



File: 23060-20/DSS 38283

June 6, 2021

Lowell Johnson, President
Lowell A. Johnson Consultants Ltd.
1397 Morice River Road
PO Box 158
Houston, British Columbia
V0J 1Z0

Dear Lowell Johnson:

Re: Contravention Determination and Notice of Penalty Levied under Section 71 (2) (a) of the *Forest and Range Practices Act*

This is further to my letter dated January 20, 2020 and your opportunity to be heard respecting the alleged contravention of section 21(1) of the *Forest and Range Practices Act* (FRPA). I have now made my determination in this matter and conclude that Lowell A Johnson Consultants Ltd. (Johnson) did contravene section 21(1) of FRPA. As such, I am levying an administrative penalty in the amount of \$3,000.00.

Authority

The Minister of Forests, Lands, Natural Resource Operations and Rural Development has delegated to me, under section 120.1 of FRPA, the authority to make determinations with respect to administrative contraventions and penalties under section 71 of FRPA.

Legislation

Specifically, section 21(1) states:

The holder of a forest stewardship plan or a woodlot license plan must ensure that the intended results specified in the plan are achieved and the strategies described in the plan are carried out.

Section 71(3) states:

Issues

The following issues are relevant to this case:

1. Did Johnson contravene section 21(1) of FRPA?

2. If Johnson contravened FRPA, do any of the defences of due diligence, mistake of fact or officially induced error apply?
3. If Johnson contravened and none of the defences apply, what amount of penalty, if any, is appropriate?

After considering the evidence presented to me, and for the reasons presented below, it is my determination that:

1. Johnson did contravene section 21(1) of FRPA;
2. None of the defences apply; and
3. it is appropriate to levy a penalty in the amount of \$3,000.00 under section 71(2)(a)(i) of FRPA, which, subject to the stay referred to below, must be paid by August 6, 2021.

Issue 1: Did Johnson contravene Section 21(1) of FRPA?

Summary of the evidence and findings of fact

Based on the evidence, I am satisfied that the following facts are **not** in dispute:

- Lowell Johnson Consultants Ltd., is the holder of Non-Replaceable Forest License (NRFL) A90554 within the Bulkley Timber Supply Area (TSA) where cutblock REIS0031 was harvested.
- Canfor manages license A90554 including operational planning and harvesting under an agreement with Johnson
- The Ministry of Forests, Lands, Natural Resource Operations and Rural Development (FLNRO) issued Johnson Cutting Permit (CP) 003 which includes cutblock REIS0031 in October 2016, which authorized the company to harvest timber in accordance with governing forestry legislation.
- Under its Forest Stewardship Plan (FSP), initially approved in May 15, 2007, Canfor included Johnson and NRFL A90554.
- Canfor specified a result that committed it and Johnson to meeting the Visual Quality Objective (VQO) for the area surrounding cutblock REIS0031. Specifically, section 6.3.1.1 of the Canfor FSP (Amendment 27) states;

“This result/strategy for established visual quality objectives applies to portions of the Bulkley, Lakes, Morice FDU’s... The Bulkley’s scenic areas were established through FRPA section 181.”

Further;

“Alteration means changing or making something different as a result of conducting harvesting or road construction by the applicable agreement holder”

“Significant public viewpoint (SPV) means a position from which a landscape is observed or considered, that is known or recognized by many or most people”

“When the applicable agreement holder harvests timber or constructs roads that are located in Visual Quality Objective (VQO) polygons in known scenic areas as identified on the FDU maps for the Bulkley, Lakes and Morice, FDU’s, the extent of proposed alteration resulting from the size, shape, and location of cut blocks and roads will be within the following specified limits:

- a) Preservation (P) VQO/VQC: When evaluated from an SPV, will be, very small in scale and not easily distinguishable from the pre-harvest landscape.
 - b) Retention (R) VQO/VQC: When evaluated from an SPV, will be, difficult to see, small in scale, and natural in appearance.
 - c) Partial retention (PR) VQO/VQC: When evaluated from an SPV, will be easy to see, small to medium in scale, and natural and not rectilinear or geometric in shape.
 - d) Modification (M) VQO/VQC: When evaluated from an SPV, is very easy to see, and is large in scale and natural in its appearance, or small to medium in scale but with some angular characteristics.
 - e) Maximum modification (MM) VQO/VQC: when evaluated from an SPV, is very easy to see, and is very large in scale, rectilinear and geometric in shape or both.”
- The Canfor Amendment 27 FDU map for the Bulkley TSA identifies the area of cutblock REIS0031 as having a VQO/VQC of Partial Retention (For the upper portion of the cutblock). Cutblock REIS0031 was harvested by Johnson between August 24 and November 16, 2017.
 - The term ‘landform’ which is relevant to assessing visual quality objectives, is defined in the ministry’s evidence as;

“a distinct topographical feature that is a sub-unit of the larger landscape, is three dimensional in form, and is generally defined by ridges, valleys, creek draws, shorelines, and skylines”

This definition was not disputed by Johnson.

