



Forest Appeals Commission

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APPEAL NO. 2000-FOR-008

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN: International Forest Products Limited **APPELLANT**
AND: Government of British Columbia **RESPONDENT**
BEFORE: Panel of the Forest Appeals Commission
David Ormerod, Chair
Patricia Marchak, Member
Brenda Milbrath, Member

DATE OF HEARING: May 8, 2001

PLACE OF HEARING: Victoria, B.C.

APPEARING: For the Appellant: Jeffrey B. Waatainen, Counsel
For the Respondent: Dawn L. House, Counsel

APPEAL

This is an appeal by International Forest Products Limited ("Interfor") of a decision dated November 10, 2000 by a Review Panel under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 179 (the "*Code*"). The Review Panel upheld the June 26, 2000 determination of the District Manager that Interfor was responsible for five contraventions of section 51(2)(a) of the *Code*. Specifically, the District Manager determined that Interfor failed to modify or stop timber harvesting operations that were in the immediate vicinity of five previously unidentified "resource features" to the extent necessary to refrain from threatening them. The District Manager assessed a penalty of \$2,500 per contravention, which was also upheld by the Review Panel.

The appeal was brought before the Forest Appeals Commission (the "Commission") pursuant to section 131 of the *Code*. Under section 138 of the *Code*, the Commission may confirm, vary or rescind the determination appealed from. The Commission may also refer the matter back to the person who made the determination, with or without directions.

Interfor requests that the determination be varied to reflect only a single contravention of the *Code*, and that the penalty be reduced.

BACKGROUND

Interfor is the holder of Forest Licence A16850 and Timber Licence TO1001. Cutting Permit 215 and Cutting Permit A were issued under Forest Licence A16850 and Timber Licence TO1001, respectively. Timber harvesting operations on Block N-12 are split between these two Cutting Permits. Block N-12, located in the South Bentick area within the Mid Coast Forest District, is where the five previously unidentified resource features were found. These resource features consisted of five culturally modified trees ("CMTs")¹.

In 1998, Bjorn Simonsen of The Bastion Group, Heritage Consultants, provided Interfor with a report indicating whether archaeological impact assessments were required on over one hundred and fifty blocks in Interfor's Mid Coast Operations area, including Block N-12. Mr. Simonsen rated Block N-12 as having "low potential" for containing CMTs, and, therefore, recommended that a full archaeological assessment was not warranted on this Block. However, Mr. Simonsen recommended that Interfor's technical staff be instructed to look out for CMTs during the course of their regular work on Block N-12.

Interfor contracted the falling and bucking phases of its harvesting operations within Block N-12 to Mikk Contracting Ltd. Prior to the commencement of production falling on September 17, 1999, Interfor held on-site pre-work conferences with the contractor, and the falling crew signed off a "Safety and Pre-Work" sheet on that date.

On September 28, 1999, the last day of falling operations, three CMTs were found in the west end of the Block N-12. These CMTs consisted of a stump, the remains of its associated felled tree, and an uncut tree with a test hole. They were not damaged by the falling operations, and steps were taken to protect them from further logging operations. Interfor's protection of these CMTs is not an issue in this appeal.

The situation was discussed with Archie Pootlass, Chief Councillor of the Nuxalk Nation, which resulted in The Bastion Group being engaged to survey the area. On October 12 and 13, 1999, John Somogyi of The Bastion Group, Simon Mack of the Nuxalk Nation, and Bruce Colpitts of Interfor recorded the CMTs found in Block N-12 and surveyed Blocks N-9 and N-10, which were due to be logged. Three "barkstrip" CMTs were found in N-9, two of which had been felled in right-of-way falling. On-site discussions led to an agreement that road development would continue after sample material was removed for analysis, under a permit held by the Bastion Group. This information was conveyed to the Ministry of Forests' District Manager, Otto Pflanz, by Mr. Colpitts in a letter dated October 14, 1999.

On Friday, October 15, 1999, the "hook tender" on the Interfor yarding crew discovered 5 damaged CMTs, consisting of two trees and three stumps with cultural modifications, in the south-west corner of Block N-12, off the end of spur 12C.

