



Forest Appeals Commission

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DECISION NO. FAC-FRP-21-A001(a)

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

BETWEEN:	Burns Lake Community Forest Ltd.	APPELLANT
AND:	Government of British Columbia	RESPONDENT
BEFORE:	A Panel of the Forest Appeals Commission Michael Tourigny, Panel Chair	
DATE:	Conducted by way of videoconference oral hearing on January 27, 2022	
APPEARING:	For the Appellant: Frank Varga, RFP For the Respondent: Trevor Bant, Counsel Kayla Fast, Counsel	

FINAL DECISION ON THE MERITS

APPEAL

[1] This is an appeal brought by Burns Lake Community Forest Ltd. ("BLCF") to the Forest Appeals Commission (the "Commission") under section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "*FRPA*").

[2] BLCF appeals a February 26, 2021 determination (the "Determination") made against it by Barry Dobbin, District Manager, Coast Mountains Natural Resource District, in his capacity as a delegated decision maker (the "DDM"). In the Determination, the DDM held that BLCF contravened section 21(1) of the *FRPA* by failing to carry out its timber harvesting in a manner that was consistent with the results and strategies of its forest stewardship plan. The DDM levied a penalty of \$3,500 against BCLF for the contravention.

[3] In this appeal, BLCF asks the Commission to rescind the DDM's finding that it contravened section 21(1) of the *FRPA*. BCLF submits that its harvesting was not inconsistent with the results and strategies of its forest stewardship plan. Alternatively, BLCF 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*. BLCF further says the finding of contravention should be set aside because BLCF's operations had been subject to numerous inspections and that it was the victim of a biased investigation in relation to the contravention. If

the Commission confirms the contravention and finds that the defences of due diligence or officially induced error do not apply, BLCF does not appeal the \$3,500 penalty assessed against it.

[4] The Respondent asks the Commission to dismiss the appeal and confirm the finding in the Determination that BLCF contravened section 21(1) of the *FRPA* and the resulting penalty of \$3,500.

[5] 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.

[6] For the reasons that follow, the Panel dismisses this appeal and confirms the findings in the Determination that BLCF contravened section 21(1) of the *FRPA* together with the resulting penalty of \$3,500.

BACKGROUND

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

[8] BLCF is a company incorporated in 1998 in response to a request for proposals from the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") in relation to a community forest agreement.

[9] BLCF is currently the licence holder managing Long Term Community Forest Agreement K1A dated October 1, 2014 ("K1A").

[10] K1A was granted to BLCF for a term of 25 years, beginning on April 12, 2015. K1A covers timber harvesting rights within an area of approximately 92,500 hectares located within the Nadia Natural Resource District and the Skeena Region, centered around the village of Burns Lake.

Habitat connectivity to be maintained within the landscape connectivity matrix

[11] K1A is located within the area subject to the Lakes North Sustainable Resource Management Plan dated January 26, 2009, as amended (the "SRMP"). The SRMP contains objectives that relate to managing biodiversity values in forested ecosystems. The biodiversity values addressed in the SRMP relate to landscape level biodiversity objectives, which include old growth and connectivity. The objectives in the SRMP were established as land use objectives under the *FRPA* for the area covered by the SRMP, by a ministerial order issued under section 93.4 of the *Land Act*, R.S.B.C. 1996, c. 245. Consequently, the land use objectives in the SRMP apply to the area within K1A.

[12] Part 2 of the SRMP lists objectives and strategies intended to provide clear management guidance on maintaining biodiversity values while retaining flexibility to manage for timber harvesting. It states that in order to provide opportunities for the distribution of species, populations, and genetic material, the SRMP includes an objective to maintain and enhance habitat connectivity at the landscape level, as

set out in Objective 4 in part 2 of the SRMP. Specifically, Objective 4 states as follows:

Maintain habitat connectivity within the landscape connectivity matrix shown on Map 3 [in the SRMP] (the "LCM"), in accordance with ... [specific stated requirements].

[13] Objective 4 in part 2 of the SRMP, was amended on March 8, 2017, by order of the Regional Director for the Skeena Region (the "Ministerial Order"). The relevant portion of Objective 4, as amended, is discussed below.

BLCF's forest stewardship plan

[14] As required by Part 2 of the *FRPA*, BLCF prepared and holds a forest stewardship plan for the areas it manages under K1A. A forest stewardship plan is a landscape-level plan of potential forest development activities that are intended to take place in the plan area. Forest agreement holders must prepare, and have approved by the Ministry, a forest stewardship plan before timber harvesting or road building activities can begin. The forest stewardship plan that was approved by the Ministry and applies to K1A in this appeal is dated May 29, 2017 (the "FSP").

[15] Section 5.4 of the FSP incorporates Objective 4 (as amended by the Ministerial Order) of part 2 of the SRMP. It requires BLCF to maintain habitat connectivity within the LCM, including the requirement to maintain the LCM in a "contiguous mature and old forest condition" defined as "at least 70% of the forested areas within each LCM being greater than 100 years old (SBS) or 120 years old (ESSF) at any time"¹.

[16] Section 5.4 includes an exemption from the requirement to maintain the LCM in a "contiguous mature and old forest condition" in specified circumstances for the salvage of dead pine trees within an LCM. The relevant exemption states that salvage harvesting of dead pine trees within an LCM "may only occur *where 50% or more of the total mature and old [trees] are composed of dead pine trees*, and only where harvesting of these dead pine trees maintains connectivity." [Emphasis added]

[17] Under section 21(1) of the *FRPA*, as the holder of the FSP, BLCF must ensure that the intended results specified in the FSP are achieved and the strategies described in the FSP are carried out. Section 21(1) states:

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

Correspondence between BLCF and the Ministry in 2018

[18] In late 2015, BCLF initiated a Mountain Pine Beetle Mitigation Plan (the "MPBMP") project in response to an infestation of mountain pine beetles in the region, which killed many pine trees.

¹ "SBS" refers to the Sub-Boreal Spruce zone, and "ESSF" refers to the Engelmann Spruce - Subalpine Fir zone, which are zones in the Ministry's Biogeoclimatic Ecosystem Classification system that divides the Province into 12 forested biogeoclimatic or ecological zones.

[19] On March 26, 2018, BLCF sent a “decision request letter” to the Ministry which set out a number of barriers to BLCF successfully implementing the MPBMP. As an important part of the timber supply mitigation aspect of the MPBMP, BLCF sought a redesign of the LCM, because the LCM established under the Ministerial Order includes a large amount of (primarily dead) pine stands. Accordingly, as part of its proposed MPBMP, BLCF’s decision request letter asked the Ministry to amend the Ministerial Order by adopting BLCF’s alternative LCM set out in the MPBMP.

[20] By letter dated May 9, 2018, the Ministry denied BLCF’s request to amend the Ministerial Order, advising BLCF that while the Ministry would consider amendments, further information and analysis was required. The Ministry also called BLCF’s attention to the fact that “greater than 70 percent of the forested area within a landscape connectivity matrix must be in a mature and old condition” and that currently “the amount of mature and old forests within the LCM ... is below the legally required minimum”.

[21] On May 22, 2018, the Ministry’s Assistant Deputy Minister, Regional Executive Director, and Nadina Natural Resource District Manager met with BLCF to discuss the proposed MPBMP. The Nadina District Manager sent BLCF a follow up letter setting out what was discussed at the meeting. The letter stated that “the Management Plan Review and Approval Process will take approximately 6 months to complete starting from the date of submission.” The letter also stated that the review of the redesigned LCM would likely require several technical meetings and may take over a year to complete after the Ministry received technical data from BLCF concerning the proposed redesign of the LCM.

Cutting permit CP BM2 and harvesting on Block 2042

[22] On June 28, 2018, BLCF sent a letter to the Nadina District Manager in support of an application for a cutting permit (“CP BM2”), which would authorize harvesting within specified cut blocks covered by K1A. In this letter, BLCF described its rationale for, and intended levels of, harvest within the cut blocks covered by the application, focusing on those within the LCM. It stated that the area within the LCM was proposed for partial harvesting with 50% retention of live green trees, and a focus on removing dead and blowdown² trees.

