley. Pursuant to this Agreement, McBride was required to manage the forest in accordance with its FSP. Profits from this harvesting are paid to the Village of McBride for use in funding community projects.

[5] One of the ways that McBride harvests timber is through its Small Market Logger Program. Under that program, McBride issues contracts to local loggers, granting temporary authority to the logger to harvest timber in a defined area within the community forest. McBride retains full responsibility for forest management, but the "small market logger" is responsible for logging, transporting and marketing the timber. McBride receives an administrative fee for each cubic metre of wood sold.

[6] Some time in December, 2010, McBride was approached by a small market logger, Norm Goodell, with a request that Mr. Goodell be allowed to harvest timber in an area within McBride's community forest. For this to occur, McBride was required to obtain a specific cutting authority for the designated area from the Ministry.

[7] McBride's General Manager, Marc von der Gonna, RPF, prepared a written Site Plan, which included a Site Plan Map that identified the boundaries of the cut block at issue (Block 5). The Site Plan and Site Plan Map identified, amongst other

things, the presence of an OGMA adjacent to the area to be harvested. Section 6.4 of the Site Plan states that "This block is consistent with the measures to retain biodiversity as stated in the FSP ... WTP [Wildlife Tree Patch] located to the east of the block compliments [sic] the large OGMA to the south." No harvesting was to occur within the OGMA, which formed the south western boundary of cut block 5. McBride was issued the cutting authority for Cutting Permit 993, which includes Block 5 ("CP 993, Block 5"), by the Ministry on December 23, 2010.

[8] In March, 2011, McBride entered into a Small Scale Licence contract with Mr. Goodell, allowing Mr. Goodell to cut and remove timber in the area identified in the Site Plan as CP 993, Block 5.

[9] On March 4, 2011, Bob Elliott, McBride's Operations Supervisor, sent a harvest notification to the attention of the District Manager, advising that Mr. Goodell had been retained as a contractor to harvest CP 993, Block 5, commencing March 9, 2011.

[10] Mr. Goodell carried out harvesting operations in CP 993, Block 5 between approximately March 11 through March 29, 2011. No harvesting took place in the northern portion of CP 993, Block 5 that is separated from the southern portion by a stream.

[11] On April 19, 2011, after Mr. Goodell's work was completed, a routine inspection of CP 993, Block 5, was undertaken by the Ministry's Natural Resource Officer, Brad Kope. Officer Kope suspected that Mr. Goodell had harvested outside of the boundaries of the cut block and within the OGMA. At that time, Officer Kope could find no evidence of boundary marking and, therefore, was unsure whether any timber harvest and removal had taken place in the OGMA. To help determine his location, Officer Kope obtained a GPS reading on a stump which, using the maps and geographic information software in his office, he later confirmed to be 74 metres outside of the boundary of CP 993, Block 5.

[12] Officer Kope attended the site again on May 11, June 22 and September 26, 2011, in the company of various other Ministry personnel. He confirmed that, in the course of the harvesting operation, Mr. Goodell had harvested in the OGMA and had cut and removed 176 trees from that area.

[13] Officer Kope and other Ministry personnel performed a 100% stump cruise to determine the volume of timber removed, as well as a GPS-traverse. Officer Kope determined that 0.9 hectares had been harvested within the OGMA without authority.

[14] The area harvested outside of the boundary of CP 993, Block 5 was not contested by McBride at the hearing of this appeal. However, McBride questions whether, or to what degree, the harvest occurred within the OGMA.

[15] Officer Kope conducted an investigation to determine what steps McBride had taken to ensure that Mr. Goodell only harvested within the cut block boundaries.

[16] Following Officer Kope's investigation, the District Manager provided McBride with an opportunity to be heard on alleged contraventions of the *FRPA*.

[17] In a Contravention Determination and Notice of Penalty dated April 14, 2014, the District Manager determined that McBride, through its contractor, Mr. Goodell, had cut and removed Crown timber without authority and contrary to its FSP in contravention of sections 21(1), 52(1) and 52(3) of the *FRPA*. The District Manager levied a $3,000 administrative penalty against McBride. He also ordered McBride to undertake remediation of the affected area through replanting, and by way of dedicating an equivalent area of OGMA within McBride's Community Forest. McBride is not challenging the Remediation Order.

ISSUES

[18] The Panel finds that the following issues are to be determined in this appeal:

1. Did McBride contravene sections 21(1), 52(1) and 52(3) of the *FRPA*?
2. If the answer to the foregoing question is "yes", did McBride exercise due diligence such that it is not liable for the contraventions pursuant to section 72 of the *FRPA*?
3. If McBride is in contravention of *FRPA* and was not duly diligent under section 72 of the *FRPA*, is the penalty levied by the District Manager appropriate in the circumstances?
4. Was it appropriate for the District Manager to find that McBride had contravened both section 52(1) and section 52(3) of the *FRPA*? Specifically, does the duplication constitute double jeopardy or run contrary to the common law rule against multiple convictions?