¹ A CMT has been defined as "a tree that has been altered by native people as part of their traditional use of the forest." Arnoud H. Stryd (ed.), *Culturally Modified Trees of British Columbia*, (1998) B.C. Ministry of Forests.

These trees had apparently been damaged by the faller who had been working in this section of the block in September. The faller had cut down two CMTs, and then attempted to destroy the evidence of cultural modifications on these trees as well as the three stumps. These two fallen trees and three stumps are the CMTs at issue in this appeal.

Once notified that the damaged CMTs had been discovered, Hans Granander, Area Manager for Interfor, stopped work at the site. On Saturday, October 16, 1999, and Monday, October 18, 1999, Mr. Granander contacted Chief Archie Pootlass regarding the discovery. On October 18, 1999, Mr. Granander also called Dave Flegel, Acting District Manager with the Ministry of Forests, and reported the damaged CMTs found in Block N-12.

During a meeting held at the Ministry of Forests offices on October 19, 1999, Interfor and the Ministry of Forests agreed to jointly conduct a field investigation of the site. On October 26, 1999, Mr. Colpitts of Interfor attended the site of the CMTs with Ministry of Forests' representatives.

Also on October 19, 1999, the falling contractor, writing under the name of King Island Contracting Ltd., wrote to the Nuxalk Nation, admitting that one of their fallers was responsible for the damage, and that he had attempted to destroy the evidence in the process. This letter conveyed the company's apologies for the incident, and advised that the employee in question had been suspended indefinitely.

On October 28, 1999, Mr. Colpitts again met with Ministry of Forests' representatives, and a letter was received from Mr. Granander describing the incident. Information regarding the pre-work conferences carried out in September 1999, and regarding Mr. Bjornsen's 1998 archaeological survey was provided to the Ministry of Forests the next day.

On November 10, 1999, at Interfor's request, Professor Phillip Hobler of the Department of Archaeology, Simon Fraser University, visited Blocks N-9 and N-12 where CMTs had been cut down. In a letter dated November 18, 1999, which was copied to Interfor, the Nuxalk Nation, and the District Manager, Professor Hobler described his observations on the Blocks, the extent of the damage to the 5 CMTs, and the likely origin of their cultural modifications. In his letter, Professor Hobler also made several recommendations regarding how such incidents could be avoided.

Subsequent to these events, meetings with the Nuxalk Nation were held by Interfor's President, and its Vice-President of Woodlands Operations, amongst others. On December 2, 1999, a formal statement of apology was given to the Nuxalk Nation by John Mann, Interfor's General Manager of Mid Coast Operations.

On January 28, 2000, after the Ministry of Forests had completed its investigation of the CMT incident in Block N-12, it sent a letter to Interfor advising that Interfor may be in contravention of the *Code* as a result of this incident.

On March 14, 2000, representatives from Interfor and the Nuxalk Nation attended an Opportunity to be Heard meeting with the District Manager. At this meeting, Mr. Granander presented a prepared brief outlining Interfor's preventative and remedial efforts with respect to the CMT issues and the company's relationship with the Nuxalk Nation. At the recommendation of the Nuxalk Nation, the District Manager personally visited the site on March 15, 2000.

On March 23, 2000, the Nuxalk Nation and Interfor signed a Reconciliation Accord in order to lay the groundwork for reconciliation and an improved relationship.

On March 24, 2000, Chief Archie Pootlass sent a letter to the District Manager suggesting that, if there was no further evidence of "additional wrongdoing" by Interfor, the Nuxalk Nation "may wish to suggest leniency, especially in light of our understanding with Interfor."

On June 26, 2000, the District Manager determined that Interfor had contravened section 51(2)(a) of the *Code* in 5 separate instances, and levied a penalty of \$2,500 for each instance, for a total penalty of \$12,500. Interfor requested an Administrative Review of this determination, which was conducted on September 6, 2000. The Review Panel upheld the District Manager's determination and penalties.

