Forest Appeals Commission

Citation: *Tolko Industries Inc. v. Government of British Columbia*, 2026 BCFAC 5

Appeal No.: FAC-FRP-22-A005

Decision Date: 2026-07-15

Method of Hearing: Conducted by way of written submissions concluding on September 19, 2025

Decision Type: Final Decision

Panel: Cynthia Lu, Panel Chair

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

Between:

Tolko Industries Ltd.

Appellant

And:

Government of British Columbia

Respondent

Appearing on Behalf of the Parties:

For the Appellant: Dean Dalke
Erin Hunter

For the Respondent: Sarah Bevan
Monica Salt

FINAL DECISION

INTRODUCTION

[1] Tolko Industries Ltd. (the "Appellant") appeals a Contravention Determination and Notice of Administrative Penalty decision made on June 3, 2022 (the "Determination"), by the Acting District Manager of the Okanagan Shuswap Natural Resource District, Ministry of Forests (the "Respondent"). The Determination found the Appellant had contravened sections 46(1) and 52(1) of the *Forest and Range Practices Act,* SBC 2002, c. 69 ("*FRPA"* or the "*Act"*), and sections 37, 39(1), and 57 of the *Forest Planning and Practices Regulation,* BC Reg 14/2004 ("*FPPR"* or the "*Regulation*"). The Respondent imposed administrative penalties of $50,000 for the contravention of section 46(1) of the *Act* and $25,000 for the contravention of section 52(1) of the *Act*.

[2] The Forest Appeals Commission (the "Commission") has the authority to hear this appeal under section 140.1 of the *Act.* The powers of the Commission in this appeal are set out in section 84(1)*:*

> ...
>
> the Commission may
>
> (c) consider the findings of the person who made the determination or decision, and
>
> (d) either
>
> (i) confirm, vary or rescind the determination or decision, or
>
> (ii) with or without directions, refer the matter back to the person who made the determination or decision, for reconsideration.
>
> ...

[3] The Appellant asks the Commission to vary the Determination on the following grounds: section 52(1) of the *Act* does not apply in this circumstance, the Determination was contrary to the principles of fairness against multiple contraventions for the same unlawful conduct, and the administrative penalty amount was excessive in this case. The Respondent asks the Commission to confirm the Determination and administrative penalty amounts.

BACKGROUND

[4] In 2011, the Appellant constructed Road 174003 (the "Road") under the authority of Road Permit R07605 to facilitate timber harvesting operations in Forest Licence A20003.

[5] Sometime between May 4-6, 2017, a landslide initiated about 40 metres below the Road (the "Rosemond Slide"), coinciding with a significant weather event in the region. The Rosemond Slide disturbed an estimated area of 2.43 hectares and deposited an estimated 11,500 cubic metres of material into Rosemond Lake. Rosemond Lake is known to provide habitat to several fish species.

[6] The Appellant discovered the Rosemond Slide within days of its occurrence and retained a Professional Geologist, known as a terrain professional, to investigate the slide. On May 9, 2017, the terrain professional assessed the slide and recommended the Appellant install additional culverts along the Road to manage the residual risk. The Appellant promptly installed additional culverts along the Road.

[7] On November 19, 2018, Ministry of Forests (the "Ministry") staff observed the Rosemond Slide from a distance while working in the general area. On June 3 and July 25, 2019, Ministry staff attended the site of the Rosemond Slide to conduct an inspection and determine causation. On September 23, 2019, Ministry staff submitted a complaint to the Ministry's Compliance and Enforcement Branch regarding the Rosemond Slide and alleged possible non-compliances related to the Road. Compliance and Enforcement investigated the complaint and the causes of the Rosemond Slide between 2019 and 2021 (the "Investigation"). In January 2022, Compliance and Enforcement brought forward the alleged contraventions to the Respondent. In accordance with the *Act,* the Respondent provided the Appellant with an opportunity to be heard which occurred on May 6, 2022.

[8] In the Determination, the Respondent found, while climatic conditions contributed to the slide, the leading cause of the Rosemond Slide was that the Appellant designed and constructed the Road with insufficient drainage management structures. The Appellant does not appeal the Respondent's finding that its actions in constructing the Road were the lead cause of the Rosemond Slide. The Respondent found the Appellant contravened sections 46(1), and 52(1) of the *Act*, and sections 37, 39(1), and 57 of the *Regulation*. The Respondent imposed administrative penalties of $50,000 for the contravention of section 46(1) and $25,000 for the contravention of section 52(1) of the *Act*.

ISSUES

[9] The issues to be addressed in this appeal are:

1) Whether the Appellant contravened section 52(1) of the *Act*,
2) Whether the Respondent unfairly made duplicative findings of contraventions and unfairly imposed duplicative penalties for the same wrongful conduct, and
3) What the appropriate penalty amount is.

SUBMISSIONS AND ANALYSIS

Issue 1 – Did the Appellant contravene section 52(1) of the *Act?*

Parties' Submissions

[10] The Appellant submits section 52(1) of the *Act* does not apply in this case and the associated penalty ought to be set aside. The Appellant submits section 52(1) is titled "Unauthorized Timber Harvesting" and found under Division 2 of Part 5 of the *Act* titled "Unauthorized Timber Harvesting, Trespass and Tree Spiking."

