Forest Appeals Commission

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DECISION NO. 2014-PMF-001(a)

In the matter of an appeal under the *Private Managed Forest Land Act,* S.B.C. 2003, c. 80.

BETWEEN:	Erie Creek Forest Reserve Ltd.	**APPELLANT**
AND:	Private Managed Forest Land Council	**RESPONDENT**
BEFORE:	A Panel of the Forest Appeals Commission James Hackett, Panel Chair	
DATE:	November 26, 2014	
LOCATION:	Nelson, BC	
APPEARING:	For the Appellant: Allison Edgar, Counsel For the Respondent: Deborah K. Lovett, QC, Counsel	

APPEAL

[1] Erie Creek Forest Reserve Ltd. ("Erie Creek Ltd.") appealed a May 13, 2014 Reconsideration decision issued by the Private Managed Forest Land Council (the "Council"). The Reconsideration confirmed the Council's November 5, 2013 Determination that Erie Creek Ltd. had contravened section 21(3) of the *Private Managed Forest Land Council Regulation* (the "*Regulation*") by failing to maintain the structural integrity of a road prism and clearing width, and failing to ensure the proper functioning of the drainage systems of a portion of the road, resulting in a material adverse effect on fish habitat. Part of a logging access road failed during the winter of 2011/2012, depositing material into a fish stream below the road. The Council levied an administrative penalty of $7,500 for the contravention, and ordered Erie Creek Ltd. to conduct remedial work.

[2] The appeal is brought before the Commission pursuant to section 33 of the *Private Managed Forest Land Act* (the "*Act*"). The Commission's powers on an appeal are set out in section 33(15) of the *Act*:

Powers of Commission

33 (15) An appeal under this section to the commission is a new hearing and at the conclusion of the hearing, the commission may

(a) by order, confirm, vary or rescind the order, decision, or determination,

(b) refer the matter back to the council or authorized person for reconsideration with or without directions,

(c) order that a party or intervenor pay another party or intervenor any or all of the actual costs in respect of the appeal, or

(d) make any other order the commission considers appropriate.

BACKGROUND

[3] Erie Creek Ltd. is the registered owner of Managed Forest 248 ("MF 248") located northwest of Salmo, BC. MF 248 contains four parcels of land totaling approximately 4,000 hectares. The Second Relief Road is an unmaintained public road running through MF 248, and is used by Erie Creek Ltd. to access MF 248 for timber harvesting and other forestry purposes.

[4] Based on a decision of the BC Supreme Court in 1980, the Second Relief Road was classified as a public highway. It was constructed between 1911 and 1914 for a narrow gauge rail line to connect the Second Relief Mine with the Nelson-Ft. Shepperd rail line.

[5] The Second Relief Road is designated as an "8F" road according to the Ministry of Transportation and Infrastructure (the "MOTI"), which means that it is not maintained in the winter and is not maintained by MOTI except to keep it passable to four wheel drive vehicles.

[6] In the summer of 2011, Erie Creek Ltd. applied to the MOTI for a permit to undertake surface maintenance and repair work on the Second Relief Road to allow for the harvesting and transportation of timber. The MOTI granted the permit, which included a number of terms and conditions, including the requirement that Erie Creek Ltd. "at all times accept full responsibility for… any damage that be done to any person or property whatsoever caused directly or indirectly by these works (i.e. the road maintenance work) and shall save harmless and keep indemnified the Crown from all claims and demands whatsoever in respect of the works".

[7] Erie Creek Ltd. also retained the services of Deverney Engineering Services Ltd. ("Deverney") to design the road repairs. Erie Creek Ltd. then completed the road repairs in 2011, based on the instructions provided by Deverney.

[8] Erie Creek Ltd. filed its annual declaration with the Council on March 29, 2012 for the April 1, 2011 to March 31, 2012 reporting period. Erie Creek Ltd. stated that it had harvested timber in a 16.5 hectare area of MFU 248 and constructed 0.48 new and reconstructed 3.5 (presumably kilometers) of the Second Relief Road.

[9] It is relevant to note that the Council is established under the *Act* with a mandate to encourage forest management practices on private managed forest land in BC. Section 1 of the *Act* defines "private managed forest land" as "private land in respect of which there is a [forest] management commitment, and… that is classified as managed forest land under the *Assessment Act"*.

[10] Generally speaking, the objective of the Council is to ensure owners of managed forest land comply with the *Act*. Each owner of private managed forest land must have an accepted and Council-approved management commitment, which outlines the management objectives for the land and describes strategies owners will implement in order to meet their objectives.

[11] The Council also has the right to enter managed forest land if, on reasonable grounds, it believes that land contains an activity that is regulated under the *Act*. If, upon investigation, the Council finds there has been a contravention of the *Act* or the *Regulation*, it may impose an administrative penalty up to $25,000 under section 26 of the *Act*. Also, under section 27 of the *Act*, the Council may issue an order to mitigate or repair damage to the managed forest land, or to carry out a requirement of the *Act* or the *Regulation*.

[12] In an email to the Council dated May 14, 2012, Mr. Ole Ahrens, a forester with Monticola Forest Ltd., which does work for Erie Creek Ltd., reported two "erosion events" at the 11.6 km mark and 11.7 mark of the Second Relief Road. He explained that the "first slide" was approximately 20 metres wide and 40 metres long, and went into a wetland/marsh beside a creek. The "second slide" was approximately 10 metres wide and 10 metres long, and went directly into a creek. The slides occurred on an unknown date during the spring of 2012. Debris from the slides entered Craigtown Creek, a tributary of Erie Creek. Erie Creek is a Class A fish stream[1].

[13] Erie Creek Ltd. again retained Deverney, which wrote a report dated June 15, 2012 (the "Deverney Report"), proposing a road reconstruction design to repair the damage to the road caused by the slides. The repairs were undertaken by Erie Creek Ltd. based on the Deverney Report's reconstruction design specifications. The work was authorized by the MOTI, in a permit issued on July 3, 2012. The permit contained terms regarding liability and indemnity that were similar to those in the 2011 permit, described above.

[14] Since the slides deposited material into a Class A fish stream, the Council initiated an investigation into the probable cause, and potential impact on fish habitat, of the slides.

[15] The Council retained Mr. Phil Blanchard, of P.R. Blanchard and Associates Limited, to conduct an initial inspection of the slide area. The inspection was conducted on September 17, 2012. Mr. Ahrens, of Monticola Forest Ltd., accompanied Mr. Blanchard on the inspection, providing him with a copy of the Deverney Report, along with a copy of a September 14, 2012 letter from Deverney confirming that the repair work had been completed according to Deverney's design specifications. Mr. Ahrens also provided photographs of the slides before the repair work was completed in June 2012.

[16] Mr. Blanchard submitted an inspection report dated September 26, 2012, to the Council. The report confirmed that a considerable volume of material had

[1] The Schedule to the *Regulation* defines stream classes, and it specifies that a Class A stream is a fish stream with a stream channel width of 10 metres or wider.

entered the main channel and a side channel of Craigtown Creek. Mr. Blanchard also found that Erie Creek Ltd. took responsibility for the road repairs in a timely way. He stated that the legal status of the road was unclear. He did not determine whether the material introduced into the stream had an adverse impact on fish habitat or water quality.

[17] Mr. Blanchard made two recommendations in his report. First, he recommended that the legal status of the Second Relief Road be investigated and the responsibility for road maintenance determined. Second, he recommended the Council investigate whether the material introduced into Craigtown Creek had any impact on fish habitat.

