Forest Appeals Commission
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DECISION NOS. FAC-FRP-20-A002(a) and FAC-FA-20-A001(a)

In the matter of two related appeals under the *Forest and Range Practices Act,* S.B.C. 2002, c. 69, and the *Forest Act,* R.S.B.C. 1996, c. 157

BETWEEN:	Interfor Corporation	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission Michael Tourigny, Panel Chair Cynthia Lu, Panel Member Ian Miller, Panel Member	
DATE:	Conducted by way of a videoconference oral hearing concluding on June 29, 2021	
APPEARING:	For the Appellant: Mark S. Oulton, Counsel Nicole C. Gilewicz, Counsel	
	For the Respondent: Darcie Suntjens, Counsel Bill Wagner, Counsel	

APPEALS

[1] Interfor Corporation ("Interfor") brings two separate but related appeals before the Forest Appeals Commission (the "Commission") that are being heard together by agreement of the parties. Both appeals are concerned with the stumpage rate payable by Interfor in respect of timber harvesting operations conducted under Cutting Permit 192 ("CP192") held by Interfor. Stumpage is the fee paid to the government of British Columbia for harvesting publicly-owned timber.

[2] Interfor's primary appeal (the "Contravention Appeal") is brought under section 82 of the *Forest and Range Practices Act,* S.B.C. 2002, c. 69 (the "*FRPA*"). The Contravention Appeal is from a determination made on October 2, 2020, that Interfor contravened section 105(5.2) of the *Forest Act,* R.S.B.C. 1996, c. 157 (the "*FA*") (the "Determination").

[3] The Determination was made by Rachael Pollard, District Manager of the Thompson Rivers Forest District. She is employed by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), and was acting as a delegated decision-maker ("DDM") under section 120.1(1) of the *FRPA.*

[4] The DDM held that Interfor had contravened section 105(5.2) of the *FA* by failing to comply with the requirement to submit information to government necessary for the redetermination of the stumpage rate applicable to CP192. In doing so, the DDM held that the submission of information was required due to changed circumstances. In the Determination, the DDM levied an administrative penalty of $17,549 against Interfor for this contravention.

[5] In its Contravention Appeal, Interfor asks that the finding of contravention of 105(5.2) of the *FA* be rescinded on the basis that there were no changed circumstances requiring the submission of information. Alternatively, Interfor submits that it cannot be held liable for the contravention because the defences of due diligence and officially induced error apply to it under section 72 of the *FRPA*. In the further alternative, Interfor asks that the administrative penalty be reduced or rescinded.

[6] After the DDM concluded in the Determination that circumstances had changed such that a reappraisal of the stumpage rate was appropriate, a Ministry employee reappraised the stumpage rate applicable to timber harvested under CP192. This resulted in an increase in the stumpage rate from $0.25 to $2.20 per cubic meter ("$m^3$") (the "Stumpage Redetermination"). The Ministry issued a stumpage rate redetermination notice to Interfor on November 17, 2020.

[7] Interfor appealed the Stumpage Redetermination under section 146(2) and (6) of the *FA* on the basis that there were no changed circumstances as submitted in the Contravention Appeal. In the "Stumpage Redetermination Appeal" Interfor seeks an order rescinding the Stumpage Redetermination and restoring the original stumpage rate of $0.25.

[8] The Respondent asks that both appeals be dismissed. The Respondent seeks orders confirming the Determination and the Stumpage Redetermination.

[9] The powers of the Commission on an appeal under the *FRPA* are set out in section 84(1) of the *FRPA*, which states that the Commission may consider the findings of the person who made the determination or decision, and 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.

[10] Likewise, the powers of the Commission on an appeal under the *FA* are set out in section 149 of the *FA*, which provides in part that the Commission may consider the findings of the person who made the initial determination and may confirm, vary or rescind the determination, or refer the matter back to the person who made the initial determination, with or without directions.

BACKGROUND

[11] The background facts in this appeal are not in dispute. The evidence establishes the following.

[12] Interfor is an integrated wood products company engaged in timber harvesting, with mills in British Columbia and in the United States. In British Columbia, it has woodlands holdings and harvesting rights, including Forest Licence

A18693 (the "Licence"), that provide timber for its four sawmills in the province including its Adams Lake Division sawmill in Chase.

The Licence and CP192

[13] The Licence grants Interfor harvesting rights from the areas of Crown land within the Kamloops Timber Supply Area, and is held by Interfor in connection with its Adams Lake operations. The Licence is a volume-based tenure with an allowable annual cut of approximately 250,000 m^3 of Crown timber.

[14] In accordance with section 104(1) of the *FA*, Interfor, as the holder of the Licence, is obliged to pay stumpage to the government for the volume of timber cut and removed under the Licence, at rates determined under section 105(1) of the *FA*.

[15] Section 105(1)(c) of the *FA* provides that stumpage rates must be determined, redetermined, and varied in accordance with the policies and procedures approved by the Minister. For the Interior Area of the Province, those policies and procedures are found in the Interior Appraisal Manual, as amended from time to time (the "*IAM*"). The parties agree that the July 1, 2012 version of the *IAM* applies on this appeal.

[16] Interfor has the right under the Licence to apply for cutting permits (such as CP192) authorizing the harvest of Crown timber from the harvest area specified in the cutting permit application.

[17] In support of its 2012 application for CP192 under the Licence, Interfor was required to submit cruise[1] and appraisal data to the Ministry, along with a map ("Exhibit A map") of the harvest area from which Interfor sought authorization to harvest Crown timber.

[18] On December 19, 2012, the Ministry issued CP192 to Interfor under the Licence. This authorized Interfor to harvest the Crown timber from the areas within CP192 indicated on the Exhibit A map (the "cutting authority area") for 4 years, up to December 18, 2016.

[19] As set out in section 4.01 of CP192, the Ministry uses a scale of the Crown timber from CP192 delivered to Interfor's mill to determine the volume of timber removed, and thus, the amount of stumpage payable[2].

[20] The cutting authority area in CP192 was 46.9 hectares ("ha"), from which approximately 22,661 m^3 of timber was estimated as being available for harvest based on Interfor's cruise data. The cutting authority area was made up of two separate cutblocks shown on the Exhibit A map, described as cutblock ADA003 ("ADA003") and cutblock GAN027 ("GAN027").

[21] ADA003 included 3 separate parcels that Interfor planned to harvest. One of these parcels, located in the southern area of ADA003, was to be harvested using a method described as "conventional ground skidding". The other two parcels, located

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[1] A "cruise" is a systematic measurement of a forested area, designed to estimate to a specified degree of accuracy the volume of timber it contains, by evaluating the number and species of trees, their sizes, and conditions.

[2] Scaling involves measuring or estimating the volume of timber obtained from trees after they are felled.

in the northern area of ADA003, comprised 5.4 ha and contained an estimated 1,126 m^3 of merchantable timber. They were to be harvested using a different method described as "overhead cable" logging. Overhead cable logging requires different equipment than conventional log skidding.

[22] All harvesting in GAN027 was to be done by conventional ground skidding.

[23] In 2012, Interfor submitted appraisal data to the Ministry that included the estimated development costs associated with Interfor obtaining road access to conduct its planned harvesting operations within CP192 ("Development Cost Estimates").

[24] The Development Cost Estimates included the following data relevant to this appeal:

1. New roads were to be constructed in both cut blocks. Some of these roads were described as "tabular roads", and had costs based on tabular cost estimates scheduled in the *IAM.* As set out in the *IAM*, tabular roads can be either "long term" or "short term" roads. "Long term" roads are engineered to a higher standard, and accordingly, cost more to construct than "short term" roads. Other roads, described as "engineered developments", were costed based on an engineering consultant's estimates.
2. On ADA003, one engineered development road (designated "ENG14" on the CP192 appraisal map submitted by Interfor in 2012) was planned for access to the two northern areas in ADA003 that were slated for overhead cable logging. The stated development cost for ENG14 was $73,779.35. On ADA003, two tabular roads of specified length were also planned, one to be short term (designated "TAB12") and the other long term (designated "TAB15").TAB15 (costed at $1,120.20) was to connect to the eastern end of ENG14 and provide access to one of the two parcels planned for overhead cable logging.
3. On GAN027, one engineered development road and three separate tabular roads (two "long term" and one "short term") of specified lengths were planned. As part of the road construction on GAN027, four culverts were to be installed.

[25] The Ministry relied on the cruise and appraisal data (including the Development Cost Estimates) submitted by Interfor in 2012, in determining the stumpage rates payable in respect of Crown timber removed from CP192.

[26] The Ministry calculated the indicated stumpage rate payable on timber removed from CP192 at -$2.44 per m^3 based on the appraisal data submitted by Interfor. Given that the applicable prescribed minimum[3] stumpage rates (depending on stratum) were either $0.25 or $0.50 per m^3, those were the original stumpage rates determined by the Ministry for CP192 effective December 19, 2012.

Harvesting operations on CP192

[3] Section 105(6) of the *Forest Act* provides that a stumpage rate must not be lower than the prescribed minimum, which is set in the *Minimum Stumpage Regulation*, B.C. Reg. 354/87.

[27] As of December 2013, the planned conventional ground skidding logging on both ADA003 and GAN027 had been completed.

[28] At that time, Interfor had not yet decided whether it was going to harvest the balance of ADA003 planned for overhead cable logging and whether to build the roads required to harvest those areas.

[29] Section 4 of the Licence obliged Interfor to assess the volume of merchantable Crown timber, whether standing or felled, that could have been, but was not, cut and removed under the Licence ("waste"). Interfor was required to pay assessments in respect of that waste, based on the *Provincial Logging Residue and Waste Measurement Procedures Manual* ("*Waste Manual*") published by the Ministry.

[30] In 2013, Interfor carried out a partial waste volume assessment on the harvested portions of CP192 as required by section 4 of the Licence.

[31] At some point after 2013 and prior to May 2016, Interfor decided not to harvest the 1,126 m^3 of merchantable Crown timber standing on the two parcels on ADA003 that were previously planned for harvest by overhead cable logging. As a result, Interfor did not construct either ENG14 or TAB15 that would have provided road access to that Crown timber.

Activity in relation to CP192 from 2016

[32] During 2016, Ken Chantler, a timber pricing coordinator employed by the Ministry, conducted a site visit of CP191 (which borders on CP192) in relation to an investigation relating to that cutting permit. At that time, he noted that the ENG14 road shown on the cutting permit map for CP192 had not been built.

[33] Interfor conducted a field review of CP192 in May 2016 to confirm what work had in fact been done on ADA003 and GAN027 as compared to what was planned to be done back in 2012, including both the planned harvesting and the associated road work included in its Development Cost Estimates.

[34] The May 2016 field review confirmed that, contrary to the originally submitted appraisal data, the two northernmost parcels of ADA003 (covering approximately 5.4 ha and containing some 1,126 m^3 of merchantable Crown timber) planned for overhead cable harvest had not been harvested. Likewise, contrary to the submitted Development Cost Estimates, the roads required to access those areas (being ENG14 and TAB15) were not constructed.

[35] On GAN027, the May 2016 field review confirmed that a portion of tabular road Gan02702 was not built to long term standards as originally planned and only three of the planned four culverts were installed.

[36] In certain circumstances, not carrying out developments that were planned in a cutting authority area can lead to what is called a "changed circumstances reappraisal". Section 2.2.1(1)(b) of the *IAM* in effect on July 1, 2012 described a "changed circumstance" as follows:

1. In this manual a changed circumstance means a circumstance where:

   …

> b. The licensee … carries out or will carry out development on the cutting authority area such that there will be a difference of at least 15% between:
>
> i. the total appraised development cost estimate if it is recalculated under chapter 4 on the basis of the development actually carried out, to the extent this development is in accordance with chapter 4, and
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> ii. the total appraised development cost estimate used in the most recent appraisal or reappraisal, where this difference results from circumstances other than a change in the manual or a change as a result of a stumpage adjustment.

[37] If a changed circumstance occurred, section 2.2.1(2) of the *IAM* required that the cutting authority area must be reappraised in accordance with section 2.2.1.1, except in certain circumstances. Under section 105(5.2) of the *FA*, a licensee who is required by the *IAM* to submit information to the government for the determination, redetermination or variation of a stumpage rate must comply with the requirement.

[38] In late 2016, Interfor conducted a changed circumstance reappraisal analysis on CP192 under section 2.2.1.(1)(b) of the *IAM*. Interfor concluded that the entire cutting authority (including the 1,126 m^3 of merchantable Crown timber not cut or removed) should be treated as harvested when considering whether a "changed circumstance" as defined in the *IAM* had occurred.

[39] By extension, Interfor determined that roads ENG14 and TAB15 that would have been required to get access to harvest the 1,126 m^3 of timber (which is presumed in Interfor's analysis as being harvested) must also be considered "development actually carried out" for purposes of a changed circumstance analysis, even though those developments were not in fact built. As a result, Interfor included in the value of development expenses for CP192 the $73,779.35 for ENG14 and $1,120.20 for TAB15 that were not, in fact, incurred.

[40] Interfor's May 2016 field review found that a portion of a tabular road in GAN027 was not built to long term standards as originally planned, and only three of four planned culverts were installed. As a result, Interfor calculated that development costs for CP192 had decreased by 6%, from the Development Cost Estimates total of $145,413.80 to $136,341.80, based on the reduction in the cost of tabular roads and culverts on GAN027.

[41] As the 15% change threshold for stumpage reassessment under section 2.2.1(1)(b) of the *IAM* had not occurred based on its analysis, Interfor determined that a stumpage reappraisal was not required and that it had no obligation to provide the Ministry with further information under section 2.2.1.1.(2)(a) of the *IAM* and section 105(5.1) of the *FA*. Based on its analysis, Interfor never did submit changed circumstances reappraisal information to the Ministry.

[42] CP192 expired on December 18, 2016.

[43] In January 2017, Interfor submitted a "Changed Circumstance Certification" with the Ministry certifying its Development Cost Estimates provided in 2012 in relation to CP192. Interfor did so as part of its Changed Circumstances Analysis system and based on its determination that no reappraisal was required.

[44] Also in January 2017, Interfor submitted a standing waste assessment to the Ministry in relation to the 1,126 m^3 of merchantable Crown timber not harvested by overhead cable logging in the two parcels of ADA003, as required by section 4 of the Licence. Interfor calculated the waste assessment payable on this volume as $290.53 based on the original stumpage rates assessed in 2012. That assessment was accepted by the Ministry and an invoice was issued to Interfor on January 31, 2017.