RELEVANT LEGISLATION

[19] The following legislation is relevant to this appeal.

Forest and Range Practices Act

Compliance with plans

21(1) The holder of a forest stewardship plan or a woodlot license plan must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

…

Unauthorized timber harvest

52(1) A person must not cut, damage or destroy Crown timber unless authorized to do so

(a) under this Act, the *Forest Act* or an agreement under the *Forest Act,*

…

(2) …

(3) A person must not remove Crown timber unless authorized to do so

(a) under the *Forest Act* or an agreement under the *Forest Act*,

(b) under a grant of Crown land made under the *Land Act*, or

(d) under the *Park Act*.

…

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

(ii) may refrain from levying an administrative penalty against the person if the minister considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty, or

(b) may determine that the person has not contravened 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,

…

***Administrative Orders and Remedies Regulation*, B.C. Reg. 101/2005**

13(2) The maximum amount that the minister may levy against a person under section 71(2) of the *Forest and Range Practices Act* for a contravention of section 52(1) or (3) of that Act is the greatest of the following amounts:

(a) an amount equal to the product of

i. the volume, expressed in cubic metres, of the Crown timber that was the subject of the contravention, and

ii. $200 per m^3;

(b) an amount equal to the product of

i. the area, expressed in hectares, that contained the timber that was the subject of the contravention, and

ii. $100,000 per ha;

(c) …

DISCUSSION AND ANALYSIS

1. Did McBride contravene sections 21(1), 52(1) and 52(3) of the *FRPA*?

[20] As set out in section 21(1) of the *FRPA*, the holder of a forest stewardship plan must ensure that the intended results specified in the plan are achieved, and that the strategies in the plan are carried out.

[21] Section 6.1.1.2 "Landscape Units" (Page 7) of McBride's FSP was entered into evidence at the hearing. This section refers to an Order of the Ministry of Agriculture and Lands dated January 6, 2006, establishing OGMAs in the area (the "Order"). The specified result of McBride's FSP for Landscape Units is set out in section 6.1.1.2 as follows:

Result or strategy

The holder of this FSP will conduct forest practices consistent with objectives set out in this order within the FDU of this FSP.

Scale of Measurement: Each OGMA

Map Reference: OGMA identified on FSP content maps.

[Emphasis added]

[22] The acronym "FDU" is not defined on the particular page provided to the Panel, but the "order" referred to is the Order dated January 6, 2006, establishing OGMAs in the McBride's area. Although McBride's FSP goes on to define the scale of measurement as "Each OGMA", the Panel finds that this is not actually a map scale that can be used for measurement, and, therefore, the actual scale of measurement is undefined.

[23] The Order requires that various OGMA's be maintained. Cutting trees within an OGMA is limited to circumstances where it is absolutely necessary for insect or disease infestation control. The Order goes on to establish OGMAs identified in the content maps appended to McBride's FSP. The OGMA in question is identified on the content map appended to McBride's FSP, albeit on a small scale overview-type map at 1:30,000 scale.

[24] McBride argues that it is not possible to determine, with precision, the boundary of the OGMA in question because the scale of the map appended to its FSP is too small to allow proper boundary identification. Based upon this 1:30,000 map, McBride argues that an unauthorized harvest into the OGMA by Mr. Goodell cannot be confirmed with any certainty.

[25] The Panel does not accept this submission. First, the intent of the Order, and therefore the intent of McBride's FSP, is to maintain the OGMA. To do so, McBride must take reasonable steps to identify the OGMA boundary.

[26] Second, maps of greater scale do allow the OGMA boundary to be identified with a higher degree of precision than the single map appended to the McBride FSP. Indeed, when McBride prepared its Site Plan Map to obtain CP 993, Block 5, it did so at a large (detailed) scale of 1:10,000, which clearly identifies the OGMA boundary. Having prepared that Site Plan Map with this degree of precision, McBride cannot now say that the OGMA boundary was either unknown, or unidentifiable. McBride's own Site Plan, signed by Mr. von der Gonna, with its Site Plan Map, contradicts that assertion.

[27] The evidence of Officer Kope confirmed that, with rather simple GPS coordinates taken on the ground and transferred to the Site Plan Map, he established that there was a harvest outside of the boundaries of CP 993, Block 5 and into the OGMA. Using GPS coordinates of the CP 993, Block 5 boundary, Officer Kope was able to count the number of tree stumps that had been harvested outside of CP 993, Block 5 and within the OGMA. Officer Kope determined that Mr. Goodell had taken 176 trees from an area that extended as far as 130 metres (approximately) beyond the boundary of CP 993, Block 5.

