BRITISH COLUMBIA

Forest Appeals Commission

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APPEAL NO. 2001-FOR-001

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN:	Rodney Gilbert and Linda Gilbert	**APPELLANTS**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission

Alan Andison	Panel Chair
Katherine Lewis	Member
Brenda Milbrath	Member

HEARING DATE: March 27-28, 2001

PLACE: Kamloops, B.C.

APPEARING:

For the Appellants:	Robert W. McDiarmid, Q.C., Counsel
For the Respondent:	Karen Tannas, Counsel

APPEAL

This is an appeal brought by Rodney and Linda Gilbert from the December 19, 2000 decision of a Review Panel. The Review Panel confirmed the decision of James D. Sutherland, District Manager, dated August 30, 2000, that the Appellant, Rodney Gilbert, contravened sections 58 and 96(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*") by unauthorized harvest of timber on Crown land and unauthorized road construction on Crown land. It further confirmed the District Manager's decision that Linda Gilbert contravened section 96(1) of the *Code* by the unauthorized harvest of timber on Crown land. Finally, the Review Panel confirmed the penalty of $100,557.17 imposed on each of the Appellants for the contraventions of section 96(1) of the *Code.* Those penalties were imposed under section 119 of the *Code*.

Rodney and Linda Gilbert appeal both the contraventions of the *Code* and the penalty imposed.

The Forest Practices Board is a Third Party to this appeal. The Board did not appear at the hearing and did not take any position on the facts. The Board, however, did make written submissions on the vicarious liability provisions of the *Code*.

The appeal is brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*. Pursuant to section 138(2) of the *Code*, the Commission may confirm, vary or rescind the determination appealed from, or refer the matter with or without directions back to the person who made the initial determination.

BACKGROUND

The Appellants purchased the NW ¼ and the NW ¼ of the SW ¼ of DL 6439, Cariboo Land District in 1992. Specifically, the land in question is located near Barriere, B.C., and was purchased for the purpose of starting a small farm. The NW ¼ of DL 6439 is a 160-acre parcel of land. The NW ¼ of the SW ¼ of DL 6439 is a 40-acre parcel of land. These parcels of land are surrounded by Crown land on all perimeters.

Both the 40-acre parcel and the 160-acre parcel had some timber on them, which needed to be cleared to make the land suitable for farming. Both parcels had previously been logged in 1975. The Appellants were not experienced with the logging industry and had most recently been operating a nursery business on the Sunshine Coast. In June 1995, Mr. Gilbert started work on the property with the assistance of Doug Lowe. They cleared a plot of approximately ¼ acre on the 40-acre parcel to build a cabin. The wood harvested from the ¼ acre was used to construct the cabin. At this time, Mr. Gilbert met David Colebank who was an experienced logger and who was logging another property in the area, the Bass property. Mr Gilbert entered into an agreement with Mr. Colebank to log both parcels of land. It was agreed that Mr. Gilbert would receive 70 per cent of the proceeds from any timber harvested on the properties and Mr. Colebank would receive 30 per cent of the proceeds. Mr. Gilbert's share of the proceeds was divided equally between himself and Linda Gilbert.

It was also agreed that Mr. Colebank would do all of the paper work in relation to the harvesting and would make all arrangements to get timber marks for the two parcels. Mr. Colebank proceeded to make these arrangements. However, the timber mark applications were signed by the Appellants, and the applications were made under their names. As a result, the Appellants were granted timber mark designations for both parcels. The timber mark granted for the 40-acre parcel was NAQKG and was issued on August 1, 1995. The timber mark granted for the 160-acre parcel was NARPH and was issued on October 26, 1995.

All other applications and permits in relation to harvesting the Appellants' land were handled in the same manner.

Logging commenced on the 40-acre parcel in November 1995 and was completed by March 1996. The Gilberts received approximately $35,000 for the timber from this operation.

Logging on the 160-acre parcel began in the summer of 1996. However, prior to the commencement of logging, Mr. Gilbert hired a surveyor to locate the boundaries of the property. The surveyor, Donald Goodrich, with the assistance of Mr. Gilbert, identified and flagged the perimeter of the 160-acre parcel. This occurred on August 23, 1996.

Mr. Colebank carried out logging on the 160-acre parcel from sometime during the summer of 1996 until November of 1997. It is the logging of the 160-acre parcel (herein after referred to as the NW ¼) that is the subject of this appeal. It was during this time that overlogging occurred on adjacent Crown land to the north and east of the property. The flagging on the east side of the property was moved out to the edge of the overlogged area, apparently in an effort to cover up the overlogging. In addition, an unauthorized road was constructed on adjacent Crown land for the purpose of removing timber from the property.

The Gilberts received a total of $269,573 for the timber that was sold from both the NW ¼ and the 40-acre parcel. Given that they received $35,000 for timber from the 40-acre parcel it can be concluded that they received $243,573 for wood which they believed came from the NW ¼.

