BRITISH COLUMBIA

Forest Appeals Commission

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APPEAL NO. 2002-FOR-007(a)

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:	Weyerhaeuser Company Limited	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
BEFORE:	A Panel of the Forest Appeals Commission	
	Alan Andison, Chair	
DATE OF HEARING:	Conducted by way of written submissions	
	Concluding on November 22, 2002	
APPEARING:	For the Appellant: Wendy A. King, Counsel	
	For the Respondent: Michael J. Pankhurst, Counsel	
	For the Third Party Calvin Sandborn, Counsel	

APPEAL

This appeal arises out of the March 20, 2002 determination of Rory Annett, District Manager, Queen Charlotte Islands Forest District (the "District Manager"), that MacMillan Bloedel Limited ("MacMillan Bloedel") was responsible for the construction of two unauthorized stream crossings in contravention of section 21(1) of the *Timber Harvesting Practices Regulation*, B.C. Reg. 109/98 ("*THPR*"). The District Manager levied a penalty of $1,500 for each contravention, for a total of $3,000. The District Manager determined that MacMillan Bloedel was the responsible party. However, because the Tree Farm Licence in question was reissued to Weyerhaeuser Company Limited ("Weyerhaeuser"), the determination was addressed to Weyerhaeuser.

Weyerhaeuser requested a review of the District Manager's determination on the grounds that the decision was made after the limitation period in section 4(1) of the *Administrative Remedies Regulation*, B.C. Reg. 182/98 ("*ARR*") had expired. On June 17, 2002, the Review Panel upheld the determination of the District Manager and confirmed the contraventions and penalties. On July 12, 2002, Weyerhaeuser appealed the District Manager's determination, as upheld by the decision of the Review Panel, to the Forest Appeals Commission (the "Commission").

The appeal was brought before the Commission pursuant to section 131 of the *Forest Practices Code of British Columbia Act* (the "*Code*"). Under section 138 of the *Code*, the Commission may confirm, vary or rescind the determination appealed from. The Commission may also refer the matter back to the person who made the determination, with or without directions.

Weyerhaeuser seeks an order rescinding the contraventions and the penalties.

BACKGROUND

On October 13, 1998, Brian Saunders, a forester with MacMillan Bloedel, discovered the unauthorized construction of a backspar trail crossing stream #1 located within Tree Farm Licence 39, Cutting Permit 922, cutblock Gold 5 in the Gold Creek/Yakoun River watershed on the Queen Charlotte Islands. Stream #1 is classified under the *Operational Planning Regulation*, B.C. Reg. 107/98, as an "S4" fish-bearing stream.

On November 10, 1998, Mr. Saunders informed Cary Drummond, a Compliance and Enforcement Officer, Queen Charlotte Islands Forest District, Ministry of Forests, of the possible contravention.

Also on November 10, 1998, Mr. Saunders sent a fax to Louis Bourcet, Compliance and Enforcement Supervisor, Ministry of Forests, with copies to Alvin Cober with the then Ministry of Environment, Lands and Parks, (now the Ministry of Water, Land and Air Protection), and Allan Cowan, a Habitat Technician with the Department of Fisheries and Oceans Canada ("DFO") in Queen Charlotte City. Mr. Saunders stated:

> I am sending this fax to report an event that occurred during the harvest of cutblock "Gold 5". On October 13 myself and Dayson Wrubel visited Gold 5. During this visit we found that the backspar trail located between falling corners 8 and 9 was built over stream 1. This stream was classified as S4...

On November 12, 1998, John Doucette, another forester with MacMillan Bloedel, informed Cary Drummond of an additional unauthorized stream crossing, over stream #5 located within Tree Farm Licence 39, Cutting Permit 922, cutblock Gold 5. Stream #5 is classified under the *Operational Planning Regulation* as an "S6" non-fish bearing stream, but it becomes a fish bearing (S4) stream approximately 200 metres downstream from the unauthorized stream crossing.

The unauthorized crossings were constructed by C&C Beachy Company Limited, a contractor hired by MacMillan Bloedel to provide hoe chucking and backspar trail construction services. The two unauthorized stream crossings led to an investigation, a determination, and an administrative review.

Investigation

On November 13, 1998, Cary Drummond completed an investigation of MacMillan Bloedel's timber harvesting activities, in response to the reports of unauthorized stream crossings.