> **Division 2 — Unauthorized Timber Harvesting, Trespass and Tree Spiking**
>
> **Unauthorized timber harvesting**
>
> **52** (1) A person must not cut, damage or destroy Crown timber unless authorized to do so
>
> …

[11] The Appellant argues section 52(1) intends to ensure timber harvesting operations only cut, damage, or destroy timber approved or authorized for harvesting—the provision is not intended to regulate the consequences of all manner of forest practices. The Appellant argues the words "damage" and "destroy" in section 52(1) are only concerned with activities that immediately and directly damage timber. The Appellant argues other provisions in the *Act* and *Regulation* regulate consequential damage. Further, the Appellant submits there appears to be no previous circumstances where section 52(1) of the *Act* has been applied in this way.

[12] The Appellant argues that if section 52(1) of the *Act* was applied as a "catch-all" provision for any damage or destruction of Crown timber, this would render all other provisions in forestry legislation that address specific causes of damage to timber redundant and superfluous. The Appellant submits this is contrary to the principles of statutory interpretation. The Appellant cites paragraph 29 of *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36, to say that every word or provision in a statute has specific meaning or function, and that decision makers should avoid interpretations that render a provision redundant.

[13] The Respondent refers to section 11(1) of the *Interpretation Act,* RSBC 1996, c. 238, and submits head notes must only be considered to be editorial for convenience or reference only.

> **11** (1) In an enactment, a head note to a provision or a reference after the end of a section or other division
>
> (a) is not part of the enactment, and

(b) must be considered to have been added editorially for convenience of reference only.

[14] The Respondent submits the headings that refer to unauthorized timber harvesting cannot be taken to limit the meaning of section 52(1) of the *Act*.

[15] Further, the Respondent argues the text in section 52(1) of the *Act*, when read in its grammatical and ordinary sense, does not include a requirement for the cause of damage or destruction of timber to be "direct" or "immediate" as argued by the Appellant. The Respondent relies on approaches to interpretation as described in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 ("*Rizzo Shoes*"), and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43 (CanLII). The Respondent submits the *Act* is a results-based regime that captures foreseeable causative mechanisms leading to the damage or destruction of Crown timber, and the destruction of timber is an entirely foreseeable consequence of landsliding.

Panel's Analysis and Findings

[16] The Appellant relies on the heading "Unauthorized Timber Harvesting," found prior to the text of section 52(1) of the *Act,* to argue the provision intends to only apply to timber harvesting operations. Section 11(1) of the *Interpretation Act* provides that head notes, or headings, are not part of the enactment. Therefore, the words and phrases "Unauthorized Timber Harvesting, Trespass and Tree Spiking," and "Unauthorized timber harvesting" are not part of the enactment nor the interpretation of section 52(1) of the *Act*.

[17] The modern approach to statutory interpretation, as set out in paragraph 21 of *Rizzo Shoes* is to read the words of an act "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." Section 52(1) of the *Act* states "a person must not cut, damage or destroy Crown timber unless authorized to do so." The text in the provision does not include the words direct, indirect, or immediate. The words "cut, damage or destroy" are not limited or modified by any other words in a plain reading of the text. The prohibition on cutting, damaging, or destroying Crown timber is only modified by the allowance to do so under specific authorizations provided in section 52(1)(a) to (e), there are no other limitations on the prohibition. Given this, I am not convinced by the Appellant's submissions that section 52(1) intends only to apply to harvesting operations or direct causes of damage to Crown timber.

[18] The existence of situations which could be considered to contravene multiple sections of the *Act* or the *Regulation* does not render one section redundant, nor does it limit the interpretation of that section. Section 52(1) of the *Act* is distinct from section 46(1), and from sections 37, 39(1), and 57 of the *Regulation* because section 52(1) of the *Act* considers the damage or destruction of timber, distinctly identifying timber as the value of concern. There may be circumstances where road construction causes a landslide that

damages timber. There may be other circumstances where road construction causes a landslide but does not result in damage to timber, for example, if a landslide occurs over non-forested terrain. Additionally, there may be circumstances where road construction activities cause a landslide to occur within a permitted cutting authority area, and therefore damage to timber occurs within an authorized area. The circumstances of this appeal pertain to a landslide caused by inadequate drainage structures installed during road construction activities; however, there may be other circumstances where road construction activities unrelated to drainage management cause a landslide. I am not convinced by the Appellant's submissions that section 52(1) of the *Act* has been inappropriately applied as a "catch-all" provision in this case.

[19] To determine if section 52(1) of the *Act* applies to the circumstances in this appeal, I also find it necessary to consider the chain of causation. It is not disputed that Tolko constructed the Road, there were insufficient culverts in the Road, and natural drainage was not maintained following Road construction. It is further not disputed that these contributing factors resulted in the Rosemond Slide. The Appellant's submissions do not convincingly demonstrate there was an intervening act that disconnects their conduct in constructing the Road from the Rosemond Slide and the damage or destruction of Crown timber. While a weather event was identified to also be a contributing factor, it is not disputed by the parties that the lead cause of the Rosemond Slide was road construction with insufficient drainage management. I find there was no intervening act to break the chain of causation between the Appellant's conduct, the occurrence of the landslide, and the landslide being the mechanism for the damage or destruction of Crown timber.