[28] Mr. von der Gonna testified that the OGMA area in question was initially established to provide caribou habitat. At some point prior to 2011, he says that this OGMA lost its high caribou designation and that McBride was hopeful that the OGMA would be moved to another location. McBride referred to a series of e-mails and letters dated from November 7, 2007 to October 11, 2013, between McBride,

McBride's consultants, and various Ministry personnel in support of this change. However, the Panel finds that these documents establish that no such alteration of this OGMA ever took place. Mr. von der Gonna was certainly aware that the OGMA boundary had not been altered, despite his hope that it might be. At the time of the harvesting operation in 2011, the OGMA boundary was where it had always been, and McBride was well aware of that fact. In the Panel's view, nothing turns on the evidence of a possible change to the OGMA. If anything, McBride's evidence shows that it paid less attention to this OGMA than it should have according to the terms of its FSP.

[29] Based upon the evidence presented, the Panel finds that 176 trees were cut and removed from the OGMA at distances of up to approximately 130 metres beyond the CP 993, Block 5 boundary. The evidence clearly establishes cutting and removal of timber in contravention of sections 52(1) and (3) of the *FRPA*. The evidence also clearly establishes a failure on the part of McBride to maintain the OGMA, the preservation of which is an intended result of its FSP. This breach of the FSP is, in turn, a contravention of section 21(1) of *FRPA*.

2. Did McBride exercise due diligence such that it is not liable for the contraventions pursuant to section 72 of the *FRPA*?

[30] Notwithstanding that an unauthorized harvest occurred, section 72 of the *FRPA* provides three potential defences to McBride, only one of which McBride is relying upon; that is, the defence of due diligence. Section 72(a) states:

> **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;

[31] Much of the evidence and argument presented during the hearing related to McBride's claim that it exercised due diligence to prevent the contraventions from occurring and should not, therefore, be subject to the contraventions.

The test for establishing the defence of due diligence

[32] In *Pope & Talbot Ltd. v. British Columbia*, 2009 BCSC 1715 [*Pope & Talbot*], the BC Supreme Court affirmed a decision of the Commission that Pope & Talbot had not made out the defence of due diligence to a contravention. The Court described the defence of due diligence as follows at paragraph 81:

> … it is a question of fact, and of applying facts to the law, as to whether a company has taken all reasonable steps to avoid the contravention in issue. This assessment may include consideration of a contractor's behaviour and the foreseeability of the contravention itself.

[33] In *Atco Wood Products Ltd. v. Government of BC* (Decision No. 2010-FOR-001(a), February 28, 2012) (unreported), the Commission summarized the test for due diligence as follows at paragraph 256:

> … can the accused establish that it is innocent of the contravention under the second branch of the test (due diligence); specifically, did the accused take all reasonable care to avoid the particular event (contravention)?

The Parties' evidence and arguments

[34] The evidence establishes that, prior to entering into a contract with Mr. Goodell, McBride prepared a Site Plan and a Site Plan Map, both of which identified the presence of an OGMA adjacent to the cutting area. There is no dispute that McBride did not physically identify the OGMA boundary by placing ribbons or paint on trees along the boundary between the OGMA and the cutting area. Neither did it instruct Mr. Goodell to do so.

[35] Mr. van der Gonna testified that both he and Bob Elliott, the Operations Supervisor for McBride, felt that Mr. Goodell was an experienced logger and familiar with the area in question; therefore, they did not need to physically identify the boundary of the cut block by placing ribbons or otherwise marking the boundary between the cut block and the OGMA.

[36] Karen Krushelnick was called to give expert evidence by the Government. Ms. Krushelnick is a Registered Forest Technician working in the Ministry with BC Timber Sales. She has experience in cut block layout and supervision of contractors performing timber harvesting. The Commission accepted Ms. Krushelnick as qualified to give opinion evidence on the preparation and monitoring of timber harvesting operations.

[37] Ms. Krushelnick testified that, in her opinion, it is normal practice to physically identify cut block boundaries because, in the absence of doing so, there is a heightened risk that harvesting beyond the boundaries could occur. In her view, it is not an acceptable practice to rely only on a contractor's experience and familiarity with a given area to prevent harvesting in an OGMA.

[38] McBride submits that Ms. Krushelnick's experience is almost exclusively in establishing cut block boundaries for work performed by large scale contractors. It submits that those same standard practices, particularly the practice of physically marking cut block boundaries, do not apply to small scale loggers like Mr. Goodell, who used hand fallers.

[39] In response, Ms. Krushelnick testified that a different standard does not apply to small scale loggers.

