



# Forest Appeals Commission

**Citation:** *Interfor Corporation v. Government of British Columbia*, 2025 BCFAC 2

**Decision No.:** FAC-FRP-22-A006(a)

**Decision Date:** 2025-02-13

**Method of Hearing:** Conducted by way of oral hearing concluding on January 18, 2024

**Decision Type:** Final Decision

**Panel:** James Carwana, Panel Chair  
Ian Miller, Panel Member  
Daphne Stancil, Panel Member

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

**Between:**

Interfor Corporation

**Appellant**

**And:**

Government of British Columbia

**Respondent**

**And:**

Forest Practices Board

**Third Party**

**Appearing on Behalf of the Parties:**

For the Appellant: Mark Oulton  
Heather Doi

For the Respondent: David Cowie  
Holly Stewart

For the Third Party: Nathan Murray

## TABLE OF CONTENTS

Introduction

Background

TFL 23 and the Cutblocks at Issue

Cutting Permit 239 (CP 239)

Cutting Permit 707 (CP 707)

The Extent of the OGMA Incursions in the Impugned Cutblocks and Subsequent Events

The Determination

The Appeal Hearing

Issues

Relevant Legislation

Discussion and Analysis

Issue 1: Are the Disputed Documents Admissible?

Appellant's Submissions

Respondent's Submissions

Third Party Submissions

Appellant's Reply

Panel's Findings

Issue 2: The Burden of Proof

Appellant's Submissions

Respondent's Submissions

Third Party's Submissions

Panel's Findings

Issue 3: The Interpretation of FSP 30

Appellant's Submissions

Respondent's Submissions

Third Party Submissions

Appellant's Reply

Panel's Findings

The Harvesting of OGMA's is an Exception

The Modification of OGMA Boundaries to Facilitate Logical Harvest Units

The Relevant Context

Conclusion on Interpretation

Issue 4: Did Interfor contravene section 21(1) of the *FRPA*?

Appellant's Submissions

Respondent's Submissions

Third Party Submissions

Appellant's Reply

Panel's Findings

The Significance of the Site Plans

The Site Plans in this Appeal

The Lack of Documentation

The Evidence on Logical Harvest Units

OGMA Replacement (Cutblock 31)

Conclusion on Whether the Strategy was Carried Out

Issue 5: In the event there was such a contravention or contraventions, what, if any, is the appropriate amount of an administrative penalty?

Appellant's Submissions

1. Whether there should be a penalty

2. The number of contraventions

3. The amount of any penalty

Respondent's Submissions

Third Party Submissions

Panel's Findings on Penalty

Should there be any penalty?

The Number of Contraventions

The Factors Used to determine the Penalty Amount

(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

Determining the Penalty Amount and Balancing the Factors

Decision

# FINAL DECISION

## INTRODUCTION

[1] Interfor Corporation (the “Appellant” or “Interfor”) appeals the determination made on June 21, 2022 (the “Determination”) that it contravened section 21(1) of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the “FRPA”). The Determination was issued by Tara DeCourcy, District Manager of the Selkirk Natural Resource District of the Ministry of Forests (the “Ministry”), acting as a delegated decision maker (the “DDM”) under section 120.1(1) of the *FRPA*. The Determination was made after an investigation by Natural Resource Officer Mike Tyler (“NRO Tyler”) was completed and after an Opportunity to be Heard (“OTBH”) was provided to the Appellant in relation to the matter.

[2] In the Determination, the DDM found that Interfor had committed eight contraventions of section 21(1) of the *FRPA* respecting eight cutblocks harvested by Interfor within draft Old Growth Management Areas (“OGMAs”). The OGMAs were within an area covered by the Kootenay Boundary Higher Level Plan Order (the “Order”), and subject to Forest Stewardship Plan 30 (“FSP” for Forest Stewardship Plans generally, and “FSP 30” for this particular one) under the *FRPA*.

[3] OGMAs are “[d]efined areas that contain, or are managed to attain, specific structural old-growth attributes and that are delineated and mapped as fixed areas.”<sup>1</sup> Throughout this decision when the Panel refers to OGMAs, we will be referring to the draft Old Growth Management Areas covered by the Order, unless the context indicates that we are speaking about Old Growth Management Areas in general. There are other regions of British Columbia where Old Growth Management Areas have been established as “legal OGMAs” as opposed to draft OGMAs. However, as will be explained, legal obligations were imposed on Interfor under FSP 30, the Order, and the *FRPA*, in respect of the draft OGMAs which are the subject matter of this appeal.

[4] The DDM levied a total penalty of \$360,000 under section 71 of the *FRPA*, as that legislation read at all relevant times, which consisted of a \$45,000 penalty for each of the eight contraventions.

[5] Section 84 of the *FRPA* sets out the powers of the Forest Appeals Commission (the “Commission”) and states the Commission may:

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

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<sup>1</sup> Forest Practices Board, June 2012, *Conserving Old Growth Forests in BC – Implementation of old-growth retention objectives under FRPA*, Special Investigation, Glossary of Terms, p. iv.

(d) 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] The Appellant asks the Commission to rescind the Determination, or in the alternative, vary the Determination to reduce the number of contraventions. In the event the Commission finds any contraventions of the *FRPA* occurred, the Appellant argues the Commission should exercise its discretion to decline to impose any penalty or, in the further alternative, impose an administrative penalty at the lower end of the range (no more than \$5,000 for each contravention).

[7] The Respondent requests the Commission confirm the Determination.

[8] The Forest Practices Board (“FPB” or “Third Party”) limited its participation in this appeal to: (a) making submissions on two aspects of the DDM’s analysis of the penalty amount under section 71(5)<sup>2</sup> of the *FRPA*; (b) making submissions regarding the characterization of certain documents in dispute; and (c) commenting on some of the facts that led to the Determination, including how the dispute could have been addressed before ending up in an OTBH.

## BACKGROUND

[9] Interfor is an integrated wood products company which is engaged in harvesting and processing timber, primarily for the purpose of producing construction grade, dimensional lumber.

[10] In May 2008, Interfor purchased Pope & Talbot Ltd.’s interests and assets pertaining to timber within an area referred to as Tree Farm Licence 23 (“TFL 23”). A tree farm licence is a tenure that grants rights to harvest timber within a defined area of land and which requires the tenure holder to manage and conserve forest resources within that area. TFL 23 is located in the southeastern area of BC, adjacent to the Arrow Lakes, and is situated within the Arrow-Boundary Forest District. Portions of a tree farm licence may be harvested when designated as cutblocks. The cutblocks at issue under this appeal are located within the area defined in TFL 23, west of the Upper Arrow Lake and the Lower Arrow Lake. Interfor’s Castlegar Division of its Kootenay operations planned and oversaw the harvesting of timber for these areas.

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<sup>2</sup> The *FRPA* has since been amended (see for example the current section 74(2)) which corresponds to the previous section 71(5)). This decision reflects the legislation as it was at the time of the Determination.

[11] The Order was enacted on or about October 26, 2002, and established forest resource management objectives set by the government for this area of the province, including the area of TFL 23. Licensees were and are to address these government objectives through the results and strategies set out in their FSPs. These results and strategies must be consistent with government's objectives, and licence holders are required to ensure the results designated in their respective FSPs are achieved and the strategies similarly designated are carried out.

[12] Two of the forest resource management objectives in the Order are relevant in this appeal. Both involve conserving biodiversity. Objective 1 is entitled "Biodiversity Emphasis" and states the objective is: "to contribute to the conservation of biodiversity, biodiversity emphasis is assigned to each landscape unit". The landscape units are spatially identified areas of land and/or water used for long-term planning of resource management activities and are defined on a map attached to the Order. Objective 2 is entitled "Old and Mature Forest" and also states the purpose of this objective is "to contribute to the conservation of biodiversity." Objective 2 provides that old forests, as defined in the Order, are to be maintained to the levels indicated in the Order.<sup>3</sup>

[13] Tables 2.1 through 2.4 of the Order list various biogeoclimatic ecosystem classification units (or "BEC Units"). Those tables set out, for the BEC Unit of each landscape unit, the percentage of old forest area that must be preserved and the associated assigned biodiversity emphasis. A BEC Unit reflects a combination of climate, vegetation and soil, and may be referred to as a BEC zone or BEC subzone depending on the context. A BEC Unit is often identified by the dominant tree species and the quantity of the old forest that must be preserved within each BEC Unit under the Order is established as being greater than a specific percentage of such tree species. For example, under the Order, the level for old forests to be preserved in the BEC Unit for Interior Cedar Hemlock with an Intermediate Biodiversity Emphasis is to be >13%.

[14] In March 2006, the Government of British Columbia (the "Province") issued its "Guide for Old Growth and Wildlife Tree Objectives" (the "Guide for Old Growth"). The Guide for Old Growth describes limited circumstances which would allow for the harvesting of an OGMA, and associated limits on the amounts to be harvested. For

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<sup>3</sup> Table 2.6 of the Order deals with various BEC units and natural disturbance types in setting out what "old" forest means. Table 2.6 indicates that for two BEC units, Interior Cedar Hemlock (ICH) and Englemann Spruce - Subalpine Fir (ESSF), where the natural disturbance type is designated as 1 or 2, "old" means stands of trees of over 250 years of age. For ICH and ESSF units, where the natural disturbance type is designated as 3, "old" means stands of trees of over 140 years of age. This applies to Montane Spruce BEC units as well. For ICH units where the natural disturbance is designated as 4, "old" means stands of trees of over 250 years of age. This applies to BEC units of Interior Douglas Fir and Ponderosa Pine as well. In summary, old stands of trees will be either greater than 250 years or 140 years depending on the level of natural disturbance designated for a stand of trees within a specific BEC unit.

example, the Guide for Old Growth provides that a reason for harvesting in an OGMA might be to allow for road development and maintenance where no practicable alternatives exist, and that the amount of such timber harvesting could be up to 10 hectares or 10% of the area of the OGMA, whichever is less.

[15] FSP 30 was approved by the Ministry in May 2006. FSP 30 had been submitted by Pope & Talbot for TFL 23. FSP 30 includes a section dealing with “Results and Strategies”. In the Result section, the holder of FSP 30 undertakes to comply with the ‘biodiversity emphasis’ in Objective 1 of the Order. Section 5.1.1.2 of FSP 30 (the “Strategy”) identifies the strategy for achieving the requirements of Objective 2 of the Order. The Strategy section regarding the old forest requirement reads as follows:

### **Strategy**

The holder of the FSP will undertake to comply with the requirements in objective 2 of the [Order] ... Consistency will be ensured by:

1. With respect to the old requirement and subject to paragraph 1a&b below, the holder will not harvest the draft OGMA's shown on the FDU [Forest Development Unit] map.
  - a. Boundaries of the draft OGMA's can be modified:
    - i. To deal with roads that cannot be located else due to safety engineering constraints or access requirements.
    - ii. To harvest areas to address health issues or to facilitate logical harvest units.
  - b. The criteria in ai) or aii) apply if the remaining draft OGMA's meet the percent requirements of the [Order]. If the remaining draft OGMA's do not meet the present requirements of the [Order], then an area of similar size and attributes must be identified as a replacement.

[16] Pope & Talbot submitted a supporting document to accompany FSP 30 (the “Supporting Document”). The Supporting Document states:

This **supporting document** to the FSP is not a legal document. It provides rationale, clarification and background to the results and strategies in the FSP. The first purpose of the supporting document is to assist the District Manager in his consideration of the FSP; it also informs the public and stakeholders. The general structure of this document is to review each Result/Strategy and provide clarification of the rationale for it, and background information about Pope & Talbot's related plans and procedures.

[17] The Supporting Document includes reference to the *FRPA*, the FSP (i.e., FSP 30), and site plans. Regarding site plans, the Supporting Document states:

At the stand level, *FRPA* requires **site plans**. Site plans identify approximate locations of cutblocks and roads and identify how intended results or strategies described on the FSP apply to the site. Site plans do not require government approval but must be in place prior to harvesting and available for review. (emphasis in original)

[18] The Supporting Document also references the “Old and Mature” section of FSP 30. It states:

A Seral Stage analysis (Biodiversity Analysis) will be run by Pope and Talbot and reviewed by qualified professionals on an annual basis unless existing analysis allows Pope and Talbot to verify that the Mature and Old requirements have been met. Since Old has been spatialized, the analysis will focus on mature only.

...

Old Seral:

Draft OGMA's have been mapped in all of the holder's FDU's in TFL 23 and will contribute towards the requirement of objective 2 of the [Order]. The holder's analysis presented to ILMB [Integrated Land Management Bureau], indicates these draft OGMA's exceed the requirements of objective 2. **Except as noted in the FSP, these OGMA's will not be harvested by Pope and Talbot over the term of this FSP.** (emphasis added)

Since the draft OGMA's exceed the requirements in the [Order] the licensee can harvest within the draft OGMA's as long as the remaining OGMA areas meet or exceed the [Order] objectives. No notification to MOF is required when harvesting within draft OGMA's if the [Order] objectives are met.

[19] In December 2008, Interfor assumed responsibility for FSP 30, without amendment, following its acquisition of Pope & Talbot's tenures. It applied twice to the Province to have FSP 30 extended and the Province extended the application of FSP 30 in 2011 and in 2016 to an end date of June 9, 2017.

[20] In March 2010, the Ministry issued an “Administrative Guide for Forest Stewardship Plans (FSPs)” (the “2010 Administrative Guide”) which provides tenure holders advice on how harvest planning is to be consistent with FSPs. The 2010 Administrative Guide indicated that licensees were to “ensure that the site plan is consistent with the approved FSP, practice requirements in the *FRPA*, or with other items that must be addressed (e.g., assessments conducted, and their findings if part of an obligation in a result/strategy in

the approved FSP)” (emphasis added). In terms of the site plan content requirements, the 2010 Administrative Guide indicated that site plans were to:

Identify how the intended results or strategies described in the forest stewardship plan apply to the site. This goes beyond ‘what’ results, strategies and measures apply. The site plan must explain ‘how’ the results, strategies and measures listed in the FSP will be applied to the site. (emphasis added)

### TFL 23 and the Cutblocks at Issue

[21] Effective November 30, 2010, the Deputy Chief Forester (the “Deputy”) for the Ministry issued the “Rationale for Allowable Annual Cut (AAC) Determination” for Tree Farm Licence 23 (the “2010 AAC Rationale”). “Allowable Annual Cut” (also referred to as AAC) is defined in the *Forest Act*, R.S.B.C. 1996, c. 157 (the “*Forest Act*”) in respect of a timber supply area or the licence area of an area-based licence, as the rate of timber harvesting determined for the area under section 8, subject to increases or reductions as allowed, under the *Forest Act*. The Chief Forester (or their delegate—the Deputy in this case) must determine the Allowable Annual Cut at least once every ten years after the date of the last determination in accordance with section 8 of the *Forest Act*.

[22] As previously noted, the cutblocks at issue are all within TFL 23. In the 2010 AAC Rationale, the Deputy noted that “the retention of an appropriate area of old growth forest is a key consideration to conserving landscape-level biodiversity” and, in determining the Allowable Annual Cut, the old growth management areas in TFL 23 were excluded from the Timber Harvesting Land Base (“THLB”). The Deputy further noted that she had considered the Order as well as the OGMAs and that “excluding these areas from the THLB reflects current operational practices” (at p.14). The 2010 AAC Rationale states that it would remain in effect until a new Allowable Annual Cut was determined, which must take place within ten years, per the requirements of the *Forest Act*.

### Cutting Permit 239 (CP 239)

[23] Interfor applied for CP 239 on or about July 25, 2012, and the permit was issued for a four-year term beginning August 21, 2012. Originally, several of the cutblocks comprising CP 239 were developed and laid out as part of CP 640, through the work of Interfor’s contractor, Timberland. These blocks included what became cutblocks 13, 15, 16, and 17. Interfor planned to cut these cutblocks under CP 239 and prepared site plans for these cutblocks. Interfor harvested the timber from these cutblocks between November 2012 and February 2013.

[24] In its submissions, Interfor notes the process relating to timber harvesting requires that, “before any harvest takes place, an FSP holder must prepare a site plan in accordance with prescribed requirements for any cutblock and road.” Interfor further notes the following in respect of such site plans:

These plans are prepared by a professional or professionals in the forest development group, and signed and sealed by [a Registered Professional Forester (an "RPF")]. The *FRPA* establishes broad content requirements for site plans. For example, they must be consistent with the licensee's FSP and identify how intended results or strategies in the FSP apply to the site. (emphasis added)

[25] The site plans for cutblocks 13, 15, 16, and 17 (the "CP 239 Site Plans") were entered into evidence in this appeal. They comprise of pre-existing forms into which information is entered. Each of the four CP 239 Site Plans is entitled "FRPA Site Plan," dated September 14, 2012, and signed by Ron Palmer, an RPF employed by Interfor. Each of the four CP 239 Site Plans has a section dealing with Biological Diversity Assessments, under which there is a sub-heading for "Old Seral". The Old Seral portion in all four of the CP 239 Site Plans contains three short questions and with a response stating either "yes", "no", or "N/A". The three questions are:

- Is the block outside of proposed OGMA's?
- Does the OGMA analysis indicate a surplus to allow for harvesting?
- If analysis does not provide for harvesting – provide rationale.

[26] The CP 239 Site Plans for cutblocks 13 and 17 indicated that the cutblocks were outside of proposed OGMA's, the OGMA analysis regarding whether there was a surplus was "N/A" (not applicable), and a rationale for not harvesting was also "N/A". The CP 239 Site Plans for cutblocks 15 and 16 indicated that the cutblocks were not outside of proposed OGMA's, the OGMA analysis indicated a surplus to allow for harvesting, and a rationale for not harvesting was "N/A". Each of the four CP 239 Site Plans had a "FRPA Site Plan" map attached; however, none of the maps showed where the OGMA's were located.

[27] Interfor harvested Crown timber from eleven cutblocks under CP 239, including the four cutblocks at issue, which were the only cutblocks under this permit which overlapped with an OGMA. This harvesting occurred between November 2012 and February 2013. All four of the cutblocks at issue involved harvesting from within the OGMA's as mapped in FSP 30.