[20] I am guided by the modern approach to statutory interpretation, informed by the *Interpretation Act*, to find that section 52(1) of the *Act* can apply to this situation where Crown timber is damaged or destroyed by a landslide caused by the Appellant. Given the above, I confirm the Respondent's finding in the Determination that section 52(1) of the *Act* applies in this circumstance, and the Appellant has contravened this provision.

Issue 2 – Are the findings of contraventions duplicative and is it unfair for the Appellant to be subject to multiple penalties?

<u>Parties' Submissions</u>

[21] The Appellant submits the Respondent inappropriately made duplicative findings of contraventions and levied multiple penalties against it for the same wrongful conduct, contrary to the *Kienapple* principle. The Appellant describes the *Kienapple* principle as the common law rule, arising out of the criminal law jurisprudence, against convictions for more than one offence arising from the same act. According to the Appellant, the *Kienapple* principle applies in the context of administrative contraventions under the *Act*. The Appellant argues the findings of contraventions of sections 37, 39(1), and 57 of the *Regulation* and section 46(1) of the *Act* should be reduced to one contravention because of the *Kienapple* principle.

[22] The Appellant submits it should only be penalized once in relation to its one wrongful act: failing to design and construct the Road with sufficient drainage management. The Appellant submits, if it is found to have contravened section 52(1) of the *Act*, it should not be subject to penalties for contraventions of both sections 46(1) and 52(1), as they arise from the same wrongful act and the penalty ought to be reduced on the account of duplication. The Appellant relies on previous Commission decisions to argue it would be unfair to be penalized more than once for a single act, including: *0793663 B.C. LTD. v. Government of British Columbia*, 2024 BCFAC 9 ("*0793663")*; *O'Brien and Fuerst Logging Ltd. and British Columbia*, 2019 BCFAC 5 ("*O'Brien*"); *Hayes Forest Services Ltd. v. Government of British Columbia*, 1998 BCFAC 4 ("*Hayes")*; and *McBride Community Forest Corporation v. Government of British Columbia,* 2015 BCFAC 3 ("*McBride").*

[23] In the Determination, the Respondent found similarity between the harms caused by contravention of section 46(1) of the *Act,* and of sections 37, 39(1), and 57 of the *Regulation.* As a result, the Respondent levied one administrative penalty under section 46(1) of the *Act.* The Respondent found harms associated with contravention of section 52(1) to be distinguishable and therefore levied a separate administrative penalty under this section of the *Act.*

[24] The Respondent argues the contraventions of sections 46(1) and 52(1) of the *Act* are distinct, therefore, the *Kienapple* principle does not apply and the Respondent did not impose duplicative penalties. The Respondent submits that for the *Kienapple* principle to apply, the same act must ground each of the offences and there must not be distinguishable elements between the offences. Further, the Respondent submits the standard of potential harm or damage is different across each of the provisions contravened. The Respondent submits the provisions in each of these sections of the *Act* and *Regulation* are not substantially identical, and while some aspects may overlap, each addresses a distinct standard and category of harm.

Panel's Analysis and Findings

[25] The *Kienapple* principle, taken from *Kienapple v. R.*, 1974 CanLII14 (SCC), is a rule against multiple criminal convictions arising from the same act. The parties submit previous decisions where the Commission has found *Kienapple* to apply to administrative contraventions (*Forest Practices Board v. Government of British Columbia,* 2018 BCFAC 4 (CanLII) ("*FPB 2018"*)), found it not to apply (*McBride* and *O'Brien*), or found it not necessary to determine whether it applies (*0793663*).

[26] In *FPB 2018,* the Commission summarized the *Kienapple* principle and its connection to *res judicata* and fairness:

> [87] The rule against convictions for more than one offence out of the same matter is best known from *R. v. Kienapple,* 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729 *[Kienapple],* as a criminal law expression of the common law doctrine of *res judicata. (Kienapple,* at pp. 748, 750-51; Sopinka, Lederman & Bryant, *The Law of*

Evidence in Canada, Fifth Edition (Toronto, ON: Lexis Nexis, 2018), at paras. 19.128, 19.157 (“Sopinka”)) Sopinka, at para. 19.65, summarizes the rationale for the doctrine of *res judicata* as follows:

> The modern rule of estoppel by *res judicata* is grounded upon two broad principles of public policy: first, that the state has an interest that there should be an end to litigation … and, secondly, that no individual should be sued more than once for the same cause … **or punished more than once for the same offence** ….

[88] The *Kienapple* rule has been refined to require both the facts and the offences charged to be substantially identical. (Sopinka, at paras. 19.159-19.163, 19.175-19.178) …

(emphasis added)

[27] In my view, the core issue is not whether *Kienapple* applies to the Commission’s administrative tribunal context but is whether there has been unfairness in finding the contraventions and ordering the administrative penalties, and if the Appellant has been punished more than once for the same offence.

[28] In *0793663,* the Commission considered whether two similarly worded sections of the *Regulation,* 39 and 79, were duplicative contraventions in the circumstances of that appeal. In *0793663*, the Commission states “this difference between the contraventions is one that is realized not by additional actions of the contravener, but rather by the effect of the one contravening act where the impact of the contravention of the former section is subsumed into the contravention of the latter.” In paragraph 34 of *0793663,* the Commission found “that where one action results both in a more general noncompliance and a more particular noncompliance, penalties should not be awarded for both unless there is evidence of legislative intent to that effect.” In *0793663*, the Commission considered contraventions of *FPPR* section 37 and *FRPA* section 46(1) to be more particularized contraventions of the more general contravention of *FPPR* section 39.