[18] The Council accepted both of these recommendations. The Council retained Shawn Hamilton, a fisheries biologist, of Shawn Hamilton and Associates, to review the slide site and assess any impacts of the slide material that had entered Craigtown Creek on fish habitat.

[19] Also, the Council again retained Mr. Blanchard to prepare a report on the users of the Second Relief Road, responsibility for its maintenance, the level of maintenance required, and the probable cause of the slope failure.

[20] On October 29, 2012, Mr. Hamilton, accompanied by Mr. Ahrens, inspected the slide area of the Second Relief Road. He found that fish habitat had been altered by the slide debris introduced into Craigtown Creek. Subsequently, he informed the Council of his findings. By letter dated November 5, 2012, the Council informed Mr. Ahrens that a formal investigation into the cause of the slides was being initiated by the Council. The investigation would focus on whether there was compliance with section 21 of the *Regulation*.

[21] In December 2012, Mr. Hamilton submitted his full report to the Council. At pages 1 through 6 of his report, he describes the two slides and their potential impacts on fish and fish habitat. He refers to "Slide A" and "Slide C". He concludes that Slide C caused a loss of fish habitat.

[22] It should be noted that other authors who prepared reports on the 2012 slides referred to Slide C as Site A, Slide 4, or Slide 1. In the Determination, the Council referred to this slide as Slide C. For simplicity, the Panel has referred to this slide as Slide C.

[23] In addition, the other reports referred to Slide A as Slide 2, Slide 5, or Site B. For simplicity, the Panel has referred to this slide as Slide A.

[24] Mr. Hamilton's report states, in part, as follows:

> ***4.1 Slide A***
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> Slide A… occurred when a French drain that was installed in the road prism in 2011 did not have enough hydraulic capacity and water pooled in the upslope ditch. It was Ole's [Mr. Ahrens'] opinion that this pooling of water was a causal factor leading to the slide event. The slide traveled down-slope and deposited material directly into Craigtown Creek. The length of stream channel in-filled with slide material was measured with a surveyor's tape on

> October 26, and was approximately 9.5 m long and the average channel width at this location was 9.2 m (approximately 87.4 m^2).
>
> Slide material that was initially deposited in the creek was comprised of graded sediments with sizes ranging from fine to angular cobbles and boulders. … the smaller diameter sediment (sands and gravels) have washed downstream since the slide occurred leaving exposed boulders and cobbles.
>
> Craigtown Creek immediately upstream of Slide A has been affected by the slide since the slide material is acting as a partial dam. … It is my opinion that this change in water depth is not detrimental to fish since it is providing pool habitat. I expect that with time the Craigtown channel bed will re-grade itself to a pre-slide channel gradient…. Upstream and downstream fish passage has not been significantly affected by Slide A.
>
> … It is concluded that the affect that Slide A has on Craigtown Creek is limited to the slide terminus area (approximately 87.4 m^2 of channel infilling) and the upstream backwater effect during low stream flows.
>
> …
>
> ***4.3 Slide C***
>
> Slide C… is located approximately 90m downstream of Slide A…. Although Slide C is much larger than Slides A and B [an event that occurred in 2007], the slide terminus does not reach the mainstem of Craigtown Creek. However, Slide C has impacted a small side channel of Craigtown Creek within the terminus area….
>
> … Two sections of this channel were completely in-filled with slide debris…
>
> Water flow in this channel (upstream of the slide) was very low and was providing marginal fish habitat downstream of 56m. Higher water flows in this channel would occur during freshet and periods of high rainfall. It is concluded that this channel provided refuge habitat for fish. It is concluded that this channel no longer provides refuge habitat between 0 m and 56 m.

[25] Mr. Hamilton's recommendations are set out at page 6 of his report, as follows:

> Some surface erosion is occurring on the slide tracks. I recommend that options for minimizing soil erosion on the slide track be considered and implement[ed] in the spring/early summer of 2013 on all slide tracks and slide deposition areas. I recommend that options that promote the recovery of natural vegetation be considered first since this is preferred (in my opinion) over standard seeding methods. I also recommend that the road system adjacent (coupled) to fish habitat including Craigtown and Erie Creeks, be inspected and works necessary to improve road drainage and road prism stability be taken. This is a high risk road system since it was built years ago (lower standards), is on steep slopes, and is immediately upslope of (coupled) productive fish habitat.
>
> [underlining added]

[26] Mr. Blanchard also submitted a report in December 2012, in which he concluded that the only industrial user for timber harvesting on the Second Relief Road beyond the nine kilometer mark during recent years was Erie Creek Ltd. He also commented that the probable cause of Slide C was a cut slope failure that blocked the ditch, resulting in surface water flowing onto the sidecast fill material, resulting in a failure. With regard to Slide A, Mr. Blanchard stated that the high runoff volume exceeded the capacity of the cross-drain culvert at the 2011 repair site, causing water to flow along the road and over the bank onto the fill slope, which then collapsed.

[27] Mr. Blanchard noted that the rain-on-snow events in the Salmo/Castlegar area during the spring of 2012 were "beyond the norm", citing Environment Canada records for nearby Castlegar at that time. He then inferred from this information that rain-on-snow events had the potential to create high runoff problems in the area.

[28] Mr. Blanchard also noted that section 21 of the *Regulation* places responsibility on the road user (i.e., Erie Creek Ltd.) to maintain the integrity of the road prism and proper functioning of the drainage system, to the extent necessary to avoid causing impacts on fish habitat. He also stated that:

> The "normal practice" at the end of the timber harvesting season is to simply allow the snow to accumulate over the winter and wait for the snow to melt in the spring before hauling. No seasonal deactivation is undertaken to over-winter the road. (pers. comm. Ole Ahrens, Cory Berukoff)

[29] On March 13, 2013, Stuart Macpherson, the Executive Director of the Council, submitted an investigation report to the Council, alleging that Eric Creek Ltd. had contravened section 21(3) of the *Regulation* by failing to maintain the Second Relief Road adequately to prevent a material adverse effect on a fish stream.

[30] By a letter dated May 2, 2013, the Council notified Erie Creek Ltd. of the results of the investigation, and offered Erie Creek Ltd. an opportunity to be heard before the Council made its determination regarding whether Erie Creek Ltd. had contravened section 21 of the *Regulation*.

[31] On May 16, 2013, Erie Creek Ltd. sent a letter to the Council, stating its position that this particular section of the Second Relief Road is publicly owned, and the Council has no jurisdiction over it.

[32] On November 5, 2013, the Council issued its Determination. At para. 10, the Council found that Erie Creek Ltd. was:

> … the primary user of a portion of the Second Relief Road, … and that such use was for timber harvesting purposes. The evidence also establishes, on a balance of probabilities that, the failure of the Owner to maintain the structural integrity of the road prism and clearing width and to ensure the proper functioning of the drainage systems of that portion of the Road resulted in Slide C during the 2012 spring run-off. Slide C in turn resulted in the permanent damage to fish habitat on Craigtown Creek, a tributary of Erie Creek, which is a Class A fish stream.

[33] The Council concluded that such permanent damage constitutes a "material adverse effect on fish habitat," and that Erie Creek Ltd. did contravene section 21(3) of the *Regulation*.