### Cutting Permit 707 (CP 707)

[28] Interfor conducted development work for CP 707 in 2013 and completed it in 2016. Mr. Palmer was responsible for the planning process for CP 707 until March 1, 2015, and was assisted by Timberland and other specialized consultants. After that, Richard Marchand, another RPF employed by Interfor, took over the planning work and the appraisal data submission for CP 707. Mr. Marchand also prepared the site plans and the necessary permit submission which was submitted on or about October 9, 2015. CP 707 was issued on or about January 8, 2016.

[29] The site plans for CP 707 cutblocks 27, 28, 29 and 31 (the “CP 707 Site Plans”) were entered into evidence in this appeal. All four CP 707 Site Plans are entitled “FRPA Site Plan”. All four CP 707 Site Plans are dated January 18, 2016, and are signed by Mr. Palmer. All four CP 707 Site Plans have a heading for “Results and Strategies”, and a sub-heading for “Biodiversity Objectives”, under which there is a further sub-heading for “Old Seral”. Relating to Old Seral, all four CP 707 Site Plans contain the same three short questions as the CP 239 Site Plans. At the end of the “Results and Strategies” section, there is a heading “Forest Stewardship Plan”; however, for each of the four CP 707 Site Plans, that section is blank.

[30] Regarding the answers to the three questions for Old Seral, the answers for cutblocks 27, 28 and 29 were the same: “No”, as to whether the block was outside of proposed OGMAs; “Yes”, as to whether the OGMA analysis indicated a surplus to allow for harvesting; and “N/A” as to providing a rationale for not harvesting. While the answer to the first question for block 31 was the same as the others and indicated that the block is not outside of proposed OGMAs, the other answers differed from cutblocks 27, 28 and 29 by indicating there was no surplus to allow for harvesting, and by stating “OGMA recruitment strategy allocated additional areas” in response to the item asking to provide a rationale “if analysis does not provide for harvesting”. These “additional areas” were not, however, identified on the cutblock 31 site plan.

[31] The harvesting of the cutblocks under CP 707 took place between August 7, 2016, and October 7, 2016. All of the CP 707 cutblocks involved OGMA harvesting. On or about March 21, 2017, Interfor inputted the harvest information for CP 707 into the Ministry’s data management system for harvesting activities on Crown land. This included the harvest boundary information for each of cutblocks 27, 28, 29 and 31.

### The Extent of the OGMA Incursions in the Impugned Cutblocks and Subsequent Events

[32] Each of the impugned cutblocks involved significant incursions into OGMAs, and in most of the impugned cutblocks a majority of the area harvested was within OGMAs. The evidence at the hearing<sup>4</sup>, which we accept on the point, established that the approximate percentage of the total area harvested in each of the eight impugned cutblocks, which was located within an OGMA, was as follows:

- CP 239 - Block 13: 50%; Block 15: 80%; Block 16: 50%; Block 17: 94%.

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<sup>4</sup> At the hearing, Interfor took the position that the estimates by Eric Wahn, an expert called by the Respondent, of the OGMA incursion areas for the CP 239 cutblocks ought to be accepted, and did not take issue with Mr. Wahn’s estimates for the OGMA incursion areas for the CP 707 cutblocks. The evidence included the written reports and oral testimony of Mr. Wahn, who was qualified as an expert by the Panel as described later in this decision, as well as overview maps showing the cutblocks in relation to OGMAs.

- CP 707 – Block 27: 92%; Block 28: 100%; Block 29: 95%; Block 31: 82%.

[33] The total of OGMA harvested in the eight impugned cutblocks was approximately 82 hectares.

[34] In 2017 and 2018, there were various communications between Interfor and the Ministry. In July 2017, the Ministry sent an email to all forest licensees in the Selkirk Forest District, including Interfor, advising them that the Ministry was conducting a review of various aspects of OGMA and biodiversity management for the Selkirk Forest District.<sup>5</sup> Ministry staff subsequently had a meeting with licensees on November 8, 2017, which Interfor attended. During this meeting, Ministry staff noted that harvesting under CP 707 had resulted in the removal of old growth.

[35] Ian Wiles, Ministry Stewardship Officer, contacted Interfor by email on June 6, 2018 indicating that the Ministry was conducting a “review of licensee processes when they undertake harvesting within an OGMA”. Officer Wiles requested information for the cutblocks at issue and Interfor provided information about the cutblocks to Mr. Wiles by email on June 8 and June 11, 2018.

[36] On November 7, 2018, Interfor staff had a meeting with Ministry staff, including District Manager Tara DeCourcy. Ministry staff noted that there were concerns about licensees’ harvesting practices in OGMAs, including in CP 239 and CP 707.

[37] In an email dated November 30, 2018, Ms. DeCourcy issued direction to all “major licensees” in the Selkirk Resource District, including Interfor, about the need to provide rationale for harvesting in OGMAs with cutting permit applications. Such prepared rationale must be consistent with commitments in any FSP and the Order. Such licensees were generally expected to also identify replacement areas for any harvested areas within OGMAs. After receiving the email from Ms. DeCourcy, Interfor adopted the procedure she had set out. According to Interfor’s evidence in this appeal, they now provide explicit notice in any cutting permit application involving proposed OGMA incursions. They reportedly describe any overlap between proposed cutblocks and OGMAs, explain the rationale for the overlap and identify any necessary replacement areas.

[38] On or about December 3, 2018, Officer Wiles submitted a complaint report to the Compliance and Enforcement branch of the Ministry, alleging that Interfor may be conducting operations inconsistent with section 5.1.1.2 of FSP 30 regarding the management of old and mature forest.

[39] The complaint was originally assigned to Natural Resource Officer Craig Kovacs (“NRO Kovacs”). NRO Kovacs subsequently transferred the investigation file to NRO Tyler in early February 2020. NRO Tyler gathered information relating to the alleged contraventions and worked on his investigative report.

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<sup>5</sup> The Selkirk Forest District includes TFL 23.

[40] On November 24, 2020, NRO Tyler emailed Interfor with questions in respect of his investigation, and Mr. Palmer responded on February 9, 2021. The questions asked and responses given included the following:

Q. For [C]utting Permit 239 blocks 0013 & 0017, the site plans identify that these blocks are not located within an OGMA. How did you determine this?

A. This was determined through a GIS [Geographic Information Systems] overlay of the proposed blocks with the LRDW [Land Resource Data Warehouse] Non-legal OGMA layer. Based on the information at hand, it appears that this statement in the [site plan] is an error. It appears that block 13 has a WRTA overlapping a substantial portion of the previously mapped OGMA. More correctly, it should have stated that no harvest is proposed within the OGMA.

[41] NRO Tyler asked what the rationale was for modifying the draft OGMA for each of the blocks at issue. Mr. Palmer provided the same answer for each block: "This block is a logical harvest unit and there is a surplus of OGMA and the remaining OGMA meets the requirements of the [Order]." With regard to cutblock 31, Mr. Palmer added a note that "[b]lock 31 showed an initial small deficit but a further review indicated this to not be the case. In addition, a subsequent replacement OGMA was identified in this area."

[42] NRO Tyler also requested any supporting rationale documents for these modifications and Mr. Palmer responded that "No supporting documents are available."

[43] On March 18, 2021, NRO Tyler provided Interfor with an electronic copy of the OTBH Investigative Report (the "NRO Report") he had prepared, alleging eight contraventions of s. 21(1) of the *FRPA*; one for each of the cutblocks at issue (four in CP 239 and four in CP 707).

## The Determination

[44] The OTBH was held on January 26, 2022, following which the DDM made the Determination that Interfor had contravened section 21(1) of the *FRPA* in relation to the eight cutblocks at issue. In arriving at the Determination, the DDM noted that there was "no argument as to whether the eight blocks in question were harvested within OGMA" and that the question was "whether the harvesting of cutblocks within OGMA was consistent with the wording of the FSP".

[45] In interpreting the Strategy, the DDM found as follows:

1. The intent of the Strategy is to meet the old forest requirements of the [Order] through the application of OGMA;
2. With some exceptions, the holder will not harvest OGMA;

3. Boundaries can be modified to facilitate logical harvest units; and
4. If the requirements of the [Order] will no longer be met following harvest, the OGMA must be replaced.

[46] In deciding whether Interfor had met the wording of the Strategy, the DDM found the intent of the Strategy “to be that, in general, OGMA will not be logged.” The DDM interpreted the wording in the Strategy about modifying boundaries as meaning “to alter; to change in incidental or subordinate features”, and found that the OGMA were substantially changed in each of the impugned cutblocks, which was not consistent with the FSP wording. The DDM interpreted the wording about “facilitating logical harvest units’ to mean boundary adjustments to allow for operational factors such as slope breaks or type changes or other site factors”, and found that the evidence did not establish such factors were the purpose of the harvesting, with the OGMA incursions being large in size and impact.

[47] In considering the administrative penalty, the DDM considered the factors described in section 71(5) of the *FRPA*. The DDM found that there was “no evidence that the incursions were deliberately planned to not comply with the FSP”, and that Interfor had “been cooperative throughout the process”; however, in determining the penalty amount in this case, the DDM specifically found that “this contravention was similar to a previous contravention, repeated and serious in gravity and magnitude”, and there was “a need to provide a meaningful deterrent against future contraventions of a similar nature by Interfor.”

[48] The DDM set the penalty amount at \$45,000 per cutblock, amounting to \$360,000 in total, and further stated that she was “confident that this penalty amount will provide an appropriate deterrent against future contraventions and convey a message to others regarding the critical importance of correctly interpreting FSP wording and ensuring that harvesting is undertaken consistent with the plan.”

### The Appeal Hearing

[49] The Appellant filed its Notice of Appeal of the Determination on July 11, 2022. In the Notice of Appeal, the Appellant alleged, among other things, that the DDM had misinterpreted FSP 30 by failing to consider the results and strategies in the FSP “in the context of the objective they were intended to meet”. The Appellant further alleged that, in imposing the penalty, the DDM had failed “to consider that Interfor’s FSP and industry practice and approach with respect to OGMA incursions has evolved since the harvesting of CP 239 and CP 707 such that there is no need for a ‘meaningful deterrent’.”

[50] The oral hearing by the Commission in this matter was conducted over the course of 10 days. The hearing proceeded by way of a new (*de novo*) hearing, which included evidence that was not before the DDM when she made the Determination.

[51] Interfor called 5 witnesses: Geoffrey Becker, an RPF who joined Interfor from Pope & Talbot after Interfor purchased Pope & Talbot's tenures and milling operations in the Kootenays in 2008 and worked as Woods Manager for Interfor's Kootenay Woodlands area, including Castlegar from 2015 to 2022; Randy Waterous, a registered forest technologist who, since 2012, has worked as Environmental and Land Use Superintendent for Interfor; Mr. Palmer, who is a long-time Interfor employee and worked as a development forester and Forestry Superintendent with responsibility for Interfor's Kootenay tenures including TFL 23; Rick Hanson, an independent RPF, who was qualified as an expert in mill fibre supply, including associated forest and harvest planning within the Kootenay Boundary region; and Kathy Howard, a forestry consultant and RPF who was qualified as an expert in forest management planning, including old growth management within the Kootenay Boundary region.

[52] The Respondent called two witnesses: NRO Tyler; and Eric Wahn, an RPF employed by the Ministry who was qualified as an expert in harvest planning and old growth management in the Kootenay Boundary region.

[53] At the outset of the hearing, a process was agreed upon between counsel for the parties, and confirmed by the Commission, regarding documents to be entered into evidence. Under the process, counsel for the parties would review the books of documents and remove documents which had not been entered into evidence through a witness and which would not form part of the record.

[54] At the conclusion of the oral evidence, and prior to resuming for oral argument, counsel went through this document process and the Panel was advised that there were three disputed documents. After considering the matter, including a procedure put forward by counsel for the parties to deal with it, the Panel directed that the admissibility of these documents be addressed as a preliminary issue in the parties' submissions.

## ISSUES

[55] There are two evidentiary issues that arise in this appeal which warrant discussion as separate issues. The first relates to the admissibility of the three documents, which we refer to collectively as the "Disputed Documents". The second relates to the burden of proof. Although the parties did not directly raise the burden of proof as an issue, in order for the Panel to evaluate and weigh the evidence adduced during the hearing, it is necessary to establish which party has the onus of proving the various matters relating to the alleged contraventions.

[56] The Panel must also consider the language of the Strategy adopted by FSP 30 to determine how it is to be interpreted. The Panel then must apply the evidence provided by the parties to decide if the Appellant contravened section 21(1) of the *FRPA*, and if so, what penalty amount, if any, is appropriate. Thus, we find the following issues arise on this appeal:

1. Should the Disputed Documents be admitted into evidence?
2. Where does the burden of proof lie?
3. How is FSP 30 to be interpreted?
4. Did the Appellant contravene section 21(1) of the *FRPA*?
5. In the event there was such a contravention or contraventions, what, if any, is the appropriate amount of an administrative penalty?

## RELEVANT LEGISLATION

[57] The allegations in the present case involve various provisions of both the *FRPA* and the Administrative Orders and Remedies Regulation made under it (the "Regulation").

[58] The provisions of the *FRPA* have undergone recent revisions, but at the time of the alleged contraventions, the relevant provisions were as follows:

### **Content of forest stewardship plan**

5 (1) A forest stewardship plan must

(a) include a map that

(i) uses a scale and format satisfactory to the minister, and

(ii) shows the boundaries of all forest development units,

(b) specify intended results or strategies, each in relation to

(i) objectives set by government, and

(ii) other objectives that are established under this Act and that pertain to all or part of the area subject to the plan, and

(c) conform to prescribed requirements.

(1.1) The results and strategies referred to in subsection (1) (b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in subsection (1) (b) (ii).

(2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:

(a) the timber supply area;

- (b) the community forest agreement area;
  - (c) the tree farm licence area;
  - (d) the pulpwood area.
- (3) A forest stewardship plan or an amendment to a forest stewardship plan must be signed by the person required to prepare the plan, if an individual or, if a corporation, by an individual or the individuals authorized to sign on behalf of the corporation.

### **Site plans for cutblocks and roads**

- 10 (1) Except in prescribed circumstances, the holder of a forest stewardship plan must prepare a site plan in accordance with prescribed requirements for any
- (a) cutblock before the start of timber harvesting on the cutblock, and
  - (b) road before the start of timber harvesting related to the road's construction.
- (2) A site plan must
- (a) identify the approximate locations of cutblocks and roads,
  - (b) be consistent with the forest stewardship plan, this Act and the regulations, and
  - (c) identify how the intended results or strategies described in the forest stewardship plan apply to the site.

### **Compliance with plans**

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

### **Administrative penalties**

- 71 (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard,

may determine whether the person has contravened the provision.

- (2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,
  - (a) if he or she determines that the person has contravened the provision,
    - (i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or
    - (ii) may refrain from levying an administrative penalty against the person if the minister considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty, or
  - (b) may determine that the person has not contravened the provision.
- (3) Subject to section 72, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.
- (4) If a corporation contravenes a provision of the Acts, a director or an officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.
- (5) 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.

[59] The Regulation has also undergone recent revisions, but at the time of the alleged contraventions, the relevant provision of the Regulation was:

**Penalties – Forest and Range Practices Act**

12. The maximum amount that the minister may levy against a person under section 71 (2) of the Forest and Range Practices Act is...

(a) \$50 000 for a contravention of any of the following sections of that Act:

3 (1); 12 (1); 21 (1); 22 (2); 31; 38 (1); 45 (1) (a) or (b);  
50 (1); 51 (7); 54 (2) (a) or (b); 57 (4); 77 (1) or (2) (a)  
or (b); 77.1 (1) or (2)...

**DISCUSSION AND ANALYSIS**

**Issue 1: Are the Disputed Documents Admissible?**

[60] The documents for which admissibility is in dispute are as follows:

- (a) “Ecological Impact Statement: Harvesting Old Forests within OGMAs in TFL 23 – CP 707 and CP 239”, dated March 1, 2021, and prepared by Deb MacKillop, RPF (the “MacKillop Report”);
- (b) “Information Note, Subject: Logical Harvest Boundaries and Considerations for Harvesting in Old Growth Management Areas”, dated February 22, 2021, and prepared by Ian Wiles, RPF – Stewardship Officer, Selkirk Resource District (the “Wiles Information Note”); and
- (c) “Economic Benefit Tables and Calculations”, undated, which testimony indicated was prepared by NRO Mark Turner, with participation from NRO Tyler (the “Economic Benefit Tables and Calculations”).

[61] As the title indicates, the MacKillop Report deals with the impacts of harvesting old forests within OGMAs in the cutblocks at issue. As the Appellant notes, the MacKillop Report contains opinion evidence on the surplus/deficit of old forest in CPs 239 and 707 and whether the harvesting of old forest was logical. The MacKillop Report was included in the NRO Report as a “professional report.”

[62] The MacKillop Report was served as an expert report in this appeal by the Respondent in July 2023, but it was subsequently withdrawn. The Respondent clarified they would not be relying on the report as expert evidence in the appeal, nor would they be calling Ms. MacKillop as a witness at the hearing. Lastly, the Respondent notes that

since the MacKillop Report is included in the NRO Report, it remains a part of the hearing record for the parties to refer to, albeit without any expert designation.

[63] The Wiles Information Note identifies its purpose “to briefly summarize appropriate considerations that a forester should undertake when planning to harvest timber on Crown land and specifically when it would be logical to harvest timber within an old growth management area (OGMA).” It is included in the NRO Report as a “professional report.” The Respondent does not rely on it as expert evidence.

[64] The Economic Benefit Tables and Calculations is included as a supporting document in the NRO Report. The Economic Tables and Calculations were put forward as an estimate of the economic benefit derived from the contravention when considering section 71(5)(e) of the *FRPA*. The footnotes to the tables explain how the numbers in the tables were calculated. For example, the tables for CP 239 explain where the species and volume/Ha information was taken from, how the volumes were calculated, and the source of the appraisal selling price for each species. The document identifies that the logging costs and log trucking costs used were calculated by Ken Chantler, Timber Pricing Coordinator in the Ministry, while other costs, such as development costs and administration costs, were taken from the applicable Stumpage Rate Details Report for the cutting blocks at issue. NRO Tyler testified that, while the document was prepared by NRO Turner, NRO Tyler participated with NRO Turner in preparing the economic analysis. The evidence further indicates that the estimated market value calculations were based on the appraisal selling price for each species taken from the Interior Market Pricing System Stumpage Rates for the cutblocks at issue.

