Forest Appeals Commission

Annual Report

2007

BRITISH COLUMBIA
The Best Place on Earth

Forest Appeals Commission

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Dear Ministers:

I respectfully submit herewith the annual report of the Forest Appeals Commission for the period January 1, 2007 to December 31, 2007.

Yours truly,

Alan Andison
Chair
Forest Appeals Commission

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Message from the Chair

I am pleased to submit the thirteenth Annual Report of the Forest Appeals Commission.

Looking back over the past year, the Commission was, once again, called upon to make many difficult decisions. Of particular note, the Commission was faced with detailed arguments on the defence of due diligence following its 2006 decision in *Weyerhaeuser Company Ltd. v. Government of B.C.* (Decision No. 2004-FOR-005(b)), as well as cases involving marine log salvagers in which the Government's decision relies heavily on circumstantial evidence.

In addition, complicated issues arising out of stumpage appraisals continue to dominate appeals under the *Forest Act*. Issues of development costs for roads and bridges, and questions of law in relation to the interpretation of the Coast Appraisal Manual and the Interior Appraisal Manual were decided by the Commission during 2007.

A selection of the Commission's 2007 decisions has been summarized in this report.

While the appeals that come before the Commission continue to involve complex questions of fact and law, the number of appeals filed with the Commission have been decreasing. There were 68 appeals filed in this report period compared to 100 in the 2006 report period. The most substantial change occurred in relation to appeals under the *Forest Act*, which decreased from a record high of 132 in 2005, to 60 appeals in 2007. The most significant decline was in the number of appeals by woodlot licensees against the stumpage rates issued in relation to bark-beetle infested wood in the interior of the Province.

The Commission continues to encourage the parties to resolve the issues underlying the appeals without the need for a hearing. I note that over the past few years, many appeals, particularly appeals of stumpage rates, have been resolved due to the efforts of both licensees and the Government. Their efforts to communicate and settle disputes in a conciliatory manner are particularly welcome given the importance of stumpage revenue to the Province.

Of the appeals that proceed to a hearing, the Commission is able to draw upon a roster of highly qualified individuals, including professional biologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and administrative law, who are appointed as part-time members. In 2007, the roster of members underwent a significant change for the first time in many years with the departure of four members, and the addition of seven new members. I wish to thank Richard Cannings, Don Cummings, Cindy Derkaz and Lorraine Shore for their lengthy service with the Commission, and more importantly, their dedication, interest and their enthusiasm for the work of the Commission. I wish them well in their future endeavours.

I also wish to welcome the seven new appointees to the Commission. They are: Susan Beach, Monica Danon-Schaffer, Les Gyug, R.G. Holtby, Gabriella Lang, Ken Long and John Savage. The Commission is extremely fortunate to have these new members appointed and I look forward to working with all of them in the coming years.

Finally, I would like to take this opportunity to thank all of the existing Commission members, as well as the Commission staff, for their hard work and dedication over the past year and for their continuing commitment to the work of the Commission.

Alan Andison
Chair

Introduction

The Forest Appeals Commission is an independent tribunal that was established under the *Forest Practices Code of British Columbia Act* (the "*Code*"), and has been continued under the *Forest and Range Practices Act*.

This is the thirteenth Annual Report of the Forest Appeals Commission. The information contained in this report covers the twelve-month period from January 1, 2007 to December 31, 2007.

This report describes the structure and function of the Commission and how the appeal process operates. This report also contains:

- the number of appeals initiated during the report period;
- the number of appeals completed during the report period (i.e., final decisions issued);
- the resources used in hearing the appeals;
- a summary of the results of appeals completed in the report period;
- an evaluation of the review and appeal processes; and,
- recommendations for amendments to the legislation, from which it hears appeals.

Finally, a selection of the decisions made by the Commission during the report period has been summarized, legislative amendments affecting the Commission are described, and the relevant sections of the applicable legislation are reproduced.

Decisions of the Commission are available for viewing at the Forest Appeals Commission office, on the Commission's website, and at the following libraries:

- Legislative Library
- University of British Columbia Law Library
- University of Victoria Law Library
- British Columbia Courthouse Library Society
- West Coast Environmental Law Association Law Library

Detailed information on the Commission's policies and procedures can be found in the Forest Appeals Commission Procedure Manual, which may be obtained from the Commission office or viewed on the Commission website. If you have questions, or would like additional copies of this report, please contact the Commission at:

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The Commission

The Forest Appeals Commission is an independent administrative tribunal, which provides a forum to appeal certain decisions made by government officials under the *Code*, the *Forest Act*, the *Forest and Range Practices Act*, the *Private Managed Forest Land Act*, the *Range Act* and the *Wildfire Act*. The Commission is also responsible for providing the Lieutenant Governor in Council (Cabinet) with an annual evaluation of the appeal and review processes, and with recommendations for amendments to forest legislation and regulations respecting reviews and appeals.

The Commission makes decisions respecting the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Commission must decide appeals by weighing the evidence, making findings of fact, interpreting the legislation and common law, and applying the law and legislation to the facts.

In carrying out its functions, the Commission has the power to compel persons or evidence to be brought before the Commission. The Commission also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Commission and the administration of the Commission are governed by the *Administrative Tribunals Appointment and Administration Act*. The Commission is not subject to the provisions of the *Administrative Tribunals Act*.

Commission Membership

Commission members are appointed by the Lieutenant Governor in Council (Cabinet) under section 194(2) of the *Code*. The members appointed to the Commission are highly qualified individuals, including professional foresters, professional biologists, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Commission membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Commission members, including the chair, are set out in the *Administrative Tribunals Appointment and Administration Act*, as are other matters relating to the appointees. This Act also sets out the responsibilities of the chair.

During the present report period, the membership of the Commission changed. Four members' appointments expired and seven new members were appointed. During the year, the Commission consisted of the following members:

MEMBER	PROFESSION	FROM
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
David Ormerod	Professional Forester	Victoria
Members		
Susan Beach (from October 30, 2007)	Lawyer	Victoria
Sean Brophy	Professional Engineer	North Vancouver
Robert Cameron	Professional Engineer	North Vancouver
Richard Cannings (until October 31, 2007)	Biologist	Naramata
Don Cummings (until October 31, 2007)	Professional Engineer	Penticton
Monica Danon-Schaffer (from October 30, 2007)	Chemical/Environmental Engineer	West Vancouver
Cindy Derkaz (until October 31, 2007)	Lawyer (Retired)	Salmon Arm
Bruce Devitt	Professional Forester (Retired)	Esquimalt
Margaret Eriksson	Lawyer	New Westminster
Bob Gerath	Engineering Geologist	North Vancouver
R.A. (Al) Gorley	Professional Forester	Victoria
Les Gyug (from October 30, 2007)	Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby (from October 30, 2007)	Agrologist	Salmon Arm
Lynne Huestis	Lawyer	North Vancouver
Gabriella Lang (from October 30, 2007)	Lawyer	Campbell River
Katherine Lewis	Professional Forester	Prince George
Ken Long (from October 30, 2007)	Agrologist	Prince George
Paul Love	Lawyer	Campbell River
Gary Robinson	Resource Economist	Victoria
John Savage (from October 30, 2007)	Lawyer	Victoria
David Searle, C.M., Q.C.	Lawyer (Retired)	North Saanich
Lorraine Shore (until September 25, 2007)	Lawyer	Vancouver
David J. Thomas	Oceanographer	Victoria
Robert Wickett	Lawyer	Vancouver
Stephen V.H. Willett	Professional Forester (Retired)	Kamloops
Phillip Wong	Professional Engineer	Vancouver
J.A. (Alex) Wood	Professional Engineer	North Vancouver

Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. Administrative law applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. The goal is to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Commission is governed by the principles of administrative law and, as such, must treat all the parties involved in a hearing before the Commission fairly, giving each party a chance to explain its position.

Appeals to the Commission are decided on a case-by-case basis. Unlike a court, the Commission is not bound by its previous decisions; present cases of the Commission do not necessarily have to be decided in the same way that previous ones were.

The Commission Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, training, and communications support for the Commission.

The Commission shares its staff and its office space with the Environmental Appeal Board, the Community Care and Assisted Living Appeal Board, the Hospital Appeal Board and the Industry Training Appeal Board.

Each of the tribunals operates independently of one another. Supporting five tribunals through one administrative office gives each tribunal access to resources while, at the same time, cutting down on administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

Commission Resources

The fiscal 2007/2008 budget for the Forest Appeals Commission was $332,000.

The fiscal 2007/2008 budget for the shared office and staff was $1,367,000.

Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Commission by one party must also be provided to all other parties to the appeal.

The Commission is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If information is requested by a member of the public regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*.

Parties to appeals should be aware that information supplied to the Commission will be subject to public scrutiny and review.

In addition, the names of the parties in an appeal appear in the Commission's published decisions which are posted on the Commission's website, and may appear in this Annual Report.

The Appeal Process

Appeals under the *Forest Practices Code of British Columbia Act*

There are no longer any decisions or determinations made under the *Code* that are appealable to the Commission. However, as other statutes refer appeals to the Commission, the *Code* is still important because it both establishes the Commission, and sets out the basic powers and procedures to be employed by the Commission on an appeal (unless otherwise specified).

Specifically, the Commission is established in Part 9 of the *Code*. This part contains the provisions setting out the structure, organization and mandate of the Commission, including its mandate to submit this Annual Report.

The general powers of the Commission on an appeal remain in Part 6 of the *Code*, with additional powers and procedures further detailed in Part 3 of the *Administrative Review and Appeal Procedure Regulation*, B.C. Reg. 12/04.

The appeal powers and procedures set out in sections 131 to 141 of the *Code* apply to appeals filed against decisions made under the *Forest and Range Practices Act*, the *Forest Act*, the *Range Act* and the *Wildfire Act*. The *Private Managed Forest Land Act* does not incorporate those *Code* provisions.

Appeals under the *Forest and Range Practices Act*

The *Forest and Range Practices Act* provides for the continuation of the Commission under section 194 of the *Code*. As noted above, it also incorporates the Commission's powers and procedures as set out in the *Code*.

Part 6, Division 4 of the *Forest and Range Practices Act* sets out the decisions that are appealable to the Commission, which include the following:

- approval of a forest stewardship plan, woodlot licence plan or an amendment;
- authorizations regarding range stewardship plans;
- approvals, orders, and determinations regarding range use plans, range stewardship plans or an amendment;
- suspensions and cancellations regarding forest stewardship plans, woodlot licence plans, range use plans or range stewardship plans, and permits;
- orders regarding range developments;
- orders relating to the control of insects, disease, etc.;
- orders regarding unauthorized construction or occupation of a building on Crown land in a Provincial forest;

- orders regarding unauthorized construction of trail or recreation facilities on Crown land;
- determinations regarding administrative penalties;
- remediation orders and stopwork orders;
- orders regarding forest health emergencies;
- orders relating to the general intervention power of the minister;
- orders regarding declarations limiting liability of persons to government;
- relief granted to a person with an obligation under this Act or operational plan;
- conditions imposed in respect of an order, exemption, consent or approval; and,
- exemptions, conditions, and alternative requirements regarding roads and rights of way.

Prior to an appeal, an official who makes a determination may correct certain errors in the determination within 15 days after the determination was made.

In addition to this correction process, there is an internal administrative review process. If a person is subject to certain specified determinations listed in the *Forest and Range Practices Act*, and that person requests a review, a review **must** be conducted. However, this review is only available if there is evidence that was not available at the time of the original determination. The Forest Practices Board may also require a review of specified determinations listed under the *Forest and Range Practices Act*, if it receives consent from the person who is the subject of the determination. Either the determination, or a decision made after completion of a review of the determination, may be appealed to the Commission by the Forest Practices Board or by a person subject to the determination.

Appeals under the *Forest Act*

Appealable decisions under the *Forest Act* are set out in section 146 of that *Act* and include certain determinations, orders and decisions made by district or regional managers, timber sales managers, employees of the Ministry of Forests, and the Chief Forester. Appealable decisions include matters such as the determination of stumpage and the suspension of rights under a licence or agreement.

Certain decisions of the Chief Forester, or an employee of the Ministry of Forests, may be appealed to the Commission without prior review (e.g., stumpage determinations). However, determinations, orders or decisions made by a district or regional manager, or a timber sales manager, must be reviewed by a reviewer before they may be appealed. If the person who is subject to the decision, or the person in respect of whose agreement a decision is made, disagrees with the review decision, that person may appeal the review decision to the Commission.

Appeals under the *Range Act*

The decisions made under this *Act* that may be appealed to the Commission include the following:

- orders deleting land from the Crown range described in a licence or permit;
- orders by the district manager, or the minister, reducing the number of animal unit months or quantity of hay set out in the licence or permit;
- orders requiring the holder of a licence or permit to refrain from using all or part of the Crown range;

- orders exempting, or refusing to exempt, a licence or permit holder from an obligation to use animal unit months;
- orders relating to the suspension of all or some of the rights granted under a licence or permit, and orders refusing to reinstate suspended rights;
- orders relating to the cancellation of a licence or permit where rights were under suspension;
- decisions that forage or Crown range will not remain available to a licence holder; and,
- amendments to a grazing licence or grazing permit reducing the number of animal unit months due to non-compliance with the licence or permit, or non-compliance with a non-use agreement.

Prior to filing an appeal, the person affected by the order, decision or amendment may request a review, provided that there is evidence that was not available at the time of the original order, decision or amendment.

Either the order, decision or amendment, or the decision made after completion of a review of the order, decision or amendment, may be appealed to the Commission.

An appeal may be filed directly to the Commission against a minister's order issued under section 15(2) of the *Range Act*, which relates to a proposal for a licence or permit.

Appeals under the *Private Managed Forest Land Act*

The requirements for appeals under the *Private Managed Forest Land Act* are set out in section 33 of that *Act*. That section creates a right of appeal to the Commission for persons who are subject to certain orders, decisions or determinations of the Private Managed Forest Land Council, including:

- determinations that a person has contravened the *Act* or the regulations;
- remediation orders;
- stop work orders;
- notifications to the assessor regarding contraventions; and,
- requests of the Council to rescind or vary orders, decisions or determinations.