[40] McBride led no persuasive evidence to establish that the practice of marking cut block boundaries does not apply to small scale contractors. Moreover, the Panel finds that it is more likely that an unmarked boundary would be breached than a marked boundary, regardless of the size of the crew that is working or the equipment that they are utilizing. The Panel is satisfied that the physical marking of the cut block boundary is a reasonable and responsible approach to prevent an

unauthorized harvest, and it is certainly an important indicium of due diligence. As McBride did not mark the boundaries, the Panel then must examine what steps McBride did take to prevent the contraventions from occurring.

[41] Both Mr. Elliott and Mr. Goodell gave evidence that they met only once before work within CP 993, Block 5 began to specifically discuss this cut block. There was scant evidence as to what was discussed at this pre-work meeting because neither Mr. Elliott or Mr. Goodell could recall when they met, where they met, or what they discussed. Mr. Elliott could not remember going over the Site Plan with Mr. Goodell, or providing any specific instructions to Mr. Goodell. Mr. Goodell says that he was given a black and white photocopy of the Site Plan Map delineating the boundaries of the CP 993, Block 5. He denies receiving the text of the Site Plan.

[42] In an Affidavit sworn on February 16, 2015 by Sarah Taylor, McBride's Administrative Assistant, Ms. Taylor states that she gave a full set of all of the relevant licensing documents to Mr. Goodell in McBride's office, including the Site Plan Map and the Site Plan.

[43] Mr. Elliott, McBride's Operations Supervisor, signed the Small Scale Licence documents on behalf of McBride, but Mr. Goodell stated that Mr. Elliott was not present when he also signed the licence on March 11, 2011. Ms. Taylor did not testify at the hearing and, accordingly, the statements in her Affidavit were not subject to cross-examination.

[44] The Small Scale Licence signed by both Mr. Goodell and Mr. Elliott to harvest timber in CP 993, Block 5 is titled "McBride Community Forest Corporation, Small Scale Licence, K1H 993 Block 5". This licence contains the terms of the agreement between McBride and Mr. Goodell in relation to the harvesting of block 5 of CP 993 including: operation guidelines, payments, felling and utilization specifications, residue and waste, damages, and indemnification for wrongful acts and omissions by Mr. Goodell. Even though termed a "licence", "sub-licence" and "contract" in various evidence provided by McBride to the Panel, Mr. von der Gonna and Mr. Elliott acknowledged during the hearing that the ultimate responsibility for meeting the commitments of McBride's Community Forest Agreement K1H remains with McBride. McBride was also issued CP 993, Block 5.

[45] Although Mr. Goodell is the small scale licensee in this case, McBride describes Mr. Goodell as the contractor in its Notification of Harvest sent to the Ministry, and the Government consistently referred to Mr. Goodell as McBride's contractor in all of its evidence. To avoid confusion, the Panel will refer to the business relationship between McBride and Mr. Goodell as a contract in the remainder of this decision.

[46] Mr. Goodell, who admitted that his memory of the interactions with anyone from McBride prior to harvesting was a distant memory, did not recall receiving any specific instructions regarding the presence of the OGMA or its specific boundaries. Regardless of what was said, Mr. Goodell testified that he was certainly aware of the presence of the OGMA from the Site Plan Map. He stated that he examined the map, estimated the distance using the scale from the map, and then estimated the distance from Highway 16 when he was on site. Clearly his estimate, or that of the

faller that he utilized, was not very accurate because the evidence is that 176 trees were harvested at least 74 metres into the OGMA.

[47] Both Mr. Goodell and Mr. Elliott testified that nobody from McBride attended the site at the time that Mr. Goodell commenced harvesting operations. There is some evidence that Mr. Elliott attended the site once during the work, but he did not testify that he did so with any intention of identifying whether the work was proceeding in compliance with Mr. Goodell's licence or CP 993, Block 5.

[48] At first, Mr. Elliott could not recall attending the site while it was being harvested as he did not make any notes of such a visit in his notebook. With prompting from Mr. von der Gonna, Mr. Elliott recalled that he and Mr. Goodell had a discussion at the site concerning a small portion of timber identified as suitable for tone wood, which would be separated and sold to a local supplier of wood suitable for the manufacture of musical instruments. Based on the evidence of Mr. Elliott and Mr. Goodell, this tone wood occupied the conversation during the one day that Mr. Elliott attended the site.

[49] Mr. Elliott testified that he may have been on-site a second time during the harvesting operation, but there is no record of this. Further, this is inconsistent with the notes that he made in 2012 indicating that he went to the site only on March 29, 2011, after the work was completed.