By letter dated February 4, 1998, from the District Operations Manager, Ministry of Forests, the Appellants were informed that:

> …it appears that a road was constructed and timber was harvested on Crown land being the NW ¼ of the SW ¼ of District Lot 1 of 6439, Cariboo Land District. Presently, there is merchantable decked wood on Crown land from your activities. Please be advised that this timber has been seized until further notice. This investigation will be ongoing until the site can be viewed snow free.

By letter dated July 15, 1999, James Sutherland, District Manager, wrote to the Appellants to advise that a Ministry of Forests' investigation had confirmed that harvesting had occurred on Crown land and that a road had been constructed without authority. Mr. Sutherland advised the Appellants that he would be making a determination on the alleged contraventions and offered the Appellants the opportunity to be heard before he made his determination.

On August 30, 2000, the District Manager issued his determination and concluded that:

1. Rodney Gilbert has contravened Sections 58 and 96(1) of the *Forest Practices Code of British Columbia Act* and I have decided it is appropriate under the circumstances to levy a penalty.

2. Linda Gilbert has contravened Section 96(1) of the *Forest Practices Code of British Columbia Act* and I have decided it is appropriate under the circumstances to levy a penalty.

3. David Colebank has contravened Section 96(1) of the *Forest Practices Code of British Columbia Act* and I have decided it is appropriate under the circumstances to levy a penalty.

4. The contraventions arise from harvesting operations supervised by David Colebank, which originated on private property owned by Rodney and Linda Gilbert, specifically, the NW ¼ of District Lot (DL) 6439 Cariboo Land District, and which continued beyond the private property boundaries onto the adjacent Crown land, specifically, the NE ¼ of the SW ¼ of DL 6439, the NE ¼ of DL 6439 and DL 6422. The timber from this Crown land was harvested and removed without authority. In addition, a road was constructed on Crown land without authority on the NE ¼ of the SW ¼ of DL 6439.

5. The area of unauthorized harvest on Crown land was 17.5 hectares (ha). The volume of timber harvested was 4176.9 cubic meters (m^3), of which 3980.7 m^3 was coniferous sawlog and 196.2 m^3 was deciduous.

6. Under Section 119 of the *Forest Practices Code of British Columbia Act*:

   Rodney Gilbert is required to pay to the Crown a penalty of $100 557.17 for the contravention of Section 96(1) of the *Forest Practices Code of British Columbia Act* (no penalty has been applied under Section 117 for the contravention of Section 58 of the *Forest Practices Code of British Columbia Act*);

   Linda Gilbert is required to pay to the Crown a penalty of $100 557.17 for the contravention of Section 96(1) of the *Forest Practices Code of British Columbia Act*; and

   David Colebank is required to pay to the Crown a penalty of $83 071.59 for the contravention of Section 96(1) of the *Forest Practices Code of British Columbia Act* (no penalty has been applied under Section 117 for the contravention of Section 97(2) of the *Forest Practices Code of British Columbia Act)*. The total amount of penalties for these contraventions is $284 185.93. These amounts are due and payable on October 10, 2000. Invoices will be issued and sent separately.

The Appellants requested a review of that decision. A review hearing was conducted on November 14, 2000, in Williams Lake. The Review Panel issued its decision on December 19, 2000, and upheld the District Manager's determination in its entirety.

ISSUES

There is no dispute that unauthorized harvesting of Crown timber occurred. However, the Appellants dispute the finding that they are responsible for the unauthorized harvesting. The Appellants further dispute the determination of the volume of timber harvested from Crown land and the calculation of the penalty.

Finally, Mr. Gilbert disputes the finding that he constructed a road on Crown land. Accordingly, the issues for this Panel are as follows:

1. Whether the Appellants contravened section 96(1) of the *Code* by the unauthorized harvesting of timber on Crown land.

2. Whether the Appellant, Rodney Gilbert, contravened section 58 of the *Code* by constructing a road on Crown land.

3. Whether the penalty assessed against each of the Appellants is reasonable in the circumstances.

RELEVANT LEGISLATION

The relevant sections of the *Code* are as follows:

Authority required to construct or modify a road on Crown land

58 (1) A person, other than the government, who constructs or modifies a road on Crown land must comply with subsection (2) if the road

(a) is within a Provincial forest, or

(b) is outside a Provincial forest and is for the purpose of providing access to timber.

(2) A person to whom this subsection applies may only construct or modify the road

(a) if

(i) the road is identified in a forest development plan prepared or approved by the district manager, and

(ii) the construction or modification has been authorized by a road permit,

Unauthorized timber harvest operations

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

...

(2) Without limiting subsection (1), a person must not remove Crown timber unless authorized to do so

...

