



# Forest Appeals Commission

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## **DECISION NO. FAC-FRP-21-A003(a)**

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

<b>BETWEEN:</b>	Forest Practices Board	<b>APPELLANT</b>
<b>AND:</b>	Government of British Columbia	<b>RESPONDENT</b>
<b>AND:</b>	Timothy H. Holland	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A Panel of the Forest Appeals Commission Linda Michaluk, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on July 29, 2022	
<b>APPEARING:</b>	For the Appellant: Nathan Murray, Counsel	
	For the Respondent: Darcie Suntjens, Counsel	
	For the Third Party: Did not appear	

## **APPEAL**

[1] The Forest Practices Board (the "Board") appeals Determination DCR-40019 (the "Determination"), issued on September 13, 2021 by Lesley Fettes, the District Manager (the "District Manager"), Campbell River Natural Resource District. The District Manager works for the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). In the Determination, the District Manager found that Timothy Holland had contravened sections 52(1) and 52(3) of the *Forest and Range Practices Act* (the "Act"), respectively, by cutting and removing Crown timber without authority. The District Manager levied administrative penalties of \$6,000 for the contravention under section 52(1) of the Act and \$6,000 for the contravention under section 52(3) of the Act. The penalties were issued in accordance with section 71(2) of the Act, after considering factors that must be considered before levying penalties, as specified in section 71(5).

[2] The Forest Appeals Commission (the "Commission") has the authority to hear this appeal under section 83 of the *Act*. Under sections 84(1)(c) and (d) of the *Act*, the Commission may:

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

(d) either

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

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

[3] The Board was established by the Legislature in 2005 to represent the public's interest in forest practices in British Columbia. It was also given the authority to appeal enforcement decisions and penalties imposed by the government under the *Act*, and other specified forest-related legislation. The Board has the right to appeal determinations under section 83(1) of the *Act*.

[4] The Board asks the Commission to vary the Determination by increasing the penalty amount from \$6,000 for the contravention of section 52(1) to \$132,401.60, and from \$6,000 for the contravention of section 52(3) to \$132,401.60. The Board submits that the original penalty amount is not a sufficient deterrent and results in Mr. Holland profiting from the contraventions.

[5] Mr. Holland declined to participate in the appeal.

## **BACKGROUND**

### **Forestry Licence to Cut A 94605**

[6] In September 2016, the Ministry issued Forestry Licence to Cut ("FLTC") A 94605 to Mr. Holland, doing business as Bigfoot Forest Productions. The FLTC authorized Mr. Holland to harvest up to 2,000 cubic metres (m<sup>3</sup>) of "damaged timber" in an area (the "Authorized Area") defined in the FLTC document. The phrase "damaged timber" is defined in the FLTC as timber "comprised of all coastal species and grades and Special Forest Products comprised of Shake/Shingle Blocks and Cants". The Authorized Area is located in the Great Bear Rainforest ("GBR"), in the general vicinity of Towry Head, Loughborough Inlet, and is subject to the Great Bear Rainforest Order<sup>1</sup>. The Authorized Area is also within the traditional territory of the Wei Wai Kum First Nation (the "Wei Wai Kum").

[7] Mr. Holland engaged a forest professional to develop his application package for the FLTC. Originally, Mr. Holland sought to harvest a 400 hectare ("ha") area. However, during the pre-application process, the proposed harvesting area was changed because it contained many registered archaeological sites. As a result, a revised map showing a 144.8 ha area to be harvested was prepared for the FLTC

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<sup>1</sup> An order of the Minister of Forests, Lands and Natural Resource Operations, dated January 21, 2016, establishing objectives for land use and management under section 93.4 of the *Land Act* which are "objectives set by government" for the purposes of the *Act*.

application package. The map included in the approved FLTC was the same as the map in the application package. The FLTC was due to expire in September 2018, and Mr. Holland applied for and was granted a three-year extension of Area 18-A in the FLTC. The extension included a provision that no further extensions would be provided.

### **Complaints and the Investigation**

[8] In June 2019, a Natural Resource Officer ("NRO") with the Ministry's Compliance and Enforcement Branch ("C&E") received a complaint from a former employee of Mr. Holland alleging that Mr. Holland had removed timber from outside the Authorized Area. Although NROs visited the site in June 2019 and observed that timber had likely been cut outside the Authorized Area, no further action was taken at that time to investigate the complaint due to resourcing constraints.

[9] A second complaint was made in June 2020 by a Guardian Watchman for the Wei Wai Kum about a 'suspicious' timber salvage operation in Loughborough Inlet. That complaint led to a formal investigation which commenced on August 18, 2020 and concluded in February 2021. The results of this investigation were set out in a report titled, "OTBH Investigative Report: DSI-40019" (the "Investigation Report"), prepared by Anthony Kennedy, an NRO. Some key information from the Investigation Report is summarized below.

[10] Over two days of field inspections conducted on October 1 and 2, 2020, the NROs observed that all but a few of Mr. Holland's harvest sites occurred well outside of the Authorized Area. When two NROs visited Mr. Holland's operation in Towry Head, they observed two maps posted in a camper: one map consistent with the area set out in the FLTC and identified with the licence number on it (i.e., the Authorized Area); and, a second map titled "Holland Salvage Licence" that had an area identified as "present harvest area" which was outside the Authorized Area. Mr. Holland's employees directed the NROs to the area where they were actively cutting timber which was outside the Authorized Area.

[11] The NROs recorded 37 sites where timber was cut outside the Authorized Area, including at least 6 sites where standing trees had been cut. Of the 37 sites, 18 were being actively cut, 19 were previously cut, and cut timber had been removed from 14 of the sites. The NROs found an estimated volume of 24.27 m<sup>3</sup> of timber on site that had been cut outside the Authorized Area. These sites included areas of significance to the Wei Wai Kum.

[12] On October 6, 2020, the investigating NRO issued a Stop Work Order (the "SWO") to Mr. Holland pursuant to section 66 of the *Act*. The email message that accompanied the SWO notified Mr. Holland that he was under investigation for an alleged contravention of the *Act* by cutting, removing, damaging, and destroying Crown timber without authorization.

[13] During the investigation, timber scale records were obtained which showed 49.6 m<sup>3</sup> of cedar blocks removed in April 2020 and 75.405 m<sup>3</sup> scaled in May 2020. The originating licence was noted as A94605, the FLTC.

[14] Also acquired as part of the investigation was an invoice for helicopter flights in April and July 2020 to remove shake and shingle blocks. According to the flight

records, which included mapped GPS data, the flights occurred outside the Authorized Area, and except for one flight line across the area, no flying occurred within the Authorized Area.

[15] In September and October 2020, Mr. Holland left voice messages on Ministry staff voicemail systems. In some of the messages, Mr. Holland threatened that he would harm Ministry staff. On October 9, 2020, Mr. Kip Sidhu of Platinum Cedar, a company that had purchased cedar from Mr. Holland, informed NRO Kennedy that Mr. Holland had attempted to arrange the removal of cut timber contrary to the SWO.

[16] According to the Investigation Report, Mr. Holland cut 24.26 m<sup>3</sup> of Crown timber without authorization, and removed 149.75 m<sup>3</sup> of Crown timber without authorization. Of the removed timber, roughly half of the volume was from standing timber. The commercial value of that timber that was cut and removed without authorization totaled \$59,157.42.