The Ministry's investigation

[45] In the spring of 2017, Ken Chantler reviewed then-current satellite imagery that showed him that ENG14 had still not been built on ADA003. Mr. Chantler reviewed the Development Cost Estimates and noted that the cost of ENG14 that was not incurred by Interfor represented significantly more than the 15% reduction that he believed would have triggered a changed circumstance determination for CP192 under section 2.2.1(1)(b) of the *IAM*. As a result, on June 29, 2017, he asked the Ministry's compliance division to investigate whether Interfor had failed to submit reappraisal data as required under section 105(5.2) of the *FA* due to changed circumstances.

[46] Interfor subsequently received a November 23, 2017 letter from the Ministry giving notice of its investigation regarding a possible infraction of section 105(5.2) of the *FA* in relation to CP192.

[47] After receiving notice of this investigation, Interfor requested a meeting with the investigators to discuss their investigation; however, the investigators did not respond to this request.

[48] In the fall of 2018, Ministry staff conducted a post-harvest field review for GAN027. They observed that some of the proposed work had not been completed to the extent submitted in the Development Cost Estimates. A length of tabular road Gan02702 was not built to long term standards and a planned culvert had not been installed.

[49] On May 13, 2019, Ministry staff conducted a post-harvest field review for ADA003. They observed that the 5.4 ha area planned for overhead cable logging had not been harvested, and roads ENG14 or TAB15 had not been constructed.

[50] On January 19, 2020, the DDM sent a letter to Interfor advising that the investigation had concluded and had produced evidence that Interfor may have contravened section 105(5.2) of the *FA* in relation to CP192. The investigation evidence was provided to Interfor along with notice of its right to participate in an opportunity to be heard ("OTBH") hearing under section 71(1) of the *FRPA*.

The Determination

[51] The Determination was based on evidence and submissions made before the DDM by both Interfor and the Ministry at the OTBH on July 15, 2020.

[52] After reviewing the evidence and submissions of the parties and making certain findings of fact, the DDM found that Interfor had contravened section 105(5.2) of the *FA* by failing to submit reappraisal information required under

section 105(5.1) of the *FA* and section 2.2.1.1(2)(a) of the *IAM* as a result of changed circumstances under section 2.2.1(1)(b) of the *IAM*.

[53] In making the finding of contravention of section 105(5.2) of the *FA,* the DDM held that the reappraisal information should have been submitted to the Ministry within 60 days of the completion of log transportation activities, as required by section 2.2.1.1(2)(a) of the *IAM*. Having found as a fact that the "logging complete" date was December 16, 2013, when Interfor scaled the last logs harvested from CP192 at its mill, the DDM held that the submission deadline was February 14, 2014.

[54] The DDM held that section 2.2.1(1)(b) of the *IAM* required a changed circumstance reappraisal when there is a difference of 15% or more between the total appraised development cost estimate used in the most recent appraisal or reappraisal, and the total appraised development cost estimate calculated on the basis of the development actually carried out.

[55] The DDM found that a changed circumstance under section 2.2.1.(1)(b) of the *IAM* had taken place when, during harvesting operations (summer 2013), Interfor modified the harvesting and development that it had planned for cut block ADA003.

[56] The DDM also found that, including the reductions in development costs actually incurred for tabular roads and culverts on GAN027, the costs of development actually carried out on CP192 were $84,377 less than originally planned, representing a 57% change in development costs.

[57] The DDM found that the *IAM* did not include any language to support Interfor's approach in its changed circumstances analysis. The DDM found no reference in the *IAM* to how standing waste is assessed and no indication that the same presumptions apply to reappraisals.

[58] The DDM held that the assumption made by Interfor about the inclusion of planned, but not incurred, development costs for cut block ADA003 was not reasonable or valid.

[59] At the OTBH, Interfor raised the defences of due diligence and officially induced error under section 72 of the *FRPA*.

[60] The DDM considered and rejected Interfor's due diligence argument. The DDM held that Interfor failed to present sufficient evidence of having taken all reasonable care to prevent this contravention. The DDM held that Interfor had decided to follow the approach used to calculate standing waste, rather than follow the specific guidance of the *IAM,* based on an assumption that this was the correct approach. The DDM stated at p. 14 of the Determination:

> … To establish a successful due diligence defence for such a significant assumption, I would have expected Interfor to obtain written direction or guidance from Ministry staff, or at least provide me with detailed evidence about the Ministry's direction that Interfor relied on.

[61] In addressing the defence of officially induced error, the DDM rejected Interfor's argument that it reasonably relied on the assumptions used to assess standing waste when determining if there was a changed circumstance. Although

Interfor said it had been "induced by the Ministry due to the inconsistent policies and approaches" taken by the Ministry under the *IAM* and the *Waste Manual*, the DDM found it was not reasonable for Interfor to rely on assumptions used in the assessment of standing waste found in the *Waste Manual* when determining whether there was a changed circumstance under the *IAM*. The DDM wrote, at p. 15 of the Determination:

> … While the two processes are different and may appear to be inconsistent, it is possible to comply with both. If Interfor disagreed with these policies, it should have sought clarification on the perceived inconsistency or unfairness through the Working Groups they participated in, and by direct communication with Ministry Revenue staff.

[62] In determining the penalty, the DDM considered the factors set out in section 71(5) of the *FRPA*. The penalty of $17,549 ordered by the DDM was made up of the deemed economic benefit to Interfor arising from the contravention, which the DDM calculated to be $7,549, plus a deterrent amount of $10,000.

The Stumpage Redetermination

[63] Based on the Determination, Ministry staff were instructed to reassess of the stumpage rate applicable to CP192 to be effective December 20, 2012 (being one day after the original appraisal date of December 19, 2012, based on section 2.2.1.2.(1) of the *IAM*).

[64] The Ministry calculated the reduction in the cost of development actually carried out on GAN027 and ADA003. The costs set out in the Development Cost Estimates that were not incurred for tabular roads (such as TAB15), engineered roads (ENG14), and culverts, totalled $81,119.15 or 56.69% of the total original Development Cost Estimates submitted by Interfor in 2012.

[65] Interfor received from the Ministry a document titled "Stumpage Rate Details" dated November 17, 2020, setting out the results of the Stumpage Redetermination. In the Stumpage Redetermination, the development costs that were not incurred by Interfor were removed from the calculation and the stumpage rate for CP192 was redetermined to be $2.20 m^3.

[66] The parties agree that the Stumpage Redetermination would increase stumpage payable by Interfor on the scaled volume of Crown timber it removed from CP129 by $42,475.

Contravention Appeal and Stumpage Redetermination Appeal

[67] Interfor filed its Notice of Appeal in its Contravention Appeal on October 30, 2020, and its Notice of Appeal in its Stumpage Redetermination Appeal on December 17, 2020.

[68] As provided in section 140.6 of the *FRPA,* and as agreed to by the parties, these appeals were conducted together as a new hearing based on the evidence and submissions before the Commission. Under section 149(3) of the *FA*, the Commission must, in deciding an appeal of a determination made under section 105 of the *FA*, apply the policies and procedures approved by the minister under

section 105 (i.e., in the *IAM*) that were in effect at the time of the initial determination.

[69] The appeals were heard by a three-member panel of Commission members (the "Panel").

[70] By further agreement of the parties, the appeals were conducted by way of audio-video conference.

[71] At the hearing of these appeals, in addition to documentary evidence, the Panel heard testimony from a total of three fact witnesses.

[72] Interfor called two fact witnesses:

- Mr. Stuart Card, who is currently Interfor's Chief Forester, has been a Registered Professional Forester ("RPF") since 2003, and has worked in the forestry industry since that time. His work experience prior to joining Interfor in 2010 includes working as a Timber Pricing Coordinator for the Ministry between 2007-2010.
- Mr. Mike Scott, who is Interfor's Forestry Superintendent for its Adams Lake Division, and has been a RPF since 1989. Mr. Scott's responsibilities include obtaining cutting permits and post-harvest reviews.

[73] The Respondent called one fact witness:

- Mr. Ken Chantler, RPF, who has been employed by the Ministry since 1989. Mr. Chantler is one of three Timber Pricing Coordinators in the geographic area using the *IAM* and has been working with the *IAM* since 2002. His main job function as a Timber Pricing Coordinator is setting stumpage rates.

ISSUES

[74] For purposes of our analysis, the Panel considered the parties' characterization of the issues to be addressed on these appeals, as set out in their respective Statement of Points and Closing Submissions. The Panel identified the issues as follows:

1. Did Interfor contravene section 105(5.2) of the *FA* by failing to submit reappraisal data to the Ministry as required by section 105(5.1) of the *FA* and section 2.2.1.1(2)(a) of the *IAM*?
2. Depending on the outcome of Issue 1, should the Stumpage Redetermination be confirmed or rescinded?
3. If the facts underlying a contravention of section 105(5.2) of the *FA* are found, was Interfor's failure to submit the required reappraisal data the result of an officially induced error within the meaning of section 72 of the *FRPA* such that no contravention can be found?
4. If the facts underlying a contravention of section 105(5.2) of the *FA* are found, did Interfor exercise due diligence to prevent the contravention within the meaning of section 72 of the *FRPA* such that no contravention can be found?

5. If neither of the defences raised by Interfor apply, should the administrative penalty be confirmed, varied downward, or rescinded?

DISCUSSION AND ANALYSIS

1. Did Interfor contravene section 105(5.2) of the *FA* by failing to submit reappraisal data to the Ministry as required by section 105(5.1) of the *FA* and section 2.2.1.1(2)(a) of the *IAM*?

[75] The provisions of the *FA* and the *IAM* that are relevant to this issue are set out below, if they were not already set out above. The *IAM* is considered to be a form of subordinate legislation (see for example, *British Columbia v. Canadian Forest Products*, 2004 SCC 38, para. 21, cited by the Commission in *Canadian Forest Products Ltd. v. Government of British Columbia*, Decision Nos. 2017-FA-001(b) to 008(b), March 18, 2020, at para. 58). Therefore, the principles of statutory interpretation are applied to determine the meaning of the words in the *IAM*.

The material provisions of the FA

[76] As previously stated, the parties agree that the version of the *IAM* in effect on July 1, 2012, constitutes the policies and procedures approved by the Minister under section 105(1)(c) that applied to the determination or redetermination of the rates of stumpage payable by Interfor on Crown timber removed from CP192 at the relevant time. The Panel agrees.

[77] Sections 105(5.1) and (5.2) of the *FA* provide:

> (5.1) The policies and procedures referred to in subsection (1)(c) may require the holder of an agreement to submit information to the government as necessary or desirable for the determination, redetermination or variation of the stumpage rate.
>
> (5.2) The holder of an agreement who is required, under the policies and procedures referred to in subsection (1)(c), to submit the information referred to in subsection (5.1) must comply with the requirement.

The material provisions of the IAM

[78] The focus on this appeal is on section 2.2.1(1)(b), set out above. Section 2.2.1(1)(b) specifically defines a "changed circumstance" based on changes in development within a cutting authority area.

[79] Under section 2.2.1(2) of the *IAM,* where a changed circumstance has occurred with respect to a cutting authority area, the cutting authority area must be reappraised in accordance with section 2.2.1.1 of the *IAM* (Changed Circumstance Reappraisal Procedure).

[80] Section 2.2.1.1(2)(a) of the *IAM* provides:

> Except for a changed circumstance under section 2.2.1(1)(e), the licensee must submit an appraisal data submission to the district manager within sixty days of completion of log transportation activities or no later than thirty

> days prior to the expiry of the cutting permit whichever comes first, if the cutting authority must be reappraised because of a changed circumstance under section 2.2.1.

[81] Interfor acknowledges that if a "changed circumstance" under section 2.2.1(1)(b) of the *IAM* is found to have occurred with respect to the development costs associated with CP192 then, given that it did not submit the reappraisal data required by section 2.2.1.1(2)(a) and section 105(5.1) of the *FA*, it has (subject to the statutory defences it has raised) contravened section 105(5.2) of the *FA*.

[82] The answer to the question as to whether, based on the undisputed background facts, a "changed circumstance" under section 2.2.1(1)(b) of the *IAM* had occurred with respect to the development costs associated with CP192 depends upon the meaning of the phrase "development actually carried out" as used in section 2.2.1(1)(b)(i) of the *IAM*. The parties' submissions confirm that they agree that the answer to this question is at the heart of this issue.

[83] Chapter 4 of the *IAM* is referred to in section 2.2.1(1)(b) of the *IAM*. Chapter 4 directs how to calculate the "tenure obligation adjustment" in a stumpage appraisal or reappraisal. The tenure obligation adjustment recognizes certain costs, such as road development costs, that are incurred by long term tenure holders. A higher tenure obligation adjustment will result in a lower stumpage rate, all other things being equal.

[84] Section 4.3 of the *IAM* addresses total development cost estimates, or the total of all development cost estimates. Development cost estimates are among the types of costs (along with forest management administration costs, road management costs, and silviculture costs) that may be included when calculating the tenure obligation adjustment. Section 4.3(1) states that the total development cost estimate must be determined in accordance with and subject to the conditions of section 4.3. One such condition that is relevant to the present appeals is found in section 4.3(3), which is discussed below.

What is the meaning of "development actually carried out" as used in section 2.2.1(1)(b)(i)?

[85] Determining the meaning of the phrase "development actually carried out" as used in section 2.2.1(1)(b)(i) of the *IAM* requires interpretating that phrase in the context of the changed circumstances provisions of the *IAM*, based on the applicable principles of statutory interpretation.

[86] The relevant principles of statutory interpretation, and their application to the interpretation of the *IAM,* are not in dispute in these appeals. As submitted by Interfor, these principles include the findings of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 [*Rizzo*], at para. 21, quoting E. Driedger, *Driedger on the Construction of Statutes* (2nd ed., 1983), at p. 87:

> Today there is only one principle or approach [to statutory interpretation], 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.

Interfor's submissions on the meaning of "development actually carried out" as used in section 2.2.1(1)(b)(i).

[87] Interfor's written and oral Closing Submissions addressing the interpretation of the phrase "development actually carried out" as used in section 2.2.1(1)(b)(i) of the *IAM* are summarized below.[4]

[88] The issue is whether "development actually carried out" is to be read literally, or whether it is means "development actually carried out for appraisal purposes". Interfor says the latter means something different from the former when, as was the case with CP192, unharvested timber remained standing in the cutting authority area at the time of the changed circumstances analysis under section 2.2.1(1)(b).

[89] It is important to note that words that may appear clear and unambiguous on their face may take on a different meaning when placed in context. As cautioned by Chief Justice McLachlin (as she then was) and Justice Deschamps in *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62, at para. 10:

> Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation...