(3) If a person, at the direction of or on behalf of another person,

(a) cuts, damages or destroys Crown timber contrary to subsection (1), or

(b) removes Crown timber contrary to subsection (2),

that other person also contravenes subsection (1) or (2).

Private land adjacent to Crown land

97 (1) Before an owner or occupier of private land that is adjacent to Crown land authorizes another person to cut or remove timber from the private land, the owner or occupier must inform that other person of the boundaries of the private land.

(2) Before a person cuts or removes timber from private land adjacent to Crown land, the person must ascertain the boundaries of the private land.

Penalties

117 (2) If a person's employee, agent or contractor, as that term is defined in section 152 of the *Forest Act*, contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.

...

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

(a) must consider any policy established by the minister under section 122, and

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

(i) previous contraventions of a similar nature by the person;

(ii) the gravity and magnitude of the contravention;

(iii) whether the violation was repeated or continuous;

(iv) whether the contravention was deliberate;

(v) any economic benefit derived by the person from the contravention;

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

(vii) any other considerations that the Lieutenant Governor in Council may prescribe.

Penalties for unauthorized timber harvesting

119 (1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96, he or she may levy a penalty against the person up to an amount equal to

(a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 20 of the *Forest Act,* and

(b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.

(2) A penalty may not be levied under both section 117 and subsection (1).

(3) In addition to a penalty under section 117 or subsection (1), a senior official who determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96 may levy a penalty against the person up to an amount equal to the senior official's determination of

(a) the cost that will be incurred by the government in re-establishing a free growing stand on the area, and

(b) the costs that were incurred by government in applying silviculture treatments to the area that were rendered ineffective because of the contravention.

EVIDENCE AND ARGUMENT

The Appellants submit that they did not contravene section 96(1) of the *Code* and that any contravention of that section was solely the responsibility of Mr. Colebank. Rodney Gilbert gave evidence that on or about August 23, 1996, and before any harvesting of the NW ¼ was started, he identified and flagged the boundaries of the property in compliance with section 97 of the *Code*. This is also confirmed in a Statutory Declaration dated March 26, 2001, sworn by Mr. Goodrich, the land surveyor hired by Mr. Gilbert to identify the property lines.

Mr. Gilbert testified that, at that time, in the summer of 1996, he believed that there were about 100 loads of merchantable timber on the NW ¼. He made this guess based on the amount of timber he had harvested from the 40-acre parcel.

Mr. Gilbert further submitted that he specifically advised Mr. Colebank to stay within the flagged boundaries of the NW ¼ and that he should keep the lines straight. Mr. Gilbert advised that Mr. Colebank employed a crew to carry out the logging activities and asked Mr. Gilbert to stay away from those activities. Mr. Gilbert advised that Mr. Colebank told him that he should stay away from the logging site because, as a person inexperienced with logging, it would be dangerous

for him to be around those activities. Mr. Gilbert also said that Mr. Colebank wanted him to stay away because it would make the logging crew nervous if he was on the site.

Mr. Gilbert testified that he complied with Mr. Colebank's request and stayed away from the logging activities. Mr. Gilbert also noted that he was away from the property during much of the time that logging was taking place. Specifically, he was in Gibsons from November 1996 until February 1997. He was then away again from May 15, 1997, until some time in June 1997. When he returned in June 1997, logging had progressed to the eastern boundary of the property. He knew this as he could see that the property had been logged up to the flagged line.

Logging was then carried out on the north and north west parts of the NW ¼ from June until November 1997, when logging was completed. Mr. Gilbert stated that he did not go up to that area and could not see it from the middle bowl area of the property where he was clearing the land. Mr. Gilbert stated that he never authorized Mr. Colebank to cut Crown timber. He became suspicious that logs were being stolen from him in November 1997, when he came upon a logging truck leaving the property at 1 a.m. with a load of unmarked logs. He told the driver of the truck to put the NARPH timber mark on the logs. He does not know if the driver put that mark on the logs.

Mr. Gilbert stated that he was approached by two members of the logging crew, in late October or November 1997. These individuals, Warren Gentles and Lee Spidell, advised Mr. Gilbert that they were owed $10,000 and $15,000 respectively for the work they had performed during the logging operation. Mr. Gilbert told them that it was Mr. Colebank who owed them the money and that they should go to West Fraser Mills on Friday, as that was when Mr. Colebank would be there to receive payment for the wood he had harvested from the land.

Mr. Gilbert testified that he later received a phone call from these two individuals, who threatened to go to the Forest Service and report him for overlogging if he did not pay them the money that they were owed. Mr. Gilbert stated that it was at this time that he first became suspicious that overlogging had occurred. Mr. Gilbert told them that they could do as they wished, but he did not owe them any money. Mr. Gilbert still did not know if overlogging had actually occurred at that time. As a result, he carried on with clearing the land, even up to the eastern flagged boundary that he later learned was Crown land.