[34] In its Determination, the Council also found that section 29(a) of the *Act* did not apply to Erie Creek Ltd. because there was no evidence to suggest Erie Creek Ltd. exercised all due diligence to prevent the contravention. Moreover, sections 29(b) and (c) of the *Act* did not apply, because Erie Creek Ltd. was not mistaken in fact and did not contravene the *Act* as a consequence of an officially induced error.

[35] The Council levied an administrative penalty of $7,500 on Erie Creek Ltd., and issued a remedial work order to repair damage to the creek caused by the slides.

[36] In a letter dated November 29, 2013, Erie Creek Ltd. requested that the Council reconsider its determination pursuant to section 32 of the *Act*. The basis of the request for a reconsideration was that Erie Creek Ltd. had exercised all due diligence by obtaining the MOTI permit in 2011 and completing road repairs under the supervision of Deverney. Erie Creek Ltd. also argued that the rain-on-snow event during winter/spring of 2012 was unprecedented and caused the slides. Erie Creek Ltd. submitted that it could not be found to have contravened the *Act* in these circumstances, because doing so would amount to imposing "absolute liability" on private forest land owners, contrary to the *Act*.

[37] On May 13, 2014, the Council issued its Reconsideration, confirming its initial Determination. The Council stated that the obligations to complete the road repairs under the MOTI permit are a separate set of obligations compared to those imposed by the *Act* on owners of private managed forest land. Regarding the defence of due diligence, the Council stated as follows:

> The evidence before the Council included evidence that: (1) the Owner did not carry out seasonal deactivation of the road in 2011 prior to the winter snowfall; (2) the probable cause of the slides was the inability of the road drainage structures to handle and accommodate the peak run offs experienced in the spring of 2012; (3) the lack of a functioning drainage system resulted in the destabilization of the road prism; and (4) the rain-on-snow event in the spring of 2012 was a *contributing factor* (emphasis added).
>
> There was also evidence before the Council that, while precipitation amounts were clearly extreme at the time of the slide event, an examination of the climate records at the nearby Castlegar Airport station indicate precipitation was within the realm of what has occurred in the past, as well as evidence supporting a history of slides in the area. The Council's view is that seasonal deactivation would normally constitute a reasonable "due diligence" procedure, especially given that history of precipitation amounts and slides in the area of the Second Relief Road. Put differently, the Council's view is that a reasonable person would have undertaken seasonal deactivation to prevent slides in all of the circumstances as described in the evidence.

[38] Erie Creek Ltd. then appealed the Reconsideration to the Commission. Erie Creek Ltd. asks the Commission to rescind the Reconsideration, along with the $7,500 administrative penalty and the remediation order. In its notice of appeal, Erie Creek Ltd. also requested that it be awarded costs. However, at the conclusion of the appeal hearing, Erie Creek Ltd. revoked its request for costs.

[39] The Council asks that the appeal be dismissed, and the Reconsideration be confirmed.

ISSUES

[40] The Panel notes that both parties structured their submissions to address the statutory defences of due diligence and mistake of fact in regard to the contravention of section 21 of the *Regulation*. At the appeal hearing and in its written submissions, the Appellant did not challenge the Council's finding of a contravention. Rather, the Appellant argued that the two statutory defences apply, and that the administrative penalty is inconsistent with the factors to be considered under section 26(5) of the *Act*. Consequently, the Panel has considered whether either of those statutory defences apply, and if not, whether the penalty is appropriate based on the facts in this case and the factors in section 26(5) of the *Act*.

[41] Accordingly, there are two issues in this appeal:

1. Whether Erie Creek Ltd. has established, on a balance of probabilities, either that it reasonably and honestly believed in the existence of facts that if true would establish that it did not contravene the *Act*, or that it exercised all due diligence to prevent the contravention, under sections 29(b) and (a) of the *Act*, respectively.
2. Whether the $7,500 administrative penalty and remedial order imposed on Erie Creek Ltd. is appropriate, based on the factors listed in section 26(5) of the *Act*.

RELEVANT LEGISLATION

[42] Section of the *Act* are relevant to this appeal:

Penalties

26 (5) Before the council levies a penalty under subsection (2), it must consider all of the following:

(a) any previous contravention of a similar nature by the person if the contravention was the subject of

(i) a determination under this section in the previous 10 years, or

(ii) a consent agreement under section 25 in the previous 12 months;

(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 cooperation and efforts to remedy the contravention;

(g) the person's efforts to prevent the contravention;

(h) whether relevant forest management objectives specified in Division 1 of Part 3 are being achieved despite the contravention.

Defences to administrative proceedings

29 For the purposes of a determination of the council under sections 26 and 27, a person must not be found to have contravened a provision of this Act or the regulations if the person establishes that

(a) the person exercised all due diligence to prevent the contravention,

(b) the person reasonably and honestly believed in the existence of facts that if true would establish that the person did not contravene the provision, or

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

[43] Section 22 of the *Regulation* imposes the following requirements:

Road maintenance

21 (1) An owner or a contractor, employee or agent of the owner who constructs or uses a road for a purpose related to timber harvesting must maintain the road in accordance with this section until the road is deactivated.

(2) Despite subsection (1), if an owner or a contractor, employee or agent of the owner uses for timber harvesting purposes a portion of a road that was constructed under another enactment, the owner or a contractor, employee or agent of the owner must maintain that portion of the road in accordance with this section for the period that the owner or a contractor, employee or agent of the owner

(a) uses the road for timber harvesting purposes, and

(b) is the primary user of that portion of the road.

(3) For the purposes of this section, an owner or a contractor, employee or agent of the owner must maintain

(a) the structural integrity of the road prism and clearing width, and

(b) the proper functioning of the drainage systems of the road

to the extent necessary to avoid causing a material adverse effect on fish habitat or on water that is diverted by a licensed waterworks intake.

DISCUSSION AND ANALYSIS

1. Whether Erie Creek Ltd. has established, on a balance of probabilities, either that it reasonably and honestly believed in the existence of facts that if true would establish that it did not contravene the *Act*, or that it exercised all due diligence to prevent the contravention, under sections 29(b) and (a) of the *Act*, respectively.

The tests for establishing the defences of mistake of fact and due diligence

[44] Before discussing the parties' submissions on the statutory defences of due diligence and mistake of fact, it is helpful to understand what is required to establish those defences. In that regard, the parties referred to several key court decisions: *The Queen v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 ["*Sault Ste. Marie*"]; *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510 ["*R. v. MacMillan Bloedel*"]; and *Pope & Talbot Ltd. v. British Columbia*, 2009 BCSC 1715 ["*Pope & Talbot*"].

[45] In *Pope & Talbot*, the BC Supreme Court discussed *Sault Ste. Marie* and *R. v. MacMillan* at length. At paras. 62 and 63 of *Pope & Talbot*, the Court explained how the common law tests for mistake of fact and due diligence relate to the two statutory defences, as follows:

> The majority of the Court of Appeal in *MacMillan Bloedel* set out the two branches of the due diligence defence as (1) where an accused's conduct is "innocent" as a result of a mistake of fact; and (2) if there is no mistake of fact, where an accused has taken all reasonable steps to avoid the particular event. The first branch of this defence is found in s. 72(b), the second branch in s. 72(a), and each is provided as an alternative. I will repeat these sections here for clarity:
>
> > … no person may be found to have contravened a provision of the Acts if the person establishes that the
> >
> > (a) person exercised due diligence to prevent the contravention, [or]
> >
> > (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision …
>
> Neither *Sault Ste. Marie* nor *MacMillan Bloedel* require reasonable foreseeability of the circumstances giving rise to the contravention before reasonable care is considered within the second branch of the defence. Moreover, s. 72(a) contains no such requirement. In *MacMillian Bloedel*, Smith J.A. simply described the first branch (mistake of fact) as applying "where the accused can establish that he did not know and could not reasonably have known of the existence of the hazard".