[29] While I am not bound by the previous decisions of the Commission, I find the above analysis in *0793633* and *FPB 2018* helpful and am guided by these approaches to fairness.

[30] I have reviewed *0793663, O’Brien, Hayes,* and *McBride* and again, while I am not bound by previous decisions of the Commission, I agree with the approach in previous decisions that the Appellant may be found in contravention of multiple sections of the *Act* or the *Regulation* and fairness may properly be addressed at the penalty assessment stage. I am not persuaded by the Appellant’s arguments that fairness requires the number of findings of contravention to be reduced.

[31] In the Determination, the Respondent found similarity in the harms caused by contraventions of section 46(1) of the *Act,* and sections 37, 39(1), and 57 of the *Regulation*. As a result, the Respondent imposed one administrative penalty for the contravention of section 46(1) of the *Act* and did not assess separate penalties for sections 37, 39(1), and 57

of the *Regulation*. Ultimately, the Respondent imposed administrative penalties for the contraventions of sections 46(1) and 52(1) of the *Act*.

[32] I turn now to considering whether these penalties are duplicative and unfair.

[33] It is not disputed that the Appellant contravened section 39(1) of the *Regulation:*

> **39** (1) If an authorized person constructs a road, a temporary access structure or a permanent access structure on an area, the person must maintain natural surface drainage patterns on the area both during and after construction.

[34] It is not disputed that the contravention of section 39(1) of the *Regulation* gave rise to the Rosemond Slide. Since the Appellant was found to have caused the Rosemond Slide, the contraventions of sections 46(1) of the *Act* and section 37 of the *Regulation* come into view.

[35] Section 46(1) of the *Act* states:

> **46** (1) A person must not carry out a forest practice, a range practice or another activity that results in damage to the environment…

[36] Damage to the environment is defined in section 3(1) of the *Regulation:*

> **3** (1) For the purpose of section 46 (1) and (1.1) [*protection of the environment*] of the Act, "damage" means any of the following that adversely alters an ecosystem:
>
> (a) a landslide;
>
> (b) a gully process on the Coast;
>
> (c) a fan destabilization on the Coast;
>
> (d) soil disturbance;
>
> (e) the deposit into a stream, wetland or lake of
>
> (i) a petroleum product,
>
> (ii) a fluid used to service industrial equipment, or
>
> (iii) any other similar harmful substance;
>
> (f) a debris torrent that enters a fish stream;
>
> (g) changes to soil.

[37] The relevant provision under section 3(1) of the *Regulation* is: (a), landslide. The contravention did not take place on the Coast; therefore, sections 3(1)(b) and 3(1)(c) do not apply. Regarding section 3(1)(d), soil disturbance, the displacement of soil downslope is, in this case, inherently captured under section 3(1)(a). Section 3(1)(e) of the *Regulation* addresses petroleum, industrial equipment fluids, or other similar harmful substances which I interpret to relate to fuels or synthetic chemical substances and not to the

movement of soil which is expressly contemplated by other subsections. The Rosemond Slide moved and deposited soil and organic debris into Rosemond Lake and I find these are not the substances contemplated in section 3(1)(e). The submissions and evidence indicate the landslide deposited debris into Rosemond Lake, which is a known fish habitat, but not that a debris torrent entered a fish stream. Therefore, section 3(1)(f) of the *Regulation* also does not apply. Neither party makes submissions on how changes to soil or soil disturbance should be distinguished in this scenario from 3(1)(a), a landslide; therefore, I find section 3(1)(g), changes to soil, also does not apply in this case.

[38] Section 46(1) of the *Act* is relevant in this situation because the Appellant carried out a forestry practice that resulted in a landslide that adversely altered an ecosystem. As the landslide debris torrent did not enter a fish stream, I find the Respondent incorrectly considered the harm to fish habitat as part of the *FRPA* section 46(1) contravention and penalty because section 3(1)(f) of the *Regulation* requires a debris torrent to enter a fish stream, and this was not established on the evidence before me.

[39] Section 37 of the *Regulation* also addresses landslides:

> **37** An authorized person who carries out a primary forest activity must ensure that the primary forest activity **does not cause a landslide that has a material adverse effect** in relation to one or more of the subjects listed in section 149 (1) of the Act.

(emphasis added)

[40] In this scenario, both contraventions of section 46(1) of the *Act* and section 37 of the *Regulation* are concerned with the Appellant's forest practice or activity that resulted in a landslide. The term "landslide" is not defined in either the *Act* or the *Regulation*; however, the meaning of the term landslide, and that a landslide occurred, is not disputed by the parties. Given the above, I find the two contraventions of *FRPA* section 46(1) and *FPPR* section 37 are, in this case, substantially similar and overlapping.

[41] The Appellant's forestry activities caused a landslide, where soil, rock, earth material, and timber slid downslope into Rosemond Lake. Consequently, the timber that slid downslope was damaged. The damage of timber in this scenario would not have occurred without the Appellant's failure to maintain natural surface drainage patterns causing the landslide. The higher order contraventions of *FPPR* sections 39(1) and 37 and *FPRA* section 46(1) are each subsumed into the more particularized contravention of *FRPA* section 52(1) in this case.