[90] The difference of opinion between the parties turns on whether, as held in the Determination and as applied by the Ministry in its Stumpage Redetermination, the plain meaning of the words "development actually carried out" are determinative, or whether, as Interfor asserts, the meaning of that phrase is informed by the broader context.

[91] The broader context which informs the meaning of "development actually carried out" includes the phrase "carries out or will carry out" that precedes the word "development" in the opening language of section 2.2.1(1)(b), as well as the references to "chapter 4" in section 2.2.1(1)(b)(i) of the IAM.

[92] The opening language of section 2.2.1(1)(b) referring to development that the licensee "carries out or will carry out" on the cutting authority area clearly indicates that the exercise is not a literal examination of what has been constructed "on the ground". This interpretation is further supported by the fact that section 2.2.1.1(2)(a) of the *IAM* requires the submission of a reappraisal data submission no later than 30 days prior to the expiry of the cutting permit. In other words, the reappraisal assessment may be completed prior to completion of all activities authorized under the cutting permit.

[93] It is also "significant" that section 2.2.1(1)(b)(i) of the IAM requires that the reappraisal assessment is to be conducted "under chapter 4" using development costs that are "in accordance with chapter 4".

[94] In chapter 4, section 4.3(3) of the *IAM* provides that:

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[4] Paragraphs 87 to 105 summarize Interfor's argument in this appeal. They do not reflect the reasoning of the panel in this case.

> A development cost estimate that may be calculated under this section is calculated for each road … that is required to be newly constructed, reconstructed or replaced by the licensee on Crown land … in order for the licensee to access Crown timber that it is authorized to harvest.

[95] If all of the timber authorized for harvest has been harvested, the application of these provisions is straight forward. There is no development that the licensee or its contractor "will carry out", as the cutting authority area has been fully developed and the timber has been harvested. However, if timber authorized for harvest has not yet been harvested when the reappraisal is conducted, ambiguity arises in the sense that the phrase "development actually carried out" must be reconciled with the opening language that requires consideration of the development that the contractor or licensee "will carry out" (to harvest the remaining timber) and the fact that chapter 4 contemplates the inclusion of all development costs required to access the timber authorized for harvest.

[96] The plain meaning applied by the Ministry cannot be reconciled with these interrelated portions of the *IAM*. A purposive approach to interpreting these provisions, together with the presumption against tautology[5], requires that each of the operative phrases be given meaning. The only way to accomplish that in circumstances where there is unharvested timber, together with unconstructed development,[6] is through the interpretation advanced by Interfor.

[97] If some of the timber authorized for harvest remains unharvested when the reappraisal analysis is conducted, chapter 4 of the *IAM* requires that the development needed to access that timber must be included in the analysis, regardless of whether or not it has actually been constructed at that moment. In effect, it is considered "actually carried out" for reappraisal purposes. Proceeding in this manner gives effect to the forward-looking language in the opening of section 2.2.1(1)(b) of the *IAM*. It also is consistent with the language of chapter 4 which contemplates that each road required to access the timber authorized for harvest must be included in the tenure obligation adjustment for development costs.

[98] This approach is consistent with how waste is assessed on unharvested timber. Where unharvested standing timber remains in a cutting authority area such that it is subject to a waste assessment, the entire cutting authority area is treated as though it is subject to stumpage for both stumpage and waste purposes.[7] The underlying principle is that the Crown is entitled to its revenue (in the form of stumpage, or waste charges based on the stumpage rate) on the entire area that was authorized for harvest, as if the entire area had been harvested as

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[5] The presumption against tautology is a principle of statutory interpretation that no legislative provision should be interpreted so as to render it unnecessary or irrelevant: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28.

[6] Which is to be distinguished from a situation where all development has been constructed but the licensee has chosen not to harvest some of the timber. That scenario would not trigger a changed circumstance (as there would be no development cost change).

[7] It is acknowledged that the unharvested areas are, strictly speaking, subject to waste charges and not stumpage in the traditional sense. However, given the relationship between the waste rate and the stumpage rate, this is a distinction without a difference for present purposes. The key point is that the entire area is treated as harvested, thereby triggering the Crown's entitlement to the economic rent for the timber in the cutting authority – either in the form of stumpage or waste.

originally planned, regardless of whether the licensee actually carries out all of that harvest.

[99] It would be inequitable if the *IAM* were interpreted in a manner that would allow the Ministry to effectively claim increased stumpage on the timber harvested from a cutting authority area, claim waste on the unharvested portions, and then obtain further compensation (in the form of additional stumpage) if, and when, the unharvested portions of the original cutting authority are harvested.

[100] Stumpage, at its core and with a few limited exceptions, is determined based on a hypothetical or notional exercise. It is generally not concerned with what a particular licensee does or does not do in harvesting or in delivering the timber to market. On the contrary, it is largely a hypothetical and statistically driven exercise based on notional operations. To function in a fair and equitable manner, consistent with the principles of statutory interpretation, those hypothetical scenarios must be applied consistently and in a logical manner.

[101] In this context, to achieve that aim, unharvested timber must be considered from the same perspective in the reappraisal analysis as it is in other related situations. Indeed, if unharvested timber is treated as notionally harvested for the purposes of assessing waste, it must also be treated as notionally harvested in the stumpage reappraisal analysis.

[102] This is because the hypothetical harvest of an area of unharvested timber (i.e., standing waste) requires hypothetical construction of the associated road development to access the unharvested areas. As such, the associated development costs ought to be considered in the reappraisal analysis, regardless of whether or not they were actually constructed. This is necessary in order to logically complete the hypothetical harvest scenario. Moreover, it is the result dictated by the prospective looking portions of the opening language of section 2.2.1(b) of the *IAM* and the express qualifier that the development "actually carried out" under chapter 4 includes any road required to access the timber authorized for harvest.

[103] The starting premise is that all timber is considered harvested for the purposes of reappraisal analysis. For the timber that has been harvested, the comparison is between the development costs claimed in the original appraisal and what was actually constructed on the ground. For CP 192, this yielded the differences resulting from the changes in tabular development in GAN027, and the culverts that were planned but not installed. These were insufficient to trigger a changed circumstance reappraisal.

[104] For the unharvested timber, the exercise is notional rather than real. Because the timber in the cable portions of ADA003 had not yet been harvested and the development not yet constructed, the comparison required under section 2.2.1(b) is a hypothetical one that is guided by the language of both section 2.2.1(b) and chapter 4. Under those provisions, the Ministry's approach is to treat unharvested timber that is authorized for harvest as if it was harvested for the purposes of the reappraisal analysis. As such, and as required by chapter 4, the associated development that is required to, and "will be", constructed to access that timber is considered "actually carried out" for reappraisal purposes. Here, that means that ENG14 and TAB15 are treated as "actually carried out" for purposes of

the reappraisal analysis. As such, no reappraisal is triggered and there was no contravention.

[105] Interfor concludes by stating that, in sum, the language of the *IAM*, properly interpreted, requires that unharvested timber authorized for harvest under a cutting authority be treated as harvested for the purposes of the reappraisal analysis under 2.2.1(1)(b) of the *IAM*, together with any associated development required to harvest such timber. If that development has been constructed, then the development "actually carried out" is considered to the extent it is different from what was claimed in the original appraisal. If that development is not constructed, then the cost estimates for that development are considered "actually carried out" for reappraisal purposes, as they represent development that the licensee "will [have to] carry out" to harvest the unharvested timber, as contemplated by the opening language of section 2.2.1(1)(b) of the *IAM*.

Respondent's submissions on the meaning of "development actually carried out" as used in section 2.2.1(1)(b)(i).

[106] The Respondent's written and oral Closing Submissions addressing the interpretation of the phrase "development actually carried out" as used in section 2.2.1(1)(b)(i) of the *IAM* are summarized below.[8]

[107] This is a straight-forward matter. The changed circumstances provisions are unambiguous. The underlying facts are not in dispute: roads were not built; there was a more than 15% difference between the total appraised development cost; and, no change circumstance reappraisal was submitted. The simple math annotated by Ken Chantler (provided in the Respondent's documentary evidence) is all the evidence needed to find a contravention of section 105(5.2) of the *FA*. Interfor's convoluted legal theory regarding the *Waste Manual* does not relieve them of their legal obligations regarding submitting information for reappraisal due to changed circumstances.

[108] A "changed circumstance" as set out in section 2.2.1.(1)(b) occurred on the undisputed evidence. The change was a result of building a lower standard tabular road and not installing one culvert on GAN027, not building TAB15, and particularly, not constructing ENG14 on ADA003 resulting in a 55.69% change from the Development Cost Estimates submitted by Interfor and used in the 2012 appraisal. The difference in development costs is well above the 15% threshold under section 2.2.1(1)(b) of the *IAM*.

[109] The words of section 2.2.1(1)(b) are unambiguous; on a plain reading the phrase "development actually carried out" could not be clearer. If the drafters of the *IAM* meant "hypothetically", they would have said so.

[110] Interfor's interpretation of the *IAM* is non-sensical. Interfor is not just reading down the word "actually" as used in the phrase "development actually carried out", they are changing that word to "hypothetically". If the work "actually carried out" as well as the original appraisal to which it is compared are both treated as

[8] Paragraphs 106 to 121 summarize the Respondent's position. They do not reflect the panel's reasoning in this appeal.

hypothetical, there will never be a changed circumstance that changes the stumpage payable – the difference will always be zero.

[111] The opening language of section 2.2.1(1)(b) referring to development that the licensee "carries out or will carry out" on the cutting authority area does not add ambiguity. It means the licensee can submit changed circumstances to their benefit. For example, if they realize additional road length or rock blasting will be required to build a road, they could apply for a stumpage reappraisal before they go ahead and incur the unanticipated costs.

[112] Section 4.3(3) of the *IAM* should be read as limiting, and not empowering as submitted by Interfor. It is significant that the reappraisal can result in an increase or decrease of stumpage fees. The Respondent refers to the use of the permissive "may" used in section 4.3(3) of the *IAM* and says section 4.3 limits the types of roads and structures that are included when calculating development costs under that section; for example, the road must be linked to the Crown timber, not for some other purpose. The Respondent refers to sections 4.3(9), (10) and (14) of chapter 4 of the *IAM* as examples of the limitations on what sort of development qualifies for inclusion in the calculations under section 4.3.

[113] The *Waste Manual* is irrelevant to the interpretation of changed circumstances and reappraisals, and is not even referenced in the *IAM.* Interfor failed to refer the Panel to any specific provisions of the *Waste Manual* that could be read in such a way as to interpret the *IAM.* No principle of statutory interpretation could support such an analysis in any event.

[114] The terms "unharvested timber" or "waste" are not found in the changed circumstances language of section 2.2.1(1)(b) of the *IAM*.

[115] Stumpage appraisals and waste calculations are two separate and distinct processes.

[116] Further, the changed circumstances provisions in the *IAM* can be read harmoniously with the *Waste Manual.* Interfor incorrectly incorporates "and associated development costs" into its reference to waste as that term is used in the *Waste Manual* and Licence.

[117] If a licensee harvests and decides, for whatever reason, not to harvest a patch of trees, then that standing timber is billed as waste so long as the threshold for a changed circumstance is not triggered.

[118] Part 4 of the Licence requiring Interfor to conduct waste volume assessments does not include the phrase "and associated development costs".

[119] If Interfor had constructed the road but decided not to harvest the timber in the cutblock, then no changed circumstance would be triggered and Interfor would bill the standing timber as waste at the rate set out in the original appraisal.

[120] The changed circumstance is triggered in this case, not by the non-harvest of timber, but by the failure to construct the planned road leading to the timber.

[121] The changed circumstances provisions are not based on "hypothetical scenarios" as asserted by Interfor. Those provisions are based on what the licensee actually does.

Panel's Analysis

[122] As noted above, the Panel is guided by *Rizzo* in our interpretation of the meaning of the phrase "development actually carried out" as used in section 2.2.1(1)(b)(i) of the *IAM.* The Panel reads those words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme, object, and the intention of the *IAM* and the *FA.*

i. *Meaning of the words used in "development actually carried out"*

[123] We first consider the literal meaning of both the individual words used in the phrase and the phrase itself before addressing the overall context in which the phrase is used in section 2.2.1(1)(b)(i) of the *IAM.*

[124] For context, the Panel notes that the word "development" as used in section 2.2.1(1)(b)(i) of the *IAM* is expressly to be read "in accordance with chapter 4" of the *IAM.* Accordingly, it has a technical meaning in this context and we need not look to the usual and ordinary meaning of the word.

[125] Section 4.1(3) of the *IAM* defines the word "development" for the purposes of chapter 4. It says that in chapter 4:

a. "development" means road development, cattleguards, fencing and pipeline crossings.

b. "road" includes a bridge, drainage and any other pertinent structure that is part of the road.

[126] It is not in dispute that the roads planned for CP192 (including ENG14 and TAB15 not constructed) fell within the meaning of "development" under chapter 4 of the *IAM*. These roads were "required to be newly constructed… in order for" Interfor to access Crown timber that it was authorized by CP192 to harvest, as stated in section 4.3(3) of the *IAM*.

[127] The word "actually" and the phrase "carried out" are not defined in the *IAM* or the *FA.* In result, as a matter of statutory interpretation, we first look to the usual and ordinary meaning of that word and phrase.

[128] The Oxford English Dictionary on lexico.com defines "actually" as an adverb meaning, "As the truth or facts of a situation; really."

[129] The Oxford English Dictionary on lexico.com defines the phrase "carry out" as a phrasal verb meaning to "perform a task" with synonyms including "perform" or "bring about". "Carried out" is the past tense.

[130] Based on these definitions, the Panel finds that the literal, usual and ordinary meaning of the phrase "actually carried out" to mean "in fact performed or brought about". Applying these definitions to a road development in the context of chapter 4, the Panel finds the literal, usual and ordinary meaning of the phrase "actually carried out" to mean "in fact constructed or built".

[131] Combining the usual and ordinary meaning of the phrase "actually carried out" with the technical meaning of road "development" in the context of chapter 4 of the *IAM*, the Panel finds that the phrase "development actually carried out" in the context of section 2.2.1(1)(b) of the IAM means a road that is in fact constructed or

built on Crown land that is required in order for the licensee to access Crown timber that it is authorized to harvest.