### Appellant’s Submissions

[65] Interfor argues the Disputed Documents should be excluded from evidence in this appeal. Interfor objects to their admission and submits that they should be marked for identification only, to recognize that they were part of the materials gathered by NRO Tyler in his investigation. Interfor further says the Disputed Documents cannot be relied on for a hearsay purpose—in other words, they cannot be relied upon for the truth of their contents.

[66] Interfor acknowledges that the Commission has broad discretion to admit evidence that it considers relevant, necessary, and appropriate, whether or not that information would be admissible in a court of law; however, Interfor says that the Commission’s discretion to admit evidence is not without bounds and is subject to the principles of natural justice.

[67] Interfor asserts that each of the Disputed Documents contains expert opinion evidence given by individuals who did not appear as witnesses in the appeal. In that respect, such opinion evidence is expressly addressed by the Commission’s Rules, including Rule 27, which provide notice and content requirements for proposed expert reports and for a right of cross-examination by the opposing party at an oral hearing.

Interfor argues that admission of the Disputed Documents would run afoul of these requirements, and it would be unfair to permit such expert opinion evidence in the circumstances.

[68] With respect to the MacKillop Report, Interfor says the report was gathered by NRO Tyler as part of his investigation, for the purposes of the OTBH, and relied on by the DDM at that hearing. Interfor further notes that the Respondent served the MacKillop Report on the other parties to this appeal as an expert report in accordance with Rule 27, but subsequently withdrew it as an expert report and advised it would not rely on the report as expert evidence or call Ms. MacKillop as a witness, but that the MacKillop Report would remain in the OTBH Binder. Interfor argues that there is no question that the MacKillop Report is expert opinion, as the Province's correspondence expressly acknowledged.

[69] With respect to the Wiles Information Note, the Appellant says that it contains Mr. Wiles's opinions on what constitutes an appropriate harvest unit and what factors ought to be considered in identifying one. Similar to the MacKillop Report, the Appellant argues that the Wiles Information Note ought not to be admitted into evidence without Interfor having had an opportunity to test Mr. Wiles's opinions through cross-examination.

[70] With respect to the Economic Tables and Calculations, Interfor asserts that the document contains calculations of the timber harvested which require GIS expertise and, therefore, amount to expert opinion. Similarly, Interfor says that the calculations of costs in the document rely on information from another Ministry employee (Ken Chantler) and neither NRO Turner nor Mr. Chantler were called as witnesses at the hearing.

[71] With respect to all the Disputed Documents, the Appellant says that cross-examination of the reports' authors would have been essential to testing the opinions in these reports and assisting the Commission in assessing what weight, if any, could be assigned to them. Interfor asserts that the Disputed Documents must be excluded or, in the alternative, if the Economic Tables and Calculations is admitted (as it is the only one of the Disputed Documents parts of which may be considered simply calculation based as opposed to opinion) either in whole or in part, then that document ought to be given no weight.

### Respondent's Submissions

[72] The Respondent's position is that all three of the Disputed Documents should be admitted into evidence and be available to the Commission to be weighed at its discretion.

[73] With regard to the MacKillop Report and Wiles Information Note, the Respondent says that neither document amounts to expert evidence for the purposes of Rule 27. The Respondent argues that those documents were not solicited or obtained by the Province for the purpose of being introduced and relied upon as expert evidence in the appeal before the Commission, and the Province has made no reliance on either document in this appeal as if it were expert evidence.

[74] The Respondent points out that that the Disputed Documents were part of the investigation and included in the NRO Report provided to the DDM as part of the OTBH. The Respondent refers to section 84 of the *FRPA* and says that provision requires the Commission to consider the findings of the person who made the determination or decision. The Respondent says that once the Commission has considered the determination at issue, the task of the Commission is to confirm, vary, or rescind the determination or remit the matter for a reconsideration.

[75] The Respondent argues that the Disputed Documents were part of the record before the DDM and should be available for the Commission to review so that the Commission can carry out its statutory obligations in an informed manner. The Respondent says that it is desirable to conduct a review of a decision based on the full record that was before the decision maker, in this case the DDM.

[76] The Respondent further argues Interfor is seeking to impose an evidentiary burden on the Disputed Documents that Interfor itself ignored with respect to its own evidence and submissions. The Respondent points to the evidence of Mr. Palmer, who the Respondent says provided lengthy evidence on the appeal respecting his opinions on why each of the eight cutblocks at issue comprised a logical harvest unit, although Mr. Palmer's evidence was not qualified as expert evidence under Rule 27. The Respondent says that if the statements in the Wiles Information Note regarding logical harvest units are to be regarded as expert opinion, the same has to be said of Mr. Palmer's evidence.

[77] Turning to the Economic Tables and Calculations, the Respondent says the information contained in the report is relevant to the question of whether Interfor derived an economic benefit from the contravention, a matter that the Commission is obliged to consider should it find itself determining what amount of administrative penalty to impose. The Respondent says that the relevant information is not opinion evidence but involves numbers derived from Ministry databases containing information respecting timber volumes and appraised selling price. The timber harvested from OGMA's was based on the GIS incursion maps located in the NRO Report, and the resulting calculation of the estimated market value of the OGMA timber requires no interpretation or application of specialized expertise. Further, the use which the Respondent seeks to make of this information is not for cost recovery, where more precise economic calculations may be warranted; rather it is to show in a general way that Interfor harvested the cutblocks specifically because it was economically viable to do so and gained an economic benefit from the harvest of the OGMA timber.

### Third Party Submissions

[78] The Third Party says that the Commission should mark the MacKillop Report and the Wiles Information Note for identification only and not enter them into evidence. The Third Party argues that the Economic Tables and Calculations should be entered into evidence as part of the NRO Report.

[79] Although the Third Party says the Disputed Documents are hearsay, the Third Party asserts that should not determine whether the Disputed Documents should be admitted as evidence in the appeal. The Third Party says that, consistent with a well-established principle of administrative law and the *Administrative Tribunals Act*, SBC 2004, c. 45 (“ATA”), the Commission’s Practice and Procedure Manual indicates that hearsay evidence is admissible in appeals to the Commission.

[80] The Third Party argues that the MacKillop Report and Wiles Information Note should be marked for identification only since they contain substantial opinion evidence, do not meet the Commission’s standard for opinion evidence, and should not be relied upon as expert evidence. The Third Party acknowledges that these two documents were both provided to NRO Tyler, who was a witness at the hearing and identified the documents, and that they formed part of the record submitted to the DDM. During oral argument, the Third Party acknowledged that the MacKillop Report and the Wiles Information Note could be admitted into evidence for the purpose of establishing the record before the DDM, but not as expert evidence.

[81] The Third Party says that the Economic Benefit Tables and Calculations should be admitted into evidence. The Third Party says this document should be characterized as the factual basis for the Ministry’s submission at the OTBH on the economic benefit that Interfor derived from the contraventions, and largely consists of basic information and basic calculations, not expert opinion evidence. The Third Party argues that, in cases involving the economic benefit from the sale of timber, the Commission “often applies a basic calculation like revenue minus costs to determine the economic benefit.” In terms of the information from the GIS incursion maps used to make calculations, the Third Party says that such GIS information is not expert evidence and does not require a degree of expertise or call for an expert opinion.

[82] The Third Party notes that the notice of appeal in the present case does not specifically challenge the economic benefit analysis, making it difficult for the Respondent to have known that it would be in dispute. Therefore, the Respondent should be given some leeway to rely on a reasonable estimate of Interfor’s logging costs and log trucking costs. Further, regarding the costs used in making the calculations in the Economic Benefit Tables and Calculations, the Third Party says that Interfor could have provided evidence about its costs.

### Appellant’s Reply

[83] The Appellant emphasizes that the Disputed Documents contain opinion evidence which is objectionable and should not be relied upon.

[84] Regarding Mr. Palmer’s evidence, the Appellant says that Mr. Palmer was a fact witness who had direct involvement in the matters. Although Mr. Palmer did not recall the specific decisions he made or instructions he gave about the location of the cutblocks, his testimony was a matter of his personal experience. Further, Mr. Palmer was made

available for cross-examination and no objection was made to his testimony by the Respondent.

### Panel's Findings

[85] We begin by noting that the Appellant's objection to the Disputed Documents relates to both the allegation that they contain opinion evidence and that they cannot be relied on for a hearsay purpose. The Appellant has put much weight on the fact that the documents are hearsay and says they should be excluded from evidence. As noted by the Third Party, both the Commission's Practice and Procedure Manual and the *ATA* allow the Commission to admit hearsay evidence if it is considered relevant. The Manual states that relevance is the primary consideration for the Commission in deciding whether to admit evidence and it will consider reliability when weighing the evidence.

[86] In addition to being specifically permitted to accept hearsay evidence, the Commission can also admit the Disputed Documents for a purpose other than for the truth of their contents, such as to show what was collected during the investigation. Documents may be admissible into evidence in a proceeding for one purpose and not another. In *Adams Lake Indian Band v. Government of British Columbia, 2024 BCFAC 2* (CanLII), at para. 35, the Commission held that transcribed interviews could be entered into evidence to show what an individual "said in response to questions he was asked, but that the transcripts are not admissible for the truth of their contents".

[87] For each of the Disputed Documents, the Panel will consider admissibility, including the purpose for which the document ought to be put, and in particular whether any such documents should be accepted as expert evidence.

[88] As stated, the main test for admissibility of evidence in an appeal is relevance. The Panel finds that the MacKillop Report is relevant because it demonstrates what information was gathered as part of the investigation, and ought to be admitted into evidence for that purpose. However, the Panel finds that the report should not be relied on or accepted as expert opinion evidence. The Respondent served the MacKillop Report as an expert report, then later stated it would not be relying on the report as expert opinion evidence. In its submissions, the Respondent further indicates that it is not relying on the MacKillop Report as expert evidence. It is clear to the Panel that this document was not intended to be relied on as expert evidence and as such, the Panel does not rely on or accept the report as expert evidence for the opinions expressed within it.

[89] The Panel finds that, like the MacKillop Report, the Wiles Information Note is relevant to show what was gathered as part of the investigation and ought to be admitted into evidence for that purpose. Similarly, the Respondent has also indicated that it is not relying on the Wiles Information Note as expert evidence and we find the Wiles Information Note is not to be relied on or accepted as expert evidence for the opinions expressed within it.

[90] In addition to finding both the MacKillop Report and the Wiles Information Note are admissible to show what was gathered as part of the investigation, the Panel finds they are also admissible as part of the record of the proceeding before the DDM and to show what the DDM considered. As the Respondent has noted, section 84 of the *FRPA* references the Commission considering the findings of the person who made the determination, and the material which was before the DDM should be available to the Panel in carrying out that task. In the event this matter goes further, both the record before us and the record before the DDM should be available to a court examining the matter.

[91] With respect to the Economic Tables and Calculations, we find that the document is not expert evidence. In terms of the Appellant's argument about the use of GIS being the subject of expert opinion, we agree with the Third Party that the information from GIS maps is not expert evidence and does not require a degree of expertise or call for an expert opinion. There was other evidence presented at the hearing based on GIS maps without establishing a basis for it qualifying as expert opinion evidence. For example, in Interfor's written argument it notes that "for use in this appeal, Mr. Bekker asked one of Interfor's GIS technicians to prepare an overview map depicting the Selkirk Resource District and Interfor's Kootenay Woodlands tenures." The GIS map was used in the appeal and referred to in the written argument, without having complied with Rule 27 or calling the GIS technician as a witness. We further agree with the Third Party that the information in the Economic Tables and Calculations consists "of basic information and basic calculations, not expert opinion evidence," and that, in cases involving the economic benefit from the sale of timber, the Commission "often applies a basic calculation like revenue minus costs to determine the economic benefit." We find the basis for the calculations of the harvested area (using geographic information) and the value of timber (using statistical information) did not require any peculiar knowledge of an expert nature to assist the Panel in reaching its decision in this case.

[92] We find the Economic Tables and Calculations document is admissible regarding the information contained within it. The document indicates where the information came from, and the information in the document about items such as costs is information which Interfor would have access to through stumpage reports or its own internal sources on its costs. NRO Tyler participated with NRO Turner in respect of marshalling such information, and NRO Tyler was a witness and available to be cross examined regarding the information in the document. Any party was able to dispute the size of the area harvested and the associated value of timber and could call evidence to do so.

[93] The Economic Tables and Calculations document provides relevant information regarding estimates of matters such as the market value of timber harvested from OGMAs on the impugned cutblocks, and the estimated economic benefit of the harvesting after subtracting the estimated expended costs. We will consider the document in that regard, recognizing that the information is not precise and estimates are involved with items such as the estimated market value of the timber. To the extent such evidence is hearsay, we

admit it pursuant to section 40 of the ATA and the Commission's Practice and Procedure Manual (at p. 43) and, subject to weight, find that the document may be used relating to the estimates within it.

[94] To summarize our findings on the Disputed Documents, we find that the MacKillop Report and the Wiles Information Note are admissible to show the information gathered by NRO Tyler and the record before the DDM, but are not to be accepted as expert evidence or relied upon for the opinions set out in those documents. The Economic Tables and Calculations document is not expert evidence, is admissible, and may be used as evidence of the estimates within it.

## Issue 2: The Burden of Proof

### Appellant's Submissions

[95] The Appellant says that it is alleged to have contravened section 21(1) of the *FRPA* (as it then was). That section provides:

- 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.

[96] The Appellant submits that the burden of proving the alleged contraventions in this appeal rests with the Respondent. The Appellant submits that this includes the requirement that the Respondent prove that the exceptions relied upon by the Appellant do not apply. The Appellant says:

...the Province bears the burden – as the party asserting the contraventions - of establishing each of the following propositions on a balance of probabilities:

- (a) the harvesting carried out within the draft, non-binding OGMAs was not intended to facilitate logical harvest units; and
- (b) the harvested areas resulted in a deficit in the amount of old and mature forest remaining in the applicable BEC and landscape unit, and if so, no replacement was identified.

[97] The Appellant argues that Respondent has not met this burden in the present appeal.

### Respondent's Submissions

[98] The Respondent did not directly address the burden of proof issue in its written submissions. However, the Respondent argued that Interfor had failed to provide evidence about various matters at issue. In terms of documentation, the Respondent submitted that Interfor was unable to produce any documents at all in the appeal from

the time the cutblocks were planned that might provide any insight as to how Interfor, Timberland, or Interfor's qualified professionals understood or applied the strategies from FSP 30 that Interfor was obliged to carry out. Similarly, the Respondent argued that Interfor did not provide any evidence that it made any efforts to assess the biodiversity of the OGMA's before conducting their harvest, nor provide any evidence to the effect that the OGMA's harvest was operationally necessary apart from indicating the harvest was economically viable.

### Third Party's Submissions

[99] The Third Party did not make any submissions regarding the burden of proof.

### Panel's Findings

[100] Interfor argues that it is up to the Respondent to prove Interfor did not meet the exceptions for harvesting OGMA as set out in the Strategy. In particular, Interfor has asserted that its harvesting of OGMA's was intended to facilitate logical harvest units and argues that it is up to the Respondent to prove what Interfor asserts is not true.

[101] The Commission's Practice and Procedure Manual at page 54 addresses the burden of proof in an appeal as follows:

The general rule is that the burden or responsibility for proving a fact is on the person who asserts it. The fact is to be proved on a "balance of probabilities."

[102] Burden of proof was recently considered by the Commission in *Lone Prairie Livestock Association v. Government of British Columbia*, 2023 BCFAC 1 (CanLII) ("*Lone Prairie*") where the Commission stated at paragraphs 49 to 57:

[49] *Lone Prairie* refers me to *Smith v. Nevins*, [1925] S.C.R. 619, for the proposition that only affirmative assertions carry an onus and, in this case, *Lone Prairie*, if they were to bear the onus, would be in effect proving a negative, rather than an affirmative assertion.

[50] This affirmative assertion doctrine was endorsed by the British Columbia Court of Appeal in *Roberge v. Huberman*, 1999 BCCA 196, where the Court, at paragraph 51, referred to Odgers on High Court Pleading and Practice which states:

As a rule (but not invariably) it lies upon the party who has in his pleading maintained the affirmative of the issue; for a negative is in general incapable of proof. ... The affirmative is generally, but not necessarily, maintained by the party who first raises the issue. Thus, the onus lies, as a rule, on the plaintiff to establish every fact which he has asserted in the statement of claim, and on the defendant to

prove all facts which he has pleaded by way of confession and avoidance, such as fraud, performance, release, rescission, etc.

[51] I have also been referred to *Atco Wood Products Ltd. v. British Columbia*, 2010-FOR-001(a). That appeal concerned an allegation that the appellant had failed to construct a forest service road in conformity with the regulations. The Appellant led evidence to demonstrate they had met the requirements and, alternatively, that they exercised due diligence if they did not meet those requirements. The Commission said that the Appellant bore the onus of proof on these issues.

[52] Similarly, in *Apollo Forest Products Ltd. v. British Columbia*, 2016-FRP-002(a) an appellant was said to bear the onus of showing that they had provided accurate data for obtaining a cutting permit.

[53] Lone Prairie says these two decisions of the Commission are examples of the appellant bearing the onus on affirmative assertions or the onus to prove a defense like due diligence. They say those issues are very different from Lone Prairie having to prove they did not do something.

Lone Prairie also relies on *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 ABCA 46 ("*Freyberg*") where the Alberta Court of Appeal said at paragraph 75:

The Supreme Court has held that the burden of proof in civil cases is not immutable but is to be determined in reference to assumed knowledge and fairness: *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481; *Farrell v. Snell*, [1990] 2 S.C.R. 311 at 321. In *Snell* at para. 16, Sopinka J. discussed the allocation of proof and held that two principles were to be weighed. He stated:

In a civil case, the two broad principles are:

1. that the onus is on the party who asserts a proposition, usually the plaintiff.
2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

[54] The Court in *Freyberg* was considering a dispute involving an oil & gas lease and the issue of onus arose in the context of whether a particular well was economic and profitable to place into production. The respondent asserted the well was not economically viable and they had it within their knowledge to provide evidence on this issue. The Alberta Court of Appeal found the respondent had the onus of proof on this issue.

...

