Forest Appeals Commission

Annual Report

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Message from the Chair

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

The Year in Review – Appeals

During the past year, the Commission continued to work towards reducing the number of appeals that proceed to a hearing. I am pleased to note that 89% of the appeals that were closed in 2012 did not require a hearing. A total of 52 appeals were active during the report period, and 73% of those appeals were closed by the year's end. Of those appeals that were closed during the year, 30 were withdrawn, which meant that they did not require a hearing. Included in that 30 were 23 stumpage rate appeals that had been held in abeyance to allow the parties time to negotiate, and were ultimately settled without the need for a hearing. In addition, four more stumpage rate appeals were resolved with the consent of the parties, without the need for a hearing. Consequently, of the 38 appeals that were closed during the report period, only four required a hearing and decision on their merits.

The appeals that were decided by the Commission during 2012 involved complex legal and factual issues, and matters of significant interest to the public, the forest industry and the Government such as the application of the defence of due diligence in relation to sediment entering a fish-bearing stream from an eroded road, determining when a forest licensee should be held responsible for an escape of a prescribed burn, and the amount of stumpage that licensees are obligated to pay when harvesting Crown timber. The Commission also heard its first appeal under the *Private Managed Forest Land Act*. That appeal concerned the question of when, and in what circumstances, an owner of private managed forest land is required to pay an exit fee as a result of developing forest land into a resort.

Efficiencies and Cost Reduction

As Chair of three tribunals, the Commission, the Environmental Appeal Board and the Oil and Gas Appeal Tribunal, I have appreciated the various benefits and actively encouraged the "clustering" of tribunals with similar processes and/or mandates. The Commission's office supports a total of eight administrative tribunals. This model has numerous benefits, not only in terms of cost savings, but also in terms of shared knowledge and information. Having one office provide administrative support for several tribunals gives each tribunal greater access to resources while, at the same time, reducing costs and allowing the tribunals to operate independently of one another.

Adding to these efficiencies, we have developed a number of policy documents to make the appeal process more accessible and understandable to the public, and are improving our information systems to facilitate further access and information sharing.

Court Decisions Impacting the Commission

When an appeal is not resolved prior to a hearing, and the Commission issues its decision on the appeal, the parties have the right to then appeal the decision to the BC Supreme Court. Such cases can be lengthy and costly, especially if the parties have to spend time addressing the standard of review which includes an assessment of the Commission's expertise over the subject matter and the law at issue. That question is important because it shapes how much the court will "defer" to the Commission's findings. However, several recent judgments of the BC courts have clarified this matter.

Following the BC Court of Appeal's 2011 decision in *Hegel v. British Columbia (Forests)*, 2011 BCCA 446, which recognized the Commission's expertise in forestry matters and confirmed that the Commission's decisions are to be given deference by the courts, five judgments of the BC Supreme Court in 2012 helped to settle the standard of review question. Each of these decisions recognized the Commission's specialized expertise in the interpretation and application of the forestry legislation, and in each case, the Court deferred to the Commission's decision. The long term effect of these judicial decisions will be to reduce the number of appeals to the courts from Commission decisions or, at a minimum, to reduce the time and expense of court proceedings in the future.

Commission Membership

The Commission's membership experienced some minor changes to its roster of qualified professionals during the past year. I am very pleased to welcome one new member to the Commission who will complement the expertise and experience of the outstanding professionals on the Commission. That new member is James Mattison. Also, Carol Brown's appointment to the Commission ended during 2012, and I thank her for her service as a member of the Commission.

I am very fortunate to have on the Commission a wide variety of highly qualified individuals including professional biologists, foresters, agrologists, engineers, and lawyers with expertise in the areas of natural resources and administrative law, and mediation. All of these individuals, with the exception of the Chair, are appointed as part-time members and bring with them the necessary expertise to hear matters ranging from timber valuation to aboriginal rights.