Appeals under the *Wildfire Act*

Part 3, Division 3 of the *Wildfire Act* sets out the decisions that may be appealed to the Commission. It provides that the person who is subject to certain orders may appeal either the order, or the decision made after the completion of a review of the order, to the Commission.

The Forest Practices Board may also request a review of those same orders, provided that it receives consent from the person who is the subject of the order. Further, it may appeal the order, or the decision made after the completion of the review of the order, to the Commission.

The orders that may be appealed are as follows:

- orders to abate a fire hazard;
- orders refusing compensation to persons carrying out fire control on the grounds that the person caused or contributed to the fire or to the spread of the fire;
- orders requiring a person to pay the government's costs for fire control and the costs related to the loss of Crown resources as a result of the fire, as determined by the minister;
- contravention orders;

- administrative penalties and cost recovery orders;
- remediation orders and administrative penalties resulting from a failure to comply with a remediation order; and,
- stop work orders.

Commencing an Appeal

Notice of Appeal

For appeals under the *Code*, the *Forest Act*, the *Forest and Range Practices Act*, the *Range Act*, and the *Wildfire Act*, a notice of appeal must comply with the content requirements of the *Administrative Review and Appeal Procedure Regulation*. Procedures for filing an appeal under the *Private Managed Forest Land Act* are set out under the *Private Managed Forest Land Regulation*.

For all appeals, an appellant must prepare a Notice of Appeal and deliver it to the Commission office within the time limit specified in the relevant statute, or as specified in the exemption contained in the *Administrative Review and Appeal Procedure Regulation*. The Notice of Appeal must contain the name and address of the appellant and the name of the appellant's agent, if any, the address for giving a document to, or serving a document on the appellant, the reasons why the appellant objects to the determination, order, or review decision (the grounds for appeal), the type of remedy the appellant is seeking from the Commission, and the signature of the appellant or the appellant's agent. Additionally, a copy of the determination, order or decision being appealed must be included with the Notice of Appeal.

Generally, if the Commission does not receive a Notice of Appeal within the specified time limit, the appellant will lose the right to appeal. However, the Chair or a member of the Commission may extend the statutory time period for filing an appeal either before or after the time limit expires.

If the Notice of Appeal is missing any of the required information, the Commission will notify the appellant of the deficiencies. The Commission may refrain from taking any action on an appeal until the Notice is complete and any deficiencies are corrected.

Once a Notice of Appeal is accepted as complete, the Commission will notify the office of the official who made the original decision or the review decision being appealed. A representative of the Government of B.C., or the Private Managed Forest Land Council if it is an appeal under the *Private Managed Forest Land Act*, will be the respondent in the appeal.

Third Party Status

The *Code* provides that, at any stage of an appeal, the Commission may grant third party status to a person who may be affected by the appeal. That provision applies to appeals under the *Code*, the *Forest and Range Practices Act*, the *Range Act*, and the *Wildfire Act*. Also under those enactments, if the Forest Practices Board is not an appellant, the Commission will add the Board as a party to the appeal at the Board's request.

The *Forest Act* provides that only the appellant and the government are parties to an appeal under that *Act*.

For appeals under the *Private Managed Forest Land Act*, the Commission may grant third party status to a person who may be directly affected by the appeal.

Intervenors

The *Code* enables the Commission to invite or permit a person who has a valid interest in the proceedings to participate in a hearing of an appeal under the *Code*, the *Forest and Range Practices Act*, the *Range Act*, and the *Wildfire Act*, as an intervenor.

Under the *Private Managed Forest Land Act*, the Commission may invite or permit any person who may be materially affected by the outcome of an appeal to take part in the appeal as an intervenor.

In all cases, an intervenor may only participate in a hearing to the extent that the Commission allows.

The *Forest Act* does not provide for intervenor participation.

Type of Hearing

The Commission has the authority to conduct a new hearing on a matter before it.

An appeal may be conducted by way of written submissions, oral hearing or a combination of both. In most cases, the Commission will conduct an oral hearing. However, in some instances the Commission may find it appropriate to conduct a hearing by way of written submissions.

Prior to ordering that a hearing be conducted by way of written submissions, the Commission may request the parties' input.

Written Hearing Procedure

If it is determined that a hearing will be by way of written submissions, the Commission will invite all parties and intervenors to provide submissions. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

Finally, all parties will be given the opportunity to provide closing submissions. Closing submissions should not contain new evidence.

Oral Hearing Procedure

The *Administrative Review and Appeal Procedure Regulation* requires the Commission to, within 30 days of receiving and accepting an appeal, determine which members will hear the appeal. At that time, the Commission must also set the date, time and location of the hearing. This requirement does not apply to appeals under the *Private Managed Forest Land Act*.

For all appeals, once the date for a hearing is set, the parties involved will be notified. If any of the parties to the appeal cannot attend the hearing on the date scheduled, a request may be made to the Commission to change the date.

An oral hearing may be held in the locale closest to the affected parties, at the Commission office in Victoria or anywhere in the province. The Commission will decide where the hearing will take place on a case-by-case basis.

Once a hearing is scheduled, the parties will be asked to provide a Statement of Points to the Commission.

Statement of Points and Document Disclosure

To help identify the main issues to be addressed in an oral hearing, and the arguments that will be presented in support of those issues, all parties to the appeal are asked to provide the Commission, and each of the parties to the appeal, with a written Statement of Points and all relevant documents.

The Commission requires the appellant to submit its Statement of Points and documents at least 30 days prior to the commencement of the hearing. The respondent (the Government or the Council), and all other parties, are required to submit their Statements of Points and documents at least 15 days prior to the commencement of the hearing. Each party is to provide the Commission, and all other parties to the appeal, with a copy of its Statement of Points and documents within the set timeframes.

The Statement of Points is, essentially, a summary of each party's case. As such, the content of each party's Statement of Points will depend on whether the party is appealing the decision or attempting to uphold the decision being appealed.

The Commission asks that the following information be contained in the respective party's Statement of Points:

(a) The appellant should outline:
  (i) the substance of the appellant's objections to the decision of the respondent;
  (ii) the arguments that the appellant will present at the hearing;
  (iii) any legal authority or precedent supporting the appellant's position; and,
  (iv) the names of the people the appellant intends to call as witnesses at the hearing.

(b) The respondent should outline:
  (i) the substance of the respondent's objections to the appeal;
  (ii) the arguments that the respondent will present at the hearing;
  (iii) any legal authority or precedent supporting the respondent's position; and,
  (iv) the names of the people the respondent intends to call as witnesses at the hearing.

Additional hearing participants that are granted party or intervenor status are also asked to provide a Statement of Points outlining the above-noted points as may be relevant to that party.

Where a party has not provided the Commission with a Statement of Points by the specified date, the Commission has the authority to order the party to do so.

Dispute Resolution

The Commission encourages parties to resolve the issues underlying an appeal at anytime in the appeal process. Its strategies for more formal dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences (discussed further below); and
- mediation, upon consent of all parties.

In addition, a process has been developed specifically in relation to appeals under the *Forest Act*. The Commission holds *Forest Act* appeals in abeyance for 30 days after the Notice of Appeal is filed. This gives the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. The parties may set out the terms and conditions of their negotiated settlement in a consent order which is then submitted to the Commission for its approval.

Pre-hearing Conference

Either before or after the Statements of Points and relevant documents have been exchanged, the Commission, or any of the parties, may request a pre-hearing conference.

Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Commission member and one staff member from the Commission office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

Disclosure of Expert Evidence

The Commission is not bound by the provisions relating to expert evidence in the British Columbia *Evidence Act*. However, the Commission does require that reasonable advance notice of expert evidence be given and that the notice include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

Summons

The Commission has the power to summon witnesses to give evidence at a hearing and bring documents related to the hearing.

If a party wants to ensure that an important witness attend the hearing, the party may ask the Commission to issue a summons. The request must be in writing and explain why the summons is required.

The Hearing

A hearing is a more formal process than a pre-hearing conference, and allows the Commission to receive the evidence it uses to make a decision.

In an oral hearing, each party will have a chance to present evidence. Each party will have an opportunity to call witnesses and explain its case to the Commission.

Although hearings before the Commission are less formal than those before a court, some of the hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination.

Parties to the appeal may have lawyers representing them at the hearing but this is not required. The Commission will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Commission are open to the public.

Rules of Evidence

The rules of evidence used in a hearing are less formal than those used in a court. The Commission has full discretion to receive any information it considers relevant and will then determine what weight to give the evidence.

The Decision

In making its decision, the Commission is required to determine, on a balance of probabilities, what occurred, and to decide the issues raised in the appeal.

The Commission will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable

time following the hearing. Copies of the decision will be given to the parties, the intervenors, and the appropriate minister(s). In an appeal under the *Forest Act*, the Commission is required to serve its decision on the parties within 42 days after the conclusion of the hearing.

If a party disagrees with the decision of the Commission, that party may appeal the decision to the British Columbia Supreme Court. This appeal must be made within three weeks of being served with the Commission's decision. A party may only appeal the Commission's decision on a question of law or jurisdiction.

The Supreme Court may confirm, reverse or vary the decision, or make any order the court considers just in the circumstances.

Costs

The Commission also has the power to award costs. If the Commission finds it is appropriate, it may order that a party or intervenor pay another party or intervenor any or all of the actual costs of the appeal.

Legislative Amendments Affecting the Commission

In this report period, the only amendments relevant to the Commission were minor legislative changes to section 108(1) of the *Forest and Range Practices Act* and section 197(1)(b) of the *Code*.

Section 108(1) of the *Forest and Range Practices Act* authorized the minister to grant specified relief "to a person who has an obligation **under this Act, the regulations, standards or operational plan**" [emphasis added]. The minister's decision was then appealable to the Commission.

In a miscellaneous amendment effective December 1, 2007, the words "regulations" and "standards" were removed from this section. The section authorizes the minister to grant specified relief "to a person with an obligation **under this Act or an operational plan**" [emphasis added].

Section 197(1)(b)(i) and (ii) of the *Code*, which requires the Commission to provide this annual report, also had a reference to "the Act and regulations" which was changed to simply refer "the Act".

These amendments were part of legislative initiative to remove unnecessary references in enactments to "regulations", "orders", "standards", and so on, where those words followed a reference to a matter "under an Act": neither of these changes had a substantive impact.

There were no amendments that affected the number or type of appeals the Commission hears, or that impacts the Commission's powers or procedures.

Evaluation and Recommendations

Under the *Administrative Review and Appeal Procedure Regulation* and section 197 of the *Code*, the Commission is mandated to annually evaluate the review and appeal process and identify any problems that have arisen. The Commission also makes recommendations on amendments to the legislation respecting reviews and appeals.

Appeals

As noted in the Message from the Chair, the number of appeals filed with the Commission in 2007 decreased from the number of appeals filed in 2006. This appears to be the trend since 2005.

The Commission continues to encourage parties to resolve their appeals without the need of a full hearing before the Commission. In this regard, it continues to employ a standard procedure of holding *Forest Act* appeals in abeyance for 30 days after the Notice of Appeal is filed. This gives the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. Appeals may then be withdrawn, abandoned or resolved by way of consent order, leading to substantial cost savings to the parties and to the Commission.

Recommendations

The nature of the appeals and the appeal processes under the *Code*, the *Forest Act*, the *Forest and Range Practices Act*, and the *Range Act* are well established and there were no new issues or problems arising in 2007 to warrant a recommendation.

No appeals have yet been filed under the *Private Managed Forest Land Act* and only one has been filed under the *Wildfire Act*, which was resolved by consent of the parties. Accordingly, the Commission will not make any comment or recommendations in relation to either of these appeal processes at this time.

Statistics

Forest Appeals Commission

The following tables provide information on the appeals filed with the Commission and decisions published by the Commission, during the report period. The Commission publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Commission also issues unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

A total of 68 appeals were filed with the Commission in 2007. Seven of these appeals were filed under the *Code/Forest and Range Practices Act*, 60 were filed under the *Forest Act*, and one appeal was filed under the *Wildfire Act*. The total number of appeals closed without a hearing during the reporting period was 26. Of this number, two appeals were rejected and 24 were withdrawn or abandoned. A total of 15 appeals were completed in 2007.*

The Commission issued 47 decisions in 2007, including 23 consent orders.

Appeals filed	
Appeals filed under the *Code/Forest and Range Practices Act*	7
Appeals filed under the *Forest Act*	60
Appeals filed under the *Private Managed Forest Land Act*	0
Appeals filed under the *Range Act*	0
Appeals filed under the *Wildfire Act*	1
Total Appeals filed	**68**
Appeals abandoned, rejected or withdrawn	**26**
Hearings held on the merits of appeals	
Oral hearings completed	8
Written hearings completed	7
Total hearings held on the merits of appeals**	**15**
Published decisions issued	
Final decisions	
Code/Forest and Range Practices Act	12
Forest Act	9
Private Managed Forest Land Act	0
Range Act	0
Wildfire Act	0
Consent order	
Code/Forest and Range Practices Act	1
Forest Act	21
Private Managed Forest Land Act	0
Range Act	0
Wildfire Act	1
Cost decisions	
Denied	
Code/Forest and Range Practices Act	3
Total published decisions issued	**47**

This table provides a summary of the appeals filed with this office and their status.

Summary of results of final decisions

	Allowed	Allowed in Part	Dismissed
Code/Forest and Range Practices Act	3	4	5
Forest Act	1	1	7

* Note: hearings held and decisions issued in 2007 do not necessarily reflect the number of appeals filed in 2007. Of the 47 decisions issued and the 15 hearings completed in 2007, 40 of the decisions and ten of the hearings were in relation to appeals filed in 2006 or earlier.