[57] I accept the observation in *Freyberg* that the question of onus is not immutable but rather must be applied according to the circumstances of each case. The practice manual places the onus on the party making assertions and I accept the guidance from the foregoing authorities that the onus properly attaches only to affirmative assertions.

[103] We agree with the statements of the Commission from *Lone Prairie* to the following effect:

- the question of onus is not immutable and must be applied according to the circumstances of each case;
- the Commission's Practice and Procedure Manual places the onus on the party making assertions and the onus properly attaches only to affirmative assertions;
- appellants have been found to bear the onus on affirmative assertions or the onus to prove a defense like due diligence; and
- a factor in determining the question of onus can be where the subject matter of the allegation lies particularly within the knowledge of one party.

[104] We turn now to an application of the above to the present appeal. We begin by noting that on matters of interpreting the wording of FSP 30, neither party bears a burden to prove its interpretation is correct. It is with respect to the application of the FSP that the burden of proof arises. The FSP provides that, subject to the exceptions in 1a & 1b, Interfor is not to harvest the draft OGMA's. The fact that such OGMA's were harvested by Interfor is not in dispute and conceded by Interfor. In terms of the exceptions under paragraph 1a & 1b, we find that the onus is on Interfor to establish such matters, not the Respondent. We say this for two reasons. First, it is Interfor that is affirmatively asserting that it meets the exceptions including, for example, that it modified boundaries "to facilitate logical harvest units." Second, the subject matter of Interfor's allegation that it harvested the OGMA's in order to facilitate a logical harvest unit lies particularly within the knowledge of Interfor.

[105] Thus, we find that the onus in this appeal is on Interfor to establish that it fell within the exceptions set out in paragraph 1a & 1b of the Strategy, and in particular that it modified OGMA boundaries to facilitate logical harvest units.

### Issue 3: The Interpretation of FSP 30

#### Appellant's Submissions

[106] Interfor submits that FSP 30 ought to be interpreted by applying the principles of statutory interpretation. Interfor cites *Western Forest Products Ltd. v. Government of British*

*Columbia*, 2011 BCFAC 4 (CanLII) ("*Western Forest Products*"), where the Commission dealt with policies found in the Coast Appraisal Manual. The Commission adopted the approach of the BC Court of Appeal in *MacMillan Bloedel Limited v. British Columbia (Forests)*, 1984 CanLII 734 (BCCA) and held that the Manual was "akin to subordinate legislation ... [and] must be interpreted in accordance with the rules of statutory interpretation." Interfor further relies on *Burns Lake Community Forest Ltd. v. Government of British Columbia*, 2022 BCFAC 2 (CanLII), where the Commission applied the principles of statutory interpretation when considering the language of a provision in an FSP.

[107] Interfor says the Supreme Court of Canada has stated that the modern principle of statutory interpretation is the "guiding rule of statutory interpretation." Interfor quotes the Supreme Court of Canada in *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 (CanLII), [2019] 2 SCR 535, at para. 54 as follows:

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[108] Interfor argues that, applying this interpretative approach, "nothing in the [Order], FSP 30, the *FRPA* or its regulations, or the support document expressly or implicitly limit the size, extent, or frequency of harvest incursions into non-legal OGMAs", as long as such incursions are to facilitate a logical harvest unit.

[109] Interfor says that Objective 2 of the Order is directed towards preserving biodiversity. It further says this is achieved by maintaining the requisite percent levels of old forest established by the Order. Where there was surplus OGMAs, nothing more was required, and where there was not a surplus, Interfor was required to identify replacement areas of similar size and attributes.

[110] Interfor says that OGMAs can be harvested under the wording of section 5.1.1.2 of FSP 30. Regarding the use of the term "modified" in the beginning portion of paragraph 1.a. of s. 5.1.1.2, Interfor says that word can be interpreted to simply mean "to alter" which does not contain any limitation regarding how much or how often. More significantly, Interfor says "modified" must be interpreted in the surrounding context. In that respect, Interfor argues that the Province could have required other language in FSP 30 before approving it if the Province wanted an express limit on incursions. For example, Interfor says that an FSP submitted by a different licensee (ATCO Wood Products) operating under the Order uses more restrictive language around modifying boundaries by including the words "only to [the] minimum necessary". Interfor says that the Commission should not overlook the intentional choices that different licensees make when drafting results or strategies in order to satisfy legislative requirements in a manner that suits their operational needs, and the additional flexibility under Interfor's FSP 30 compared to ATCO Wood Products' FSP.

[111] Interfor argues that the role of surplus under s. 5.1.1.2 supports its interpretation. Interfor says that the Supporting Document provides context for the interpretation of s. 5.1.1.2 since it was submitted as part of the approval package for consideration by the District Manager who approved FSP 30 at the first instance and is referred to in the FSP. Interfor submits that “reading s. 5.1.1.2 in its proper context means having regard to the relevant surrounding sections, including Part 5 which expressly directs readers to the Support[ing] Document as a source of ‘additional information on the results and strategies presented in this section’.”

[112] Interfor emphasizes the portion of the Supporting Document dealing with the amount of OGMA, which states that “since the draft OGMA’s exceed the requirements of the [Order] the licensee can harvest within the draft OGMA’s as long as the remaining OGMA areas meet or exceed the [Order] objectives”.

[113] Interfor addresses other interpretive arguments by the Respondent and the Respondent’s reliance on other guidance documents. Regarding the Old Growth Guide, Interfor says there is no evidence that Pope & Talbot or Interfor was provided, had access to, or used this Guide in drafting or subsequently interpreting FSP 30. Interfor further says that the recommendations in the Guide that OGMA incursions not to exceed 10 hectares or 10% of the OGMA is directed at legal OGMA’s, and there are no legal OGMA’s in the areas covered by the Order.

[114] Turning to the interpretation of the phrase “to facilitate a logical harvest unit”, Interfor cites dictionary definitions in support of its position. It says the “word ‘facilitate’ is defined in Black’s Law Dictionary as to ‘free from difficulty or impediment’ and in the Canadian Oxford Dictionary as to ‘make (in action, result, etc.) easier, less difficult, or more easily achieved’.”

[115] With regard to “logical harvest unit”, Interfor states that neither the Order nor FSP 30 defines the phrase, and that based on the evidence of its witnesses, it understands a “logical harvest unit” to be a cutblock “whose boundary is located subject to constraints such as slope, harvest equipment, topography, timber quality, economics, green up, wildlife features, forest health and cultural heritage values.” Interfor says that the evidence established that each of the blocks at issue constituted a logical harvest unit.

### Respondent’s Submissions

[116] The Respondent submits that the objective in the Old and Mature Forest section of the Order is the conservation of biodiversity within the Kootenay Boundary region. Further, the Respondent says the Strategy in FSP 30 is aimed at achieving the objective of conserving biodiversity and the Strategy in the FSP must be interpreted with that purpose in mind.

[117] The Respondent says that the FSP Strategy provides a general commitment that Interfor will not harvest the draft OGMA’s shown on the FDU map and the exceptions must be interpreted in light of that general commitment. The Respondent refers to the

exception for boundaries to be “modified” to “facilitate a logical harvest unit” and says this provides Interfor “with the ability to make a limited harvest intrusion into an OGMA if doing so would facilitate the harvest of a cutblock proposed within the vicinity of the OGMA”. In other words, where there is a planned harvest of non-OGMA forest bordering the OGMA, there is potential for there to be a limited incursion and the exception to apply.

[118] The Respondent relies on various arguments in support of its interpretation. The Respondent says the plain or ordinary meaning of the word “modify” connotes a partial or minor change. The Respondent relies on the following dictionary definitions:

- the Oxford Canadian Dictionary which defines “modify” as to “make partial or minor changes in; alter without radical transformation”; and
- Black’s Law Dictionary which defines “modify” as “to alter; to change in incidental or subordinate features”.

[119] The Respondent argues the strategy contemplates minor or incidental adjustments to OGMA boundaries so long as the boundary changes do not undermine the fundamental purpose of an OGMA, i.e., the conservation of biodiversity and the preservation of old forest.

[120] Regarding the wording around facilitating logical harvest units, the Respondent says this recognizes that, in some circumstances, it will be appropriate to allow a licensee to intrude into an OGMA if doing so facilitates the licensee’s harvest of timber outside the OGMA. The Respondent says the word “facilitate” must be given some meaning and it is not simply a matter of a cutblock being a logical harvest unit, which will invariably be the case otherwise Interfor would not harvest it. Rather, what was done must have been for the particular purpose of facilitating a harvest unit in the adjacent non-OGMA lands. For example, if the logical place to situate a landing for the non-OGMA harvest is within the OGMA, then a limited intrusion into the OGMA may be permitted to accommodate an operational need.

[121] The Respondent argues that there is a connection between modifying the boundaries of the OGMA and facilitating logical harvest units. The Respondent says, “[i]n this context, that the strategy allows for OGMA boundaries to be modified to facilitate a logical harvest unit should be readily understood as a limited accommodation of Interfor’s right to access timber supply outside of OGMA, rather than a justification for the unrestricted harvest of timber within an OGMA whenever a “logical harvest unit” can be laid out”.

[122] The Respondent relies on the Guide for Old Growth published by the Ministry in the months before the approval of FSP 30 and the Thompson Okanagan Old Growth Guide published more than a year after the approval of FSP 30. The Respondent says these documents indicate that up to 10 hectares or 10% of the area of an OGMA may be disturbed for limited purposes, which may include an incursion where the purpose is to establish a logical boundary for timber harvest operations. The Respondent says that the

intent behind the approval of FSP 30 was more in line with these Provincial old growth guidance documents, rather than to permit the holder of FSP 30 to harvest within OGMA's in a way that directly contravenes the provincial guidance in all material respects.

[123] The Respondent refers to the 2010 AAC Rationale issued by the Deputy Chief Forester on November 30, 2010. In that document, the draft OGMA's are identified as areas to be avoided and are excluded from the Timber Harvesting Land Base within TFL 23 for purposes of calculating the Allowable Annual Cut.

[124] The Respondent argues that industry practice supports its interpretation of FSP 30. The Respondent relies on a 2012 investigation done by the Forest Practices Board entitled "Conserving Old Growth Forests in BC" (the "2012 FPB Report"), which indicated that OGMA incursions were infrequent, small in size, supported by detailed rationale for the incursion, and related to matters such as the adjustment of OGMA boundaries to better suit operational conditions. The Respondent says that this approach to OGMA's aligns with provincial guidance and is contrary to the position asserted by Interfor.

### Third Party Submissions

[125] While the Third Party takes no position on whether Interfor achieved the results and carried out the strategies specified in FSP 30 for old and mature forests, the Third Party says that the Strategy lacks clarity. The Third Party says section 5.1.1.2 lacks clarity over the meaning of the word "modified" and the phrase "logical harvest unit", as well as what role the word "facilitate" has in the phrase "to facilitate logical harvest units" and when Interfor was required to identify a replacement area.

[126] The Third Party notes that the Commission is now in a difficult position to interpret the words of an FSP drafted in 2006 or earlier based on a range of interpretations. In that respect, the Third Party notes "the appeal record includes interpretations of the term 'logical harvest unit' from the Compliance & Enforcement branch, Interfor representatives, the district manager who issued the determination and experts retained by the parties in this appeal". The Third Party says that although "there is little evidence from around 2006 to help the Commission interpret section 5.1.1.2 of Interfor's FSP", the Supporting Document is one piece of evidence that should carry weight with the Commission. The Third Party asserts that the Supporting Document gave some indication of the licensee's plans in respect of harvesting in draft OGMA's and the role of excess OGMA.

### Appellant's Reply

[127] Interfor says the Province could have sought clarification of the Strategy in FSP 30 before approving it or extending it in 2011 and 2016, but did not do so. Interfor argues that the Province is attempting to read limitations into the FSP that are not present. With respect to the Respondent's argument that the Strategy contemplates OGMA boundaries being modified in the vicinity of the OGMA on a limited basis to facilitate a logical harvest unit, Interfor says such an interpretation is not supported by the Strategy and there is no

limitation on the harvesting as long as a surplus exists, or a replacement of similar size and attributes is identified.

[128] In interpreting the reference in the Strategy to complying with Objective 2 of the Order, Interfor acknowledges the Objective is aimed at conserving biodiversity. However, Interfor argues that the Objective is accomplished as long as the remaining amount of OGMA in the applicable Landscape Unit and BEC is sufficient to satisfy the old growth percent levels referred to in Objective 2.

[129] Interfor addresses the 2012 FPB Report relied upon by the Respondent. While the 2012 FPB Report discusses the general practices of licensees relating to OGMA incursions, Interfor argues that its ability to harvest within OGMA is determined by FSP 30 and Objective 2, not by the general practices of other licensees, who may be subject to entirely different legislative and regulatory requirements.

[130] Interfor further addresses other interpretive arguments by the Respondent and the Respondent's reliance on other guidance documents. Regarding the Guide for Old Growth, Interfor says there is no evidence that Pope & Talbot or Interfor was provided with, had access to, or used this Guide in drafting or subsequently interpreting FSP 30. Interfor further says that the recommendations in the Guide that OGMA incursions not exceed 10 hectares or 10% of the OGMA is directed at legal OGMA, and there are no legal OGMA in the areas covered by the Order.

[131] In interpreting FSP 30, Interfor says that the Old Growth Guide is irrelevant if Pope & Talbot did not know about it at the time. Interfor relies on the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633, and says that the surrounding circumstances which can be relied upon in the interpretive process are background facts which were within the knowledge or reasonably ought to have been within the knowledge of both parties on or before the relevant date.

### Panel's Findings

[132] The portion of FSP 30 at issue is the section of the Strategy dealing with old forest. In interpreting FSP 30 and the Strategy within it, we adopt the reasoning of *Western Forest Products* and find that we should apply the modern approach of statutory interpretation. We find such an approach to be appropriate following the case law cited by the Appellant, and further find that the Order, and the FSP approved pursuant to the Order, to be akin to subordinate legislation. In applying this approach to interpretation, we note that the words of the Strategy within the FSP are to be:

- Read in their entire context;
- Read in their grammatical and ordinary sense;
- Read harmoniously with the scheme and object of the FSP; and
- Read harmoniously with the intention behind approving the FSP.

[133] In the Strategy, Interfor undertakes to comply with the requirements in Objective 2 of the Order. Both the Appellant and the Respondent acknowledge that Objective 2 of the Order is directed at “conserving biodiversity”. Flowing from Objective 2, the object of the Strategy in the FSP is, therefore, to conserve biodiversity, and it is with that object in mind that the Strategy is to be read.

### The Harvesting of OGMAs is an Exception

[134] Having established that Objective 2 will be complied with, the FSP Strategy then specifies that consistency with this Objective will be ensured by not harvesting the draft OGMAs, subject to the exceptions in paragraphs 1a and 1b of the Strategy. The plain and ordinary meaning of the opening words “will not harvest the draft OGMAs” in section 1 of the Strategy establishes a general proposition that the harvesting of OGMAs by the holder of FSP 30 is prohibited. This is also consistent with the Supporting Document, which refers to the harvesting of OGMAs as exceptions – “Except as noted in the FSP, these OGMAs will not be harvested”.

[135] The language of FSP 30 declaring the general prohibition against harvesting the draft OGMAs is followed by wording enabling exceptions to this prohibition. The exceptions provide for how and why harvesting may be undertaken within OGMAs - both of which must be addressed and satisfied as prerequisites to OGMA harvesting. In answer to how harvesting can be undertaken in an OGMA, the Strategy provides that it can only be done through modification of the boundaries of draft OGMAs. In answer to why harvesting can be undertaken, the Strategy provides for three circumstances, with the specific circumstance relied upon by Interfor in the present appeal being “to facilitate logical harvest units.” In addition, the Strategy places a further constraint on the harvesting of draft OGMA - it must meet the percent requirements targeted for the applicable BEC Units as established under Objective 2 of the Order. If those percent requirements are not met, then an area of similar size and attributes must be identified as a replacement.

[136] Given the general proposition that the draft OGMAs will not be harvested, it is non-OGMAs which FSP 30 envisages will be harvested. The FSP then provides for the potential harvesting of OGMAs to be done ancillary to the non-OGMA harvesting if the exceptions are met. In other words, it would be contrary to the general proposition of not harvesting OGMAs to start with a plan to harvest OGMA. This is also consistent with the removal of OGMA from the timber harvesting land base contributing to the Allowable Annual Cut for TFL 23, which occurred in 2010 and prior to the harvesting of timber at issue under CP 239 and CP 707. We infer Interfor would have been aware of this removal before such harvesting occurred since the document involved was directed specifically to Interfor and this TFL.

### The Modification of OGMA Boundaries to Facilitate Logical Harvest Units

[137] This interpretation of FSP 30 is supported by the wording of other portions of the Strategy and reading the FSP as a whole. Item 1a of the Strategy refers to “Boundaries” of the draft OGMA’s being modified. The Oxford Advanced Learner’s Dictionary online defines “boundary” as “a real or imagined line that marks the limits or edges of something and separates it from other things or places; a dividing line” (emphasis added). The Britannica Dictionary online defines “boundary” as “something (such as a river, a fence, or an imaginary line) that shows where an area ends and another area begins” and “a point or limit that indicates where two things become different”. The Panel adopts these consistent definitions of a “boundary” for the purpose of these appeals, given that the term “boundaries” is not defined in FSP 30.

[138] The boundaries referred to in section 1 of the Strategy are the mapped lines or borders separating the OGMA’s and the non-OGMA lands. For example, if there was a cutblock entirely within the OGMA borders, the OGMA boundaries would remain the same and not need to be modified. Thus, the Strategy is dealing with the planned harvesting of non-OGMA lands in a cutblock adjacent to OGMA lands, and the exceptional harvesting of OGMA is in conjunction with that planned non-OGMA harvesting within the same cutblock. Where an exception is established, the OGMA boundary may be modified to allow for some OGMA harvesting in connection with the non-OGMA harvest.

[139] This interpretation that OGMA harvesting is prohibited, except when connected to planned non-OGMA harvesting, is further supported by the use of the word “modified” in dealing with this exception. The ordinary meaning of the word “modify” involves minor or slight changes, as argued by the Respondent and similarly noted by the DDM. This common understanding, or plain and ordinary meaning of “modify”, is evident from a review of the dictionary definitions. The Cambridge Dictionary online defines modify as “to change something such as a plan, opinion, law, or way of behaviour slightly” (emphasis added). The Oxford Advanced Learner’s Dictionary online defines modify as to “to change something slightly”. Vocabulary.com states: “to *modify* is to change or transform, but only slightly”. The concept of slight changes to boundaries is also consistent with the general non-harvesting of OGMA’s as discussed above.

