



Forest Appeals Commission

Citation: *Adams Lake Indian Band v. Government of British Columbia*, 2024 BCFAC 2

Decision No.: FAC-FRP-22-A008(a)

Decision Date: 2024-01-16

Method of Hearing: Conducted by way of an oral hearing concluding on July 19, 2023

Decision Type: Final Decision

Panel: Jeffrey Hand, Panel Chair

Appealed Under: *Forest and Range Practices Act*, SBC 2002, c. 69

Between:

Adams Lake Indian Band

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Kelsey Rose, Counsel
Jason Harman, Counsel

For the Respondent: Matthew Fingas, Counsel
Mark Seebaran, Counsel

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CONTEXT OF APPEAL

[1] The Appellant, Adams Lake Indian Band (the “Band”) brings this appeal in respect of an administrative penalty levied by Beth Eagles, District Manager, Nadina Natural Resource District (the “District Manager”) under section 71(2)(a) of the *Forest and Range Practices Act*, SBC 2002, c. 69 (the “Act”). The District Manager found that the Band had transported unscaled timber to a site other than a place where it is required to be sent for scaling contrary to section 94(1)(b)(i) of the *Forest Act*, RSBC 1996, c. 157.

[2] The District Manager levied an administrative penalty in the amount of \$69,490 for this contravention. While the District Manager determined the Band had committed two other contraventions and imposed administrative penalties for those contraventions as well, those contraventions have not been appealed.

[3] The Band concedes that it transported 943 m³ of unscaled birch timber but says that it did so after having spoken to a scaling officer with the Ministry of Forests (the “Ministry”) and believing that it was allowed to transport the timber to a site of their choosing. The Band says its decision to transport the unscaled timber was the result of an officially induced error. The Band asks the Commission to rescind the contravention and the administrative penalty.

[4] Alternatively, the Band argues that the administrative penalty is too high because it did not receive any economic benefit as a result of this contravention. It submits that if the contravention is not set aside the penalty should be reduced to \$2,000.

[5] The Respondent says that the Band’s contravention was not the result of an officially induced error and therefore there is no defence to the contravention. The Respondent says that because the birch was not scaled it was not applied to the cut volume permitted under the license held by the Band and, as a result, the Band now has the opportunity to cut 943 m³ of higher value coniferous timber in the period covered by its next cutting permit. The Respondent says this represents the economic benefit the Band will obtain. It submits that the decision should be confirmed and that the administrative penalty properly reflects this economic benefit.

BACKGROUND AND FACTS

[6] The Band holds Woodlot License #315 and an associated cutting permit ZZ, (the “Cutting Permit”) over a block of Crown land (the “Woodlot”), located in the Adams Lake region of the province. The Cutting Permit was for a term of four years, spanning September 1, 2015, to August 31, 2019. The Band is the holder of timber mark WAH JZZ.

[7] As the holder of the Cutting Permit, the Band was required to determine the volume of all timber harvested by scaling the timber for the purpose of determining the amount of stumpage payable to the Crown. Scaling must be performed in accordance with the *Forest Act*, meaning it must either be scaled prior to transport from the harvest area or transported only to an authorized scale site.

[8] In the first three years of the Cutting Permit, the Band did not harvest any timber in the Woodlot. It commenced harvesting in approximately May 2019.

[9] The Band employed Steve Murphy as its Resource Manager and Director of Natural Resources to oversee its timber harvesting at all relevant times. The Band hired LeBeau Bros. Logging Ltd. ("LeBeau Bros.") as its contractor to harvest and transport timber from the Woodlot.

[10] Shortly after harvesting commenced, LeBeau Bros. advised Mr. Murphy that the cutting area contained a significant amount of birch in addition to other, more valuable, timber species. Depending on its quality, birch is typically used for firewood. The birch was harvested concurrently with the other timber species, prepared for transport, and set aside on the Woodlot to be dealt with later.

[11] The other timber species harvested as saw logs were transported to various mills. Mr. Murphy often used the Tolko Industries Heffley Creek location as a scale site for timber originating from the Woodlot.

[12] LeBeau Bros. operates a lumber yard in Kamloops (the "LeBeau Yard"). The parties agree the LeBeau Yard is not a designated scaling site with the Ministry.

[13] In July 2019, Natural Resource Officers employed by the Ministry discovered an illegal firewood operation in Knutsford, BC, where firewood was being split and sold commercially from timber that had not been scaled and on which there was no visible timber mark. The investigation into the Knutsford operation eventually led Natural Resource Officers to the LeBeau Yard where they found eight decks of unscaled timber, consisting mostly of birch firewood, as well as the splitting equipment that had been seen at Knutsford.

[14] The unscaled timber did not have a timber mark. On July 19, 2019, Natural Resource Officers Cameron Helfrich and Janis Boivin seized the birch timber found at the LeBeau Yard. Craig LeBeau subsequently provided load description slips indicating that some of this birch firewood had come from the Woodlot. Thereafter the Ministry opened an investigation into the activities of the Band and the LeBeau Bros.

[15] On July 23, 2019, Mr. Murphy began making inquiries with the Ministry indicating he wanted to move firewood from the Woodlot to the Band. He wanted to know if this firewood needed to be scaled and whether it would count against the cut volume the Band was allowed to harvest. In or about the same time period, Mr. Murphy learned that the Tolko Mill was shutting down and would no longer be available to scale timber taken

from the Woodlot. Mr. Murphy knew he would need to find another site authorized to scale timber.

[16] On August 22, 2019, scaling officer Shelley Kupryk sent an email to Mr. Murphy advising him that the firewood had to count against the Band's allowable cut volume.

[17] As part of the Knutsford Investigation, officer Helfrich and another resource officer, Cameron Coles, interviewed Mr. Murphy on August 27, 2019. Mr. Murphy advised the resource officers that he intended to move some birch timber from the Woodlot to the Band. He was told he would need to speak to Shelley Kupryk about scaling the timer before it was transported.

[18] The Cutting Permit was due to expire on August 31, 2019, which meant any timber harvested under the permit would have to be transported to a scale site before the expiration of the permit.

[19] Mr. Murphy spoke by telephone with Shelly Kupryk on August 28.

[20] On Friday, August 30, 2019, Mr. Murphy instructed Craig LeBeau to take the birch from the Woodlot to the LeBeau Yard over the weekend to follow. Later that morning, Mr. Murphy was contacted by Brita Pederssen, Authorizations Forester at the Ministry, who asked that he come to the Ministry's offices that afternoon for a meeting. Mr. Murphy declined because he was leaving town for the weekend. He proposed going on the next business day: Tuesday, September 3, 2019.

[21] LeBeau Bros. transported the birch that weekend as directed by Mr. Murphy. The wood was unloaded in the LeBeau Yard. Craig LeBeau testified that he applied some spray paint to the wood in order to identify the birch as belonging to the Band.