** Note: most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

Summaries of Decisions

January 1, 2007 – December 31, 2007

Appeals are not heard by the entire Commission; the appeals are heard by a "panel" of the Commission. The Chair of the Commission will decide whether an appeal should be heard and decided by a panel of one, or by a panel of three members of the Commission. The size and composition of the panel generally depends upon the type(s) of expertise needed by the Commission members in order to understand the issues and adjudicate in a fair and impartial manner.

Under all of the statutes in which the Commission is empowered to hear appeals, the Commission has the power to confirm, vary or rescind the decision under appeal and to send the matter back to the original decision–maker with or without directions. In addition, under the *Private Managed Forest Land Act* the Commission may make any other order it considers appropriate. When an appellant is successful in convincing the panel that the decision under appeal was made in error, or that there is new information that will change the decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all that he or she has asked for, the appeal is said to be "allowed in part". When an appellant fails to establish on a balance of probabilities that the decision is incorrect on the facts or in law, and the Commission upholds the original decision, the appeal is said to be "dismissed".

The Commission also has the power to order a party or intervenor to pay the costs of another party or intervenor. An application for costs may be made at any time in the appeal process, but will not normally be decided until the hearing concludes and the final decision is rendered. One of the Commission's decisions on an application for costs has been included in the summaries.

It is important to note that the Commission encourages parties to resolve the subject of the appeal either on their own or with the assistance of the Commission. For appeals under the *Forest Act*, a special procedure has been put in place in accordance with a 2005 memorandum from the Ministry of Forests and Range. Upon receipt of a Notice of Appeal under the *Forest Act*, the Commission will hold the appeal in abeyance for 30 days to allow the parties an opportunity to enter into discussions to resolve the issues under appeal.

Regardless of the statute, many appeals are resolved without the need for a hearing. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Commission to approve the order. The consent order then becomes an order of the Commission. The Commission has included a description of a consent order in the summaries.

It is also important to note that the Commission issues many decisions each year, some that are published and others that are not. Therefore, not all of the decisions made by the Commission between January 1, 2007 and December 31, 2007 have been included in this Annual Report. Rather, we have selected a few of the Commission's decisions to be summarized in this report that reflect the variety of subjects and issues that come before the Commission in any given year. As has been noted in the Message from the Chair, the subject matter and the issues can vary significantly in both technical and legal complexity. The summaries have been organized according to the statute under which the appeal was filed.

Finally, these summaries are an interpretation of the decisions by Commission staff and may be subject to a different interpretation. For a full viewing of all published decisions issued during this report period, and summaries of those decisions, please refer to the Commission's web page.

Appeals under the *Code* and the *Forest and Range Practices Act*

Application for Costs

2003-FOR-005(c) and 2003-FOR-006(c)
Kalesnikoff Lumber Co. Ltd. v. Government of British Columbia, (Forest Practices Board, Third Party, Interior Lumber Manufacturers et al., Intervenors)

Decision Date: September 25, 2007

Panel: Lorraine Shore, Bruce Devitt, Robert Wickett

The Commission has a broad power to order that "a party pay another party any or all of the actual costs in respect of the appeal." The Commission has not followed the civil court practice of "loser pays the winner's costs". Instead, it has adopted a policy that costs should only be awarded in special circumstances.

This decision on costs came about after the Commission allowed two appeals by Kalesnikoff Lumber Co. Ltd. ("Kalesnikoff") was successful in having two determinations made by the Deputy District Manager (the "District Manager") overturned by the Commission (see the August 2, 2006 decision by the Commission). Although Kalesnikoff had applied for an order of costs against the Government at the end of the appeal hearing, the Commission's Reasons for Decision did not address the application. When this omission was identified, the parties were given an opportunity to provide further written submissions on the matter.

Kalesnikoff argued that special circumstances existed such that the Government ought to be penalized through an order of costs. Specifically, it alleged that the Government

- made "very careless and serious allegations" against both Kalesnikoff and the professionals that it had retained which affected their respective reputations in the community;
- changed its theory of the case part way through the appeal hearing, thus causing undue delay in the proceedings and prejudice to Kalesnikoff; and
- had no reasonable evidence in support of its theories.

Although the Commission was sympathetic to some of Kalesnikoff's concerns about the treatment of Kalesnikoff and some of its professionals prior to the determinations being made, it noted that Kalesnikoff's remedy was to appeal the determinations, which it did, and it was ultimately successful in the result.

Considering whether the Government changed its theory of the case, the Commission found that the Government's approach was consistent with the approach adopted by the District Manager, and that the position it articulated prior to the hearing did not change at the hearing.

Finally, the Commission found that this was not a case where "no evidence" was tendered by the Government; rather, it was a case where the Commission had found that the evidence tendered was ultimately not credible and/or was erroneous. There was no indication that the Government had knowingly based its case on unreliable evidence, or unreasonably defended the determinations.

Considering all of the circumstances, the Commission found that there was no evidence of malfeasance such that Kalesnikoff should be awarded actual costs.

The applications for costs were denied.

The Defence of Due Diligence

Under all of the enactments which allow appeals to the Commission, the Legislature has provided for certain statutory defences to administrative penalties, one of which is the defence of due diligence. Despite the fact that a government official may be able to show that a person has contravened a section of the *Code*, the *Forest and Range Practices Act*, the *Forest Act*, the *Private Managed Forest Land Act*, the *Range Act* or the *Wildfire Act*, that person may avoid a finding of a contravention and a penalty if the person can establish a defence of due diligence. What a person must do to establish this defence has been the subject of many arguments before the Commission. The Commission's most detailed review of the defence of due diligence has been in the context of the *Code* and the *Forest and Range Practices Act*.

In a 2006 decision in *Weyerhaeuser Company Ltd. v. Government of British Columbia (Forest Practices Board, Third Party)*, (Decision No. 2004-FOR-005(b), January 17, 2006) [*Weyerhaeuser*], the Commission set out the legal test to be met in order to establish a defence of due diligence to a contravention of the *Code*. It concluded that to establish the defence, there are two main questions to be answered: (1) whether the event that occurred was foreseeable and, if so, (2) whether the person charged had taken all reasonable actions to prevent the contravention from occurring.

The Commission found that, in the context of a licensee who engages a contractor whose acts or omissions result in the contravention, the test requires the licensee to demonstrate that:

(a) the act took place without the licensee's direction or approval; and

(b) the licensee exercised all reasonable care by taking all reasonable steps to ensure that the contravention did not occur.

Further, the Commission found that the determination of whether a licensee was duly diligent depends on the circumstances of the case. Whether a licensee took "all reasonable steps" must be considered in the specific context of the "particular event" which comprised the contravention in question, and not in the context of a broader duty of care. It was held that the standard to be applied is that of a reasonable licensee in the particular circumstances of the particular case, and will be shaped by the following factors:

(a) the gravity of the potential harm,

(b) the available alternatives to protect against the harm,

(c) the likelihood of the potential harm,

(d) the skill required, and

(e) the extent the accused could control the causal elements of the offence.

Applying this test to the facts in *Weyerhaeuser*, the majority of that panel found that the licensee had established the defence.

This test has been followed and applied by the Commission in subsequent cases, but not always with the same result as in *Weyerhaeuser*. Three of the Commission's 2007 decisions have been summarized below.

2005-FOR-004(b) Pope and Talbot Ltd. v. Government of British Columbia (Council of Forest Industries, Intervenor)

Decision Date: September 4, 2007

Panel: David Ormerod

In this appeal, the defence of due diligence was claimed by the licensee, Pope and Talbot Ltd. ("P&T"), in relation to an error committed by its contractor during harvesting operations. The error resulted in the clearcut harvesting of an area where the silviculture prescription required certain trees to be reserved.

As background, in order to manage its responsibilities as a licensee, P&T had instituted an Environmental Management System ("EMS"), which sets out its policies and procedures governing the conduct of forestry operations. In accordance with those procedures, P&T held a pre-work meeting on the cutblock with its logging contractor and the falling sub-contractor. P&T's silviculture prescription for this cutting permit was extremely complicated. At the pre-work meeting, the prescription was reviewed for the block, the leave tree specifications were discussed, and clear-cut falling of the guy-line clearances was approved. It was also decided that a second on-site meeting would be scheduled by the contractor once the guy-line clearing had been done. The second meeting was to review certain wildlife habitat requirements with the contractor and the additional parties involved in the prescriptions prior to falling the rest of the block. That second meeting did not take place.

When a logging supervisor with P&T inspected the site, he discovered an area that had been clear-cut instead of being selectively cut as required by the silviculture prescription.

The District Manager found that P&T, the contractor, and the subcontractor, had contravened section 67(1) of the *Code* by cutting trees contrary to the silviculture prescription. He levied a total penalty of $1,000.00 assessing P&T as being liable for 60 percent of the penalty, and its harvesting contractor responsible for 40 percent of the penalty. P&T admitted that the contravention occurred, but argued that it had exercised due diligence to prevent the contravention.

Applying the test from *Weyerhaeuser*, the Commission found that the contravention was reasonably foreseeable; specifically, there is always a risk that harvesting might deviate from the plans and prescription and that, in this case, the risk was higher than usual because the cutblock had an extremely complicated silviculture prescription.

The Commission then considered whether P&T took reasonable steps to prevent the contravention from occurring. The Commission found that P&T's steps were not adequate in the circumstances. The Commission found that the contravention took place without P&T's direction or approval, but that the collective efforts of P&T through its EMS, the layout of the harvesting area, and the supervision of the contractor, were deficient. In particular, P&T gave too much discretion to its logging supervisory staff, the contractor, and the sub-contractor, in deciding how to implement the leave tree requirements of the silviculture prescription. For example, P&T gave the contractor the responsibility to decide on the limits of the guy-line clearance areas and to select leave trees beyond these limits, without the benefit of clearance area boundary layout or leave tree markings. Therefore, the

Commission found that the defence of due diligence was not established in this case.

The Commission confirmed the determination of the District Manager and dismissed the appeal.

2005-FOR-008(a) A & A Fibre Ltd. v. Government of British Columbia

Decision Date: August 9, 2007

Panel: James Hackett

In this case, a licensee, A & A Fibre Ltd. ("A&A Fibre"), sought to rely on its contractor's efforts to establish its own defence of due diligence. The background to this case is as follows.

A&A Fibre was awarded a Timber Sale Licence in an area near Hotham Sound in the Sunshine Coast Forest District, and retained a contractor to carry out the harvesting operation. A stream crossing location was designated in the Harvest Plan to restrict machine crossings to those portions of the stream that were not classified as fish-bearing. The boundary between the fish-bearing (no crossing allowed) and non-fish bearing portions of the stream were marked on the Harvest Plan map, and marked in the field with a ribbon. However, when the contractor attended the site, the ribbon was found in the stream. The contractor took steps to determine the proper location of the fish-bearing stream boundary, and then made crossings to avoid that location.

The District Manager determined that the location of the crossings was, in fact, within the fish-bearing reach of the stream and that, as a result of the crossings, slash that was capable of damaging fish habitat was deposited into the stream contrary to the *Timber Harvesting and Silviculture Practices Regulation*. He levied a minor penalty of $500.00 on the grounds that there was minimal damage to the stream bed and banks, it was poor quality fish habitat, and there were no observable impacts to fisheries habitat as a result of the crossings.

A&A Fibre appealed the determination on the grounds that it exercised due diligence given the steps taken by its contractor in determining the location of the stream crossing.

Regarding the first part of the test in *Weyerhaeuser*, the Commission found that it was reasonably foreseeable that there could be issues with the stream crossing location.

Regarding the second part of the test, whether A&A Fibre took reasonable care to prevent the contravention from occurring, the Commission observed that most of the evidence provided in the appeal described the actions of the contractor, not A&A Fibre. The Commission stated:

> A&A Fibre has focused on the actions of its contractor to establish the defence of due diligence, rather than focusing on what it did (its diligence) to prevent the contraventions from occurring. What the contractor did may provide the contractor with a defence of due diligence, but not necessarily the licensee. Given that the contravention was issued to A&A Fibre, not to Southview [its contractor], the applicable legal test requires A&A Fibre's actions alone to be examined in the context of whether the statutory due diligence defence has been made out.

The Commission found that a licensee is responsible for the oversight and supervision of its contractors. It found that A&A Fibre had hired a competent contractor and had attended the site. However, it found that A&A Fibre's "guard should have been up" because this Timber Sale Licence was obtained from a third party. If it had a pre-work review system in place to check things such as the accuracy of falling boundary locations, harvesting methods, and stream crossing locations, the ribbon found in the stream may have been identified as an issue for follow-up. It found that a reasonable

licensee would have had more of a review system in place to prevent the potential harm of crossing a stream in the wrong location. Therefore, the Commission found that A&A Fibre's actions were not adequate to establish a defence of due diligence in the circumstances, and the contravention was confirmed.

Despite finding that the due diligence defence was not established, the Commission found that there was no need for a determination to be issued in this case: a simple warning would have been sufficient, given that the infraction was trivial, in that the crossings occurred only a few metres above the designated location, and there were no observable impacts on fish habitat. The Commission rescinded the penalty on the grounds that it was not in the public interest to levy an administrative penalty.

The appeal was allowed, in part.

2005-FOR-016(a) Franklin Dean Miller and Miller Ranches Ltd. v. Government of British Columbia

Decision Date: December 14, 2007

Panel: David Searle, C.M., Q.C.

In this case, the Commission found that the defence of due diligence had been made out by the Appellants, as they had taken all reasonable steps to prevent its cows from trespassing on Crown land.

The historic Chilco Ranch (also known as the Miller Ranch), is located in the Chilcotin District of the Cariboo forest region. It is approximately 20,000 acres and was acquired by the Appellants in 1992. In 2004, the Appellants were running approximately 1,100 cow/calf units or 2,200 animals on their range.

Drought conditions were experienced in the area during the summer of 2004, and water on the pastures where the cattle graze was scarce. Anticipating this condition, the Appellants had moved approximately 400 cattle from their ranch from May until September at significant cost to them.

Throughout the summer and fall of 2004, the Appellants rotated their cows clockwise throughout the various ranges on their ranch, but this rotation was impacted by the lack of water on certain pastures.