[42] The remaining contravention is section 57 of the *Regulation:*

> **57** An authorized person who carries out a primary forest activity must conduct the primary forest activity at a time and in a manner that is unlikely to harm fish or destroy, damage or harmfully alter fish habitat.

[43] The fact that deposition of material into Rosemond Lake was likely to harm fish or destroy, damage, or harmfully alter fish habitat is not challenged. *S*ection 57 of the

Regulation was contravened because the Appellant's failure to maintain natural surface drainage patterns caused a landslide, after which the materials were deposited into Rosemond Lake, likely harming fish or damaging or harmfully altering fish habitat. As with section 52(1) of the *Act* above, the higher order contraventions of sections 39(1) and 37 of the *Regulation* and section 46(1) of the *Act* are each subsumed into the particularized contravention of *FPPR* section 57.

[44] The circumstances in this appeal are that the Appellant's conduct resulted in damage to Crown timber and likely harm to fish or damage to fish habitat. I have found that contravention of section 46(1) of the *Act* is encompassed within contraventions of section 52(1) of the *Act* and section 57 of the *Regulation.* For this reason, I find it unfair for the Appellant to be subject to duplicative penalties for contraventions of sections 46(1) and 52(1) of the *Act*.

[45] For the reasons above, I find the Appellant's wrongful act resulted in two particularized, non-overlapping contraventions of section 52(1) of the *Act* and section 57 of the *Regulation*. In my view, *FPPR* section 57 ought to be considered separate from *FPRA* section 52(1) to account for the potential for the Crown to be compensated for these distinct impacts. Therefore, I do not consider it unfair for penalties to be imposed for both contraventions of *FRPA* section 52(1) and *FPPR* section 57 because, though arising from the same wrongful act, the nature of the contraventions and harms to timber and to fish or fish habitat are distinct.

[46] The Appellant's submissions do not persuade me that contraventions of section 52(1) of the *Act* and section 57 of the *Regulation* are duplicative, or that penalties imposed under each contravention would be duplicative or unfair. As I have found the Respondent incorrectly imposed duplicative penalties for contraventions of section 46(1) and 52(1) of the *Act* and did not impose an administrative penalty for contravention of section 57 of the *Regulation*, it is necessary to vary the administrative penalty found in the Determination.

Issue 3 – What is the appropriate penalty amount?

[47] Under Issue 1, I confirmed the Respondent's finding in the Determination that the Appellant contravened section 52(1) of the *Act*. Under section 103(3) of the *Forest Act*, RSBC 1996, c.157:

> …a person who cuts, damages, destroys or removes Crown timber without authorization must pay, in addition to all other amounts payable under this Act or another enactment, stumpage calculated by multiplying the volume or quantity of the timber that was cut, damaged, destroyed or removed without authorization, as determined by an official designated by the minister…"

[48] Stumpage owing under section 103(3) of the *Forest Act* is an additional consequence of the contravention. However, a stumpage calculation did not form part of the Determination and therefore is not before me to consider. I am left to consider the

administrative penalty amounts for contraventions of the legislated provisions described above.

[49] The powers of the Commission on appeal are provided for in section 84(1) of the *Act.* Under Issue 2, I found it is necessary for me to vary the Determination and reconsider the administrative penalty amounts. Section 74(2) of the *Act* provides the factors that must be considered before imposing an administrative penalty. The Determination was issued in 2022 under a previous version of the *Act* (the "Former Act") where these factors were provided under section 71(5). Nevertheless, both the *Act* and the Former Act lay out substantially similar legislated factors (the "Factors") to be considered:

- previous contraventions of a similar nature by the person;
- the gravity and magnitude of the contravention;
- whether the contravention was repeated or continuous;
- whether the contravention was deliberate;
- any economic benefit derived by the person from the contravention;
- the person's cooperativeness and efforts to correct the contravention;
- any prescribed matters

[50] In determining the administrative penalty amounts, I must also consider the context of the maximum penalty for each contravention. The Respondent submits the maximum administrative penalty calculated for contravention of section 52(1) of the *Act* in this case is $243,000. The Appellant does not dispute this calculation.

[51] The maximum administrative penalty amount for contravention of section 57 of the *Regulation* is $100,000 as provided in section 14(a) of the *Administrative Orders and Remedies Regulation,* B.C. Reg. 101/2005.

[52] Next, I consider the Factors set out in the Former Act.

<u>Previous contraventions of a similar nature</u>

Parties' Submissions

[53] The Appellant acknowledges it was subject to a previous contravention and administrative penalty related to section 37 of the *Regulation*, pursuant to a consent order made by the Commission in *Tolko Industries Ltd. v. Government of British Columbia*, 2017 BCFAC 5 (CanLII) (the "Consent Order"). The Appellant submits—given the timelines of construction of the Road, the Rosemond Slide, and the Consent Order—it could not have accounted for the circumstances in the Consent Order in its construction of the Road. The Appellant argues the contravention in the Consent Order ought not to have significant impact on the penalty imposed in this case.

[54] The Respondent submits the Appellant had two similar previous contraventions where inadequate drainage structures on the Appellant's constructed roads caused a landslide to occur. The Respondent submits these two previous contraventions were addressed in determinations issued in 2009 and 2016, where the 2016 determination was the subject of the previous Consent Order. The Respondent submits this Determination was made in response to the third contravention related to drainage management of roads. The Respondent argues that these successive instances of inadequate drainage management show a pattern of conduct.