[140] In our view, Pope & Talbot, Interfor, and the Province all knew or ought to have known that the common understanding of “modify” involved slight changes. Indeed, Interfor argues that we should not “overlook the intentional choices that different licensees make when drafting results or strategies in order to satisfy legislative requirements in a manner that suits their operational needs” – and Interfor, when assuming the rights and responsibilities under FSP 30, chose to accept the language of FSP 30 limiting its incursions on boundaries with language referring to “modifying” boundaries.

[141] With respect to Interfor’s argument that the Province could have required more restrictive language prior to approving FSP 30, it was Interfor’s predecessor, Pope &

Talbot, which drafted the FSP and chose the word “modified”. Interfor subsequently had FSP 30 renewed in 2011 with that language, before the harvesting at issue. If Interfor wished to be able to have the right to unlimited harvesting of OGMA as long as it met the percentage requirements, it could have sought changes to clearly say so when seeking renewal of its FSP. Instead, it accepted the restrictive language of FSP 30 as drafted which included referring to “modify” when describing what it could do regarding boundaries in item 1a of the Strategy.

[142] Likewise, the use of the phrase “to facilitate logical harvest units” envisages there being a harvest under consideration which would not be logical and having to make boundary modifications “to facilitate” a logical harvest unit. The wording does not state the harvest can take place “as long as” it is a logical unit, and the requirement is not simply that the eventual harvest unit be logical. Such a broad authority to harvest within OGMA would defeat the overall purpose of protecting them, since it would not make sense for Interfor to create and harvest an illogical unit. Rather, the wording envisages that a different harvest proposal was changed to facilitate, or make possible, it becoming a logical harvest unit. That prior harvest proposal must have been for a non-OGMA unit given the general prohibition on harvesting OGMA. Furthermore, because of this general prohibition, the modification cannot be to facilitate the harvesting of an OGMA unit, but must be to facilitate the harvesting of a non-OGMA unit. That is, in order to logically harvest a non-OGMA unit, some limited harvesting of the OGMA might be necessary. Similarly, if all that was being harvested was within OGMA, the boundaries of the OGMA would not need to be modified.

[143] To summarize, reading the general prohibition against harvesting draft OGMA in the opening portion of paragraph 1 of the Strategy, together with the use of the word “modified” in subparagraph 1a, we interpret the “how” of what is to occur as a harvest of non-OGMA with a minor or slight variation to include OGMA where an exception applies. Reading the phrase “to facilitate logical harvest units”, together with modifying OGMA boundaries and the general prohibition on OGMA harvesting, we interpret the “why” of what is to occur as including OGMA to the extent required to make an otherwise illogical harvest unit outside of OGMA logical.

### The Relevant Context

[144] In terms of context, the Appellant is correct that the Supporting Document provides some assistance in considering FSP 30. In that respect, we note two things about the Supporting Document. First, the Supporting Document itself supports the general prohibition against harvesting OGMA in providing that “Except as noted in the FSP, these OGMA will not be harvested by Pope and Talbot over the term of this FSP.” Second, the Supporting Document does not supercede the FSP and cannot effectively amend the FSP to remove item 1a from the Strategy. In that respect, the statement in the Supporting Document that “since the draft OGMA exceed the requirements in the [Order] the licensee can harvest within the draft OGMA as long as the remaining OGMA areas meet

or exceed the [Order] objectives”, is incorrect. Such an approach would make item 1a meaningless if the issue was only one of the remaining OGMA, and an interpretation of FSP 30 to that effect would nullify the effect of item 1a, which limits the reasons for harvesting within OGMA, above and beyond the limits imposed by the extent of the OGMA. In other words, both item 1a dealing with the reasons for harvesting OGMA, and item 1b dealing with the amount of OGMA, must be satisfied in order to harvest OGMA. As a result of item 1a, OGMA cannot be harvested if it does not meet one of the exceptions in item 1a, even if the remaining OGMA areas meet or exceed the minimum numbers in the Order objectives.

[145] With regard to the Ministry’s Guide for Old Growth released prior to the approval of FSP 30, it reflects the Ministry’s guidance about old growth. As such, the Ministry’s approval of FSP 30 should not be taken as permitting Interfor to harvest as much OGMA as it wanted provided the remaining OGMA areas were within the percentage requirements. First, as previously discussed, such an approach would be contrary to FSP 30 itself which limits the reasons for OGMA intrusions to the exceptions in item 1a of the Strategy, as well as the limits placed by the rest of FSP 30. In that respect, the Ministry’s Guide for Old Growth also provides guidance on restricting both the reasons that allow for the harvesting of OGMA as well as the amount of OGMA which can be harvested. Second, while FSP 30 did not limit the amount of intrusion to a specific number such as 10 hectares or 10% as referred to in the Guide for Old Growth, we have already found that it was not the Ministry’s intention in approving FSP 30 to permit unlimited harvesting with only reference to the remaining OGMA, including OGMA intrusions of 100% as argued by the Appellant.

[146] In terms of the context for the Ministry’s approval of FSP 30, the extension of the FSP occurred on June 9, 2011. Prior to that, in November 2010, the Deputy Chief Forester of the Ministry issued their 2010 AAC Rationale in relation to TFL 23, which is the area where the cutblocks at issue are located. In that Ministry document, the Deputy Chief Forester identified the draft OGMA as areas to be excluded from the Timber Harvesting Land Base. This indicates that the licensee should be looking to harvest the timber supply outside of the excluded area, and the draft OGMA were part of the excluded area. It was further noted in the 2010 AAC Rationale that excluding the draft OGMA from the Timber Harvesting Land Base was in accordance with operational practices.

[147] Given the statements in the 2010 AAC Rationale and the exclusion of the draft OGMA’s from the AAC, the extension of FSP 30 in June 2011 should not be taken as indicating an interpretation of the FSP on the part of the Ministry that permitted the extensive OGMA harvesting as argued for by the Appellant. Further, Interfor’s harvesting of the cutblocks in Cutting Permits 239 and 707 occurred after the 2010 AAC Rationale, and Interfor ought to have known from the 2010 AAC Rationale that the Ministry was not of the view that Interfor could harvest old growth as it claims to have the right to do in this appeal.

[148] As previously noted, the Strategy in FSP 30 limits the reasons for harvesting OGMA as well as setting the requirements for the amount of OGMA which must remain post-harvest. In that regard, the Appellant's argument that the stated objective was just to maintain the requisite percent levels of old forest established by the Order fails to capture the entire scope of the matter. First, as noted earlier, the stated objective of Objective 2 of the Order is "the conservation of biodiversity", and maintaining levels of OGMA was one means towards achieving that objective, in addition to limiting the reasons for harvesting OGMA. Second, to achieve the objective of conserving biodiversity, it is important to recognize that the amounts of old growth in the Order were set at levels greater than a certain number—that is the reason for the > symbol before all the numbers in the Order. So, for example, the Engleman Spruce – Subalpine Fir set at > 19 % for the Old Seral Stage in one of the tables means that more than 19% is to be preserved. This indicates the goal of the Order was to maintain more than minimum amounts of Old Growth.

[149] The goal of working towards more than the minimum amount of old growth is also reflected in the Supporting Document. The Supporting Document notes that the Order has percentages which are at one-third of the values in the Biodiversity Guidebook and a strategy is required to achieve the full requirement. In that regard, the Supporting Document indicates that in TFL 23 "all but one landscape unit are in deficit for old growth as defined by age" and "Pope and Talbot is working towards an old growth strategy for TFL 23 in accordance with the biodiversity guidebook."

[150] Put another way, the overall aim was to increase the percentages of old growth—not to limit the percentages to the minimums in the Order, which were already below the levels in the Biodiversity Guidebook. A tool in achieving that goal was to restrict the reasons for any such harvesting to exceptional circumstances. The exceptional nature of OGMA harvesting is further evidenced by the 2010 AAC Rationale, as previously mentioned, which removed the OGMA's from the Timber Harvesting Land Base.

### Conclusion on Interpretation

[151] Returning to the interpretation of the Strategy as a whole, the provisions in paragraph 1a are exceptions to the general prohibition against harvesting the OGMA's. This is based on a reading of the Strategy in its proper context and is consistent with the Supporting Document, the Ministry's Guide for Old Growth, and the 2010 AAC Rationale. Separate and apart from the above contextual analysis, it is a principle of interpretation that exceptions to a general prohibition should be read narrowly, not broadly. In the present appeal, application of this interpretative principle supports a narrow construction of the exceptions and is consistent with the general purpose of conserving biodiversity.

[152] From all of foregoing, we interpret the Strategy in FSP 30 to mandate a process of planning to harvest non-OGMA timber, then considering if the boundaries of the OGMA's need to be modified to facilitate a logical harvest unit. In other words, the plan is supposed to start with, and focus on, the harvest of non-OGMA timber, and not intrude

into an OGMA unless the exception applies. Where such an exception is established, the OGMA boundary may be modified to allow for some OGMA harvesting in connection with the non-OGMA harvest. Such a modification is to involve a minor or slight variation of the boundaries to include OGMA to the extent required, under this exception, to make an otherwise illogical harvest unit of non-OGMA timber logical.

[153] Before leaving this matter, we note one other item regarding the OGMAs in the present case. Although there was discussion in the evidence of the difference between legal OGMAs and the draft OGMAs in the Order, it was not disputed that Interfor was legally bound by the provisions relating to the draft OGMAs in FSP 30.

#### **Issue 4: Did Interfor contravene section 21(1) of the FRPA?**

##### Appellant's Submissions

[154] Interfor acknowledges that each of the cutblocks at issue involved the harvesting of OGMAs. However, Interfor argues that its harvesting of OGMAs in the impugned cutblocks complied with FSP 30 and therefore did not contravene the *FRPA*.

[155] Interfor says the evidence establishes each of the cutblocks at issue constituted a logical harvest unit. Interfor relies upon the evidence of Mr. Hanson who reviewed each of the cutblocks in question under CP 239 and CP 707 and opined that each was a logical harvest unit. Interfor also relies on the evidence of Mr. Palmer, who was involved in planning the cutblocks at issue. Regarding the evidence about what occurred regarding the planning, Interfor says there has been a significant passage of time since the planning process for CP 239 and argues that this has affected the availability of documentary evidence on this and other issues, as well as Mr. Palmer's recollection regarding specifics of the planning process for CP 239.

[156] With respect to documents, Interfor argues that it would have generally had its contractor, Timberland, gather site data. While Interfor would have kept this data for a number of years, it was unable to locate such material for this appeal. Interfor says that this Panel ought to infer that this data was destroyed at some point in the last decade.

[157] With respect to Mr. Palmer's testimony, Interfor acknowledges that Mr. Palmer did not have a specific recollection of the planning decisions he made with respect to CP 239, including the factors involved with determining that the cutblocks were logical harvest units. His evidence was based on his belief about the matters he would ordinarily have considered regarding location decisions. Interfor says that given the passage of time, it is not surprising that Mr. Palmer no longer recalls making specific decisions about the location of block boundaries, including whether they should include OGMAs.

[158] Interfor argues that, similar to his evidence regarding the CP 239 cutblocks, Mr. Palmer gave evidence about the factors he reasonably expected would have identified the site location and boundaries for the CP 707 cutblocks and why they were each logical

harvest units. For example, Mr. Palmer's testimony regarding Block 31 involved him reviewing the site plan map and identifying those factors which likely would have made this a logical harvest unit, as opposed to what he actually considered and the process he actually followed in deciding on the cutblock.

[159] Interfor says that Mr. Palmer's assessment of whether the blocks were logical harvest units ought to be preferred over that of Mr. Wahn (the Respondent's expert witness), since Mr. Palmer was involved in the planning of the cutblocks. Interfor also questions Mr. Wahn's opinion on the question of whether a harvest unit was logical since Mr. Wahn took into account the effect on OGMA's in considering that question, which Interfor described as "largely, if not entirely, self-fulfilling and in conflict with the terms of s. 5.1.1.2".

[160] Regarding the amount of OGMA and the question of surplus, Interfor says that compliance with FSP 30 is to be determined having regard to whether Interfor met the Objective in the Order of maintaining "the requisite percent levels of old forest established by the [Order]". Interfor asserts that for each of the cutblocks at issue, it maintained the percentages of old growth prescribed by the Order throughout the development and harvesting activities at issue. Interfor says that for seven of the eight cutblocks, its harvesting activities did not cause an OGMA deficit, and for cutblock 31 Interfor says "the prescribed targets were met indirectly by identifying and adding alternate old growth area to the OGMA spatial inventory."

[161] With respect to cutblock 31 and the issue of replacement, Interfor says that it identified replacement areas of similar size and attributes to address the OGMA incursion. Although the replacement did not occur until 2019 for the 2016 harvest of cutblock 31, Interfor says that FSP 30 does not contain any temporal requirement for identifying a suitable replacement OGMA area, but only that the replacement area must be identified.

### Respondent's Submissions

[162] The Respondent says that section 21(1) of the *FRPA* requires that the holder of an FSP ensure the strategies described in the plan are carried out. As such, the Respondent says that section 21(1) obliged Interfor to ensure that the Strategy was carried out with the planning and harvest of each of the cutblocks at issue.

[163] The Respondent says that under section 10(2) of the *FRPA*, a forest stewardship plan holder, before starting any timber harvesting on a cutblock, must prepare a site plan which identifies "how the intended results or strategies described in the forest stewardship plan apply to the site."

[164] The Respondent points to the Association of BC Forest Professionals Forest Legislation and Policy Reference Guide regarding the importance of the s. 10(2) requirement "that site plans show how the results in approved FSPs apply to the site." The Respondent also points to the 2010 Ministry's Administrative Guide for Forest Stewardship Plans which notes that "a site plan should not simply identify what results and strategies

apply to the site but must explain how the results and strategies in the FSP will be applied to the site”, and that “site plans have several operational uses, including providing information for inspections conducted by compliance and enforcement personnel.”

[165] With the foregoing in mind, the Respondent says that the site plans in the present appeal are deficient and fail to demonstrate how the Strategy applied to the sites or if the Strategy was carried out. The Respondent says the deficiencies in Interfor’s site plans include:

- i) the absence of any reference in the site plans to FSP 30 or the Strategy, let alone a description of how the elements of the Strategy apply to the cutblock or its harvest;
- ii) the absence of any rationale in the site plans indicating why Interfor determined it was permissible to harvest within the OGMA’s;
- iii) the absence of any information in the site plans that would allow a reader to understand the extent to which the cutblocks intruded into an OGMA;
- iv) that the site plans for Blocks 13 and 17 are inaccurate and misleading in stating that the blocks do not infringe on any OGMA;
- v) that the site plans for Blocks 15 and 16 appear also to be in error by stating there was an “OGMA surplus” where the evidence suggests no surplus existed at the block planning stage; and
- vi) that the site plan for Block 31 is inaccurate in stating that an “OGMA recruitment strategy allocated additional areas” when no replacement area had been identified at the time the site plan was prepared and would not be identified for a further three and a half years.

[166] The Respondent notes that Interfor was further unable to produce any documents at all in the appeal from the time the cutblocks were planned that might provide insight as to how Interfor, Timberland, or Interfor’s qualified professionals understood or applied the strategies from FSP 30 that Interfor was obliged to carry out.

[167] The Respondent argues that, in the above circumstances, the Commission should conclude that Interfor did not give the Strategy any meaningful consideration when planning and harvesting the cutblocks at issue and did not ensure that the Strategy was carried out in connection with the harvest of each of the cutblocks at issue.

[168] The Respondent says that, in addition to Interfor failing to demonstrate it had ensured the Strategy was carried out through its Site Plans or other documentation, Interfor’s OGMA incursions cannot be characterized as modifying a boundary to facilitate a logical harvest unit. As previously noted, the Respondent relies on the use of the term “modify” as contemplating minor or incidental adjustments to OGMA boundaries and says that in no circumstance did the Strategy allow for intrusions into OGMA’s having the size and impact of the OGMA intrusions at issue here.

[169] The Respondent says the Strategy allowed for OGMA boundaries to be modified to facilitate a logical harvest unit as a limited accommodation of Interfor's right to access the timber supply outside of OGMAs, rather than a justification for the unrestricted harvest of timber within an OGMA whenever a logical harvest unit can be laid out. The Respondent says that the harvest here went beyond what was contemplated in FSP 30.

[170] In addition to arguing that the changes to OGMA boundaries went beyond what was permitted, the Respondent says that Interfor's actions did not constitute facilitating logical harvest units. The Respondent relies on the expert opinion of Mr. Wahn that, given the cutblocks at issue involved significant OGMA intrusions in an area covered by the Order, consideration of whether the cutblocks at issue comprised logical harvest units should have included consideration of the effect of the proposed harvesting on the OGMA and whether the harvesting was consistent with the objectives of the Order.

[171] The Respondent argues that Interfor did not provide any evidence that it made any efforts to assess the biodiversity value of the OGMAs before conducting their harvest, nor any evidence to the effect that the OGMA harvest was operationally necessary apart from indicating the harvest was economically viable. The Respondent says the manner in which Interfor planned and harvested the cutblocks failed to involve any consideration of the impacts of the OGMA harvesting on the conservation of biodiversity. As such, the Respondent argues the Panel should not accept Interfor's argument that the harvesting was done to facilitate a "logical harvest unit" and was thus permissible under the Strategy.

[172] The Respondent further relies on Mr. Wahn's evidence about the effect of Interfor's harvest. The Respondent notes that Mr. Wahn conducted a site visit to each of the cutblocks at issue and found extensive damage across all the cutblocks, which is contrary to the objective of conserving biodiversity. This damage included "fragmentation of remaining OGMA, targeted harvest of highest biodiversity value trees in terms of age and productivity, elimination of forested elevational travel corridors for wildlife, increased edge effect, loss of interior forest, destruction of wildlife habitat, and the bisection of remaining OGMA and subsequent loss of connectivity."