Mr. Gilbert then received a certified letter dated February 4, 1998, from the Ministry of Forests, advising him that there may have been contraventions of sections 96(1) and 97(1) of the *Code* because of road building and timber harvesting on Crown land. This letter further notified him that merchantable decked wood on Crown land was being seized until further notice. Mr. Gilbert stated that, by the time the seizure notice was rescinded, the wood was so badly checked that it was only good for fence posts or firewood.

Mr. Gilbert testified that he was again advised that overlogging may have occurred in the spring of 1998 when Gillmor Anderson of the Forest Service approached him

and told him that the property had been overlogged. Mr. Gilbert stated that Mr. Anderson instructed Mr. Gilbert to stop all work on the property. Mr. Gilbert complied with this request. Mr. Gilbert stated that, because of this, he had to buy feed and grain for his cattle at a cost of $30,000. He was also forced to sell his cattle herd at a loss because he was unable to farm the land.

Mr. Gilbert advised that he derived no economic benefit from the overlogging. He believes that the only monies he received were for the 5000 cubic metres of timber that he estimated was on his private property. The only monies received by him for the wood sold under NARPH timber mark came from Tolko Industries Ltd., Ainsworth Timber Co. Ltd. and West Fraser Mills Ltd. In conclusion, he submits that all of the logging on Crown land was carried out by Mr. Colebank and that it was not done at the direction of, or on behalf of, Mr. Gilbert.

Linda Gilbert gave evidence that she was away from the property during the majority of the time when the logging was taking place. She stated that when she was there she never went near the logging operation, and mostly stayed at the cabin or went down to the lake. She never walked the boundary of the property. She advised that the total monies received by her and Mr. Gilbert for wood that was harvested from the loads of timber that the District Manager assessed as Crown timber was $209,251.19.

Arlene Gilmore, Compliance and Enforcement Specialist, Ministry of Forests, gave evidence regarding her investigation of possible contraventions of the *Code* by the Appellants.

Ms. Gilmore advised that a timber cruise of forest adjacent to the Crown land that had been logged was conducted in order to determine the volume of timber that had been harvested from Crown land.

Ms. Gilmore then did an investigation of all wood sold under the NARPH timber mark. The volume of wood was in excess of the amount of timber that was on the Appellants' private property. This was partly determined by a series of aerial photographs of the private land and the adjacent Crown land. In particular, an aerial photograph dated 1986, shows the NW ¼ to be practically barren from previous logging activities.

Ms. Gilmore also supplied evidence of ephemeral stream areas that ran through the Crown land, which had been logged over resulting in water pooling. This created a difficulty for replanting in the area.

Ms. Gilmore stated that Mr. Colebank was also under investigation for overlogging activities on the Bass property. The Gilberts were not under investigation for those contraventions.

Ms. Gilmore was asked about the truck that Mr. Gilbert saw leaving his property in the middle of the night in November 1997. She responded that she looked into the November invoice reports from the mills and found some corresponding load slips with irregular hours, but noted they all had proper timber marks. She also stated

that it wasn't unusual to have trucks loading in the middle of the night due to daytime hauling restrictions at certain times of the year.

Finally, Ms. Gilmore confirmed that logging may have continued within the boundaries of the NW ¼ at the time that logging was taking place on the adjacent Crown land. Accordingly, timber from the NW ¼ may have been mixed with timber from the Crown land when the timber was sold to the mills.

James D. Sutherland, District Manager, gave evidence regarding the Determination that he issued on August 30, 2000. Mr. Sutherland advised that he determined that David Colebank carried out the logging on Crown land on behalf of the Gilberts. He based this finding solely on the economic gain received by the Gilberts. Mr. Sutherland then apportioned the penalty based on the profit each person received. He did not find it necessary to determine who was to blame. He was simply making the Crown "whole" and removing the profit.

When determining the volume of timber that had been harvested from Crown land, Mr. Sutherland compared cruise data from six sites adjacent to the unauthorized harvest area to ensure that the cruise data was accurate. Based on the results of a cruise of timber adjacent to the trespass, he determined the volume of timber that had been taken from Crown land. He then subtracted an area of Crown land that had been previously harvested on the south side of the NW ¼, from the total. Mr. Sutherland then compared that volume of timber with invoices from the three mills to determine the monies received for the Crown timber. Mr. Sutherland acknowledged that, although some of those invoices may have included payment for private timber, that was not an issue. He was simply totalling up enough invoices to cover the entire volume of timber taken from Crown land. The remainder was for timber that must have been taken off of the NW ¼.

Mr. Sutherland stated that he was satisfied that the Gilberts had received payment for Crown timber and, therefore, the logging was done on their behalf. In assessing the penalty, Mr. Sutherland did not account for any payments made by the Gilberts for clearing land. He did not consider the overlogging of the Bass property by Mr. Colebank. He did not consider whether the overlogging was deliberate. Finally, he did not put any weight on the fact that Mr. Gilbert was verbally told to stop work on the property.