[23] BLCF’s application for CP BM2 covered approximately twenty cut blocks, approximately half of which were proposed for clear cut and the other half were proposed for partial retention harvest. Five of the proposed cut blocks were partially or entirely within the LCM. The application included cut block 2042 (“Block 2042”) with a total harvest area of 6.86 hectares.

[24] Block 2042 is located entirely within the LCM, and was proposed for partial retention harvest.

[25] The Nadina District Manager did not respond to BLCF’s June 28, 2018 letter.

[26] On October 11, 2018, the Nadina District Manager issued CP BM2 to BLCF under the *Forest Act*, R.S.B.C. 1996, c. 157 (the “FA”), for the proposed cut blocks including Block 2042, without reference to BLCF’s June 28, 2018 letter.

² “Blowdown” refers to timber that has been uprooted by wind.

[27] CP BM2 authorized harvesting subject to the K1A from lands within the areas designated in the cutting permit for a period of four years beginning on October 11, 2018.

[28] BLCF prepared a site plan dated December 17, 2018, in relation to timber to be harvested on Block 2042 (the "Site Plan"). In describing the timber species mix within Block 2042, the Site Plan stated that the timber in Block 2042 was "spruce leading" consisting of 70% spruce and 30% pine, and there was moderate to high blowdown of 40 to 60%.

[29] On January 10, 2019, BLCF submitted a notice to commence harvest under CP BM2 as required by section 85 of the *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004 (the "*FPP Regulation*"). The notice stated that harvest was to commence January 14, 2009. The cut blocks subject to the notice included Block 2042.

[30] On or about January 30, 2019, BLCF started harvesting on Block 2042 under CP BM2.

[31] BLCF partially harvested approximately 164 cubic metres ("m³") of incidental green trees from skid trails and blowdown spruce, and approximately 685 m³ of dead and fallen pine from Block 2042.

[32] Over 50% of the trees removed from Block 2042 were dead pine.

[33] At the time of BLCF's harvest on Block 2042:

- a. The LCM contained 56% mature forested areas (i.e., forested areas greater than 100 years old); and
- b. Block 2042 as a whole contained less than 50% dead pine.

Investigation

[34] In March 2019, a Natural Resource Officer (the "Investigator") in the Ministry's Compliance and Enforcement Branch (the "C&E") for the Skeena Region received a complaint about BLCF harvesting within the LCM.

[35] On April 9, 2019, the Investigator conducted a site visit at Block 2042. After the site visit, the Investigator prepared a Natural Resource Inspection Report stating that BLCF was under investigation for an alleged contravention of section 21(1) of the *FRPA* and section 105.1(3)(b) of the *FA* in relation to its harvesting on Block 2042. A copy of this report and notice of this investigation was provided to BLCF on June 24, 2019. The report asked BLCF to provide any documentation of preharvest field work that confirmed that 50% or more of the total mature and old stems within Block 2042 were dead pine trees.

[36] BLCF provided the Investigator with documentation and a statement as requested, and was cooperative throughout the investigation.

[37] On September 3, 2020, after completing the investigation, BLCF received a copy of the Ministry's Investigation Report (the "Investigation Report"), which alleged that BLCF had contravened section 21(1) of the *FRPA* and section 105.1(3)(b) of the *FA*. The Investigation Report included copies of the Ministry's

supporting evidence. The Investigation Report did not include the name of the complainant.

[38] BLCF was subject to approximately 19 inspections of its operations by the C&E from October 2018 through May 2019.

Opportunity to be Heard and Determination

[39] BLCF attended an Opportunity to be Heard ("OTBH") on October 8, 2020, before the DDM.

[40] On February 26, 2021, the DDM issued the Determination that is the subject of this appeal.

[41] The Determination was based on evidence and submissions made by both BLCF and the Ministry at the OTBH.

[42] After reviewing the evidence and submissions of the parties and making certain findings of fact, the DDM found that BLCF had not contravened section 105.1(3)(b) of the *FA*, but had contravened section 21(1) of the *FRPA*. For contravening section 21(1) of the *FRPA*, the DDM levied a penalty of \$3,500. The DDM decided not to issue a remediation order.

[43] Specifically, the DDM held that the results and strategies set out in BLCF's FSP, including section 5.4 – Landscape Connectivity, applied to Block 2042. The DDM further held that these results and strategies had not been amended as requested by BLCF in its March 26, 2018 decision request letter.

[44] The DDM also found that BLCF failed to comply with the results and strategies in section 5.4 of its FSP when it harvested Block 2042. Block 2042 was entirely within the LCM and was ineligible for harvest according to the FSP. The LCM was in a mature deficit, meaning that it did not contain the 70% mature and old forest condition that was a pre-requisite for harvesting within the LCM. Rather, the LCM only contained 56% mature and old forest. As Block 2042 primarily contained spruce trees, and not the requisite 50% dead pine trees, it did not fall within the exemption from the old forest requirement described in section 5.4 of the FSP.

[45] Furthermore, the DDM held that BLCF did not obtain approval from the Ministry exempting it from the results and strategies described in section 5.4 of its FSP with respect to this LCM.

[46] In addressing the issuance of CP BM2 for Block 2042 within the LCM, the DDM held that issuing CP BM2 did not change or amend BLCF's FSP.

[47] At the OTBH, BLCF raised the defences of due diligence and officially induced error under section 72 of the *FRPA*. The DDM considered those defences and held that the facts did not support either in relation to section 21(1) of the *FRPA*.

[48] BLCF said the Ministry had rejected some of BLCF's previous cutting permit applications in the LCM. In that context, BLCF submitted it had exercised due diligence in that, before the issuance of CP BM2 and its treatment in Block 2042, it had provided a rationale to the Nadina District Manager for its proposed treatment (to which no reply was received), following which the District Manager issued CP BM2. The DDM held that silence from the Ministry was not consent, and therefore, BLCF's level of diligence exercised was not enough in this case.

[49] Regarding the defence of officially induced error, BLCF submitted that the Nadina District office had refused to issue cutting permits in LCMs prior to CP BM2's approval, and therefore, the Ministry had set a precedent by issuing CP BM2. As a result, BLCF was induced to erroneously believe that issuing CP BM2 gave it the authority to harvest Block 2042 as described in its rationale provided to the District. However, the DDM held that the District did not err in issuing CP BM2 for Block 2042, and given that the results and strategies in the FSP were still in effect, there was no officially induced error in this case. The DDM held that the fact that some of BLCF's previous cutting permit applications in the LCM had been denied was irrelevant to CP BM2.

[50] In determining the penalty, the DDM considered the factors set out in section 71(5) of the *FRPA*. The DDM held that the contravention of section 21(1) of the *FRPA* was not trifling and that a penalty of \$3,500 was appropriate in the circumstances.

The Appeal

[51] BLCF filed its Notice of Appeal with the Commission on March 22, 2021.

[52] As provided in section 140.6 of the *FRPA*, and as agreed to by the parties, this appeal was conducted as a new hearing based on the evidence and submissions before the Panel. By further agreement of the parties, the appeal was conducted by way of audio-video conference.

[53] At the hearing of the appeal, the parties provided an Agreed Statement of Facts dated December 15, 2021, which contained numerous documents. In addition, the parties provided further document evidence, and the Panel heard testimony from Mr. Frank Varga, RFP, General Manager of BLCF.

[54] On the question of penalty, the Respondent acknowledged in its statement of points that BLCF's harvesting on Block 2042 was limited in scale and focused mostly on dead pine. The Respondent further accepted that BLCF undertook the harvesting because it honestly believed, in good faith, that the harvesting was prudent forest stewardship, and that economic gain was not its primary goal. The Respondent submitted that these mitigating factors were reflected in the modest \$3,500 penalty assessed by the DDM. The Respondent further submitted in its statement of points, and Mr. Varga on behalf of BLCF confirmed to the Panel, that if the Panel confirmed that BLCF contravened section 21(1) of the *FRPA*, the parties agree that \$3,500 is the appropriate penalty. Consequently, the hearing of the appeal proceeded on the basis that penalty amount was not in issue.