[17] The Investigation Report also states that the volume of timber salvaged by Mr. Holland under his FLTC from 2016 to 2020 totalled 827.77 m<sup>3</sup>, all of which likely originated from Crown land outside his FLTC. The Investigation Report set the total market value of cut and removed timber at \$226,462.82. In addition, the Investigation Report notes that Mr. Holland has not paid stumpage<sup>2</sup> to the Crown for the entire duration of his FLTC and he owed a total of \$5,486.22 to the Province as of January 15, 2021 for unpaid stumpage.

[18] The Investigation Report notes that the monetary value of the timber does not reflect the significance that cedar, both standing and downed, has for the Wei Wai Kum, the environment, and the Province. An impact statement from the Wei Wai Kum refers to the fact that they seriously consider forestry referrals, and they work with the government in issuing forestry licences. The impact statement indicates that Mr. Holland did not respect that the Wei Wai Kum assert title over this area and that they have a unique relationship with cedar.

[19] On December 16, 2020, NRO Kennedy arranged to meet with Mr. Holland, so Mr. Holland could provide a formal statement. On the evening of December 16, 2020, Mr. Holland sent an email to NRO Kennedy that contained threatening statements.

[20] On January 21, 2021, NRO Kennedy interviewed Mr. Holland. At the beginning of the interview, NRO Kennedy explained that he was investigating Mr. Holland for contraventions of sections 52 and 53 of the *Act*, and that Mr. Holland was not obliged to say anything, but anything he did say may be used as evidence. During that interview, Mr. Holland offered contradictory statements concerning his knowledge of the archaeological sites in the areas where harvesting occurred, admitted to harvesting timber from unauthorized areas, and contested a statement from his forest professional that the forest professional had uploaded information on cutting boundaries to Mr. Holland's tablet. Mr. Holland denied having a tablet. During the interview, Mr. Holland admitted he had "made some mistakes" but he

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<sup>2</sup> Stumpage is the purchase price that tenure holders under the *Forest Act* pay to the Province for harvesting publicly owned timber.

also became upset and used profane language. Shortly after that, Mr. Holland stated that he was "upset" and "done", so NRO Kennedy ended the interview. The Investigation Report notes that during the interview, NRO Kennedy assessed Mr. Holland to ensure that his rights were protected during the investigation. He noted that Mr. Holland did not indicate that he was unable to provide the interview, and NRO Kennedy was satisfied that Mr. Holland was able to participate.

[21] The Investigation Report concluded that Mr. Holland was explicitly informed of the tenure boundaries of the FLTC before he harvested timber from the area. Further, Mr. Holland intentionally disregarded the direction provided in the FLTC, and salvaged cedar on Crown land beyond the Authorized Area.

### **The Determination**

[22] On June 24, 2021, the District Manager conducted an opportunity to be heard ("OTBH") meeting with Mr. Holland by conference call. At the OTBH, Mr. Holland represented himself, and C&E was represented by NRO Kennedy.

[23] On September 13, 2021, the District Manager issued the Determination. In coming to the Determination, the District Manager considered information and evidence from NRO Kennedy and Mr. Holland presented at the OTBH, as well as additional written materials from Mr. Holland received on July 22, 2021. Due to concerns raised by Mr. Holland, the District Manager chose not to rely heavily on the January 21, 2021 interview, as Mr. Holland indicated it was given while he was "under the influence of substances". As a result, the District Manager chose to put more weight on the statements he made during the OTBH.

[24] During the OTBH and in the subsequent written material, Mr. Holland acknowledged that he and his employees cut trees at the sites noted in the Investigation Report, and took the approach of 'going up the creeks' 30 metres off the beach. Mr. Holland also stated that he would not have agreed to the FLTC because the area was not feasible for harvesting or for hauling timber out by helicopter due to steep ground, rock bluffs, and distance from the water.

[25] The District Manager noted in the Determination that Mr. Holland had been combative with the NROs and a Ministry scaling officer, had left threatening messages with the investigating NRO and the scaling officer, and that there was no evidence that Mr. Holland had taken any steps to correct the contraventions.

[26] In the Determination, the District Manager found that:

- Mr. Holland contravened section 52(1) of the *Act* by cutting Crown timber for shake and shingle materials in at least 37 sites outside the authorized area. The District Manager noted that Mr. Holland admitted that he had directed his staff to harvest wood outside of the authorized area; that he directed staff to cut wood 30 metres off the beaches along the creeks on sites identified by the NORs during the field investigation, and that are clearly outside the authorized area.
- Mr. Holland contravened section 52(3) of the *Act* by removing Crown timber without authorization, including from unauthorized harvest sites, based on evidence presented by C&E which included: evidence of timber cutting and photographs where wood had been removed from 14 sites; invoices for

helicopter flights dated April 18, 2020 and July 12, 2020; and flight data information demonstrating that heavy flight activity occurred outside of the authorized area.

- The defences of due diligence, mistake of fact, or officially induced error do not apply to Mr. Holland. In terms of the due diligence defence, the District Manager found that Mr. Holland took steps in the field to direct his employees to cut outside the boundary. As regards the mistake of fact defence, the District Manager found that: despite claims that Mr. Holland believed the TFLC map to be an archaeological map, Mr. Holland was not confused or mistaken about the authorized area; Mr. Holland admitted he had directed his employees to cut timber 30 metres from the shoreline and that he would not be willing to walk past this timber; and that Mr. Holland should be aware of how FLTC areas are authorized, given that he had held FLTCs in the past. Although Mr. Holland provided no direct information suggesting that officially induced error was a factor, the District Manager considered that Mr. Holland's FLTC was based on his application package which was prepared by a forestry professional, and concluded that officially induced error did not apply to the contraventions.

[27] Regarding the penalties for the contraventions, the District Manager considered that the contraventions were not trifling, and it was in the public interest to levy a penalty for each contravention. In accordance with section 71(5) of the *Act*, the District Manager considered the following factors in setting the amount of the penalty:

- Previous contravention of a similar nature: Mr. Holland was charged with an offence on June 11, 2002, under section 67(1) of the *Forest Practices Code of British Columbia Act* by way of violation ticket. The ticket was issued for cutting and removing cedar blocks from a riparian reserve zone in Tree Farm Licence 47 on East Thurlow Island, and Mr. Holland was found guilty by expiry (i.e., he did not challenge the ticket).
- Gravity and magnitude of the contraventions: the District Manager determined the gravity of the contraventions was moderate as the 37 sites identified were in various locations, all clearly outside the authorized boundary, with a total scaled volume of 174.005 m<sup>3</sup>. The area where the unauthorized harvest occurred has high potential for archaeological sites and culturally modified trees<sup>3</sup> ("CMTs"); as such Mr. Holland's initial application for the FLTC was changed substantially when the FLTC was issued, to avoid areas that were known or likely to have CMTs. CMTs in the coastal forest are often western red cedar which was the focus of Mr. Holland's harvesting.
- Whether the contraventions were repeated or continuous: the District Manager found the contraventions were both repeated and continuous, occurring over a nine-month period in 37 different locations, all outside of the authorized area, with timber removed on at least 2 occasions.

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<sup>3</sup> The phrase "culturally modified tree" commonly refers to trees modified by Aboriginal people in the course of traditional tree utilization (*Culturally Modified Trees of British Columbia*, Archaeology Branch, B.C. Ministry of Small Business, Tourism and Culture, March 2001, available online).