[173] With respect to the amount of OGMA and whether there was surplus, the Respondent says there was not a surplus for all the blocks planned and harvested by Interfor. Although the site plans for cutblocks 15 and 16 indicated a surplus, the Respondent says the evidence of Interfor's expert Ms. Howard was that, at the time cutblocks 15 and 16 were in planning (i.e., 2011), the harvest of the blocks would have resulted in an OGMA deficit of 1 hectare.

[174] For cutblock 31, the Respondent notes the site plan specifically indicated there was not a surplus. Further, the Respondent says even though the site plan indicates that an "OGMA recruitment strategy allocated additional areas," the evidence on the appeal establishes that Interfor did not actually identify a replacement area for a further 3 ½ years, and did so only when the Ministry made inquiries as to the status of the replacement area. The Respondent argues that "it is very likely that if the Ministry had not

made any inquiry about Block 31 that no replacement area would have been identified”, and Interfor’s delayed identification of a replacement area “does not align with the process contemplated in the [Strategy].

[175] In addition to Interfor not replacing the OGMA in a timely manner, the Respondent says the area eventually identified was not of similar size and attributes as required by the Strategy. The Respondent relies on the opinion of Mr. Wahn that “the replacement area provided a net decrease in biodiversity values largely because it contained much younger and smaller stands than in [the] OGMA harvested.”

### Third Party Submissions

[176] As previously noted, the Third Party takes no position on the issue of whether Interfor achieved the results and carried out the Strategy. However, the Third Party makes a number of comments on the circumstances surrounding this issue and regarding the lack of clarity in FSP 30.

[177] The Third Party says that the lack of clarity in the FSP could have been addressed before the harvesting occurred when the FSP was being approved in 2006 and later extended in 2011. For example, the Third Party says the Ministry could have required clearer or more specific language be used in section 5.1.1.2 of FSP 30, or set specific limits on the area of draft OGMA that could be harvested, or issued orders with conditions respecting harvesting.

### Appellant’s Reply

[178] Interfor says that the Province could have alleged a contravention of section 10 of the *FRPA*, but has not done so. Interfor says that section 10 has separate penalties from section 21, which is the section alleged in this appeal and section 21 does not require compliance with section 10.

[179] Although the site plans did not contain information showing how Interfor met the requirements of FSP 30, Interfor says that the evidence it provided demonstrated that the cutblocks at issue were logical harvest units and there was a surplus of, or replacement of, OGMA relating to the cutblocks at issue.

[180] In terms of the size of the OGMA incursions, Interfor says that, unlike the limit of 10% mentioned in some guidance documents, the Strategy in FSP 30 does not contain limits on the OGMA harvest. As a result, Interfor says such limits do not exist and the amount of OGMA overlap in the cutblock is irrelevant. Interfor argues that, in determining compliance, the amount of OGMA is to be considered at the landscape level, and if there is a surplus OGMA in the landscape unit, the OGMA can be harvested.

### Panel's Findings

[181] We begin with s. 21(1) of the *FRPA*. This section requires the holder of an FSP to do two things:

- i. ensure that the intended results specified in the plan are achieved; and
- ii. ensure that the strategies described in the plan are carried out.

[182] In determining whether Interfor complied with s. 21(1) of the *FRPA*, we will focus on the second element noted above—whether Interfor ensured that the Strategy in FSP 30 was carried out. In this case, if through its evidence and submissions the Appellant cannot demonstrate it complied with the second part of section 21(1), that is enough to find that the Appellant contravened s. 21(1) of the *FRPA*. That is the focus of the following analysis.

### The Significance of the Site Plans

[183] A key consideration in the present case in determining whether the Strategy was carried out, and the exceptions have been met, are the CP 239 Site Plans and CP 707 Site Plans (collectively the “Site Plans”) for the cutblocks at issue. The importance of the Site Plans in demonstrating that the Strategy described in FSP 30 has been carried out is evident from:

- i) the Supporting Document;
- ii) the evidence of Mr. Palmer; and
- iii) the legal framework.

[184] The Supporting Document specifically refers to the role of site plans. It states:

Site plans identify approximate locations of cutblocks and roads and identify how intended results or strategies described in the FSP apply to the site (emphasis added).

[185] The Supporting Document provides context for how FSP 30 is to be applied. It is clear the site plans are to identify how the strategies in FSP 30 apply to the site. However, the Site Plans in the present appeal make no mention of how the boundaries are being modified, or how logical harvest units are being facilitated, in accordance with paragraph 1a of the Strategy.

[186] The evidence of Mr. Palmer indicates he knew what was required in respect of Site Plans in order to comply with the FSP. In particular, under cross-examination Mr. Palmer indicated that he:

- understood that an FSP must specify results and strategies that are consistent with government-set legal objectives, and that licensees were obliged to ensure that the strategies in the FSP were carried out;

- understood that site plans were connected to the FSP and are to show how the results and strategies in approved FSPs apply to associated sites;
- understood there were *FRPA* requirements about what goes into a site plan;
- saw the 2010 Administrative Guide relating to FSPs in 2010;
- agreed with the statement in the 2010 Administrative Guide that site plans are to show how the results and strategies in the FSP apply to the site;
- agreed that site plans are a good tool to demonstrate due diligence on the part of the licensee;
- agreed that a site plan should have a clear link to the obligations set out in the approved FSP, as well as containing any additional information to assist the licensees implement their results, strategies and measures;
- understood that site plans were to be available for inspection by compliance and enforcement personnel;
- agreed that site plans needed to be consistent with their associated FSP;
- agreed with the statements in the 2010 Administrative Guide that site plans are to:

Identify how the intended results or strategies described in the forest stewardship plan apply to the site. This goes beyond ‘what’ results, strategies and measures apply. The site plan must explain ‘how’ the results, strategies and measures listed in the FSP will be applied to the site; and,

- was aware that the Ministry expected forest professionals to prepare site plans consistent with the requirements set out above.

[187] With respect to the legal framework, Interfor is responsible for knowing and meeting its legal requirements. Although a contravention of section 10 of the *FRPA* has not been alleged, section 10 is part of the legal framework that Interfor is responsible for knowing and complying with. Section 10(2) (b) and (c) specifically provide:

**10** (2) A site plan must

...

- (a) be consistent with the forest stewardship plan, this Act and the regulations, and
- (b) **identify how the intended results or strategies described in the forest stewardship plan apply to the site** (emphasis added).

### The Site Plans in this Appeal

[188] As previously noted, the Site Plans in the present case do not identify how the Strategy applies to the impugned cutblocks. Their configuration indicates that the harvesting of OGMA was a goal of Interfor, rather than confining such harvesting to exceptional circumstances, as required by FSP 30.

[189] The Panel finds that Interfor did not go through the process contemplated in FSP 30 of looking to first harvest non-OGMA, then considering if boundary modifications were needed to encroach into OGMA to facilitate a logical harvest unit. The Site Plans indicate Interfor's process relating to old growth was as follows.

[190] The first question on the Site Plan forms required that Interfor personnel identify if a cutblock location was outside of "proposed" OGMA. The reference to "proposed" OGMA is not explained; however, FSP 30 provided for the draft OGMA not to be harvested unless exceptional circumstances were present, and the draft OGMA in TFL 23 were removed from the Timber Harvesting Land Base in the 2010 Allowable Annual Cut determination, all of which indicates they were more than "proposed" OGMA. Regarding the cutblock location, the Site Plan forms do not raise modifying an OGMA boundary in respect of the location, or how that was to be done if the location was not completely outside of OGMA.

[191] The second question on the Site Plan forms had Interfor personnel analyze whether there was surplus OGMA to allow for harvesting. There is no mention, however, of the items in paragraph 1a of the Strategy, such as facilitating a logical harvest unit, nor the factors to be considered in respect of such matters. Even on the question of the remaining OGMA, there is no explanation of the result—i.e., the Site Plans do not say what the surplus was if one was indicated, or how that conclusion was reached.

[192] The third aspect of this process required Interfor personnel to provide a rationale for not harvesting any surplus OGMA which had been identified, as opposed to requiring a rationale for harvesting the OGMA, as envisaged by the Strategy in FSP 30. Thus, rather than preserving OGMA, Interfor's site plan exercise promoted the harvesting of OGMA by requiring the person preparing the Site Plan to justify not harvesting OGMA.

[193] Our finding that Interfor did not follow the process contemplated in FSP 30 is highlighted by cutblock 28. Approximately 100% of the harvested area in cutblock 28 was within an OGMA. This indicates that Interfor's focus was not on a non-OGMA harvest, and that Interfor did not recognize that harvesting within an OGMA was to be a limited exception to the general prohibition against harvesting OGMA.

[194] With regard to Interfor's argument that harvesting OGMA facilitated or made a logical harvest unit easier to achieve, the Site Plans do not identify a potential unit without OGMA or explain why harvesting the OGMA made it easier than the proposed harvest unit without OGMA. As previously noted, there was no mention of logical harvest units at all.

[195] The lack of any mention in the Site Plans of modifying boundaries or facilitating logical harvest units in relation to the harvesting of OGMA and FSP 30, supports our findings that Interfor did not consider such matters when planning and harvesting the cutblocks at issue and did not ensure the Strategy was carried out. In that respect, we make the following additional findings.

[196] First, we find the Site Plans created by Interfor to address the Strategy failed to ask the right questions or obtain the necessary information for ensuring the Strategy was being carried out. As previously noted, there was nothing in the Site Plans about modifying boundaries or facilitating logical harvest units. Interfor's failure to create site plans with questions which ensured the necessary information for carrying out the Strategy was obtained contributed to Interfor's failure to ensure that the Strategy was being carried out.

[197] Second, the questions which the Site Plans did ask were focused on harvesting OGMA and required an explanation for not harvesting OGMA, as opposed to an explanation or rationale to harvest OGMA. This is contrary to the exceptional nature of OGMA harvesting and the intention behind the Strategy of preserving OGMA.

[198] Third, Interfor knew or ought to have known that it was necessary to explain in the Site Plans how the Strategy applied to the cutblocks involved. As previously noted, this was evident from the Supporting Document, the evidence of Mr. Palmer, and the legal framework under the *FRPA*. In terms of the *FRPA* requirement to identify how the Strategy applied to the site, each page of the Site Plans for cutblocks 13, 15, 16 and 17 was headed "FRPA Site Plan", which ought to have reminded Interfor of this requirement. The Site Plans for cutblocks 27, 28, 29 and 31 all indicate they are an "FRPA Site Plan" on the cover sheet. Each has a section under "Results and Strategies" headed "Forest Stewardship Plan" (which has been left blank in each of them), and each has a map entitled "FRPA Site Plan"—all of which ought to have alerted Interfor that the *FRPA* established the requirements for FSPs, and these needed to be met when developing a site plan.

[199] Fourth, none of the maps attached to the Site Plans for the impugned cutblocks identified OGMA, nor did these maps indicate the relationship of the cutblock to a harvest unit without encroaching into OGMA, nor did they support an explanation of how a logical harvest unit was being facilitated through the inclusion of OGMA.

[200] In addition to the above, there are specific issues raised by the Site Plans for cutblocks 13 and 17. These Site Plans were incorrect in asserting that OGMA was not involved and indicate that Interfor did not even consider the question of surplus as required by the FSP. These Site Plans show that:

- Interfor proceeded on the basis that these cutblocks were outside of proposed OGMA – which was incorrect, as the percentage of the cutblock located within OGMA was approximately 94% in cutblock 17 and approximately 50% in cutblock 13;

- the question of whether the OGMA analysis indicated a surplus for harvesting was indicated as “not applicable”; and
- the item requiring a rationale for not harvesting the OGMA was also “not applicable”.

[201] We infer that, since Interfor believed OGMA was not involved, it did not conduct an OGMA analysis for surplus in respect of cutblocks 13 and 17. By not conducting an analysis of the amount of OGMA prior to harvesting, Interfor failed to ensure the Strategy was carried out and the percentage requirements of the Order were being met under paragraph 1b of the Strategy for cutblocks 13 and 17, which was contrary to section 21 of the *FRPA*.

[202] Based on all of the foregoing, we find the Site Plans demonstrate a failure by Interfor to carry out the Strategy in FSP 30 for the impugned cutblocks. The Site Plans demonstrate a failure by Interfor to consider subparagraph 1(a)(ii) of the Strategy and a failure to ensure that OGMA boundaries were being modified to facilitate logical harvest units in the present case. The Site Plans further evidence a failure to recognize the exceptional nature of OGMA harvesting, indicate that Interfor’s focus was on harvesting OGMA which it considered surplus rather than ensuring the reason for harvesting OGMA met the Strategy requirements, and show that the surplus question was not even considered with respect to cutblocks 13 and 17.

### The Lack of Documentation

[203] Although Interfor argues that it could demonstrate compliance without having supporting explanations in its Site Plans, the evidence did not reveal documentation adequately demonstrating that Interfor had considered the location of OGMA boundaries or their modification in order to facilitate logical harvest units in accordance with FSP 30. Interfor has asserted that its contractor would have collected field data and given documentation to Interfor about cutblock locations and boundaries for CP 239. Interfor has also argued that the significant passage of time has affected its ability to produce documentary evidence regarding the decisions it made about cutblock location and boundaries in terms of carrying out the Strategy, and the Panel ought to infer that such documentation and data has been destroyed. We do not accept this argument and find it is more probable, based on the evidence which was provided to the Panel, that Interfor did not prepare documentation explaining how a cutblock was designed in order to carry out the Strategy. Further, we find that Interfor knew or ought to have known to preserve any documents which may have existed. We say this for several reasons.

[204] First, the Site Plans for the cutblocks at issue were preserved and produced, and Interfor did not offer any persuasive explanation for why those documents would have been preserved and other documents that recorded Interfor’s decision-making with respect to those cutblocks would not have been.

[205] Second, regarding Interfor's contractor, the site plan maps for CP 640 produced by Timberland in 2012 were put into evidence and there was no satisfactory explanation provided for why these documents were available, but other such documentation from the contractor for the same time period was unavailable.

[206] Third, Interfor's Statement of Points regarding the planning and harvesting of CP 239 states that, although the incursions into the OGMA were for the purpose of facilitating logical harvest units, "no written rationale were required and none were prepared at the time for any of the impugned CP 239 blocks." While the statement that no written rationale was required fails to take into account the requirement of section 10 of the *FRPA* that site plans identify how the FSP strategy applies to the site, the statement that no written rationales were prepared supports the finding that there was no documentation prepared dealing with facilitating logical harvest units. We further infer that Interfor's belief about not needing a written rationale also applied to the CP 707 cutblocks as well as the CP 239 cutblocks. The evidence did not demonstrate that Interfor's approach to documenting its rationale, in terms of carrying out the Strategy, was substantively different between the CP 707 and CP 239 cutblocks and we consider it most likely that, similar to the CP 239 cutblocks, no written rationale would have been prepared for the impugned CP 707 cutblocks to show that the incursions into OGMA were for the purpose of facilitating logical harvest units.

[207] Fourth, in July 2017, Interfor was notified that a review was being conducted regarding "various aspects of OGMA and biodiversity management" for the Selkirk Forest District. This was less than a year after the harvesting of CP 707 which occurred between August 7, 2016 and October 7, 2016, and Interfor was effectively on notice that any documentation about OGMA matters would need to be preserved. There was, however, a lack of adequate documentation produced for CP 707 setting out Interfor's rationale for cutblock locations and boundaries in relation to OGMA for these CP 707 cutblocks. Given Interfor's statement that it typically keeps such data for a number of years, such documentation ought to have been available and kept, since this was less than a year after the harvest. From the lack of such documentation about modifying boundaries and facilitating logical harvest units, we find it most likely that such documentation was not prepared for the CP 707 cutblocks. Likewise, we conclude that such documentation was not prepared for the cutblocks in CP 239, as the evidence did not demonstrate that Interfor's approach to document preparation and retention was different for the CP 239 cutblocks.

[208] Fifth, the planning for the cutblocks at issue was not completed until September 2012 for the CP 239 cutblocks and January 2016 for the CP 707 cutblocks. That was well after the November 2010 AAC Rationale noting the removal of OGMA from the Timber Harvesting Land Base. In the circumstances, Interfor knew or ought to have known of the importance of preserving any documentation dealing with how its harvesting of OGMA met the requirements of FSP 30, if it had such documentation. This is particularly the case in terms of having any such documentation available for inspection by compliance and

enforcement personnel and to assist Interfor personnel in recalling how the cutblock decisions they made involved modifying OGMA boundaries and facilitating logical harvest units.

[209] The failure of Interfor to have adequate documentation dealing specifically with the modification of OGMA boundaries and the facilitation of logical harvest units, contributed to the failure to ensure that the Strategy was being carried out. In our view, part of ensuring that a strategy is being carried out is ensuring that there are documents which adequately describe the carrying out of the strategy for use by those tasked with carrying it out. Interfor's documents provided to the Panel did not do so.

### The Evidence on Logical Harvest Units

[210] With respect to Interfor's evidence that the blocks were logical harvest units, we find such evidence did not demonstrate that Interfor went through the process contemplated in FSP 30 of looking to harvest in the non-OGMA lands, then considering whether the boundaries of the OGMA needed to be modified to facilitate a logical harvest unit. The evidence did not establish that Interfor proceeded in this fashion, nor did the evidence establish that such an approach and such matters were typically considered by Interfor when dealing with the OGMA lands. Thus, even if the result was that the cutblocks ended up being logical harvest units, Interfor did not establish that it ensured the Strategy was carried out pursuant to section 21(1) of the *FRPA* to that end. In this respect, Interfor did not establish that OGMA boundaries were only changed slightly, that OGMA was included in the harvest unit for the purpose of making an otherwise illogical harvest unit without OGMA logical, or that the amount of OGMA which was included was to the extent required to make an otherwise illogical harvest unit without OGMA logical.

[211] In terms of Mr. Hanson's evidence, it was to the effect of explaining why, looking at the matter with the benefit of hindsight, the cutblocks can be seen as logical harvest units. It did not establish what Interfor actually considered regarding the cutblocks at issue, or the process Interfor went through in designing the cutblocks, or that Interfor carried out the Strategy. In other words, while Mr. Hanson's evidence was to the effect that the cutblocks ended up being logical harvest units in his opinion, it did not establish that the Strategy was carried out to achieve that result.