ISSUES

This appeal raises the following issues:

1. Whether the District Manager erred in treating the damage to each of the five CMTs in Block N-12 as five separate contraventions of section 51(2)(a) of the *Code*.
2. Whether the penalty is reasonable in the circumstances.

RELEVANT LEGISLATION

Section 51 of the *Code provides as follows:*

Previously unidentified resource features

51 (1) In this section, "**resource feature**" includes the following:

- (a) a cultural heritage resource;

...

- (2) If a person carrying out a forest practice, other than fire control or suppression, finds a resource feature that was not identified on an approved operational plan or permit, the person carrying out the forest practice must

- (a) modify or stop any forest practice that is in the immediate vicinity of the previously unidentified resource feature to the extent necessary to refrain from threatening it, and

- (b) promptly advise the district manager of the existence and location of the resource feature.

A "cultural heritage resource", as referred to in section 51 of the *Code*, is defined in section 1(1) of the *Forest Act*, R.S.B.C. 1996, c. 157:

"cultural heritage resource" means an object, a site or the location of a traditional societal practice that is of historical, cultural or archaeological significance to British Columbia, a community or an aboriginal people;

When a contravention of section 51(2) of the *Code* occurs, a penalty may be levied under section 117 of the *Code*:

- 117.** (1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.

...

- (4) Before the senior official levies a penalty under subsection (1) or section 119, he or she

...

- (b) subject to any policy established by the minister under section 122, may consider the following:

- (i) previous contraventions of a similar nature by the person;
- (ii) the gravity and magnitude of the contravention;
- (iii) whether the violation was repeated or continuous;
- (iv) whether the contravention was deliberate;
- (v) any economic benefit derived by the person from the contravention;
- (vi) the person's cooperativeness and efforts to correct the contravention;

...

Sections 2 and 13 of the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, provide as follows:

Purpose of Act

- 2** The purpose of this Act is to encourage and facilitate the protection and conservation of heritage property in British Columbia.

Heritage protection

- 13 (1) Except as authorized by a permit issued under section 12 or 14, a person must not remove, or attempt to remove, from British Columbia a heritage object that is protected under subsection (2) or which has been removed from a site protected under subsection (2).
- (2) Except as authorized by a permit issued under section 12 or 14, or an order issued under section 14, a person must not do any of the following:
- ...
- (d) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846;

DISCUSSION AND ANALYSIS

1. Whether the District Manager erred in treating the damage to each of the five CMTs in Block N-12 as five separate contraventions of section 51(2)(a) of the *Code*.

To determine whether the damage to the five CMTs constitutes a single contravention or five separate contraventions of the *Code*, one must examine the specific wording of the relevant legislation. Section 51 of the *Code* requires that, when a person carrying out a forest practice finds a previously unidentified "resource feature", which includes a "cultural heritage resource" as defined by section 1 of the *Forest Act*, the person must modify or stop forest practices in the immediate vicinity of the resource feature to the extent necessary to refrain from threatening it.

The Respondent takes the position that each CMT is a separate "cultural heritage resource" and, therefore, each CMT damaged constitutes a separate contravention.

The Respondent argues that there is no need to look beyond the words of the *Code* and the *Forest Act* to determine the meaning of the words contained in section 51 of the *Code*. The Respondent refers to the preamble of the *Code*, which states that the "sustainable use" of forests includes "balancing economic, productive, spiritual, ecological and recreational values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations". The Respondent argues that the clear intent of section 51 is the protection and preservation of physical evidence of things that are of historical or cultural significance, regardless of whether they are objects, a site or a location. The Respondent takes the position that section 51 contains no ambiguity and, therefore, there is no reason to look at other legislation for definitions. In support of this submission, the Respondent relies on *Miln-Bingham Printing Co. Ltd. v. The King*, [1930] S.C.R. 282, where Duff C.J. stated:

No doubt, for the purpose of ascertaining the meaning of any given word in a statute the usage of that word in other statutes may be looked at, especially, if the other statute happens to be *in pari materia*, but it is

altogether a fallacy to suppose that because two statutes are *in pari materia*, a definition clause in one can be bodily transferred to the other.