- Whether the contraventions were deliberate: the District Manager determined that Mr. Holland deliberately led his employees to harvest outside the FLTC boundary. The District Manager noted that neither Mr. Holland nor his professional forester visited the site and were not aware of the area's operational challenges. Based on this information, it is likely that once Mr. Holland realized the operational challenges in the approved area of the FLTC, he chose to harvest trees in alternative and unauthorized areas.
- Any economic benefit derived by the person from the contraventions: the District Manager determined the economic benefit of the contraventions to be \$45,958.53 (\$59,157.42 – \$18,685.11 helicopter transport and barging costs + \$5,486.22 in unpaid stumpage). The District Manager's value of \$59,157.42 for the timber was based on the estimated market value of 24.26 m<sup>3</sup> cedar cut and 149.745 m<sup>3</sup> cedar cut and removed, as opposed to the market value and costs for the full term of Mr. Holland's FLTC (827.77 m<sup>3</sup>) as all the evidence focused on the 174.005 m<sup>3</sup> figure.
- The person's cooperativeness and efforts to correct the contraventions: the District Manager determined that Mr. Holland was combative with the NROs and had taken no steps to correct the contraventions. The District Manager also considered that Mr. Holland participated in the OTBH process and, to her knowledge, had obeyed the SWO.
- Any other considerations that the Lieutenant Governor in Council may prescribe: the District Manager noted that no other considerations were prescribed.

[28] Under the heading, "Compensatory Penalty Considerations", the District Manager considered that Mr. Holland was operating in an area of high archeological potential. Six standing trees were felled, most of which appeared to be old growth cedar which were providing old growth characteristics in an area of historic harvest. The District Manager also noted the Wei Wai Kum's victim impact statement emphasizing the cultural importance of cedar for practical and spiritual uses. The District Manager determined that "a higher penalty was warranted" given the potential loss of archeological artifacts, the importance of standing old growth cedar trees to the indigenous community, and the biological benefits that old growth trees provide in a forest.

[29] Under the heading, "Deterrent Penalty Considerations", the District Manager noted that Mr. Holland was aware he was cutting and removing Crown timber outside his Authorized Area and was cutting standing trees without authorization. The District Manager reasoned that the Ministry relied on people adhering to the conditions in their FLTC for operations such as Mr. Holland's, where they are in remote and difficult to access areas. The District Manager considered that the unauthorized harvest was unacceptable, and that the Province, indigenous nations and the public have much higher expectations for the forest industry in BC than had been evidenced here in this circumstance.

[30] The District Manager noted that, in determining the penalty, the maximum penalty amount for a contravention of sections 52(1) and 52(3) of the *Act* is governed by section 13 of the *Administrative Orders and Remedies Regulation* (the "*Regulation*"). It provides that the maximum penalty is the greatest of the three calculations made under that section.

[31] In terms of determining the volume of cut timber, the District Manager noted that while the NORs calculated the market value and costs of Mr. Holland's cut timber using 827.77 m<sup>3</sup>, which was the total scaled under his FLTC from 2016 to 2020, she based her calculations on 174.005 m<sup>3</sup> of cut timber (149.745 m<sup>3</sup> which was cut and removed) because the case and evidence before her focused on that amount. The District Manager applied the calculations as set out in the table below.

#### Maximum Penalty Calculations

Relevant section of the Regulation	S 52(1) – cutting Crown timber without authority	S 52(3) – removing Crown timber without authority
13(2)(a) – volume of timber x \$200/m <sup>3</sup>	174.005 m <sup>3</sup> x \$200/ m <sup>3</sup> = <b>\$34,801.00</b>	149.745 m <sup>3</sup> x \$200/ m <sup>3</sup> = <b>\$29,949.00</b>
13(2)(b) – area of unauthorized harvest x \$100,000/ha	N/A	N/A
13(2)(c) – i) stumpage plus bonus bid, plus ii) market value x2, plus iii) cost to re-establish free to grow stand, plus iv) cost of silviculture	i) 174.005 m <sup>3</sup> x \$68.66/ m <sup>3</sup> = \$11,947.18, plus ii) \$59,157.43 x2 = \$118,314.90, plus iii) \$0, plus iv) \$0 = <b>\$130,262.04</b>	I) 149.745 m <sup>3</sup> x \$68.66 m <sup>3</sup> = \$10,281.49, plus ii) \$50,373.38 x 2 = \$100,746.76, plus iii) \$0, plus iv) \$0 = <b>\$111,028.25</b>
<b>Maximum total amount of penalty</b>	<b>\$130,262.04</b>	<b>\$111,028.25</b>

[32] As a result, the District Manager determined that the maximum penalty that could be levied against Mr. Holland for the section 52(1) contravention was \$130,262.04, and \$111,028.25 for the section 52(3) contravention.

[33] The District Manager decided, in consideration of the factors set out in the Determination, to levy against Mr. Holland an administrative penalty of \$6,000 for the section 52(1) contravention and an additional \$6,000 for the contravention of section 52(3) for a total penalty amount of \$12,000.

#### The Appeal

[34] The Board appealed the Determination to the Commission on November 4, 2021, on the basis that the penalty amount for each contravention is too low, having regard to the considerations described in section 71(5) of the Act. In particular, the Board alleges that the District Manager erred by:

- a) not satisfactorily considering the factors described in section 71(5) of the Act in respect of each contravention;



- b) levying, in the circumstances, a total penalty amount that is less than the economic benefit Mr. Holland derived from the contraventions; and,
- c) determining that a \$6,000 penalty for each contravention will be an effective deterrent and adequately compensates the Province.

[35] The Board seeks an order varying the penalty amount from \$6,000 for the contravention of section 52(1) to \$132,401.60, and from \$6,000 for the contravention of section 52(3) to \$132,401.60.

[36] The Government is the Respondent in the appeal. Initially, the Government advised they did not intend to provide written submissions on the appeal, and that they were looking forward to receiving a copy of Mr. Holland's submissions. The Government subsequently forwarded to the Commission, by way of an affidavit, an email received from Mr. Holland as it "may be relevant to the consideration of the person's cooperativeness" under section 71(5)(f) of the *Act*. The email from Mr. Holland to the Government's legal counsel consisted of one statement, which was "Kiss my ass".

[37] Mr. Holland did not file any submissions with the Commission.

### **RELEVANT LEGISLATION**

[38] The relevant sections of the *Act* state:

**71** (1) The minister, after giving a person who is alleged to have contravened a provision of the Act 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 the 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.

...

(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.

[39] The relevant sections of the *Regulation* state:

**13** (2) The maximum amount that the minister may levy against a person under section 71(2) of the *Forest and Range Practices Act* for a contravention of section 52(1) or (3) of that *Act* is the greatest of the following amounts:

- (a) an amount equal to the product of
    - (i) the volume, expressed in cubic metres, of the Crown timber that was the subject of the contravention, and
    - (ii) \$200 per m<sup>3</sup>
  - (b) an amount equal to the product of
    - (i) the area, expressed in hectares, that contained the timber that was the subject of the contravention, and
    - (ii) \$100,000 per ha;
  - (c) an amount equal to the sum of
    - (i) the stumpage and bonus bid that in the opinion of the minister would have been payable if the volume of timber was the subject of the contravention had been sold under a BC timber sales agreement at the time of the contravention,
    - (ii) twice the market value of the logs and special forest products that in the opinion of the minister were, or could have been, produced from the timber that was the subject of the contravention,
    - (iii) the costs that have been or will be incurred by the government in re-establishing a free growing stand on the area, and
    - (iv) the costs that were incurred by the government for silviculture treatments to the area that were rendered ineffective because of the contravention.
- (3) For a contravention of section 52 of the *Forest and Range Practices Act*, the minister, in a penalty levied under section 71(2) of that *Act*, may not include any amount for the value of the timber, if any, that is recoverable under section 103 of the *Forest Act*.