ISSUES

[55] The Panel has identified the issues to be decided, as follows:

1. Did BLCF fail to ensure that the intended results and strategies of section 5.4 of its FSP were carried out, and therefore, contravene section 21(1) of the *FRPA* when it partially harvested Block 2042?
2. If the facts underlying a contravention of section 21(1) of the *FRPA* are found, did BLCF exercise due diligence to prevent the contravention within

- the meaning of section 72(a) of the *FRPA* such that no contravention can be found?
3. If the facts underlying a contravention of section 21(1) of the *FRPA* are found, was the contravention the result of an officially induced error within the meaning of section 72(c) of the *FRPA* such that no contravention can be found?
 4. Should the finding of contravention in the Determination be rescinded on the basis that the DDM failed to consider that BLCF was subject to numerous inspections by the Ministry and that the identity of the complainant was not disclosed in the Investigation Report?

DISCUSSION AND ANALYSIS

1. Did BLCF fail to ensure that the intended results and strategies of section 5.4 of its FSP were carried out and therefore contravene section 21(1) of the *FRPA* when it partially harvested Block 2042?

[56] It is not in dispute that section 21(1) of the *FRPA* required BLCF, as the holder of the FSP, to ensure that the intended results specified in the FSP were achieved and the strategies described in the FSP were carried out.

[57] As Block 2042 is located entirely within the LCM, it is also not in dispute that section 5.4 of the FSP, which sets out the requirements for landscape connectivity, constitutes the relevant "results" and "strategies" that BLCF was to ensure were carried out, as required by section 21(1) of the *FRPA*.

[58] As part of its requirement to maintain habitat connectivity within the LCM, section 5.4 (1)(a) of the FSP requires BLCF to maintain each LCM in a "contiguous mature and old forest condition". Section 5.4 (1)(a)(i) states that "Each LCM is in a contiguous mature and old forest condition if: i. At least 70% of the forested areas within each LCM being greater than 100 years old (SBS) or 120 years old (ESSF) at any time".

[59] The parties agree that the LCM contained 56% mature forested areas and, accordingly, was below 70% maturity when BLCF harvested Block 2042. Based on the definition of "contiguous mature and old forest condition" set out in section 5.4 (1)(a)(i), the LCM was not in a "contiguous mature and old forest condition" when BLCF harvested Block 2042 in early 2019.

[60] However, the parties disagree as to whether BLCF's harvesting activity in Block 2042 was contrary to its obligation under section 5.4 to maintain the LCM in a contiguous mature and old forest condition. BLCF asserted that the partial harvesting in Block 2042 was a "treatment" and did not fall within the scope of section 5.4 of the FSP, which covers "salvage harvesting". Alternatively, even if the harvesting "treatment" is covered by section 5.4 of the FSP, BLCF submitted that one of the exemptions in section 5.4 applied.

[61] Before considering whether an exemption applies, the Panel will address whether BLCF's partial harvest of Block 2042 was *prima facie* contrary to section 5.4 of the FSP.

By its partial harvest of Block 2042, did BLCF fail to ensure that the intended results and strategies described in section 5.4 of the FSP were carried out?

BLCF's submissions

[62] BLCF submits that the results and strategies in the Ministerial Order and section 5.4 of the FSP speak specifically to "salvage"; however, the intent of its harvesting activity in Block 2042 was not "salvage", but rather, "treatment" for the objectives as set out in its June 28, 2018 letter to the Nadina District Manager in support of its application for CP BM2. Those objectives included reducing fuels that created a high wildfire hazard, addressing a spruce beetle infestation and blowdown, and enhancing the high recreational value of the area. BLCF submits that "treatment" harvesting, as opposed to "salvage" harvesting, is not covered by the Ministerial Order or section 5.4 of the FSP.

[63] BLCF agrees that it partially harvested approximately 164 m³ of incidental green trees from skid trails and blowdown spruce, and approximately 685 m³ of dead and fallen pine from Block 2042. However, it submits that as its harvesting "treatment" on Block 2042 was entirely partial harvest (single tree selected), that it had met the intent of the results and strategies set out in section 5.4(1) of the FSP.

[64] BLCF submits that the question for the Panel to answer is: Did the treatment have adverse effects on the LCM order (i.e., the Ministerial Order and section 5.4 of the FSP), to the extent that a contravention was warranted? BLCF submits that its partial harvesting met the intent of the results and strategies set out in section 5.4(1) of the FSP as it had no adverse effects on the LCM or the objectives of the Ministerial Order and section 5.4 of the FSP. BLCF submits also that its harvesting treatment of Block 2042 was not conducted for economic gain. For these reasons, a finding of contravention was not warranted.

[65] In support of its contention that its treatment harvesting had no adverse effects on the LCM, BLCF submits that its post-treatment survey assessment and subsequent monitoring of Block 2042 demonstrate that, since the original treatment harvesting in early 2019, "the LCM portion has not been impacted and connectivity (improved) age class and species label was never impacted."

[66] In conclusion on this point, BLCF submits that it was justified in proceeding as it did with treatment harvesting on Block 2042 given that authorization for its requested amendment to the Ministerial Order "would have taken a lot of time".

Respondent's submissions

[67] The Respondent interprets section 5.4 as prohibiting harvesting within the LCM when it is less than 70% mature, subject only to the specific exceptions in section 5.4. The exception for salvage harvesting applies only when more than 50% of a given cut block is pine. By harvesting within Block 2042 when the LCM was less than 70% mature and Block 2042 was less than 50% pine, BLCF breached section 5.4 of the FSP, and thus, contravened section 21(1) of the *FRPA*.

[68] The Respondent submits that it is irrelevant whether BLCF conducted "treatment" harvesting or "salvage" harvesting on Block 2042. "Treatment" harvesting is still a harvesting activity that is prohibited by section 5.4 when the

LCM is less than 70% mature, unless an exception applies. There is no exception for "treatment".

[69] In response to BLCF's submissions that its "treatment" harvesting had no adverse effects on the LCM and was beneficial forest stewardship serving other objectives of the FSP, the Respondent submits the question for the Panel was not whether the harvesting was good forest stewardship that should have been permitted, but rather, whether it was permitted under section 5.4 of the FSP. The Respondent submits that BLCF cannot unilaterally rewrite their FSP.

[70] The Respondent submits that the delay in authorizing BLCF's request to amend the Ministerial Order does not mean that BLCF's harvesting was consistent with section 5.4 of the FSP. Rather, this "delay of authorization of amendment of the Ministerial Order" submission by BLCF is an admission that its harvesting on Block 2042 was contrary to section 5.4 of the FSP.

Panel's Findings

[71] The Panel starts its analysis by considering whether section 5.4 of the FSP prohibits harvesting within the LCM when it is less than 70% mature, subject only to the specific exceptions in section 5.4.

[72] To determine whether BLCF's harvesting constituted a breach of section 21(1) of the *FRPA*, the Panel must consider the intent of section 5.4. The language in section 5.4 of the FSP is identical to that in Objective 4 in the SRMP. Objective 4 in the SRMP was amended to adopt the language set out in the Ministerial Order. The Ministerial Order is a form of subordinate legislation. As such, the language in Ministerial Order that constitutes the words in Objective 4 of the SRMP, as adopted in section 5.4 of the FSP, is to be interpreted by applying the principles of statutory interpretation.

[73] The relevant principles of statutory interpretation 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.

[74] The biodiversity objectives addressed in the SRMP including old growth and connectivity have been adopted by BLCF into its FSP. Part 2 of the SRMP states that in order to provide opportunities for the distribution of species, populations and genetic material, the SRMP includes an objective (adopted in section 5.4 of the FSP) to maintain and enhance habitat connectivity at the landscape level. As these biodiversity values have a clear public interest aspect to them, the Panel finds that a broad and liberal interpretation of the intent of the Ministerial Order (and thus Objective 4 of the SRMP adopted in section 5.4 of the FSP) should be applied so as to best achieve these biodiversity objectives.