A field inspection of cutblock REIS0031 by ministry staff occurred in March 2019, after which an investigation into the compliance of this harvesting with the Canfor FSP was initiated.

With respect to the facts that **are** in dispute, Ministry staff presented the following evidence and submissions:

- Cutblock REIS0031 was assessed following harvest completion by ministry visual specialist Peter Williams who concluded that the Partial Retention VQO was not met. More specifically, his conclusion was that the harvesting did not meet the partial retention characteristics as it was very easy to see, large in scale, had poor design attributes, **and** that percent alteration calculations exceeded the expected range for partial retention.

- As a component of this assessment, the ministry specialist considered three separate viewpoints for which he identified the applicable landforms, commented on design elements and conducted percent alteration calculations. These results are identified in table 1 below.

	<u>Design comments</u>	<u>Percent alteration</u>	<u>VSC achieved</u>
VPT 1 – Telkwa High Road	Very easy to see Large in scale Poor design	26.4	Modification
VPT 2 – Youen’s corner	Very easy to see Very large in scale Poor design	34.7	Maximum Modification
VPT 3 – Kitseguetla Lake Road	Easy to see Large in scale Poor design	16.7	Modification

Table 1: Design and percent alteration calculations for REIS0031 visual assessments

- While the FSP commitment and the Forest Planning and Practices Regulation (FPPR) section 1.1 VQO definitions do not define percent alteration criteria, they are a standard component of visual assessment, and are useful to consider in evaluating the achievement of a VQO.
- That the provincial working definition of Significant Public Viewpoint (SPV) is “a place or location on the land or water that is accessible to the public, and provides a direct viewing opportunity to the landform being assessed.
- The viewpoints used in the table 1 assessments shown above were located on the basis of this SPV definition.

In turn, Johnson presented the following evidence and submissions. From the Johnson written submission discussed at the October 9th, 2020 Opportunity to be Heard (OTBH);

- That the Ministry’s evidence includes a map showing the cutblock to be in a PR VQO polygon that is not part of the FSP
- That the definition of SPV that is applicable relevant to the approved FSP strategy is defined in the FSP itself. This definition is;

“Significant Public Viewpoint (SPV)” means a position from which a landscape is observed or considered, that is known or recognized by many or most people.

- That the ministry did not properly apply the definition of SPV in selecting its locations for assessing the degree of alterations thereby invalidating its conclusions
- That an independent expert retained by Johnson found neither the Telkwa High Road nor the Youen’s corner viewpoints to meet the applicable SPV definition

- That ‘Bob Storey’s corner and Kitsegucla Lake Road are the only relevant SPVs
- That the extent of alteration visible from Kitsegucla Lake Road is PR not Modification (based on independent expert conclusions)
- That the view from ‘Bob Storey’s corner’ easily met PR VQO

Having regard to the foregoing evidence, I have made the following findings with respect to the facts in dispute:

- The applicable Johnson FSP map identifies the majority of cutblock REIS 0031 as being within a polygon with a PR VQO.
- That the applicable Johnson FSP strategy commits Johnson to meeting the PR objective specified in the FSP for this area.
- That the definition of Significant Public Viewpoint described in the Johnson FSP is the correct definition to be applied to the assessment of the FSP strategy and whether it has been achieved
- That this definition of SPV does include the Highway 16 corridor in its totality (including Youen’s corner, Bob Storey’s corner, and the points between and past both of these sites). Mr. Bedford’s conclusions with regard to the duration of visibility from Youn’s corner are irrelevant as the duration of visibility is not a component of the FSP SPV definition nor the FSP strategy.
- That neither Telkwa High Road nor Kitsegucla Lake Road meet the applicable definition of SPV
- That the extent of alteration visible from Highway 16 SPVs (including Youen’s corner) does not meet the PR objective, and that a contravention of FRPA s.21(1) has occurred.