[46] Although this discussion in *Pope & Talbot* was concerned with the defences of due diligence and mistake of fact in sections 72(a) and (b) of the *Forest and Range*

Practices Act, respectively, the Panel finds that this reasoning is equally applicable to those defences in sections 29(a) and (b) of the *Act*.

[47] Section 29(b) of the *Act* provides for the defence of mistake of fact. For this defence to succeed, the person who is responsible for a contravention must show that "the person reasonably and honestly believed in the existence of facts that if true would establish that the person did not contravene the provision." It is clear that, for this defence to succeed, the mistake of fact must be a reasonable one. In *R. v. MacMillan Bloedel*, the majority of the Court described the common law defence of mistake of fact as applying "where the accused can establish that he did not know and could not reasonably have known of the existence of the hazard."

[48] Section 29(a) of the *Act* provides for the defence of due diligence. At para. 81 of *Pope & Talbot*, the Court described the defence of due diligence as follows:

> … it is a question of fact, and of applying facts to the law, as to whether a company has taken all reasonable steps to avoid the contravention in issue. This assessment may include consideration of a contractor's behaviour and the foreseeability of the contravention itself.

[49] In *Atco Wood Products Ltd. v. Government of BC* (Decision No. 2010-FOR-001(a), issued February 28, 2012) ["*Atco*"], at para. 256, the Commission summarized the tests for mistake of fact and due diligence, respectively, as follows:

> The Panel has summarized the Court's test in *Pope & Talbot* as follows:
>
> > (1) Can the accused establish that it is innocent under the first branch of the test (mistake of fact); specifically, did it or could it have reasonably known of the existence of the facts giving rise to the particular event (contravention)?
> >
> > (2) If not, can the accused establish that it is innocent of the contravention under the second branch of the test (due diligence); specifically, did the accused take all reasonable care to avoid the particular event (contravention)?

The Appellant's Submissions

[50] The Appellant argues that the 2011 repairs to the Second Relief Road were completed in accordance with Deverney's instructions and involved the drainage of the road. The Appellant submits that it believed, and had every reason to believe, that the repaired road would be capable of withstanding peak weather events. The Appellant submits that the Second Relief Road has historically had few drainage structures, and the maintenance completed on the road before 2011 was occasional grading. The Appellant submits that no water bars were installed and no seasonal deactivation was done in the past, because the road had been "stable" for 100 years.

[51] The Appellant also submits that the extreme weather conditions in March and April of 2012 caused the slides. Evidence from three sources was cited to support that assertion. First, the Appellant pointed out that the Blanchard Report states

that the total precipitation during March 2012 was greater than two times normal, and precipitation during April 2012 was 20% greater than normal. Second, the local newspaper reported other slides and significantly greater rainfall than usual. Specifically, the April 27, 2012, edition of the Nelson Star reported mudslides and closed sections of highway, including 13 kilometres south of Nelson, BC. Third, Mr. Ahrens recalls a slide that occurred at the end of April 2012, at Giveout Creek, 20 kilometres north east of the Erie Creek slides. He witnessed the mud flowing down Giveout Creek, and the impacts of the erosion on the highway. From this evidence, the Appellant argues that the precipitation in the spring of 2012 was extreme and unprecedented, and had adverse effects on creeks and roads near MF 248.

[52] The Appellant also submits that it repaired the Second Relief Road in 2011 to improve it and prevent any adverse effect on fish habitat. Before completing the repairs, the Appellant retained Deverney to design the repairs, and obtained the appropriate permit from the MOTI before starting the repairs. The repairs were then completed according to the design specifications and instructions specified by Deverney. The Appellant submits that the first repair was at the 10.5 km mark, and the second repair was at the 11.7 km mark (the area of Slide A), of the Second Relief Road. According to the Appellant's submissions, the second repair involved installing a French drain to improve drainage and return the road to its original width, as this section of the road had become too narrow for logging trucks. The Appellant maintains that the road repairs undertaken in 2011 were "due to chronic erosion" of the road over time, and not due to previous slides.

[53] Consequently, the Appellant argues that it reasonably and honestly believed the road was capable of withstanding peak weather events.

[54] In addition, the Appellant argues that the Respondent failed to consider a number of factors, including evidence of the Appellant's due diligence. The Appellant submits that the defence of due diligence is established if the Appellant took reasonable care to avoid the contravention. In order to consider whether all reasonable care had been taken to avoid the contravention, the following points must be considered: the gravity of the potential harm, the available alternatives to protect against the harm, the likelihood of the potential harm, the skill required, and the extent that the accused could control the causal elements of the harm. In support of those submissions, the Appellant refers to the Commission's decision in *Pope and Talbot Ltd. v. Government of British Columbia* (Decision No. 2005-FOR-004(b), issued September 4, 2007), and the Court's decision in *Pope & Talbot Ltd.*

[55] The Appellant also argues that the Respondent relied upon materials that contained misinformation and incorrect assumptions, leading to the conclusion that the Appellant contravened the *Regulation*. First, the Respondent concluded that seasonal deactivation would normally constitute a due diligence procedure. However, the Respondent provided no evidence that these measures would have made a difference in this case. Nor did the Respondent provide proof that seasonal deactivation was a normal procedure in this area of the Kootenays, or a practice that a reasonable person would have completed in these circumstances.

[56] In particular, the Appellant submits that the Respondent relied on certain incorrect conclusions in the report prepared by the Council's Executive Director.

For example, the Executive Director's report states that, "had the road been seasonally deactivated a back-up culvert likely would have been installed and additional water bars constructed. These measures would have helped contain and disperse the high run-off." However, the Appellant argues that the Executive Director did not visit the site to view the specific locations of the slides, the steepness of the side slopes, the nature of the terrain, and the damage to fish habitat in the creek below the Second Relief Road. The Executive Director also did not state where a back-up culvert should have been installed. The Appellant submits that the Executive Director must be referring to a back-up culvert near the French drain that was installed in 2011, given that there was no culvert in the area of Slide C. According to the Appellant's submissions, water from the French drain area "appears to have moved northward toward Slide 5…" [i.e., Slide A].

[57] The Appellant also argues that winter deactivation has not been a customary practice on the Second Relief Road, nor is it a usual practice on many forest roads in the Interior of BC. The Appellant submits that the Respondent presented no evidence defining the usual deactivation practices, or the standard of care a reasonable owner of managed forest land should have met, in this situation.

[58] The Appellant further submits that, at this particular section of the Second Relief Road, the grade is essentially flat (i.e., 0 to 2%). In the past, water bars have not been installed, especially where Slide C, the slide that damaged fish habitat, occurred. The Appellant submits that it is unclear whether water bars would assist drainage on this section of the road, because it is difficult to tell which way the water will flow along the nearly flat section of road. Moreover, the Appellant submits that there was no evidence of previous slides or water drainage problems where Slide C occurred. Therefore, the Appellant contends, there was no reason to build drainage structures at that location as part of a winter deactivation program.