[75] Interpreting Objective 4 of the SRMP as prohibiting harvesting within the LCM when the LCM is less than 70% mature, subject only to specific defined exceptions,

is consistent with the overall objects and purpose of the SRMP. In particular, this interpretation is consistent with the specific object of maintaining the LCM in a contiguous mature and old forest condition. Any harvesting within the LCM when it is in a mature deficit, as was the fact here, would be inconsistent with the object of maintaining the LCM in a contiguous mature and old forest condition.

[76] Further, the Panel finds the fact that Objective 4 of the SRM sets out a specific exemption from the requirement to maintain the LCM in a contiguous mature and old forest condition supports its interpretation that Objective 4 of the SRM creates a “prohibition” against harvesting when the LCM is less than 70% mature – subject to that specific exception. If such harvesting was not prohibited in the first place, then what is the need for an exemption?

[77] The Panel finds that the language in the Ministerial Order (as adopted in section 5.4 of the FSP) clearly “prohibits” harvesting within the LCM when the LCM is less than 70% mature, subject only to specific defined exceptions.

[78] The Panel next considered whether BLCF’s “treatment” on Block 2042 was “harvesting” that was *prima facie* prohibited by section 5.4 of the FSP.

[79] The Panel finds that CP BM2 authorized BLCF to cut and remove timber from the cut blocks designated in BLCF’s application, including Block 2042, subject to the on-the-ground practice requirements in the FSP, the *FRPA*, and the *FPP Regulation*.

[80] The Panel also finds that BLCF’s “treatment” on Block 2042 did, in fact, involve cutting and removing timber from Block 2042 under CP BM2.

[81] Objective 4 in the SRMP, which is adopted in section 5.4 of the FSP, was set by the Ministerial Order and is established as a land use objective under the *FRPA*. The Ministerial Order is subordinate legislation that is related to the *FRPA* and the related *FPP Regulation*. Accordingly, the Panel has looked to the definition of “harvest” as set out in the *FPP Regulation* for assistance in interpreting the Ministerial Order, and by extension section 5.4 of the FSP, on the premise that related statutes are presumed to be coherent.

[82] The definition of “harvest” in section 1 of the *FPP Regulation* states in part:

“harvest”, in relation to timber, means to fell or remove timber, other than under a silviculture treatment...

[83] As the *FPP Regulation* defines “harvest” to exclude “silviculture treatment”, and as BLCF used the term “treatment” to describe its activities on Block 2042, the Panel considered whether BLCF’s treatment meets the definition of “silviculture treatment” in the *FPP Regulation* as an exclusion from the definition of “harvest”.

[84] The *FPP Regulation* defines “silviculture treatment” as including “site preparation for the purposes of reforestation”. This definition also includes “sanitation treatments” associated with a silviculture treatment, and “pest management treatments”.

[85] BLCF submitted that its “treatment” on Block 2042 was done to achieve the objectives it had set out in its June 28, 2018 letter as being the reduction of high fuel fire hazard, addressing spruce beetle infestation and blowdown, as well as enhancing the high recreational value of the area.

[86] BLCF did not submit or provide evidence to the effect that its "treatment" on Block 2042 was either "site preparation for purposes of reforestation", "sanitation treatment", "pest management treatments" or that it otherwise met the *FPP Regulation* definition of "silviculture treatment". In result, the Panel finds BLCF's "treatment" did not meet the *FPP Regulation* definition of "silviculture treatment".

[87] Accordingly, the Panel finds that BLCF's "treatment" on Block 2042, which involved felling and removing timber, met the definition of "harvest" in section 1 of the *FPP Regulation*, and that such harvesting was *prima facie* prohibited by section 5.4 of the FSP.

[88] The Panel agrees with the Respondent and finds that whether BLCF's partial harvesting on Block 2042 is described by it as "treatment" or "salvage" is irrelevant to the question of whether section 5.4 of the FSP applies on the facts. "Treatment", as described by BLCF, still involved felling and removing timber and, as such, is still a harvesting activity that is subject to compliance with the "results" and "strategies" set out in section 5.4 of the FSP.

[89] The *FRPA* and the *FPP Regulation* create strict liability contraventions, such as were addressed by the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 [*Sault Ste. Marie*]. In *Sault Ste. Marie*, the Court described offences of strict liability in which there is no necessity for the prosecution to prove that the person intended to commit the offence; doing the prohibited act constitutes committing the offence. The Court also held that public welfare offences are assumed to be strict liability offences. Accordingly, the Panel has assessed whether BLCF contravened section 21(1) of the *FRPA*, by failing to ensure compliance with section 5.4 of the FSP, as a strict liability contravention.

[90] In response to BLCF's submission that its treatment did not have "adverse effects" on the Ministerial Order and section 5.4 of the FSP, the Panel finds that a finding of "adverse effects" is not a requirement for a finding of contravention. The absence of "adverse effects" is irrelevant.

[91] Likewise, as section 21(1) of the *FRPA* is a strict liability provision, the Panel finds that whether BLCF's harvesting treatment on Block 2042 was not intended by it to adversely effect the LCM or the objectives of section 5.4 of the FSP to be irrelevant to the determination of a breach of section 21(1) of the *FRPA*. BLCF's intentions are not an element that needs be proven to establish a contravention.

[92] The Panel also agrees with the Respondent that BLCF's perceived expediency as a justification for harvesting Block 2042 prior to receiving its requested amendment of the Ministerial Order is not a reason that BLCF's harvesting was consistent with section 5.4 of the FSP.

[93] Accordingly, the Panel finds that BLCF's harvesting in Block 2042 constituted a breach of section 21(1) of the *FRPA* as being a failure to ensure that the intended results and strategies described in section 5.4 of the FSP were carried out. This finding is subject to a determination as to whether the exemption from compliance set out in section 5.4(1)(d)(ii) applies.

Does the exemption in section 5.4(1)(d)(ii) of the FSP apply?

[94] The question remains as to whether the specific exemption set out in section 5.4(1)(d)(ii) of the FSP to the requirement to maintain the LCM in a contiguous mature and old forest condition applies to BLCF's partial harvesting of Block 2042.

[95] Section 5.4(1)(d)(ii) of the FSP states:

d) Despite 1(a) above;

[...]

ii. Live stems are [sic. and] non-merchantable understory in a stand must be retained where the salvage of dead pine trees within an LCM occurs. Salvage may only occur where 50% or more of the total mature and old are composed of dead pine trees, and only where harvesting of these dead pine trees maintains connectivity.

[96] Section 5.4(1)(d)(ii) of the FSP allows for the salvage of dead pine trees within an LCM only where "... 50% or more of the total mature and old are composed of dead pine trees."

[97] Of the total percentage of trees removed from Block 2042 during harvest, the parties agree that over 50% were dead pine. The parties also agree that Block 2042 contained less than 50% dead pine. BLCF's Site Plan for Block 2042 confirmed that the stand of trees on Block 2042 was "spruce leading" and consisted of 70% spruce and 30% pine.

Submissions of the parties

[98] Although BLCF submitted in its statement of points that its harvesting on Block 2042 was not "salvage" harvesting, Mr. Varga provided an alternative submission during the appeal hearing that BLCF's harvesting was authorized by the salvage exemption set out in section 5.4. For purposes of analysis on this point, the Panel will proceed on the basis that BLCF's harvesting constituted a "salvage of dead pine trees" as contemplated in section 5.4(1)(d)(ii) of the FSP.

[99] BLCF submits that the word "total" as used in the phrase "50% or more of the total mature and old are composed of dead pine trees" (a pre-condition for salvage under section 5.4(1)(d)(ii)), refers to the total stand of dead pine that BLCF removed from Block 2042 [emphasis added]. As more than 50% of the trees BLCF removed were dead pine trees, BLCF submits that the exception applies.

[100] The Respondent submits that the exemption for salvage applies only when 50% of the total mature and old trees in a stand on a given cut block is dead pine. Given that Block 2042 was less than 50% dead pine, the exemption did not apply. Block 2042 was about 70% spruce, and accordingly, it cannot be disputed that the total stand was less than 50% pine at the time of BLCF's harvesting.