On three separate occasions in August and September of 2004, some of the Appellants' cattle crossed the road and were found on adjacent Stone Indian Reserve lands and Crown land before being driven back to ranch pasture by cowboys employed by the Appellants. The cattle were able to cross the road as the cattle guards were filled with mud and there was inadequate fencing. The District Manager issued a determination to the Appellants stating that they contravened section 50(1) of the *Forest and Range Practices Act* by permitting their cattle to graze on Crown range without authorization, and levied a penalty of $1,000.00.

The Appellants did not dispute that their cattle had grazed on Crown land, but said that they had exercised due diligence to prevent this contravention from occurring. The Government argued that, in the absence of fences, it was foreseeable that their cattle would escape onto Crown land and that the Appellants should have built fences to prevent this from occurring.

The Commission disagreed with the Government. It found that, on a balance of probabilities, the Appellants had done all that could reasonably have been done to avoid the contravention. Although the Commission found that the contravention was foreseeable, it also found that given the severe drought in 2004, it would have been unreasonable to expect the Appellants to focus their resources on fencing. The Appellants did what a reasonable person would be expected to do to avoid the trespasses: they asked the Ministry for a renewal of the Temporary Grazing Permit that had

been granted in 2002 so that they would have more range available for their cattle, they conducted an aerial survey of their range to determine available feed and water, they shipped 400 head of cattle from their ranch and rented pasture elsewhere, they rotated the remaining cattle throughout their land, they contacted highway officials to request that the ineffective mud-plugged cattle guards be cleaned, they placed salt on the ranch to keep the cattle there, and they drove cattle that had wandered across the road back to their property.

The Commission also considered the fact that the fencing required to prevent the trespasses would have been very expensive to build, and the Appellants had been unable to reach an agreement with adjacent private land owners over sharing the cost of the fencing. The Commission rescinded the determination and the penalty.

The appeal was allowed.

Contraventions Relating to Marine Log Salvage

Since logging began on the B.C. coast, logs have escaped from booms during transit to mills or while in storage. The recovery of logs left behind in coastal waters and rivers as a result of logging operations is referred to as marine log salvage.

The Ministry of Forests and Range controls marine log salvage activities along the coast to ensure that as many of these logs as possible are recovered and returned to the manufacturing process. However, the legislation relating to log salvage only allows a salvor to take the wood found floating in the water, or on the beach below the high water mark. Salvors are prohibited from removing timber from above the high water mark, from cutting standing timber or from manufacturing timber (this includes cutting off any root ball, branches or portion of the butt), except where they hold a permit or licence to do so.

When there is an allegation that a salvor didn't just simply "find" or recover the logs, but that the salvor actually cut the trees without authority, the evidence against the salvor is usually circumstantial – meaning that it is not direct evidence from a witness who saw or heard something. Rather, it is a fact that can be used to infer another fact. Since salvaging often takes place in remote areas along the coast where there are no witnesses, the evidence presented in these type of appeals can involve highly sophisticated DNA matching processes used to "match" the suspect logs with stumps on the land.

In 2007, the Commission issued two decisions on appeals involving marine log salvors. They were as follows.

2006-FOR-001(a) Ryan Bowes v. Government of British Columbia

Decision Date: October 5, 2007

Panel: Paul Love

Mr. Bowes is an experienced log salvor in the North Island-Central Coast Forest District. On two separate occasions, he was found in possession of "bags of wood" (floating logs surrounded and tied to boom sticks) that appeared freshly cut and showed signs of manufacturing, with the butts and limbs bucked off. A total of 228 bucked or trimmed logs were seized by the Ministry.

Further investigation by a Forest Officer revealed that Mr. Bowes did not have the appropriate permit that would allow him to manufacture the timber prior to scaling. Moreover, the Forest Officer was able to match three of the logs seized with an illegal harvest site.

The District Manager determined that Mr. Bowes had contravened the *Code*, which prohibits the cutting, damaging or destroying of Crown timber without authorization. A penalty of $4,000.00 was imposed.

Mr. Bowes appealed the determination to the Commission, alleging that Ministry staff had conspired against him and fabricated evidence, that he had not harvested any timber above the high water mark and that he had not stolen the logs from another operator. He requested compensation for the timber that was seized and a written apology from the District Manager. However, during the hearing he admitted that he operated without a permit when he collected or harvested the timber that was seized from him. He also admitted that he manufactured the timber in his possession prior to having the timber scaled. The Commission found that these admissions alone supported the finding of contravention. The Commission stated that the Government had the right to regulate salvors, and it is for salvors to comply with that regulatory scheme by obtaining the necessary permits, complying with the terms and conditions of those permits and adhering to the applicable law.

In relation to the allegation that some of the timber was taken from an illegal harvest site, the Commission concluded that there was strong circumstantial evidence that Mr. Bowes cut the timber, and that he did not provide any credible evidence or explanation to the contrary. In particular, the Commission pointed out that Mr. Bowes failed to produce any of the standard documentation used by salvors, such as photographs or log books, which could have verified his version of events.

Regarding the penalty, the Commission agreed with the District Manager that Mr. Bowes and others must be deterred from illegal harvesting activities. In light of Mr. Bowes' uncooperative attitude during the investigation and the flagrant and continuing nature of the violation, the Commission found the penalty imposed by the District Manager to be appropriate.

Therefore, the Commission confirmed the contravention and the penalty.

The appeal was dismissed.

2006-FOR-014(a) Bruce William Giles v. Government of British Columbia

Decision Date: July 16, 2007

Panel: Paul Love

On a routine flight, Forest Officers noticed a bag of timber and a tugboat in Hemasila Inlet tied up to a float house in a fairly desolate area approximately 80 miles north of Port Hardy. The officers landed the plane near the float house where they noted that the bag of timber contained logs with terrestrial growth and tight bark, with bucked ends and limbs bucked off. This was green timber with evidence of manufacturing. Mr. Giles denied that his wood had been scaled, but could not give a location for the root wads. Mr. Giles said that he salvaged the wood from slides in Draney Inlet, Moses Inlet and Taylor Bay between June and December 2003. He admitted that he did not have a root buck permit.

The Forest Officers were suspicious that the logs might have come from unauthorized logging sites on Crown land and, therefore, commenced an investigation. Following the investigation, the Forest Officers seized the wood, a Regional Manager issued a determination that Mr. Giles had contravened the *Code* by manufacturing 366.6 cubic metres of Crown timber without authorization, obtained seven logs from unauthorized harvest sites, and levied a $2,000.00 penalty.

Mr. Giles appealed the determination.

The Commission found that Mr. Giles made admissions that he manufactured timber prior to having the timber scaled, that he did not have a permit, and that he knew it was illegal to manufacture timber into logs without such a permit. Manufacturing logs by cutting the butt end is a method used to avoid detection of illegal activity.

The Commission found that the evidence was strong enough to support a finding that Mr. Giles had contravened the *Code*. There were seven matches of logs in Mr. Giles' possession to stumps on Crown land above the high water mark, all of the logs were high grade logs, and most of them showed signs of manufacturing. Therefore, the Commission concluded that it was more probable than not that Mr. Giles had cut the timber at issue from Crown land without statutory authority to do so, and that he had manufactured the logs before scaling without the necessary exemption, contrary to subsections 96(1) and (2) of the *Code*. The Commission rejected Mr. Giles' claim that "someone else must have done it."

Regarding penalty, the Commission found that the Regional Manager's penalty of $2,000.00 was actually low, given that Mr. Giles had a previous conviction for a similar infraction, deliberately "flouted" the permitting scheme, and failed to cooperate with the investigation. However, the Commission agreed with the Regional Manager that, given Mr. Giles' financial circumstances, there was no benefit to imposing a larger deterrent penalty.

Accordingly, the Commission confirmed the decision of the Regional Manager and dismissed the appeal.

Dispute over Fencing Specifications for a Crown Pasture

2006-FOR-017(a) Rainer Albert Krumsiek and Gertrud Sturm-Krumsiek v. Government of British Columbia

Decision Date: June 13, 2007

Panel: Cindy Derkaz

Rainer Albert Krumsiek and Gertrud Sturm-Krumsiek operate a cattle ranch and hold a grazing licence covering a portion of Crown land. In 2004, they approached the Central Cariboo Forest District office (the "District"), Ministry of Forests and Range, with a proposal to fence a portion of the Crown pasture they used in order to prevent their herds from mixing with those of another licence holder. In 2005, the District issued a Range Improvement Authorization (the "2005 Authorization") for the construction of a four strand, smooth wire electric fence, which included requirements and specifications to be met when constructing the fence. The District also supplied seven rolls of high tensile wire for construction of the fence, and gave the Appellants five months to complete the work.

Rather than constructing the four strand fence, the Appellants constructed a single wire electric fence. This did not comply with the specifications in the 2005 Authorization.

A second Range Improvement Authorization was issued in 2006 (the "2006 Authorization") with similar specifications. As the Appellants again failed to complete construction of the fence in compliance with the specifications, the District Manager issued a determination that the Appellants had contravened section 51(6) of the *Forest and Range Practices Act* by failing to complete the fencing requirements set out in the 2005 Authorization, and imposed a penalty of $830.00. The District Manager also included a remediation order in his determination requiring the Appellants to remove certain unauthorized fencing materials.

The Appellants appealed the District Manager's determination arguing, in essence, that the Ministry should have allowed them to use a single strand electric fence and was unreasonable and unfair in requiring a four strand fence in the first place. They argued that the District was intransigent in refusing to approve single strand electric fencing for use on Crown range, whereas this type of electric fencing is used successfully all over the world, including in other forest districts in B.C.

The Commission found no evidence that the District had unreasonably refused to consider approving a single strand electric fence and had not treated the Appellants unfairly during its decision-making processes. Regarding the contravention itself, the Commission found that the Appellants built a fence on Crown land contrary to the specifications set out in the 2005 Authorization. Although the Appellants argued that the 2005 Authorization should not have required a four strand fence, the Commission did not have the jurisdiction to change the specifications set out in the authorization: the decision regarding the type of fence most suitable on Crown land is a policy issue for the District and the Ministry, it is not for the Commission to decide. The Commission found that the District Manager's safety concerns with respect to a single strand electric fence were reasonable, and that the District may properly take concerns about public and wildlife safety into account when making a determination.

Regarding the penalties, the Commission agreed with the District Manager's conclusion that the Appellants deliberately ignored the 2005 Authorization whereby some form of deterrent penalty was appropriate. In the circumstances, the Commission found the penalty of $830.00 to be reasonable. Similarly, the Commission determined that the remediation order issued by the District Manager was reasonable.

Accordingly, the determination and the remediation order were confirmed.

The appeal was dismissed.

Appeals under the *Forest Act*

Except for one appeal involving a licence suspension, all of the appeals decided under this *Act* in 2007 related to stumpage rates. A stumpage rate is the amount of money that a person (the licensee) must pay to the Government for harvesting Crown timber. The Ministry of Forests and Range determines the rate that a licensee must pay, and advises the licensee of the rate in a stumpage advisory notice or a stumpage adjustment notice.

Section 105 of the *Forest Act* states that these rates must be determined, redetermined or varied in accordance with the policies and procedures approved by the Minister of Forests and Range. Those policies and procedures are contained in two manuals, one for the interior forest region, and one for the coastal forest region. For the interior, stumpage rates must be calculated in accordance with the Interior Appraisal Manual ("IAM"). For the coast, stumpage rates must be calculated in accordance with the Coast Appraisal Manual ("CAM"). The content of these manuals have the force of law under section 105 of the *Forest Act* and the Commission is required to apply them by section 149(3) of the *Act*.

A "Material Omission of Fact" leads to Licence Suspension

2006-FA-052(a) Hugh Barnet Linville v. Government of British Columbia

Decision Date: February 2, 2007

Panel: David Ormerod

This is the one appeal decided under the *Forest Act* in 2007 that did not relate to stumpage.

Hugh (Barney) Linville appealed a decision to suspend his Forestry Licence to Cut. The licence authorized Mr. Linville to salvage Crown timber that had been attacked by Douglas-fir bark beetles. The decision to suspend the licence was made on the ground that there was a "material omission of fact" in Mr. Linville's licence application, contrary to section 76(1)(a) of the *Forest Act*. Specifically, the licence application failed to

mention the presence of root rot in the proposed salvage timber. The relevant portion of the licence application had been certified by a registered professional forester acting on Mr. Linville's behalf.

Mr. Linville argued that the licence should not have been suspended because the presence of root rot made no difference to the harvesting conducted in this case, and was not material to the decision to issue the licence.

The first question to be decided was whether information about the presence of root rot was material to the application. The Commission found that it was. It accepted that decision-makers within the Ministry must be able to assess the impact of a licence on future timber harvesting and forest regeneration. The Commission found that the root rot on the site was significant, and its presence could have affected the salvage priority given to the licence, the way the site was harvested, and the prescribed treatments for the site. It found that a forester exercising professional judgment would have recognized that root disease was present at the site, and should have known that it was material to the decision to issue the licence. This information was omitted from the application and, therefore, the Commission concluded that it constituted a "material omission", sufficient to suspend the licence.

Finally, the Commission found that the decision to suspend the licence was reasonable in the circumstances. The Ministry suspended the licence, rather than cancelled it, and this was done to facilitate further investigation and consideration of how the stand should be managed.

The licence suspension was confirmed.

The appeal was dismissed.

Stumpage: The Adequacy of a Cost Estimate for Bridge Construction

2006-FA-054(a) Stuart Lake Lumber Co. Ltd. v. Government of British Columbia

Decision Date: April 27, 2007

Panel: R.A. (Al) Gorley

At issue in this case was a 24.4 metre (length) bridge located at 1 kilometre on the 23 Mile Road which accesses cutting permit ("CP") 801. Initially, Stuart Lake Lumber Co. Ltd. ("SLL") intended to construct a 30 metre bridge. However, at some point a decision was made to proceed with a 24.4 metre bridge rather than a 30 metre bridge, and the bridge was to be located "some metres away along the creek in question" from the proposed 30 metre bridge. SLL submitted its detailed cost estimate of $194,758.34 to the Ministry for the 24.4 metre bridge, to be applied to the stumpage appraisal for CP 801.