Mr. Sutherland confirmed that, in reaching his decision, he reviewed all of the timber volumes for sales invoices for the two timber marks that were assigned to the Gilberts. He stated that all sales for all timber marks must be reported to the Ministry of Forests by the mills that accept that wood.

Mr. Sutherland also stated that he was not aware of any of the timber from the Crown land being sold under a different timber mark or being sold without a timber mark.

DISCUSSION AND ANALYSIS

1. Whether the Appellants contravened section 96(1) of the *Code* by the unauthorized harvesting of timber on Crown land.

The facts of this case are that the Appellants entered into an agreement with Mr. Colebank to log their property for them. In return for this, Mr. Colebank would receive approximately 30 per cent of the revenue from the timber taken off the property and the Gilberts would receive the remaining 70 per cent of the revenue, which they then divided equally between themselves. Prior to commencing the logging activities, Mr. Gilbert hired a professional surveyor to identify and flag the property lines. He then told Mr. Colebank to keep all logging activities within those flagged lines. Mr. Colebank did not stay within the flagged lines and overlogged onto Crown land on both the east and north sides of the NW ¼. The flags on the east side of the property were then moved to make it appear that Mr. Colebank kept the logging within the property lines. The Panel accepts that the flags were moved without the knowledge of the Gilberts.

There is some dispute regarding the timber marks that were used to mark the timber that came from the overlogged Crown land. The Appellants submit that all of the timber that received the NAQKG timber mark came from the 40-acre parcel. They further submit that all of the timber that received the NARPH timber mark came from the NW ¼. If this were so, then any wood taken from the Crown land was either harvested and sold by Mr. Colebank under a third unknown timber mark, or with no timber mark at all.

The Panel has reviewed the method used by the District Manager to assess the volume of Crown timber and the remaining volume of timber that came from the Appellants' land. The Ministry of Forests' Harvest Billing Reporting Mark Invoice Report for the period from October 26, 1995 through May 26, 1998, indicates that 6,003.2 m^3 was the total volume of timber sold under the two timber marks. Based on the timber cruise of adjacent Crown land, the District Manager determined that 4,176.9 m^3 was the total volume of timber that was taken from 17.5 ha of Crown land. He then reduced the total volume to 4,163 m^3. In reaching this number, he subtracted 1.24 ha of Crown land that had been logged prior to 1995. Accordingly, the result is that 1,840.2 m^3 is the total volume taken from the Appellants' private land. Of that amount, 727 m^3 was sold under the NAQKG timber mark. This would mean that 1,113.2 m^3 was harvested and sold from the NW ¼ under the NARPH timber mark.

The Appellants submit that all logging that occurred on Crown land must have taken place after spring break up in 1997. They provide receipts that indicate that only 2066.4 m^3 of wood was sold under NARPH after March 1997. As the Ministry of Forests timber cruise indicates that 4,163 m^3 of Crown timber was taken from the adjacent land, the Appellants submit that over 2,000 m^3 of timber is unaccounted for.

The Panel does not agree with the Appellants. The Panel notes that no timber cruise was conducted on the NW ¼ prior to the commencement of logging

activities. Accordingly, the amount of merchantable timber on the NW ¼ is unknown. In addition, it is noted that the property was logged in 1975 and aerial photographs indicate that the coverage of timber on the property was sparse.

The Panel notes that a valid timber cruise was taken of lands adjacent to the overcut Crown land and accepts that the volume of merchantable timber on that land that was harvested was 4,163 m^3. The Panel is satisfied that harvesting of Crown timber may have occurred before spring break up in March 1997. Mr. Gilbert has given evidence that he followed Mr. Colebank's request that he stay away from the logging operation. Mr. Gilbert also gave evidence that he was away from the property from November 1996 until February 1997. In addition, Mr. Gilbert stated that he did not realise the flags had been moved on his return to the property in June 1997. Thus, even when he saw a trespass, he was unable to recognize it. Therefore, it is entirely possible that Mr. Gilbert had no idea that logging was taking place on Crown land prior to March 1997. If such harvesting was occurring, which this Panel is satisfied did occur, then this would account for the receipts for the unaccounted for timber.

Finally, the Panel has considered the fact that a truck was seen leaving the property with unmarked timber in the middle of the night in November 1997. The evidence is that Mr. Gilbert told the driver of the truck which timber mark to use. The evidence is also that harvesting was taking place on the NW ¼ at the same time that the Crown land was being harvested. Additionally, the Panel received some second hand evidence that logs were being taken to other mills from the property. This limited and partially uncorroborated evidence is not sufficient to persuade the Panel that Crown timber was being taken off the property with anything other than the NARPH timber mark.

Accordingly, the Panel is satisfied that the wood harvested from the Crown land was harvested under the NARPH timber mark.