DFO also investigated the stream crossings. On November 16, 1998, Mr. Cowan of DFO sent a letter to the District Manager. The letter states that a recent investigation determined that an unauthorized backspar trail had been constructed across stream #1 located within Tree Farm Licence 39, Cutting Permit 922, cutblock Gold 5. The letter characterized the construction of the backspar trail across stream #1 as "a serious incident." Mr. Cowan stated "[W]e are quite disconcerted to find that Stream 1A has been obliterated by the recent harvesting. No protection was afforded to the tributary at the backspar trail crossing, and the former channel is completely obscured by large logs and woody debris…." The District Manager forwarded the letter to Ministry of Forests, Compliance and Enforcement staff.

By letter dated December 17, 1998, Cary Drummond advised MacMillan Bloedel that the suspected contraventions would be investigated further.

On April 6, 2000, at the completion of the investigation, a letter was sent to Weyerhaeuser confirming the investigative findings. The letter states:

> The investigation has confirmed that you may be operating contrary to ***Part 4, Division 3 Section 67.(1)(a)(d)(e)(f) and 67.(2)(a) of the Forest Practices Code of British Columbia Act and Section 4., 21.(1) and 23.(d) of the Timber Harvesting Practices Regulation and Sections 7.02(a) and (b) of Tree Farm Licence 39, Cutting Permit 922.***
>
> Specifically, the investigation has revealed that timber harvesting operations including the construction of temporary stream crossings on Cutting Permit 922 Cutblock Gold 5 were conducted contrary to the logging plan, silviculture prescription and backspar trail standards. Temporary stream crossings were constructed on streams #1(S4) and #5(S6) without authorization of the District Manager and stream disturbance or damage was found at each of the stream crossing sites, including stream #1(A) (S6). Timber harvesting operations deposited slash and debris into a prohibited area, being a fish stream, at the stream-crossing site on stream #1.
>
> [Bold as per original]

The letter indicated that a senior official would be making a determination regarding the alleged contraventions. Weyerhaeuser was informed that it would have an opportunity to be heard and to present evidence relevant to the alleged contraventions.

On July 13, 2000, the District Manager held an "Opportunity to be Heard" hearing.

Determination

The District Manager issued his determination on March 20, 2002. The District Manager determined that MacMillan Bloedel was responsible for two contraventions of section 21(1) of the *THPR*, which provides:

> **21**(1) A person carrying out harvesting must not construct a temporary stream crossing unless it is approved in an operational plan or authorized by the District Manager in writing, with or without conditions.

The District Manager determined that MacMillan Bloedel was not fully diligent, and he issued a deterrent penalty of $1,500 for each contravention, for a total of $3,000.

The District Manager determined that the responsible party was MacMillan Bloedel. However, because Tree Farm Licence 39 had been reissued to Weyerhaeuser, the determination was addressed to Weyerhaeuser.

Administrative Review

Weyerhaeuser requested an administrative review of the District Manager's determination. The administrative review was conducted by way of written submissions before an administrative panel (the "Review Panel") pursuant to section 129(2)(b) of the *Code*.

Weyerhaeuser did not challenge the District Manager's findings with respect to the contraventions of section 21(1) of the *THPR*; rather, Weyerhaeuser challenged the determination on the grounds that it was made outside of the three-year limitation period established under section 4(1) of the *ARR*, which states that "the time limit for levying a penalty against a person is three years after the facts on which the penalty is based first came to the knowledge of a senior official."

Weyerhaeuser argued that the senior official was made aware of the facts relating to the contraventions by the November 16, 1998 letter that DFO sent to the District Manager. Weyerhaeuser further argued that it is fair to assume that the District Manager read the November 16, 1998 letter and had actual knowledge of the facts contained within the letter. Weyerhaeuser concluded that the three-year limitation period expired on November 17, 2001 and, given that the District Manager's determination was issued on March 20, 2002, the District Manager failed to meet the limitation period. Weyerhaeuser requested that the District Manager's determination be reversed.