[22] The Cutting Permit expired after August 31, 2019. Any timber harvested under the permit was to be present at a scale site before the expiration of the permit.

[23] On Monday September 2, 2019, officers Coles and Helfrich attended at the LeBeau Yard and discovered the birch wood that had been moved from the Woodlot. Mr. LeBeau could not produce any authorization for having this unscaled timber in his yard. The timber was seized by the Ministry and later sold in a public auction.

[24] When Mr. Murphy attended at the Ministry offices on September 3, 2019, he was interviewed a second time, this time by officers Boivin and Helfrich.

[25] Officer Boivin told Mr. Murphy that because of the transport of the birch wood over the weekend to a site other than an authorized scale site, the purpose of their meeting had now changed from discussion of the Band's options for dealing with the birch wood to an investigation of unauthorized transport.

[26] In the aftermath of this incident, the Band determined that Mr. Murphy had not kept the Band Council adequately informed about the harvesting activities in the Woodlot. In March 2020, Mr. Murphy's employment with the Band was terminated. He was replaced

by David Nordquist who made a number of changes to the harvesting procedures, including no longer using the services of LeBeau Bros.

[27] In May 2021, the Band was notified that they were under investigation for three contraventions of the *Forest Act*. Contraventions 1 and 3 related to the timber seized in July 2019 and its transport without a timber mark to a site other than a scaling site. Contravention 2 concerned the timber seized on Sept 2, 2019, which is the subject of this appeal.

[28] An opportunity to be heard hearing was conducted on February 17, 2022. The District Manager issued her decision on July 13, 2022, and found that the Band had contravened:

1. Sections 84(1) and 94(1) (b) (i) of the *Forest Act* with respect to the firewood seized from LeBeau on July 19, 2019 ("Count 1" and "Count 3")
2. Section 94(1)(b)(i) of the *Forest Act* with respect to the birch wood seized from the LeBeau Yard on September 1, 2019 ("Count 2")

[29] Administrative penalties were levied for each count.

[30] The Band filed an appeal only in respect of Count 2 on August 11, 2022. This notice of appeal was amended on October 5, 2022.

[31] The present appeal was heard by video conference on June 19 and 20, 2023. Closing submissions were made by video conference on July 18 and 19, 2023.

[32] The remedial powers of the Commission are set out in section 84(1) of the *Act*:

....

the commission may

(c) consider the findings of the person who made the determination or decision, and

(d) either

(i) confirm, vary or rescind the determination or decision, or

(iii) with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration.

ISSUES ON APPEAL

[33] The issues to be determined in the appeal are:

1. Was the transport of unscaled birch to the LeBeau Yard the result of an officially induced error?

2. If there was no officially induced error, what is an appropriate administrative penalty?

[34] The Band raised a third issue after the evidence was closed: the assertion that the birch had been hand-scaled and, therefore, there was no contravention. The Respondent objected to the Appellant raising this issue after the evidence portion of the appeal was closed. However, the Panel was subsequently told that the parties had reached agreement, and that the Band was withdrawing this issue. Consequently, I was informed that the relevant portions of the Band's written submission should not be considered by the Panel other than for the purposes of considering a penalty. I confirmed this in a letter to counsel dated July 12, 2023, before the Panel reconvened for oral argument.

DISCUSSION AND ANALYSIS

Was the transport of unscaled birch to the LaBeau Yard the result of an officially induced error?

Evidence

[35] Mr. Murphy did not testify at the appeal. The parties agreed that two transcribed interviews conducted of Mr. Murphy should be admitted into evidence at the appeal. The parties agreed that these are "out of court statements", evidencing only what Mr. Murphy said in response to questions he was asked, but that the transcripts are not admissible for the truth of their contents. I will set out below various excerpts from the transcripts that are relevant to the issue of officially induced error. The transcripts are set out in significant detail below as, discussed in detail later, any assessment of an allegation of officially induced error must consider the words that were conveyed as well as the context in which they were spoken or written.

[36] Mr. Murphy was aware in July 2019 that a significant volume of birch wood had been cut in the Woodlot that he would need to address. He said this during his August 27, 2019, interview:

MR. MURPHY: I've still got about ten loads of firewood I need to bring down to the community that we want to use for heat, which I normally get from -- every year I'm trying to get firewood for the community, and that's what I've got there right now and I have to deal with. Yeah.

[37] On July 23, 2019, Mr. Murphy sent an email inquiry to Brita Pedersson, indicating that he would like to move some firewood from the Woodlot to the Band. His typical scale site at the Tolko yard has closed and he was anxious about finding a new scale site. In his August 27, 2019, interview with Officer Coles, Mr. Murphy stated:

MR. MURPHY: Nothing's crossed the scale yet. No. We couldn't get to the scales right, that's why we were shut down. Tolko cut that off.

MR. COLES: Yeah.

MR. MURPHY: So that left us scrambling -- couldn't even get on my holidays, because I'm going to figure out where our wood is going now that Tolko hasn't taken it.

[38] As part of the investigation into the Knutsford firewood operation, Officers Coles and Helfrich interviewed Pat Hoyle, a former scaling officer with the Ministry who retired in 2018. They asked him about his experiences with LeBeau Bros. and the Band, as well as his experience relating to the scaling of firewood.

[39] Mr. Hoyle's interview was placed into evidence. He did not testify. The interview transcript suggests that Mr. Hoyle had not considered firewood a priority for enforcement measures during the time that he was working at the Ministry. When unscaled firewood was discovered, he would typically scale it. Mr. Hoyle's interview transcript showed that he reportedly recalled scaling 20 loads of firewood for the Kamloops Indian Band. However, since Mr. Hoyle did not testify, I have no information to understand the circumstances of how or why this particular firewood was scaled, whereas the birch wood at the heart of this appeal was not.

[40] On August 16, 2019, Mr. Murphy sent an email to Dave Spinks, Revenue Supervisor at the Ministry, to inquire about obtaining a "firewood permit". He also asked if a scale site was required and whether the firewood would count against the cut control volume. This email, which was placed into evidence but not admitted for the truth of its contents, read:

Hello Dave,

We are presently logging our woodlot and would like to acquire a firewood permit.

Can you tell me how to proceed with that?

Do I need a scale site? If so which should I use? Our woodlot is at Spaplum Creek. 40km up Adams Lake FSR

Can you also confirm if firewood goes against our cut and if so is it grade 4¹ ie we can get the credits back?

Thanks

¹ Section 17(6) of the Cut Control Regulation allows some types of inferior timber to be used for certain uses like pulp and paper production, and if so used a grade 4 credit is given and the volume is not applied to a licence holders allowable cut

Steve

Mr. Spinks did not reply to this email but did forward it on to Officer Kupryk.