Panel's findings

[101] In finding that BLCF's harvesting on Block 2042 was contrary to section 5.4 of the FSP, the DDM held at page 14:

... that the Block area within the LCM did not meet the requisite percentages of mature trees and therefore did not meet the pre-harvest exemption

described in the Ministerial Order and BLCF's FSP of 50% dead pine. The Block being spruce leading was not available for harvest.

[102] Authorization is required before harvesting timber on Crown land, including the salvage of dead pine trees. In this case, CP BM2 authorized harvesting from defined areas within cut blocks identified in CP BM2. The harvesting permitted by CP BM2 (whether characterized as salvage of dead pine trees or not) was authorized to take place within cut blocks identified in CP BM2, such as Block 2042. Therefore, the Panel finds it logical that the "total" being addressed under section 5(4)(1)(d)(ii) is referring to the total mature and old trees within the cut block authorized for harvest by the cutting permit that is also within the LCM in question.

[103] The Panel also finds that a logical, plain and ordinary reading of the words used in the Ministerial Order (which are adopted in section 5.4(1)(d)(ii) of the FSP) requires the licensee to determine the relevant percentage of dead pine trees before any salvage of dead pine can occur, as it states:

Salvage may only occur where 50% or more of the total mature and old are composed of dead pine trees, ... [emphasis added]

[104] The licensee must consider the total available for harvest within the authorized cut block before being able to determine whether that total was, or was not, made up of 50% or more dead pine.

[105] The Panel also finds BLCF's interpretation to be contrary to the wording and intent of section 5.4(1)(d)(ii) of the FSP. BLCF's interpretation is fundamentally flawed as it amounts to an "after the fact" assessment based on the harvesting it has already done. This is contrary to the clear intent of section 5.4 (1)(d)(ii).

[106] Such an interpretation could also be subject to manipulation by a licensee, in that it could choose to harvest live timber within an LCM, and so long as more than 50% of its total harvest was dead pine, it could claim it was entitled to do so under the section 5.4 exemption. Although there is no evidence of an intention to do that in this case, this would be contrary to the forest stewardship objectives of the SRMP incorporated into the FSP.

[107] The Panel agrees with the DDM's interpretation, and finds that the "total" of which 50% or more must be dead pine trees refers to the total stand of mature and old trees within Block 2042 that was authorized for harvest by CP BM2 and that was also within the LCM. Given that Block 2042 is entirely within the LCM, the reference on the facts is to the total stand of trees within Block 2042.

[108] Accordingly, the Panel finds that the exemption in section 5.4(1)(d)(ii) of the FSP does not apply to BLCF's harvesting on Block 2042.

Conclusion on Issue 1

[109] As set out above, the Panel has found that BLCF's harvesting in Block 2042 was not consistent with section 5.4(1)(a) of the FSP and that the exemption in section 5.4(1)(d)(ii) does not apply.

[110] Accordingly, the Panel finds that BLCF failed to ensure that the intended results and strategies of section 5.4 of its FSP were carried out. Therefore, subject only to the Panel's consideration of the statutory defences that BLCF says apply,

the Panel confirms the finding in the Determination that BLCF contravened section 21(1) of the *FRPA* when it partially harvested Block 2042.

[111] The Panel will now address the statutory defences raised by BLCF.

2. If the facts underlying a contravention of section 21(1) of the *FRPA* are found, did BLCF exercise due diligence to prevent the contravention within the meaning of section 72(a) of the *FRPA* such that no contravention can be found?

[112] Section 72(a) of the *FRPA* provides that no person may be found to have contravened a provision of the *FRPA* if the person establishes that the person “exercised due diligence to prevent the contravention”.

Submissions of the parties

[113] BLCF submits that it has established the defence of due diligence as set out in section 72(a) of the *FRPA*.

[114] BLCF submits that it exercised due diligence through the professional rationale, communication, and engagement that it completed before its treatment harvesting on Block 2042. It submits that its “due diligence” activities included the following:

1. It received letters of support from First Nations.
2. It engaged and communicated with the relevant Ministry Recreation Officer to garner authorization for timber harvesting in recreational areas.
3. It completed public communication and engagement on the subject of its proposed harvesting activities in Boer Mountain (the area where Block 2042 is located).
4. It provided the Nadina District Manager with a detailed rationale for the treatment harvesting.
5. It invited forest health pathologists onsite to examine the extent of the spruce beetle infestation in the green spruce blowdown.
6. The area was a moderate to high fire risk area and the area was a world class recreational destination, which was a key consideration for treatment.
7. The 40 to 60% blowdown in Block 2042 with additional root rot and spruce beetle issues within the Block supported the conclusion that the treatment of Block 2042 was the right stewardship decision.
8. Many aspects of the preceding information were provided to the Ministry.

[115] The Respondent submits that the activities listed above do not constitute a due diligence defence. Carefully considering how to steward this area is not the kind of “due diligence” required by section 72(a) of the *FRPA*.

[116] The Respondent submits that the due diligence defence does not apply because BLCF did not take reasonable care to avoid contravening the FSP, and therefore, section 21(1) of *FRPA*. The Respondent submits that the Commission’s past decisions in *Lemare Lake Logging Ltd. v. British Columbia*, 2018-FRP-001(a),

June 25, 2019, at para. 47 and *Interfor Corp. v. British Columbia*, 2015-FRP-002(a), July 29, 2016 [*Interfor 2015*], at para. 203, confirm that the person claiming the defence must establish, on a balance of probabilities, that they took reasonable care to avoid the contravention [emphasis added]. Here, although BLCF's efforts show that it did not rush into this harvest or undertake it lightly, its efforts were not directed at avoiding the contravention.

[117] The Respondent submits that, for example, if BLCF had made diligent efforts to measure the total mature and old trees in Block 2042 and BLCF believed – mistakenly but reasonably – that it contained more than 50% dead pine, that might constitute a due diligence defence. If the stand were more than 50% dead pine, salvage would be permitted by the section 5.4 exception. Thus, if BLCF believed, after diligent but imperfect measurement efforts, that the stand was more than 50% dead pine, the due diligence defence might be available.

Panel's findings

[118] Section 72(a) of the *FRPA* codifies the common law defence of due diligence established in *Sault Ste. Marie*, as followed in numerous subsequent court decisions.

[119] As held in *Sault Ste. Marie* at p. 1326, the defence of due diligence will be available "if the accused ... took all reasonable steps to avoid the particular event."

[120] The Commission has previously considered and applied the test for this defence 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 2015*, at para. 203. For this defence to succeed, the person claiming it must establish, on a balance of probabilities, that they took reasonable care to avoid the contravention. Thus, BLCF must establish, on a balance of probabilities, that it exercised due diligence by taking reasonable care to prevent the contravention of section 21(1) of the *FRPA*. In this case, the standard of care is that which would be expected of a reasonable licensee in similar circumstances.

[121] The Panel finds that BLCF's claim of due diligence is to be assessed based on both what information it 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 and 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.

[122] Although the Panel is not bound by the Commission's past decisions, the Panel finds that they provide helpful guidance in deciding the present appeal. In addition, the Panel is mindful of the legal test and principles set out in the judicial decisions above and has applied them when assessing BLCF's assertion that it exercised due diligence.

[123] The Panel finds as a fact that BLCF was aware of the restrictions against harvesting within the LCM under section 5.4 of its FSP. This is clear from its March 26, 2018 letter to the Ministry which included a request to amend the Ministerial Order as proposed by BLCF to address the large amount of (primarily dead) pine

stands in the LCM. Mr. Varga testified that he sought the amendment so they could access and harvest the area subject to the FSP and LCM, to address the problem of beetle-killed wood and other issues, through a proposed mitigation plan which included the request for an alternative LCM.

[124] Through receipt of the Ministry's May 9, 2018 letter denying BLCF's request to amend the Ministerial Order, the Panel finds that BLCF was reminded that the LCM must be in a mature and old condition for harvesting, and that currently it was below the legally required minimum. Mr. Varga testified that one "message" he got from this letter was that it would take some time for amendments to be considered and approved.