[59] Lastly, the Appellant argues that the Respondent conflated the two slides that occurred in 2012, to attach liability to the Appellant and determine that a contravention of section 21 of the *Regulation* had occurred. However, the Appellant argues that, when the facts related to each slide are reviewed separately, only Slide C had an adverse effect on fish habitat according to Mr. Hamilton's report and the Determination. Yet, the winter deactivation suggested by the Respondent only relates to the area of Slide A, which had no adverse effect on fish habitat.

[60] At the hearing, the Appellant called three witnesses: Rainer Muenter, Ole Ahrens, and Norman Deverney.

[61] Mr. Muenter is a registered professional forester, and holds a Master's degree in Forest Science. He is a director of Erie Creek Ltd., owns Monticola Forest Ltd., and has been managing MFU 248 since 1990.

[62] Mr. Muenter testified that water runoff on the Second Relief Road has always worked in the past by "shedding water" in a diffused manner off of the entire road section. He also testified that it was not a common practice to seasonally deactivate the Second Relief Road, and he referred to an email from Hugh Eberle of the MOTI stating that it was not a common practice for MOTI to issue permits for

seasonal deactivation. However, Mr. Muenter admitted that he does complete seasonal deactivation on roads where the practice is necessary.

[63] Under cross-examination, Mr. Muenter was referred to the letter he had written in 2011 on behalf of Erie Creek Ltd., stating that the Council had no jurisdiction over the section of the Secondary Relief Road where the slides had occurred. He answered that this was his initial position, but his position has since changed, given the developments of this case.

[64] Mr. Ahrens is a forester-in-training ("FIT") with Monticola Forest Ltd., which is a forestry consulting firm that contracts services to Erie Creek Ltd. Mr. Ahrens' responsibilities include forest planning and layout, and logging supervision. He is responsible for road maintenance and road inspections.

[65] Mr. Ahrens testified that his regular practice was to inspect roads regularly, and fix problems when he found them. He discovered the slides on the Second Relief Road in the spring of 2012, and reported them to Mr. Muenter right away. The next day, he blocked the Second Relief Road with ribbon for safety purposes. He testified that the repairs were completed promptly, according to the instructions prescribed by Deverney, and given the concerns that Erie Creek Ltd. had for public safety.

[66] In his testimony, Mr. Ahrens also described in detail the repairs that were completed in 2011. He referred to a series of photographs provided in the Appellant's evidence.

[67] Under cross-examination, Mr. Ahrens distinguished slides from general erosion events, and he disagreed with the statement at p. 6 of Mr. Blanchard's December 2012 report that, "The reconstruction included road repairs related to two slides that occurred in 2011." Mr. Ahrens stated that the road repairs that were done in 2011 were due to general erosion; they were not due to slides off the Second Relief Road that year.

[68] Mr. Deverney is a professional engineer who holds a Bachelor of Applied Science degree. He has owned his own engineering company in the West Kootenays since 1994. His clients include many of the forestry firms located in the area. His field of practice includes slope and terrain stabilization, water resources, bridge and culvert design and installation, and water run-off issues.

[69] Mr. Deverney testified that he was retained to design and supervise repairs to the Second Relief Road in 2011. The objective of those repairs was to ensure that the Second Relief Road was durable, reliable, safe, cost effective, and free of erosion. He opined that these objectives have been met. He stated that he visited the site subsequent to the completion of the repairs, and he observed that they were performing well.

[70] Mr. Deverney further testified that he visited "site 4" [site A in his report] in 2011, the location of Slide C which deposited material into Craigtown Creek. He stated that there was nothing remarkable about the site. He did not observe water pooling on that portion of the Second Relief Road at that time, or any other unusual event occurring there. In his opinion, the cause of the slide was a modest volume of soil from the cut slope side of the road, which was softened due to its moisture

content, and collapsed into Craigtown Creek. He stated that the abundance of moisture in the soil reduces the cohesion between the clay and silt particles. In his opinion, the abundance of rain-on-snow events during the spring of 2012, coupled with the accumulated moisture already present in the soils, caused ~~the~~ Slide C at site 4.

[71] When asked whether a culvert should have been placed at site 4, he stated that he would not put one there, because the ground is flat, there is no source of water, and no cross drain is in place. Moreover, there was no need for waterbars at this site because they would serve no purpose. Water bars break up surface flow, but the road grade at this location is undulating, so there were no water accumulations.

[72] Under cross-examination, Mr. Deverney also distinguished the occurrences in 2011 from the slides in 2012. In his opinion, the 2011 events were not slides, but the 2012 events were slides. When asked whether he had completed any assessment of the 2011 road repairs at the end of that season, he answered that he had not.

The Respondent's Submissions

[73] The Respondent submits that, at common law, the due diligence defence for strict liability offences has two parts, and both parts have been incorporated into section 29 of the *Act*. Section 29(b) deals with the second part – it is the defence that involves a person having a reasonable belief in a mistaken set of facts which, if true, would render the act or omission innocent. The Respondent argues that the onus is on the Appellant to establish, on the evidence, that one of these statutory defences applies to it.

[74] In addition, the Respondent submits that, according to *Pope & Talbot*, consideration of the foreseeability of the particular event (i.e., the contravention) must be considered under both section 29(a) and (b) of the *Act*. *Pope & Talbot* states as follows at para. 72:

> Whether conduct is "innocent" under the first branch of the common law defence, or whether all reasonable steps were taken under the second branch, must first be considered in the context of the "particular event": *MacMillan Bloedel*, para. 48. The same focus applies in a foreseeability analysis: *MacMillan Bloedel*, para. 53. Accordingly, the proper inquiry under the second branch of the due diligence defence, as codified in s. 72(a) [of the *Forest and Range Practices Act*], is whether the company took reasonable care to avoid the contravention…

[75] The Respondent submits that section 29(b) of the *Act* does not apply in this case, because any belief on the Appellant's part that a high risk road, which had experienced two major slope erosion events in 2011, would sustain peak weather events based on the repairs done in 2011, was an unreasonable belief in the circumstances.

[76] In support of those submissions, the Respondent refers to the Council's 2008 *Field Practices Guide* (the "Guide"), which the Council provides to owners of private managed forest land, and the *Handbook of Best Management Practices for Private*

Forest Land in BC (the "Handbook") prepared by the Private Forest Landowners Association. Both the Guide and the Handbook discuss risk assessment and management, as well as road maintenance, in the context of private managed forest land. In summary, the Guide and the Handbook indicate that there are two issues that must be considered when assessing risk: (1) whether the hazard is high or low for the event to occur; and, (2) if the event occurs, whether the consequences will be high or low. According to the Guide and the Handbook, high hazard categories include road sections featuring easily erodible sediment sources, poorly constructed roads with ineffective water management, high rainfall areas, and unstable terrain. High consequence categories include fish streams and sedimentation that is highly likely to impact fish or water quality values.

[77] The Respondent submits that the evidence presented at the appeal hearing establishes that the Second Relief Road has features associated with a high risk, high consequence road that required increased care. In particular, it has easily erodible sediments, steep side slopes, unstable terrain, it was built many years ago, it is in a high rainfall area, and it is immediately upslope of fish habitat.

[78] The Respondent acknowledges that rainfall in the area during March 2012 was higher than usual, but it argues that the rainfall was not unprecedented based on the weather records for the area, and in any case, road drainage systems should be designed to accommodate peak weather events. The Respondent provided weather records for the Castlegar Airport, located approximately 19 km west of the location of the slides, and submits that these show that the area is a high rainfall area. The Respondent argues that there is evidence that increased precipitation and extreme weather is foreseeable, given the impact that global warming is having on weather patterns. The Respondent notes that the Guide makes reference to changing weather patterns in the sections on road construction, road maintenance, and deactivation, and the Guide cautions managed forest land owners that increased diligence is necessary to construct and maintain roads during times of heavy precipitation.