[50] McBride submits that it had no need to mark the OGMA boundary or to provide specific instructions to Mr. Goodell in regards to maintaining that boundary because of Mr. Goodell's general experience in the McBride area, his lengthy experience as a logger, and his experience harvesting nearby (CP 992-4). McBride submits that it has dealt with Mr. Goodell on many previous occasions and it has never had any difficulty with him harvesting timber outside of a cut block boundary. McBride submits that, in these circumstances, it had no reason to expect that Mr. Goodell would harvest beyond the block boundaries and/or into the OGMA.

[51] Further, McBride points to the fact that its contract (the Small Scale Licence) with Mr. Goodell requires Mr. Goodell to, among other things:

(a) seek clarification from McBride if he is unclear as to any of the requirements of the cutting permit (Schedule B); and

(b) indemnify McBride as a result of Mr. Goodell's wrongful acts and omissions (clause 11).

[52] The contract also requires Mr. Goodell to adhere to the provisions of the Site Plan.

[53] The Panel finds that, requiring Mr. Goodell to adhere to the cutting permit and to indemnify McBride in the event that he contravenes the provisions of the permit, cannot be equated with McBride taking reasonable steps, and exercising all reasonable care, to avoid the contraventions. The contract provisions do not prevent the unauthorized harvest; rather, they provide McBride with a remedy against Mr. Goodell should McBride be found liable for something covered by the indemnity clause in the contract.

[54] Lastly, McBride submits that there was a definite "stand type difference" between the OGMA and the area covered by the cutting permit such that Mr. Goodell ought to have readily been able to identify where the cut block boundary ended and the OGMA began. Mr. Elliott testified that a distinct delineation existed. Mr. von der Gonna provided aerial photos as well as photographs taken of portions of the unauthorized harvest area after Mr. Goodell's cutting operation.

[55] In the Panel's view, it is not readily apparent from the photographs that there was a distinctive stand type delineation. Mr. Goodell testified that he did not observe any such difference. Neither did Officer Kope, who examined the area extensively while performing his stump count. Notably, even Mr. Elliott, who suggested that the OGMA boundary was quite distinctive, did not notice that an unauthorized harvest of at least 74 metres had occurred when he went to the site shortly after Mr. Goodell's work was completed. If the OGMA boundary was so obvious to Mr. Elliott, the Panel expects that it would have been equally obvious that 176 trees had been cut beyond the boundary.

[56] The Panel has carefully reviewed and considered the oblique aerial photograph, the vertical aerial photograph, the on-the-ground photographs, and the stand types designated on the Forest Cover map. Based upon this evidence, and the testimony provided during the hearing, the Panel finds that the stand type difference, if it did exist, was not sufficiently distinct or obvious that physical marking of the boundary with either ribbons or paint was not reasonably required in the circumstances to prevent a contravention.

[57] In summary, on the issue of whether McBride has met the test for due diligence to avoid the contraventions, the Panel finds that the evidence is as follows:

(a) McBride identified the OGMA boundary on the Site Plan Map but did not physically mark the boundary on-site;

(b) McBride had one meeting with Mr. Goodell before the work commenced but that meeting was not on-site, and the OGMA boundary was not discussed in any detail;

(c) McBride did not give Mr. Goodell any specific instructions or information that would help him identify the OGMA boundary beyond the Site Plan Map itself;

(c) McBride did not instruct Mr. Goodell to mark the boundary of the OGMA or the cut block in advance of harvesting;

(d) McBride did not attend at the site prior to the work commencing;

(e) McBride did not expect an unauthorized harvest to occur because it had not happened with Mr. Goodell in the past;

(f) In Ms. Krushelnick's opinion, physical marking of the boundary in some form is standard practice; and

(g) There was no discernable difference in stand type between the OGMA and the cutting permit area.

[58] Based upon the totality of the evidence, the Panel finds that McBride's confidence in Mr. Goodell was, in reality, its only means of avoiding or preventing an unauthorized harvest from occurring. This confidence was based solely on the fact that McBride had not had previous problems with Mr. Goodell. The Panel finds that the evidence falls short of establishing a defence of due diligence under section 72 of the *FRPA*. There was minimal contact between McBride and Mr. Goodell, no supervision of his work, and this, combined with the decision not to mark the boundary, amounts to a lack of due diligence to avoid the foreseeable contraventions from occurring.