Panel's Findings

[55] The Appellant argues, due to the timing of events, it could not account for the Consent Order during construction of the Road. However, I am not convinced knowledge of the Consent Order was necessary. When the Appellant constructed the Road, it had knowledge of the relevant requirements found in the *Act* and *Regulation* pertaining to road construction, drainage management, and landslides. Knowledge of the Consent Order would not have changed the relevant requirements of legislation that must be adhered to when constructing a road. Further, the Appellant's responsibility to maintain natural drainage continued after construction.

[56] The provision in the *Act* states "previous contraventions of a similar nature by the person," and this wording does not limit the timing of previous contraventions of a similar nature. The previous contraventions I consider to be relevant are contraventions related to drainage structure management on roads and road construction related terrain instability. Furthermore, with respect to the Consent Order, a finding of contravention was made and confirmed by the Appellant under the terms of the Consent Order. At all relevant times it was and remains a prior contravention of a similar nature to the one underlying this appeal. The Appellant's arguments do not convince me that its previous contraventions should be excluded from consideration under this factor. I find, as the Respondent found, that the Appellant has had two previous contraventions of a similar nature.

Gravity and magnitude of the contravention

Parties' Submissions

[57] The Appellant submits the gravity of its contravention was low and the magnitude was, at most, moderate. The Appellant argues it is not the potential gravity and magnitude, but actual gravity and magnitude of a contravention that must be considered when determining an administrative penalty. The Appellant relies on the analysis provided by the Commission in *North Enderby Timber Ltd. v. Government of British Columbia*, 2022 BCFAC 3 (CanLII) ("*North Enderby*"), in arguing how gravity and magnitude ought to be considered.

[58] The Appellant submits the actions it took included retaining a qualified professional to conduct a terrain assessment and prepare a Terrain Stability Assessment Report ("TSA

Report"), having a Site Plan prepared by a Registered Forest Technologist and approved by a Registered Professional Forester ("RPF"), conducting a pre-work meeting with the road construction crews, and having a RPF conduct a post-construction road inspection. The Appellant submits the efforts it made to manage drainage requirements of the Road demonstrate that gravity is not at the high end of the spectrum. The Appellant argues significant climatic conditions contributed to the Rosemond Slide and should be considered a mitigating factor in assessing any penalty.

[59] The Respondent submits the gravity of the Appellant's conduct was high. The Respondent argues the Appellant's conduct was a well-understood mistake with predictable consequences. In support, the Respondent refers me to several management handbooks and articles that discuss the risks and impacts of road construction, drainage management, and landslides on "gentle over steep terrain," a specific topographic situation well known to the forest industry, academics, and professionals in the southern interior of BC. The Respondent also points to a written statement provided during the Investigation by the terrain professional retained by the Appellant to assess the Rosemond Slide in May 2017. In the statement, the terrain professional states that, since the late 1990's to early 2000's, the primary method for managing post-construction or post-harvest landslide occurrence in gentle over steep terrain is to ensure surface drainage is managed correctly. The Respondent submits the occurrence of a severe weather event ought not to be considered as a mitigating factor in assessing gravity of the contravention. The Respondent submits the Appellant cannot rely on its efforts prior to the slide occurring as a mitigating factor in the assessment of the gravity of the contravention.

[60] The Respondent submits the Rosemond Slide impacted an area considered to be "large" or "very large" by various landslide rating systems applied in BC. The Respondent submits it is unchallenged that the landslide debris likely harmed fish or fish habitat in Rosemond Lake and resulted in soil disturbance. The Respondent argues this supports the finding of high magnitude.

Panel's Findings

[61] Both parties refer me to the approach taken in *North Enderby* when considering the gravity and magnitude of the contravention. Again, while I am not bound by previous decisions of the Commission, I have reviewed *North Enderby* and I take guidance from the approach the Commission set out at paragraph 246:

> 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 resulting damage from the contravention…

[62] I have reviewed the available evidence related to the Appellant's actions prior to the contravention. The TSA Report appears to cover adjacent cut blocks and roads, and does not appear to have assessed either terrain stability or drainage structures related to the Road. The terrain assessor walked along the road right-of-way but did not make any

relevant comments about the Road in the TSA Report. For this reason, I do not consider the Road to have been assessed by a terrain specialist prior to the slide occurring.

[63] The Site Plan set out that "[the Road] should be reviewed post harvest, construction, to determine if seasonal deactivation is required to ensure natural drainage is maintained. If needed, these roads should be deactivated in a manner that maintains natural drainage…" A review of the post-construction inspection shows there was no specific assessment made as to whether seasonal deactivation was required, nor were specific comments made as to whether natural drainage was maintained. The Respondent noted in the Determination that the Appellant did not monitor the Road in accordance with their own road risk rating system—which required an inspection once every five years. The Appellant did not submit records of subsequent road inspections and does not dispute that subsequent road inspections were not conducted.

[64] While the Appellant emphasizes the role of the significant weather event, its submissions on appeal do not contradict the notion that the Road was constructed on terrain where it would be reasonable to expect potential terrain stability and drainage management risks. I do not accept the Appellant's arguments that its efforts prior to the contraventions are sufficient to mitigate the gravity of the contraventions. Instead, the evidence sheds light on the Appellant's apparent oversights and lack of due diligence giving rise to the contravention. As a result, I confirm the gravity of the contraventions to be significant or high.