[41] On August 22, 2019, Officer Kupryk sent an email to Mr. Murphy stating that any harvested firewood would be applied to the Band's cut control volume unless it was delivered and scaled as a special forest product at a special forest product facility. She said the birch firewood did not constitute a special forest product and, accordingly, this would not be an option for the Band if the birch wood was to be used as firewood. She referred Mr. Murphy to Bill Asham at the Ministry for more information and to investigate any possible way for the firewood to qualify for grade 4 credits.

[42] Officer Kupryk attached to her email what she described as a guidance document regarding firewood but also said the guidance document did not authorize Mr. Murphy to transport the timber. This guidance document however was not placed into evidence during the appeal and I have no direct evidence on what this guidance document states. During Mr. Murphy's August 27, 2019 interview he said he did not recall receiving the guidance document.

[43] The Cutting Permit was due to expire after August 31, 2019, and according to his August 27, 2019 interview, Mr. Murphy was aware that the birch timber would need to be dealt with prior to that date. He noted that he had made some earlier inquiries with the Ministry about how to scale this firewood, but he remained uncertain about how he was going to proceed. He felt stumpage should not have to be paid on firewood despite knowing the *Act* required stumpage on harvested timber:

MR. MURPHY: And that's the part that I'm still not necessarily agreeing with --

MR. COLES: Right.

MR. MURPHY: -- I know that's how the *Act* works, but for a band -- and this is firewood for a community and heat, I just don't see us paying stumpage on it. So -

MR. HELFRICH: Yeah, I can't speak to that --

MR. MURPHY: No, and that's something I'll work through with district --

MR. HELFRICH: Yeah.

MR. MURPHY: -- and that's what I was trying to figure out, what do they normally do.

MR. HELFRICH: Yeah.

MR. MURPHY: In the bands, and I say what in the past -- I don't know how many years its been now we've been getting firewood through Interfor, and they just bring us a load of wood. Usually off one of our sales, if we're doing the cut, but --

MR. HELFRICH: Yeah.

MR. MURPHY: And I don't know -- I'm not sure how they dealt with it in the past.

MR. HELFRICH: Yeah.

MR. MURPHY: Whether they hand scaled it, or how they did it, or right across their own scale site. And that's the kind of thing I've been trying to figure out, is how to do that to get this wood to the band.

[44] In the course of this interview on August 27, Mr. Murphy learned that the birch wood seized in July was seized due to the LeBeau Yard not being an authorized scale site:

MR. HELFRICH: And I'm sure you understand why we seized that timber, just given that Craig doesn't have a scale site authorisation there, right, so, just to provide some light to that --

MR. MURPHY: I was a little concerned that we didn't -- no one got a hold of us for it, being it's the band wood --

MR. HELFRICH: Yeah. You know --

MR. MURPHY: Craig was pretty straight up with that in my understanding, he wasn't trying to hide any of that

MR. HELFRICH: No. I mean, he was, but I --

MR. MURPHY: -- what wood it was, so I don't know why we wouldn't have been able to just deal with our wood and get pictures and then deal with it afterwards.

[45] Officer Coles told Mr. Murphy that he did not have any experience with the *Forest Act* and that any scaling information had to come from Officer Kupryk:

MR. COLES: Okay. Okay. And just -- again for our clarity's sake, I know that there are some questions about some deciduous on site there. Is it a usual thing for the wood lot -- and again, you'll have to pardon me a little bit, I don't -- forestry isn't my area, so.

MR. COLES: That's what we -- so we talked to Shelly this morning as well, and she asked that you give her a call when you're available.

MR. MURPHY: Yeah. Because I didn't know how to -- like, what's involved in setting up the scales either. Do we take pictures, or do we hand scale it? Because I heard Pat Wolfe used to go out and do some of that and would hand scale it for you and move it and whatever is required for that, right, so. Or do I just leave it? And if we just happen to leave it, then I've got to go and meet with Rachael and find out how we're going to do this.

MR. COLES: Yeah.

...

MR. COLES: And, yeah, she just asked before any of that wood was moved, to just get in contact with her. Like I said, she is out in the field today, but she would be around if you left her a message, and –

MR. MURPHY: Yeah, I'll get hold of her for that.

MR. COLES: She had mentioned that, yeah, something about hand scaling as well.

MR. HELFRICH: At the des -- once it reaches its destination. I won't speak for Shelly, we just had a quick conversation this morning, but it sounds like that timber, once it reaches its destination, that's where it has to be hand scaled.

MR. MURPHY: Well, and that's -- yeah, okay, so whatever it goes it has to be hand scaled.

MR. HELFRICH: Yeah. Yeah.

[46] The following day, Mr. Murphy contacted Officer Kupryk by telephone. The information presented as to their respective recollections of this phone call differ, and neither individual testified at the appeal.

[47] Mr. Murphy claims that Officer Kupryk advised him that he could take the birch wood to any of "100 places." Mr. Murphy further stated that he was advised that he should inform Officer Kupryk where the firewood was taken, and that she would scale it at that location:

MR. MURPHY: So, on Friday I talked to Shelly and asked her. I said, "well, I got to have everything moved by Sunday. Where – how do I move -where can I move this wood? And she says, well, you could take it to 100 places. And as long as you tell me all those places and "I'll go scale it there". And I was like, "Okay".

....

And she mentioned it had to go to a scale site. And now it was- and she said it had to go against my cut. So, then, I started wondering if I should be doing it all for firewood.

[48] An email summary of this phone call prepared by Officer Kupryk was placed into evidence. However, this email summary was not entered as evidence in this appeal for the truth of its contents:

Below is a summary of the telephone conversation I had with Steve Murphy on Wednesday August 28th at approximately 1430.

Steve called in a panic because Adams Lake Indian Band Woodlot Timber mark (WAHJZZ) was expiring in a few days (Sunday Sept 1 2019). There

was approximately 10 truck loads of birch logged for firewood that needed moving.

Steve wanted to know his options for the firewood - birch logged from W315. I explained, 2 options: a Cash Sale or a Free Use Permit (FUP). Both of those have a 50m³ cap per application and this concerned Steve because he thought there was about 10 loads - approx 400m³ - too much to go under one application. I told Steve if he chose a FUP, the address(s) would be on the application and would notify district scaling staff where to perform a field scale. I explained the field scale would be performed by myself and was necessary for tracking the volume of timber (HBS). Steve mentioned the Chase Industrial Park was an option for all the wood - there's enough room. Steve also mentioned, just letting the TM expire, then he'd send band members straight to the block to help them selves - this would save a lot of grief. I didn't comment. Steve mentioned he felt the FUPs would be too much work and was upset that district couldn't just put all the birch under the current FUP they already had. I explained this was not possible - the current FUP was for something different.

Steve said he had to think about it and hung up.

Steve never called back.

Dave Spinks and myself field scaled the birch in the CP on Thursday August 29th in case the wood was moved.