[59] While the Panel is satisfied on the evidence that the defence of due diligence has not been made out, the Panel also takes guidance from previous Commission decisions that have considered the defence of due diligence in the context of marking cut block boundaries. In *Forest Practices Board v. Government of British Columbia (Douglas Lake Cattle Company, Third Party)*, Decision No. 2013–FRP–002(a), June 13, 2014), (unreported), Douglas Lake Cattle Company had authority to cut and remove timber under a private timber mark. Douglas Lake retained Westwood Fibre Ltd., a contractor that it had used in the past, to harvest the timber. During its harvesting, Westwood cut and removed timber from Crown land without authority. Westwood had begun to mark the private lot boundary with ribbon but only partially completed this work, intending to return at a later date and continue to mark the boundary. The Commission concluded that Douglas Lake did not exercise due diligence because it did not take steps to either mark the property boundary, or ensure that its contractor did so. The Commission noted at paragraph 54:

> Silence does not establish this defence, nor does putting the matter in the hands of a contractor without demonstrating what instructions were provided to the contractor, and/or what systems were in place for locating boundaries and preventing unauthorized harvesting.

[60] The Commission went on to state at paragraph 58:

> The Panel finds that there was no information before the District Manager, and there is no evidence before the Commission, that Douglas Lake exercised reasonable care in these circumstances, which at a minimum would have involved correctly marking the boundary … for the whole 1.6 kilometres, or making sure that Westwood or someone else, such as a BC Land Surveyor, did that on its behalf. There is no evidence that Douglas Lake had any kind of system in place for locating its property boundaries.

[61] A similar finding was made in *Pope & Talbot*, cited above. In that case, Pope & Talbot had retained a contractor who then mistakenly clear cut in a cut block that was to be selectively logged. The Commission found that Pope & Talbot had not exercised due diligence because it left too much discretion with its contractor in how to achieve the selective logging objective. Pope & Talbot relied on verbal

instructions to their contractor and should have, in the Commission's view, required physical markings to be placed in the field to identify the individual trees to be left.

[62] For the reasons given above, the Panel finds that McBride failed to exercise due diligence to avoid the unauthorized cutting and removal of Crown timber. McBride also failed to exercise due diligence to ensure that the intended results and strategies in the FSP were achieved (i.e., protect/maintain the OGMA). Therefore, McBride has not established a defence under section 72(a) of the *FRPA* to the contraventions of sections 21(1), 52(1) and 52(3) of the *FRPA*.

3. Is the penalty levied by the District Manager appropriate in the circumstances?

[63] Both parties acknowledged that McBride has already paid stumpage on the timber harvested; therefore, this was not an issue before the Panel.

[64] The District Manager levied an administrative penalty of $3,000 against McBride. As the District Manager did not give evidence at the hearing, there was no opportunity to question him on exactly how the amount was determined, or what he may have used as precedent. The Panel has, therefore, relied on what was written in the Contravention Determination and Notice of Penalty.

[65] In the Contravention Determination and Notice of Penalty, the District Manager first identified the maximum penalties that could be levied under section 71(2)(a) of the *FRPA* and section 13(2) of the *Administrative Orders and Remedies Regulation*. For a contravention of sections 52(1) and (3) of the *FRPA*, he concluded that the maximum penalty for each contravention is $90,000, calculated by multiplying the area affected (0.9 hectares) by $100,000. He concluded that the maximum penalty for a contravention of section 21(1) of the *FRPA* is $50,000.

[66] The District Manager then noted that section 71(2)(a) of the *FRPA* states that he may "refrain from levying a penalty if the minister considers the contravention "trifling and that it is not in the public interest to levy the administrative penalty". He concluded that it was appropriate to levy a penalty in this case.

[67] McBride submits that it is not in the public interest for such a penalty to be levied against it because it is a non-profit organization set up to fund community projects within the Village of McBride.

[68] The Panel does not accept this assertion. The public interest is in responsible forest harvesting and protecting the Crown resource, including the forest in the OGMA. The benefit that McBride, and the Village of McBride, receive from McBride's harvesting operations cannot be at the expense of these other public interest values. McBride can only benefit from harvesting in exchange for maintaining the forest in accordance with the legislation and its FSP. The Commission finds that the public interest would not be served if unauthorized harvesting of Crown land, and harvesting into OGMAs, was permitted to occur without consequence, solely on the basis that the harvesting authority is a non-profit organization, and/or that the money obtained from the harvesting benefits community projects. Nor does the Panel find that the contraventions are "trifling", given that 176 trees were harvested, and the harvest occurred in an OGMA.

[69] McBride also submits that the District Manager relied on improper considerations, unsupported by the evidence, when he made his decision on the monetary penalty.

[70] Before levying a penalty under section 71, the District Manager is required to consider the factors set out in section 71(5) of *FRPA*. Those factors are repeated for convenience as follows:

> (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.

[71] The District Manager concluded that:

- McBride did not have any contraventions of a similar nature;
- While the magnitude of the contravention was small, the gravity of the contraventions was "quite significant": 238 cubic metres of Crown timber was cut and removed without authority from an OGMA. He stated:

  > OGMAs are unique features which protect ecological and biological values that cannot be replaced in the short or medium terms through silviculture treatments. The value of OGMAs is clearly identified at all levels of planning, where they, along with other special values, are accorded priority status. In this case, 0.9 ha [hectares] of an OGMA with an overall size of 1,111 ha, was impacted.