As the Appellants did not perform the actual cutting or harvesting of the wood, the next question is whether they should be the subject of the Determination.

For clarification, the relevant provisions of section 96 of the *Code* are as follows:

Unauthorized timber harvest operations

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

...

(2) Without limiting subsection (1), a person must not remove Crown timber unless authorized to do so

...

(3) If a person, at the direction of or on behalf of another person,

(a) cuts, damages or destroys Crown timber contrary to subsection (1), or

(b) removes Crown timber contrary to subsection (2),

that other person also contravenes subsection (1) or (2).

If a "person" cuts, destroys, damages or removes Crown timber without authorization, that person is responsible for a violation of section 96 of the *Code.* "Person" is not defined in the *Code* but it is defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238 to include "a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law." On the facts of this case, the arrangement between the Gilberts and Mr. Colebank appears to be in the nature of a partnership – in that it is "the relation which subsists between persons carrying on business in common with a view of profit" (section 2 of the *Partnership Act*, R.S.B.C. 1996, c. 348). As one of the partners, the Gilberts are responsible for the actions of Mr. Colebank vis-à-vis the unauthorized cutting.

Alternatively, section 96 of the *Code* establishes responsibility for the contravention if the Crown timber was cut, damaged, destroyed or removed at the "direction of" or "on behalf of" the Gilberts.

On a review of the evidence, the Panel is satisfied that Mr. Colebank carried out the harvesting of Crown timber without any *direction* to do so from the Appellants. To the contrary, Mr. Gilbert went to the effort and expense of marking his property lines and expressly directed Mr. Colebank to stay within those lines. In spite of this, Mr. Colebank harvested Crown timber and the Appellants received payment for that timber.

Thus, the question for the Panel is whether the harvesting of the Crown timber by David Colebank was on "behalf" of Rodney and Linda Gilbert. The Forest Practices Board has made written submissions on this question. Specifically, the Board submits that section 96(3) does not establish vicarious liability on the basis of relationship status alone. Instead, according to the Board, section 96(3) limits vicarious liability to situations where the contravenor (including contractors) acted "at the direction of or on behalf of" the other person. The Board then provides the Panel with a number of definitions of the phrase "on behalf of."

For example, *Black's Law Dictionary,* Sixth Edition, defines "behalf" as "Benefit, support, defence or advantage." In addition, the Court of Appeal has considered the words "on behalf of" as they are found in the *Condominium Act.* In that case, *Strata Plan No. VR 368, Owners* v. *Marathon Realty Co.* (1982), 141 D.L.R. (3d) 540 (B.C.C.A.) the Court said, "In this legislation 'on behalf of' an owner means 'for the benefit of' that owner."

Finally, the Board submits that, if Mr. Colebank was acting on behalf of the Gilberts when he logged the Crown timber, due diligence is likely not a defence.

The Panel has considered these submissions and has concluded that Mr. Colebank logged Crown timber on behalf of Rodney and Linda Gilbert in contravention of section 96(3) of the *Code*. The Panel accepts that "on behalf of" within section

96(3) of the *Code* includes "for the benefit of." Specifically, the Panel is satisfied that the Appellants benefited from the unauthorized harvest through the receipt of monies paid for that wood. In addition, the Panel is satisfied that, sometime before November 1997, the Appellants became suspicious that wood was being harvested from adjacent Crown land, but did not take any proactive steps to notify the Ministry of Forests. If they were suspicious that Crown timber was being harvested under their timber mark, then they must have been equally suspicious that they were benefiting from that unauthorized harvest. Even if the Appellants were not aware that a trespass had occurred on Crown land, they have, at the very least, benefited from a "windfall." It is still a benefit.

The Panel also confirms that due diligence is not a defence for administrative penalties under the *Code*. It is well established in previous decisions of the Commission that the defence of due diligence is only available for prosecutions under the *Code*.

For all of the above reasons, the Panel finds that Rodney and Linda Gilbert contravened section 96(1) of the *Code* by benefiting from the unauthorized harvest of Crown timber.

2. Whether the Appellant, Rodney Gilbert, contravened section 58 of the *Code* by constructing a road on Crown land.

The Panel was provided with very little evidence on this part of the Determination.

Mr. Gilbert explained that the unauthorized road was constructed by Mr. Colebank in June 1997. Mr. Gilbert stated that he did not know that the road was on Crown land. In his evidence at the Determination hearing, Mr. Gilbert indicated that the road was an existing road and the only construction that was carried out was to traverse a wet spot.

Ms. Gilmore provided the Panel with copies of photographs of the road that were taken by Gillmor Anderson of the Ministry of Forests. The photographs were plotted on a map that showed that the road is on the NE ¼ of the SW ¼ of DL 6439 which is Crown land adjacent to and south of the NW ¼.