Bridges and roads must be constructed in order to access a cutting authority. The associated expenses are considered operating costs, specifically, "development costs". According to chapter 4 of the IAM, the Timber Pricing Coordinator must estimate development costs for a cutting authority area using the information that he/she has at the time the estimate is made, and in a manner that will produce the least total development cost estimate.

The cost of the bridge at issue in this appeal was determined using the detailed engineering cost estimate approach. The Ministry's Regional Bridge Engineer prepared the cost estimate for the bridge that was used to arrive at the stumpage rate. The stumpage rate was based upon a cost estimate of $143,746.00 which is much lower than SLL's estimate of $194,758.34. SLL argued that the cost estimate used for the bridge should be higher, and that the stumpage for the cutting permit should be reduced to reflect this higher development cost.

The Commission found that SLL's cost estimate was derived from taking the lowest of the tendered bids for the proposed 30 metre bridge and modifying it to reflect the lower cost of a 24.4 metre structure. The Ministry's rough quote, on the other hand, was prepared in accordance with the policies and procedures contained in the IAM, and gave more limited consideration to the actual costs incurred by the licensee and to the competitive bids for the project.

In reviewing both parties' detailed cost estimate submissions, the Commission found that SLL's rationale was more convincing for some phase cost estimates, and the Ministry's for others. Considering the applicable sections of the IAM and the evidence presented, the Commission assessed the total cost estimate at $146,646.00 and referred the stumpage determination back to the Timber Pricing Coordinator to be amended accordingly.

The appeal was allowed, in part.

Stumpage: Road Development Costs – "first tributary cutting authority"

2006-FA-064(a) James Wayne Dyck v. Government of British Columbia

Decision Date: April 11, 2007

Panel: David Ormerod

Mr. Dyck appealed a stumpage determination set out in a stumpage advisory notice issued for timber harvested under Cutting Permit D ("CP D") of his woodlot licence. In determining the stumpage rate for CP D, the Timber Pricing Coordinator had disallowed the cost for 4.2 kilometres of road that was used previously to harvest another CP under the same woodlot licence, CP Y (a blanket salvage CP). In denying the costs, the Timber Pricing Coordinator relied on section 4.3 of the IAM, which states that "The costs for development works may only be allocated to the first tributary cutting authority…." Based on that clause, the Timber Pricing Coordinator concluded that CP Y was the first tributary cutting authority for the 4.2 kilometres of road; therefore, the development costs of that road section were accounted for in the stumpage appraisals for CP Y, which were issued in 2004 and 2005.

Mr. Dyck argued that the Timber Pricing Coordinator improperly disallowed the road development costs. He argued that, although the section of road had been used to harvest CP Y, the road development costs were not included in the appraisal of CP Y because it was appraised using the "base permit" method, whereby district average cost data for road development is applied in determining stumpage rates. In contrast, CP D was appraised using the "full appraisal" approach, which allows the terrain of the area being harvested to be taken into account when determining the allowable road development costs.

The Commission found that the intent of section 4.3 of the IAM was to incrementally amortize a licensee's road development costs along a system of road being developed to harvest the area covered by a licence. The Commission found that the only way to reflect this intent to incrementally amortize, when using the "base permit" method of appraisal, was to deem a portion of the volume harvested under that cutting permit (in this case, CP Y) as "first tributary" to a section of the new road system, such that the base permit data accounts for part of the overall road development costs. Specifically, the combined per cubic metre cost for all cutting permits under the licence should reflect the reasonable cost of developing the road system serving the cutting permit areas.

The Commission further found that the information before it was insufficient to determine the overall cost per cubic metre of the roads serving CPs Y and D, but the Timber Appraisal Coordinator

would have sufficient information to do so. The Commission referred the matter back to the Timber Appraisal Coordinator with directions to reconsider the stumpage appraisal for CP D by fully accounting for the road construction costs allocated between CP Y and CP D, consistent with the intent of section 4.3 of the IAM.

The appeal was allowed.

Stumpage: Reappraisal of Blanket Salvage Cutting Permits due to Interior Appraisal Manual Amendments

2007-FA-002(a); 2007-FA-003(a); 2007-FA-004(a) Jannette and Dean Daly, Silverking Woodlands Inc. and Allan Bahen and Anne Lockington v. Government of British Columbia

Decision Date: June 21, 2007

Panel: David Ormerod

On January 12, 2007, the Minister of Forests and Range approved Amendment No. 18 of the IAM and directed that all woodlot blanket salvage cutting permits be reappraised, effective immediately. According to the Appellants, this directive was made without the prior knowledge of or consultation with the woodlot licensees. The Timber Pricing Officer reappraised all woodlot blanket salvage permits, including those issued to the Appellants, and made the reappraisals effective January 12, 2007. These were appealed by the Appellants who asked the Commission to reinstate their July 2006 stumpage rates. They argued that the application of Amendment No. 18 created a breach of contract as it unilaterally replaced the stumpage rates that had not yet expired with untenably higher rates.

The Government argued that the Minister has the legal authority under section 105(1) of the *Act* to amend stumpage policy and procedures at any time, that stumpage rates are not contracts, and that the Timber Pricing Officer complied with the amended IAM when he issued the stumpage rates under appeal.

The Commission found that it did not have the jurisdiction to interfere with either the Minister's discretion to approve stumpage determination policies and procedures, or his discretion to specify when stumpage rates must be determined, redetermined and varied pursuant to section 105(1)(b) of the *Act*. Rather, section 149(3) of the *Act* requires the Commission to apply the IAM, as it was amended on January 12, 2007. The Commission found no evidence that the Timber Pricing Officer had improperly applied the amended IAM, or failed to reappraise the stumpage rates at the times specified by the Minister in the directive.

The Commission confirmed the stumpage determinations.

The appeals were dismissed.

Stumpage: A Dispute over the Trigger Date for a Changed Circumstance Reappraisal

2007-FA-023(a) Canadian Forest Products Ltd. v. Government of British Columbia

Decision Date: November 13, 2007

Panel: Alan Andison

The facts underlying this appeal occurred over a number of years.

In 2005 and early 2006, Canadian Forest Products Ltd. ("Canfor") harvested approximately 70,000 cubic metres of timber from one of its cutting permits within the Prince George Forest District. It completed its harvesting activities in January 2006. Some of the harvested timber was scaled during May, June and July of 2005, and the remainder was scaled in January and February of 2006. Canfor was invoiced and paid the stumpage owing on that timber in accordance with the original stumpage notice.

In the fall of 2006, Ministry staff inspected the road construction and upgrade work that had been performed for the cutting permit, and determined that some of the work included in Canfor's appraisal data submission had not been performed.

In a letter dated September 20, 2006, the District Manager notified Canfor that he believed a "changed circumstance" had occurred, and he requested that Canfor submit a reappraisal data sheet ("RDS") for the cutting permit which deleted the cost allowances for the work that had not been performed.

Canfor submitted a RDS based on the lower total development costs incurred for the actual work that had been carried out. It also specified an effective date of October 1, 2006, for the reappraisal. This effective date was based on the wording of the IAM in effect when the original stumpage advisory notice was issued in 2005.

On March 19, 2007, the Timber Pricing Officer issued the stumpage rate reappraisal that is the subject of this appeal. The reappraised stumpage rate was higher than the rate set in the original stumpage advisory notice, and the reappraised rate was effective from January 16 to March 31, 2005. This effective date was based upon an amendment to the IAM that occurred in April of 2006.

For the purposes of the appeal, Canfor conceded that a changed circumstance reappraisal had been triggered, but it argued that the effective date for the reappraisal was wrong: it should have been October 1, 2006, almost 21 months later than the January 16, 2005 effective date applied by the Ministry. Canfor also pointed out that the timber had already been scaled and that, based on section 103 of the *Act*, a redetermined stumpage rate cannot apply to timber that had already been scaled.

The Commission found that there was nothing in section 103 that limits the timing of the determination or redetermination of stumpage rates. Therefore, section 103 does not fix stumpage rates at the rates that applied on the date on which the timber was scaled, and this ground for appeal was denied.

Regarding the effective date, the Commission found that the applicable section of the IAM, as amended, was intended to operate retrospectively by tying the effective date to the most recent appraisal or reappraisal of the cutting authority prior to the changed circumstance reappraisal. Therefore, the effective date in the stumpage advisory notice was confirmed.

The appeal was dismissed.

Paved v. Gravel: The Impact on a Cost Estimate

2007-FA-010(a) West Fraser Mills Ltd. and Houston Forest Products Company v. Government of British Columbia

Decision Date: November 13, 2007

Panel: Alan Andison

West Fraser Mills Ltd. and Houston Forest Products Company (collectively referred to as "West Fraser") appealed a stumpage rate determination for a licence located in the Nadine Forest District. The determination was based in part on a detailed engineering cost estimate for the structural repair and gravel resurfacing of 160 metres of the Morice River Forest Service Road. Gravel resurfacing costs less than paving.

West Fraser appealed on the basis that the cost estimate should have included the cost of repaving a section of the road surface rather than resurfacing the road with gravel. West Fraser argued that the stumpage rate should be recalculated to include an allowance for the cost of paving the road section, which would ultimately result in a lower stumpage rate.

The "least cost" principle requires that development, harvesting and transportation costs be assessed so as to produce the least total cost

estimate. The Commission found that, while the IAM and the Regional Manager's Procedures required West Fraser to rebuild and restore the road bed to its original condition or carrying capacity, they did not specifically require the reapplication of the same surface material. As gravel is a structurally sufficient surface material on a forest service road, there was no need to surface the road section with asphalt. The Commission determined that the cost of the surface material was an appropriate factor to consider, and that the Timber Pricing Officer had properly applied the least cost principle by including the cost of using of gravel instead of asphalt.

The Commission considered various other arguments made by West Fraser, such as the long term costs of paved versus gravel surfaces, but ultimately found that the stumpage advisory notice at issue should not reflect future costs or savings, because it is unknown how long West Fraser would be using that portion of the road for harvesting purposes.

The Commission confirmed the stumpage rate and dismissed the appeal.

Appeals under the *Private Managed Forest Land Act*

During the report period, there were no decisions issued on appeals from determinations made under the *Private Managed Forest Land Act*.

Appeals under the *Range Act*

During the report period, there were no decisions issued on appeals from determinations made under the *Range Act*.

Appeals under the *Wildfire Act*

Determination Changed by Consent Order

2007-WFA-001(a) Ronald Edward Hegel v. Government of British Columbia

Decision Date: December 6, 2007

Panel: Alan Andison

Mr. Hegel owns a property in the Kootenay District and obtained a burning reference for a category 3 open fire.

Mr. Hegel lit a "landing debris pile" in June of 2005. The burning reference expired in July of 2005.

In August, a "hangover fire" from the June burn occurred and was not properly extinguished by Mr. Hegel. Air tankers, rotary wing and ground crews were dispatched by the Government to extinguish the fire.

In August of 2007, the Fire Centre Manager, Southeast Fire Centre, issued a determination to Mr. Hegel finding that Mr. Hegel had contravened sections 22(2)(b) and 22(3) of the *Wildfire Regulation* by failing to extinguish a category 3 open fire by the date specified in his burning reference, and by allowing the fire to escape. A $5,000.00 penalty was imposed for the contravention of section 22(3) of the *Regulation*. Mr. Hegel was also found liable under section 27(1)(b) of the *Wildfire Act* for $37,995.11 of the Government's costs of fire control that resulted from the contraventions. Mr. Hegel appealed on the basis that the determination was made outside of the limitation period set out in the *Wildfire Act*.

The Government and Mr. Hegel resolved the issues underlying this appeal and prepared a consent order containing the agreed upon terms for approval by the Commission.

By consent of the parties, the Commission ordered as follows:

(a) the determination that Mr. Hegel had contravened section 22(2)(b) of the *Regulation* was rescinded, as it was made outside the limitation period;

(b) the contravention of section 22(3) of the *Regulation* and the penalty of $5,000.00 was confirmed; and

(c) Mr. Hegel is liable under section 27(1)(b) of the *Wildfire Act* for $37,995.11 of the Government's costs.

Appeals of Commission Decisions to the Courts

January 1, 2007 – December 31, 2007

British Columbia Supreme Court

British Columbia (Minister of Forests and Range) v. Forest Appeals Commission

Decision date: May 16, 2007

Court: B.C.S.C. Johnston, J.

Cite: [2007] B.C.J. No. 1053; [2007] BCSC 696 (QL)

The Province appealed a September 21, 2005 decision of the Commission that a log dump owned by Western Forest Products Ltd. at Jordan River was not suitable as an appraisal log dump for the purpose of calculating stumpage to be paid by Western to the Province. The Province alleged that the Commission erred when it admitted into evidence extrinsic documents purporting to explain the policy underlying the CAM, as well as opinions of an expert witness and of Western employees interpreting the policy underlying those provisions of the CAM that were germane to the appeal.

The CAM contains the policies and procedures regarding stumpage in the Coast Region that have been approved by the Minister under the *Forest Act*. The policies and procedures set out in the manual must be applied when calculating stumpage. The version of the manual that was in effect in this case required that cost estimates for harvesting and transportation be determined in a way that assumes the cheapest method of harvesting and transportation available. However, it also stipulated that the cheapest method need not be determinative if it is determined to be "unsuitable for the cutting authority area." The Province argued that the Commission wrongly interpreted the phrase "unsuitable for the cutting authority area" and was led into error when it admitted into evidence extrinsic documents purporting to state or explain the policy underlying the CAM.

The Court first considered the appropriate standard of review to be applied to the Commission's decision. It stated that if the standard of review is viewed as a continuum from correctness (with little deference) to patent unreasonableness (with great deference) at the other, and reasonableness *simpliciter* somewhere near the middle, the appropriate standard of review for this case is "closer to reasonableness *simpliciter*."