  The District Manager also stated that the damage "could easily have been prevented if more care had been taken to protect the OGMA." He also found that the contraventions occurred in a highly visible area adjacent to a public highway that had been the subject of public comment and complaint.
- The contraventions were not repeated or continuous.
- The contraventions were not done deliberately, but resulted from taking insufficient care.
- McBride would benefit from some savings by not having to mark the OGMA or taking the time to properly review the maps with the contractor or carry out monitoring of the contractor's work. It would also have received a profit from the sale of the timber of approximately $2,991. However, assuming that McBride complies with the remediation order,

the District Manager concluded that McBride's economic benefit would be zero.

- McBride was less than cooperative with investigators: it failed to provide documentation requested by the Ministry staff on a number of occasions.

[72] Based upon these findings, the District Manager levied the $3,000 penalty for all three contraventions. He advised that the penalty amount would have been higher if McBride had any previous contraventions of a similar nature, if the contraventions had been repeated or continuous, or a larger portion of the OGMA had been harvested.

[73] Finally, the District Manager noted, with concern, that McBride provided no indication that it would adopt a different policy or approach to marking OGMAs in the future which "suggests that MCFC [McBride] does not fully appreciate the level of risk inherent in the approach it took in this case."

[74] Although McBride alleges that the District Manager relied on improper considerations, unsupported by the evidence, when he made his decision on the monetary penalty, the Panel disagrees.

[75] First, the Panel is of the view that $3,000 is a relatively modest penalty given the maximum penalties set out in the legislation.

[76] Next, the Panel finds the District Manager correctly observed that McBride does not have a record of previous contraventions of a similar nature, and correctly found that the contraventions were not repeated, continuous, or deliberate.

[77] The Panel also finds that the District Manager correctly concluded that McBride was less than fully cooperative in responding to requests for information concerning the circumstances under which the unauthorized harvest occurred. Mr. von der Gonna replied briefly to the first two requests for information from Officer Kope quickly (the requests of January 30 and March 14, 2013), stating that he would respond later in detail; however, he did not do so. In addition, Mr. von der Gonna did not respond at all to Officer Kope's third request of June 20, 2013. The Panel notes that McBride did take steps to address the contraventions by complying with the Remediation Order (i.e., agreeing to a reforestation program and by agreeing to allocate additional OGMA in other areas of their community forest).

[78] In terms of the gravity and magnitude of the contraventions, there is some discrepancy in the District Manager's decision, in that he appears to be under the impression that the affected area was visible to passing traffic and, therefore, offensive to the public. There is no evidence to conclude that that is correct. Specifically, there is no evidence that the unauthorized harvest area is any more visible than the authorized harvest area. As CP 993, Block 5 is immediately adjacent to Highway 16, it appears that any of the permitted cutting would be visible to the public. On the other hand, the District Manager also found that the unauthorized harvest area was relatively small and there is no evidence that he placed any particular importance on this erroneous finding.

[79] Finally, section 71(5)(e) requires consideration of any economic benefit derived by McBride from the contraventions. The evidence before the District Manager and, indeed, the evidence before the Panel, is that McBride derived an

economic benefit of approximately $2,900 from the unauthorized harvest. The District Manager calculated this benefit by applying the log price, less logging costs, to the estimated gross merchantable volume of the unauthorized harvest, instead of to the net merchantable volume.

[80] Log prices and logging costs are based on net scale. Thus, the imputed benefit includes value for "decay, waste and breakage" (the difference between gross and net merchantable volume). This volume deduction has no market value and, therefore, should be excluded in the calculation of economic benefit. However, the Panel finds that the penalty in this instance is not specifically predicated on the erroneous benefit, so this recalculation is of little relevance.

[81] Considering the whole of the evidence before the Panel, and bearing in mind that a $3,000 penalty is very modest compared to the maximum penalties allowed under the legislation, and that the location of the contravention is in an OGMA, the Panel finds that the penalty levied by the District Manager is reasonable in the circumstances.

4. Was it appropriate for the District Manager to find that McBride had contravened both section 52(1) and section 52(3) of the *FRPA*? Specifically, does the duplication constitute double jeopardy or run contrary to the common law rule against multiple convictions?

[82] McBride submits that it should not be found to have breached both section 52(1) and 52(3) of the *FRPA* based on the principles established in *R. v. Kienapple*, [1975] 1 S.C.R. 729 [*Kienapple*]. The *Kienapple* decision established the principle that, in matters of criminal convictions, a person should not be found guilty of two offences arising out of one crime. McBride submits that it should not be found to have contravened both the unauthorized cutting of trees under section 52(1) of *FRPA*, and the unauthorized removal of trees under section 52(3) of *FRPA*.