The Review Panel found that the District Manager became aware of all facts relating to the contraventions on July 13, 2000, during the "Opportunity to be Heard" hearing, and that he levied the penalty within the three-year limitation period. In the reasons for its decision, the Review Panel stated:

> The panel agrees with Weyerhaeuser and the district manager that the purpose of the limitation period is to ensure any claims that fail to meet the time requirements of the limitation period are barred from

> proceeding. The dispute is when the senior official became aware of the facts of this case.
>
> The panel has determined that the key phrase in Section 4(1) of the ARR is "3 years after the facts on which the penalty is based". It is clear to the panel that on November 16, 1998, not all the facts were in front of the district manager. The panel has determined that not until July 13, 2000, was the district manager presented with all the evidence for his consideration, finding of facts and determination resulting in a penalty. The panel has concluded that the start of the limitation period was on the date of the OTBH [Opportunity to be Heard], July 13, 2000.

The Review Panel found that the November 16, 1998 letter from DFO formed part of the investigative findings that were presented to the District Manager during the Opportunity to be Heard hearing. The Review Panel denied Weyerhaeuser's request for relief and confirmed the contraventions and penalties.

The Appeal

On July 12, 2002, Weyerhaeuser appealed the District Manager's determination, as upheld by the decision of the Review Panel, to the Commission. Weyerhaeuser appeals on the grounds that the District Manager and the Review Panel misinterpreted section 4(1) of the *ARR*. Weyerhaeuser argues that a proper interpretation of section 4(1) is that the limitation period begins once the District Manager is made aware of the facts and, in this case, the District Manager was made aware of the facts when a letter addressed to him was sent to his office on November 16, 1998. Weyerhaeuser seeks an order rescinding the determination.

The Forest Practices Board (the "Board") requested party status in this appeal on July 16, 2002, pursuant to section 131(7) of the *Code*. The Board argues that the Commission should interpret the three-year limitation period under section 4(1) of the *ARR* as commencing when a senior official, or his/her or the official's employees, becomes aware of the facts that establish a likely contravention of the *Code*. Alternatively, the Board argues that the Commission should recommend that the *Code* be amended to reflect the above principle.

The Government requests that the appeal be dismissed and that the determination of contraventions and penalty amounts be confirmed. Alternatively, if the Commission finds that the District Manager levied a penalty after the limitation period, the Government requests that the determination of contraventions be confirmed and only the associated penalties be rescinded.

In support of its position, the Government provided a letter of certification from the District Manager dated October 11, 2002, prepared pursuant to section 4(2) of the *ARR*. That letter reads as follows:

> I, Rory Annett, certify under Section 4(2) of the *Administrative Remedies Regulation* of the *Forest Practices Code of British Columbia Act*, that in relation to my contravention determination against

Weyerhaeuser Company Limited of March 20, 2002 (Ministry of Forests file: DQC 1999-0063) I became aware of the facts on which the penalty is based on July 13, 2000, at the Opportunity to be Heard hearing.

I saw a letter dated November 16, 1998, from the Federal Department of Fisheries in the days or weeks following its arrival in my office. However, I only read the first paragraph or two before realizing it was a Compliance and Enforcement (C&E) matter and sent it to District C&E staff to deal with, so that I could maintain my neutrality between the parties should the matter require a contravention determination at a later date.

ISSUE

Whether the District Manager's decision was issued within the limitation period established in section 4(1) of the *Administrative Remedies Regulation*.

RELEVANT LEGISLATION

Section 117 of the *Code* provides a senior official with authority to levy a penalty against a person that the senior official determines has contravened the *Code*:

Penalties

117 (1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.

Section 117(4) of the *Code* establishes the factors that a senior official must and may consider prior to levying a penalty under section 117 or section 119.

(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.

"Senior official" is defined in section 1 of the *Code* as:

(a) a district manager or regional manager,

(b) a person employed in a senior position in the Ministry of Forests, who is designated by name or title to be a senior official for the purposes of this Act by the minister of that ministry.

(c) a person employed in a senior position in the Ministry of Water, Land and Air Protection, who is designated by name or title to be a senior official for the purposes of this Act by the minister of that ministry, and

(d) a person employed in a senior position is the Ministry of Energy and Mines, who is designated by name or title to be a senior official for the purposes of this Act by the minister of that ministry.

Section 4(1) of the *ARR* specifies the time limit for levying a penalty against a person who the senior official has determined has contravened the *Code*:

Limitation period

4 (1) For the purposes of section 117(1) of the Act, the time limit for levying a penalty against a person is 3 years after the facts on which the penalty is based first came to the knowledge of a senior official.

(2) A document purporting to have been issued by the senior official, certifying the date on which he or she became aware of the facts on which the penalty is based, is admissible in a review under section 129 of the Act and an appeal under section 131 of the Act without proof of the signature of the official character of the individual appearing to have signed the document and, in the absence of evidence to the contrary, is proof of the matter certified.