However, the Commission finds that section 51 of the *Code* is unclear on whether each CMT is a separate cultural heritage resource, or whether a group of CMTs are, collectively, a cultural heritage resource. Section 1(2) of the *Code* states that “[w]ords and expressions not defined in this Act have the meaning given to them in the *Forest Act* and *Range Act* except where the context indicates otherwise.” We can then look to the section 1(1) of the *Forest Act*, which defines a cultural heritage resource as “...an *object*, *site*, or the location of a traditional societal practice that is of historical, cultural or archaeological significance to British Columbia, a community or an aboriginal people”.

Neither the *Code* nor the *Forest Act* further define the words “object” or “site”. As a result, the language in these provisions does not provide a clear indication of whether the five CMTs at issue in this appeal should be considered five separate “objects” or “sites”, or whether the group of five CMTs should, together, be considered one “site”.

A principle in the construction of statutes is that statutes *in pari materia*, that is, statutes enacted by the same legislature and relating to the same subject, are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. *Driedger on the Construction of Statutes* (3rd ed.) 1994, states as follows, at page 287:

Where statutes deal with the same subject, it is presumed that their language is consistent throughout. Identical phrases and expressions are presumed to have the same meaning...

Interfor submits that the Commission has applied this same principle of statutory construction in a previous decision, in determining the meaning of a phrase in a manual prescribed under the *Forest Act* by looking to other statutes to see how it was defined. In *Weyerhaeuser Company Limited v. Government of British Columbia* (Appeal No. 00-FA-003, May 29, 2000)(unreported), the Commission looked to a variety of provincial statutes to determine whether the phrase “city, district, municipality, town or village” included only those incorporated under the *Municipal Act*, R.S.B.C. 1996, c. 323.

Given that the *Code* and *Forest Act* are unclear as to the meaning of “object” and “site”, the Commission finds that it is appropriate to look to other legislation relating to the subject of heritage preservation as an aid in determining the meaning of these words.

The Commission notes that the purpose of the *Heritage Conservation Act*, as expressly stated in section 2 of the Act, is “to encourage and facilitate the protection and conservation of heritage property in British Columbia”. Further, in *Siska Indian Band v. British Columbia (Minister of Forests)* (1999), 62 B.C.L.R. (3d) 113, the Court found section 13(2)(d) of the *Heritage Conservation Act* and section 51(1) of the *Code* to have similar legislative purposes. At page 136 of this decision, the Court stated as follows with respect to these two provisions:

The purpose of these legislative provisions is to protect and preserve, respectively, physical evidence of aboriginal habitation before 1846 and resources historically of cultural significance.

In fact, the Commission notes that the language used in section 51 of the *Code* does not expressly state that it protects previously unknown physical evidence of aboriginal habitation only if such evidence dates from *before* 1846.

In any event, while the *Code* and the *Heritage Conservation Act* may each have several purposes, not all of which are the same, they do share at least one common purpose with respect to heritage resources, as referred to in *Siska Indian Band, supra*. As such, the Commission finds that it is appropriate to look to the *Heritage Conservation Act* for guidance in interpreting the definition of "cultural heritage resource".

The *Heritage Conservation Act* protects "heritage property", as stated in section 2. Two types of "heritage property" are defined in section 1 of the *Heritage Conservation Act*, namely, a "heritage object" and a "heritage site". They are defined as follows:

"heritage object" means, whether designated or not, *personal property* that has heritage value to British Columbia, a community or an aboriginal people;

"heritage site" means, whether designated or not, *land*, including land covered by water, that has heritage value to British Columbia, a community or an aboriginal people; [italics added]

In defining a "cultural heritage resource", section 1 of the *Forest Act* uses similar language, referring to both "objects" and "sites" of historical cultural or archaeological significance.