[132] The Panel agrees with the Respondent that the ordinary meaning of the words of section 2.2.1(1)(b)(i) are unambiguous; on a plain reading, the phrase "development actually carried out" could not be more clear. If the usual and ordinary meaning of the phrase prevails, neither ENG14 or TAB15 were a "development actually carried out" and the development cost estimates for those roads would not be included as part of the total appraised development cost estimate under section 2.2.1(1)(b)(i) of the *IAM*.

ii. *Does the inclusion of the phrase "or will carry out" in the opening language of section 2.2.1(1)(b) mean that the subsequent phrase "development actually carried out" should not be interpreted literally?*

[133] As noted above, Interfor submits that the broader context which informs the meaning of development "actually carried out" includes the phrase "carries out or will carry out" in the opening language of section 2.2.1(1)(b) of the *IAM.*

[134] The Panel agrees with Interfor that the presumption against tautology is a well-accepted principle of statutory interpretation and is applicable to this appeal. We do not agree, however, that this principle is offended by a literal interpretation of the phrase "development actually carried out" in section 2.2.1(1)(b)(i), while also interpreting "carries out or will carry out" in the introductory language to section 2.2.1(1)(b) as having a forward-looking aspect. A literal interpretation of both phrases does not treat the introductory language as being unnecessary, irrelevant, or mere surplus.

[135] Interfor says (based on section 2.2.1.1(2)(a) of the *IAM* requiring a reappraisal submission no later than 30 days prior to permit expiry) that its interpretation is supported by the fact that the reappraisal assessment may be completed before completing all activities authorized under the cutting permit.

[136] As the Respondent points out, a changed circumstance reappraisal under section 2.2.1(1)(b) can lead to either an increase or a decrease in stumpage rate. The reappraisal process can be initiated by the licensee at any time during the currency of the cutting permit, up to 30 days prior to its expiration (see section 2.2.1.1(2)(a) of the *IAM)*. Including the phrase "or will carry out" in the introductory language of section 2.2.1(1)(b) contemplates that the licensee can submit changed circumstance reappraisal to their benefit before the development expense is incurred. For example, if the licensee realizes prior to construction that the original engineered development cost estimates to build a road were significantly lower than revised cost estimates based on unanticipated ground conditions, they could apply for a stumpage reappraisal based on that changed circumstance before they go ahead and incur the unanticipated costs.

[137] The Panel finds the fact that the reappraisal assessment process may be completed before completing all activities authorized under the cutting permit does not cause ambiguity or otherwise support Interfor's interpretation argument.

[138] A "changed circumstance" under section 2.2.1(1)(b) occurs when the difference between the "total appraised development cost estimate" used in the most recent appraisal and the amount recalculated on the basis of the development

actually carried out, results in a difference of at least 15%. The Panel finds that the licensee is obliged under section 2.2.1(1)(b) to provide that latter cost estimate based on development it has or "will" carry out, as stated in the introductory language. It is neither logical nor reasonable to interpret "will" carry out to include development that, to the knowledge of the licensee, 'will not' be carried out (such as ENG14 and TAB15 on CP192 at the time Interfor conducted its reassessment analysis).

[139] The Panel finds that a literal interpretation of the phrase referencing development that the licensee "carries out or will carry out" in the introductory language of section 2.2.1(1)(b) of the *IAM*, and a literal interpretation of the phrase development "actually carried out", does not offend the presumption against tautology. We also find that the inclusion of the phrase "carries out or will carry out" does not support Interfor's interpretation of development "actually carried out" as being a notional, rather than a literal, examination of what has been constructed on the ground.

iii. *Do the references to chapter 4 of the IAM mean that the phrase "development actually carried out" should not be interpreted literally?*

[140] Chapter 4 of the *IAM* is titled "Tenure Obligation Adjustments". Section 4.1(1)(b) states that the types of costs that may be used in the calculation of the Tenure Obligation Adjustment in the appraisal or reappraisal of a cutting authority include "the total development cost".

[141] Section 4.3 of chapter 4 is titled "Development" and covers "Development Cost Allocation", "Tabular Cost Estimates" and "Detailed Engineering Cost Estimates".

[142] Section 4.3(1) of chapter 4 specifies that the total development cost estimate in an appraisal or reappraisal must be determined in accordance with and subject to the conditions of section 4.3. Section 4.3(2) specifies that there are two categories of development; namely, new construction projects, and reconstruction and replacement projects.

[143] In chapter 4, section 4.3(3) of the *IAM* provides:

> A development cost estimate that <u>may</u> be calculated under this section is calculated for each road, bridge or other drainage structure that is required to be newly constructed, reconstructed or replaced by the licensee on Crown land … in order for the licensee to access Crown timber that it is authorized to harvest.
>
> [Emphasis added]

[144] The Panel notes that the permissive word "may" is used in the phrase "may be calculated" in section 4.3(3) of the *IAM*, as opposed to mandatory language such as 'shall be calculated' or 'must be calculated'. Interfor's argument would imply the use of mandatory language in section 4.3(3), but such language is not used.

[145] Contrary to Interfor's submissions, the Panel does not read section 4.3 of the *IAM* as 'requiring' that the development required to access unharvested timber be included in the tenure obligation adjustment for development costs when such development has not, in fact, been constructed or built.

[146] Section 4.3 of the *IAM* should be read as prescribing what constitutes a development and as setting out how development cost estimates are to be determined. Nowhere in section 4.3 is it stated that a licensee is 'required' to include development cost estimates for roads not constructed.

[147] The Panel agrees with the Respondent that section 4.3 limits the types of roads and structures that qualify as a development – the road must be linked to the Crown timber and not be used for some other purpose. As referenced by the Respondent, sections 4.3(9), (10) and (14) are examples of the limitations on what sort of development qualifies.

[148] The Panel finds that where there is a planned development associated with unharvested timber that was authorized for harvest, the references to chapter 4 of the *IAM* in section 2.2.1(1)(b)(i) do not require that the development be considered as a development "actually carried out" even if it was not constructed. The reference to chapter 4 does not support Interfor's argument against a literal interpretation of "development actually carried out".

iv. *Does section 2.2.1(1)(b) of the IAM require that timber authorized for harvest be treated as harvested in the reappraisal analysis?*

[149] As a foundational premise for its submission that a planned development associated with unharvested timber should be considered a "development actually carried out" under section 2.2.1(1)(b)(i), Interfor submits that all timber authorized for harvest under a cutting authority is treated as having been harvested in the reappraisal analysis. In support of this foundational premise, Interfor again points to the reference to chapter 4 and to the introductory language in section 2.2.1(1)(b) that has been addressed above.

[150] Having reviewed chapter 4 of the *IAM,* the Panel finds no provision stating that all timber authorized for harvest under a cutting authority is to be treated as having been harvested in the reappraisal analysis. Interfor has not provided any particular reference from chapter 4 of the *IAM* that supports its proposition.

[151] Section 4.3 in chapter 4 links development to Crown timber that a licensee is "authorized to harvest". Reference to Crown timber that a licensee is "authorized to harvest" does not support Interfor's submission that chapter 4 treats all such timber as having in fact been harvested in the reappraisal analysis or otherwise.

[152] Likewise, the fact that the introductory language in section 2.2.1(1)(b) has a forward-looking aspect to it in no way supports Interfor's submission that all timber authorized for harvest under a cutting authority is to be treated as having been harvested in the reappraisal analysis.

[153] Interfor submits that when the Ministry conducted its reappraisal analysis in relation to CP192 based on the Determination, it did not remove from its analysis the 1,126 m^3 of standing timber that was originally planned for overhead cable harvest, but was not harvested. Interfor maintains that in doing so, the Ministry, in effect, "treated that unharvested timber as harvested".

[154] We find that Interfor is correct that the volume of merchantable Crown timber (based on Interfor's cruise data submitted in 2012) was not changed in the Ministry's reappraisal analysis. The 1,126 m^3 of standing timber was included in

both the original assessment and the reassessment as part of the total volume available for harvest, upon which the stumpage calculation would be based. Contrary to the assertion of Interfor, the Panel finds that this fact does not imply that the Ministry had "treated that unharvested timber as harvested".

[155] Rather, the Panel finds the inclusion of the total cruise volume of merchantable Crown timber within the cutting authority area in both assessments was consistent with the stumpage appraisal process set out in the *IAM.*

[156] As previously stated, stumpage is payable on Crown timber removed by a licensee from the cutting authority area, such as CP192. In support of its 2012 application for CP192, Interfor provided cruise data of the total volume of merchantable Crown timber located in the cutting authority area. CP192 authorized Interfor to harvest this Crown timber from the cutting authority area, upon which stumpage would be payable.

[157] Under section 2.1(1) of the *IAM*, an appraisal process is used to determine a stumpage rate for a cutting authority area, and the stumpage rate takes effect on the effective date of the cutting authority. The effective date of CP192 was December 19, 2012.

[158] Under section 2.2(2) of the *IAM*, a reappraisal is a "complete reassessment of the cutting authority area", taking into account a revised appraisal data submission submitted by the licensee, and/or information available to the person who determines the stumpage rate.

[159] Under section 2.2.1.2(1) of the *IAM*, a "reappraisal because of a changed circumstance is effective on the day after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal." The effective date of the Ministry's reappraisal of CP192 was December 20, 2012.

[160] The reappraisal analysis conducted on CP192 was based on a changed circumstance due to changes in development actually carried out under section 2.2.1(1)(b), and not a changed circumstance based on a change in the harvest area under sections 2.2.1(1)(c) or (d). With no change in harvest area being considered, there is no reason to adjust the volume of timber available for harvest in the cutting authority area for purposes of the redetermination.

[161] The Panel finds that the Ministry's "complete reassessment of the cutting authority area" effective December 20, 2012, based on changes in development actually carried out, would logically include the total cruise volume in the reassessment analysis. Whether the cruise volume that was available for harvest was subsequently harvested or not is irrelevant to the stumpage redetermination process based on changes in development actually carried out under section 2.2.1(1)(b).

[162] As a result, the Panel rejects Interfor's submission that the Ministry had in effect "treated that unharvested timber as harvested" in its reappraisal analysis.

[163] In any event, and as pointed out by the Respondent, the changed circumstance under section 2.2.1(1)(b) is triggered, not by the non-harvest of timber, but by the failure to build or construct the planned roads leading to the timber.

v. *Waste*

[164] Interfor says that a principle it described as "take or pay" applies to the facts of this appeal. As described in Interfor's submissions, this "take or pay" structure ensures that the government receives payment for all the merchantable Crown timber authorized for harvest within a cutting authority area under a cutting permit (such as CP192), whether it is harvested, removed, and scaled (and payment is made as stumpage under the *FA* and calculated under the *IAM*), or is left behind on the cutting authority area as waste (and payment is made as a waste assessment in accordance with the Licence and calculated under the *Waste Manual)*.

[165] Interfor submits that waste charges for standing timber are determined under the *Waste Manual* by multiplying the average stumpage rate applicable to the cutting authority area over the preceding 12-month period by the volume of 'waste' left behind in the cutting authority area.

[166] Interfor submits that the "take or pay" principle assures that the Crown receives revenue on the entire area that was authorized for harvest "as if the entire area had been harvested" as originally planned, regardless of whether the licensee actually carries out all of that harvest. However, we find that Interfor has not explained how this "take or pay" principle leads to the conclusion that unharvested standing timber is treated as having been harvested for purposes of stumpage determination or waste assessment.

[167] In part 7 of the *FA,* titled "Payments to the Government", sections 103, 104, and 105 oblige a licensee, such as Interfor, to pay stumpage for timber cut and removed under an agreement, such as the Licence, and scaled at rates determined under section 105(1) of the *FA,* and in this case under the *IAM.*

[168] Unlike sections 103, 104, and 105, section 103.1 does not refer to stumpage. Under section 103.1(1) of the *FA*, if an agreement entered into under the *FA* (such as the Licence) specifies that waste assessments are payable by the licensee to the government in respect of merchantable Crown timber that could have been cut and removed under the agreement, but, at the licensee's discretion, is not cut and removed, then the amount payable must be calculated in accordance with that agreement.

[169] As previously noted, section 4 of the Licence defines "waste" as being the volume of merchantable Crown timber, "whether standing or felled, that could have been cut and removed under the Licence, but at its discretion was not cut and removed". The Panel finds that this language defining waste to include "standing" merchantable Crown timber is logically inconsistent with Interfor's proposition that such standing Crown timber is treated as having been harvested for the purposes of assessing waste. Interfor has provided no logical reason why "standing timber" needs to be treated as "harvested" for waste assessment purposes.

[170] It is the terms of the Licence, and the *Waste Manual* incorporated by reference in the Licence, that determine how waste assessment is to be calculated, not the *FA* or the *IAM.*

[171] Interfor has not referred the Panel to any specific provisions of the *Waste Manual* that support its submission that unharvested timber is treated as "notionally harvested" for the purposes of assessing waste.

[172] Likewise, Interfor has not referred the Panel to any specific provisions of the *Waste Manual* that it says should be read in such a way as to affect the interpretation of the *IAM.*

[173] The Panel agrees with the Respondent that stumpage determinations and waste assessments are two separate and distinct processes. This is consistent with the fact that section 103.1 of the *FA*, which addresses waste assessments, is distinct from sections 103, 104 and 105 of the *FA*, which address stumpage. Similarly, waste assessment is not mentioned in any of the reappraisal provisions within section 2.2 of the *IAM*. More particularly, the terms "unharvested timber" and "waste" are not found in the language of section 2.2.1(1)(b) of the *IAM*.

[174] While the Panel accepts that the calculated stumpage rate applies to the entire volume of merchantable Crown timber within the cutting authority area, whether it is harvested (and stumpage is paid) or not (and waste is assessed), the Panel does not accept that this fact of "take or pay" requires a presumption that the entire volume was harvested – this would be inconsistent with the fact that there is no reference to harvest being assumed in the *IAM.* Nor would it be consistent with the wording of the Licence defining "waste" as including standing timber.

[175] The Panel finds that Interfor's submissions regarding the assessment of waste do not support its foundational argument that unharvested timber is treated as harvested for stumpage reappraisal under section 2.2.1(1)(b) of the *IAM*.

[176] Interfor has also submitted that it is "internally-inconsistent", "inequitable", and would result in overcompensation to the Ministry, if a literal interpretation of section 2.2.1(1)(b) of the *IAM* prevails. In support, Interfor speculates that at some point in the future, the unharvested 1,126 m^3 may be harvested (by Interfor or some other licensee?), making it subject to stumpage payments while Interfor has already paid a waste assessment on that same timber. Given that Interfor already decided not to incur the costs of building the roads required to access this timber for harvest during the term of CP192, the Panel considers this "future harvesting scenario" to be speculative. Regardless, the Panel finds that this speculation does not assist Interfor's "notional" interpretation, and the Panel rejects this submission.