The Court then considered two issues: the admissibility of the evidence relied upon by the Commission, and the reasonableness of the Commission's interpretation of the manual.

In addressing the admissibility issue, the Court determined that, while the evidence of the witnesses appeared to be more argument and conclusion than statements of fact, policy statements and explanatory documents issued by the Ministry were properly admissible as evidence aiding the interpretation of the manual. In that regard, the Court held that, while the CAM is akin to

legislation, it is neither a statute of the Legislature, nor a regulation; rather it is a "statement by the Minister." The Court also noted that the manual is drafted by Ministry employees and is then approved by the Minister. Consequently, the Court found that policy statements and explanatory documents issued by the Ministry are part of the context in which the CAM operates, and out of which it emanated.

The Court then considered the reasonableness of the Commission's finding that the Jordan River log dump, which is owned, operated and utilized by Western only, was "unsuitable". The Court found that the concepts of licensee neutrality and "notional average operator" or "average efficient operator" were important to the Commission's interpretation of the phrase "unsuitable for the cutting authority area", yet those two concepts are not expressly used in the manual. Rather, those concepts were repeatedly referred to by Western's witnesses. The Court held that the Jordan River log dump only becomes unsuitable if the concepts of "licensee neutrality" and "notional average operator" are read into the CAM to defeat what would otherwise be the result of a plain and unambiguous reading of the manual. The Court found that such a reading of the manual leads to the conclusion that the suitable log dump for Western is the Jordan River log dump. The Court applied the concept of licensee neutrality and concluded that it would be absurd to find that Western should pay stumpage as if it were trucking logs to a further log dump simply because other licenses cannot use Western's own log dump at Jordan River. Therefore, the Court found that the Commission's decision was unreasonable.

The Commission's decision was stayed under section 150 of the *Forest Act*.

British Columbia Court of Appeal

Western Forest Products Limited v. British Columbia (Minister of Forests and Range) and the Forest Appeals Commission

Decision date: August 16, 2007

Before: Prowse, J.

Cite: [2007] B.C.J. No. 1812; [2007] BCCA 418 (QL)

Western Forest Products Limited applied for leave to appeal an order of Johnston J. (above), staying a 2005 decision of the Commission.

The Court considered the criteria set out in *Queens Plate Dev. Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (B.C.C.A.), such as whether the appeal raised questions of statutory interpretation, whether there was some prospect of the appeal succeeding on its merits, and whether there was any clear benefit to be derived from the appeal.

The Court found that Johnston J. had adopted the incorrect standard of review to be applied to the Commission's decision, as the Supreme Court of Canada rejected the concept of a continuum. The Court agreed with Western that determining the correct standard of review was critical to a proper analysis by the chambers judge of the Commission's decision, and found that the standard of review was a significant ground of appeal in so far as it was in dispute.

The Court was also satisfied that there was an arguable case that the chambers judge erred in his interpretation of the CAM. The Court noted that the interpretation of certain sections of the manual had been part of a continuing dispute between the Ministry and licensees, and that it raised questions as to the relevance of Ministry policies, and the admissibility of certain types of

evidence as aids to interpretation. The Court found these to be questions of general importance to the industry, and concluded that there was a clear benefit to the parties and others in having these issues addressed by the Court.

Leave to appeal was granted.

Supreme Court of Canada

There are no appeals of Commission decisions before the Supreme Court of Canada.

APPENDIX I

Legislation and Regulations

Reproduced below are the sections of the *Forest Practices Code of British Columbia Act* and the *Administrative Review and Appeal Procedure Regulation* which establish the Commission and set out the general powers and procedures that apply to most appeals.

Also included are the appeal provisions contained in each of the five statutes which provide for an appeal to the Commission from certain decisions of government officials: the *Forest and Range Practices Act*, the *Forest Act*, the *Range Act*, and the *Wildfire Act*. Also included is the *Private Managed Forest Land Act* and the *Private Managed Forest Land Regulation*, which establish the particular powers and procedures of the Commission in relation to appeals under that enactment.

The legislation contained in this report is the legislation in effect at the end of the reporting period (December 31, 2007). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Forest Practices Code of British Columbia Act

Part 6

COMPLIANCE AND ENFORCEMENT

Division 4 – Administrative Review and Appeals

Part 6 of the *Forest and Range Practice Act* applies

130.1 Part 6 of the *Forest and Range Practices Act* applies to this Act and the regulations under this Act, unless the context indicates otherwise.

Appeal

131 (1) To initiate an appeal under section 82 or 83 of the *Forest and Range Practices Act*, the person referred to in section 82(1) of that Act, or the board under section 83(1) of that Act, no later than 3 weeks after the latest to occur of

(a) the original decision,

(b) any correction under section 79 of that Act, and

(c) any review under section 80 or 81 of that Act,

must deliver to the commission

(d) a notice of appeal,

(e) a copy of the original decision, and

(f) a copy of any decision respecting a correction or review.

(2) [Repealed 2003-55-94.]

(3) The person or board bringing the appeal must ensure the notice of appeal given under subsection (1) complies with the content requirements of the regulations.

(4) Before or after the time limit in subsection (1) expires, the chair or a member of the commission may extend it.

(5) If the person or the board does not deliver the notice of appeal within the time specified, the person or board loses the right to an appeal.

(6) On receipt of the notice of appeal, the commission must, in accordance with the regulations, give a copy of the notice of appeal to the ministers and

(a) to the board, if the notice was delivered

(i) by the person who is the subject of the determination, or

(ii) for an appeal of a failure to make a determination, by the person who would be the subject of a determination, if made,

(b) to the person who is the subject of the determination, if the notice was delivered by the board, or

(c) for an appeal of a failure to make a determination, to the person who would be the subject of a determination, if made, if the board delivered the notice.

(7) The government, the board, if it so requests, and the person who is the subject of the determination or would be the subject of a determination, if made, are parties to the appeal.

(8) At any stage of an appeal the commission or a member of it may direct that a person who may be affected by the appeal be added as a party to the appeal.

(9) a notice of appeal is delivered under subsection (1), the parties must disclose the facts and law on which they will rely at the appeal, if required by the regulations and in accordance with the regulations.

(10) The commission, after receiving a notice of appeal, must

(a) promptly give the parties to an appeal a hearing, or

(b) hold a hearing within the prescribed period, if any.

(11) Despite subsection (10), if the commission determines that the notice of appeal does not comply with the content requirements of the regulations, or that there was a failure to disclose facts or law under subsection (9) or (14), the commission need not hold a hearing within the prescribed period referred to in subsection (10), but must hold a hearing within the prescribed period after a notice of appeal that does comply with the content requirements of the regulations is delivered to the commission, or the facts and law are disclosed as required under subsection (9) or (14).

(12) A party may

(a) be represented by counsel,

(b) present evidence, including but not limited to evidence that was not presented in the review under section 129,

(c) if there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(13) The commission may invite or permit a person to take part in a hearing as an intervenor.

(14) An intervenor may take part in a hearing to the extent permitted by the commission and must disclose the facts and law on which the intervenor will rely at the appeal, if required by the regulations and in accordance with the regulations.

(15) A person who gives oral evidence may be questioned by the commission or the parties to the appeal.

Repealed

131.1 [Repealed 2003-55-95]

Order for written submissions

132 (1) The commission or a member of it may order the parties to deliver written submissions.

(2) If the party that initiated the appeal fails to deliver a written submission ordered under subsection (1) within the time specified in the order, the commission may dismiss the appeal.

(3) The commission must ensure that every party to the appeal has the opportunity to review written submissions from the other parties and an opportunity to rebut the written submissions.

Interim orders

133 The commission or a member of it may make an interim order in an appeal.

Open hearings

134 Hearings of the commission must be open to the public.

Witnesses

135 The commission or a member of it has the same power as the Supreme Court has for the trial of civil actions

(a) to summon and enforce the attendance of witnesses,

(b) to compel witnesses to give evidence on oath or in any other manner, and

(c) to compel witnesses to produce records and things.

Contempt

136 The failure or refusal of a person

(a) to attend,

(b) to take an oath,

(c) to answer questions, or

(d) to produce the records or things in his or her custody or possession,

makes the person, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

Evidence

137 (1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,

(a) any oral testimony, or

(b) any record or other thing

relevant to the subject matter of the appeal and may act on the evidence.

(2) Nothing is admissible in evidence before the commission or a member of it that is inadmissible in a court by reason of a privilege under the law of evidence.

(3) Subsection (1) does not override an Act expressly limiting the extent to or purposes for which evidence may be admitted or used in any proceeding.

(4) The commission may retain, call and hear an expert witness.

Repealed

138 [Repealed 2003-55-95.]

Decision of commission

139 (1) The commission must make a decision promptly after the hearing, and must give copies of the decision to the ministers, the parties and any intervenors.

(2) On the request of any of the ministers or a party, the commission must provide written reasons for the decision.

(3) The commission must make a decision within the prescribed period, if any.

Order for compliance

140 If it appears that a person has failed to comply with an order or decision of the commission or a member of it, the commission or a party may apply to the Supreme Court for an order

(a) directing the person to comply with the order or decision, and

(b) directing the directors and officers of the person to cause the person to comply with the order or decision.

Appeal to court

141 (1) The minister or a party to the appeal, within 3 weeks after being served with the decision of the commission, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction.

(2) On an appeal under subsection (1), a judge of the Supreme Court, on terms he or she considers appropriate, may order that the decision or order of the commission be stayed in whole or in part.

(3) An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

Part 9
FOREST APPEALS COMMISSION

Forest Appeals Commission continued

194 (1) The Forest Appeals Commission is continued.

(1.1) The commission is to hear appeals under

(a) Division 4 of Part 6, and

(b) the *Forest Act*, the *Private Managed Forest Land Act* and the *Range Act* and, in relation to appeals under those Acts, the commission has the powers given to it by those Acts.

(2) The commission consists of the following members appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(3) The *Administrative Tribunals Appointment and Administration Act* applies to the commission.

(4) to (6) [Repealed 2003-47-32.]

Organization of the commission

195 (1) The chair may organize the commission into panels, each comprised of one or more members.

(2) The members of the commission may sit

(a) as a commission, or

(b) as a panel of the commission

and 2 or more panels may sit at the same time.

(3) If members of the commission sit as a panel,

(a) the panel has the jurisdiction of, and may exercise and perform the powers

and duties of, the commission, and

(b) an order, decision or action of the panel is an order, decision or action of the commission.

Commission staff

196 (1) Employees necessary to carry out the powers and duties of the commission may be appointed under the *Public Service Act*.

(2) In accordance with the regulations, the commission may engage or retain specialists or consultants that the commission considers necessary to carry out the powers and duties of the office and may determine their remuneration.

(3) The *Public Service Act* does not apply to the retention, engagement or remuneration of specialists or consultants retained under subsection (2).

No oral hearing as of right

196.1 A person is not entitled to an oral hearing before the commission.

Delegation of powers

196.2 (1) The chair may in writing delegate to a person or class of persons any of the commission's powers or duties under this Act, except the power

(a) of delegation under this section, or

(b) to make a report under this Act.

(2) A delegation under this section is revocable and does not prevent the commission exercising a delegated power.

(3) A delegation may be made subject to terms the chair considers appropriate.

(4) If the chair makes a delegation and then ceases to hold office, the delegation continues in effect as long as the delegate continues in office or until revoked by a succeeding chair.

(5) A person purporting to exercise a power of the commission by virtue of a delegation under this section must, when requested to do so, produce evidence of his or her authority to exercise the power.

Mandate of the commission

197 (1) In accordance with the regulations, the commission must

(a) hear appeals under Division 4 of Part 6 and under the *Forest Act* and the *Range Act*,

(b) provide

(i) the ministers with an annual evaluation of the manner in which reviews and appeals under this Act are functioning and identify problems that may have arisen under their provisions, and

(ii) the minister responsible for the administration of the *Ministry of Forests and Range Act* with an annual evaluation of the manner in which reviews and appeals under the *Forest Act* and the *Range Act* are functioning and identify problems that may have arisen under their provisions, and

(c) annually, and at other times it considers appropriate, make recommendations

(i) to the ministers concerning the need for amendments to this Act and the regulations respecting reviews and appeals,

(ii) to the minister responsible for the administration of the *Ministry of Forests and Range Act* concerning the need for amendments to the *Forest Act* and the *Range Act* and

related regulations respecting reviews and appeals under those Acts, and

(d) perform other functions required by the regulations.

(2) The chair must give to the ministers an annual report concerning the commission's activities.

(3) The ministers must promptly lay the report before the Legislative Assembly.

Forest and Range Practices Act

Part 6

COMPLIANCE AND ENFORCEMENT

Division 4 – Correction, Reviews and Appeals

Determinations stayed until proceedings concluded

78 (1) A determination that may be reviewed under section 80 or appealed under section 82 is stayed until the person who is the subject of the determination has no further right to have the determination reviewed or appealed.

(2) Despite subsection (1), the minister may order that a determination, other than a determination to levy an administrative penalty under section 71 or 74(3)(d) is not stayed or is stayed subject to conditions, on being satisfied that a stay or a stay without those conditions, as the case may be, would be contrary to the public interest.

(3) Despite subsection (1), a determination is not stayed if the determination is made under prescribed sections or for prescribed purposes.

Correction of a determination

79 (1) Within 15 days after a determination is made under section 16, 26(2), 27(2), 32(2), 37, 51(7), 54(2), 57(4), 66, 71, 74 or 77 of this Act, the person who made the determination may

(a) correct a typographical, an arithmetical or another similar error in the determination, and

(b) [Repealed 2003-55-37.]

(c) correct an obvious error or omission in the determination.

(2) The correction does not take effect until the date on which the person who is the subject of the determination is notified of it under subsection (4).

(3) The discretion conferred under subsection (1)

(a) is to be exercised in the same manner as the determination affected by it, and

(b) is exercisable with or without a hearing and

(i) on the initiative of the person who made the determination, or

(ii) at the request of the person who is the subject of the determination.