The distinguishing feature between a "heritage object" and a "heritage site" in the *Heritage Conservation Act* appears to be whether the thing is personal property or land. Trees (and by inference, stumps) have traditionally been treated as part of the land, as long as they remain growing on or attached to the land (R.E. Megarry and W.R. Wade, *The Law of Real Property* (5th ed.) 1984). In comparison, "personal property" is defined in *Black's Law Dictionary* (7th ed.) 1999, as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property."

These general legal concepts suggest that the five CMTs at issue in this appeal, which were attached to the land before the damage occurred, may be considered to be part of the land. As such, these CMTs may be considered a "heritage site" under the *Heritage Conservation Act*. By applying the principles of interpretation regarding statutes *in pari materia*, these CMTs could also be considered a "site" under the *Forest Act*.

However, the Commission cautions that this analysis is not intended to suggest that section 51 applies only to CMTs that are affixed to the land. Many kinds of CMTs are found in British Columbia. For example, CMTs may also include trees that have

been felled as part of a traditional native activity. Further, it is clear from the preamble to the *Code* that this statute applies to more than just trees (or stumps) as a form of property. As stated in the preamble, one of the objectives of the *Code* is to balance a variety of forest values, including spiritual values, to meet various human needs, including the social and cultural needs of First Nations. Moreover, it is clear that both section 51 of the *Code* and section 13(2)(d) of the *Heritage Conservation Act* protect "objects" as well as "sites" that have heritage value.

If, in this case, the five CMTs are to be considered a "site" as opposed to an "object", the next question is whether these CMTs represent one site or five separate sites.

For further guidance, Interfor points to a current protocol agreement between the Ministry of Forests and the Ministry of Small Business, Tourism and Culture. The stated purpose of this agreement is to define the roles and responsibilities of these Ministries "in assuring the integration of cultural heritage resources in MOF's land and resource management planning and operations." The Commission notes that the operating protocols with respect to archaeological resources, as set out in section 3.0 of this protocol agreement, place the responsibility for defining standards on the archaeological experts at the Archaeology Branch of the Ministry of Small Business, Tourism and Culture, while the operational burden of fieldwork lies with the Ministry of Forests.

Interfor also directed the Commission to a document titled, "Culturally Modified Trees in British Columbia - A Handbook for the Identification and Recording of Culturally Modified Trees" (the "Handbook"). Published in 1998 by the Ministry of Forests, and edited by Arnoud H. Stryd, the Handbook is used as a guide for identifying and recording CMTs.

The Respondent argues that the Handbook deals with identifying and managing CMTs rather than enforcing their protection and, therefore, they may be characterized as either objects or sites. The Respondent also points out that the Handbook states that "the recording of CMT sites does not preclude the recording, study and protection of individual CMTs". The Respondent submits that, in any event, the Handbook should not be seen as authoritative with respect to the interpretation of the *Code*.

The Commission recognizes that the Handbook is not legally binding with respect to interpretation of the *Code*. However, the Commission notes that the Handbook is intended as an operational guide to identifying, recording, and protecting CMTs in British Columbia. As such, the Handbook provides assistance in determining whether a group of CMTs is, for practical purposes, generally considered to be an "object" or a "site" in the context of being studied or protected.

At page 69, the Handbook discusses "CMT Sites" in detail:

A group of CMTs constitutes a CMT site (also called a forest utilization site). Level 1 recording is concerned with providing information about CMT sites rather than the individual CMTs that make up a site. A CMT site can vary considerably in area, can consist of any number of CMTs, and can include CMTs of one or more types...

Determining the boundaries of a CMT site, and the number of CMT sites in an area, can be problematical, particularly when CMTs are scattered more or less continuously over a large area. However, in many cases, boundaries are self-evident if sufficient time is available to establish the spatial distribution of the CMTs. In many cases, the boundaries are somewhat arbitrary.

There are many CMTs in British Columbia. **It is not practical to manage, study and protect these CMTs if they are recorded only as individual trees.** These undertakings are more manageable when CMTs are recorded and mapped in larger groups called sites. The recording of CMT sites does not preclude the recording, study and protection of individual CMTs. [emphasis added]

Based on these portions of the Handbook, the Commission finds that defining a group of CMTs as a "site" is generally consistent with the operational guidelines applied by the Ministry of Forests.