[177] Interfor's submissions that "development actually carried out" should be interpreted as notional is rejected for all the reasons given above. The Panel finds that Interfor's interpretation of section 2.2.1(1)(b) of the *IAM* would be inconsistent with its clear purpose. The comparison being made in this case under section 2.2.1(1)(b) is between the "total appraised development cost estimate" used in the 2012 stumpage appraisal and that amount when recalculated on the basis of the development in fact constructed or built. This requires a comparison between the planned development (which included ENG14 and TAB15), and the development in fact built or constructed (which excludes ENG14 and TAB15). Interpreting the "development actually carried out" as being notional defeats that purpose.

vi. *Panel's Conclusion on Issue 1*

[178] Having read the phrase "actually carried out" in section 2.2.1(1)(b)(i) in the overall context of the *IAM* and the *FA*, and in accordance with the principles of statutory interpretation*,* the Panel finds that the literal, usual and ordinary meaning of the phrase applies. The Panel further finds that the technical meaning of

"development" set out in chapter 4, particularly with respect to roads, such as those in issue in this appeal, applies to "development" as used in section 2.2.1(1)(b)(i).

[179] Accordingly, the Panel finds that the phrase "development actually carried out" in section 2.2.1(1)(b)(i) of the *IAM* means a road that is in fact constructed or built on Crown land and is required in order for the licensee to access Crown timber that it is authorized to harvest.

[180] As a result, the Panel finds that neither of ENG14 nor TAB15 was a "development actually carried out" by Interfor in relation to CP192. The development cost estimates for those roads are not to be included as part of the total appraised development cost estimate when reappraising the stumpage rate under section 2.2.1(1)(b)(i) of the *IAM*.

[181] Based on the above interpretation of "development actually carried out", the Panel finds on the undisputed facts before us that the 15% threshold was exceeded and a changed circumstance under section 2.2.1.(1)(b) of the *IAM* occurred in relation to CP192. Specifically, the Panel agrees with the findings in the Determination that:

- the two parcels on ADA003 planned for cable harvest (approx. 5.4 ha) were not harvested and the roads required to access those parcels (being ENG14 and TAB15) were not constructed;
- not building ENG14 resulted in a significantly lower engineered road costs of $73,779, and not building TAB15 resulted in lower tabular road costs of $1,120; and
- in total, actual development costs for cut block ADA003 were $74,899 less than planned, representing a 51% change in development costs, which is above the 15% threshold in the *IAM*.

[182] As calculated by the Ministry in the Stumpage Redetermination, the cost of all development actually carried out on CP192 was approximately 57% less that the costs set out in the Development Cost Estimates.

[183] Because of this changed circumstance under section 2.2.1.(1)(b), the Panel finds that Interfor was required by section 2.2.1.1(2)(a) of the *IAM* and section 105(5.1) of the *FA* to have submitted to the Ministry an appraisal data submission for stumpage reappraisal purposes for CP192 "within sixty days of completion of log transportation activities or no later than thirty days prior to the expiry of the cutting permit whichever comes first". Interfor did not comply with either time limit.

[184] Interfor never did submit changed circumstances reappraisal information to the Ministry with respect to the development costs associated with CP192.

[185] The Panel finds that by failing to submit changed circumstances reappraisal information to the Ministry, Interfor contravened section 105(5.2) of the *FA*, subject to statutory defenses that Interfor says apply.

[186] In conclusion, the Panel confirms the finding in the Determination that a changed circumstance under section 2.2.1.(1)(b) of the *IAM* had occurred in relation to CP192 and that Interfor contravened section 105(5.2) of the *FA*.

[187] This finding of contravention is subject to the Panel's consideration of the statutory defences that Interfor has raised. Those statutory defences will be addressed below, after the Panel addresses whether, as a result of the above findings, the Stumpage Redetermination should be confirmed or rescinded.

2. Depending on the outcome of Issue 1, should the Stumpage Redetermination be confirmed or rescinded?

[188] Based on their written submissions, the parties are in agreement that, in the event that Interfor was successful on Issue 1 and the Panel rescinded the DDM's finding of contravention of section 105(5.2) of the *FA*, then consequently the Stumpage Redetermination should be rescinded. As is clear from the findings above, Interfor was unsuccessful on Issue 1.

[189] The Respondent submits that the Stumpage Redetermination should not be rescinded if the Panel finds that there was a contravention but the Panel also finds that a statutory defence applies. Interfor should not benefit from the lower original appraised stumpage rate simply because they were duly diligent or officially induced into their incorrect interpretation. Interfor's written submissions do not clearly concede this point. In any event, the Panel agrees with the Respondent's submissions on this point.

[190] The outcome of a successful defence under section 72 of the *FRPA* is that the person may not be found to have contravened the provision in question. However, that does not change the findings of fact underlining the contravention.

[191] The DDM found that a changed circumstance under section 2.2.1.(1)(b) of the *IAM* had taken place when Interfor modified the harvesting and development that it had planned for CP192. The Panel has confirmed that finding. The finding with respect to the reappraised stumpage rate will stand regardless of whether a statutory defence relieves Interfor from liability for contravening the information requirement in section 105(5.2) of the *FA*.

[192] Based on the Determination, Ministry staff were instructed to prepare a reappraisal of the stumpage rate applicable to CP192, effective December 20, 2012.

[193] Under section 2.2.1(2) of the *IAM,* where a changed circumstance has occurred with respect to a cutting authority area, the cutting authority area must be reappraised in accordance with section 2.2.1.1 of the *IAM.* This is what occurred in the Stumpage Redetermination.

[194] Accordingly, in conclusion on this issue, the Panel confirms the Stumpage Redetermination.

3. If the facts underlying a contravention of section 105(5.2) of the *FA* are found, was Interfor's failure to submit the required reappraisal data the result of an officially induced error within the meaning of section 72 of the *FRPA* such that no contravention can be found?

Interfor's submissions

[195] Interfor's written and oral Closing Submissions addressing the defence of officially induced error are summarized below.

[196] The defence of officially induced error applies in this case. Interfor's approach to the reappraisal analysis relied on the fact that the Ministry required that standing unharvested timber:

a. be treated as harvested for the purposes of the reappraisal analysis; and

b. be assessed waste on the unharvested portions of ADA003 on the same basis, by treating the unharvested timber as harvested and levying waste charges (which Interfor paid) based on a stumpage rate generated from the hypothetical scenario that the unharvested timber from ADA003 was harvested (including associated development costs).

[197] In *Levis (City) v. Tetreault*, 2006 SCC 12, at para. 26, citing *R. v. Jorgensen*, [1995] 4 S.C.R. 55 [*Jorgensen*], at paras. 28-35, the Supreme Court of Canada recognized the following factors for consideration in determining the applicability of the defence of officially induced error:

(1) an error of law or of mixed law and fact was made;

(2) the person who committed the act considered the legal consequences of his or her actions;

(3) the advice obtained came from an appropriate official;

(4) the advice was reasonable;

(5) the advice was erroneous; and

(6) the person relied on the advice in committing the act.

[198] More recently, the Supreme Court of Canada held in *R. v. Bedard*, 2017 SCC 4 [*Bedard*], at para. 1, that:

> The defence of officially induced error of law is intended to protect a diligent person who first questions a government authority about the interpretation of legislation so as to be sure to comply with it and then is prosecuted by the same government for acting in accordance with the interpretation the authority gave him or her.

[199] In its written submissions, Interfor states several times that it conducted both the waste assessment and its reappraisal analysis in relation to CP192 which treated unharvested timber as harvested, "as directed" by or "on the direction" of, the Ministry. When questioned by the Panel on this point, Interfor agreed there was no evidence of "direction" per se; rather, it was Interfor's understanding of Ministry policy.

[200] Interfor says that Ministry policy was to treat unharvested timber as harvested for the purposes of both stumpage reappraisal and waste assessment. Interfor asserts that the Ministry applied this policy in its Stumpage Redermination by including the 1,126 m^3 that was not harvested "as if harvested" in its reassessment.

[201] Interfor emphasizes that the jurisprudence regarding officially induced error makes clear that the "advice" that induces the error does not need to be a specific

conversation or communication about the error. Rather, it suffices if other direction or decisions lead to the erroneous conclusion. Interfor says that is what occurred here.

[202] Interfor says it was not induced into error by a discussion with the Ministry regarding whether to include or exclude development costs where timber is left unharvested. Rather, if it was in error, it was induced into such error by the Ministry, in fact, treating unharvested timber as harvested for the purposes of both reappraisal and waste assessment. The logical and natural extension of this hypothetical exercise is the inclusion of those development costs that would have been required to complete the hypothetical harvest of that timber. If following the Ministry's direction [which the Panel understands to mean a Ministry policy] in this regard to its logical conclusion is in error, then that error was induced by the Ministry.

[203] This distinction is important given that "...there need not be direct communication between the accused and the officials furnishing information or advice". "Advice" can be given in a variety of ways. For example, while the accused was acquitted on other grounds, in *Jorgensen*, Chief Justice Lamer (as he then was; in dissent) would have found that approval of certain adult films by the Ontario Film Review Board constituted sufficient "advice" to demonstrate officially induced error on the part of the defendant, who believed that the approved material was legally allowed to be sold in Ontario. Similarly, in *R. v. Ralph*,[9] a defendant's reliance on department guidelines that clearly applied to him was sufficient to constitute reliance on official "advice", even where he did not specifically seek out advice from any particular individual.

[204] Viewed in that context, to the extent that Interfor's approach to the reappraisal analysis was in error, that error was induced by the Ministry such that section 72(c) of the *FRPA* precludes any finding of contravention.

[205] Here, Interfor was aware of Ministry practice to treat unharvested timber as harvested in a reappraisal analysis, despite there being no direction in that regard in the *IAM*.

[206] Interfor also submitted a waste assessment for the unharvested standing timber, was assessed waste accordingly, and paid the waste amount invoiced. In both the hypothetical exercise that generated the stumpage rates that provided the foundation for the waste assessment, and the Ministry's approach to unharvested timber in a reappraisal analysis, the unharvested timber was treated as though it had been harvested. Interfor conducted its reappraisal analysis on the same basis; namely, as though the unharvested standing timber was harvested.

[207] The Ministry's position, as communicated regularly and publicly to industry, was that standing waste (i.e., unharvested timber) was to be treated as harvested for reappraisal purposes.

[208] Mr. Card testified that Interfor's understanding that the unharvested standing timber was to be treated as harvested was confirmed through discussions with Ministry staff "over the years". Mr. Card drew on his experiences at the Regional

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[9] *R. v. Ralph* (2002), 2002 CanLII 54054 (NL SC), 220 Nfld. & P.E.I.R. 351 (NLTD).

Appraisal Advisory Committee ("RAAC") meetings attended by representatives of both government and industry, as well as during his experience as a Timber Pricing Coordinator. The latter including experience working on a prior reappraisal, where he treated unharvested timber as harvested.

[209] Significantly, the Ministry had regularly required that standing waste be treated in this manner for the purposes of reappraisal analysis in the years prior to Interfor completing the reappraisal analysis for CP192. In carrying out its analysis for CP192, Interfor included the development costs associated with the unharvested areas, because in the hypothetical harvesting scenario being applied, those costs were necessary to facilitate the notional harvest of ADA003.

[210] If Interfor was in error in its interpretation and subsequent consideration of the "changed circumstance" requirement in its reappraisal analysis, then pursuant to the test for officially induced error in *Jorgensen*, factor (1) has been satisfied because an error of mixed fact and law was made. Given that Interfor conducted a reappraisal analysis and waste assessment pursuant to its standard procedure and submitted a Changed Circumstance Certification on the basis of the Ministry's position that the standing unharvested timber was to be considered harvested, factors (2) and (6) of the test for officially induced error are also satisfied. If Interfor erred in its reappraisal analysis, then the advice it received and relied upon was erroneous, such that factor (5) is also satisfied.

[211] Interfor submits that each of the elements of officially induced error are, therefore, satisfied and no contravention can be found pursuant to section 72(c) of the *FRPA.*

Respondent's submissions

[212] On this issue Mr. Chantler testified that, in all his experience as a Timber Pricing Coordinator working with the *IAM* (since 2002), he could not recall any reappraisal where something that was not done was included as having being done. Mr. Chantler participated in the RAAC for a number of years. To his recollection, the issue of development cost expenses not being incurred, but being included as if incurred in a stumpage reappraisal, never came up.

[213] The Respondent agrees that Interfor accurately summarized the requirements set out in *Jorgensen* to establish a defence of officially induced error. However, the Respondent disputes Interfor's claim that the defence applies to these facts. In that regard, the Respondent submits that:

a. Interfor did not obtain advice from an appropriate official. Interfor is unable to identify a single Ministry official by name who provided advice or guidance on this issue. Interfor staff, particularly Mr. Card who is a former Timber Pricing Coordinator, knew or could have identified and contacted appropriate Ministry officials, such as Mr. Chantler, to confirm their interpretation but they failed to do so.

b. Mr. Card referred to discussions that may have occurred at meetings of the RACC about this issue but he did not produce any meeting minutes to evidence this. Nor did he provide any meaningful details of such discussions, such as specific instances where such an approach had been adopted, from whom the Province expressed any positive view of the conduct in which Interfor ultimately chose to engage, or whether any Provincial employee either had the professional capacity to make an informed

statement or was speaking as a Provincial representative or in their personal capacity. Mr. Chantler denied that waste assessments would have been discussed at RACC meetings and could not recall any instances of such a discussion despite his long-standing involvement with the RACC.

c. Interfor does not point to any written Ministry guidance that could constitute officially induced error. To the extent that Interfor is arguing that the Waste Manual itself, or the acceptance of a waste assessment, is the guidance regarding changed circumstances, this is incorrect and was not reasonable.

d. There is no evidence whatsoever that any advice was provided to Interfor by an identifiable Ministry employee acting in an official capacity, but if there had been such advice, this advice was not reasonable in the context of the plain words of the changed circumstances provisions of the *IAM*.

e. There is no air of reasonableness in relying upon a $290.52 waste assessment relative to the $73,779.35 cost of ENG14.

[214] The Respondent says that the person advancing this defence must meet all of the factors set out in *Jorgenson.* Here, there was no evidence of Interfor seeking "advice", nor was there any evidence of an official giving "advice". Rather, Interfor's analysis was based on a number of assumptions of its own making.

Panel's Analysis

[215] It is not in dispute that Interfor carries the burden of proof to establish the statutory defences it seeks to rely on. Interfor must prove the elements of the test for officially induced error on a balance of probabilities.

[216] The Panel is guided by the referenced findings in *Jorgenson* and *Bedard* in our analysis of whether Interfor has established that its potential contravention of section 105(5.2) of the *FA* was the result of an officially induced error for purposes of section 72(c) of the *FRPA*.