[79] The Respondent submits that, given the high risk and high consequence features of the Second Relief Road, and the two slope failures in 2011, regardless of whether they are called "slides" or "erosion events", it cannot be said that the Appellant had no reason to foresee future slope failures. The Respondent submits that the Appellant had preventative responsibilities, and not just remedial responsibilities, to protect against a reasonably foreseeable slope failure on this section of the Second Relief Road.

[80] The Respondent argues that seasonal deactivation is a common forest management practice that is completed to ensure that a forest road's integrity is maintained, especially during freshet. The Respondent submits that the Appellant is expected to formulate its own risk assessment, and determine the steps necessary to maintain the proper functioning of road drainage systems that will avoid impacts to fish habitat.

[81] The Respondent maintains that three compelling and interrelated reasons point to why seasonal deactivation was required to exercise reasonable care to protect fish habitat. First, there was a history of slope failure on this section of the

Second Relief Road. Second, the Second Relief Road lies in close proximity to a Class A fish stream. Third, the Second Relief Road is a high risk, high consequence road since it is so close to Erie Creek, was built long ago based on lower standards than modern logging roads, is inaccessible during the winter, contains steep side slopes just above the creek, and there has historically been high levels of rainfall in the area.

[82] The Respondent submits that the Appellant's submissions fail to recognize that the Appellant had preventative responsibilities under section 21 of the *Regulation*, and not just remedial responsibilities. The Respondent submits that the Appellant was required to engage in risk management to take the protective measures that were reasonably called for given the risk factors in this case. While the Appellant may have proceeded on the mistaken belief that the road repairs carried out in 2011 were sufficient to meet the requirements in section 21 of the *Regulation*, the Respondent submits that the Appellant has provided no evidence that it put its mind to the need to protect the road against further slope failure events during the winter when the road was inaccessible.

[83] The Respondent argues, therefore, that the Appellant's assertion that section 29(b) of the *Regulation* applies because the 2011 "repairs improved the drainage of the road and the Appellant believes and had every reason to believe that the Road was repaired to appropriate standards and that it was capable of withstanding significant spring weather" is not reasonable. The Respondent argues that the section of the road where the damage occurred was repaired to enable logging during the summer of 2011. However, it is not reasonable to conclude that these repairs would, in turn, withstand subsequent peak weather events in the absence of seasonal deactivation.

[84] The Respondent submits that section 29(a) requires the Appellant to show that it took all reasonable steps to avoid the contravention.

[85] The Respondent argues that the contravention in this case is a particular event: the failure of the road prism which, in turn, led to a material adverse effect on fish habitat in Erie Creek. The Respondent submits that the defence in section 29(a) of the *Act* is assessed on an objective standard, based on what a reasonable owner of a private managed forest, such as the Appellant, would have done in these circumstances. This defence will apply if the Appellant knew or ought to have known of the hazard, but demonstrates that it took reasonable care to avoid the particular event from occurring.

[86] In support of those submissions, the Respondent cites *Sault Ste. Marie*, as follows (at page 1325):

> In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with evidence of due diligence.

[87] The Respondent submits that the Appellant must demonstrate that it "exercised all reasonable care by establishing a proper system to prevent commission of the offence" and took "reasonable steps to ensure the effective operation of the system" (*Sault St. Marie*, p. 1331).

[88] The Respondent argues that the Appellant relies on three main points to assert that it exercised all reasonable care to avoid the event:

a. there were no "slides" in the immediate area;

b. winter deactivation is not a usual practice on the Second Relief Road; and

c. it completed construction work on the Second Relief Road in accordance with engineering designs and requirements, and the requirements of the MOTI permit.

[89] The Respondent submits that the Appellant's first point above is based on its assertion that the "major erosion events" in 2011 were not "slides", and that the Council erred in placing any weight on them in its consideration of due diligence. However, the Respondent argues that all four events (the two in 2011 and the two in 2012) were "slope failures" and all occurred within a 1 kilometer stretch of the Second Relief Road. The Respondent argues that the evidence shows that the 2012 slide that caused damage to fish habitat in Erie Creek is located close to both of the 2011 slope failures.

[90] With regard to the fact the Appellant completed road repairs in 2011, the Respondent argues that the only maintenance or repair work completed by the Appellant in 2011 was to enable it to access timber on MFU 248. The work was remedial, rather than preventative. The Respondent distinguishes road construction and maintenance work for access, from the need for seasonal deactivation where there is a risk of slides when the road is not being used. The Respondent submits that the Appellant has provided no evidence that the Appellant considered which road prism or drainage measures were required to avoid adverse effects on fish habitat that might foreseeably arise as a consequence of future slope failures once the road was inactive. There were, therefore, no preventative measures taken by the Appellant; it only completed remedial work to repair damage caused by previous slope failures in order to continue logging operations.

[91] In regard to whether seasonal deactivation would have been a reasonable due diligence practice in this case, the Respondent referred to various documents, including the road maintenance and risk management guidelines in the Guide. The Respondent also referred to the *Forest Road Regulation*, which is cited in a "Forest Road Engineering Guidebook" published by the Ministry. However, the Panel notes that the *Forest Road Regulation* was repealed in 2004, and would not be binding in this case even it was in force, because it was not a regulation made under the *Act*. Rather, it applied to forest practices on public land.

[92] The Respondent called Mr. Rod Davis as its first witness. He is currently Chair of the Council, and he chaired both the Determination and the Reconsideration panels.

[93] Mr. Davis testified that the Council's Determination panel placed significant weight on the loss of fish habitat in Erie Creek, as confirmed by Mr. Hamilton.

[94] He also testified that, based on a review of the precipitation data, the Council concluded that precipitation amounts observed during the time frame of the slide

events were extreme, but they were within the realm of precipitation that has occurred in the past, and therefore, they were not unprecedented.

[95] The Council's second witness was Mr. Michael Alexander. Mr. Alexander is a member of the Council and was a member of both the Determination panel and the Reconsideration panel.

[96] Mr. Alexander testified that seasonal deactivation in this area of the Kootenays is a standard practice, especially for high risk, high consequence road sections, such as this section of the Second Relief Road. He disagreed with the testimony of the Appellant's witnesses that seasonal deactivation is not a normal practice. He stated that he has completed audits for forestry companies who operate in this area, and he confirmed that it is a standard practice with them.

[97] Mr. Alexander also stated there was evidence that the Second Relief Road was a high risk, high consequence road at the 11 km section. He stated that it was built a long time ago, was built according to lower standards than would be used today, and is an old railway grade that is not steep but has side slopes that are steep. He stated that these steep side slopes are prone to failure, and therefore, would likely cause damage to the Class A fish stream below. In this case, he did not distinguish between slides and slope failures since, fundamentally, both could result in erosion and deposition of material into a fish stream.

[98] Mr. Alexander referred to one of the Appellant's photographs of site 4 (the section of road where Slide C originated) taken prior to the repair work undertaken in 2011, and he testified that the tension cracks that are visible along the edge of the road surface showed evidence of road instability which would require seasonal deactivation. He stated that, in his opinion, the Appellant did not perform reasonable deactivation on this road section. There were no surveys or evidence of an in-place environmental management system that would demonstrate that the Appellant had put its mind to the need for seasonal deactivation on the Second Relief Road.