[65] As described in *North Enderby,* I find the magnitude of the contravention references the damage resulting from the contravention. The resulting damage from the Appellant's contraventions includes a landslide that disturbed 2.43 hectares and moved 11,500 cubic meters of material, damage to 990 cubic meters of timber, soil disturbance, and likely harm to fish or fish habitat. The parties' submissions on magnitude focus on the landslide. The Respondent submits the generally accepted landslide rating systems in BC characterize the magnitude of the Rosemond Slide as "large" or "very large." The Appellant has not provided me with another framework to assess the magnitude of the landslide. The Appellant has not convincingly established why the weather event in May 2017 and occurrence of other landslides in the region during that time should influence the assessment of the resulting damage, or magnitude, of the Rosemond Slide.

[66] The parties offered limited submissions on the impact to fish and fish habitat. In the Investigation, Ministry staff stated that the slide was likely to have caused harm, but without an understanding of baseline conditions in Rosemond Lake, it is difficult to determine the extent and nature of the impacts of the slide on fish and fish habitat. The Appellant makes no substantial submissions on the harm or impact to fish or fish habitat.

[67] Given the above, I find insufficient evidence to vary the Respondent's finding on magnitude of the contravention. I confirm the Respondent's finding of the magnitude of the contraventions to be significant or high.

Whether the contraventions were repeated, continuous, or deliberate

[68] The parties agree that the contraventions were not repeated, continuous, or deliberate. Having insufficient evidence before me to demonstrate otherwise, I confirm the contraventions were not repeated, continuous, or deliberate.

Economic benefit derived by the person from the contraventions

[69] The Appellant submits it did not derive any economic benefits from the contraventions and has not benefited from any inflationary adjustments through exercising its rights to appeal. The Respondent submits that any economic benefit derived was minimal and does not argue that this factor ought to be engaged in the penalty assessment. As a result, I find no convincing evidence that the Appellant derived an economic benefit from the contraventions.

Cooperativeness and efforts to correct the contravention

[70] The parties agree that the Appellant was cooperative throughout the Investigation and took steps to undertake remedial works within days of the Rosemond Slide. The Appellant submits it has also since incorporated a staff geoscientist to support future road developments. The Respondent argues, however, the Appellant has not been cooperative in all respects. It is not disputed that the Appellant did not report the slide to the Ministry despite its own policy to do so. Further, the Respondent submits the Appellant also did not report its remedial works to the Ministry as required.

[71] I find the remedial works are limited in their ability to be considered as efforts to correct the contravention. The landslide and resulting damage to environment and timber has already occurred and few meaningful efforts are available to correct such a contravention. The submissions do not support a conclusion that either the Appellant or the Ministry has or plans to rehabilitate or replant the slide-damaged area.

[72] In my view, the contraventions are borne of inadequate risk assessment during road design, planning, construction, and post-construction inspection. The parties note that the Appellant has hired a staff geoscientist, but submissions are otherwise limited on how this meaningfully contributes to cooperativeness or to efforts to correct the contravention. I find the Appellant’s conduct with respect to this Factor does not meaningfully mitigate the penalty amount.

Prescribed matters

[73] There are no prescribed matters to consider.

Deterrence and Administrative Penalty Amount

Parties' Submissions

[74] The Appellant submits the Commission owes no deference to the Respondent's Determination and ought to consider the administrative penalty afresh. The Appellant argues the penalty assessed by the Respondent is unreasonable and should be reduced. The Appellant argues, given consideration of all the Factors, there is no need for a deterrence penalty. The Appellant argues any penalty, if assessed, should be nominal or low in these circumstances.

[75] The Appellant submits the administrative penalty in this case is excessive and not consistent with penalty amounts levied in the past for similar contraventions, particularly in *O'Brien*, *Tembec Enterprises Inc. v. Government of British Columbia,* 2009 BCFAC 7 (CanLII) ("*Tembec*"), and the Consent Order. The Appellant submits it was previously subject to an $8,000 administrative penalty in the Consent Order. An $8,000 penalty was also imposed on Weyerhaeuser Company Ltd. related to the same landslide considered in the Consent Order.

[76] The Respondent compares the total penalty in this case to other previous landslide contraventions based on disturbed area, volume of debris moved, and volume of Crown timber destroyed. The Respondent submits a range of administrative penalties imposed for landslide related contraventions in previous Commission decisions: *Forest Practices Board v. Government of British Columbia*, 2002 BCFAC 1 (CanLII) ("*FPB v. BC* 2002"), *O'Brien, Tembec, 0793663,* and the Consent Order. The Respondent submits the penalty in this case is within the proportionate dollars per hectare range relative to previous penalty amounts for comparable contraventions. The Respondent submits the selection of one penalty amount rather than another, within a given range, is a "line-drawing" exercise and efficiency does not favour the Commission intervening.

[77] The Respondent submits the gravity and magnitude of the Appellant's conduct underscore the need for general and specific deterrence. The Respondent refers me to *R. v. Canadian Pacific Forest Products Ltd.*, 1992 CanLII 389 (BC SC), where the court stated: "This is a large corporation and so a fine has to be substantial enough to impose a significant economic hardship on it, so that the penalty is a realistic deterrent." The Respondent argues the Appellant is a large corporation and a reduction in the penalty amount would undermine the goal of specific deterrence.