[217] Interfor's failure to submit changed circumstances reappraisal information to the Ministry for CP192, as required by section 2.2.1.1(2)(a) of the *IAM* and section 105(5.1) of the *FA,* resulting in the possible contravention of section 105(5.2) of the *FA*, was based on its erroneous interpretation of the phrase "development actually carried out" as used in section 2.2.1(1)(b)(i) of the *IAM.* The Panel finds this was an error of law.

[218] The Panel accepts Interfor's submission that the "advice" required by a number of the *Jorgensen* factors for consideration to determine the applicability of the defence of officially induced error can be given in a variety of ways.

[219] The examples from the court decisions included a prior decision of an official provincial body (the Ontario Film Review Board) to approve an adult film in *Jorgensen*. In that case, the accused believed the Ontario Film Review Board allowed for the legal sale of the film. Another court decision was *R. v. Ralph*, which related to department guidelines clearly applicable to the accused in that case. The Panel reads these examples of "advice" as being directly linked to the erroneous actions of the accused in each case. The Panel also notes that both of these examples of "advice" would have been in writing and would have been put before the courts as evidence.

[220] In carrying out its appraisal reassessment analysis for CP 192, Interfor chose to treat the unconstructed development costs associated with the unharvested areas as though the developments were "actually carried out".

[221] Even if the evidence establishes that there was a Ministry "policy" or "practice" of treating unharvested timber as harvested for the purposes of both reappraisal and waste assessment, or evidence of some other "advice" that Interfor was aware of, can it be said that Interfor was reasonably induced by it to take the approach it did in its appraisal reassessment analysis for CP192?

[222] As stated in *Bedard*, this defence is intended to protect a diligent person who first questions a government authority about the interpretation of legislation, so as to be sure to comply with it, and then is penalized by the same government for acting in accordance with the interpretation the authority gave them. Has Interfor established that this happened in this case?

[223] Before answering those questions, the Panel will weigh the evidence as to whether there was such a Ministry "policy" or "practice", and if so, what were its details. If there is sufficient evidence of such a policy or practice, the Panel will then consider the relevance it could have as to whether unconstructed development should be considered "development actually carried out" under section 2.2.1(1)(b)(i) of the *IAM.*

[224] Interfor provided no written evidence supporting the existence of the alleged "policy" or "practice" of the Ministry. If there was such a policy, the Panel would have expected to see it having been put in writing by the Ministry.

[225] The evidence from Mr. Chantler concerning his reappraisal analysis for CP192 does not support Interfor's submission that by including the 1,126 m^3 of unharvested timber in the Ministry's reappraisal for CP192, this shows that the Ministry's practice was to treat that volume "as if harvested". The Panel finds the fact that the unharvested 1,126 m^3 was included in the Ministry's reappraisal analysis does not constitute evidence of the alleged "policy" or "practice" of the Ministry.

[226] Rather, the Panel has found under Issue 1 that leaving the total volume available for harvest in the Ministry's reappraisal analysis was consistent with the relevant provisions of the *IAM*, and those provisions do not treat unharvested standing timber as if it was harvested.

[227] Likewise, there is also a lack of evidence before the Panel to support Interfor's contention that the Ministry, in fact, treats unharvested timber as harvested for the purposes of waste assessment. Interfor has also not adequately addressed the fact that the definition of "waste" in section 4 of the Licence includes "standing timber". As already stated in our analysis on Issue 1, the Panel sees no logical reason for the Ministry to treat the unharvested or standing timber as having been harvested for purposes of the waste assessment given that definition.

[228] Interfor submits that Mr. Card's testimony supports its argument. The Panel does not agree.

[229] Mr. Card's testimony in chief on this issue was quite brief. He testified about his participation, over years, in various industry advisory committees (including RAAC). These committees dealt with the *IAM*, and policy and interpretation

questions relating to the *IAM*. In the fall of 2016, he, Mike Scott, and others completed the Changed Circumstances Analysis form in relation to CP192. He advised Mr. Scott as to how to conduct the analysis. Mr. Card stated that the way Interfor conducted the analysis was consistent with his understanding as to how it should have been done, based on his experience.

[230] In cross-examination, Mr. Card said he was the one interpreting the *IAM* on behalf of Interfor, and the officially induced error claim was tied only to him. His reliance on the Ministry was from historical discussions with the key people who worked with him as Timber Pricing Coordinators at the Ministry over the years: Ken Chantler, Brian Russell, and Dana Manhard. He was asked if the interpretation question had come up at any of the joint committee meetings over the years, and he could not recall. He was asked if he had reviewed minutes of any committee meetings to see if this interpretation was discussed, and he had not seen any. Mr. Card could not remember the details, but he did recall discussing the issue of assuming that timber was harvested even if it was not – and he agreed that he did not discuss how to deal with un-incurred development expenses relating to that unharvested timber.

[231] Other than Mr. Card's recollection of discussions of the issue of assuming that timber was harvested even if it was not, Interfor's witnesses provided no further details of the alleged "policy" or "practice" of the Ministry. The Panel finds that Interfor has provided insufficient evidence regarding how the alleged Ministry policy applied to the processes of reappraisal or waste assessment.

[232] Likewise, if the Ministry's position was "communicated regularly and publicly to industry" or if the Ministry had "regularly required that standing waste be treated in this manner for the purposes of the reappraisal analysis in the years prior to the reappraisal analysis being completed for CP192", as submitted by Interfor, why was no written or probative oral evidence of this put before the Panel? Its absence speaks loudly. Mr. Chantler's evidence that he could not recall any reappraisal where something that was not done was included as being done, is contrary to Interfor's submissions regarding Ministry practice.

[233] Based on the evidence before the Panel, we find that Interfor has failed to establish the existence of the alleged Ministry "policy" or "practice", on a balance of probabilities.

[234] At best, Interfor relies on Mr. Card's recollection of some general and non-specific discussions over the years either at RAAC meetings (which Mr. Chantler does not recall) or with Ministry staff while he worked as a Timber Pricing Coordinator (between 2007 and 2010), about the issue of assuming that timber was harvested even if it was not. It is not clear from Mr. Card's evidence as to whether these discussions were in the context of waste assessment, stumpage appraisal, both, or otherwise. Mr. Card's testimony is not specific enough to establish the existence of a Ministry policy of treating unharvested timber as harvested in the context of the issues on this appeal.

[235] Additionally, it is clear from Mr. Card's evidence that the discussions he recalled were not about how to deal with un-incurred development expenses relating to unharvested timber.

[236] The Panel also notes that Interfor does not submit that it was Ministry "policy" or "practice" that unconstructed development associated with unharvested timber is to be treated as development in fact built or "actually carried out" for purposes of section 2.2.1(1)(b)(i) of the *IAM.*

[237] The Panel finds that the discussions Mr. Card testified about concerning treating unharvested timber as harvested do not constitute "advice" as contemplated by the *Jorgenson* factors or the other court decisions relied upon by Interfor. The informal discussions amongst stakeholders, including Ministry staff, that Mr. Card described do not reach any reasonable threshold to be considered interpretation advice that Interfor could rely upon.

[238] The fact that the discussions Mr. Card testified to clearly were not about how to deal with un-incurred development expenses relating to unharvested timber in a changed circumstances reappraisal under section 2.2.1.1(2)(a) of the *IAM*, further supports our finding that the discussions were not "advice" on how to interpret what was meant by "development actually carried out".

[239] The Panel finds it was unreasonable for Interfor to have relied upon such discussions as a basis to presume that the developments ENG14 and TAB15, that were not built, should be treated as "development actually carried out" for purposes of section 2.2.1(1)(b)(i) of the *IAM*.

[240] The Panel finds that Interfor has failed to establish that its erroneous interpretation of "development actually carried out" that led to its contravention of section 105(5.2) of the *FA* was the result of an officially induced error for purposes of section 72(c) of the *FRPA*.

[241] In conclusion on this issue, the Panel confirms the finding in the Determination that Interfor has failed to establish the defence of officially induced error.

4. If the facts underlying a contravention of section 105(5.2) of the *FA* are found, did Interfor exercise due diligence to prevent the contravention within the meaning of section 72 of the *FRPA* such that no contravention can be found?

[242] The general law relevant to the consideration of the defence of due diligence under section 72(a) of the *FRPA* is not in dispute.

[243] Section 72 of the *FRPA* codifies the common law defence of due diligence established in *R. v. Sault Ste-Marie*, [1978] 2 SCR 1299 [*Sault Ste-Marie*], as followed in numerous subsequent court decisions.

[244] As held in *Sault Ste-Marie* at p. 1326, the defence of due diligence involves consideration of what a reasonable person would have done in the circumstances. The Court stated that the defence will be available "if the accused … took all reasonable steps to avoid the particular event."

[245] The Commission has previously considered the test for the defence of due diligence under section 72(a), and has applied the test based on the Court's directions in *Pope & Talbot Ltd. v. British Columbia*, [2009] B.C.J. No. 2492 (2009 BCSC 1715). For example, see: *Interfor Corporation v. Government of British*

Columbia (2015-FRP-002(a), July 29, 2016), at para. 203. For this defence to succeed, the person claiming the defence must establish, on a balance of probabilities, that they took reasonable care to avoid the contravention. In this case, the standard is that which would be expected of a reasonable licensee in similar circumstances.

[246] The Supreme Court of Canada discussed in *Sault Ste-Marie* (at p. 1331) the significance of "establishing a proper system to prevent commission of the offence and … taking reasonable steps to ensure the effective operation of the system" in making out the defence. The Commission has previously considered this aspect of the due diligence defence in *Atco Wood Products Ltd. v. British Columbia*, Decision No. 2010-FOR-001(a), February 28, 2012 [*Atco*]. In *Atco,* the Commission referenced the above statement of the law from *Sault Ste-Marie* (at para. 260) and found at para. 273 that Atco had a proper system in place and took reasonable steps to ensure the effective operation of its system. For those reasons, the Commission found at para. 278 that the defence of due diligence had been established.

Interfor's submissions

[247] Interfor's written and oral Closing Submissions addressing the defence of due diligence under section 72(a) of the *FRPA* are summarized below.

[248] The evidence establishes the defence of due diligence under section 72 of the *FRPA* in the circumstances. Interfor took all reasonable steps required of a prudent and similarly situated licensee to prevent the alleged contravention of section 105(5.2) of the *FA*.

[249] It is important that the contravention was a failure to submit information, not that it made an interpretation error upon which it relied in failing to do so.

[250] Interfor submits that its actions have to be assessed based on the facts known at the time. Here, those facts primarily involve the system Interfor developed, adopted, and followed to determine if a cutting permit warrants reappraisal based on the timeframes and criteria set out in the *IAM*.

[251] Interfor points to the Commission's decision in *Atco* at paras. 262, 263 and 273. In that case, the Ministry alleged that Atco had contravened certain provisions of the *Forest Planning and Practices Regulation* by failing to properly maintain a section of forest service road and the associated drainage system. The Commission considered the evidence and found that Atco met the "systems and reasonable steps" branch of the test articulated in *Sault Ste. Marie*, and dismissed the allegations. Interfor submits that it has likewise met the "systems and reasonable steps" branch of the test articulated in *Sault Ste. Marie* and adopted in *Atco*.

[252] Interfor has developed and implemented a detailed process as part of its standard operating procedures for evaluating each of its active cutting permits to determine whether reappraisal is required within the timeframes specified in the *IAM.* Its procedures were developed over years with input from its Stumpage Working Group, as well as on the advice of other stumpage related groups and committees in which it participates.

[253] Interfor followed its standard policies and procedures to determine whether a reappraisal was required, and after discussion and input from three of its professional staff, determined that one was not.

[254] For the purposes of changed circumstances, the outcome of Interfor's standard policies and procedures is either: (a) a changed circumstance certification is submitted to the Ministry where no reappraisal is triggered; or (b) a reappraisal data submission is submitted where the thresholds set by the changed circumstance provisions of the *IAM*, properly interpreted, are triggered. In the case of CP192, Interfor followed its standard procedure for determining whether a reappraisal was necessary under the *IAM*.

[255] What is clear from the evidence of both Mr. Card and Mr. Scott is that any alleged contravention was not a result of any lack of reasonable prudence or diligence by Interfor. This alleged contravention is solely a function of a difference of opinion regarding the proper interpretation of the *IAM*. But for this difference of opinion, Interfor's reappraisal assessment procedures would have resulted in the submission of an appraisal data submission in accordance with the *IAM*.

[256] When Mr. Card and Mr. Scott's evidence surrounding Interfor's conduct is examined in its proper context, it is clear that Interfor took all reasonable steps required of a prudent and similarly situated licensee to prevent the alleged contravention. Further, it is particularly clear that Interfor was not required to submit a reappraisal by February 14, 2014, as found by the DDM. Interfor followed its standard policies and procedures in order to determine if a reappraisal was required, determined that it was not, and as a result of its care and consideration, was duly diligent.

[257] Despite the Ministry's efforts to demonstrate that Interfor could have called a Ministry representative if it had a question, the Respondent fails to acknowledge that Interfor did not have a question for which it needed to consult the Ministry. It had internal discussion about what to do, and resolved that discussion with the logic, reason, and professional judgment of three professional foresters well-versed in interpretation of the *IAM*, one of whom used to be a Timber Pricing Coordinator with the Ministry.

[258] Because Interfor's staff followed its policies and procedures, the Panel should consider on the evidence before it whether those policies and procedure met the requisite standard of diligence.

[259] There is no evidence to suggest that Interfor's system of review and assessment to determine whether a reappraisal was triggered was not reasonable or sufficient in the circumstances. Similarly, there is no evidence to demonstrate that Interfor did not follow that system here.

[260] Interfor's system was reasonable, as was its assessment that further info was not called for—even if the Panel does not agree that Interfor's conclusion was reasonable. So long as Interfor considered the question on a reasoned basis, and not on an arbitrary basis, it has met the standard of reasonableness required in the circumstances. All those involved in the process are professional foresters acting reasonably.

[261] In the circumstances, like in *Atco*, Interfor's procedures, and its conduct under those procedures, establish that Interfor was duly diligent, and no contravention can be found pursuant to section 72(a) of the *FRPA*.

Respondent's submissions

[262] The Respondent's submissions that the defence of due diligence has not been established by Interfor are summarized below.

[263] The reason given by Interfor for not following its system is essentially a mistake of law. This cannot be defended by claiming due diligence.