Shelley Kupryk, RFT
Scaling Officer

[49] Officer Boivin, Superintendent of Enforcement with the Ministry, testified at the appeal. She confirmed that after the Knutsford operation was discovered there was increased scrutiny on the Band and LeBeau Bros. She testified that she spoke to Officer Kupryk immediately following her phone call with Mr. Murphy on August 28, 2019, and that Officer Kupryk expressed concern that Mr. Murphy might attempt to move the firewood to an unauthorized scale site in the next few days. Officer Boivin agreed that Officer Kupryk and Dave Spinks should visit the Woodlot on August 29, 2019. They did so, and estimated there was 943m³ of birch on site that had been made ready for transport.

[50] Officer Boivin stated that, by this point in time, her team was considering possible ways of getting this firewood to the Band. This included the option of leaving it in the Woodlot and granting a new timber mark to the Band that would extend the current cutting permit. She asked Brita Pedersson to call Mr. Murphy on Friday August 30, 2019, to remind him that the cutting permit would soon expire and to request that Mr. Murphy attend the Ministry offices that afternoon for a meeting. Mr. Murphy was not told what the purpose of this meeting was, but Officer Boivin testified that the purpose of the meeting

would have been to discuss with Mr. Murphy any available options for dealing with the birch wood.

[51] However, Mr. Murphy told Ms. Pedersson he was leaving town for the long weekend and was not available for a meeting that day, but that he would come to a meeting on Tuesday, September 3 after the Labor Day weekend.

[52] Before receiving the call from Ms. Pedersson, Mr. Murphy had already contacted Craig LeBeau earlier that day and told him to transport all of the birch timber from the Woodlot to the LeBeau Yard before Sunday, September 1, 2019. As noted in Mr. Murphy's September 3, 2019 interview:

MR. MURPHY: So, on Friday morning, I phoned Craig and then Rita [Brita] phoned me, like, an hour later to say, 'Oh, we want to meet with you in the afternoon here' And I'm like, "Well, I'm just about to leave the office to go away for the weekend, so".

...

MR. MURPHY: Okay. I can't speak for Craig other than Friday -- like I said, as far as I was concerned is Friday I talked to Shelly. I still hadn't made a decision getting off the phone call with her how we were going to deal with it. I had to talk to Craig about the logistics of the loader. We're talking about just how much wood had to be moved for the weekend anyway and he's rounding up people to do it, otherwise it gets left for waste. And so, to me, it became it's either waste and I kind of lose it or I don't -- really didn't understand what happens all the time. And then -- so, I told him to move it to his yard.

[53] Mr. Murphy did not inform Ms. Pedersson that he had made the decision to transport the birch wood to the LeBeau Yard when they spoke by telephone on August 30. He said only that the wood would be dealt with before the cutting permit expired.

[54] Mr. Murphy indicated, in his interview which was not entered into evidence for the truth of its contents, that he was told by Officer Kupryk he could take the birch to any of 100 places and as long as he told her where he had taken it, and that she would scale it at that location. He said that he remained uncertain about how to deal with the firewood and that in hindsight he ought to have clarified what was needed.

MR. MURPHY: Cause that was what I said to her. I said, "So, I could leave it right now. I could get my guys to up and -- or whether it's my guys or band members, whatever you call them -- to go up and cut it all and bring it back and it would all be fine. And then I wouldn't go against my cut and I wouldn't pay stumpage." And she's like, "Yeah" And I was like, "well, but" It didn't seem right, to be honest. So, I was like, that's -but I'm asking her, going, "Is that an option?" And then didn't have time. You know, I just didn't want to go there.

MS. BOIVIN: Yeah.

MR. MURPHY: I obviously thought I'm, - I mean, obviously, what I'm feeling right now is that I'm guilty of not knowing some things that I should- maybe I should be responsible for knowing and I didn't know.

...

MR. MURPHY: The rest of this wood, that's on me for not getting this authorization letter because I really wasn't sure that's what I needed.

MR. HELFRICH: Yeah

MR. MURPHY: I just know that it was -by Sunday, I needed to get the wood moved.

Positions of the Parties

[55] The Band says I should find there was an officially induced error because:

1. Mr. Murphy's unanswered inquiries about where to scale the firewood created uncertainty and induced Mr. Murphy to transport the birch to the LeBeau Yard in contravention of the *Act*.
2. Officer Kupryk told Mr. Murphy that he could take the timber to "any one of 100 places", and that she would scale it later.
3. Officers Coles and Helfrich "previewed" the advice he would receive from Officer Kupryk.
4. The Ministry's past scaling practices were consistent with the advice Officer Kupryk gave Mr. Murphy.

[56] The Respondent argues that:

1. Mr. Murphy's uncertainty about how to scale the firewood was of his own making and not due to official advice.
2. There was no incorrect advice given by Officer Kupryk because Mr. Murphy was told that the birch would count against his cut control volume and that the timber need to be scaled.
3. Officer Kupruk did not say the timber could be taken to the LeBeau Yard
4. Officers Coles and Helfrich were not scaling officers in a position to provide any official advice on scaling, but in any event, they did not provide any advice that would have caused Mr. Murphy to transport the birch to the LeBeau Yard.
5. None of the information provided to Mr. Murphy rises to the level of clear and precise advice as required by the legal authorities to support an officially induced error.

Analysis

[57] Section 72 of the *Act* explicitly provides for the defense of officially induced error:

72 For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the *Acts* if the person establishes that the

...

(c) person's actions relevant to the provision were the result of an officially induced error.

[58] Section 94 of the *Forest Act* requires that timber harvested from Crown land must be scaled before transport, or if it is not scaled, transported only to a site for scaling by an official scaler.

94 (1) Subject to section 94.1, a person must not manufacture products from, sell or transport to a place, other than the place where it is required to be sent for scaling,

(b) timber that

(i) is cut from Crown land and that under the terms of the authority to cut is required to be scaled, unless it is scaled by an official scaler authorized by the minister to scale the timber or scaled by a forest service scaler.

[59] A scale site must be authorized by the Ministry under section 95 of the *Act*.

95 (1) Each of

(a) the owner of a scale site, and

(b) the operator of a scale site must ensure that no timber is scaled at the site unless a scale site authorization has been issued under subsection (2) for the site.

(2) On application the minister must issue to the applicant a scale site authorization on being satisfied that a complete and accurate scale can be performed at the site.

[60] Reading the foregoing provisions together, the Band could only transport the unscaled birch to an authorized scale site for scaling unless the timber was scaled prior to its transport.

[61] The Band bears the onus of proving, on a balance of probabilities, that Mr. Murphy was told by Officer Kupryk that the birch firewood could be transported anywhere, after which it would later be scaled. The Commission has previously held, in *Lone Prairie Livestock Association*, 2023 BCFAC 1, that the onus of proof lies on the party making an affirmative assertion and here, the Band is the party making the affirmative assertion that it relied on official advice.