## ISSUE

[40] The Board framed its issues as if the appeal was a review of the Determination for errors. However, the Commission does not conduct appeals simply as reviews. Section 140.6 of the *Act* provides that the Commission may conduct an appeal by way of a new hearing. In addition, the Commission may

receive new evidence that was not before the District Manager. Section 40(1) of the *Administrative Tribunals Act*<sup>4</sup> provides the Commission with broad discretion to receive information that "it considers relevant, necessary and appropriate". At the same time, section 84(1)(c) of the *Act* provides that the Commission may consider the findings of the person who made the determination that has been appealed. Based on these and other provisions in the Commission's enabling legislation, the Commission conducts appeals as a hybrid process, whereby it may consider both new evidence and evidence was before the District Manager. Therefore, I will not be considering the issues from the perspective of whether errors were made by the District Manager.

[41] There is no dispute that Mr. Holland contravened sections 52(1) and 52(3) of the *Act*.

[42] The sole issue to be decided in this appeal is whether an administrative penalty totalling \$12,000, or \$6,000 for each contravention, is appropriate in the circumstances.

## **DISCUSSION AND ANALYSIS**

### **Is an administrative penalty totalling \$12,000 appropriate in the circumstances?**

[43] As neither the Government nor Mr. Holland chose to provide any submissions or evidence on this matter, except for the one-line email, the evidence of the Board is uncontroverted.

[44] The Board agrees with the findings in the Determination that Mr. Holland, in committing the contraventions: directed his employees to cut and remove timber outside of his Authorized Area, and he did so deliberately and repeatedly; likely harvested trees in areas that were excluded from his Authorized Area due to their archaeological value; harvested in areas that had cultural significance to the Wei Wai Kum; harvested standing old growth cedar trees which provide biological benefits to the forest; left threatening messages for Ministry personnel during the investigation; and did not meet the standard expected of a licensee. The Board also agrees with the conclusions in the Determination that the defences of due diligence, mistake of fact, and legally induced error do not apply in the circumstances.

[45] Where the Board disagrees with the Determination is on the gravity and magnitude of the contraventions, with the District Manager characterizing both as "moderate" while the Board characterizes them as "high". The Board also submits that the penalty fails to remove the economic benefit derived from the contraventions. In addition, I have identified some differing information about his cooperativeness during the investigation.

[46] For ease of discussion and analysis, I have broken the main issue into the following subject areas:

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<sup>4</sup> Sections 83.1 and 140.2 of the *Act* specify the provisions of the *Administrative Tribunals Act* that apply to the Commission.

1. Previous contraventions of a similar nature
2. Cooperativeness and efforts to correct the contraventions
3. Nature of the Contraventions:
  - i. whether the contraventions were deliberate
  - ii. whether the contraventions were repeated or continuous
  - iii. the gravity and magnitude of the contraventions
4. Economic benefit derived
5. Penalty Calculation

[47] Except where these subject areas are discussed below, I agree with and adopt the reasoning in the Determination. Before addressing the subject areas listed above, I will address the credibility of some of Mr. Holland's statements during the investigation process.

[48] In the Determination, the District Manager noted that Mr. Holland raised a concern during the OTBH that he was "under the influence of substances" when NRO Kennedy interviewed him. Consequently, the District Manager placed more weight on Mr. Holland's statements during the OTBH than on his statements during the interview.

[49] The Investigation Report states that, during the interview with NRO Kennedy, Mr. Holland "did not show any signs that he had trouble speaking or understanding questions posed by NRO Kennedy", and there was no indication during the approximately 30-minute interview that Mr. Holland was unable to provide a statement.

[50] Throughout the material before me are instances where the District Manager and others found that Mr. Holland presented misleading or contradictory statements. In light of that information, in view of the information contained in the Investigation Report regarding why NRO Kennedy was comfortable proceeding with the interview, and given Mr. Holland's vague comment about being "under the influence of substances", I find that Mr. Holland's statement to the District Manger regarding his altered state at the time of the interview is unreliable. Also, the transcript of the interview shows that NRO Kennedy informed Mr. Holland of his rights at the outset of the interview, including his right to decline to participate in the interview, and that Mr. Holland stated that he understood. Further, nothing in the interview contradicts the ultimate findings of the District Manager in the Determination.

[51] Accordingly, in weighing Mr. Holland's statements, I have not distinguished between whether they were made in the interview, the OTBH, and at other times during the investigation including his voicemail and email messages.

### ***Previous contraventions of a similar nature***

#### **Summary of the Board's Submissions and Evidence**

[52] The Board submits that Mr. Holland's previous contravention, while under different legislation, is similar to the ones relevant to this appeal, in that he cut and removed Crown timber without authorization. However, given that the previous contravention occurred in 2002, it should not have significant influence on the penalty amounts.

Panel's Finding

[53] In the Determination, the District Manager noted Mr. Holland's previous contravention, but she did not indicate whether that fact influenced the penalty she ultimately decided to levy against Mr. Holland.

[54] I find that the earlier conviction was some time ago, and apparently Mr. Holland has not been found responsible for any contraventions in the intervening time period. For that reason, I find that the previous contravention should not have a significant influence on the penalty amounts.

***Cooperativeness and efforts to correct the contraventions***Summary of the Board's Submissions and Evidence

[55] The Board submits that Mr. Holland was not cooperative in some respects during the investigation process. Mr. Holland sent intimidating and inappropriate correspondence to Ministry officials and left threatening voicemails on Ministry voicemail systems. Examples of this type of communication include:

- a September 15, 2020 voicemail to a Ministry employee stating: "You'd better watch yourself. If you come out... to my place... then I'll f[###]ing hurt you... You've got a problem with me buddy";
- an October 7, 2020 voicemail to an NRO stating: "don't make me fight ya"; and
- a December 16, 2020 email to an NRO stating: "my native friends have watching waiting for you you [sic] better have all our guns and bullets. That's a metaphor...I think you know s[###] and I'm gonna take you into the mud like I learned I'll have the native bands all over your a[##]...(sic)"

[56] The Board also acknowledges that Mr. Holland could do little, if anything, in the circumstances to correct the contraventions.

[57] The District Manager found that Mr. Holland had obeyed the SWO. She also noted that he had participated in the OTBH process.

Panel's Findings

[58] It is clear from the uncontested evidence that Mr. Holland was often not cooperative during the investigation, and at times he made threatening statements towards Ministry staff. Although the District Manager found that Mr. Holland complied with the SWO, the evidence before me indicates that Mr. Holland may not have willingly complied with the SWO. The Investigation Report states that Mr. Sidhu of Platinum Cedar advised NRO Kennedy that he had been funding Mr. Holland's operation in exchange for a percentage of the timber volume removed, and that "Mr. Holland had instructed Mr. Sidhu to arrange removal of the remaining slings of cedar blocks despite the SWO." This evidence indicates to me that Mr. Holland did not intend to fully comply with the SWO.

[59] In terms of Mr. Holland's participation in the interview with NRO Kennedy and the OTBH proceedings, Mr. Holland was cooperative in terms of participating in the interview process, although he later claimed during the OTBH that he was "under the influence of substances" while giving the interview.

[60] I find that Mr. Holland was not fully cooperative during the Ministry's investigation of the contraventions and this should be reflected in the amount of the penalties.

### ***The Nature of the Contraventions***

#### *i. Whether the contraventions were deliberate*

##### Summary of the Board's Submissions and Evidence

[61] The Board submits that Mr. Holland deliberately contravened sections 52(1) and 52(3) of the Act, and agrees with the District Manager's comments in the Determination that Mr. Holland probably decided to contravene when he realized the operational challenges that his FLTC presented.

##### Panel's Findings

[62] In the Determination, the District Manager found that Mr. Holland deliberately led his employees to harvest timber outside of his FLTC.