[264] Ignorance of the law or mistake of law is not a defence. Due diligence consists of taking steps to fulfil a duty imposed by law, and not in "ascertaining the existence of a statutory prohibition or its interpretation." (Rick Libman, *Libman on Regulatory Offences in Canada*, (Salt Spring Island, BC: Earlscourt Legal Press, 2002) (loose-leaf updated 2019, release 30), at 8.6(a); *R*. v. *Molis,* [1980] 2 SCR 351, 55 CCC (2d) 558, 1980 CanLII 8 (SCC)).

[265] Further, even if a defence of mistake of law was available, Mr. Card's mistaken interpretation was not reasonable because:

a. he could not recollect whether or not he reviewed the changed circumstances provisions of the *IAM;*
b. he disregarded the words "as built" in Interfor's own changed circumstance analysis spreadsheet that formed part of its self-monitoring system; and
c. Interfor did not provide evidence of a careful or any legal analysis of the changed circumstances provisions.

[266] Due diligence is not just about creating a system, it is also about following it. How was it implemented and carried out? Here Interfor had a system; however, the people authorized to do it disregarded the words "as built" as set out in their own form. They failed to follow their own form by ignoring this and assuming all was built, while knowing that it was not.

Panel's Analysis

[267] Based on the guidance provided by *Sault Ste-Marie* (at p. 1331) and *Atco,* the Panel finds that it is appropriate to focus on both the reasonableness of the systems employed by Interfor in 2016 to prevent the contravention, as well as whether Interfor took reasonable steps to ensure the effective operation and compliance with the system. The Panel adds that this focus necessarily includes an assessment of the factual circumstances in which Interfor was operating, all in the context of the *FA* and the *IAM.*

[268] As explained in *R. v. British Columbia Hydro and Power Authority,* 1997 CanLII 4373 (BCSC) [*BC Hydro*], at para. 54-55, reasonable care does not require that an accused take every conceivable precaution. The Panel does not expect Interfor to have taken "every conceivable precaution" as stated in *BC Hydro*, but does expect Interfor to demonstrate a high standard of awareness of the risk of breaching the requirements in section 105(5.2) of the *FA*.

[269] The Panel finds Interfor's claim of due diligence is to be assessed based on both what information Interfor had, as well as on what information it should reasonably have known, at the relevant time. This finding is based on the extract from *R. v. MacMillan Bloedel Ltd.,* 2002 BCCA 510, at paras. 47-48, that "the due diligence branch applies when the accused knew or ought to have known of the hazard but establishes that reasonable care was taken to avoid the contravening event".

[270] Interfor must establish that it exercised due diligence to prevent the contravention of 105(5.2) of the *FA*. We repeat that, because of the changed circumstance under section 2.2.1.(1)(b), Interfor was required by section 2.2.1.1(2)(a) of the *IAM* and section 105(5.1) of the *FA* to submit to the Ministry an appraisal data submission for stumpage reappraisal purposes for CP192. Interfor chose not to submit a reappraisal data submission based on its erroneous interpretation of the phrase development "actually carried out" in section 2.2.1.(1)(b).

[271] The Panel has considered both whether Interfor has proven the existence of a reasonable "Changed Circumstances Analysis" system, and if so, whether it has proven that Mr. Card and Mr. Scott followed its standard policies and procedures when they determined that a changed circumstance calling for a reappraisal of CP192 was not required.

i. *Interfor's "Changed Circumstances Analysis" system*

[272] Based on the evidence, the Panel makes the following findings about Interfor's "Changed Circumstance Analysis" system that was implemented in 2014. The system was designed to track development and harvesting on Interfor's cutting permits, and to evaluate those permits post-harvest to assess whether changed circumstances had occurred requiring Interfor to submit information to the Ministry for a stumpage reappraisal. If the planned logging on a particular cutting permit was not completed, Interfor tracked the cutting permit expiry date to make sure that it filed any stumpage reappraisal information that was required by the *FA* and the *IAM* on a timely basis.

[273] As part of its "Changed Circumstance Analysis" system, Interfor, through its forestry superintendents (such as Mr. Scott) performed audits of post-harvest reviews of its cutting permits done by others. A post-harvest review for purposes of stumpage reappraisal would include auditing of what developments were constructed, a calculation of the associated costs, and a field review. In deciding whether to conduct a field review of a particular cutting permit, the forestry superintendent would consider how difficult the cutting permit was to complete, based on the harvesting method and harvest and road construction costs.

[274] Also, as part of its "Changed Circumstances Analysis" system, the information obtained from a post-harvest review of a cutting permit was to be used by Interfor to complete its "Changed Circumstance Analysis" spreadsheet relating to that cutting permit. The Changed Circumstances Analysis spreadsheet sets out the Development Cost Estimates originally submitted by Interfor to the Ministry when applying for the cutting permit, and compares those cost estimates to the development costs "As Built" based on the field review, to determine if the 15% cost difference threshold for a changed circumstance had been met.

[275] In describing the "Changed Circumstance Analysis" spreadsheet, Mr. Card said the form was developed by Interfor in late 2014 or early 2015 to ensure that Interfor met its statutory obligations and did not miss time limits. It was designed by Interfor's stumpage working group, with input from other working committees and industry peers. The spreadsheet compares the post-harvest data to what was planned. At the bottom of each table, there is a formula that calculates a percentage to determine whether or not a reappraisal is required.

[276] Based on the evidence of Mr. Card and Mr. Scott, the Panel finds that Interfor did have a reasonable "Changed Circumstances Analysis" system in operation when it conducted its reappraisal analysis for CP192. We also find that the system was designed to facilitate compliance by Interfor with its statutory obligations under section 105(5.2) of the *FA* and the *IAM*, and in particular, its obligations when addressing a "changed circumstance" based on changes in development within a cutting authority area under section 2.2.1.(1)(b).

[277] The question remains as to whether Interfor took reasonable steps to ensure the effective operation and compliance with the system.

ii. *Did Mr. Card and Mr. Scott comply with Interfor's "Changed Circumstances Analysis" system in their reappraisal analysis of CP192?*

[278] The Panel findings on this question turn in part on the evidence provided by Mr. Scott and Mr. Card. We have summarized key aspects of their evidence below.

[279] Mr. Scott testified that, in his role in 2016 as forestry superintendent for Interfor's Adams Lake Division, he performed a post-harvest audit including a field review of CP 192. He conducted the field review of CP192 in May 2016 as the term of CP192 was set to expire on December 18, 2016, and the planned logging had not been completed. The purpose was to confirm what work had in fact been done on ADA003 and GAN027, as compared to what was planned to be done back in 2012.

[280] Mr. Scott was not able to tell the Panel why or when the decision not to harvest the 1,126 m^3 planned for overhead cable logging was taken by Interfor. Mr. Scott testified that the decision not to harvest the area would have been an "operational" decision made by others.

[281] In reference to the "Changed Circumstance Analysis" spreadsheet for CP192, Mr. Scott said that although one of his appraisal foresters, Domenico Fiorenza, filled in the data and signed the certification in the document, Mr. Scott was responsible for it as the Harvesting Supervisor.

[282] When asked about his involvement in filling out the "Changed Circumstance Analysis" spreadsheet for CP192, Mr. Scott said he recalled discussions that occurred around the expiry of CP192 about the volume that had not been harvested and how that would be handled. He discussed this with Mr. Card and Mr. Fiorenza. Their discussion involved treating both the harvesting and the construction of the road as having been done for purposes of this declaration. He participated in those conversations at arms-length but agrees that is what appears to have been done. They concluded that Mr. Fiorenza would file a certification that there was not a changed circumstance because the 15% threshold was not met, so no reappraisal was called for.

[283] Mr. Scott made it clear that this decision was based on Mr. Card's opinion on the matter. He described Mr. Card's rationale for this decision as being that, since Interfor was paying waste, it would be paying twice if it paid increased stumpage. Mr. Card felt that Interfor shouldn't have to pay both waste increase and increased stumpage.

[284] Mr. Card testified that the "As Built" values were inputted by Mr. Fiorenza on Mr. Card's direction in the late fall of 2016. Mr. Card directed Mr. Fiorenza to include the development costs as if incurred, knowing that ENG14 and TAB15 had not been built and the associated development expenses were not incurred. He was aware that, if they removed those expenses, it would have exceeded the 15% threshold and would have triggered a reappraisal. Mr. Card convinced Mr. Scott and Mr. Fiorenza to complete the "Changed Circumstance Analysis" spreadsheet for CP192 as they did, and to certify that no changed circumstance had occurred.

[285] The Panel finds that the evidence of Mr. Card and Mr. Scott with respect to how the "Changed Circumstance Analysis" spreadsheet for CP192 was completed falls short of proving compliance with Interfor's "Changed Circumstance Analysis" system. To the contrary, while Mr. Card testified that the spreadsheet was designed to "compare the post-harvest data to what was planned" he expressly directed Mr. Fiorenza not to do so in relation to ENG14 and TAB15. Further, the Panel finds that the rationale Mr. Card provided to Mr. Scott for doing so being that "since Interfor was paying waste, it would be paying twice if it paid increased stumpage" has nothing to do with and is inconsistent with the stated purpose of Interfor's "Changed Circumstance Analysis" system.

[286] The Panel also considered the documentary evidence introduced by Interfor concerning its "Changed Circumstances Analysis" system, which is discussed below. The only documents put before the Panel concerning Interfor's "Changed Circumstance Analysis" system were a spreadsheet titled "Changed Circumstance Analysis" and a one-page document titled "Changed Circumstance Procedures".

[287] The "Changed Circumstance Procedures" document contains three brief instructions as to how the "Changed Circumstance Analysis" spreadsheet is to be completed.

[288] We have summarized the "Changed Circumstance Analysis" spreadsheet relating to CP192, as follows:

- The spreadsheet has a one-page summary of "Development Cost Changes", each of which is described in one or more tables.
- The changes listed in the one-page summary were tabular roads (such as TAB15), engineered cost estimates ("ECE's") for roads (such as ENG14), and other development (such as culverts).
- The spreadsheet includes green shaded areas that, according to instructions on the summary page, "must be completed by the Development Supervisor at the time of Cutting Permit Approval". The shaded areas set out the development and associated development cost estimates submitted by Interfor to the Ministry with its application for CP192.
- The spreadsheet includes blue shaded areas that, according to instructions on the summary page, "must be completed by the Harvesting Supervisor at the

time of the completion of a given Phase/Project (ie. Pre-built Roads, ECE's, etc)."

- The blue shaded area to be completed at the time of completion for each of the categories of development included the descriptor "As Built" as in '"As Built" Attributes' and 'Total "As Built" Value ($)'.
- No definition of "As Built" was set out in the document.

[289] The Panel was advised that, embedded in the "Changed Circumstance Analysis" spreadsheet, was a formula to calculate and compare the originally submitted development charges to the "As Built" development charges, to determine if the 15% changed circumstance threshold had been exceeded, which determined whether a reappraisal submission was required or not.

[290] Critical to the Panel's analysis of Interfor's "Changed Circumstance Analysis" system is the meaning of "As Built" as used in its spreadsheet. The spreadsheet instructs the Harvesting Supervisor to complete the "As Built" portions of the spreadsheet "at the time of the completion of a given Phase/Project". The Panel finds that this instruction indicates that the phrase "As Built" in the spreadsheet means a development that had in fact been built.

[291] Given that the stated object of the spreadsheet exercise was to comply with the requirements of section 2.2.1.(1)(b) of the *IAM* in comparing the costs of development "actually carried out" to the original development cost estimates, it makes sense that the usual and ordinary meaning of "As Built" was intended by Interfor in designing its spreadsheet. As defined in lexico.com, the phrase "as-built" is used as an adjective and means: "Relating to the form in which something was actually constructed, especially as opposed to what was planned; (Building) designating a plan, survey, etc., made after the completion of works."

[292] Given that the instructions in the "Changed Circumstance Procedures" document are brief and shed further light on the meaning of "As Built", we set them out here in full:

1. Development Supervisor completes the green fields on the spreadsheet at the time of CP submission and stores it on the shared drive in the CP folder.
2. Harvesting Supervisor completes the blue field on the spreadsheet as harvesting is finished on each block.
3. At the completion of all blocks in the Cutting Permit, Development Supervisor reviews the spreadsheet and submits the changed circumstance reappraisal or certification that a changed circumstance reappraisal has not been triggered (note that the same effective date as the original appraisal should be used for cost comparison).

[293] The instruction that the Harvesting Supervisor was to complete the blue field on the spreadsheet "as harvesting is finished on each block" is also consistent with the usual and ordinary meaning of "As Built" set out above from lexico.com.

[294] When asked on cross-examination what the term "As Built" as used in the "Changed Circumstance Analysis" spreadsheet meant, Mr. Card said it means the actual costs incurred, determined after the fact, as compared to the original development cost estimates provided by Interfor to the Ministry in support of its

application for the cutting permit. The Panel finds that Mr. Card's testimony supports its interpretation of the phrase.

[295] Based on the forgoing, the Panel finds that the phrase "As Built", as used in Interfor's "Changed Circumstance Analysis" system, refers to the development in fact constructed on the ground when a given phase of harvesting on a cutting permit is completed.

[296] We agree with the Respondent that due diligence involves not just creating a system, but also following it. Here, Interfor had a system; however, the people authorized to implement it disregarded the words "As Built" as set out in their own form. They failed to follow their own form by ignoring this and assuming all was built, while knowing that it was not.

[297] Having focused on both the reasonableness of the system employed by Interfor in 2016 to prevent the contravention, as well as on whether Interfor took reasonable steps to ensure the effective operation and compliance with the system, the Panel finds Interfor did not follow its "Changed Circumstance Analysis" system in relation to CP192.

[298] Mr. Card understood what "As Built", as used in Interfor's system, meant, but he chose to ignore this and instead proceeded on his "notional" or "hypothetical" analysis.

[299] The Panel finds that Mr. Card, and through him Interfor, failed to take reasonable or diligent action when he chose not to follow the "As Built" language of the "Changed Circumstance Analysis" spreadsheet for CP192.

[300] Based on the forgoing analysis, the Panel finds that Interfor has failed to establish that it exercised due diligence. While the system it had in place might have been sufficient to establish a defence of due diligence, Interfor's staff did not follow that system in this case. Interfor has failed to establish that it took the steps reasonably required to ensure the effective operation of and compliance with its "Changed Circumstance Analysis" system. That system was not complied with in relation to CP192. Interfor's actions did not reach the threshold of due diligence.

[301] In conclusion, the Panel confirms the finding in the Determination that Interfor failed to establish the defence of due diligence in relation to the Contravention.

5. If Interfor has not established either of the defences, should the administrative penalty imposed by the DDM be confirmed, varied downward, or rescinded?