Finally, I would like to take this opportunity to thank the members of the Commission and the staff 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 is continued under the *Forest and Range Practices Act*. The information contained in this report covers the twelve-month period from January 1, 2012 to December 31, 2012. It covers 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 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; and
- 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's website. If you have questions, or would like additional copies of this report, please contact the Commission at:

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Facsimile: 250-356-9923

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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 *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 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*.

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, professional agrologists 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 2012 report period, the membership of the Commission changed. One new member was appointed, and one member's appointment concluded. During the year, the Commission consisted of the following members:

MEMBER	PROFESSION	FROM
Chair		
Alan Andison	Lawyer	Victoria
Vice-Chairs		
Gabriella Lang	Lawyer (Retired)	Campbell River
Robert Wickett	Lawyer	Vancouver
Members		
R. O'Brien Blackall	Land Surveyor	Charlie Lake
Carol Brown (to 2012-06-12)	Lawyer/CGA/Mediator	Sooke
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Cindy Derkaz	Lawyer (Retired)	Salmon Arm
W. J. Bruce Devitt	Professional Forester (Retired)	Victoria
J. Tony Fogarassy	Professional Geoscientist/Lawyer	Vancouver
Les Gyug	Professional Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Jagdeep S. Khun-Khun	Lawyer	Vancouver
Blair Lockhart	Lawyer/Professional Geoscientist	Vancouver
Ken Long	Professional Agrologist	Prince George
James Mattison (from 2012-05-03)	Professional Engineer	Victoria
David Searle, C.M., Q.C.	Lawyer (Retired)	North Saanich
Douglas VanDine	Professional Engineer	Victoria
Reid White	Professional Biologist/Engineer	Telkwa
Loreen Williams	Lawyer/Mediator	West 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 of this type of law 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 decided.

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 Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Health Professions Review Board, the Hospital Appeal Board, the Industry Training Appeal Board, and the Financial Services Tribunal.

Each of the tribunals are legally independent of one another, but are jointly administered. Supporting eight 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 2012/2013 budget for the Forest Appeals Commission was $334,000.

The fiscal 2012/2013 budget for the shared office and staff was $1,410,000.

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

Overview

The appeal process begins with a notice of appeal filed against a particular decision of a statutory decision-maker. To determine what decisions are appealable to the Commission, who can appeal the decisions, the time for filing an appeal, whether the appealed decision is stayed pending an appeal, or what the Commission's decision-making powers are with respect to the appeal, including the power to award costs, one must consult the individual statutes and regulations which provide the right of appeal to the Commission; specifically, the *Forest and Range Practices Act*, the *Forest Act*, the *Private Managed Forest Land Act*, the *Range Act* or the *Wildfire Act*. A brief description of those statutes and their respective appeal provisions is provided under the next heading.

As will be noted in the descriptions of the statutes below, one unique feature of two of the statutes is the participation of the Forest Practices Board in appeals. The Forest Practices Board is the "forest watchdog" in BC and has an arms-length relationship from government. In addition to its other mandates and responsibilities, it has been given the ability to appeal specified decisions (or the failure to make a decision) under the *Forest and Range Practices Act* and the *Wildfire Act*. When an appeal is filed by someone other than the Board under those two statutes, the Commission is required to notify the Forest Practices Board of the appeal and invite the Board to participate in the appeal as a third party.

In terms of the mandate of the Commission and the processes that apply once a valid appeal is filed, one must turn to the *Code*. Parts 6 and 9 of the *Code* establish the basic structure, mandate, powers and procedures of the Commission. Part 9 describes the composition of the Commission and how hearing panels may be organized, as well as the requirement to submit this Annual Report. Part 6 describes the authority of the Commission to add parties to an appeal, the requirement to notify and add the Forest Practices Board to certain appeals, the ability to order documents and summon witnesses, and the rights of the parties to present evidence. Additional procedural details, such as the requirements for starting an appeal, are further detailed in Part 3 of the *Administrative Review and Appeal Procedure Regulation*, B.C. Reg. 12/04 (the "*Regulation*").