(4) The person who corrected a determination under this section must notify the person who is the subject of the determination.

Review of a determination

80 (1) Subject to subsection (2), at the request of a person who is the subject of a determination under section 16, 20(3), 26(2), 27(2), 32(2), 37, 38(5), 39, 51(7), 54(2), 57(4), 66, 71, 74, 77, 77.1, 97(3), 107, 108, 112(1)(a) or 155(2) of this Act, the person who made the determination, or another person employed in the

ministry and designated in writing by the minister must review the determination, but only if satisfied that there is evidence that was not available at the time of the original determination.

(2) On a review required under subsection (1) the person conducting the review may consider only

(a) evidence that was not available at the time of the original determination, and

(b) the record pertaining to the original determination.

(3) To obtain a review of a determination under subsection (1) the person must request the review not later than 3 weeks after the date the notice of determination was given to the person.

(4) The minister may extend the time limit for requiring a review under this section before or after its expiry.

(5) The person conducting the review has the same discretion to make a decision that the original decision maker had at the time of the determination under the review.

Board may require review of a determination

81 (1) If the board first receives the consent of the person who is the subject of a determination under section 16, 37, 71 or 74 of this Act, the board may require a review of the determination by the person who made the determination, or another person employed in the ministry and designated in writing by the minister.

(2) To obtain a review of a determination under subsection (1), the board must require the review not later than 3 weeks after the date the notice of determination was given to the person.

(3) The minister may extend the time limit for requiring a review under this section before or after its expiry.

(4) The person conducting the review has the same discretion to make a decision that the original decision maker had at the time of the determination under the review.

Appeal to the commission by a person who is the subject of a determination

82 (1) The person who is the subject of a determination referred to in section 80, other than a determination made under section 77.1, may appeal to the commission either of the following, but not both:

(a) the determination;

(b) a decision made after completion of a review of the determination.

(2) Sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under this section.

Appeal to the commission by the board

83 (1) The board may appeal to the commission either of the following, but not both:

(a) a determination referred to in section 81;

(b) a decision made after completion of a review of the determination.

(2) The board may apply to the commission for an order under section 84(2) if

(a) the minister authorized under section 71 or 74 of this Act to make a determination has not done so, and

(b) a prescribed period has elapsed after the facts relevant to the determination first came to the knowledge of the official or the minister.

(3) Sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under subsection (1) or an application under subsection (2).

Powers of the commission

84 (1) On an appeal

(a) by a person under section 82(1), or

(b) by the board under section 83(1),

the commission may

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

(d) either

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

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

(2) On an application under section 83 by the board the commission may order the official or minister referred to in section 83(2) to make a determination as authorized under the applicable provision that is referred to in section 83(2)(a).

(3) The commission may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal.

(4) After filing in the court registry, an order under subsection (3) has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken as if it were an order of the court.

Forest Act

Part 12

REVIEWS, APPEALS, REGULATIONS, PENALTIES

Division 2 – Appeals

Determinations that may be appealed

146 (1) Subject to subsection (3), an appeal may be made to the Forest Appeals Commission from a determination, order or decision that was the subject of a review required under Division 1 of this Part.

(2) An appeal may be made to the Forest Appeals Commission from

(a) a determination, order or decision of the chief forester, under section 60.6, 68, 70(2), 77(1)(b) or 112(1),

(b) a determination of an employee of the ministry under section 105(1), and

(c) an order of the minister under section 75.95(2).

(3) No appeal may be made under subsection (1) unless the determination, order or decision has first been reviewed under Division 1 of this Part.

(4) If a determination, order or decision referred to in subsection (1) is varied by the person conducting the review, the appeal to the commission is from the determination, order or decision as varied under section 145.

(5) If this Act gives a right of appeal, this Division applies to the appeal.

(6) For the purpose of subsection (2), a redetermination or variation of stumpage rates under section 105(1) is considered to be a determination.

Notice of appeal

147 (1) If a determination, order or decision referred to in section 146(1) or (2) is made, the person

(a) in respect of whom it is made, or

(b) in respect of whose agreement it is made

may appeal the determination, order or decision by

(c) serving a notice of appeal on the commission

(i) in the case of a determination, order or decision that has been reviewed, not later than 3 weeks after the date the written decision is served on the person under section 145(3), and

(ii) in the case of a determination, order or decision that has not been reviewed, not later than 3 weeks after that date the determination, order or decision is served on the person under the provisions referred to in section 146(2), and

(d) enclosing a copy of the determination, order or decision appealed from.

(2) If the appeal is from a determination, order or decision as varied under section 145, the appellant must include a copy of the review decision with the notice of appeal served under subsection (1).

(3) The appellant must ensure that the notice of appeal served under subsection (1) complies with the content requirements of the regulations.

(3.1) After the notice of appeal is served under subsection (1), the appellant and the government must disclose the facts and law on which the appellant or government will rely at the appeal if required by the regulations and in accordance with the regulations.

(4) Before or after the time limit in subsection (1) expires, the chair or a member of the commission may extend it.

(5) A person who does not serve the notice of appeal within the time required under subsection (1) or (4) loses the right to an appeal.

Appeal

148 (1) The commission, after receiving the notice of appeal, must

(a) promptly hold a hearing, or

(b) hold a hearing within the prescribed period, if any.

(2) Despite subsection (1), if the commission determines that the notice of appeal does not comply with the content requirements of the regulations, or that there was a failure to disclose facts and law required under section 147(3.1), the commission need not hold a hearing within the prescribed period referred to in subsection (1) of this section, but must hold a hearing within the prescribed period after service of a notice of appeal that does comply with the content requirements of the regulations, or the facts and law are disclosed as required under section 147(3.1).

(3) Only the appellant and the government are parties to the appeal.

(4) The parties may

(a) be represented by counsel,

(b) present evidence, including but not limited to evidence that was not presented in the review under Division 1 of this Part,

(c) if there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(5) A person who gives oral evidence may be questioned by the commission or the parties to the appeal.

Order for written submissions

148.1 (1) The commission or a member of it may order the parties to an appeal to deliver written submissions.

(2) If the appellant does not deliver a written submission ordered under subsection (1) within the time specified in the order, the commission may dismiss the appeal.

(3) The commission must ensure that each party to the appeal has the opportunity to review written submissions from the other party and an opportunity to rebut the written submissions.

Interim orders

148.2 The commission or a member of it may make an interim order in an appeal.

Open hearings

148.3 Hearings of the commission are open to the public.

Witnesses

148.4 The commission or a member of it has the same power as the Supreme Court has for the trial of civil actions

(a) to summon and enforce the attendance of witnesses,

(b) to compel witnesses to give evidence on oath or in any other manner, and

(c) to compel witnesses to produce records and things.

Contempt

148.5 The failure or refusal of a person

(a) to attend,

(b) to take an oath,

(c) to answer questions, or

(d) to produce the records or things in his or her custody or possession,

makes the person, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

Evidence

148.6 (1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,

(a) any oral testimony, or

(b) any record or other thing

relevant to the subject matter of the appeal and may act on the evidence.

(2) Nothing is admissible in evidence before the commission or a member of it that is inadmissible in a court because of a privilege under the law of evidence.

(3) Subsection (1) does not override an Act expressly limiting the extent to or purposes for which evidence may be admitted or used in any proceeding.

(4) The commission may retain, call and hear an expert witness.

Powers of commission

149 (1) On an appeal, whether or not the person who conducted the review confirmed, varied or rescinded the determination, order or decision being appealed, the commission may consider the findings of

(a) the person who made the initial determination, order or decision, and

(b) the person who conducted the review.

(2) On an appeal, the commission may
  (a) confirm, vary or rescind the determination, order or decision, or
  (b) refer the matter back to the person who made the initial determination, order or decision with or without directions.

(3) If the commission decides an appeal of a determination made under section 105, the commission must, in deciding the appeal, apply the policies and procedures approved by the minister under section 105 that were in effect at the time of the initial determination.

(4) The commission may order that a party pay any or all of the actual costs in respect of the appeal.

(5) After filing in the court registry, an order under subsection (4) has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken as if it were an order of the court.

(6) Unless the minister orders otherwise, an appeal under this Division does not operate as a stay or suspend the operation of the determination, order or decision under appeal.

Decision of commission

149.1 (1) The commission must make a decision promptly after the hearing and serve copies of the decision on the appellant and the minister.

(2) On request of the appellant or the minister, the commission must provide written reasons for the decision.

(3) The commission must serve a decision within the prescribed period, if any.

Order for compliance

149.2 If it appears that a person has failed to comply with an order or decision of the commission or a member of it, the commission, minister or appellant may apply to the Supreme Court for an order
  (a) directing the person to comply with the order or decision, and
  (b) directing the directors and officers of the person to cause the person to comply with the order or decision.

Appeal to the courts

150 (1) The appellant or the minister, within 3 weeks after being served with the decision of the commission, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction.

(2) On an appeal under subsection (1), a judge of the Supreme Court, on terms he or she considers appropriate, may order that the decision of the commission be stayed in whole or in part.

(3) An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

Part 6 of the *Forest and Range Practices Act* applies

167.3 (1) Divisions 1 to 4 of Part 6 of the *Forest and Range Practices Act* apply to this Act and the regulations under this Act, unless the context indicates otherwise.

(2) Without limiting subsection (1), sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under the *Forest and Range Practices Act* in respect of a contravention of this Act or the regulations under this Act.

Part 3

COMPLIANCE AND ENFORCEMENT

Division 3 – Reviews and Appeals

Reviews

69 (1) Subject to subsection (2), at the request of a person who is the subject of, or whose licence or permit is affected by,

(a) an order of a forest officer under section 60(1),

(b) an order of a district manager under section 36(1) or (2), 49(1), 50(1), 55, 60(1), 62(1)(b) or 63(1),

(c) a decision of the district manager referred to in section 25(5) or 50(4), or

(d) amendments under section 47 or 48,

the person who made the order or decision or who prepared the amendments, or another person employed in the ministry and designated in writing by the minister, must review the order, decision or amendments, but only if satisfied that there is evidence that was not available at the time of the original order, decision or amendments.

(2) On a review referred to in subsection (1), only

(a) evidence that was not available at the time of the original order, decision or amendments, and

(b) the record pertaining to the original order, decision or amendments

may be considered.

(3) To obtain a review referred to in subsection (1), the person who is the subject of, or whose licence or permit is affected by, the order, decision or amendments must request the review not later than 21 days after the date the notice of the order, decision or amendments was delivered to the person.

(4) The minister may extend the time limit in subsection (3) before or after its expiry.

(5) The person conducting a review referred to in subsection (1) has the same discretion to

(a) make an order referred to in subsection (1)(a) or (b),

(b) make a decision referred to in subsection (1)(c), or

(c) prepare amendments referred to in subsection (1)(d)

that the person who made the original order or decision or prepared the original amendments had at the time of the original order, decision or amendments.

(6) After the preparation of amendments under subsection (5)(c) to a licence or permit, and on delivery of the particulars of the amendments to the holder of the licence or permit, the licence or permit, as the case may be, is deemed to be amended to include the amendments.

Appeals to the commission

70 (1) The person who is the subject of, or whose licence or permit is affected by,

(a) an order,

(b) a decision, or

(c) amendments

referred to in section 69(1) may appeal to the commission either of the following, but not both:

(d) the order, decision or amendments;

(e) a decision made after completion of a review of the order, decision or amendments.

(2) An applicant referred to in section 15(2) may appeal to the commission an order of the minister made under that provision.

(3) Sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under this section.

Powers of the commission

71 (1) On an appeal under section 70, the commission may

(a) consider the findings of the person who made the order or decision or who prepared the amendments, and

(b) either

(i) confirm, vary or rescind the order, decision or amendments, or

(ii) with or without directions, refer the matter back to that person for reconsideration.

(2) If an appeal referred to in subsection (1) results in amendments to a licence or permit, the licence or permit, as the case may be, is deemed to be amended to include the amendments as soon as the particulars of the amendments have been delivered to the holder of the licence or permit.

(3) The commission may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal.

(4) After a certified copy of an order under subsection (3) is filed with the Supreme Court, the order has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken as if it were an order of the court.

Review or appeal not a stay

72 Unless the minister orders otherwise, a review or an appeal under this Act does not operate as a stay or suspend the operation of the order, decision or amendments being reviewed or appealed.

Wildfire Act

Part 3

ADMINISTRATIVE REMEDIES AND COST RECOVERY

Division 3 – Corrections, Reviews and Appeals

Order stayed until proceedings concluded

36 (1) An order that may be reviewed under section 37 or appealed under section 39 is stayed until the person who is the subject of the order has no further right to have the order reviewed or appealed.

(2) Despite subsection (1), the minister may order that an order, other than an order levying an administrative penalty under section 27 or 28(3)(d) is not stayed on being satisfied that a stay or a stay without those conditions, as the case may be, would be contrary to the public interest.

(3) Despite subsection (1), an order is not stayed if the order is made under section 34.

Review of an order

37 (1) Subject to subsection (2), at the request of a person who is the subject of an order under section 7(3), 17(4), 25, 26, 27, 28(1) or (3)(d) or 34, the person who made the order, or another person employed in the ministry and designated in writing by the minister, must review the order, but only if satisfied that there is evidence that was not available at the

time of the original order.

(2) On a review referred to in subsection (1), only

(a) evidence that was not available at the time of the original order, and

(b) the record pertaining to the original order

may be considered.

(3) To obtain a review referred to in subsection (1), the person who is the subject of the order must request the review not later than 3 weeks after the date the notice of order was given to the person.

(4) The minister may extend the time limit in subsection (3) section [sic] before or after the time limit's expiry.

(5) The person conducting a review referred to in subsection (1) has the same discretion to make a decision that the original decision maker had at the time of the original order.

Board may require review of an order

38 (1) If the board first receives the consent of the person who is the subject of an order referred to in section 37(1), the board may require a review of the order by the person who made the order, or another person employed in the ministry and designated in writing by the minister.