[125] The Panel also finds that, following BLCF's May 22, 2018 meeting with Ministry representatives, BLCF was reminded by a letter from the Nadina District Manager that the review of the redesigned LCM would likely require several technical meetings, and may take over a year to complete after the Ministry received technical data from BLCF concerning the proposed redesign of the LCM.

[126] The Panel finds that, with the knowledge that harvesting in the LCM was prohibited by section 5.4 of the FSP (subject to the dead pine salvage exception), BLCF applied by letter dated June 28, 2018 to the Nadina District Manager for CP BM2 covering some 20 cut blocks, five of which (including Block 2042) were partially or wholly within the LCM.

[127] In these factual circumstances, can it be said that BLCF took reasonable care to avoid its contravention of section 5.4 of the FSP and the resulting contravention of section 21(1) of the *FRPA*?

[128] With respect to the activities that BLCF says are evidence of its due diligence, the Panel finds that all of the listed activities other than items 4 and 8 (which will be addressed below) cannot be characterized as steps that a reasonable licensee would take in similar circumstances to avoid the contravention of section 5.4 of the FSP and section 21(1) of the *FRPA*. The Panel finds that taking steps intended to provide diligent forest stewardship planning prior to commencing harvest did not constitute taking reasonable care to avoid the contravening event.

[129] That leaves for consideration items 4 and 8 from BLCF's list, which focus on BLCF's June 28, 2018 letter to the Nadina District Manager along with its prior discussions with the Ministry concerning its rationale for its proposed partial harvesting within the LCM.

[130] The Panel finds that providing the Nadina District Manager, or other Ministry officials, with a detailed rationale for BLCF's partial retention harvesting on Block 2042 did not amount to due diligence to avoid the contravention. A licensee in similar circumstances, acting reasonably, would have done more to avoid the contravention.

[131] The Panel agrees with the following findings by the DDM at p. 15 of the Determination:

... At a minimum, BLCF should have awaited formal reply in writing to their CP rationale, obtained a change to the Ministerial Order, amended its FSP results and strategies related to the LCM, or obtained approval for exemptions to achieving the results and strategies of the FSP, or all of the

above. Without these type approvals, BLCF did not have approval to enter onto the LCM for harvest or treatment as set out in the Ministerial Order or its own FSP.

[132] Based on the forgoing evidence and analysis, the Panel finds that BLCF has failed to establish that it exercised due diligence for purposes of section 72(a) of the *FRPA*. It has failed to establish that it took the steps reasonably required by a licensee in similar circumstances to avoid the contravention of section 5.4 of the FSP and section 21(1) of the *FRPA*.

[133] In conclusion on this issue, the Panel confirms the finding in the Determination that BLCF has failed to establish the defence of due diligence in relation to its contravention of section 21(1) of the *FRPA*.

3. If the facts underlying a contravention of section 21(1) of the *FRPA* are found, was the contravention the result of an officially induced error within the meaning of section 72(c) of the *FRPA* such that no contravention can be found?

[134] Section 72(c) of the *FRPA* provides that no person may be found to have contravened a provision of the *FRPA* if the person establishes that the "person's actions relevant to the provision were the result of officially induced error."

BLCF's submissions

[135] BLCF submits that it has established the defence of officially induced error as set out in section 72(c) of the *FRPA*.

[136] In support of its claim of officially induced error, BLCF submits that:

- a. prior to the issuance of CP BM2, the Nadina District Manager had refused to issue cutting permits for harvesting within the LCM, based on landscape and other objectives;
- b. the Nadina District Manager had withheld previous cutting permit authorization requests where LCM harvesting and salvage of stands greater than 50% dead were proposed, and two examples of this are found in documents it provided relating to its December 2017 application for two other CPs (CP116 and a subsequent resubmission of that request under CP RRR);
- c. the Nadina District Manager attended the proposed area of harvest and was informed about the intent of the treatment program for Block 2042 and other cut blocks in the Boer Mountain recreational area, and a May 1, 2018 email from the Nadina District Manager demonstrates this "acknowledgement";
- d. the Nadina District Manager had previously provided verbal approvals for cutting permits where a rationale was submitted, and an example of this is found in relation to a CP QQQ landscape fire hazard abatement harvest operation;
- e. in relation to its request for authorization of CP BM2, BLCF put forth its claim that the District had not issued previous cutting permits in the LCM; and

- f. in its June 28, 2018 letter request for authorization of CP BM2, BLCF put forth its detailed rationale for partial harvesting within the LCM.

[137] Based on the above submissions, BLCF submits that by not responding to its June 28, 2018 letter and by later issuing CP BM2 that included proposed harvesting in the LCM (including in Block 2042), the Nadina District Manager induced BLCF to mistakenly believe that he had accepted BLCF's rationale for harvesting within the LCM and had provided "approval" to proceed with its partial retention harvest treatment on Block 2042 under an exemption from its obligation to ensure compliance with section 5.4 of the FSP.

Respondent's submissions

[138] The Respondent refers to *Interfor Corp. v. British Columbia*, FAC-FRP-20-A002(a), December 15, 2021 [*Interfor 2021*] at para. 222, citing *R. v. Bedard*, 2017 SCC 4, at para. 1 [*Bedard*], as support for the proposition that the defence of officially induced error "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 them."

[139] The Respondent refers further to *Interfor 2021* (at paras. 197 and 216), and submits that the test for officially induced error has six elements. *Interfor 2021* adopted *Levis (City) v. Tetreault*, 2006 SCC 12, at para. 26, citing *R. v. Jorgensen*, [1995] 4 S.C.R. 55 [*Jorgensen*], at paras. 28 to 35, where 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.

[140] The Respondent submits that the defence does not apply because BLCF did not make an error of law or of mixed law and fact. It knew its harvesting plans for Block 2042 were contrary to the FSP. Otherwise, it would not have sought amendments to the Ministerial Order, which it knew had not been approved by the Ministry.

[141] The Respondent submits that rather than either waiting for Ministry consideration and approval of its request to amend the FSP, or seeking a "sanitation exemption" from the Minister under section 25 of the *FRPA*, it seems to have decided to seek a different sort of informal "approval" by engaging with the Nadina District Manager. BLCF does not allege that it believed the Nadina District Manager could legally override the FSP by granting some kind of informal "approval" of BLCF's harvesting plans for Block 2042. Therefore, there was no error of law or of mixed law and fact as required by *Jorgensen*.

[142] Further, neither the absence of a specific written response to the June 28, 2018 letter, nor the issuance of CP BM2, constitute official advice that BLCF's harvesting plans for Block 2042 were legally permitted. It is doubtful that silence could ever constitute "advice" in the sense required for the officially induced error defence.

[143] The Respondent maintains that the Nadina District Manager's lack of a specific response to the June 28, 2018 letter and his subsequent issuance of CP BM2, must be viewed in context:

- a. BLCF's March 26, 2018 letter to the Ministry included a request to amend the Ministerial Order, including a redesign of the LCM, in part because "the current LCM [...] includes a large amount of (primarily dead) pine stands."
- b. The May 9, 2018 letter from the Ministry denying BLCF's request to amend the Ministerial Order advised BLCF that although the Ministry would consider amendments, further information and analysis was required.
- c. Following its May 22, 2018 meeting with Ministry representatives, BLCF was reminded by letter from the Nadina District Manager that the review of the redesigned LCM would likely require several technical meetings and may take over a year to complete after the Ministry received technical data from BLCF concerning the proposed redesign of the LCM.
- d. BLCF's June 28, 2018 letter to the Nadina District Manager specifically referred to the ongoing discussions about the LCM, and committed to continuing "a dialogue with ministry staff about the LCM which will lead to a request to amend the LCM".
- e. CP BM2 was issued for a term of four years.
- f. Cutting permits do not regulate forest practices, and the Nadina District Manager has limited discretion to refuse a cutting permit.

[144] The Respondent argues that, if BLCF interpreted the lack of a specific response to its June 28, 2018 letter as a tacit abandonment of everything the Nadina District Manager had communicated on the topic earlier in 2018, that interpretation was not reasonable.