It is important to note that the appeal powers and procedures in Part 6 of the *Code* and the *Regulation* apply to appeals filed against decisions made under the *Forest and Range Practices Act*, the *Range Act* and the *Wildfire Act*. *The Private Managed Forest Land Act* sets out its own powers and procedures for the Commission; it does not incorporate the *Code* provisions. Similarly, the *Forest Act* includes some of the content requirements in the *Regulation*, but has also established its own powers and procedures for the Commission.

The relevant portions of all of those statutes and regulations are included at the back of this report.

Finally, to ensure that the appeal process is open and understandable to the public, the Commission has created a Procedure Manual which contains more details and information about the Commission's policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. The Procedure Manual is posted on the Commission's website.

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 stated above, the *Code* is still important because it both establishes the Commission in Part 9 and sets out the basic powers and procedures to be employed by the Commission on most appeals.

Appeals under the *Forest and Range Practices Act*

There are a number of enactments that govern forestry in BC. The *Forest and Range Practices Act* is one such Act. Since taking effect in 2004, this *Act* has played a major role in the way in which forests are managed in the province.

The *Forest and Range Practices Act* regulates operational planning, forestry practices such as road building, logging and reforestation, requirements for range use planning, range stewardship and grazing schedules, as well as protection, compliance, enforcement and monitoring.

Part 6, Division 4 of the *Forest and Range Practices Act* sets out the decisions that are appealable to the Commission. They 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 stop work 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*

The *Forest Act* governs the allocation of Crown (public) timber and the administration of this resource. The primary focus of the *Forest Act* is:

- determining the rate of logging, known as the allowable annual cut;
- granting different forms of agreements or tenures which allow the harvest of Crown timber;
- establishing the rules for the administration of tenures, and the consequences for non-compliance;
- establishing rules for those allowed to harvest Crown timber, including
  - the calculation and collection of stumpage to be paid to the government for the timber harvested,
  - scaling timber (the measurement and classification of timber),
  - marking timber and transporting logs; and
  - milling requirements within BC.

In addition, the *Forest Act* provides for road permits and road use permits to access timber, offences and penalties, and appeals of certain decisions.

Appealable decisions under this *Act* are set out in section 146 and include certain determinations, orders and decisions made by timber sales managers, employees of the Ministry of Forests, Lands and Natural Resource Operations, the Minister of Forests, Lands and Natural Resource Operations, 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, Lands and Natural Resource Operations, may be appealed to the Commission without prior review (e.g., stumpage determinations). However, determinations, orders or decisions made by a timber sales manager, and most decisions of the Minister, 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 *Range Act* provides the authority for the management of Crown range land. It creates different forms of forage tenures, addresses various aspects of tenure management such as transfers, consolidations, subdivisions and amendments, and establishes the regulatory framework for grazing and hay-cutting licences and permits. The *Act* also includes compliance

and enforcement tools such as the power to conduct inspections, issue orders and suspend or cancel licenses and permits.

Decisions that may be appealed to the Commission include the following:

- orders deleting land from the Crown range described in a licence or permit;
- orders 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 license or permit.

Appeals under the *Private Managed Forest Land Act*

Approximately two percent of BC's forest lands are privately owned. Because the legal requirements that apply to logging on Crown land do not apply to logging on private land, the Government decided to establish a property assessment classification of "managed forest", which was designed to encourage private landowners to manage their forest lands for long term forest production through the use of property tax incentives. This program was initially begun in 1988, and was continued in 2004 with the enactment of new legislation, the *Private Managed Forest Land Act*. This legislation established forest management objectives in relation to soil conservation, water quality, fish habitat, critical wildlife habitat and reforestation that were to be applied to private forest management lands. The *Act* also set up the Private Managed Forest Land Council, an independent provincial agency responsible for administering the managed forest program. The Council's responsibilities include:

- setting and monitoring forest practice standards for these managed forest lands;
- handling complaints and investigations; and
- enforcing standards through the use of various orders, determinations, notifications and fines.