[99] Under cross-examination, Mr. Alexander referred to another one of the Appellant's photographs, which shows "site 4" (the origin of Slide C) when the slide was discovered, and he testified that sloughing of deciduous brush on the side slope above the road at site 4 was another indication of road instability. He also stated that he did not visit the Second Relief Road.

The Panel's findings re: mistake of fact

[100] The Panel finds that MF 248 is managed by well-trained forestry professionals who, according to their evidence, have numerous years of experience managing operations on MF 248, including responsibility for road inspections and ensuring road safety. The Panel finds that, while the Appellant's staff and contractors may have honestly believed that the Second Relief Road was stable and safe once the repairs were completed in 2011, this belief was not a reasonable one. The Panel finds that, in 2011, the Appellant's forest professionals were, or should have been, familiar with the characteristics of the Second Relief Road which indicate that it is a "high risk" and "high consequence" road, and that it posed a hazard of slope failure that could adversely impact the fish stream below it.

[101] Specifically, they knew, or should have known, that the road was built many years ago when road-building standards were lower than they are now, it has steep side slopes, is in a high precipitation area, and is immediately upslope from a fish stream. As stated in Mr. Hamilton's report, "This is a high risk road system since it was built years ago (lower standards), is on steep slopes, and is immediately upslope of (coupled) productive fish habitat." Also, the Appellant was aware of previous erosion events within the 1 kilometre stretch of the Second Relief Road where the 2012 slides occurred, including "chronic erosion" and visible tension cracks near the origins of Slide A, which is only approximately 100 metres from the origins of Slide C. None of those facts were discovered after the 2012 slides occurred; rather, they were known before the 2012 slides occurred.

[102] Although Slide A was not found to have caused a "material" adverse effect on fish habitat, and therefore was not a contravention of section 21 of the *Regulation*, the Panel finds that Slide A is relevant as an indication of the hazard posed by this portion of the road. Had Slide C not occurred, Slide A would still have been a cause for concern about the stability of the road and the risk it posed to the creek below. Slide A involved a significant volume of material that slid downslope, causing a partial dam of the stream channel and temporary downstream sedimentation.

[103] The Panel accepts the evidence that, although the precipitation events in the winter and spring of 2012 were extreme, they were not unprecedented. The Respondent provided evidence that, based on weather records dating back to 1971, the area had previously experienced monthly maximum and daily maximum precipitation levels that exceeded those that occurred in March 2012. In any event, the Panel finds that these events were a contributing factor to the cause of the slides, rather than being the sole reason for the slides.

[104] The Panel also finds that the 2011 repairs were done to widen the road surface for logging trucks, in order to gain access to timber for harvesting purposes on MF 248. The Panel does not accept the Appellant's asserted belief that the 2011 repairs alone were sufficient for the road to withstand spring freshet weather conditions, without further oversight and consideration of the environmental risks and related potential consequences. There is no evidence that, in undertaking those repairs, the Appellant's staff and contractors actually turned their minds to whether the road would withstand foreseeable high precipitation events during the winter and spring. Such an assessment would have been especially important given that the Appellant's practice is to leave the road unmaintained and unmonitored during the winter/spring.

[105] Given the facts, and the skill and training of the Appellant's staff and contractors, the Panel finds that the Appellant has failed to establish, on a balance of probabilities, that it could not reasonably have known of the existence of the hazard (i.e., risk of inadequate maintenance of the structural integrity of the road prism or the road's drainage systems, resulting in a material adverse effect on fish habitat) posed by this portion of the Second Relief Road. Rather, the Panel finds that the Appellant knew, or ought to have known, that there was a high risk of a slope failure in the vicinity of the 11.6 km mark during the winter/spring, when the road was left unmaintained and unmonitored, which could have a material adverse effect on the fish habitat immediately below the road. Consequently, the Panel

finds that the Appellant has not established that it reasonably believed in the existence of facts that, if true, would establish that the Appellant did not contravene section 21 of the *Regulation*. To the extent that the Appellant was under any mistake of fact in this regard, it was not a reasonable one. The Appellant has not met the test required under section 29(b) of the *Regulation*.

The Panel's findings re: due diligence

[106] At para. 75 of *Pope & Talbot*, the BC Supreme Court explained the role of foreseeability in the due diligence test, as follows:

> … The focus of a foreseeability analysis is… on the "occurrence of the particular event giving rise to the charge" or the *actus reus* of the contravention in issue: see *MacMillan Bloedel* at paras. 44 and 53. …

[107] The Panel agrees with the Respondent that the particular event in this case is the event that gave rise to the contravention: Slide C (at site 4) on the Second Relief Road, which resulted in a material adverse effect on fish habitat.

[108] Once the contravention has been established, the test, as explained in *Sault Ste. Marie* is: did the accused exercise all reasonable care by establishing a system to prevent commission of the contravention, and then take all reasonable steps to ensure the system was operating? Applying that reasoning to the present case, the Panel finds that the "system" that the Court is referring to in *Sault Ste. Marie* is an environmental management system developed and implemented by the Appellant and its staff and/or contractors. The Panel further finds that, in the present case, such a system would have involved a system of risk assessment and/or monitoring in relation to the roads that the Appellant is responsible for maintaining under the *Act*. For example, such a system should assess or forecast the possibility of weather events causing damage to roads which could then cause harm to fish habitat, and the need to attempt, at the very least, to prevent this damage from occurring. While the Appellant argues that it is unclear from the Determination and the Reconsideration what constitutes "peak" weather events and whether a road should be capable of withstanding 10, 50, or 100-year worst precipitation events, the Panel has found that the weather conditions that contributed to the slides were not unprecedented.

[109] The Panel finds that this conceptualization of an environmental monitoring system that would meet the test for due diligence is consistent with the Commission's decision in *Atco*, an appeal in which the appellant was successful in establishing the statutory defence of due diligence. In that case, the appellant had obtained a road use permit that required it to maintain a forest service road, which the appellant used to access and harvest timber. One week after the appellant's staff had graded a section of the road near a crossing over a fish-bearing creek, Ministry staff noticed suspended sediment in the creek below the graded section of the road. The Ministry staff also noticed gravel ridges on both sides of the road section, and water pooling on the road surface. After an investigation, the Ministry levied penalties for two contraventions of the *Forest Planning and Practices Regulation.* On appeal, the Commission found that the appellant was duly diligent, because it had a proper system in place to prevent the contravention, and it took reasonable steps to ensure that its system was operating properly. In particular,

the appellant had prepared a manual of Environmental Instructions to address various environmental concerns, including road surfacing, maintenance and grading. The appellant required its staff to adhere to its Environmental Instructions, to carry the instructions with them at all times, and to attend annual environmental training sessions. In this instance, the appellant's staff had inspected the road after the grading was completed, and noticed no gravel ridges at that time. Based on that evidence, the Commission found that the appellant demonstrated that it took reasonable steps to prevent its road maintenance from negatively affecting the function of the road drainage systems.

[110] The Panel also notes that the test in *Sault Ste. Marie* and the subsequent cases places the onus on the Appellant to demonstrate that it exercised due diligence. The Panel finds, however, that the arguments advanced by the Appellant attempt to turn this onus back to the Respondent, by arguing that there was no proof that some form of seasonal deactivation, such as the installation of water bars or culverts, would have prevented the slides from occurring. Much of the evidence and argument that the Appellant presented was directed this way.