[145] Likewise, the Respondent says that if BLCF interpreted the issuance of CP BM2 as official advice that its harvesting plans for Block 2042 were legally permitted, that interpretation was also not reasonable. As emphasized in BLCF's statement of points, cutting permits do not regulate forest practices. Following issuance of a cutting permit, the licensee remains obliged to ensure compliance with its FSP.

[146] In support of its submission that cutting permits do not regulate forest practices, the Respondent refers to the DDM's finding to that effect in the Determination at p. 12:

It is important to appreciate the purpose that FSPs and CPs serve. BLCF submitted a CP application for Block 2042 in accordance with its community forest agreement and the provisions of the *Forest Act*. CPs, by definition, permit timber harvesting rather than regulate forest practices on the ground, which are under *FRPA*. I view CP BM2 then as providing authority for BLCF to

harvest and that the harvesting and other practices are subject to BLCF's approved FSP, *FRPA* and *FPP Regulation* for on-the-ground practice requirements. That is, the requirement to meet the results and strategies of the approved FSP holds.

[147] On the evidence, the Respondent submits that BLCF understood that the Nadina District Manager's issuance of CP BM2 did not authorize it to contravene its FSP. Alternatively, if there was any misunderstanding on the part of BLCF, that misunderstanding was not caused by the Ministry.

Panel's Findings

[148] As a preliminary matter, the Panel finds as a fact that the Nadina District Manager did not grant BLCF either formal approval to harvest in Block 2042 contrary to the FSP, or a formal exemption from its obligation to ensure compliance with the results and strategies described in section 5.4 of its FSP with respect to Block 2042. These facts are not in dispute. The issue is whether BLCF's mistaken belief that the Nadina District Manager had done so was the result of officially induced error.

[149] In its analysis of this issue, the Panel is guided by and adopts the findings and analysis in *Interfor 2021*, *Jorgenson* and *Bedard* referred to by the Respondent.

[150] Has BLCF established, as contemplated in *Bedard*, that it questioned the Nadina District Manager about the interpretation of section 5(4) of the FSP or section 21(1) of the *FRPA* so as to be sure to comply with them, and then BLCF was penalized by the Ministry for acting in accordance with the Manager's or Ministry's interpretation? For the reasons that follow, the Panel finds that the Appellant has failed to establish this.

[151] BLCF must prove, on a balance of probabilities, the *Jorgenson* elements required for officially induced error. The question of whether BLCF has established that it received official "advice" upon which it reasonably relied is at the heart of this issue. The Panel accepts that the "advice" required by a number of the *Jorgenson* factors can be given in a variety of ways.

[152] Prior to addressing whether the absence of a response to the June 28, 2018 letter and subsequent issuance of CP BM2 constituted "advice", the Panel will consider BLCF's evidence of alleged historical "advice" from the Nadina District Manager that BLCF says it relied upon.

[153] The only evidence in support of BLCF's submission that, prior to the issuance of CP BM2, the Nadina District Manager had refused to issue cutting permits for harvesting within the LCM "based on landscape and other objectives" was Mr. Varga's brief testimony to that effect.

[154] While the Panel does not doubt the honesty of Mr. Varga's belief as to why prior cutting permit applications within the LCM were not granted, BLCF provided no documentary evidence sent from the Nadina District Manager to BLCF stating his rationale for denying those permits. Nor did BLCF call for the Nadina District Manager to testify at the appeal hearing. As BLCF carries the burden of proof on this issue, and in the absence of such evidence, the Panel is not prepared to assume that the Nadina District Manager's reasons were exclusively what Mr. Varga

believed them to be. However, the Panel does accept Mr. Varga's testimony as establishing that "landscape and other objectives" would have been raised by the Nadina District Manager in the context of his refusal to issue cutting permits for harvesting within the LCM.

[155] Likewise, the documents included with BLCF's statement of points relating to its applications for CP 116 and a subsequent resubmission of that request under CP RRR (that BLCF says are examples of prior refusals by the Nadina District Manager) originate from it setting out its rationale for the requested harvesting. However, no written response from the Nadina District Manager setting out his rationale for denying the requests has been provided to the Panel. Without such evidence, the Panel can only find that BLCF believed that prior refusals of these cutting permits within the LCM were based on landscape and other objectives, and not that this belief was, in fact, based on any specific statement from the Nadina District Manager.

[156] Regarding BLCF's submission that a field visit of Block 2042 with the Nadina District Manager supports its claim of officially induced error, the Panel accepts that the field visit occurred. Mr. Varga's testimony confirms that at some point prior to May 2018, he and the Nadina District Manager attended the proposed area of harvest in Boer Mountain and they discussed BLCF's intended treatment program for Block 2042 and other cut blocks in the Boer Mountain recreational area. However, the Panel finds that this field visit is not evidence that Mr. Varga sought, or that the Nadina District Manager said anything about granting, an informal approval or exemption from section 5.4 of the FSP for purposes of the intended activities on Block 2042.

[157] BLCF submits that a May 1, 2018 email from the Nadina District Manager constitutes an "acknowledgement" of the above referenced discussion. The subject of the email is stated as being "WFN [First Nations] support letter for Boer Mountain Trail". In it, the Nadina District Manager refers to BLCF's application for a cutting permit "showing the 2 planned demonstration areas". In it, he also states: "Larger CP issues, LCMs etc. can be discussed later." The Panel finds that this email is not inconsistent with a field visit of Block 2042 having taken place, but the email does not support BLCF's claim of receiving historical "advice" concerning its unauthorized harvesting in Block 2042.

[158] The Panel finds that, overall, BLCF's evidence concerning historical actions of the Nadina District Manager falls short of proving that these actions constituted "advice" for purposes of establishing the defence of officially induced error.

[159] The Panel also considers that any "advice" from an official would need to be directly linked to the erroneous actions of BLCF. BLCF's evidence concerning historical actions of the Nadina District Manager has failed to make this link. In this regard, the Panel agrees with the finding of the DDM at p. 15 of the Determination:

...The district's reasons for issuing other CPs within LCMs are not material to the issuance of CP BM2 Block 2042. The wording of the Ministerial Order indicates that each CP may or can be considered on a case by case basis if the criteria for harvest entry are met and the intent of the Ministerial Order is maintained. I see no way to link the issuance of this CP to rationales that may or may not have been approved for other CPs.

[160] Regarding BLCF's submission that the Nadina District Manager's failure to respond to its' June 28, 2018 letter was part of the alleged "advice" that BLCF could proceed with its partial retention harvest treatment on Block 2042 under an exemption from section 5.4 of the FSP, the Panel finds that this silence did not constitute "advice". The Panel is not persuaded that this "silence" could be seen as constituting "advice" obtained from an appropriate official, as required by *Jorgensen*.

[161] Mr. Varga testified that one goal in writing the June 28, 2018 letter was to get an exemption from the FSP if required to proceed with the treatments proposed within the LCM. While he testified that he had no prior experience with exemptions, Mr. Varga said he expected a decision with reasons in response to his June 28, 2018 request for an exemption. The Panel finds that this testimony is inconsistent with BLCF's submission that it relied upon the Nadina District Manager's silence as "advice".

[162] The Panel finds that the Nadina District Manager's lack of specific response to the June 28, 2018 letter, and his subsequent issuance of CP BM2, must be viewed in context. This context includes the fact that BLCF's request to amend the LCM was under separate and active discussion between BLCF and the Ministry. Also, in its June 28, 2018 letter to the Nadina District Manager, BLCF specifically referred to those ongoing discussions and committed to continuing "a dialogue with ministry staff about the LCM which will lead to a request to amend the LCM".

[163] The Panel also finds that if BLCF interpreted the lack of a specific response to its June 28, 2018 letter as a tacit abandonment of everything the Nadina District Manager had communicated on the topic earlier in 2018, that interpretation was not reasonable.

[164] Regarding the Nadina District Manager issuing CP BM2 in the context of his silence on the June 28, 2018 letter, the Panel has considered whether the evidence supports a finding that CP BM2 constitutes "advice" authorizing BLCF's activities on Block 2042.