[62] The wording of section 72 of the *Act* also supports a finding that the Band bears the onus on this issue because the *Act* requires that the party seeking to avail itself of this defense must “establish the person's actions relevant to the provision were the result of an officially induced error.”

[63] The Band does not dispute that it transported the birch from the Woodlot to the LeBeau Yard, which is not an authorized scaling site, and accordingly concedes that it contravened the *Act*.

[64] The only defense to the contravention that was raised by the Band which it advised that I am to consider is that it contravened the *Act* because their employee, Mr. Murphy, understood from his discussions with Officer Kupryk and his interview with Officers Helfrich and Coles, that it was permissible to transport the birch wood to LeBeau Yard without it first being scaled.

Legal test for officially induced error

[65] The Supreme Court of Canada in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, (“Jorgensen”) established five criteria, each of which have to be met, to establish 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.

[66] In *Jorgensen*, Chief Justice Lamer (as he then was) stated that “an officially induced error of law argument will only be successful in the clearest of cases” because it is the exception to the rule that ignorance of the law is not a defense.

[67] *Jorgensen* was cited with approval in the Ontario Court of Appeal decision in *R. v. Cancoil Thermal Corp.*, 1986 CanLII 154 (ON CA), where the court had this to say about assessing the reasonableness of reliance on official advice:

In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

[68] Taking these authorities as guidance I find that the reference to “clearest of cases” to mean that the official advice that is relied upon must be clear, definite, and specific to the circumstances in issue in order for it to support such a defense.

Panel Findings

[69] The Band has asserted that several communications (or the absence of communication) from the Ministry gave rise to officially induced error in this case. I will consider whether various communications (or the lack of communication) by the Ministry did so.

1) Did the lack of response from the Ministry induce Mr. Murphy to contravene the Act?

[70] The Band submits that the Ministry’s slow response to Mr. Murphy’s inquiries, which began in mid July 2019, supports a defense based on officially induced error. However, the lack of a response from the Ministry in July cannot amount to an officially induced error if no advice was received from any Ministry officials at that time. In *Burns Lake Community Forest Ltd. v. Government of British Columbia*, 2022 BCFAC 2 (CanLII) (“Burns Lake”), the Commission held, at paragraph 48, that silence in response to an inquiry does not constitute “advice” on which to base an officially induced error.

[71] The Band also submits that the lack of response from the Ministry created time pressures, which caused Mr. Murphy to make the decision in late August to move the birch wood to the LeBeau Yard. However, it is clear that Mr. Murphy knew in July that the firewood needed to be scaled, the Tolko scale site had closed, and he would need to find an alternative scaling site. It was incumbent on Mr. Murphy to make plans to scale the birch wood if it was his intention to do so before the cutting permit expired more than a month later.

[72] The provisions in the Cutting Permit required the Band to comply with the requirements in the *Act* and its regulations before transporting timber:

3.02 All timber must be marked in the prescribed manner prior to being transported from the harvest area.

4.02 The Licensee must ensure that:

- a) all timber removed from the harvest area is scaled; and
- b) the scale of the timber is conducted properly in accordance with the requirements of the *Forest Act* and the regulations made under that *Act*.

[73] I find it is the license holder’s obligation to comply with the requirements of the legislation, regardless of if this was explicitly stated in the permit. It was not the responsibility of the Ministry to come up with a solution for the Band or to advise Mr. Murphy on how to comply the *Act*.

[74] Mr. Murphy chose to leave the birch wood on site until the weekend when the permit was due to expire. His delay appears to be due to his reluctance to scale the birch

wood and have it count against the cut volume. His inquiries to the Ministry consistently included a focus of avoiding this requirement and he was consistently told the birch would count against the cut volume. Yet Mr. Murphy waited until the end of August to deal with the birch. Even after having spoken to Officer Kupryk on August 27, 2019, Mr. Murphy stated during his September 3, 2019, interview that he was still undecided about what he would do with the birch. He eventually ran out of time. In Burns Lake, the Commission noted that for the defense of officially induced error to succeed, the party asserting the defense must establish that they exercised due diligence by taking reasonable care to prevent the contravention. I am persuaded by this reasoning and adopt it here.

[75] I find Mr. Murphy created the circumstance he found himself in. I reject the submission that the Band was somehow induced to contravene the *Act*. In the circumstances before me, I find that that silence in response to an inquiry does not constitute “advice” on which to base an officially induced error. Even were this not the case, the Band has not demonstrated, on a balance of probabilities, that Mr. Murphy’s inquiries were met with silence. The evidence before me, while being insufficient to establish many facts, does establish that the Ministry responded to Mr. Murphy in a consistent manner. That Mr. Murphy did not like, or agree with, the response he received is immaterial to his continuing obligation to comply with the legislation. For all these reasons, I conclude that any lack of response from the Ministry did not induce Mr. Murphy to contravene the *Act*.

2) Did Officer Kupryk induce Mr. Murphy to contravene the Act by telling him he could take the timber to “any one of 100 places” and she would scale it later?

[76] As noted above, Mr. Murphy did not testify at the appeal. The evidence presented as to Mr. Murphy’s actions and statements is crucial to the Band establishing its assertion that it acted based on an officially induced error. I have only the interview transcripts of Mr. Murphy’s two interviews, which record what he said in answer to certain questions but not do not amount to evidence for the truth of what he said. Much of the interviews are made up of broken sentences and incomplete questions and answers. Without the benefit of hearing Mr. Murphy’s testimony and having it subject to cross examination, I am left with an imprecise and unsworn evidentiary record on the most significant issue in this appeal.

[77] The advice Mr. Murphy relied upon purportedly came from Officer Kupryk. Officer Kupryk also did not testify at the appeal, and I have only her August 22, 2019, email to Mr. Murphy and a summary which Officer Kupryk purportedly prepared of her August 28, 2019, phone call with Mr. Murphy.

[78] Mr. Murphy’s interview statements and the recollections from Officer Kupryk differ in many respects. Before discussing this evidence, I wish to deal with submissions that counsel have made regarding the relative weight to be given to the evidence of these two witnesses.

[79] Counsel for the Band submits that Officer Kupryk did not prepare her summary of her phone call with Mr. Murphy until September 23, 2019: approximately one month after the call. The Band urges me to find that Officer Kupryk would necessarily have tailored her summary to favour the Ministry and that the passage of time would have permitted her to do so. Conversely, the Band says that Mr. Murphy sat for his interviews without preparation and that they are more reliable than Officer Kupryk's recollection for that reason. The Respondent says I should give little weight to Mr. Murphy's interviews because he would have been motivated to be less than candid once he understood the Band was under investigation.

[80] I find that neither Mr. Murphy's nor Officer Kupryk's record of communication is deserving of greater weight or should be considered more reliable. Neither of these witnesses provided a sworn statement and the evidence pertaining to each suffers equally from not having been subjected to testing through cross examination. I give them equal weight.