My reasons for making these findings are as follows:

- The establishment of VQOs and their applicability to forestry operations has been done to manage to the public’s expectations for visual aesthetics. VQOs define the parameters and extent of acceptable alterations to natural viewsapes for the purposes of resource development. The management of visual values through VQOs requires a trade-off between access to timber resources, the value of those timber resources, and the aesthetic qualities of viewsapes to the public eye.
- The public in their observation from a particular viewpoint, will take in and draw conclusions with regard to the aesthetics of a particular view that is available to them by relating any alterations to the surrounding landscape. The views of cutblock REIS 0031 from points of Highway 16 meeting the Johnson definition of SPV are distinctly visible and different from the surrounding landform and other disturbances to it and do not meet the prescribed requirements for PR.

- That the FSP definition of SPV is based on the viewscape being visible by ‘many or most people’. I certainly believe that Highway 16 as the only route through which travel between Smithers and Terrace can occur and which is regularly used by all people travelling between these communities meets this definition. I do not however conclude that the Telkwa High Road nor the Kitseguella Lake Road are similarly used by what could be considered ‘many or most’ relative to the amount of travel occurring on Highway 16. Regardless, I am finding a contravention to have occurred however will weigh these conclusions into my considerations of the gravity and magnitude of the offence.
- Accordingly, the REIS 0031 development is not consistent with the Johnson FSP, and the VQO was not achieved. I conclude that the facts set out above support a finding of contravention of section 21(1) of FRPA, provided the defences set out in section 72 of FRPA do not apply.

Issue 2: If Johnson contravened FRPA, do any of the defences of due diligence, mistake of fact or officially induced error apply?

While the Johnson OTBH written submission originally raised numerous questions around the legitimacy and applicability of the objectives relating to visual resource management, no specific claims of mistake of fact or officially induced error were raised. Further, given that my determination of a contravention having occurred is based on the Johnson FSP strategy, SPV definition, and FSP map, I do not see that such a defence could be raised.

Johnson did raise several points during its opportunity to be heard and within its written submission relative to a due diligence defence. Specifically, the Kevin Skarda affidavit speaks to actions that were taken to assess the degree of alteration visible from ‘Bob Storey’s corner’. While I view these as being positive steps that were taken to assess the management of visual objectives relevant to cutblock REIS 0031, they are not sufficient to establish that all reasonable actions were taken to prevent an unintended outcome which in this case resulted in the commission of a contravention.

I have therefore concluded based on the facts set out above that none of the defences provided for in section 72 of FRPA apply.

Issue 3: If Johnson contravened and none of the defences apply, what amount of penalty, if any, is appropriate?

Under section 71(2)(a)(i) of FRPA and section 12(c) of the *Administrative Orders and Remedies Regulation*, I am authorized to levy an administrative penalty of up to \$50,000 for the contravention of s. 21(1) of FRPA.

Alternatively, under section 71 (2) (a) (ii) of FRPA, I may refrain from levying a penalty if I consider that the contravention is trifling and that it is not in the public interest to do so.

If I do levy a penalty, I must consider the following factors in section 71 (5) (a) (ii) of FRPA:

- (a) your previous contraventions, if any, of a similar nature;
- (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 you derived from the contravention;
- (f) your cooperativeness and efforts to correct the contravention; and
- (g) any other considerations that the Lieutenant Governor in Council may have prescribed.

Having regard to the facts of this case, I have decided the contravention is not trifling and that it is therefore appropriate to levy a penalty in the amount of \$3,000.00. My reasons are as follows:

- Johnson has had no previous contraventions of a similar nature.
- The view of cutblock REIS 0031 from the Highway 16 viewpoints that I have considered as meeting the definition of SPV is outside of the area of focus of a driver (not of a passenger) and is relatively fleeting in nature. Additionally, I have considered that the broader viewscape from highway 16 between the communities of Smithers and Terrace includes forest harvesting alterations that are equally or more distinct as the REIS 0031 development. Accordingly, I have concluded that while not trifling, there is a relative low gravity and magnitude associated with this contravention
- The contravention was not repeated or continuous.
- The contravention was not deliberate. I believe that Johnson did not exercise appropriate diligence or care in the development of this harvesting as it relates to the visual objectives but that the outcome was not deliberate in nature.
- I do not conclude that Johnson received an economic benefit from the contravention, nor that this was a motivator for its actions. By harvesting a larger contiguous opening, Johnson was perhaps able to access more timber in a *more efficient* manner than what would have been available if the VQO was followed, however I do not conclude that the same quantum of timber would not have been available in the same area with appropriate visual design.
- Johnson while initially very defensive with regard to its actions and this outcome subsequently submitted to me an acknowledgement of the result being an unintended consequence, and that it would not dispute a finding of a contravention. Further, Johnson made a commitment in this communication to cooperatively work with the ministry through the management of its licenses to better fulfil the public's expectations in the management of visual aesthetics. Given the shift in approach that this commitment represents I have weighed it heavily in my assessment of a penalty and have accordingly reduced what I would have assessed to a less cooperative entity as a result. Further I am encouraged by what such a change in tactic represents when it comes to reflecting on the professionalism of the forestry community and the results based legislation regime under which forest operations are regulated under FRPA.

- There are no other considerations prescribed by the Lieutenant Governor in Council.

Accordingly, I have determined that it is appropriate to apply what I consider to be an appropriate deterrent of \$3,000.00, to inspire Johnson to apply appropriate attention to their future management of VQOs.

Determination does not forestall other actions that may be taken

Please note that this determination does not relieve you from any other actions or proceedings that the government is authorized to take with respect to the contravention described above.

Opportunity for correcting this determination

For 15 days after making my contravention determination and penalty determination under section 71, I am authorized under section 79 of FRPA to correct certain types of obvious errors or omissions. I may do this on my own initiative or at your request. If you think there are valid reasons to correct the determination, you may contact me at 250-847-6305 within this 15 day period.

Opportunities for review and appeal

If you have new information that was not available at the time I made this determination, you may request a review of my determination on the basis of this new information. A request for review must be in writing, must be signed by you, or on your behalf, and must contain:

- a. your name and address; and the name of the person, if any, making the request on your behalf;
- b. the address for serving a document to you or the person acting on your behalf;
- c. the new evidence that was not available at the time this determination was made; and
- d. a statement of the relief requested.

This request should be directed to me, at 3333 Tatlow Road, Bag 6000, Smithers BC, V0J 2N0 and I must receive it ***no later than three weeks*** after the date this notice of determination is given or delivered to you. If you request a review, you may appeal the decision made after the completion of the review to the Forest Appeals Commission.

The provisions governing reviews are set out in section 80 of the *Forest and Range Practices Act* and in the *Administrative Review and Appeal Procedure Regulation*. Please note the **three week time limit** for requesting a review.

Alternatively, if you disagree with this determination, you may appeal directly to the Forest Appeals Commission.

The appeal request must be signed by you, or on your behalf, and must contain:

- a. your name and address; and the name of the person, if any, making the request on your behalf;
- b. the address for serving a document to you or the person acting on your behalf;
- c. the grounds for appeal;
- d. a statement of the relief requested; and
- e. a copy of this determination.

The Forest Appeals Commission must receive the appeal *within 30 days* of the date that I made this determination.

The provisions governing appeals are set out in sections 82 through 84 of FRPA and in the *Administrative Review and Appeal Procedure Regulation*. To initiate an appeal, you must deliver a notice of appeal, together with the requisite supporting documents, to the Forest Appeals Commission. A notice of appeal may be delivered to the following address:

The Registrar, Forest Appeals Commission
PO Box 9425, Stn. Prov. Govt.
Victoria, BC V8W 9V1

Please note the **30 day time limit** for delivering a notice of appeal.

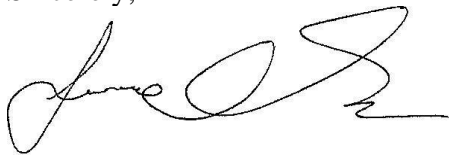
Determination is stayed pending review or appeal

Under section 78 of FRPA, my contravention determination and penalty determination under section 71 are stayed until you have no further right to have this determination reviewed or appealed, after which time they take immediate effect.

Performance Record

As FLSM is the holder of an agreement under the *Forest Act*, my determination under section 71 will become part of your performance record, pursuant to section 85 (2) of FRPA, subject to decisions made on review or appeal.

Sincerely,



Jevan Hanchard, RPF
District Manager

pc: Paul Bastarache, Regional Compliance Leader, Skeena Region, Integrated Resource Operations Division
Nathan Murray, Forest Practices Board
Tracy Andrews, Forest Practices Board
Christoph Dietzfelbinger