Mr. Sutherland told the Panel that, after having found that Mr. Gilbert was responsible for the construction of the road, he decided not to issue any penalty in respect of that finding.

The Review Panel stated, "that construction of this road had relatively insignificant consequences in that no timber was harvested nor was there any damage to the environment."

The Panel notes that section 58 of the *Code* specifically refers to the "person who constructs or modifies a road on Crown land."

If Mr. Gilbert's relationship with Mr. Colebank is in the nature of a partnership, then Mr. Gilbert is responsible for the section 58 contravention.

In the alternative, if Mr. Colebank acted as an agent for Mr. Gilbert when he constructed the road, then Mr. Gilbert is liable under section 117(2) for the contravention. Counsel for the Respondent provided the Panel with the following definition for agent from Black's Law Dictionary, (*supra*):

> **Agent**. A person authorized by another to act for him, one intrusted with another's business. *Humphries* v. *Going*, D.C.N.C., 59 F.R.D. 583, 587. One who represents and acts for another under the contract or relation of agency (*q.v.*). A business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.
>
> One authorized to transact all business of principal, or all of principal's business of some particular kind, or all business at some particular place…

While Mr. Colebank is not a contractor within the definition of section 152 of the *Forest Act*, based upon the definition of "agent" provided by the Respondent, Mr. Colebank is an agent and is, therefore, in contravention of section 58 of the *Code*, despite the fact that he was not involved in the actual construction of the road.

Accordingly, the Panel upholds this finding of a contravention. However, the Panel makes this finding reluctantly as it acknowledges that Mr. Gilbert was unaware of the road construction and notes that the Respondent did not see fit to name the actual road-builder.

3. Whether the penalty assessed against each of the Appellants is fair in the circumstances.

The Appellants submit that the penalty is excessive. They submit that the estimate of the volume of wood taken from Crown land is excessive. They also submit that the penalty does not take into account costs that resulted from clearing the land and losses experienced due to Ministry of Forests' enforcement activities.

As noted above, the Panel has determined that the volume of wood taken from Crown land, for which the Appellants received payment, was 4,163 m^3. This is based on the Ministry of Forests' cruise figure. The District Manager assessed the penalty based on the cruise information and actual invoices. In particular, he stated:

> Using Stumpage Invoice and Scale Summaries, the actual shipments of unauthorized timber were estimated by working backward from the last

> shipment until an equivalent volume of scaled timber to estimated cruise volume was identified. In this case, shipments for 196.2 m^3 of aspen and 3980.7 m^3 of conifer (totalling 4176.9 m^3) were identified and I determined this to be a reasonable estimate of the actual shipments of unauthorized harvest timber.

He then stated:

> Based on the actual payment information supplied by the mills…which received the shipments…for timber marked NARPH; I have determined that the parties to this contravention profited from the contravention in the following amounts:
>
> Rodney Gilbert $100, 557.17 (35.4%)
>
> Linda Gilbert $100, 557.17 (35.4%)
>
> David Colebank $83, 071.59 (29.2%)
>
> For a total of $284,185.73

This is the same amount that each of the three parties was penalized under section 119 of the *Code*. The District Manager recalculated the penalty to account for stumpage, plus bonus bid, plus silviculture costs, plus deterrent to remove the profit, and arrived at the same numbers.

The Panel has reviewed the District Manager's calculations and agrees that the Crown should be made whole for any loss of Crown timber, and that no one should profit from a contravention of the *Code*. The Panel finds that, by using the actual invoices to come to an accounting of the monies paid for the Crown timber, the District Manager has accurately determined the market value of the wood. Accordingly, the Panel finds that the penalty assessed by the District Manager fully compensates the Crown for the lost timber and removes all of the profit that the Appellants received for the Crown timber.

This is consistent with previous Commission rulings in situations similar to this one. See *Frank McIntyre* v. *Government of British Columbia,* Appeal No. 97-FOR-18, August 17, 1998, unreported and *Safe Enterprises D.L.S. Ltd*. v. *Government of British Columbia,* Appeal No. 98-FOR-04, November 6, 1998, unreported.

The District Manager could have assessed additional penalties of up to 2 times market value plus stumpage and bonus bid, plus regeneration costs. However, he chose not to do so. The Panel agrees that, under the circumstances and taking into account the provisions of section 117(4) of the *Code,* no further penalty should have been assessed. The Panel finds that the Appellants were novices who unknowingly benefited from the illegal activities of Mr. Colebank, with whom they entered into a business relationship in good faith. They made efforts to comply with the *Code* by flagging the property boundary lines prior to allowing the logging to proceed.

The Panel has also considered the Appellants' request that the penalty be reduced by between $20,000 and $30,000 to account for the cost of clearing Crown land. The Panel does not agree that the penalty should be reduced for this reason. The clearing was carried out without the knowledge of the Crown and on land that the Crown did not want cleared in any event. The Crown should not be required to compensate the Appellants for their own error.