DISCUSSION and ANALYSIS

Whether the District Manager's decision was issued within the limitation period established in section 4(1) of the *Administrative Remedies Regulation*.

The facts in this case are not in dispute, and all of the parties agree that the contraventions occurred. The sole issue is whether the District Manager made the findings of contravention and levied the two penalties within the time limit specified by section 4(1) of the *ARR*.

As noted above, both Weyerhaeuser and the Board submit that a correct interpretation of section 4(1) of the *ARR* is that the limitation period begins once the senior official, which in this case is the District Manager, or his employees, are aware of the facts on which the penalty is based. Weyerhaeuser and the Board submit that the District Manager, or his employees, were made aware of those facts when Mr. Cowan sent the November 16, 1998 letter to the District Manager.

Weyerhaeuser submits that the fact that the District Manager may have chosen not to review that letter should not deprive Weyerhaeuser of the protection of section 4(1). In addition, Weyerhaeuser argues that Mr. Cober was aware of the facts on November 10, 1998, as evidenced by the correspondence dated November 10, 1998, from Brian Saunders of Weyerhaeuser to Louis Bourcet, Mr. Cober and Mr. Cowan.

The Board submits that the limitation period should begin to run as soon as the District Manager's employees first had knowledge of the unauthorized backspar trail crossings. The knowledge of the senior official's employees must be imputed to the senior official, especially when the sole reason that the senior official does not have knowledge is because of a routine administrative procedure of shielding the senior official from the information.

In support of those submissions, the Board referred the Commission to a decision of the B.C. Court of Appeal in which that Court interpreted a provision similar to section 4(1) of the *ARR*. In *Romashenko v. Real Estate Council of BC*, [2000] B.C.J. No. 1292, at paragraphs 14 to 18, the Court held that the limitation period began to run as soon as the employees of the person named in the legislation had evidence of the material elements of the charge. The knowledge of the employees was imputed to the supervisor.

Both Weyerhaeuser and the Board submit that the District Manager and the Review Panel misinterpreted section 4(1) of the *ARR* by taking a literal approach to the interpretation of the section, rather than a purposive approach. They refer to a decision of the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 3, where Mr. Justice Iacobucci states:

> …This Court has stated on numerous occasions that the preferred approach to statutory interpretation is that set out by E.A. Driedger in *Driedger on the Construction of Statutes* (2nd ed. 1983), at p.87
>
> > Today there is only one principle approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Board argues that the ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose if the preferred interpretation is one the words are capable of bearing (Ruth Sullivan, *Driedger on the Construction of Statutes*, (3rd ed.Buttersworth, Vancouver: 1994 page 35). One way to discover the legislative purpose is to examine the mischief or problem the provision is designed to address.

Both the Board and Weyerhaeuser submit that limitation periods are enacted in order to promote timely and efficient litigation of claims. The purpose of limitation periods includes the following:

- providing certainty and finality;
- enhancing the effectiveness of enforcement;
- ensuring the reliability of evidence;
- maintaining fair decision making; and
- reducing economic and social costs.

The Board and Weyerhaeuser argue that the Review Panel's interpretation of section 4(1) runs counter to the purposes of the limitation period.

Applying a purposive approach, the Board and Weyerhaeuser submit that the limitation period in section 4(1) of the *ARR* commences when a senior official, or his employees, becomes aware of the facts that establish a likely contravention of the *Code*. The limitation period applies to the whole of the process from the investigation through to the finding of contravention and the levying of a monetary penalty. Because making a finding of contravention is a prerequisite for issuing a penalty, the contravention finding must also be made within three years. To find otherwise would result in a lack of accountability on the Government to move cases forward diligently and would defeat the entire purpose of the limitation period in section 4(1).

In addition, the Board points out that Ministry of Forests' Policy 16.6 - *Investigation*s, interprets this provision to begin at the time of discovery of a contravention:

> Where it is determined that a contravention may have occurred, the investigator must gather, in a timely fashion, sufficient information so as to ensure the Statutory Decision Maker can make an informed decision within the appropriate limitation period.

The Board and Weyerhaeuser argue that the result of the Review Panel's decision is that there is no effective time limit on *Code* investigations. Government officials would be free to take as many years as they liked before commencing an Opportunity to be Heard hearing. The three-year limitation period would only apply to the period after the hearing and would require the decision maker to take no more than three years to deliberate and write the decision.