[78] The Respondent submits, regardless of which specific sections of the *Act* or *Regulation* that the Appellant is found to have contravened, the core finding is the Appellant's forest practices resulted in a landslide and associated damage to timber and the environment. The Respondent submits the Commission has the jurisdiction to vary the determination meaning that it may increase, maintain, or decrease the penalty amount. The Respondent argues even if the Commission finds technical errors in the initial penalty assessment, the Commission has the authority to impose the same penalty amount on a different basis or increase the administrative penalty amount. The Respondent argues

that regardless of any errors in the Determination, the $75,000 penalty is still supported and reasonable given the factual circumstances.

Panel's Findings

[79] The Commission has previously held that the primary purpose of administrative penalties is to compensate the Crown for loss or damage suffered by public natural resources, and the secondary purpose is to deter future contraventions: (*Wadlegger Logging and Construction Ltd. v Government of British Columbia*, 2025 BCFAC 8 (CanLII); *Forest Practices Board v. Government of British Columbia*, 2017 BCFAC 1 (CanLII); and *Marilyn Abram v. Government of British Columbia*, 2005 BCFAC 8 (CanLII)). The stumpage determined to be owed under section 103(3) of the *Forest Act* will address compensation to the Crown for loss or damage to the timber resource in this case. Stumpage value recovery is one way to compensate the loss to the Crown. At the same time, I am mindful stumpage does not wholly capture the losses with respect to environmental damage and site productivity. Due to the nature of a landslide, in addition to damage to Crown timber, there are also impacts to soil productivity and future site productivity over the long term. In this case, there were also likely harms to fish and fish habitat. These non-timber impacts are difficult to quantify, and the parties' submissions do not provide substantial evidence on how to characterize these impacts.

[80] In determining the administrative penalty amounts, I consider the Factors, compensation for damage to non-timber public resources, and the need for general and specific deterrence.

[81] I have reviewed the previous Commission decisions referred to me by the parties including *O'Brien, Tembec, FPB 2002, 0793663,* and the Consent Order. I find the facts and circumstances in these five appeals to be distinguishable. In *FPB 2002, O'Brien, Tembec,* and *0793663,* none of the appellants were found to have previous contraventions of a similar nature. In *FPB 2002, O'Brien, Tembec,* and *0793663,* the assessment of gravity and magnitude is not consistent with the guidance in *North Enderby* which the parties argue, and I agree, is relevant to the assessment of gravity and magnitude in this case. The Consent Order does not provide details on issues or analysis.

[82] The *Act,* and Former Act, require the Factors described above be considered before imposing an administrative penalty. The *Act* does not require an assessment of, or comparison against, previous penalties applied in similar circumstances. Comparisons, expressed in dollars per volume of debris or dollars per hectare disturbed, against administrative penalties imposed in previous non-binding decisions of the Commission are unhelpful and distract from the Factors that are legally required to be considered. I have considered the area disturbed, the volume of debris, and the volume of timber as part of the magnitude of the contravention.

[83] In determining the need for specific and general deterrence, I also consider the Appellant's conduct following its discovery of the Rosemond Slide. The Appellant is an experienced forest licensee with a number of qualified professionals working on its behalf as employees or contractors. It is troubling that despite the apparent existence of internal monitoring and inspection systems, and the involvement of several qualified professionals in assessing the Rosemond Slide and planning remedial works, the Ministry was not notified of the slide. The Investigation into the Appellant's conduct and the impacts to environmental values began more than one year after the occurrence and the Appellant's initial discovery of the Rosemond Slide.

[84] Both parties acknowledge in their submissions that the Commission has the authority to vary the decision. For the reasons above, I have confirmed the findings of contraventions for each of sections 46(1), and 52(1) of the *Act,* and sections 37, 39(1), and 57 of the *Regulation.* For the reasons above, I find it appropriate to impose administrative penalties under section 52(1) of the *Act* and section 57 of the *Regulation,* and do not consider these penalties to be unfair or duplicative.

[85] The manner in which the Appellant contravened *FRPA* section 52(1) and *FPPR* section 57 was by causing a landslide due to inadequate drainage management during and after road construction. Road construction and natural surface drainage management are activities frequently undertaken by the Appellant. The Appellant has had previous contraventions of a similar nature related to road construction and drainage management. As set out above, the gravity and magnitude of the contraventions is high. These considerations aggravate the penalty amount. I have found no factors under section 74(2) of the *Act* or section 71(5) of the Former Act which mitigate the penalty amount. The circumstances of this appeal warrant the need for strong specific and general deterrence.

DECISION

[86] In making my decision I have carefully considered the parties' submissions and the available evidence, whether or not they are specifically referenced in the reasons above. For the reasons provided in this decision, the administrative penalty for contravention of section 46(1) of the *Act* is rescinded. I impose an administrative penalty of $50,000 for the contravention of section 57 of the *Regulation*. I confirm the administrative penalty of $25,000 for contravention of section 52(1) of the *Act*.

[87] For clarity, the stumpage owing under section 103(3) of the *Forest Act*, as a result of contravention of section 52(1) of the *Act*, is to be determined by an official designated by the minister, and the Appellant is required to pay the amount in addition to the administrative penalties in this appeal.

"Cynthia Lu"

Cynthia Lu, Panel Chair
Forest Appeals Commission