[63] During the investigation, Mr. Holland made numerous statements attesting to the fact that he cut timber "right off the beach" because "it would take you, like, 2 hours" to hike up to his FLTC. I take that to mean that it was more convenient for Mr. Holland to harvest timber outside of his Authorized Area than to abide by the terms of his FLTC. He also made statements that he was not going to "walk by all this wood on the beach", and that "as soon as we hit the beach, we started cutting".

[64] The District Manager did not accept Mr. Holland's claims during the OTBH that he was confused or mistaken about his Authorized Area. I agree with the District Manager's conclusion that Mr. Holland was not confused or mistaken about the boundaries of the FLTC.

[65] I find that Mr. Holland's contraventions of sections 52(1) and 52(3) were deliberate, and this should be reflected in the penalty amounts.

#### *ii. Whether the contraventions were repeated or continuous*

##### Summary of the Board's Submissions and Evidence

[66] The Board submits that the contraventions were repeated, as opposed to continuous, both in terms of locations and timing. Mr. Holland and his workers committed contraventions in at least 37 sites outside the FLTC, and harvested and removed Crown timber without authorization repeatedly from September 2016 to August 2020.

##### Panel's Findings

[67] This is an area in which the Board and the District Manager disagree, with the Board submitting that the contraventions were repeated whereas the District Manager finding in the Determination that the contraventions were both repeated and continuous. Neither party explained their rationale for why they said the contraventions were repeated, continuous, or both.

[68] The evidence shows that the contraventions likely occurred throughout the term of the FLTC. Therefore, because the contraventions took place throughout the

term of the FLTC, I find they were continuous. In addition, given the evidence that the unauthorized timber harvesting occurred at 37 discrete sites, I find that the contraventions were repeated. In this circumstance, I find that the contraventions were both continuous and repeated, and this should be reflected in the amount of the penalties.

*iii. Gravity and magnitude of the contraventions*

Summary of the Board's Submissions and Evidence

[69] The Board submits that in considering the terms "gravity" and "magnitude", I should adopt the considerations set out by the Commission in *North Enderby Timber Ltd. and Canadian Cedar Oil Technologies Ltd. v. Government of British Columbia*, Decision No. FAC-WFA-20-A001(a) and FAC-WFA-20-A002(a), April 1, 2022 [*North Enderby*], at para. 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 the resulting damage from the contravention...

[70] The Board submits that the gravity of Mr. Holland's contraventions is high and that his conduct falls far short of the standard that the public expects from forest licensees. Holding an FLTC is a privilege, and basic compliance with the licence and the associated legislation is essential to maintaining public trust and confidence.

[71] The Board submits that Mr. Holland's conduct put important values at risk, in that he knowingly harvested in an area that contained important archaeological sites and for which he had no authorization, because it was convenient and profitable. By ignoring the FLTC boundaries, Mr. Holland prevented the Wei Wai Kum from having input on harvesting at the unauthorized sites, prevented the Ministry from establishing appropriate conditions for those sites, and put ecosystem values related to old growth forests and biodiversity at risk. The Board notes that the Ministry had already worked with Mr. Holland and his forester to specifically remove these areas from Mr. Holland's initial proposed licence area.

[72] The Board submits that the magnitude of Mr. Holland's contraventions is high, in that from 2016 to 2020, Mr. Holland cut 852.03 m<sup>3</sup> and removed 827.77 m<sup>3</sup> of Crown timber without authorization. Further, the Board submits that based on photographic evidence contained in the Investigation Report, one or more of the (at least) six standing trees included in the timber volume may have met the criteria for "monumental cedar" as set out in the Great Bear Rainforest Order:

"monumental cedar" means a large old western red cedar tree or large old yellow cedar tree that has the attributes necessary to fulfill the Aboriginal Tree Use needs of the applicable First Nation primarily for totem poles, canoes, or long beams and poles to build longhouses, community halls or similar community structures

[73] In terms of the "magnitude" of the contraventions, the Board submits that the District Manager's focus on the 174.005 m<sup>3</sup> of Crown timber that Mr. Holland cut and the 149.745 m<sup>3</sup> that he removed, as opposed to the total volume scaled

under the FLTC from 2016 to 2020 (i.e., 827.77 m<sup>3</sup>), resulted in the finding on magnitude being lower than it should have been.

[74] The Board submits that the Investigation Report and other information from the OTBH, including Mr. Holland's subsequent letter to the District Manager, shows that Mr. Holland's contraventions began in 2016 and were not limited to 174.005 m<sup>3</sup> of Crown timber salvaged in 2020. The Board submits that there is no reason to believe that all of the 37 unauthorized harvest sites documented in the Investigation Report were harvested only in 2020, and the Board points to the complaint made by Mr. Holland's former employee in June 2019, and comments made by Mr. Holland during the interview. This belief is shared by NOR Kennedy and is included in the Investigation Report.

[75] In summary, the Board submits that the gravity and magnitude of Mr. Holland's contraventions was high.

#### Panel's Findings

[76] Although I am not bound by the Commission's previous decisions, I find that the reasons in *North Enderby* provide helpful guidance on my analysis of the present case.

[77] In terms of the "gravity" of the contraventions, the evidence before me is clear that Mr. Holland did wantonly and flagrantly disregard the boundaries set out in the FLTC by harvesting timber at numerous sites that were outside of his Authorized Area. Small scale salvage is a regulated activity, and the authorization process provides the opportunity for resource objectives and values to be identified, and appropriately managed and protected.

[78] Mr. Holland unilaterally decided to harvest outside of the Authorized Area where, according to his own statements, it was more convenient and profitable to do so. He did so against the advice of his forest professional, and he bypassed the Ministry process established to develop appropriate harvest areas. By proceeding in this way, he did not consider ecosystem values or other values that are important to the public of British Columbia or the Wai Wei Kum in particular. He deliberately chose to harvest in areas which had been excluded from his initial application due to their existing and potential cultural and ecosystem values. Further, the activity took place in the GBR which is an area subject to a Ministerial order setting out land use and management objectives.

[79] In considering Mr. Holland's actions, I find the gravity of the contraventions to be high, and this should be reflected in the amount of the penalties.

[80] Regarding the magnitude of the contraventions, there is no question that Mr. Holland was responsible for the cutting in all 37 unauthorized harvesting sites identified in the Investigation Report. Indeed, that fact is not contested, nor is the fact that Mr. Holland salvaged a total of 827.77 m<sup>3</sup> at scale under his FLTC between June 2017 and September 2020, for which he owes a total of \$5,486.22 in stumpage to the Province.

[81] Mr. Holland provided statements verbally and in writing that his FLTC was a difficult area in which to harvest timber. He stated during the interview and the OTBH that he was not willing to walk past good timber in the beach area. Nothing in



any of Mr. Holland's statements suggests that his unauthorized harvesting of these areas was confined to 2020. His final statement filed with the District Manager after the OTBH includes the following: "The area the Ministry of Forests says I could harvest in is a waste of time and money". The Investigation Report sets out that it is more likely than not that all of the 827.77 m<sup>3</sup> of timber that was scaled under the FLTC came from unauthorized areas. The Board agrees with this conclusion, noting the 24.26 m<sup>3</sup> of Crown timber that C&E found on site (and not yet scaled) during the investigation would be in addition to this volume.

[82] The District Manager declined to consider the total volume scaled, and instead chose to focus on the total of the volume left on site and the volume scaled in 2020 (i.e., 174.005 m<sup>3</sup>), which was the volume that was the focus of the C&E case and evidence before her.