The Appellants further submit that they lost a season of farming due to a "stop work order" that was imposed upon them during the course of the Ministry of Forests' investigation of the contravention of the *Code*. The evidence before the Panel is that, on May 20, 1998, Gillmor Anderson, a Ministry of Forests employee wearing a Forest Service uniform, attended at the Appellants' property where he found Mr. Gilbert clearing the land. Mr. Anderson gave a statement to Ms. Gilmore during the investigation of this matter in which he stated as follows:

> Upon returning to the office I informed my supervisor of the possible work being done on the site…I was told to go talk to the landowner, and asked him not to do any work on site till the investigation was finished. I was going to give him a 242 to impose the request, but as I approached Rodney Gilbert it was clear to me that he had no intention of doing any work…so only a verbal asking him not to do any work was given at that time.

He also stated:

> I basically asked him to stop all work, um, regarding his land improvements, cause he was clearing the land at the time…. I basically verbally asked him to stop all work until the investigation was done.

The Panel notes that the Gilberts were not advised that the investigation was completed until July 15, 1999. This was over a year after the order was made.

The Appellants advise that, upon receiving the order, they stopped all work on their farm for the year that it was in place. The Appellants submit that they incurred expenses of approximately $30,000 as a result of the order.

The Respondent submits that a stop work order was never formally issued to Mr. Gilbert. For that to have occurred, the oral stop work order had to have been followed up with a written order within three days.

Section 3 of the *Administrative Remedies Regulation* provides as follows:

> **3.** (1) An order to stop work issued by an official under section 123(1) of the Act must be in writing and include all of the following:
>
> (a) the nature of the contravention;
>
> (b) the extent to which the contravention must cease;

(c) the date by which the requirements of paragraph (b) must be met;

(d) the person's right to a review and appeal including the title and address of the review official to whom a request for a review may be made.

(2) Despite subsection (1), if the official is of the opinion that the nature of the contravention is causing or may imminently cause serious damage to the environment, the official may order that the contravention cease or cease to an extent specified, and the order need not be in writing.

(3) If the stop work order in the form referred to in subsection (2) is given to a person, the official must, within 72 hours of giving that order, give the person a written order referred to in subsection (1).

Counsel for the Respondent submits that the verbal stop work order was simply a misunderstanding and that it was not followed up in writing within 72 hours. She submits that it would have been reasonable for the Appellants to have asked the Ministry of Forests if the order remained in effect, rather than to cease all operations on their farm until further notice.

When levying a penalty under section 119 of the *Code*, subsection 117(4) identifies a number of factors that may be considered. One of those factors is the cooperativeness of the parties. The Panel finds that the Ministry of Forests told the Appellants to stop work on their land and, despite the fact the official did not meet the legislative requirements in relation to the order, Mr. Gilbert fully cooperated with what he reasonably believed to be a proper order. This cooperation was to the Gilberts' detriment. It is simply not appropriate for the Respondent to put the onus on the Appellants to ensure that the Ministry of Forests is following its own legislation and doing its job properly.

The result of the Appellants' cooperation with the Respondent in this case, is that they incurred some additional expenses including having to buy feed for their cattle. The Panel does not have enough information before it to properly assess the additional expenses that the Appellants experienced due to the issuance of that order. However, the Panel finds that the amount of the penalty under section 119 of the *Code* should be reduced by whatever that amount is. Accordingly, the Panel refers this matter back to the District Manager for that purpose. In reducing the penalty, the District Manager should divide the reduced amount equally between Rodney and Linda Gilbert.

Finally, the Appellants submit that the penalty should be further reduced because of a seizure order that was placed on five loads of logs. Mr. Gilbert gave evidence that by the time the seizure order was rescinded, the logs were so badly checked that they could only be used for firewood or fence posts.

On review of the evidence, it is noted that a seizure notice was sent to the Appellants on February 4, 1998. A Ministry of Forests' File Note dated September 8, 1998, describes the wood as "mostly aspen, and small spruce with a minor

amount of pine." That same File Note recommends that the seizure notice be rescinded. Based on this information, the Panel is not convinced that the seized timber was of high value. The Panel is also not convinced that the timber would have deteriorated to such a degree over a seven-month period that it lost its value in relation to other uses besides firewood or fence posts. Accordingly, the Panel is not prepared to order that the Appellants be compensated for the seized timber.

DECISION

Pursuant to section 138(2) of the *Code* the Panel refers this matter back to the District Manager for the limited purpose of determining the financial loss caused to the Appellants as a result of their cooperation with the stop work order. The Panel further directs the District Manager to reduce the penalty imposed under section 119 of the *Code* by that amount and to divide it equally between Rodney and Linda Gilbert.

The balance of the Determination and Review Decision is upheld. The appeal is allowed in part.

Alan Andison, Chair
Forest Appeals Commission

April 23, 2001