The Commission finds that, where CMTs are grouped closely together on ground that is not separated by distance or natural features such as streams or rock outcrops, and where the modification of the trees appears to have originated from the activities of the same community of people and time period, it is most likely that they would be viewed or recorded as a CMT site.

In this case, the five damaged CMTs occurred within an area about one tree length wide, and were not separated by natural physical barriers. According to Professor Hobler's 1999 letter, the modifications on all five CMTs originated from activities by people of one native community, whose villages were located about two kilometres away. Professor Hobler further wrote that these modifications occurred in the period between 1860 and 1920, "with probable use more likely to have occurred in the earlier half of this period". As such, the Commission finds that the five CMTs at issue in this appeal would most likely be recorded and studied as one CMT site.

Interfor further submits that the question of whether the incident at issue in this appeal constitutes one contravention or five is analogous to a section 96(1) contravention of the *Code* in cases of unauthorized timber harvesting. Section 96(1) states that a person "must not cut, damage or destroy Crown timber unless authorized to do so". Interfor submits that, regardless of whether a single incident of unauthorized harvesting results in one tree or an entire stand of trees being cut down, the incident will be treated as a single contravention of section 96(1). Interfor suggests that, just as the word "timber" in section 96(1) can be taken to be singular or plural, so can the word "resource" in section 51(1)(a). Interfor submits that the quantity of timber cut affects the size of the administrative penalty, but not the number of contraventions that have occurred.

The Commission agrees that, where a single incident of damage to a group of CMTs located in the same area occurs, it should generally be treated as one contravention of section 51 of the *Code*. In this case, there is no dispute that the five CMTs were damaged as a result of one incident involving one faller. The Commission notes that, under section 150 of the *Code*, if a contravention of section 51 (2) "continues

for more than one day, the offender is liable to a separate penalty... for each day that the contravention occurs." However, no submissions concerning section 150 were provided by the parties in this appeal, and the Commission notes that the District Manager's determination states that the incident "occurred at a single point in time and therefore [was] not repeated or continuous".

For all of these reasons, the Commission finds that the five CMTs at issue in this appeal should be classified as a site, and the single incident that led to their damage should be treated as a single contravention of section 51 of the *Code*.

2. Whether the penalty is reasonable in the circumstances.

Interfor submits that only a nominal penalty is warranted in the circumstances. Interfor maintains that it should not be penalized for the dishonesty of a contractor's employee. Interfor points out that it has no record of previous contraventions of a similar nature, and argues that it generally has a good record of identifying and recording CMTs in this area. Interfor emphasizes that it took immediate measures to halt operations on Block N-12 once CMTs were discovered, and has expressed its regret over the incident to the Nuxalk Nation. Interfor maintains that it took steps to ensure its falling operations would not result in *Code* contraventions, by having an archaeological consultant review the area before harvesting operations began, by conducting a pre-work conference with the contractor, and by having its own staff visit or be present on Block N-12 each day that harvesting was underway. Interfor notes that it received no economic benefit from the contravention, and was very co-operative in respect of this incident.

Mr. Simonsen testified that finding CMTs in this area was a surprise. Block N-12 and approximately one hundred and fifty other blocks were reviewed by Mr. Simonsen's firm in 1998, and the potential for finding cultural heritage remains in Blocks N-9 through N-17 in the South Bentick area was rated low, due to the low incidence of cedar, the rugged terrain, the elevation, and the distance from tidewater.

However, Professor Hobler's letter of November 18, 1999 contains some specific criticisms of practices by Interfor and the Ministry of Forests which, in his opinion, contributed to the occurrence of this incident. Professor Hobler's letter states the following:

- Interfor's professional foresters and engineers failed to note the now destroyed CMTs in the course of their "repeated traverses of these blocks during the planning process."
- It is not reasonable to expect fallers to "recognize and afford last minute protection to cultural features."
- The Ministry of Forests should have predicted a medium potential for CMTs because of the presence of cedar less than two kilometres from a major Nuxalk settlement, regardless of elevation.