The Board submits that this interpretation is contrary to the fundamental purpose of section 4(1) of the *ARR*. The Board submits that if the purpose of the limitation

period were to limit the decision/deliberation/writing period, it would make no sense to provide a three-year limit, because such a time period should be weeks, and not years, in length. Furthermore, if the legislators had intended to set a time limit for post-hearing deliberations and decision-writing, they would have specifically stated that the limitation period started at the conclusion of the hearing.

Weyerhaeuser maintains that the Government's interpretation of section 4(1) of the *ARR* and section 117 of the *Code* would remove any accountability for conducting an investigation and hearing in a fair and timely manner. In addition, the Government's interpretation would allow government officials to delay investigations to the prejudice of licensees.

The Government agrees that the proper approach to statutory interpretation is the passage from *Driedger on the Construction of Statutes* quoted above. However, the Government submits that the correct application of this approach is to first consider the grammatical and ordinary meaning of the words in the provision. The Government refers to the legal test, *Statutory Interpretation* (Irwin Law, 1997) page 41, where Ruth Sullivan states:

> This rule tells courts and other interpreters that the first consideration to take into account in resolving statutory interpretation problems is the ordinary meaning of the legislative text. In the absence of an adequate reason to prefer some other interpretation, the ordinary meaning should prevail.

The Government argues that the plain, ordinary and grammatical meaning of section 4(1) of the *ARR* is that senior officials cannot levy penalties after the expiry of three years from the date that the facts on which the penalty is based first came to the knowledge of a senior official. The Government argues that there are two key components to this provision:

1. the word "penalty"

2. the term "senior official".

The term "penalty" in section 4(1) refers to the imposition of a monetary amount against a person. The Government submits that the objective of the *Code* limitation provision is to limit the amount of time a senior official has to render a penalty under section 117 of the *Code*. Only the levying of a penalty under section 117 of the *Code* is statute barred after the defined period. The Government submits that the *Code* is intended to preserve the right of the Crown to proceed, for an indefinite period of time, against persons who have contravened the provisions of the *Code*. It submits that if the legislature intended for the provision to apply to contravention determinations it would have said so expressly.

The Government submits that section 4(1) specifies that "a senior official" must have knowledge of the facts upon which the penalty is based before the limitation begins to run. The term "senior official" is defined in section 1 of the *Code* and is limited to district managers, regional managers and other designated persons

employed in senior positions in one of the three ministries responsible for administering the *Code*. By using the word "designated" the Legislature means that, other than a district or regional manager, a person who is not designated cannot be a senior official. Therefore, persons employed in the offices of "senior officials" are not incorporated into the definition of "senior official" under the *Code*.

The Government submits that, in this case, the District Manager, as senior official, first had knowledge of the facts at the Opportunity to Be Heard hearing, and could not have had prior knowledge of the facts because the Ministry of Forests has a practice of shielding the District Manager until such time as a determination is required. The Government argues that to ensure that the provisions of the *Code* are applied fairly and evenly, there must be an operational separation between Compliance and Enforcement staff who undertake investigations and senior officials who adjudicate alleged contraventions.

The Government submits that the test adopted in *Romashenko* deals with how much and what kind of information is considered sufficient to determine that a person had knowledge of the material facts of a case at a particular time. The Government submits that the test is used to determine, objectively, *when* a particular person had "evidence of the material averments of the charge." The point at which the person had evidence of the material averments is the point at which they are considered to have had "knowledge", and that is when the limitation period begins to run.

With respect to the facts in this appeal, the Government submits that the November 16, 1998, letter from Mr. Cowan did not contain sufficient information to constitute the material facts of the contravention or sufficient evidence to support a finding of contravention. The Government submits that the District Manager saw the November 16, 1998 letter in the days or weeks following its receipt. However, the District Manager only read the first paragraph or two, realized it was a Compliance and Enforcement matter and sent it to district Compliance and Enforcement staff. In any event, the Government submits that the November 16, 1998, letter from Mr. Cowan did not contain sufficient information to constitute the material elements of the contravention or penalty.

The Government argues that the test adopted in *Romashenko* is what an objective observer would determine looking at the facts. The Government submits that an objective observer could not conclude that the District Manager had knowledge of the material facts of the contravention on or around November 16, 1998. An objective observer would conclude that he had knowledge of the material facts only on July 13, 2000, when he was presented with the Ministry evidence and the Appellant's response.