[83] It is clear from the evidence before me that Mr. Holland did harvest the 37 sites outside the Authorized Area. There was no evidence that any person or company other than Mr. Holland and his workers were working in this area, and Mr. Holland never denied that he harvested those sites. As noted earlier in this decision, those sites had ecosystem and cultural values which are now potentially damaged and the values are not recoverable, at least in any practical time frame.

[84] I find the magnitude of the contraventions to be high, and this should be reflected in the amount of the penalties.

### ***Economic Benefit Derived from the Contraventions***

#### Summary of the Board's Submissions and Evidence

[85] The Board submits the economic benefit derived from a contravention is an important penalty consideration, and that Mr. Holland derived substantial economic benefit from the contraventions. The Board submits that the Commission has found in previous decisions that administrative penalties usually should remove a person's economic benefit from a contravention. In that regard, the Board refers to *Forest Practices Board v. Government of British Columbia*, Appeal No. 1999-FOR-05, April 10, 2000 [FPB 2000], in which the Commission stated at pages 7 and 8:

Accordingly, while the senior official must "contemplate" or "take into account" the economic benefit derived from a contravention, if it exists, there is no obligation to remove all economic benefit. It is only a factor to be "taken into account".

Having said that, the Commission agrees that in most, if not all cases, it will be appropriate to remove the entire economic benefit derived from the contravention at issue. ... the main purposes of administrative penalties are compensation to the Crown for the loss of any values, and deterrence. In most cases, it would be contrary to these purposes to assess a penalty that is less than the economic benefit drawn from a contravention. However, the Commission is not prepared to find that it will never be appropriate to assess such a penalty.

[86] In addition, the Board refers to *Randolph Carson O'Brien v. Government of British Columbia*, Decision No. 2005-FOR-014(a), January 12, 2007 [O'Brien], in which the Commission stated at page 15:

The Commission also agrees that removing the economic benefit of the unauthorized harvest is a critical component of the administrative penalty regime. ...

[87] The Board also submits that the term “economic benefit” is not defined in the Act and that in most decisions, the Commission has calculated the person’s economic benefit as their profit, by deducting operational expenses like harvesting and transportation costs from the revenue.

[88] The Board submits Mr. Holland’s economic benefit should be based on the value of timber he cut and removed between 2017 and 2020; as he did not earn any revenue on timber that was cut and left on site, the value of that timber should not be included in the calculation. The Board submits that Mr. Holland’s economic benefit is \$264,803.20 based on the following:

<b>Revenue</b>	
Market value of cedar shakes and shingles	\$290,495.00
Market value of cypress cants and blocks	\$13,646.67
Market value of logs	\$22,203.08
<b>TOTAL</b>	<b>\$326,344.75</b>
<b>Costs</b>	
Stumpage cost	\$5,486.22
Helicopter costs	\$15,174 x 3 years
Barging costs	\$3,511.11 x 3 years
<b>TOTAL</b>	<b>\$61,541.55</b>
<b>ECONOMIC BENEFIT</b>	<b>\$264,803.20</b>

[89] The Board employed a number of assumptions in determining the numbers used in the calculation, including: the total volume cut and removed was 827.77 m<sup>3</sup>; the cedar volume was used 50% for shakes and 50% for shingles; helicopter and barging costs for 2017 and 2018 were estimated to be the same as the known cost for 2020; no costs were attributed to 2019 as there was no timber scaled from Mr. Holland’s FLTC in 2019; with the exception to the timber actually scaled as logs, the market value of the Crown timber is based on a reasonable estimate of the going price for shakes and shingles, not the average log prices for the Coastal area.

[90] The Board recognizes that the assumptions employed in the economic benefit calculation likely result in the calculated economic benefit being higher than what

Mr. Holland actually received. The Board submits that the C&E's reliance on the average market value of logs, however, undervalues the timber that Mr. Holland harvested.

### Panel's Findings

[91] The Commission has said in past decisions that economic benefit is generally calculated by determining the selling price or market value of the timber cut/removed without authorization, and then deducting operating costs (e.g., the cost of harvesting and transporting the timber) as well as any stumpage paid on the timber: see *O'Brien*. However, economic benefit may also include fees for harvesting the timber that should have been, but were not, paid to the government: see *Interfor v. Government of British Columbia*, Decision No. FAC-FRP-20-A002(a) & FAC-FA-20-A001(a), December 15, 2021.

[92] First, I will discuss the economic benefit from the contraventions as calculated in the Investigation Report, which is lower than the economic benefit as calculated by the Board. The Investigation Report estimated that the economic benefit of the contraventions was \$157,208.60. This figure, like that of the Board's calculation, is based on several assumptions. One of those assumptions is clearly incorrect in that, in determining the appropriate number for "costs" (i.e., helicopter and barging expenses), the 2020 cost was multiplied by 4 because it was assumed, in the absence of other evidence, that the actual costs of 2020 also applied to 2017, 2018, and 2019. However, no timber was scaled under Mr. Holland's FLTC in 2019, and therefore, I find that the multiplier for costs should be 3 years rather than 4 years. Using a multiple of 3 would increase the estimated economic benefit to \$175,893.71 ( $\$157,208.60 + \$18,685.11$ ). Further, the Investigation Report figure included the timber that was cut and left on site. As noted in the Board's submission, it is questionable whether this volume of timber should be included in an economic benefit calculation, because Mr. Holland received no economic benefit from it. The Investigation Report estimates the value of the timber cut and left on site at \$8,784.04. Removing this amount from the adjusted amount as determined above would set the estimated economic benefit at \$167,109.67, assuming a timber value based on average log prices for the Coastal area.

[93] The District Manager, in considering the economic benefit, focused her calculations on the volume left on site and the scale records for 2020, as she determined that was the basis of the case and of the evidence before her. Based on evidence in the Investigation Report, the District Manager calculated that Mr. Holland derived a \$45,958.53 economic benefit from the contraventions. The District Manager reached that conclusion by adding the value of the timber that C&E found on site and the value of the timber cut and removed under the FLTC in 2020 ( $\$8,784.04 + \$50,373.38 = \$59,157.42$ ), plus \$5,486.22 for the stumpage that Mr. Holland owes under the FLTC, and then subtracted Mr. Holland's 2020 expenses related to helicopter use and barging ( $\$15,174 + \$3,511.11 = \$18,685.11$ ).

[94] I do not agree with the District Manager that a calculation of economic benefit should be based solely on the timber scale records for 2020. The evidence is clear that Mr. Holland harvested timber in 2017, 2018, and 2020. Mr. Holland's statements, both verbal and written, as presented in the interview, the OTBH, and

the Investigation Report, show that it is unlikely that the timber came from Mr. Holland's Authorized Area, even though it was scaled under his FLTC. Additionally, Mr. Holland did not derive any economic benefit from the timber left unsold on site.

[95] It is extremely difficult, if not impossible, to determine the actual economic benefit that Mr. Holland received without, at a minimum, information showing the timber volume percentages attributed to shakes and to shingles, and invoices for flights and barging for 2017 and 2018. It is telling that there was no evidence presented to show that any of the timber scaled was harvested from the Authorized Area. In fact, Mr. Holland's statements as to the inaccessibility and poor quality of the FLTC area coupled with his statements confirming that he harvested outside of the Authorized Area lead me to conclude that it is more likely than not that all of Mr. Holland's harvest occurred in unauthorized areas.

[96] I find, in this case as in most, the economic benefits Mr. Holland received should be reflected in the amount of the penalties. Furthermore, in this circumstance, I find that the estimated economic benefit derived from the contraventions ranges between \$167,109.67 (the three-year estimate based on information in the Investigation Report) and \$264,803.20 (the Board's estimate), subject to my comments below regarding possible costs associated with workers that Mr. Holland hired.