[81] Given that the onus lies on the Band to establish the defence of officially induced error, I will start this analysis by looking at what Mr. Murphy said during his interviews and what it reveals about the decisions he made regarding transporting the timber to the LeBeau Yard.

[82] I find that Mr. Murphy was aware that the birch harvested from the Woodlot needed to be scaled. This is evident from his various statements inquiring about where to scale the birch wood and his statements about having to find an alternative scale site after the Tolko Industries site shut down in July 2019.

[83] I also find that Mr. Murphy was aware that the Band's cutting permit was due to expire after August 31, 2019, and that he would either need to move all harvested timber from the Woodlot for scaling before that date or leave it onsite as waste.

[84] I further find that Mr. Murphy was aware that the LeBeau Yard was not an authorized scale site once timber from the Woodlot was seized in July of 2019. Officer Coles advised Mr. Murphy that the LeBeau Yard was not an authorized scale site during the August 27, 2019, interview, which occurred before the birch wood was transported.

[85] Mr. Murphy initially inquired to see if the birch would count against the cut volume. I find he was aware as of August 22, 2019, that it would. Officer Kupryk's email is clear on this point. I further find he knew that the birch needed to be scaled in order to be counted. There is no other method for counting volume other than scaling. Mr. Murphy's communications indicate that he did not want the birch to count against the cut volume and did not want to leave the timber in the Woodlot as waste.

[86] Mr. Murphy was told by Officers Coles and Helfrich on August 27, 2019, that he needed to speak with Officer Kupryk before moving any of the birch. While the officers told Mr. Murphy they understood the birch would be scaled at its destination, they were clear that only Officer Kupryk could provide Mr. Murphy with specific information on

scaling. I find that the record demonstrates that Mr. Murphy understood this, as evidenced by his statement that he intended to call Officer Kupryk to discuss this topic.

[87] Mr. Murphy spoke to Officer Kupryk on August 28, 2019. The record of the interview reveals that Mr. Murphy said he was told that he could take the birch to “any one of a hundred places” and he needed to tell her where it was taken and that she would then scale it. Importantly, however, Mr. Murphy also stated that Officer Kupryk told him that the birch needed to go to a “scale site”, which I find is inconsistent with Mr. Murphy’s assertion that he was told the timber could be taken anywhere as long as he later told Officer Kupryk where the timber had gone.

[88] The record of the interview reveals that Mr. Muphy said he was told by Officer Kupryk that the birch would count against the cut volume, and that this caused him to remain undecided on his plans for the birch. His indecision after the call with Officer Kupryk is not consistent with the Band’s assertion that Mr. Murphy received clear advice about the scaling of the timber.

[89] Additionally, the fact that the Ministry was concerned that Mr. Murphy might transport the birch to an unauthorized site after his call with Officer Kupryk does not support Mr. Murphy’s assertion that he was authorized by Officer Kupryk to do so. Had such a direction been given to Mr. Murphy, there would have been no need for the Ministry Officers to visit the Woodlot over the long weekend.

[90] Mr. Murphy’s decision to transport the birch to the LeBeau Yard appears to have been taken more out of expediency and with the intention of figuring out what to do with the birch later, rather than as a result of an authorization he received from Officer Kupryk.

[91] Officer Kupryk did not testify, and I have only a written summary of her call with Mr. Murphy, which, like Mr. Murphy’s interviews, is nothing more than an out of court statement and not admissible for its truth. Her summary says nothing about telling Mr. Murphy that he could transport the birch to “any of 100 places”. Her summary does confirm that Mr. Murphy was undecided on his plans, and this is consistent with the record of his statements that he remained undecided after his call with her.

[92] I have some doubt that Officer Kupryk, an experienced scale officer, would have said the firewood could go any of 100 places. Even Mr. Murphy said Officer Kupryk told him the birch also had to go to a scale site. As noted above, Mr. Murphy knew the LeBeau Yard was not an authorized scale site after his interview with Officer Helfrich a few days earlier.

[93] I find there is insufficient evidence of a clear instruction from Officer Kupryk that could reasonably have led Mr. Murphy to believe he was authorized to transport the unscaled birch wood to the LeBeau Yard. I accordingly find that Officer Kupryk did not induce Mr. Murphy to contravene the *Act* by telling him that he could take the timber to “any one of 100 places” and she would scale it later.

3) Did Officers Coles and Helfrich induce Mr. Murphy to contravene the Act?

[94] Turning to the interview of Mr. Murphy by Officers Cole and Helfrich on August 27, 2019, the Band submits that these officers “previewed” the advice Mr. Murphy says he later received from Officer Kupryk.

[95] According to the transcript from that interview, Officer Cole told Mr. Murphy to speak to Officer Kupryk for specific information on scaling and to do so before moving the birch. Officer Coles also told Mr. Murphy that he was not well-versed in forestry matters. Mr. Murphy acknowledged that he would need to speak to Officer Kupryk.

[96] The only information Officers Coles and Helfrich conveyed to Mr. Murphy was a vague reference to hand scaling without explanation of what this might entail.

[97] I find Mr. Murphy did not rely on Officers Cole or Helfrich for any official advice on the topic of scaling, and that it would not have been reasonable for him to do so given that the officers told him they were not well-versed in forestry matters. More importantly, there is nothing in the information provided by these officers that could be considered specific scaling advice that could be relied upon.

4) Did past Ministry enforcement scaling practices induce Mr. Murphy to contravene the Act?

[98] The Band submits that I should find that it is more likely than not that Mr. Murphy was told that he could transport the birch wood anywhere in the province to be scaled because this would be consistent with past Ministry practices. It says that a former scaling officer, Pat Hoyle, may have scaled firewood at locations other than authorized scaling sites.

[99] There is little evidence before me of these past practices. Mr. Hoyle did not testify. There is no evidence to show that the Band was certain of Mr. Hoyle’s previous scaling practices. I have no evidence of the circumstances in which timber may have been scaled by Mr. Hoyle in the past, as Mr. Hoyle did not provide evidence in this appeal. Moreover, how an individual scaler may have treated firewood in the past is irrelevant to the issue of officially induced error since Mr. Murphy had no dealings with Mr. Hoyle and the Band does not allege that any advice from Mr. Hoyle was ever received.

Conclusion

[100] As noted above, Jorgensen says that an officially induced error can only arise in the clearest of cases. I have found that Mr. Murphy never received clear and specific directions from Officers Coles, Helfrich, or Kupryk that transport of the birch wood to any place other than an authorized scale site was allowed. Mr. Murphy was not told he could take the birch to the LeBeau Yard. There was no lack of communication from the Ministry or any past scaling practice of the Ministry that induced Mr. Murphy to contravene the Act. I find that the evidence falls well short of establishing the Band acted on an officially induced error. No erroneous advice was received or reasonably acted upon. Accordingly, it is not

necessary to deal with the other requirements for officially induced error set out in Jorgenson.