Section 33 of the *Private Managed Forest Land Act* allows individuals or companies that are subject to certain decisions of the Council to file an appeal with the Commission. The appealable decisions include:

- 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*

The *Wildfire Act* is dedicated exclusively to wildfire protection in BC. This *Act* specifies the main responsibilities and obligations with respect to fire use, prevention, control and rehabilitation. It also allows the Government to recover its fire control costs, whether on Crown land or private land, and to recover a sum of money to compensate the Crown for its loss of timber, grass land, and other forest land resources and property that is damaged or destroyed by a wildfire. The *Act* also authorizes certain orders, determinations and administrative monetary penalties to be issued for non-compliance with the legislation.

Part 3, Division 3 of the *Wildfire Act* allows an appeal to the Commission from certain orders, or a decision made after the completion of a review of the order.

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 determining that a person caused or contributed to a fire or to the spread of a 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.

Legislative Amendments Affecting the Commission

In this reporting period, there were no legislative changes that affected the types of appeals the Commission hears, or that affected 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.

The Commission is pleased to report that no problems have been identified in either the review or the appeal process during the past year. Accordingly, the Commission is not making any recommendations in relation to either of these processes at this time.

Statistics

Forest Appeals Commission

Part 4 of the *Administrative Review and Appeal Procedure Regulations* requires the Commission to include in this Annual Report:

- the number of appeals initiated during the report period; and
- the number of appeals completed during the report period (i.e., final decisions issued).

The following tables provide information on the appeals filed with the Commission, appeals closed by the Commission and decisions published by the Commission, during the reporting period. It should be noted that 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.

In 2012, a total of 28 appeals were filed with the Commission. Twelve appeals were filed under the *Forest and Range Practices Act*, 13 were filed under the *Forest Act*, two were filed under the *Wildfire Act*, and one was filed under the *Private Managed Forest Land Act*. No appeals were filed under either the *Range Act*.

A total of 38 appeals were completed during 2012. Regarding the total number of appeals completed, the Commission issued eight final decisions, including four consent orders. In addition, 30 appeals were withdrawn.

In addition to the eight final decisions, the Commission issued one decision on an application for costs, and three unpublished preliminary decisions in 2012. Two of those preliminary decisions granted applications to adjourn hearings, and one granted an application for an extension of time to file an appeal.

Appeals	
Open Appeals at period start	24
Open Appeals at period end	14
Appeals filed	
Appeals filed under the *Forest and Range Practices Act*	12
Appeals filed under the *Forest Act*	13
Appeals filed under the *Private Managed Forest Land Act*	1
Appeals filed under the *Range Act*	0
Appeals filed under the *Wildfire Act*	2
Total appeals filed	**28**
Appeals Closed	
Withdrawn or abandoned	30
Final decisions on the merits	4
Consent orders	4
No jurisdiction/standing	0
Total appeals closed	**38**
Hearings held on the merits of appeals	
Oral hearings completed	1
Written hearings completed	1
Total hearings held on the merits of appeals*	**2**
Published decisions issued*	
Final decisions (excluding consent orders)	
Forest and Range Practices Act	2
Forest Act	0
Private Managed Forest Land Act	1
Range Act (dismissed, no jurisdiction)	0
Wildfire Act	1
Consent orders	
Forest and Range Practices Act	0
Forest Act	4
Private Managed Forest Land Act	0
Range Act	0
Wildfire Act	0
Costs decisions	
Forest and Range Practices Act	1
Total published decisions issued	**9**

*Note: hearings held and decisions issued in 2012 do not necessarily reflect the number of appeals filed in 2012.