[302] Under section 71(2)(a)(i) of the *FRPA,* having found the contravention of section 105(5.2) of the *FA*, the DDM was authorized to levy an administrative penalty. The maximum penalty for contravention of section 105(5.2) of the *FA* is $500,000.

[303] Section 71(5) of the *FRPA* specifies the factors that must be considered before an administrative penalty is levied under subsection 71(2). Those factors are:

(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.[10]

[304] The DDM considered those factors together with the circumstances of the case, and levied a $17,549 penalty for the contravention. The DDM calculated a $7,549 penalty to remove the economic benefit that Interfor derived from the contravention to compensate the Crown for the same economic losses, and imposed a $10,000 deterrent component based on the section 71(5) factors other than economic benefit. The DDM's review of previous Ministry determinations indicated that the average penalty for this type of contravention is $5,000. This was Interfor's second such contravention in the past five years, and the previous penalty of $5,000 apparently did not provide a sufficient deterrence. Therefore, the DDM doubled the deterrent penalty. The penalty was intended to serve the purpose of specific and general deterrence.

[305] In determining the economic benefit penalty of $7,549, the DDM started from her finding that the reappraisal information was due within 60 days of the last logs being scaled on December 16, 2013. The DDM reasoned that Interfor had the benefit of the $42,475 of additional stumpage that it did not pay based on a reappraisal, from that date until the date of the OTBH. Applying a "conservative" savings account interest rate of 1.5%, the DDM calculated that Intefor would have earned approximately $4,300 in interest on the $42,475 during that time. The DDM added to this $3,080, (which was the estimate provided to the DDM by Ministry staff of how much Interfor's waste assessment would have gone up based on the stumpage reassessment), but which will not be re-invoiced by the Ministry. To this amount, the DDM added interest of 1.5% on the $3,080 from the date the lower waste assessment was invoiced or paid in January 2017 until the date of the OTBH, for an additional $169 interest on that waste assessment amount not paid. The total of these figures is $7,549.

[306] The DDM held that this basic calculation was a simple, conservative, and reasonable way to calculate Interfor's likely economic benefit.

Interfor's submissions

[307] Interfor made the following submissions on the penalty.

[308] Having regard to the factors enumerated in section 71(5) of the *FRPA*, no penalty should be levied against Interfor.

[309] First, Interfor's previous contravention of section 105(5.2) of the *FA* was not of a similar nature to that alleged here. In the prior determination that Interfor had

[10] No other considerations or factors have been prescribed.

contravened section 105(5.2) of the *FA* (a January 11, 2017 determination of Josh Pressey, District Manager, Quesnel Natural Resource District (the "Prior Contravention")), Interfor had requested an extension of the deadline for submitting a reappraisal after the expiry of that deadline. It was found to have contravened section 105(5.2) on the basis that it had not submitted the required reappraisal information by the deadline. Furthermore, the decision-maker in that case expressly found that, at that time, Interfor did not have a system in place to identify the need to submit reappraisals in accordance with the requirements of the *IAM*. Neither is the case here.

[310] Here, Interfor had an established system for analyzing whether a reappraisal is triggered under the *IAM* as part of its standard operating procedures, and it did not submit a reappraisal because it honestly believed it did not need to do so. This contravention, accordingly, was not of a similar nature to the prior contravention.

[311] Second, the gravity and magnitude of the contravention here is relatively low. Interfor's position with regard to the interpretation of a "changed circumstance" under the IAM in the particular circumstances of CP192 (including in light of the waste assessment for that permit) was, and remains, a reasonable interpretation of a single term within a complex set of overlapping requirements and processes.

[312] Third, the contravention was not repeated or continuous. There is only a single contravention alleged here.

[313] Fourth, the District Manager expressly found that the contravention was not deliberate. The meaning of "deliberate" proposed by the Respondent is inconsistent with the language of the legislation – it means an intentional contravention. Based on the Respondent's approach, every contravention would be deliberate other than those that are negligent. It is better to attempt to comply with the legislative requirements and err, than it is to negligently fail to act, yet based on the Respondent's view, the penalty would be worse in the former case.

[314] Ultimately, resolution of the different interpretations the parties have of the reassessment provisions in the *IAM* is what brings the parties before this Commission. However, that difference of opinion does not render any contravention found "deliberate" for the purposes of the penalty analysis. Interfor says the contravention was <u>not</u> deliberate.

[315] Fifth, Interfor acknowledges that a lower stumpage rate is an economic benefit. However, Interfor submits that this factor should be considered as neutral in the penalty assessment. In the end, there is no real "benefit" to Interfor. Moreover, under either circumstance (i.e., whether the contravention is upheld or set aside), the proper amount of stumpage (as ultimately determined by the outcome of this process) will be paid.

[316] As it is Ministry policy not to reassess the waste charge, that is not something that can reasonably be imposed on Interfor as a penalty.

[317] There is no evidence before the Panel as to the interest rate upon which an interest analysis such as that conducted by the DDM could be based. In the absence of such evidence, the Panel cannot do a calculation as suggested by the Respondent. Any such assessment by the Panel would be inappropriate in the circumstances.

[318] Sixth, Interfor was cooperative in the matter of the Ministry's investigation.

Respondent's submissions

[319] The Respondent made the following submissions on penalty.

[320] The administrative penalty levied by the DDM was reasonable, and should be confirmed. The DDM appropriately weighed the considerations set out in section 71(5) of the *FRPA*.

[321] Interfor's prior contravention is "similar" to the present contravention, for the purposes of section 71(5). Interfor may have developed a system regarding reappraisals, but that system failed since Interfor did not perform the calculation as required under section 2.2.2(1)(b) of the *IAM*. Simply inputting the cost of a culvert and tabular roads into the changed circumstances spreadsheet without considering the meaning of "as built" or reading the "changed circumstances" provisions in the *IAM* is insufficient when a licensee has a legal obligation to submit accurate information so it can pay for its use of public resources.

[322] The gravity and magnitude of the contravention are significant. But for Mr. Chantler identifying the possible contravention, Interfor would have underpaid stumpage by approximately $42,475. Further, the standing waste invoice was $2,011 too low because the waste billings were based on the original, rather than reappraised, stumpage rate. While the estimate of the waste underpayment before the DDM was $3,080, the Respondent provided a calculation in submissions to the Panel confirming the amount as $2,011.

[323] It is important to the citizens of British Columbia that accurate stumpage rates are applied to Crown timber. It is also important that the stumpage appraisal and reappraisal system is applied fairly for all licensees.

[324] While the DDM found the contravention was not deliberate, the Respondent says the evidentiary record in this appeal supports a finding that the contravention was calculated and deliberate. On the meaning of "deliberate", the Respondent says it means that Interfor intended its actions – no good or bad intent is to be imposed.

[325] The $10,000 deterrent penalty is reasonable.

[326] Interfor did benefit economically from the contravention. It would have paid $42,475 less stumpage and had a waste assessment that was at least $2,011 lower that it otherwise would have paid. The full waste assessment will not be changed.

[327] The District Manager also found that Interfor had the benefit of additional capital, and additional interest would have accrued on that capital. The Respondent submits that the Panel should undertake a similar exercise to determine financial benefit for accrued interest.

Panel's Analysis

[328] The Panel first considered Interfor's submission that "no penalty" should be levied against it. While Interfor does not refer to it, section 71(2)(a)(ii) of the *FRPA* provides that the DDM may refrain from levying an administrative penalty against the person if the DDM "considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty". The DDM did not consider

Interfor's contravention to be trifling and consequently considered an appropriate penalty.

[329] The Panel agrees with the DDM that Interfor's contravention was not trifling. The parties did not provide any arguments in relation to section 71(2)(a)(ii) or evidence to the contrary, despite having the opportunity to do so. The Panel also finds it is in the public interest to levy an administrative penalty in the circumstances.

[330] The Panel will consider the factors set out in section 71(5) of the *FRPA* in assessing the appropriate penalty for the Interfor's contravention of section 105(5.2) of the *FA*.

i. *Previous contraventions of a similar nature*

[331] The Prior Contravention was of section 105(5.2) of the *FA,* as was the contravention we are dealing with on this appeal. While the Panel accepts that the particular facts leading to the contravention in each instance were different from the other, both involved a failure by Interfor to submit the requisite stumpage reappraisal information leading to a contravention of the same provision of the *FA.* In that sense, the Panel considers the contraventions to be "similar in nature" for purposes of section 71(5) of the *FRPA*. It is the "nature" of the infraction, rather than the particular facts leading to the infraction, that is at issue here.

ii. *Gravity and Magnitude of this contravention*

[332] The DDM held that while the magnitude was low from an environmental impact perspective, it was higher from a financial perspective, given that Interfor benefited from a lower stumpage rate and waste assessment than should have been the case. If not for the investigation, the Ministry would likely have lost revenue.

[333] The Panel agrees with the Respondent that it is important to the citizens of British Columbia that accurate stumpage rates are applied to Crown timber. The Panel agrees with the DDM and finds the magnitude of the contravention, from a financial perspective, to be more than low as suggested by Interfor.

[334] The Panel has already found that Mr. Card did not follow Interfor's "Changed Circumstance Analysis" system in directing Mr. Scott as to how the spreadsheet was to be completed. Accordingly, the Panel agrees with the DDM and finds that the gravity of the contravention was significant given that Interfor's level of diligence in relation to preventing the contravention was low.

iii. *Was the contravention repeated or continuous?*

[335] There is no suggestion that the contravention was "repeated and/or continuous.

iv. *Was this contravention deliberate?*

[336] The Panel does not accept the Respondent's interpretation of "deliberate" as used in this context. The Panel finds, as did the DDM, that there is no evidence that the contravention was "deliberate" for purposes of section 71(5) of the *FRPA*. The Panel agrees with Interfor's submissions above on this issue.

v. *Did Interfor derive any economic benefit from the contravention?*

[337] It is clear on the evidence that Interfor will be obliged to pay the increased stumpage of $42,475 based on the Stumpage Redetermination.

[338] The Panel finds the waste assessment of $2,011 that Interfor avoided paying over and above the $290.52 it did pay in January 2017 to be an economic benefit derived by Interfor as a direct result of its contravention. Interfor submitted its standing waste assessment at the lower rate based on its erroneous interpretation of section 2.2.1(1)(b) of the *IAM* that also led to its contravention. While the Panel heard evidence concerning the existence of a Ministry policy not to reassess paid waste assessments, Mr. Chantler could not provide any specifics about this policy as waste assessment was outside his area of responsibility. In any event, the Panel finds that the existence of such a policy does not change the fact that Interfor derived an economic benefit as a result of its contravention. The Panel finds this economic benefit of $2,011 should be taken into account when assessing penalty.

[339] While the Panel accepts that the time delay in making the payment of the increased stumpage and waste assessment implies some further economic benefit to Interfor, and consequent loss to the government, the Panel also finds it would be speculative to try to calculate a precise benefit, without further evidence to determine an appropriate interest rate. The Panel will not adopt the DDM's approach of adding a specific amount of interest in relation to this deemed economic benefit.

vi. *Was Interfor cooperative?*

[340] It was agreed that Interfor was cooperative throughout the investigation and the OTBH. Furthermore, Interfor's cooperative approach continued throughout this appeal process.

Assessment of administrative penalty

[341] The Prior Contravention was the only prior administrative penalty decision by the Ministry for a contravention of section 105(5.2) of the *FA* that was put before the Panel. The penalty levied against Interfor in that case was $5,000.

[342] In the Determination, the DDM described $5,000 as the average penalty for this type of contravention based on her review of previous Ministry determinations.

[343] Neither party brought forward any other prior decisions of the Commission to guide the Panel on the appropriate quantum of penalty in the circumstances of this case.

[344] Administrative penalties under the *FRPA* are intended to encourage compliance with "the Acts" as defined in section 58.1[11] of the *FRPA*, including the *FA*. General and specific deterrence, as well as providing compensation to the Crown, are primary considerations in assessing a penalty (for example, see: Forest Practices Board v. Government of British Columbia, Decision No. 2016-FRP-001(a),

[11] Section 58.1 of the *FRPA* defines "the Acts" for the purposes of Part 6 [Compliance and Enforcement] of the *FRPA* as meaning "one or more of this Act, the regulations or the standards or the Forest Act, the Range Act or a regulation made under" those Acts.

February 10, 2017, at paras. 43 to 47). In considering the appropriate penalty, the Panel has been mindful of the specific circumstances of this particular case.

[345] As was held by the DDM, this was Interfor's second contravention of section 105(5.2) of the *FA* within a 5-year timeframe. Interfor points out that it had implemented its "Changed Circumstance Analysis" system in the interim. Unfortunately, that system was not complied with in this case.

[346] The Panel agrees with the DDM and finds that a higher deterrent component to penalty in the amount of $10,000 is called for given this was Interfor's second contravention of section 105(5.2) of the *FA* within a 5-year timeframe and the previous penalty of $5,000 apparently did not provide a sufficient deterrence.

[347] To address the economic benefit derived by Interfor as a result of the contravention the Panel finds an additional $2,011 should be included in the penalty amount.

[348] In the circumstances of this contravention, the Panel finds that a penalty of $12,011 will properly address the objectives of penalty assessment as well as the factors set out in section 71(5) of the *FRPA* including any economic benefit derived by Interfor as a result of its contravention. The Panel varies the penalty levied in the Determination accordingly.

DECISION

[349] In making this decision, the Panel has considered all of the relevant evidence and the submissions of the parties, whether or not specifically reiterated in this decision.

[350] For the reasons set out above, the Panel makes the following orders under section 84(1) of the *FRPA* in the Contravention Appeal and under section 149 of the *FA* in the Stumpage Redetermination Appeal:

a. the Panel confirms the finding in the Determination that Interfor contravened section 105(5.2) of the *FA* by failing to submit reappraisal data to the Ministry as required by section 105(5.1) of the *FA* and section 2.2.1.1(2)(a) of the *IAM*;

b. the Panel confirms the Stumpage Redetermination;

c. the Panel confirms the finding in the Determination that Interfor's failure to submit the required reappraisal data was not the result of an officially induced error within the meaning of section 72 of the *FRPA* such that no contravention can be found;

d. the Panel confirms the finding in the Determination that Interfor did not exercise due diligence to prevent the contravention within the meaning of section 72 of the *FRPA* such that no contravention can be found; and

e. the administrative penalty levied in the Determination should be varied downward, to $12,011.

"Michael Tourigny"

Michael Tourigny, Panel Chair
Forest Appeals Commission

"Cynthia Lu"

Cynthia Lu, Panel Member
Forest Appeals Commission

"Ian Miller"

Ian Miller, Panel Member
Forest Appeals Commission

December 15, 2021