[212] Mr. Palmer's evidence was similar in that respect. He explained why, looking at the matter now, the cutblocks can be seen as logical harvest units; however, Mr. Palmer did not have a specific recollection of the planning decisions regarding the cutblocks at issue, including the factors involved with determining that the cutblocks were logical harvest units, and his evidence did not support that Interfor carried out the Strategy. While Mr. Palmer's evidence included his belief about the type of matters he would ordinarily have considered regarding location decisions, it did not demonstrate Interfor ordinarily went through the process contemplated in FSP 30 of looking to harvest non-OGMA timber, then

considering if the boundaries of the draft OGMA needed to be modified to facilitate a logical harvest unit.

### OGMA Replacement (Cutblock 31)

[213] The last remaining issue in this section involves cutblock 31 and the OGMA replacement. The Site Plan for cutblock 31 states that an “OGMA recruitment strategy allocated additional areas” for the deficit being created by the OGMA harvesting. That Site Plan is dated January 18, 2016; however, Mr. Palmer’s evidence was that he did not identify a replacement until February 2019 – more than 3 years later. No satisfactory explanation was provided by Interfor for not identifying the replacement earlier. In particular, in March 2017, Interfor inputted the harvest information for CP 707 into the Ministry’s system, including the harvest boundary information for cutblock 31, and there was no satisfactory explanation about why the OGMA replacement did not take place at that time.

[214] The Panel finds that, in addition to the matters already mentioned, Interfor did not ensure the Strategy was carried out for cutblock 31 because it failed to identify a replacement for the cutblock 31 OGMA deficit in a timely manner. In that respect, the Panel does not accept Interfor’s argument that there was no temporal requirement on when a replacement was to occur. While the Strategy does not identify a specific deadline for replacement, this does not mean that the replacement date can be any date Interfor chooses in the future. On that basis, the licensee would never be in violation as it could always say it had not done the replacement yet and would do so some time in the future. Indeed, such an interpretation would mean that Interfor would not be violation today if the replacement exercise had still not been done. Rather, we find that such a replacement is to be identified in the planning for the cutblock and implemented as soon as reasonably practicable. The early identification of replacement is supported by Ms. Howard’s evidence that deficits need to be dealt with early on and in the planning stage. Further, the evidence indicated that changes in surplus/deficit calculations could vary from year to year such that updated information on the available OGMA was important to ensure the Strategy was being carried out. For example, at the time planning commenced for cutblock 31 in 2013, a surplus was indicated in the applicable BEC unit, but by the time the CP 707 application was submitted for approval in 2015, there was a deficit.

[215] With respect to whether the cutblock 31 replacement was of similar size and attributes as required under paragraph 1b of the Strategy, the Panel accepts the evidence of Mr. Wahn that “the replacement area does not provide similar attributes” compared with the portion of OGMA harvested and to be replaced. Mr. Wahn’s opinion is based on site visits and sampling undertaken in the field and his opinion is that “the identified replacement area provides a net decrease in old growth diversity value as the replacement areas do not resemble the incursion area and contain fewer & lower quality old growth attributes.” For example, Mr. Wahn identifies that the trees sampled in the northern OGMA replacement area “are much younger and smaller, and the stand contains relatively few old growth attributes”, while the cutblock 31 OGMA incursion area

“contained very large old growth forest on one of the most productive sites in the OGMA and provided exceptional biodiversity value.” Thus, in addition to Interfor’s failure to identify a replacement for the cutblock 31 deficit in a timely manner, we find that Interfor failed to carry out the Strategy in FSP 30, contrary to section 21(1) of the *FRPA*, by failing to identify a replacement area of similar attributes for cutblock 31.

### Conclusion on Whether the Strategy was Carried Out

[216] The evidence and argument put forward by Interfor regarding its actions in respect of the Strategy were based on an interpretation of the Strategy which we have found to have been incorrect. For example, Interfor did not assert that its harvesting of OGMAs in the impugned cutblocks involved minor or slight variations to the boundaries between the OGMAs and non-OGMA lands, but that the Strategy should not be interpreted in line with such a requirement. Having found that Interfor’s interpretation of the Strategy should not be accepted, we find the evidence and argument of Interfor based on that interpretation did not establish that it ensured the Strategy was carried out as required by section 21(1) of the *FRPA*.

[217] Section 21(1) of the *FRPA* places the onus on the holder of an FSP to ensure the strategies described in the plan are carried out. From the lack of sufficient evidence about modifying boundaries or facilitating logical harvest units in line with the Strategy, including the lack of such information in the Site Plans, we find that Interfor did not plan its harvest of the impugned cutblocks in accordance with the process in the Strategy. In addition, the evidence of Mr. Palmer and Mr. Hanson did not demonstrate Interfor went through the process contemplated in FSP 30 of looking to harvest non-OGMA timber, then considering if the boundaries of the draft OGMAs needed to be modified to facilitate a logical harvest unit.

[218] Specifically, we find Interfor did not act in a manner consistent with the limitations on how and why OGMA harvesting could occur under subparagraph 1a of the Strategy. Based on the OGMA incursion maps, the Site Plan maps, and the evidence of Mr. Wahn, the Panel finds that the planning and harvesting of OGMA for all eight of the impugned cutblocks went beyond what we consider to be modifications to the boundaries between non-OGMA lands and the OGMAs, as previously described, and that more OGMA was harvested than allowed for under the exceptions in the Strategy. All of the impugned cutblocks involved a substantial realignment of the OGMA boundaries, with a large percentage of the impugned cutblocks consisting of OGMA, and a failure to take into account the amount of OGMA needed to make an otherwise illogical non-OGMA unit logical. Further, Interfor did not replace the OGMA harvested on cutblock 31 as required. Thus, Interfor has not demonstrated that it ensured the Strategy was carried out when planning and harvesting the impugned cutblocks, contrary to section 21(1) of the *FRPA*.

**Issue 5: In the event there was such a contravention or contraventions, what, if any, is the appropriate amount of an administrative penalty?**

Appellant's Submissions

[219] Interfor raises three main arguments regarding penalty, which are summarized in turn:

1. the Commission should exercise its discretion to order no penalty;
2. the number of contraventions should be reduced from the number (8) found by the DDM; and
3. the amount of any penalty should be reduced.

**1. Whether there should be a penalty**

[220] Interfor relies on section 71(2)(a)(ii) of the *FRPA*, which allows the Commission to refrain from levying an administrative penalty, to say the Commission should exercise its discretion to decline to impose any penalty. Interfor argues there are two reasons for not imposing a penalty:

- i) the prejudice Interfor says it has suffered as a result of the Province's delay in investigating and prosecuting this matter; and
- ii) the underlying purposes of administrative penalties would not be served by the imposition of a penalty.

[221] Interfor refers to a delay by the Ministry between the time that it became aware of the OGMA incursions and when it delivered the investigation binder to Interfor alleging the contraventions at issue here. Interfor says that the dates for discovery of the alleged contraventions are September 8, 2018 for CP 239, and June 11, 2018 for CP 707. Although Mr. Wiles made a complaint in November 2018, "no material steps were taken in the investigation until February 2020" and the OTBH binder was not delivered to Interfor until March 2021.

[222] Interfor alleges that it has been caused significant prejudice as a result of this delay. Interfor says its witnesses were tasked with recalling events and attempting to locate records dating back many years. As previously noted, Interfor says that "Mr. Palmer no longer has a recollection of the specific steps taken or judgments made in determining whether each Block was a logical harvest unit." Further, given the evidence that Interfor would typically keep documents from its contractors for several years, Interfor argues that, as a result of the delay, it was unable to locate documents and it is reasonable to infer that such documents existed at one point, but have since been destroyed. Interfor argues that the prejudice suffered by it is self-evident and, together with consideration of

the factors in section 71(5), weighs heavily in favour of the Commission exercising its discretion to decline a penalty here.

[223] With respect to the purposes of administrative penalties, Interfor quotes from a FPB publication that there are three purposes for administrative penalties under Provincial forestry legislation such as the *FRPA*: “to compensate the government for loss; to remove any economic benefit a person may gain through the contravention; and to discourage the person from contravening the same rule in the future”.

[224] Interfor says that none of these underlying purposes for imposing an administrative penalty will be served by the imposition of a penalty in this case. Interfor asserts that there is no evidence of any loss to the Crown regarding the contraventions, there has been no economic benefit to Interfor from harvesting the blocks that it would not have otherwise been entitled to, and there is no need for deterrence given the change in practices around harvesting non-legal OGMAs.

## 2. The number of contraventions

[225] Interfor acknowledges that the number of contraventions will depend on the conduct that gives rise to the finding, and if any of the cutblocks are not found to be logical harvest units and a contravention is found on that basis, then the number of cutblocks which are not logical harvest units will reasonably determine the number of contraventions.

[226] Having said that, Interfor submits that no more than five contraventions in total can be found to have occurred because there are only five BEC subzone/landscape unit combinations at issue and, therefore, no more than five contraventions can be found to have occurred. Furthermore, on the evidence, Interfor says no more than one contravention should be found to have occurred because “the only alleged contravention that resulted in an OGMA deficit at any point in time on the evidence is Block 31, CP 707”, although Interfor also submits that it subsequently “identified sufficient suitable replacement area to address that deficit in accordance with the requirements of FSP 30.”

## 3. The amount of any penalty

[227] A preliminary matter has arisen relating to section 71(5) of the *FRPA* and whether it contains a complete list of the factors to be considered, or whether additional items can be considered. Interfor argues that delay can be considered as a factor in addition to the items listed in section 71(5) regarding the amount of any penalty, as well as whether there should be a penalty at all. In this respect, Interfor argues that the amount of any penalty should take into account the prejudice and resulting unfairness Interfor says it has suffered because of the delay in this case.

[228] Regarding the section 71(5) factors, Interfor argues that an assessment of the prescribed factors in subsection 71(5) of the *FRPA* ought to yield a penalty on the low end of the permitted range. Interfor notes that the maximum penalty for a contravention of section 21(1) of the *FRPA* is \$50,000 as set out in section 12(c) of the Regulation and the DDM imposed a \$45,000 penalty for each of the eight contraventions. Interfor argues that the evidence does not support “the need for such an onerous penalty” and submits a penalty of no more than \$5,000 per contravention is appropriate in these circumstances.

[229] With respect to the individual factors in section 71(5), Interfor makes several submissions.

[230] According to Interfor, there are no previous contraventions of a similar nature. Interfor says that the previous contravention of section 21(1) by Interfor, relied upon by the DDM, was not similar as it did not relate to objectives in respect of old growth and/or incursions into OGMA as in this case.

[231] In terms of the gravity and magnitude of the contraventions, Interfor acknowledges and agrees that old growth plays a significant role in BC’s forests in terms of biodiversity, forest health, wildlife habitat, and numerous other social values. However, Interfor says that this factor focuses on the gravity and magnitude of the contravention at issue, and “should not be conflated with the value being preserved or public attitudes towards the value being preserved.” Interfor says the gravity and magnitude of the contraventions here were low, in particular since there was an existence of surplus OGMA for most of the BEC subzones present in the cutblocks at issue.

[232] Turning to whether the contraventions were repeated or continuous, Interfor says the contraventions are not properly considered as continuous or repeated. Interfor argues that a “continuous” contravention connotes an ongoing or sustained failure to comply, and a “repeated” contravention connotes frequent or persistent non-compliance. Interfor asserts that the planning of the two cutting permits occurred approximately four years apart and were separate and removed from each other.

[233] Interfor argues that the contraventions were not deliberate, and says the DDM found as much at the OTBH. Interfor says this weighs in favour of a low penalty, if any.

[234] On the economic benefit factor, Interfor challenges the reliability of the Economic Tables and Calculations and says there is no reliable evidence of any economic benefit here. Interfor says that the DDM declined to acknowledge any economic benefit derived by Interfor from the contraventions, as no such benefit could be identified with any certainty.

[235] Regarding the question of cooperativeness and efforts to correct the contravention, Interfor argues that it cooperated throughout the process and the Ministry acknowledged at the OTBH that Interfor has taken “progressive steps in order to better manage OGMA.” Interfor says it has changed its practices with respect to harvesting non-legal OGMA since November 2018 and has minimized the risk of the issues giving rise to

the alleged contraventions here. Interfor says that, given the DDM's finding that Interfor had been cooperative, it was inconsistent for the DDM to impose a penalty amount near the maximum.

[236] Interfor argues that the DDM erred in imposing the \$360,000 penalty as "an appropriate deterrent against future contraventions ...[which] would convey a message to others regarding the critical importance of correctly interpreting Forest Stewardship Plan wording and ensuring that harvesting is undertaken consistent with the plan" (Determination, p. 20). Interfor says that with the changes in practice and in the language to protect old growth, for both Interfor and other licensees operating in the Kootenay Boundary Region, deterrence is not a live concern.

[237] Taking into account all of the above, Interfor argues that the penalty imposed is inconsistent with the prescribed factors and wholly disproportionate to the nature and extent of any contravention found. Interfor argues that the DDM's justification for a significant penalty based on deterrence overlooks that there was no pattern of continuous contraventions, any contravention was not deliberate, no economic benefit was derived, and Interfor's cooperation throughout and efforts to improve its non-legal OGMA management. According to Interfor, all of these considerations "militate against the need for any deterrent", and Interfor submits that this is not an appropriate case in which to levy an administrative penalty of the size imposed by the DDM. Instead, Interfor argues there should either be no penalty or a much lower penalty. Regarding a lower penalty, Interfor asserts that if the alleged contraventions were made out "a penalty of no more than \$5,000 per contravention would be appropriate."

### Respondent's Submissions

[238] The Respondent argues that there ought to be an administrative penalty and the penalty imposed by the DDM is appropriate.

[239] Regarding the matter of delay relied upon by Interfor to argue there should be no penalty, the Respondent says delay is not a consideration going to penalty. Regarding the purposes for a penalty, the Respondent notes the importance of old growth forest and the significant departure from professional standards exhibited by Interfor in its approach to the OGMA harvests. The Respondent argues this departure "has the potential to significantly undermine public trust and confidence in the forestry industry and the validity of the legislative scheme under which the industry operates".

[240] In terms of the number of contraventions, the Respondent says the DDM was correct to find Interfor had committed a contravention with respect to the harvest of each of the eight cutblocks at issue. The Respondent argues that "had Interfor been following its strategy diligently, it should have made a separate and independent decision during the planning for each cutblock as to whether there were any factors associated with the cutblock that might permit a harvest intrusion into an OGMA." In that respect, the Respondent says "Interfor should not be relieved from its multiple failures to apply its

strategy in a diligent and considered way simply because the failures relate to cutblocks that were planned and harvested under a common cutting permit.”

[241] Turning to the amount of the penalty, the Respondent says the factors set out in section 71(5) of the *FRPA* deal with penalty and that delay is not a factor listed in section 71(5). The Respondent argues that the section provides a closed list of factors and does not include wording preserving the residual discretion to consider other matters — such as wording to the effect that the factors to be considered “include the following....”

[242] In terms of the section 71(5) factors, the Respondent places particular emphasis on those relating to: a previous contravention of a similar nature; the gravity and magnitude of the contraventions; and the economic benefit derived from the contraventions.

[243] Regarding the previous contravention, the Respondent says it also concerned a contravention of section 21(1) of the *FRPA* and is similar in that it involved Interfor’s planning and harvest of a cutblock in a manner that did not give effect to results and strategies in the relevant FSP.

[244] In terms of the gravity and magnitude of the contraventions, the Respondent says the importance of the values threatened by Interfor’s conduct and the significant departure from professional standards exhibited by Interfor in its approach to the OGMA harvest indicate the gravity of the contraventions is high. In particular, the Respondent asserts that the unlawful harvest of old forest has significant consequences, as old growth forests provide unique habitats, structures and ecological functions not found in younger stands, and the failure to adhere to strategies designed to conserve old forest puts those biodiversity values at risk.

[245] Regarding the magnitude of the contraventions, the Respondent says that the OGMA incursions were large and excessive with approximately 82 hectares of OGMA having been destroyed. The Respondent points out that: the harvest of cutblock 13 resulted in the deletion of an entire OGMA polygon; the harvest of cutblock 28 was located entirely within the boundaries of an OGMA; and over 90% of the cutblock was located within OGMA for cutblocks 17, 27 and 29. In addition, the Respondent says significant harm was caused to the remaining OGMA forest and related habitat with reduced biodiversity. The Respondent submits that the size of the unlawful harvest and the significant damage to biodiversity values that resulted from the unlawful harvest make the magnitude of the contraventions high.

[246] As to the economic benefit derived from the contravention, the Respondent points to the analysis in Economic Tables and Calculations. The Respondent says that the Ministry’s analysis estimated Interfor would have earned a net profit of \$1,873,740 on the OGMA timber, based on an assessment of various items including the area of OGMA harvested, the estimated value of the timber, and the estimated costs.

[247] The Respondent argues in conclusion that an administrative penalty for each of the eight contraventions of s. 21(1) of the *FRPA* is appropriate, given Interfor’s past infraction,

the gravity and magnitude of the contraventions, particularly the significant impacts on old growth and biodiversity values, and the economic benefit Interfor derived from the contraventions.

### Third Party Submissions

[248] As previously noted, the Third Party limited its submissions on penalty.

[249] In dealing with whether factors other than those listed under section 71(5) of the *FRPA* can be considered in respect of penalty, the FPB cites the decision in *Forest Practices Board v. Government of British Columbia*, 2017 BCFAC 1 (CanLII). In that case, the Commission held that factors in addition to those set out could be considered. At paragraph 138 the Commission stated:

While section 71(5) of the *Act* sets out the particular factors that *must* be considered when making a penalty determination, these are not the only considerations when exercising the discretion to levy a penalty. As found in Issue 1, when exercising the discretion provided in section 71(2), the minister may consider any information that is relevant to the assessment of an administrative penalty in accordance with the principles of administrative law. (emphasis in original)

[250] With regard to the items listed in section 71(5) of the *FRPA*, the Third Party's submissions focus on the interpretation of subsections (b) and (c) and the aspects of the DDM's analysis in respect of those subsections.

[251] Regarding subsection (b), the Third Party says that it was appropriate for the DDM to consider the conduct of the Appellant and the impact of the contraventions when considering the gravity and magnitude of the contraventions.