[97] The evidence shows that Mr. Holland directed others to harvest timber within his FLTC. There was no evidence to show, nor was it alleged, that these individuals acted contrary to Mr. Holland's direction. I find that the cost of paying workers to harvest timber is a cost associated with harvesting timber and could be included in the economic benefit calculation. Although it may seem inappropriate for employees and contractors to receive payment for logging that they knew or should have known was illegal, section 71(5)(e) is clearly worded - it accounts for the economic benefit "derived by the person" who contravened the legislation. Indirect benefits to employees and/or contractors are not relevant under this factor (see *Forest Practices Board v. Government of British Columbia* (Decision No. 2016-FRP-001(a), February 10, 2017) [FPB 2017], at para. 191). However, given that no evidence was presented to show the cost associated with Mr. Holland's workers, it is unknown how much this may reduce the economic benefit that Mr. Holland derived from the contraventions. It is also unclear whether or what other operating costs may also have been associated with the harvesting activities.

### ***Penalty Calculation***

#### Summary of the Board's Submissions and Evidence

[98] The Board submits that in *FPB 2017*, at paras. 43 and 46, the Commission held that administrative penalties are a regulatory tool intended to encourage compliance with the legislation, and it confirmed that the two main purposes of administrative penalties are to compensate the Crown for the loss or damage suffered to natural resources in the province, and to deter future contraventions. The Board submits that Mr. Holland's actions call for a meaningful penalty to ensure that he is deterred from similar conduct in the future and to demonstrate to others that it is unacceptable to ignore the boundaries of a licence, regardless of whether the licence is in a remote area. The Board submits that the total penalty should be

split equally between the sections 52(1) and 52(3) contraventions, because both were integral to Mr. Holland’s economic benefit.

[99] The Board submits that the District Manager should have levied a total penalty of \$264,803.20, evenly split between the contraventions of sections 52(1) and 52(3), to better reflect the volume and value of the timber that Mr. Holland sold in contravention. The Board recognizes that although this penalty is a significant amount of money, it reflects the calculated economic benefit reaped by Mr. Holland and is less than 25% of the maximum penalty allowed under the *Regulation*.

[100] The District Manager in the Determination set out that she wanted to be clear that unauthorized harvest was unacceptable and that the Province, Indigenous nations, and the public have much higher expectations for the forest industry than had been evidenced by Mr. Holland. The District Manager stated at page 10 in the Determination:

Given the potential loss of archaeological artifacts, the importance of standing old growth cedar trees to the indigenous community and considering the biological benefits that old growth trees provide in a forest, a higher penalty is warranted.

[101] The District Manager then set the penalty amounts at \$6,000 for each of the contraventions, for a total of \$12,000.

Panel’s Findings

[102] Section 13(2) of the *Regulation* provides that the maximum penalty amount for contraventions under section 52(1) and section 52(3) is the greater of the figures calculated under subsections (a), (b) and (c). The Board and the District Manager agree that calculations under section 13(2)(c) result in the maximum penalty. The Board also agrees with the District Manager’s estimate of applicable stumpage and bonus bid.

[103] The evidence before me contains three different maximum penalty calculations – one in each of the Board’s submission, the Investigation Report, and the Determination. Although all are based on the same sections of the *Act*, all three use different numbers in the various sections, and as a result, they arrive at different maximum penalty amounts.

[104] The Board’s submission sets out the calculations as follows:

Relevant section of the Regulation	S 52(1) – cutting Crown timber without authority	S 52(3) – removal of Crown timber without authority
13(2)(c) – i) stumpage plus bonus bid, plus ii) market value x2,	i) 852.03 m <sup>3</sup> x \$68.66/ m <sup>3</sup> = \$58,500.38, plus ii) 273,587.24 x2 = \$547,174.48,	I) 827.77 m <sup>3</sup> x \$68.66 m <sup>3</sup> = \$56,834.69, plus ii) \$264,803.20 x 2 = \$529,606.40

<b>Maximum total amount of penalty</b>	<b>\$605,674.86</b>	<b>\$586,441.09</b>
<b>Penalty Sought</b>	<b>\$132,401.60</b>	<b>\$132,401.60</b>

[105] The District Manager in the Determination applied the calculations as follows:

Relevant section of the Regulation	S 52(1) – cutting Crown timber without authority	S 52(3) – removal of Crown timber without authority
13(2)(c) – i) stumpage plus bonus bid, plus ii) market value x2,	i) $174.005 \text{ m}^3 \times \$68.66/\text{m}^3 = \$11,947.18$ , plus ii) $\$59,157.43 \times 2 = \$118,314.90$	I) $149.745 \text{ m}^3 \times \$68.66 \text{ m}^3 = \$10,281.49$ , plus ii) $\$50,373.38 \times 2 = \$100,746.76$
<b>Maximum total amount of penalty</b>	<b>\$130,262.04</b>	<b>\$111,028.25</b>
<b>Penalty Levied</b>	<b>\$6,000</b>	<b>\$6,000</b>

[106] The Investigation Report sets out the calculations as follows:

Relevant section of the Regulation	S 52(1) – cutting Crown timber without authority	S 52(3) – removal of Crown timber without authority
13(2)(c) – i) stumpage plus bonus bid, plus ii) market value x2,	i) $24.26 \text{ m}^3 \times \$68.66/\text{m}^3 = \$1,665.69$ , plus ii) $\$8,784.04 \times 2 = \$17,568.08$	I) $149.745 \text{ m}^3 \times \$68.66 \text{ m}^3 = \$10,281.49$ , plus ii) $\$50,373.38 \times 2 = \$100,746.76$
<b>Maximum total amount of penalty</b>	<b>\$19,233.77</b>	<b>\$111,028.25</b>

[107] The difference between the two Ministry calculations is that in the Investigation Report, the calculation for the contravention of section 52(1) considers only the timber cut and left on site, whereas the District Manager considers the total volume of timber cut and left on site as well as that scaled in 2020. In terms of which approach is preferable, I note that the timber cut and left on site was in unauthorized areas, and therefore was cut without authority. This also applies to the timber that was cut and removed. The *Regulation* differentiates between timber that is cut without authority and timber that is removed without authority. It is therefore possible that timber that is cut and removed without authority could be considered for penalty purposes under both sections 52(1) and 52(3), as is properly the case here. In terms of this appeal, for the purposes of the maximum penalty calculation, I prefer the District Manager's approach of including

the timber left on site in the calculation of maximum penalty under section 52(1) to the approach used in the Investigation Report.

[108] The major difference between calculations of the Board and the District Manager is that the Board’s calculation is based on the total amount of timber harvested over the term of the FLTC, whereas the District Manager’s is based only on the timber left on site and the timber scaled in 2020. The Board and the District Manager also used different approaches for estimating the market value of the timber: the Board estimate includes market value for shakes and shingles as well as logs, whereas the District Manager used the amount from the Investigation Report which was based on average log prices for the Coastal area.

[109] As with the determination of economic benefit, it is difficult, if not impossible, to determine with any degree of accuracy the true market value of the timber that was harvested without authorization, due the lack of specific information. The absence of information such as the actual percentage of the cedar that went to shakes and to shingles means that estimates must be made. Given that the market value plays a major role in the penalty calculation under the *Regulation*, I find that it is important in this circumstance to be circumspect in coming to that figure. Therefore, for the purposes of the maximum penalty calculation, in this circumstance I prefer the District Manager’s approach of basing the market value on the average log prices for the Coastal area.