[111] For example, Mr. Deverney testified that there was nothing remarkable about site 4, the location of Slide C that deposited material into Erie Creek and caused the destruction of fish habitat. He observed no water pooling at that site or any other unusual event that might signal the road was unstable. He stated that he would not have placed a culvert at this location as part of a seasonal deactivation program. The ground was flat and there was no source of water to manage. Moreover, he believed that there was no need for waterbars, since they would serve no purpose. However, Mr. Deverney also testified that seasonal deactivation was necessary in areas of steep road grades and steep side slopes where water run-off will cause erosion, leading to instability. The Appellant's approach to seasonal deactivation was essentially a "do nothing" approach, which Mr. Deverney found acceptable since deactivation should be completed on a site-specific basis. However, the Panel finds that the question of whether seasonal deactivation would have prevented Slide C is not determinative of whether the Appellant exercised due diligence. Rather, the key question is whether the Appellant had a system in place for assessing the risk of material harm to fish habitat occurring due to a failure of the road prism or the drainage system of a road that the Appellant was responsible for maintaining, and determining whether action (e.g., seasonal deactivation or something else) should be taken to mitigate those risks.

[112] The Panel finds that the Appellant presented no evidence, either oral or written, demonstrating that it had some form of environmental management system in place for assessing the risk of a failure of the road prism or the drainage system on the roads that it is responsible for maintaining under the *Act*. There is no evidence that the Appellant considered which road prism or drainage measures were required to avoid any material adverse effects on fish habitat that might foreseeably arise during the winter/spring when the road was left unmaintained and unmonitored.

[113] Mr. Alexander testified that this section of the Second Relief Road was a high risk and high consequence road that showed evidence of slope instability. The road was built to lower standards, and displayed tension cracks and sloughing deciduous

vegetation. Under cross-examination, Mr. Alexander stated that there are different deactivation practices for different road uses, depending on the risks involved, but when it is required it should be done.

[114] The Respondent provided evidence of the need for an environmental management system or road deactivation program by referring to the Council's Guide. Mr. Alexander referred to the Guide in his testimony, noting that while it did not reference "seasonal deactivation" specifically, it devotes three pages to road maintenance and deactivation. The Guide, dealing with due diligence, makes the following statement, which the Panel finds is relevant:

> If a problem should develop or if non-compliance is identified through an audit or inspection, it is important that you can demonstrate due diligence in your planning, risk assessment, and operational implementation if required.

[115] In the Panel's view, although the Guide is not binding, it speaks to the need for some form of environmental management system that anticipates that erosion problems with forest roads may arise, and advises taking action proactively to minimize the risk to the environment.

[116] The Panel acknowledges that an established and implemented environmental management system will not, of its own right, prevent all slides, slope failures, or the destruction of fish habitat caused by the transportation and deposition of slide material. However, the Panel finds that having a proper system in place to attempt to prevent such events, and taking reasonable steps to ensure the proper operation of such a system, would meet the test of due diligence found in section 29(a) of the *Regulation*.

[117] The Panel accepts the Appellant's evidence that its staff was, and continues to be, concerned about the function of drainage systems on the Second Relief Road, and that the road repairs in 2011 were completed according to engineered standards. However, the Panel finds that these repairs were necessary to access timber for harvesting purposes on MF 248. They were not, of their own, part of a system designed to minimize or prevent negative impacts on the environment caused by inadequate maintenance of the road prism or drainage structures on the forest roads that the Appellant was responsible for maintaining.

[118] For these reasons, the Panel finds that the Appellant has not established that it exercised due diligence as provided in section 29(a) of the *Act*.

2. Whether the $7,500 administrative penalty and remedial order imposed on Erie Creek Ltd. was appropriate based on the factors set out in section 26(5) of the *Act*.

[119] The Panel notes that, under section 26 of the *Act*, the Council is provided the authority to levy a penalty of up to $25,000 for a contravention, unless it is deemed to be "trifling". When determining the appropriate penalty, the Council (and now the Panel) must consider the factors set out in section 26(5) of the *Act*.

The Appellant's Submissions

[120] The Appellant submits that the factors considered under section 26(5) all point to imposing no administrative penalty.

[121] The Appellant argues that the Executive Director's report outlines the following points for consideration in determining the appropriate administrative penalty: the Appellant cooperated with the investigation and obtained no economic benefit from the slides. The Executive Director also stated that fish habitat loss is not likely to have a long term effect.

[122] The Appellant also notes that it completed remedial work before the remedial order was issued.

The Respondent's Submissions

[123] In its Determination, the Council considered the factors under section 26(5) and concluded as follows:

> In this case, the Owner self-reported the slides and fully cooperated with the Executive Director in his investigation. The Owner has not had previous contraventions and took steps to reconstruct the road in 2013. There is no evidence the Owner derived any economic benefit as a result of the contravention. On the other hand, given the damage to the fish habitat on Craigtown Creek the Council does not consider the contravention to be trifling. Additionally, while the contravention was not deliberate, the Road is located in an area of steep topography and is adjacent to fish habitat, and there has been a history of slides on the road prior to 2012. Taking all of these factors into account the Council has decided to levy an administrative penalty in the amount of $7,500.

[124] The Respondent maintains that the penalty was appropriate and reasonable in all of the factors described above, and it submits that the Commission should concur.

[125] Mr. Davis testified at the appeal hearing that the $7,500 penalty applied to the Appellant was based on a precedent set by the Council in a case involving a property owner on Vancouver Island. No other information about that case was presented in his testimony, and this information is insufficient to assist to the Panel in assessing the appropriateness of the penalty in the present case.

The Panel's Findings

[126] The Panel agrees that a penalty is warranted in this case, because the contravention is not trifling. However, given the facts in this case, the factors that must be considered under section 26(5) of the *Act*, and that the maximum penalty under section 26(2)(a)(i) of the *Act* is $25,000, the Panel finds that a penalty of $7,500 is excessive. Based on the evidence and the factors in section 26(5) of the *Act*, the Panel finds that the following considerations support a lower penalty:

- the Appellant reported the slides and cooperated fully with the Council's investigation;

- the Appellant had no previous contraventions;
- the contravention was not deliberate;
- the contravention was not repeated or continuous;
- the Appellant, through its own initiative, took steps to remediate the damage to the environment and re-build the Second Relief Road;
- there is no evidence that the Appellant received any economic benefit as a consequence of the contravention;
- fish habitat in a side channel to Craigtown Creek was permanently lost due to Slide C, but Mr. Hamilton's report indicates that the lost fish habitat was "marginal" given that it only provided high water refuge to fish during freshet and periods of high rainfall. Mr. Hamilton also concluded that there was no evidence of sediment delivery from the affected side channel to Craigtown Creek itself.

[127] In this case, the Panel finds a penalty of $3,000 is appropriate, given the factors listed above, and that the maximum penalty for a worst case scenario is $25,000. The remedial order is confirmed.

DECISION

[128] The Panel has carefully considered all of the submissions of the parties and the documents and evidence before it, whether or not specifically reiterated herein.

[129] For the reasons set out above, the Panel confirms the Council's Determination, as confirmed by the Council's Reconsideration, except that the administrative penalty is varied. The administrative penalty is reduced from $7,500 to $3,000. The remedial order is confirmed.

[130] The appeal is dismissed, except in regard to the reduction in the administrative penalty.

James Hackett, Panel Chair
Forest Appeals Commission

May 11, 2015