[252] The Third Party distinguishes between the gravity of the contravention and the magnitude of the contravention. The Third Party cites the Commission's decision in *Forest Practices Board v. Government of BC*, 2022 BCFAC 5 (CanLII) ("*FPB 2022*") as supporting its position on the proposed interpretation of section 71(5) (b) and distinguishing between the gravity and magnitude of the contravention. At paragraph 69 of *FPB 2022*, the Commission adopted the distinction between gravity and magnitude from an earlier decision as follows:

The gravity of the contravention, in the Panel's view, invites a consideration of the Appellants' actions that gave rise to the contravention while the magnitude is a reference to the resulting damage from the contravention....

[253] The appeal in *FPB 2022* involved harvesting Crown timber from outside the boundaries of an individual's forestry licence to cut, and the Commission found that the individual there had wantonly and flagrantly disregarded the boundaries. The Commission

found the gravity of the contraventions to be high, and this should be reflected in the amount of the penalties.

[254] The Third Party says that assessing the gravity of a contravention should focus on the conduct of the person who contravened, including the extent to which the person departed from the legal or expected standard of conduct and the related level of deterrence required. The Third Party also says that the gravity of any contravention should include the level of any risk which the contravention posed to forest resources, persons and property but did not result in an adverse impact.

[255] The Third Party argues that assessing the magnitude of a contravention should focus on the impact of a contravention. In relation to the loss of trees, as in this case, the Third Party argues that it is reasonable to consider: the size of the area(s) impacted; the volume of timber in question; the importance of the area(s) and values impacted which may include the species and size of the trees and attributes they contribute to biodiversity, riparian features, and wildlife and wildlife habitat; and the nature and extent of the impact to the area(s) and values including the length of time for an area to recover.

[256] The Third Party says that the DDM's comments about the size of the area harvested in non-compliance with the FSP, the importance of old growth, the impact to biodiversity values, the fragmentation to OGMA's and the loss of interior forest conditions are all relevant to the magnitude of those contraventions.

[257] Turning to subsection 71(5)(c), the Third Party says that while the DDM was justified here to determine that the appropriate number of contraventions was eight based on the number of cutblocks in question, the DDM should not have characterized each contravention as repeated. The Third Party argues that "when a penalty is levied for every repetition of a contravention, it is not appropriate or consistent with section 71(5)(c) to characterize each of them as repeated", since "doing so would essentially result in the repetitious nature of contraventions counting twice in the penalty assessment – first by levying a penalty for each repetition of the contravention and second by increasing each of those penalties."

### Panel's Findings on Penalty

#### *Should there be any penalty?*

[258] We will deal first with Interfor's arguments about delay.

[259] Interfor has argued that the Province has delayed this process, prejudicing Interfor by affecting its ability to prove its case. Specifically, Interfor argues that it has suffered an inability to find documentation regarding the specific steps taken or judgments Interfor made in determining why each cutblock was a logical harvest unit in relation to the Strategy in FSP 30. While there has been delay, particularly from the time between NRO Kovacs being assigned the matter and it being reassigned to NRO Tyler, we have not found that Interfor suffered prejudice as a result. In terms of the documentation, Interfor

has asked us to infer that such documents existed at one point but have since been destroyed. However, for the reasons previously set out, we have declined to make such an inference, finding instead it more probable that no such documentation was prepared in relation to carrying out the Strategy in FSP 30. Thus, we find Interfor has not established that it suffered prejudice as a result of the delay which occurred, and further find such delay is not a reason for there to be no penalty.

[260] With respect to the purposes for administrative penalties, Interfor relies on an FPB publication from 2014 about penalty determinations, which reads in the relevant portion:

Administrative penalties are intended to:

- compensate the government for losses, such as the loss of important wildlife habitat or the cost of repairing damage or carrying out reforestation (under FRPA, compensation for timber value is dealt with through a separate process).
- remove any economic benefit the person may have gained through the contravention, such as costs saved due to cutting corners.
- discourage the person, and others, from contravening the legislation in the future—this is known as deterrence.

[261] We begin by noting that, while this document may set out the FPB's perception on penalties, the Commission does not defer to the FPB on such matters. We address this document because Interfor has raised it and because we agree that it sets out some important intended purposes of penalties generally. In that respect, we further find that an administrative penalty in the present case will serve those purposes as set out below.

[262] First, we find that the Province has suffered losses in this case. In addition to the loss of old growth forest on the impugned cutblocks, we find there has been a loss of and disruption to wildlife habitat on several of the impugned cutblocks, based on Mr. Wahn's report.

[263] Second, the evidence indicates there were cost savings for Interfor through the contraventions. For example, we find, based on Mr. Wahn's evidence, the spur road on cutblock 13 could have been moved downslope to reduce and/or avoid incurring on the OGMA, but by not doing so Interfor avoided cost increases associated with the road location.

[264] Third, although deterrence in respect of harvesting OGMA may be less of a consideration given Interfor's changed OGMA-related practices following the 2018 directive from the Ministry, deterrence in respect of not carrying out strategies in FSPs remains a consideration for both Interfor and others. Regarding Interfor, while the evidence indicated that its practices around planning Strategy matters have improved, the evidence also indicated that the FSP system relies to a high degree on the professional responsibility of the foresters involved for compliance with FSPs and there continued to be a lack of appreciation on the part of some of Interfor's witnesses involved with decision making about the importance the system places on being able to demonstrate

professional responsibility through documenting their FSP decision making. Further, the evidence did not establish that Interfor had made improvements in timeliness around designating replacement OGMA to avoid a repeat of the delayed replacement of harvested OGMA, such as occurred for cutblock 31. Regarding general deterrence, we agree with the DDM's Determination that it is important that a message be conveyed "to others regarding the critical importance of correctly interpreting Forest Stewardship Plan wording and ensuring that harvesting is undertaken consistent with the plan."

[265] In addition to meeting the purposes for administrative penalties identified in the FPB document, an administrative penalty is appropriate under section 71(2)(a)(ii) of the *FRPA* as it then was, since we find the contraventions involved with failing to ensure the Strategy was carried out in the present case are not trifling and it is in the public interest to levy an administrative penalty. The contraventions involved eight cutblocks where important old growth forest was harvested and Mr. Wahn's evidence, which we accept on this point, was that several of the cutblocks involved "high quality old growth from a biodiversity perspective" (e.g. cutblock 13, and cutblock 28). Interfor itself has acknowledged "that old growth is a valuable contributor to the biodiversity of the forest", and the Order and 2010 AAC Rationale are to the same effect.

#### The Number of Contraventions

[266] As previously noted, Interfor acknowledges that the finding on the number of contraventions "will depend on the conduct that gives rise to the finding." Interfor has relied on the portion of FSP 30 relating to the modification of boundaries to facilitate logical harvest units to support its harvesting of the eight cutblocks at issue. We have found, however, that Interfor has failed to establish that it modified OGMA boundaries in order to facilitate logical harvest units for each of the eight impugned cutblocks as required by the Strategy. Thus, we have found that the conduct giving rise to the contraventions is the failure to ensure that the Strategy was carried out, as required by s. 21(1) of the *FRPA*, for each of the eight cutblocks at issue, and therefore the number of contraventions is eight.

#### The Factors Used to determine the Penalty Amount

[267] We begin with Interfor's argument regarding the scope of section 71(5) and whether additional factors to those set out in section 71(5) may be considered in establishing the penalty amount. In that respect, Interfor argues that we should reduce the penalty amount due to the additional factor of the Ministry's delay. We find that any potential for delay to reduce any penalty issued would be where the penalized party suffered prejudice as a result of the delay, and we have previously found that Interfor did not suffer such prejudice. We therefore find that delay is not a factor that would affect the result here. The parties did not urge us to consider any other additional factors beyond those listed in section 71(5) and as such we find that we do not need to determine the

scope of section 71(5) in the present appeal and whether the list of factors there is a closed list.

[268] We turn now to the factors which must be considered as listed in section 71(5).

*(a) previous contraventions of a similar nature by the person*

[269] We find that the previous contravention relied upon by the DDM, involving wildlife tree retention areas and a previous contravention of s. 21(1) of the *FRPA*, is of a similar nature to the current contraventions. We disagree with Interfor's argument that the previous contravention was not similar because it did not relate to old growth objectives and/or incursions into OGMAs. In the present case, the previous contravention is similar in the following ways: it involved a failure to ensure strategies described in an FSP were carried out; it involved an incorrect interpretation of an FSP requirement; and it adversely affected biodiversity. We find this factor favours an increase in relation to the contraventions in the present case.

*(b) the gravity and magnitude of the contravention*

[270] We adopt the finding of the Commission in *FPB 2022* regarding this factor. In considering the gravity of the contraventions, we will examine the Appellant's actions that gave rise to the contraventions, and in considering the magnitude of the contraventions we will examine the resulting impact of the contraventions.

[271] The Appellant's actions involved the failure to ensure that the Strategy in FSP 30 was carried out. FSPs are a critical component of achieving the Province's objectives, and in FSP 30 those objectives involve the conservation of biodiversity and maintenance of old growth forests. We agree with the Respondent that old growth forests provide unique habitats, structures and ecological functions not found in younger stands, and the failure to adhere to strategies designed to conserve old forest puts those biodiversity values at risk.

[272] The failure to ensure FSPs are carried out also impacts on forest operations under the *FRPA*. We agree with the DDM that "the *FRPA* framework rests on professional reliance, and as such licensees are expected to clearly identify how their activities will be consistent with government objectives and provide professional documentation on how they deliver on approved results and strategies" (Determination, at p. 19). The failure to meet these professional expectations relating to FSP strategies, such as by Interfor in the present case, "undermines public trust and confidence in forestry" (Determination, p. 19).

[273] Thus, we find the gravity of the contraventions to be high both in terms of the failure to ensure the Province's objectives around biodiversity were carried out, and the undermining of public confidence in forestry.

[274] Regarding the items to be examined in the present case regarding the magnitude of the contraventions, we find they include those put forward by the Third Party such as: the size of the area(s) impacted, which would include the percentage of the cutblock located within an OGMA; the volume of timber harvested; and the importance of the

area(s) and values impacted, including the attributes they contribute to biodiversity, and wildlife habitat.

[275] In the application of the magnitude element, we find persuasive the evidence of Mr. Wahn. Mr. Wahn visited the impugned cutblocks, where he estimated the age of the trees and analysed the quality of the old growth. Based on Mr. Wahn's evidence, we find the impacted OGMA's were important in terms of old growth biodiversity, included incursion areas of high-quality old growth from a biodiversity perspective, and experienced adverse impacts from the harvesting including to wildlife habitat.

[276] Mr. Wahn also undertook GIS analyses of the CP 239 and CP 707 OGMA incursions, including the percentage of the cutblocks within an OGMA. Based on this evidence, the percentage of the impugned cutblocks located within OGMA was extensive, with six of the eight impugned cutblocks at approximately 80% or higher. In terms of the area impacted and volume of timber harvested, approximately 82 hectares of OGMA was harvested in the eight impugned cutblocks, and the total volume of timber harvested from the OGMA's was approximately 38,026 cubic meters, according to the Economic Tables and Calculations. We find these incursions to be of significant size and impact in respect of the eight cutblocks.

[277] From all of the above, we find the magnitude of the contraventions to be high.

*(c) whether the contravention was repeated or continuous*

[278] Under factor (c), the DDM commented that the "blocks in CP 239 were harvested four years prior to CP 707 and given the time that elapsed between these occurrences I consider this to be repeated." It is not clear to the Panel, however, what the significance is of the four-year time lapse and whether the DDM would have found the contraventions relating to the cutblocks in CP 239 to be repeated if they had gone to adjudication in the period before the cutblocks in CP 707 were harvested.

[279] No issue is raised that the contraventions in the present case should be treated as continuous. In terms of the "repeated" element under factor (c), we agree with the FPB that if each cutblock is treated as an individual contravention in the present case, that individual contravention should not also be treated as repeated. As the FPB points out, applying this factor in the present circumstances "would essentially result in the repetitious nature of the contraventions counting twice in the penalty assessment – first by levying a penalty for each repetition of the contraventions and second by increasing each of those penalties". Thus, we find subsection 71(5)(c) is not a factor impacting the penalty amount in the present case.

*(d) whether the contravention was deliberate*

[280] The DDM found there was no indication that the contraventions were deliberate, nor did the Respondent make an argument to that effect. The DDM noted that although Interfor knowingly harvested OGMA's, the evidence did not indicate that the incursions were deliberately planned to not comply with FSP 30. Similarly, the evidence before us did

not indicate that Interfor deliberately ignored FSP 30, and we find this factor does not favour an increased penalty.

*(e) any economic benefit derived by the person from the contravention*

[281] The Economic Tables and Calculations document provides estimates regarding the volume of timber harvested on the impugned cutblocks, the market value of that timber, and the estimated economic benefit after subtracting the estimated expended costs. While the DDM considered these estimates are not sufficiently certain or precise to establish the economic benefit to be removed from Interfor, we find that they provide an estimate of the economic benefit derived by Interfor from the contraventions which can assist in establishing the proper amount of the penalty without being used to remove any economic benefit. Further, although both the DDM and Interfor indicated that an economic benefit could have been obtained in any event by Interfor harvesting elsewhere in its licence, the evidence was not sufficient to establish where else Interfor would have harvested or that the economic benefit derived would have been to the same extent as harvesting the OGMAs in the impugned cutblocks.

[282] In terms of the numbers involved, the Economic Tables and Calculations indicate that the estimated volume of timber harvested from the OGMAs was 38,026 cubic metres, the estimated market value of that timber was \$4,390,536, and the estimated economic benefit after subtracting the estimated expended costs was \$1,873,740. We find these numbers to be significant and the economic benefit derived from the contraventions to be high.

*(f) the person's cooperativeness and efforts to correct the contravention*

[283] The DDM found that Interfor had “been cooperative throughout the process.” We agree with that finding and further find that efforts have been made by Interfor to correct the contraventions in terms of changes to the process since 2018.

*(g) any other considerations that the Lieutenant Governor in Council may prescribe*

[284] There are no such considerations under this factor.

Determining the Penalty Amount and Balancing the Factors

[285] In setting the penalty amount, the DDM imposed the same amount for each of the contraventions. Similarly, in their submissions, the parties did not make arguments about imposing different amounts for the different contraventions. In that respect, the Respondent argued that an “administrative penalty of \$45,000 for each of the eight contraventions” is appropriate, while the Appellant asserted that if the alleged contraventions were made out “a penalty of no more than \$5,000 per contravention would be appropriate.” The approach, therefore, of having the same penalty amount for each of the contraventions was not in issue and neither the Appellant nor the Respondent sought different amounts relating to each of the contraventions.

[286] In imposing the same amount for each of the contraventions, we note that most of the factors under section 71(5) apply the same way for all of the contraventions. For example, the previous contravention under factor (a) and Interfor's cooperativeness and efforts to correct the contraventions under factor (f) apply the same way for each of the contraventions and justify the same amount being imposed for each of the contraventions. On the gravity and magnitude of the contraventions, the gravity element is the same, while there are some variances in the magnitude. However, we find that those variances balance out when considering all the various aspects involved with the magnitude of the contraventions. For example, while cutblock 13 involved the smallest incursion of all the impugned cutblocks, the cutblock 13 incursion resulted in the deletion of virtually an entire OGMA polygon and the "incursion area contained high quality old growth from a biodiversity perspective with very large trees and abundant old growth attributes" according to Mr. Wahn. Similarly, while a lower percentage of cutblock 16 was located within OGMA than most of the impugned cutblocks (at approximately 50% of the harvested area), cutblock 16 involved the largest incursion area in terms of the number of hectares (at approximately 17.8 hectares).

[287] Thus, taking into account all of the above, we find that it is appropriate to set the same penalty amount for each of the contraventions, and turn now to an application and balancing of the factors.

[288] In determining the penalty amount, Section 71(5) of the *FRPA* requires the consideration of all the factors listed in the section. For all the impugned cutblocks, the factors in favour of a larger penalty amount are: the existence of a previous contravention of a similar nature; the high level of the gravity and magnitude of the contraventions; and the high level of economic benefit Interfor accrued by harvesting the OGMA's. On the other hand, the factors in favour of a reduced penalty amount are: the contraventions were not deliberate, and Interfor had been cooperative throughout the process and had made efforts to correct the contraventions.

[289] In weighing the relevant factors, some will have greater weight than others depending on the particular circumstances of the case. In the present appeal, with the importance placed on ensuring FSP strategies are carried out, and the Province's objectives relating to the conservation of biodiversity and maintenance of old growth forests in FSP 30, we find the gravity and magnitude of the contraventions to be of particular importance and the most impactful factor. This factor, together with the economic benefit factor, favours the imposition of a penalty amount at a high level. Taking into account the maximum penalty is \$50,000, and making allowance for the factors previously noted in terms of reducing the penalty, we set the penalty amount at \$35,000 for each for the contraventions. Although lower than the penalty amount imposed by the DDM, in our view this penalty amount still provides an appropriate level of deterrence against future contraventions by Interfor as well as others, and conveys the importance of correctly interpreting FSP wording, meeting professional expectations in working with

FSPs, carrying out the strategies in FSPs, and ensuring that the treatment of OGMA is undertaken consistent with the relevant FSP requirements.

[290] The total amount of the administrative penalty based on the above for the eight contraventions is \$280,000 and we vary the Determination to reflect that amount.

## DECISION

[291] In making this decision, we have considered all the evidence, the relevant documents, and the parties' submissions, whether or not they have been specifically referred to herein.

[292] For the reasons provided above, our findings and determinations in respect of the contraventions and penalty set out in the Determination are summarized as follows:

- We find the Appellant failed to ensure that the Strategy in FSP 30 was carried out, and that the Appellant contravened section 21(1) of the *FRPA*. We confirm the Determination in that regard.
- We find the Appellant committed eight contraventions of section 21(1) of the *FRPA* and confirm the Determination in that regard.
- We find the Administrative Penalty amount of \$360,000 ordered by the DDM pursuant to section 71 of the *FRPA* is to be varied to \$280,000.

"James Carwana"

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James Carwana, Panel Chair  
Forest Appeals Commission

"Ian Miller"

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Ian Miller, Panel Member  
Forest Appeals Commission

"Daphne Stancil"

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Daphne Stancil, Panel Member  
Forest Appeals Commission