Mr. Simonsen took issue with these statements, noting that Interfor's technical field staff, through working with consulting archaeologists, are competent in

identifying CMT sites, and that elevation and distance from the sea reduce the potential for CMT sites to exist. Further, Mr. Simonsen stated that the most important indicator of CMTs was the amount of cedar found in the inventory.

Interfor points to the low cedar volume in the timber cruise for the Block (approximately two percent of the timber volume), as confirmation of the low CMT potential assessment in Mr. Simonsen's 1998 archaeological overview.

The discovery of the CMTs in Block N-12 has had a notable impact on the relationship between the Nuxalk Nation, Interfor, and the Ministry of Forests. This relationship was discussed at length by Mr. Granander and Mr. Pflanz. The Commission did not have the opportunity to hear the views of a representative of the Nuxalk Nation, although the March 24, 2000 letter from Chief Pootlass to the Ministry of Forests, and the presence of Nuxalk representatives at the Opportunity to be Heard meeting, has been noted.

Nevertheless, the five CMTs have been described in letters by the Nuxalk as "bearing witness" to the extent of traditional Nuxalk presence on the land. The willful damage to these CMTs has been described as disrespectful to the Nuxalk, and has eroded their confidence that their cultural heritage will be treated appropriately. The incident has been treated as a grave matter by all parties.

In his determination, the District Manager noted that Interfor did not act with intent, has been generally diligent in the management of cultural resources, was co-operative, and reacted appropriately in striving to rebuild trust with the Nuxalk Nation. However, the District Manager was concerned by the fact that the CMTs were not found during the layout/engineering phase of operations, and found that there had been a "lapse in care" in that technical field staff were not directed to be "on the lookout" for CMTs. The District Manager concluded that, since the archaeological overview indicated that there was some potential for finding CMTs on Block N-12, technical staff should have found these CMTs if they were looking for such features.

Interfor responds that its technical staff are always on the "look-out" for such features, and that since 1994 the company has identified and documented more than 380 CMTs. However, the Commission finds that because both CMT sites on Block N-12 were immediately adjacent to the logging roads being developed, the presence of these few large cedars should have been noted, and a special effort should have been made to "look-out" for CMTs. The Commission agrees with the District Manager that there has been a "lapse of care" in Interfor's fieldwork with respect to identifying and noting possible locations of CMTs.

The maximum penalty prescribed by the *Administrative Remedies Regulation* for a single contravention of section 51(2)(a) of the *Code* is \$10,000. The damage to the CMTs in question was a result of deliberate action by a contractor's employee in an attempt to hide his damage to a CMT site, rather than report it, and resulted in continued operations and further damage to the CMTs. This resulted in severely strained relations between Interfor and the Nuxalk Nation, and a significant penalty is warranted to signal the seriousness of the employee's disregard for cultural remains. Further, had Interfor made greater effort to locate CMTs in this

Block, the incident may have been avoided. However, the Commission accepts that the damage to the CMTs did not significantly diminish their scientific value, that Interfor received no economic benefit from the contravention, and that there was no pattern of continuity or repeat contraventions of this nature in Interfor's operations. Further, the Nuxalk Nation have recognized and appreciated Interfor's efforts to rebuild trust, and have asked that leniency be given if no evidence of further wrongdoing was found.

In these circumstances, the Commission finds that a penalty of \$5,000 is appropriate.

DECISION

In making its decision, the Commission has considered all of the evidence and submissions before it, whether or not specifically reiterated here.

For the reasons given above, the Commission orders that the determination be varied to reflect a single contravention of section 51(2)(a) of the *Code*, and that the penalty be reduced to \$5,000.

The appeal is allowed.



David Ormerod, Panel Chair
Forest Appeals Commission

Brenda Milbrath, Member
Forest Appeals Commission

Patricia Marchak, Member
Forest Appeals Commission

July 4, 2001