[101] Considering all of the foregoing, I find the Band has not met the onus of proving Mr. Murphy acted in reliance upon an officially induced error when he transported the birch wood to the LeBeau Yard.

What is an appropriate administrative penalty?

Positions of the Parties

Appellant

[102] The Band agrees that one of the purposes of an administrative penalty is to remove any economic benefit obtained as a result of the contravention. However, the Band says it did not receive any economic benefit because its costs of harvesting the birch wood exceeded its value, and, more importantly, since the birch was seized and sold at auction, the Band never received any revenue from the harvested birch.

[103] Secondly, the Band says that it did not harvest any additional timber in 2019 as a result of not scaling the birch and having it count against the Band's allowable cut. The Band says any future benefit it might obtain from not having the birch applied to its allowable cut and the reduction of its future available cut has not yet crystallized and cannot form the basis of an economic benefit analysis. They submit that section 71(5) of the *Act* contains the words "economic benefit derived" from the contravention which they say must mean actually derived and not a benefit that may be derived.

[104] The Band further submits that basing the penalty on what might be a future "overharvest", on the assumption they harvest their entire future allotment without deducting 943 m³, is unfairly turning a penalty for unauthorized transport into a contravention of the harvest volumes. They say it would be procedurally unfair for them to have to answer for such a contravention at this stage of the appeal.

[105] The Band says an appropriate penalty for this contravention is no more than \$2,000.

Respondent

[106] The Respondent agrees that the consequence of not scaling the birch is that it was not carried forward to be applied to the cut volume allowed under the Band's next cutting permit. The Respondent agrees that the Band did not obtain an economic benefit in 2019 of harvesting additional coniferous species. However, the Respondent argues that the administrative penalty should still remove any economic benefit the Band might obtain from this contravention, and that this includes future cut volumes which will not have had the 943 m³ of birch deducted. They say this future benefit is still an economic benefit.

[107] The Respondent says the administrative penalty for this contravention is not similar to, nor does it include an offence of, overharvesting. Rather, it remains a contravention of the requirement that unscaled timber only be transported to a site for scaling.

[108] The Respondent submits I should confirm the \$69,490 penalty issued by the decision maker.

Panel Findings

Procedural fairness

[109] I do not accept the argument that it is procedurally unfair to consider the economic benefit that may have resulted from not scaling the birch wood given that this volume also counts against the allowed cut volume. Despite the Band's submissions, I disagree that this is tantamount to penalizing the Band for a future overharvest. The administrative penalty under appeal remains, as it always has been, one that arose from a contravention of the *Act* by transporting unscaled timber to a location other than an authorized scale site. The Band has been given the full opportunity to answer that contravention in this appeal. I find there is no procedural unfairness in determining an appropriate administrative penalty in the circumstances of this case.

[110] Section 71(5) of the *Act* sets out the criteria to be considered in levying an administrative penalty:

Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:

- a) previous contraventions of a similar nature by the person;
- b) the gravity and magnitude of the contravention;
- c) whether the contravention was repeated or continuous;
- d) whether the contravention was deliberate;
- e) any economic benefit derived by the person from the contravention;
- f) the person's cooperativeness and efforts to correct the contravention;
- g) any other considerations that the Lieutenant Governor in Council may prescribe.

[111] Both the Band and Respondent focused their submissions on subparagraph (e), the economic benefit criteria, and that issue does indeed figure largely in the penalty analysis before me.

[112] I will briefly review the other criteria found in section 71(5).

Previous contraventions

[113] There is no evidence that the Band has previously contravened the requirements for transporting timber only to a site authorized to scale it. While the Ministry seized firewood that originated in the Woodlot at the LeBeau Yard in July 2019, there is no evidence showing that the Band was aware that Craig LeBeau had taken the birch firewood to his yard. The Band learned about this after the fact.

[114] I find there were no previous contraventions which were known by the Band that occurred prior to the unauthorized transport of the birch wood.

Gravity and magnitude

[115] The birch wood comprised some 27 truck loads. It was not a trivial amount. Compliance with the scaling requirements found in the *Act* is important for the proper administration of forestry resource and to assist in ensuring that stumpage is paid on harvested timber.

[116] While no guidance on measuring gravity and magnitude of the contravention is set out in the legislation, I find that the contravention here should be considered in the mid-range of the scale of gravity and severity, based on the volume of timber harvested, and the implications such an unrecorded harvest can have on the management of forestry resources.

Repeated or continuous contraventions

[117] I have not been presented with sufficient evidence to establish that the Band participated in any repeated contraventions. The contravention in issue in this appeal is not one that is of a continuous nature and was not presented as such by the Respondent.

Deliberate conduct

[118] Not having heard from Mr. Murphy, the deliberateness of his conduct is difficult to assess. Some evidence has been presented that Mr. Murphy made statements that may suggest he disagreed with having to pay stumpage on firewood or having the volume of harvested wood count against the cut volume. I find, however, that there is compelling evidence which indicates that Mr. Murphy was inquiring about how to scale the birch. As noted above, I found that he failed to plan appropriately for the transport of the birch once he learned in July that his typical scale site was shutting down. His discussions with Officers Coles, Helfrich, and Kupryk presented as seeking solutions that comply with the *Act*, but Mr. Murphy seemed to have run out of time. I do not find that he deliberately contravened the *Act*.

Cooperativeness

[119] The evidence that I have been presented with demonstrates that the Band cooperated with the investigation into the then-alleged contravention of the *Act* in issue.

[120] The affidavit evidence of David Norquist, the new Forestry manager at the Band, provides some evidence of proactive steps taken by the Band to ensure that this sort of contravention will not occur in the future.

Economic benefit

[121] Section 75.41(1.1) of the *Forest Act* allows a woodlot licence holder to harvest up to 120% of the allowable cut:

(1.1) The holder of a licence that is a woodlot licence must ensure that the volume of timber harvested during its cut control period does not exceed 120% of the sum of the allowable annual cuts that for that period are authorized for the licence.

[122] Section 75.7 provides that any cut taken in excess of 120% is to be applied to the next cutting permit:

75.7 If the volume of timber harvested during a cut control period for a licence, as defined in section 75.4, a forest licence, as defined in section 75.5, or a timber sale licence, as defined in section 75.5, exceeds the sum of the allowable annual cuts

(a) authorized for the licence for that period if it is a forest licence, timber sale licence or woodlot licence, or

(b) available to the holder under the licence for that period if it is a tree farm licence, the excess volume of timber must be treated as being timber harvested during a cut period that is the next cut control period.