[83] The Government submits that these two sections of *FRPA* must be read in the spirit of the Legislature's intent to create a regulatory scheme without gaps. For instance, the Government submits that an individual could carry out unauthorized cutting but not removal of trees and, conversely, might carry out unauthorized removal of trees that they had not cut themselves. As McBride did both, the Government submits that it should be found in contravention of both sections of the *FRPA*.

[84] Previous Commission decisions have held that the principle from *Kienapple* is not applicable to administrative penalties under the *FRPA.* In *International Forest Products Limited and Government of British Columbia*, (Appeal No. 96/02(b), March 19, 1997) (unreported) [*Interfor*], the Commission found that, once a contravention of section 17(1) of the regulation was established, section 63 of the *Forest Practices Code of British Columbia Act* was also contravened by operation of statute. The Commission considered the applicability of *Kienapple* and found as follows at page 9:

> The *Code* and the regulations constitute an integrated scheme of forest protection, and cannot be applied separately. The Commission is unable to find that the application of one penalty by the District

> Manager and upheld by the Review Panel constitutes either double punishment or unfairness.
>
> …
>
> The Commission does not agree in any event that the prohibition against multiple convictions for criminal offences, as enunciated by the Supreme Court in *R. v. Kienapple*, has any application to administrative schemes such as the *Code*.

[85] *Interfor* was appealed to the BC Supreme Court. One of the issues was whether the Commission failed to apply the *Kienapple* principle. The Court refused leave on that particular issue. The Court found as follows:

> The question of the application of the *Kienapple* principle, while one of law, is not of sufficient importance in the context of this case to warrant granting leave. No additional penalty was imposed for the contravention of both the *Code* and Regulation. Failure to meet the regulatory standard must amount to a failure to comply with the *Code* in light of the wording of the provision cited above. [*International Forest Products Limited* v. *Forest Appeals Commission, Forest Practices Board and Government of British Columbia*, Unreported, Reasons for Judgment, Edwards J., November 28, 1997, A970934, Vancouver Registry, p. 4].

[86] In *Canadian Forest Products Ltd. v. Government Of British Columbia*, (Appeal No. 98-FOR-09, May 5, 1999) (unreported) [*Canfor*], the Commission adopted the findings from *Interfor*. It also adopted the Commission's findings in *Hayes Forest Services Limited v. Government of British Columbia* (Appeal No. 97-FOR-07, February 4, 1998), (unreported) [*Hayes*]. In *Hayes*, the Commission further found as follows:

> In our view, this scheme was created in an effort to create consistency in the determination process and a "gapless" regulatory scheme. Thus, there is evidence that the Legislature intended to allow the government officials to find a person to be in contravention of two or more sections of the *Code* and its regulations for a single action, even though it may constitute a single legal prohibition. (page 7)

[87] However, the Commission held in Hayes that even though a finding of multiple contraventions for the same circumstances may be acceptable, unfairness may result from the manner in which penalties are levied and reported in those circumstances:

> Having said that, the Commission also recognizes that this scheme may result in an unfairness if two separate penalties are assessed for what is essentially one wrongful action having one legally prohibited effect (e.g. cross stream yarding). However, the place for any unfairness to be remedied is at the penalty assessment stage. Section 117 [now section 91 of the *FRPA*] provides government officials with significant discretion in assessing a penalty. Where it is clear that the contraventions arise out of a single action and are for a single legal

> prohibition, these circumstances should be factored into the penalty assessment. (pages 7-8)

[88] Most of the *Code* has now been repealed and replaced by the *FRPA*, and other enactments. Many of the contraventions previously found in the Code, are now found in the FRPA, including the provisions relating to unauthorized harvesting. In addition, the administrative penalty regime is substantially similar and the seven factors to be considered are identical. Therefore, while the sections at issue in the present appeal are different than those in the above-cited cases, the Panel finds that the same reasoning outlined in the past Commission cases, applies to this case.

[89] The Panel finds that there is no prohibition on McBride being found to have contravened more than one section of the *FRPA*. Further, like the District Managers in the above-cited cases, the District Manager in the present case imposed one penalty. Therefore, there is no unfairness to McBride.

DECISION

[90] In making this decision, the Panel of the Forest Appeals Commission has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[91] For the reasons stated above, the Panel confirms the District Manager's Contravention Determination and Notice of Penalty against McBride.

[92] The appeal is dismissed.

Jeffrey A. Hand, Panel Chair

Les Gyug, Member

Howard M. Saunders, Member

June 1, 2015