In addition, the Government submits that the District Manager's certification under section 4(2) of the *ARR* is proof that the District Manager did not have knowledge of the facts until July 13, 2000, in the absence of evidence to the contrary. The Government submits that no evidence to the contrary has been provided.

The Government further submits that an objective observer could not conclude that Mr. Cober had knowledge of the material facts of the contravention on or around November 10, 1998, as submitted by Weyerhaeuser. The Government submits that the information contained in the November 10, 1998 communication falls far short of constituting material facts. In addition, the Government submits that Mr. Cober was a Forest Ecosystems Specialist and was not a "senior official" under section 1 of the *Code*.

The Government argues that the plain and grammatical meaning of the words in section 4(1) of the *ARR* establish a limitation period that is reasonable within the scheme and purpose of the *Code*. The primary goal of the *Code* is to ensure the sustainable use of B.C.'s forests. Flexibility is built into the enforcement regime because some investigations are extensive and complex. The Government submits that forcing the entire process of investigation and determination into a three-year limitation period undermines the enforcement and administrative remedy regimes and runs counter to the primary purpose of the *Code*. Such an interpretation fails to appreciate the constraints on investigative staff and district managers including the involvement of other agencies, weather, remote locations, and resources.

The Government submits that the application of the three-year limitation period to the entire process makes the District Manager's ability to render a decision dependent on the investigators' ability to complete their investigations in advance of the expiry of the limitation period. The District Manager may then be left with insufficient time to hold an Opportunity to be Heard hearing, consider the evidence and the law and to render a determination. The Government submits that if the Commission accepts this interpretation, inevitably, either some investigations would be cut short, or district managers could lose their jurisdiction to make a determination of a contravention and levy a penalty.

Finally, the Government urges the Commission not to reconstrue the plain meaning of section 4(1) of the *ARR* unless those words lead to an absurdity or unless the Commission has been provided with an adequate reason to prefer another interpretation. The Government argues that Weyerhaeuser and the Board have not provided adequate reasons to prefer any other interpretation.

Panel's findings

Under section 117 of the *Code*, government officials are given the power to levy administrative penalties and make orders against anyone who contravenes the *Code*. The Panel notes that before a penalty is levied, the senior official must first find that a person has contravened the *Code*. The senior official may then consider previous contraventions of a similar nature by the person, the gravity and magnitude of the contravention, whether the violation was repeated or continuous, whether the contravention was deliberate, any economic benefit derived by the person from the contravention, and the person's cooperativeness and efforts to correct the contravention.

Section 4(1) of the *ARR* establishes a three-year time limit for levying a penalty against a person who has contravened the *Code*. The Commission finds that the

time limit in section 4(1) of the *ARR* is intended to apply to the decision to levy a penalty under section 117 of the *Code*, and does not apply to determinations of contraventions.

The time limit for levying a penalty begins when "the facts on which the penalty is based first came to the knowledge of a senior official." The Review Panel determined that the time limit started to run when the District Manager was presented with all of the facts and all of the evidence. In the opinion of the Review Panel, the District Manager did not have all of the facts and evidence until the Opportunity to Be Heard hearing on July 13, 2000. However, the Commission finds that because the decision to levy a penalty is based on, among other things, the nature of the contravention, the limitation period in section 4(1) of the *ARR* begins to run when the senior official first has knowledge of any of the facts that are material to the decision to levy a penalty, including, and most importantly, the facts surrounding the contravention.

The Commission finds that, if the Legislature had intended section 4(1) of the *ARR* to set a time limit for post-hearing deliberations and decision-writing after the conclusion of an Opportunity to be Heard hearing, then it would have specifically stated that the three-year limitation period started "at the conclusion of the hearing." As noted by the Board, such language is used in section 23 of the *Administrative Review and Appeal Procedure Regulation*, which sets a time limit for the Commission to issue decisions "after the conclusion of the hearing" in appeals under the *Forest Act*.

The Commission further finds that the words "first came to the knowledge" in section 4(1) indicate that the limitation period should start to run at the earliest point in the administrative process. This administrative process includes an investigation, an opportunity to be heard, a contravention determination and decision to levy a penalty. The Commission finds that the purpose of the limitation period in section 4(1) of the *ARR* is to ensure that the administrative penalty process moves forward in a timely fashion.