Summaries of Decisions

January 1, 2012 ~ December 31, 2012

Appeals are not heard by the entire Commission; rather 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 the appeal in a fair and impartial manner.

Under all of the statutes under 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 was 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.

It is important to note that the Commission encourages parties to resolve the issues under 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 memorandum from the Ministry of Forests, Lands and Natural Resource Operations. 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 the 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 descriptions of some consent orders 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. 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 *Forest and Range Practices Act*

Defence of due diligence relieves licensee from responsibility for sediment flow into a fish-bearing stream

2010-FOR-001(a) Atco Wood Products Ltd. v. Government of British Columbia (Forest Practices Board, Third Party)

Decision Date: February 28, 2012

Panel: Loreen Williams, Douglas VanDine, Ken Long

Atco Wood Products Ltd. ("Atco") appealed a determination issued by the District Manager (the "District Manager"), Arrow Lakes Forest District, Ministry of Forests and Range (now the Ministry of Forests, Lands and Natural Resource Operations) (the "Ministry"). The determination arose from an incident where sediment entered Blueberry Creek from a forest service road (the "Road").

In June 2007, Atco obtained a cutting permit to harvest timber under a forest licence. Atco also obtained a road use permit that allowed it to use the Road to access and haul the timber harvested under the cutting permit. The road use permit required Atco to maintain the Road, including grading its surface and clearing ditches and culverts along the Road. Previously, the Ministry had maintained the Road. After receiving the road use permit, Atco began regular inspections of the Road.

In late September 2007, Atco performed spot grading at several locations along the Road, including near a crossing of Blueberry Creek. One week later, a Ministry Compliance and Enforcement Officer observed suspended sediment in Blueberry Creek. He also observed gravel ridges along both sides of the Road extending across the Creek crossing, and water flowing on the Road surface along the gravel ridges and into the Creek.

The next day, the Ministry initiated an investigation. The Ministry notified Atco of the investigation two days after the incident was observed. One day after Atco was notified of the investigation, Atco's Woodlands Manager attended at the site, and notified employees and contractors that hauling on the Road could only occur if it was not raining. Three days later, on the first weekday after a long weekend, Atco carried out remedial work at the site by breaching the gravel berms along the Road, and creating waterbars to direct water off of the Road surface. It also placed ballast on the Road surface over the Creek crossing.

In February 2010, the District Manager determined that Atco had contravened two sections of the *Forest Planning and Practices Regulation* (the "*Regulation*") by failing to properly maintain the Road near Blueberry Creek.

Specifically, the District Manager found that the Road's drainage system was not functional, contrary to section 79(6) (b) of the *Regulation*, and that Atco had failed to maintain the Road in a manner that was "unlikely to harm fish or to destroy, damage or harmfully alter fish habitat", contrary to section 57 of the *Regulation*. The District Manager also determined that Atco had not exercised due diligence as a defence to the contraventions, and he levied penalties of $2,000 against Atco for each of the contraventions, for a total penalty of $4,000.

Atco appealed to the Commission on the basis that there was insufficient evidence to support the District Manager's findings of contraventions, and that the defence of due diligence applied as a defence to the contraventions. Atco requested that the Commission rescind the determination and the penalties, or alternatively, rescind the penalties.

The Commission found that the Ministry's inspection and investigative practices in relation to the incident were poor. The Commission noted that the Ministry could have issued a warning or closed the Road when the incident was observed, but instead the Ministry continued with its investigation the next day. Nevertheless, the Commission found that the evidence supported the finding that Atco had failed to ensure that the Road's drainage system was "functional", contrary to section 79(6)(b) of the *Regulation*. Specifically, the Commission found that the gravel ridges observed along the sides of the Road were, on a balance of probabilities, caused by Atco's grading of the Road, and the gravel ridges caused sediment-laden water on the Road surface to flow along the Road and into the Creek.