[123] The Band was allowed to cut 19,194 m³ under its 2014-2019 woodlot cutting permit. In 2019, the Band actually harvested 24,541 m³ and after adjustment for grade 4 credits, a net volume of 20,303 m³ was taken. If the birch wood was included in this volume, which would have been the case if the birch had been properly scaled, the total cut volume would be 21,246 m³. In the result, the Band harvested 110.7% of its allowable cut, which is well within the 120% allowance permitted under the *Act*. I find there was no overharvest in 2019 and, since the birch wood was confiscated and not used or sold by the Band, no economic benefit obtained by the Band in 2019.

[124] The parties agree that one of the objectives of levying an administrative penalty is to remove any economic benefit obtained from the contravention. Some contraventions of the *Act* can be easily understood through this analysis. The economic benefit derived by, for example, the illegal harvest of timber where the harvester enjoys the benefits of selling timber on which it has not paid any stumpage, is easily calculated when in possession of the relevant information.

[125] The challenge in this appeal, however, is determining what, if any, economic benefit the Band realized from the transport of the birch wood to an unauthorized scale site. The timber was seized by the Ministry and sold at auction. The Band did not receive any direct economic benefit from the harvest and improper transport of the birch.

[126] As conceded by the Respondent, the Band did not harvest additional timber in 2019 as a result of not scaling the birch. The Respondent submits that the undeclared volume that should have been deducted from any future cut volume could be realized in the future by the Band and this gives rise to the economic benefit. I must consider whether this potential future benefit constitutes an economic benefit for the purpose of assessing an administrative penalty.

[127] The Commission has previously considered the issue of a penalty for cutting and damaging crown timber without authority in *Nextech Forestry Services Ltd. v. Government of British Columbia*, 2022 BCFAC 6 (CanLII) ("*Nextech*"). There, the timber was seized but the Crown argued that had the illegal harvesting not been uncovered, Nextech would have obtained a benefit. The Commission found that this hypothetical benefit should not be the basis for a penalty. The Commission did find that there was still a deterrent factor to consider. There was a relatively small volume of timber taken, some 42 m³, and the Commission imposed an administrative penalty of \$1,500 on account of deterrence alone.

[128] In *O'Brien and Fuerst Logging Ltd. v. Government of British Columbia*, 2019 BCFAC 5 (CanLII) ("*O'Brien*"), the Commission considered the removal of a significant volume of timber along a roadway, although the timber had little commercial value. The Commission found it was too speculative to find that an economic benefit might have been obtained. However, a \$9,000 penalty was levied for the deterrence factor.

[129] In *Bruce William Giles v. British Columbia*, 2007 BCFAC 13 (CanLII) ("*Giles*"), the Commission considered an administrative penalty for the manufacture of 366 m³ of timber taken without authorization and without scaling. The timber was subsequently seized by the Ministry and sold. The Commission found there was no economic benefit derived from the contravention. In levying a \$2,000 administrative penalty, the Commission noted that the appellant in that case had previously contravened the *Act* and had acted deliberately in carrying out the contravention. I also note that the volume of timber was roughly one third of the volume I am considering in this appeal.

[130] The Respondent refers me to *Forest Practices Board v. Government of British Columbia*, 2022 BCFAC 5 (CanLII). There, a significant penalty of \$130,000 was levied to reflect the economic benefit derived from the contravention. I find this decision of little assistance. The value of the unauthorized harvest was estimated to be between \$130,000 - \$240,000 and had taken place over several years. Further, and notably, this benefit had actually been received by that appellant. The appellant in that case was combative, and there was evidence before the Commission that he tried to deceive the investigators. The facts of that case are so different from those before me that I do not consider it to be of assistance in assessing an administrative penalty on the issue before me.

[131] Taking some guidance from *Nextech*, *O'Brien*, and *Giles*, I find that economic benefit, for the purposes of an administrative penalty, should be based on an actual benefit received. It is too speculative to say that the Band will obtain an economic benefit in the future based on a harvest that has not yet occurred, which may not occur, and for which

there is no evidence of value. I find that the Band has not received an economic benefit on which an administrative penalty can be based.

Deterrence

[132] One of the purposes of an administrative penalty is to deter future contraventions of the Act. The contravention in this instance was not trivial, and a considerable volume of timber was not scaled by The Band and not counted against the Band's cut volume. It is appropriate, in my view, to assess an administrative penalty in consideration that the penalty should serve as a deterrent, even in the absence of any economic benefit.

[133] I have considered the authorities to which the parties have referred me. In *Nexotech*, 43m³ of timber was harvested without authorization. The administrative penalty imposed for deterrence was \$1,500.

[134] In *Giles*, 366m³ was taken without being scaled, and a \$2,000 penalty was assessed for deterrence. However, in that case the contravention was found to be deliberate, a factor that has not been found in the appeal before me.

[135] As noted above, in the *O'Brien* decision the Commission levied a \$9,000 deterrence penalty for the removal of a large volume of low value timber.

[136] In *Marilyn Abram v. Government of British Columbia*, 2005 BCFAC 8 (CanLII), 28m³ of timber was harvested without authority and a total penalty of \$3,828 was levied: \$1,000 for deterrence and \$2,828 to reflect the economic benefit derived from the contravention.

[137] In *Edward William Reiersen v. Government of British Columbia*, 2006 BCFAC 20 (CanLII), 48 large Douglas fir trees were harvested without authority. A \$4,000 penalty for deterrence was levied in addition to a \$7,000 penalty to account for lost compensation.

[138] *Dave Tremblay v. Government of British Columbia*, 2005 BCFAC 7 (CanLII), concerned four separate contraventions of unauthorized timber harvest, with penalties ranging from \$2,300-2,800.

[139] While the foregoing decisions consider illegal harvesting, I consider them of assistance in determining a deterrence penalty related to improper transportation to a site other than for scaling.

[140] It is apparent from the referenced decisions that penalty amounts levied on the basis of deterrence vary widely. Many factors arising from the individual circumstances of a contravention should be considered in determining the amount of this penalty, such as the volume of timber taken and whether or not a penalty included the return of economic benefit, I find that the considerable volume of timber that went unscaled and which was transported from the Woodlot to a place other than a scaling site is a situation which should attract a deterrence penalty closer to the higher end of the range which was set out in the decisions above.

[141] Having found that the Band had no previous contraventions of a similar type, no repeated or continuous contraventions, no deliberate conduct, and that it cooperated with

the investigation in this instance, an administrative penalty should be based on the gravity and magnitude of the contravention and on account of deterrence. I find an administrative penalty in the amount of \$4,000 is warranted.

DECISION

[142] In making this decision, I have carefully considered all of the evidence before me, and the submissions and arguments made by the parties, whether or not they have been specifically referenced in this decision.

[143] For the reasons provided above, the penalty amount for the contravention is set at \$4,000. The appeal is allowed, in part.

"Jeffrey Hand"

Jeffrey Hand, Panel Chair
Forest Appeals Commission