[110] However, in terms of the volume of timber harvested, and for the purposes of calculating the maximum penalty, I prefer the Board’s approach of including the volume left on site and the total volume scaled for the term of the FLTC, as opposed to that scaled for 2020, as it is more likely than not that all the timber recorded under Mr. Holland’s FLTC was harvested from unauthorized areas.

[111] As a result, I find that the maximum total amount of penalty is \$511,426.02 for section 52(1) and \$492,192.25 for section 52(3), as set out below.

Relevant section of the Regulation	S 52(1) – cutting Crown timber without authority	S 52(3) – removal of Crown timber without authority
13(2)(c) – i) stumpage plus bonus bid, plus ii) market value x2,	i) 852.03 m <sup>3</sup> x \$68.66/m <sup>3</sup> = \$58,500.38, plus ii) 226,462.82 x2 = \$452,925.64,	I) 827.77 m <sup>3</sup> x \$68.66 m <sup>3</sup> = \$56,834.69, plus ii) \$217,678.78 x 2 = \$435,357.56
<b>Maximum total amount of penalty</b>	<b>\$511,426.02</b>	<b>\$492,192.25</b>

[112] The *Regulation* sets out how to calculate the maximum potential penalty; it does not provide that the maximum penalty is the penalty that should be levied. Determining the maximum potential penalty is a matter of arithmetic; determining the penalty that is appropriate in the circumstances requires a consideration of the factors set out in section 71(5) of the *Act*, and the objectives of compensating the

Crown and deterring future contraventions. In terms of the factors in section 71(5), I have found that: the previous contravention should not have a significant influence on the penalty amounts; the gravity and magnitude of the contraventions was high; the contraventions were repeated and continuous; the contraventions were deliberate; Mr. Holland was uncooperative; and the economic benefit that Mr. Holland derived from the contraventions ranged between \$167,109.67 and \$264,803.20.

[113] In previous decisions, the Commission has indicated that administrative penalties should usually remove the economic benefit that the person derived from the contravention (*FPB 2000*, at pages 7 and 8; *O'Brien*, at page 15). The Commission has also stated that the primary goal or purpose of administrative penalties is to encourage compliance with the legislation as opposed to punishing people for contravening the legislation. I agree with that in principle, but it is very difficult in this case to determine exactly how much economic benefit Mr. Holland derived from the contraventions.

[114] The Board submits that the penalty should be set at the Board's estimated economic benefit which equates to roughly 22% of the Board's maximum penalty calculation, but I disagree. As noted earlier, the economic benefit calculation is based on estimates, and I have found that the economic benefit falls within a range. Further, it appears that the economic benefit calculation is incomplete, even with the use of the range, because the wages or fees Mr. Holland paid to his workers were not considered. Given the uncertainty regarding exactly how much economic benefit Mr. Holland received, I find that it is inappropriate to set a penalty based solely on removing all of the economic benefit derived from the contraventions.

[115] The District Manager calculated that the total maximum penalty that could be awarded was \$241,290.29. She determined that Mr. Holland's contraventions warranted a "higher penalty", given the potential loss of archeological artifacts, the importance of standing old growth cedar trees to the Indigenous community, and considering the biological benefits that old growth trees. I agree that a significant penalty is warranted in these circumstances. However, without further explanation, the District Manager then levied a total penalty of \$12,000 against Mr. Holland. In the absence of any accompanying rationale, it is extremely difficult for me to understand how a penalty of \$12,000 meets the District Manager's determination of a "higher penalty" given the District Manager's calculated total maximum of \$241,290.29, and her consideration of the factors in section 71(5).

[116] What is clear and uncontested is that Mr. Holland cut and harvested Crown timber without authority and in so doing, contravened the *Act* and potentially impacted cultural and biodiversity values. The *Regulation* provides a mechanism to calculate the maximum potential penalty. It also provides guidance in determining the actual administrative penalty in these situations.

[117] I have found that the maximum penalty that could be levied in this circumstance totals \$1,003,618.27. This amount was based on my decision to use the approach employed by the District Director to determine the market value of the timber; i.e., average value of logs, as opposed to the average value of the timber as shakes and shingles. It is more likely than not that this approach results



in an undervaluing the Crown timber, given that Mr. Holland's purpose in harvesting the timber was primarily for shakes and shingles rather than logs, based on the timber scale records that are available. However, in the absence of more definitive evidence as to the ultimate disposition of the timber, I prefer to take a conservative approach in determining the market value.

[118] Neither the maximum penalty formula nor the economic benefit calculations include cultural and biodiversity values. Nothing in the *Act* or previous decisions of the Commission indicates that an administrative penalty is to be based solely on the economic benefit derived from the contraventions. Rather, it is one of many considerations that is to be applied. In this circumstance, the determination of economic benefit is impossible to quantify with any degree of certainty. The lack of a definitive determination of economic benefit does not mean the penalty should be minimal. As set out earlier, penalties encourage compliance with, and deter contraventions of, the *Act*. In remote areas of the province especially, the government and the public rely on licence holders to act responsibly and in compliance with their licences.

[119] The evidence is clear that for many years, Mr. Holland chose not to comply with the terms of his FLTC. For one of those years, 2020, Mr. Holland's contravention of section 52(1) resulted in 174,005 m<sup>3</sup> of unauthorized Crown timber cut with a market value of at least \$59,157.43, and his contravention of section 52(3) resulted in 149,745 m<sup>3</sup> of unauthorized Crown timber removed with a market value of at least \$50,373.38.

[120] Based on the findings above, in this circumstance, the penalty for the contraventions must be more than \$59,157.43, as I found that amount to be the minimum market value of the unauthorized timber harvested in a single year. To set the penalty at or below this amount does not acknowledge the potential loss of cultural and biodiversity values, and does not address any benefit that Mr. Holland received from the activity. Nor does it address what I found to be the wanton disregard that Mr. Holland displayed in choosing to harvest as he did. As I noted earlier, the vast majority of the timber cut and included in the section 52(1) contravention was also captured in the section 52(3) contravention. Therefore, assigning a penalty of market value plus stumpage and bonus bid for each of the sections has the effect, in practical terms, of removing the financial benefit, recognizing the potential harm to cultural and ecosystem values, and demonstrating to Mr. Holland and others that it is unacceptable to ignore the boundaries of a licence, regardless of whether the licence is in a remote area. While I have used a similar formula to calculate the penalty as is used in section 13(2)(c) of the *Regulation*, I did not apply the multiplier of 2 to the market value of the timber. This is in recognition of the fact that the maximum potential penalty is not necessarily the penalty that should be levied, and that the economic benefit calculation in this case is based on a range and is an estimate based on incomplete information.

[121] Based on all of the considerations above, I find that an administrative penalty of \$131,759.48 is appropriate in the circumstances.

[122] The details of the penalty are set out below.

Relevant section of the Regulation	S 52(1) – cutting Crown timber without authority	S 52(3) – removal of Crown timber without authority
stumpage plus bonus bid, plus market value,	174.005 m <sup>3</sup> x \$68.66/ m <sup>3</sup> = \$11,947.18, plus \$59,157.43	149.745 m <sup>3</sup> x \$68.66 m <sup>3</sup> = \$10,281.49, plus \$50,373.38
<b>Penalty</b>	<b>\$71,104.61</b>	<b>\$60,654.87</b>

**DECISION**

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

[124] For the reasons provided above, the penalty amounts for the contraventions are varied as indicated above. The appeal is allowed, in part.

“Linda Michaluk”

Linda Michaluk  
Panel Chair

October 3, 2022