In this case, the Commission finds that the District Manager was first aware of "the facts on which the penalty is based" when the District Manager viewed the letter from Mr. Cowan on or about November 16, 1998. The Commission finds that the fact that the District Manager forwarded the letter to Ministry of Forests' Compliance and Enforcement staff is evidence that he had actual knowledge of the facts, sufficient to start the clock running.

The Commission has also considered the District Manager's certification that he became aware of the facts on which the penalty was based on July 13, 2000, at the Opportunity to Be Heard hearing.

In his certification, the District Manager also stated as follows:

> I saw a letter dated November 16, 1998, from the Federal Department of Fisheries in the days or weeks following its arrival in my office. However, I only read the first paragraph or two before realizing that it

> was a Compliance and Enforcement (C&E) matter and sent it to District C&E staff to deal with, so that I could maintain my neutrality between the parties should the matter require a contravention determination at a later date.
>
> [italics added]

The Commission notes that the first two paragraphs of Mr. Cowan's letter state:

> On November 10, 1998 we received a facsimile from MacMillan Bloedel Ltd. (MB) describing an event in the Gold 5 setting that was discovered by MB staff on October 13, 1998. The facsimile outlined that a backspar trail located between FC 8 and FC 9 had been built over the Riparian Class S4 reach of Stream 1. This incident was investigated on November 13, 1998 with Cary Drummond from your office and John Doucetter and Brian Saunders from MB.
>
> On November 6, 1997 we participated in the agency review with MB of the proposed Gold 5 setting. We reviewed the stream in question as well as its mapped tributaries and discussed harvesting prescriptions for the protection of the identified fisheries resource values of this system. On our November 7, 1997 letter to MB with copy to your ministry, we describe the findings of our field assessment and confirm the stream classification portrayed on the logging plan for this setting. In brief, Stream 1 downstream of the falling boundary was found to exhibit good fish spawning and juvenile fish rearing habitat. Stream 1 within the setting exhibited a less defined channel represented by a dashed line on the logging plan. We were not adverse to the proposal to yard a few high quality trees across this reach of Stream 1 within the setting given the proviso that maximum yarding suspension to Spur G520 would be achieved in order to prevent disruption of the drainage network.

The Commission finds that the District Manager read these parts of Mr. Cowan's letter, and ascertained that the letter pertained to a compliance and enforcement matter. It also establishes that the District Manager had actual knowledge of the same material facts of the contravention, including the nature of the contravention (backspar trail crossing stream), the precise location of the contravention, the classification of the stream, details of the fisheries resource on the stream, and evidence that the incident had already been investigated by Ministry of Forests district staff.

The Commission finds that the District Manager also determined that the gravity of the allegations in the letter could require a contravention determination, which, by its very nature, may require a penalty determination. In the end, that is exactly what occurred.

The Commission finds that the facts on which the penalties were levied first came to the knowledge of the District Manager on or about November 16, 1998. Therefore,

the three-year limitation period in section 4(1) of the *ARR* ended on or about November 16, 2001. The District Manager's determination of the contraventions and decision to levy the penalties was issued on March 20, 2002. Accordingly, the Commission finds that the District Manager's decision to levy the penalties was made outside of the limitation period, and is therefore void for lack of jurisdiction.

The Commission also finds that the limitation period under section 4(1) of the *ARR* only applies to monetary penalties as described under the *ARR*. An ordinary reading of section 4(1) of the *ARR* does not apply to findings of contravention. Under these circumstances, the Commission is without authority to rescind the findings of contravention as they are not subject to the limitation period found in section 4(1) of the *ARR*. As there was no other evidence or argument made that would justify the rescission of the District Manager's findings of contravention, the Commission confirms the determination of contravention under section 21(1) of the *THPR*.

DECISION

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

For the reasons set out above, the Commission finds that the District Manager's decision to levy penalties of $3,000 for two contraventions of the *Timber Harvesting Practices Regulation* is void for lack of jurisdiction. Therefore, the monetary penalties are rescinded.

However, the Commission confirms the District Manager's determination of contraventions of section 21(1) of the *Timber Harvesting Practices Regulation*, as those determinations are not subject to the limitation period under section 4(1) of the *Administrative Remedies Regulation*.

The appeal is allowed, in part.

Alan Andison, Panel Chair
Forest Appeals Commission
November 28, 2003