(2) To obtain a review of an order under subsection (1), the board must require the review not later than 3 weeks after the date the notice of the order was given to the person who is the subject of the order.

(3) The minister may extend the time limit for requiring a review under this section before or after the time limit's expiry.

(4) The person conducting the review has the same discretion to make a decision that the original decision maker had at the time of the order under review.

Appeal to the commission from an order

39 (1) The person who is the subject of an order referred to in section 37(1) may appeal to the commission from either of the following, but not both:

(a) the order;

(b) a decision made after completion of a review of the order.

(2) Sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under this section.

Appeal to the commission by the board

40 (1) The board may appeal to the commission from either of the following, but not both:

(a) an order referred to in section 37;

(b) a decision made after completion of a review of the order.

(2) Sections 131 to 141 of the *Forest Practices Code of British Columbia Act* apply to an appeal under this section.

Powers of commission

41 (1) On an appeal under section 39 by a person or under section 40 by the board, the commission may

(a) consider the findings of the decision maker who made the order, and

(b) either

(i) confirm, vary or rescind the order, or

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

(2) The commission may order that a party or intervener pay another party or intervener any or all of the actual costs in respect of the appeal.

(3) After the period to request an appeal to the Supreme Court under the *Forest Practices Code of British Columbia Act* has passed, the minister may file a certified copy of the decision of the commission with the Supreme Court.

(4) A certified copy of a decision filed under subsection (3) has the same force and effect as an order of the court for the recovery of a debt in the amount stated in the decision, against the person named in the decision, and all proceedings may be taken as if the decision were an order of the court.

This Regulation applies to appeals under the *Code*, *Forest and Range Practices Act*, the *Forest Act*, the *Range Act* and the *Wildfire Act*.

Administrative Review and Appeal Procedure Regulation (B.C. Reg. 12/04)

Part 1
DEFINITIONS

1 In this regulation:

"appellant" means

(a) for a *Forest Act* appeal, the person that initiates an appeal under section 147(1) of that Act,

(b) for a *Range Act* appeal, the person that initiates an appeal under section 70(1) of that Act,

(c) for a *Forest and Range Practices Act* appeal, the person that initiates an appeal under section 82(1) of that Act, and includes the board if the board initiates an appeal under section 83(1) of the Act, or

(d) for a *Wildfire Act* appeal, the person that initiates an appeal under section 39(1) of that Act, and includes the board if the board initiates an appeal under section 40(1) of that Act;

Part 3
FOREST APPEALS COMMISSION PROCEDURE

Exemption from time specified to appeal a determination

16 (1) In respect of an appeal under section 83 of the *Forest and Range Practices Act*, the board is exempt from the requirement under section 131 of the *Forest Practices Code of British Columbia Act* to deliver to the commission

(a) a notice of appeal,

(b) a copy of the original decision, and

(c) a copy of any decision respecting a correction or review

no later than 3 weeks after the latest to occur of

(d) the original decision,

(e) any correction under section 79 of the *Forest and Range Practices Act*, and

(f) any review under section 80 or 81 of the *Forest and Range Practices Act*

if the board delivers to the commission the documents described in paragraphs (a) to (c) within 60 days after the latest to occur of the events described in paragraphs (d) to (f).

(2) In respect of an appeal under section 40 of the *Wildfire Act*, the board is exempt from the requirement under section 131 of the Forest Practices *Code of British Columbia Act* to deliver to the commission

(a) a notice of appeal,

(b) a copy of the original decision, and

(c) a copy of any decision respecting a correction or review

no later than 3 weeks after the latest to occur of

(d) the original decision,

(e) any correction under section 35 of the *Wildfire Act*, and

(f) any review under section 37 or 38 of the *Wildfire Act*

if the board delivers to the commission the documents described in paragraphs (a) to (c) within 60 days after the latest to occur of the events described in paragraphs (d) to (f).

(3) In respect of an appeal under section 70(1) of the *Range Act*, section 82 (1) of the *Forest and Range Practices Act* or section 39(1) of the *Wildfire Act*, a person whose request for a review is denied by the reviewer for the reason described in subsection (4) is exempt from the requirement under section 131 of the *Forest Practices Code of British Columbia Act* to deliver to the commission

(a) a notice of appeal,

(b) a copy of the original decision, and

(c) a copy of any decision respecting a correction or review

no later than 3 weeks after the latest to occur of

(d) the original decision, or

(e) any correction under the *Range Act*, the *Forest and Range Practices Act* or the *Wildfire Act*

if the appellant delivers to the commission the documents described in paragraphs (a) to (c) within 21 days after the appellant is given notice by the reviewer that the appellant's request for the review is denied for the reason described in subsection (4).

(4) The reason referred to in subsection (3) is that the reviewer is not satisfied as to the existence of evidence not available at the time of the original determination, order, decision or amendment.

[am. B.C. Reg. 83/2006, s. 9.]

Prescribed period for board to apply for order

17 The prescribed period for the purpose of section 83(2)(b) of the *Forest and Range Practices Act* is 6 months.

Notice of appeal

18 The notice of appeal referred to in section 147(1) of the *Forest Act* and section 131(1) of the *Forest Practices Code of British Columbia Act*, must be signed by, or on behalf of, the appellant and must contain all of the following information:

(a) the name and address of the appellant, and the name of the person, if any, making the request on the appellant's behalf;

(b) the address for giving a document to, or serving a document on, the appellant;

(c) the grounds for appeal;

(d) a statement describing the relief requested.

[am. B.C. Reg. 83/2006, s. 10.]

Deficient notice of appeal

19 (1) If a notice of appeal does not comply with section 18, the commission may invite the appellant to submit further material remedying the deficiencies within a period specified in a written notice of deficiencies, by

(a) serving the written notice of deficiencies on the appellant, if the appeal is under the *Forest Act* or

(b) giving the written notice of deficiencies to the appellant, if the appeal is under the *Range Act*, *Forest and Range Practices Act* or the *Wildfire Act*.

(2) If the commission serves or gives a notice of deficiencies under subsection (1), the appeal that is the subject of the notice of appeal may proceed only after the submission to the commission of further material remedying the deficiencies.

[am. B.C. Reg. 83/2006, s. 11.]

Notification of parties following receipt of notice of appeal

20 The commission must acknowledge in writing any notice of appeal, and

(a) in the case of an appeal under the *Forest Act*, serve a copy of the notice of appeal on the deputy minister of the minister responsible for the *Forest Act*,

(a.1) in the case of an appeal under the *Range Act*, give a copy of the notice of appeal to the minister,

(b) in the case of an appeal under the *Forest and Range Practices Act*, give a copy of the notice of appeal to

(i) the minister, and

(ii) either

(A) the board, if the notice was delivered by the person who is the subject of the determination, or

(B) the person who is the subject of the determination, if the notice was delivered by the board, and

(c) in the case of an appeal under the *Wildfire Act*, give a copy of the notice of appeal to

(i) the minister, and

(ii) either

(A) the board, if the notice was delivered by the person who is the subject of the order, or

(B) the person who is the subject of the order, if the notice was delivered by the board.

[am. B.C. Reg. 83/2006, s. 12.]

Procedure following receipt of notice of appeal

21 Within 30 days after receipt of the notice of appeal, the commission must

(a) determine whether the appeal is to be considered by members of the commission sitting as a commission or by members of the commission sitting as a panel of the commission,

(b) designate the panel members if the commission determines that the appeal is to be considered by a panel,

(c) set the date, time and location of the hearing, and

(d) give notice of hearing to the parties if the appeal is under the *Range Act*, *Forest and Range Practices Act* or the *Wildfire Act*, or serve notice of hearing on the parties if the appeal is under the *Forest Act*.

[en. B.C. Reg. 83/2006, s. 13.]

Panel chair determined

22 For an appeal that is to be considered by a panel of the commission, the panel chair is determined as follows:

(a) if the chair of the commission is on the panel, he or she is the panel chair;

(b) if the chair of the commission is not on the panel but a vice chair of the commission is, the vice chair is the panel chair;

(c) if neither the chair nor a vice chair of the commission is on the panel, the commission must designate one of the panel members to be the panel chair.

Additional parties to an appeal

23 (1) If the board is added as a party to an appeal under section 131(7) of the *Forest Practices Code of British Columbia Act*, the commission must promptly give written notice of the addition to the other parties to the appeal.

(2) If a party is added to the appeal under section 131(8) of the *Forest Practices Code of British Columbia Act*, the commission must promptly give written notice of the addition to the other parties to the appeal.

Intervenors

24 (1) If an intervenor is invited or permitted to take part in the hearing of an appeal under section 131(13) of the *Forest Practices Code of British Columbia Act*, the commission must give the intervenor a written notice specifying the extent to which the intervenor will be permitted to take part.

(2) Promptly after giving notice under subsection (1), the commission must give the parties to the appeal written notice

(a) stating that the intervenor has been invited or permitted under section 131(13) of the *Forest Practices Code of British Columbia Act* to take part in the hearing, and

(b) specifying the extent to which the intervenor will be permitted to participate.

Transcripts

25 On application to the commission, a transcript of any proceedings before the commission or the panel of the commission must be prepared at the cost of the person requesting it or, if there is more than one applicant for the transcript, proportionately by all of the applicants.

Prescribed period for appeal decision under the *Forest Act*

26 The prescribed period for the purposes of section 149.1(3) of the *Forest Act* is 42 days after conclusion of the hearing.

Part 4

ANNUAL REPORT OF FOREST APPEALS COMMISSION

Content

27 (1) By April 30 of each year, the chair of the commission must submit the annual report for the immediately preceding calendar year required by section 197(2) of the *Forest Practices Code of British Columbia Act*.

(2) The annual report referred to in subsection (1) must contain

(a) the number of appeals initiated under the *Forest Act*, the *Range Act*, the *Forest and Range Practices Act* or the *Wildfire Act*, during the year,

(b) the number of appeals completed under the *Forest Act*, the *Range Act*, the *Forest and Range Practices Act* or the *Wildfire Act*, during the year,

(c) the resources used in hearing the appeals,

(d) summary of the results of the appeals completed during the year,

(e) the annual evaluation referred to in section 197(1)(b) of the *Forest Practices Code of British Columbia Act*, and

(f) any recommendations referred to in section 197(1)(c) of the *Forest Practices Code of British Columbia Act*.

[am. B.C. Reg. 83/2006, s. 14.]

Private Managed Forest Land Act

Part 4

COMPLIANCE AND ENFORCEMENT

Division 2 – Administrative Remedies

Appeal to commission

33 (1) A person who is the subject of an order, a decision or a determination of the council under section 26(1), 27(1) and (2), 30, 31(1) or 32 may appeal the order, decision or determination to the commission in accordance with the regulations.

(2) An order, a decision or a determination that may be appealed under this section, other than a stop work order, is stayed until the person who is the subject of the order, decision or determination has no further right to have the order, decision or determination appealed.

(3) The commission must conduct an appeal in accordance with this section and the regulations.

(4) The appellant and the council are parties to the appeal and may be represented by counsel.

(5) At any stage of an appeal, the commission or a member of it may direct that a person who may be directly affected by the appeal be added as a party to the appeal.

(6) The commission may invite or permit any person who may be materially affected by the outcome of an appeal to take part in the appeal as an intervenor in the manner and to the extent permitted or ordered by the commission.

(7) The commission or a member of it may order the parties to an appeal to deliver written submissions.

(8) If the appellant does not deliver a written submission ordered under subsection (7) within the time specified in the order or the regulations, the commission may dismiss the appeal.

(9) The commission must ensure that each party to the appeal has the opportunity to review written submissions from the other party or any intervenor and an opportunity to rebut the written submissions.

(10) The commission or a member of it may make an interim order in an appeal.

(11) Hearings of the commission are open to the public.

(12) The commission or a member of it has the same power as the Supreme Court has for the trial of civil actions

(a) to summon and enforce the attendance of witnesses,

(b) to compel witnesses to give evidence on oath or in any other manner, and

(c) to compel witnesses to produce records and things.

(13) The failure or refusal of a person

(a) to attend,

(b) to take an oath,

(c) to answer questions, or

(d) to produce the records or things in the person's custody or possession,

makes the person, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(14) The commission may retain, call and hear an expert witness.

(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.

(16) An order under subsection (15) that is filed in the court registry has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken as if the order were an order of the court.

Appeal to court

34 (1) A party to the appeal before the commission may appeal, within 3 weeks of being given the decision of the commission in writing and by application to the Supreme Court, the decision of the commission on a question of law or jurisdiction.

(2) After an application is brought to the Supreme Court, a judge may order, on terms he or she considers appropriate, that all or part of the decision of the commission be stayed.

(3) An appeal from a decision of the Supreme Court lies with the Court of Appeal with leave of a justice of the Court of Appeal.

Private Managed Forest Land Regulation (B.C. Reg. 371/04)

Notice of appeal

9 (1) A person who, under section 33(1) of the Act, may appeal an order, decision or determination to the commission must submit a notice of appeal to the commission that is signed by, or on behalf of, the appellant and contains all of the following:

(a) the name and address of the appellant, and the name of the person, if any, making the request on the appellant's behalf;

(b) the address for service of the appellant;

(c) the grounds for appeal;

(d) the relief requested.

(2) The appellant must deliver the notice of appeal to the commission not later than 3 weeks after the later of the date of

(a) the decision of the council under section 32(2) of the Act, and

(b) the order, decision or determination referred to in section 33(1) of the Act.

(3) Before or after the time limit in subsection (2) expires, the commission may extend it.

(4) A person who does not deliver a notice of appeal within the time specified loses the right to an appeal.

Deficient notice of appeal

10 (1) If a notice of appeal does not comply with section 9 the commission may deliver a written notice of deficiencies to the appellant, inviting the appellant, within a period specified in the notice, to submit further material remedying the deficiencies.

(2) If the commission delivers a notice under subsection (1), the appeal may proceed only after the earlier of

(a) the expiry of the period specified in the notice of deficiencies, and

(b) the submission to the commission of further material remedying the deficiencies.

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