[165] Mr. Varga testified that CP BM2 was in "standard form" and makes no reference to an exemption. He agreed that, in general, a cutting permit only authorizes harvesting and does not address forest practices on the harvesting site, which are subject to the *FRPA* and the FSP. He agreed that, in general, a cutting permit does not constitute an exception to the FSP.

[166] Evidence before the Panel included an email statement given by the Nadina District Manager to the Investigator, dated July 13, 2020. This email sheds light on his reasons for issuing CP BM2 for a four-year term, and it provides evidence of his dealings with Mr. Varga in the fall of 2018 prior to the issuance of CP BM2. In that email, the Nadina District Manager states:

Mr Varga and I met in the fall of 2018, prior to the issuance of the CP [CP BM2]. The Chief Forester's AAC decision limited BL Comfor [BLCF] from harvesting in the Landscape Connectivity Matrix [LCM] until such time as they submitted a new ACC and Management plan for approval. It was anticipated that the new submission would occur in Dec 2018 which it did. I issued CP BM2 in October 2018 for a 4-year term, which would allow ample time for the ComFor [BLCF] to complete their new plan and receive approval;

ideally without the TSR LCM restriction. It was understood that compliance with the LCM Order [Ministerial Order] was a requirement of any harvest in the LCM even if the TSR restriction was removed.

[167] BLCF did not challenge the evidence in this email. The Panel finds that the reference to a meeting with Mr. Varga in the fall of 2018, and to the understanding reached that compliance with the Ministerial Order was a requirement of any harvest in the LCM, is contrary to BLCF's allegation that it relied upon "silence" and the issuance of CP BM2 as "advice" that BLCF could proceed with its harvesting on Block 2042 under an exemption from section 5.4 of the FSP.

[168] The Panel finds that the Nadina District Manager's issuance of CP BM2 taken together with his silence on the June 28, 2018 letter did not constitute giving "advice" for purposes of the test for officially induced error set out in *Jorgensen*.

[169] Even if any of the actions of the Nadina District Manager can be considered as "advice", can it be said that BLCF reasonably relied upon such advice and was induced by it to proceed with harvesting of Block 2042 contrary to section 5.4 of the FSP?

[170] The Panel finds that if BLCF interpreted the issuance of CP BM2 together with silence on the June 28, 2018 letter as official advice that its harvesting plans for Block 2042 were legally permitted, that interpretation was not reasonable. In his testimony, Mr. Varga agreed that, in general, a cutting permit authorizes harvesting and does not address forest practices on the ground, which are subject to the *FRPA* and the FSP. He agreed that in general, a cutting permit does not constitute an exception to the FSP. His evidence establishes that BLCF was aware that, following issuance of a cutting permit, the licensee remains obliged to comply with its FSP.

[171] Given the Panel's finding that BLCF did not receive official advice, or that if it did, it did not reasonably rely on the advice in committing the contravention, it is not strictly necessary to consider whether BLCF's error was one of law or of mixed fact and law.

[172] However, the Panel agrees with the Respondent that BLCF knew its harvesting plans for Block 2042 were contrary to section 5.4 of the FSP. It would not have otherwise sought amendments to the Ministerial Order, which it knew had not been approved by the Ministry. BLCF does not allege that it believed the Nadina District Manager could legally override the FSP by granting some kind of informal "approval" of BLCF's harvesting plans for Block 2042. BLCF was seeking some sort of exemption outside of the legal requirements that applied to it. Therefore, the Panel finds that there was no error of law or of mixed law and fact as required by *Jorgensen*.

[173] The Panel finds that BLCF has failed to establish that its erroneous belief that it says led to its contravention of section 21(1) of the *FRPA* was the result of an officially induced error for purposes of section 72(c) of the *FRPA*.

[174] In conclusion on this issue, the Panel confirms the finding in the Determination that BLCF has failed to establish the defence of officially induced error in relation to its contravention of section 21(1) of the *FRPA*.

4. Should the finding of contravention in the Determination be rescinded on the basis that the DDM failed to consider that BLCF was subject to numerous inspections by the Ministry and that the identity of the complainant was not disclosed in the Investigation Report?

Parties' Submissions

[175] In its Notice of Appeal and statement of points, BLCF asserts that the DDM erred by failing to consider the fact that it was subject to 19 inspections by the C&E from October 2018 through May 2019 and that "given the circumstance of how they arose, [this] puts the investigation and complaint in disrepute". BLCF submits that the finding of contravention should be set aside due to the "unfairness" of these inspections.

[176] BLCF provided copies of email correspondence dated in February 2020 showing that it made a freedom of information request to the B.C. Government so that it could assess the frequency and intensity of C&E inspections within the Nadina Resource District. BLCF advised the Panel that it had not received the requested information by the time of the hearing of this appeal. BLCF did not seek additional time from the Panel to obtain and present any evidence arising from its information request to the B.C. Government, nor did it seek any order from the Panel concerning its production.

[177] BLCF further submitted that the name of the Nadina Resource District staff member who was identified as the complainant in the Investigation Report was not included in the Investigation Report. BLCF maintains that this demonstrated bias and unprofessional conduct by the Ministry in relation to this case, that should also lead the Panel to set aside the contravention.

[178] The Respondent submitted that these allegations lack any evidentiary basis or legal foundation, and should be dismissed.

Panel's findings

[179] While BLCF's representative, Mr. Varga, provided no legal analysis to support these allegations about the Ministry's inspections of BLCF, the Panel understands BLCF to be alleging bias and an abuse of process by the Ministry in relation to these inspections such that the Panel should rescind the finding of contravention in the Determination. The Panel also understands BLCF to be asserting that it was denied procedural fairness at the OTBH through the DDM's alleged failure to consider these allegations.

[180] However, the Panel finds that BLCF did not establish any link between the inspections by the C&E and the contravention at issue in this appeal.

[181] Also, on page 10 of the Determination, the DDM did, in fact, refer to BLCF's concern about these inspections, where the DDM noted BLCF's submission that:

C&E staff made an inordinate number of inspections of BLCF that are not warranted.

[182] The Panel finds that, as this appeal was conducted as a new hearing based on the evidence and submissions before the Panel, any potential lack of procedural

fairness at the OTBH was cured by the hearing on this appeal. Also, as noted above, the DDM did consider the allegation regarding the inspections, in any event.

[183] Furthermore, the Commission's Practice and Procedure Manual and Rules explain how a party may request that the Commission order a person to disclose documents that are relevant to an issue in an appeal, or order a person to testify at an appeal hearing. BLCF could have taken steps to obtain such orders and put documents or witness testimony before the Panel that might have provided an evidentiary foundation for its allegation of abuse by the C&E. BLCF did not do so. No evidence concerning the "circumstances of how the 19 inspections arose" or how those circumstances "puts the investigation and complaint in disrepute" was put before the Panel. BLCF has failed to establish that there was bias or an abuse of process in the Ministry's inspections of BLCF, or how its allegations are relevant to the contravention at issue in this appeal.

[184] Likewise, BLCF provided no submission as to how the identity of the complainant is relevant or how its absence from the Investigation Report demonstrated bias. BLCF could have sought testimony from the Investigator on the identity of the informant or on facts relevant to the allegation of bias at the appeal, but it did not do so.

[185] In conclusion, the Panel finds that BLCF's allegations of unfairness or abuse of process associated with the C&E inspections, or bias by the C&E, to be unsupported by any cogent evidence, and to lack any legal foundation. This ground of appeal is dismissed.

DECISION

[186] 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.

[187] For the reasons set out above, the Panel dismisses the appeal and makes the following orders under section 84(1)(d)(i) of the *FRPA*:

- a. the Panel confirms the finding in the Determination that BLCF contravened section 21(1) of the *FRPA*;
- b. the Panel confirms the findings in the Determination that BLCF has failed to establish the defences of due diligence or officially induced error in relation to its contravention of section 21(1) of the *FRPA*; and
- c. the Panel confirms the finding in the Determination that BLCF pay a penalty of \$3,500 for its contravention of section 21(1) of the *FRPA*.

"Mike Tourigny"

Michael Tourigny, Panel Chair
Forest Appeals Commission

March 22, 2022