Regarding the defence of due diligence in relation to the contravention of section 79(6)(b), the Commission found that Atco had a proper system in place to prevent the contravention from occurring, and the grader operator was trained in and understood Atco's system and its requirements. The Commission also found that Atco took reasonable steps to ensure the effective operation of its system, including undertaking regular inspections of the Road. In the vicinity of the Creek crossing, Atco had conducted at least four inspections between the time when the grading was completed and the incident was observed. The evidence established that the gravel ridges were small enough that they were difficult to notice. For all of those reasons, the Commission concluded that Atco had exercised due diligence, and therefore, Atco had a full defence to the contravention.

Regarding the second contravention, the Commission found that the evidence did not support a finding that Atco had contravened section 57 of the *Regulation*. The Commission found that the gravel ridges along the Road were small, were made during a fisheries "window" when work in or about a stream is least likely to cause harm to fish, and were made during a relatively dry period. In that context, the Commission found that the gravel ridges were "unlikely to harm fish or destroy, damage or harmfully alter fish habitat", as contemplated by section 57.

Focusing on the interpretation of the word "unlikely" in section 57, the Commission held that the situation did not create a real possibility or a reasonable expectation of harm to fish or fish habitat. Consequently, the Commission concluded that Atco had complied with section 57 of the *Regulation*.

- Accordingly, the determination and associated penalties were rescinded, and the appeal was allowed.

Salvage licensee penalized for cutting reserve trees and not fully utilizing cut trees

2011-FOR-003(a) Greg Schacher v. Government of British Columbia

Decision Date: April 30, 2012

Panel: Alan Andison

Greg Schacher appealed a determination of contravention and penalty issued by the District Manager, Okanagan Shuswap Forest District, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry").

Mr. Schacher owns and operates a cedar shake business. He makes roofing shakes by cutting cedar logs into blocks and then hand splitting the blocks into shakes. In 2004 or 2005, Mr. Schacher walked to a remote site in the Puddingbowl Creek area and saw some dead standing cedar trees that he

could use to make shakes. The site had limited vehicle access, and timber harvested from the area would have to be removed by helicopter.

In 2007, Mr. Schacher gave instructions to Mr. Franklin, his brother-in-law, to apply to harvest an estimated 30 cubic metres of Crown salvage timber in the Puddingbowl Creek area. Mr. Schacher requested Mr. Franklin to submit the application because Mr. Schacher worked for the Ministry at the time.

The Ministry issued a licence authorizing the harvest of up to 30 cubic metres of standing dead or damaged cedar in a specific area. All other timber was defined in the licence as "reserved" and could not be cut. The licence included a schedule of conditions, including that the licensee was required to "utilize the entire log". There was no provision for harvesting trees to provide access to the site.

Harvesting began in September 2007. Felled trees were transported by helicopter to a landing, where they were processed into smaller blocks. Debris from processing was burned near the landing. In November 2007, the Ministry amended the licence to allow the harvest of 45 cubic metres of dead or damaged cedar, at the licensee's request.

In 2008, the Ministry received a public complaint that a salvage operation had left waste and debris at Puddingbowl Creek. The Ministry inspected the site and initiated an investigation.

The District Manager determined that Mr. Schacher had contravened section 52 of the *Forest and Range Practices Act* (the "Act") by cutting, damaging and destroying Crown timber without authorization. Specifically, the District Manager found that several reserve trees had been cut, some standing trees had been damaged by a debris pile burn and useable portions of trees were left at the site. The Ministry scaled 67 logs/trees at the harvest and landing sites that were cut, damaged or destroyed without authorization. Subsequently, Mr. Schacher hired his own scaler to attend the site. His scale results differed significantly in terms of volume and grade from the Ministry's results. Based on the Ministry's scale, the District Manager levied a penalty of $3,994.93. He determined that Mr. Schacher was 75% responsible for the contravention, and ordered him to pay 75% of the penalty, which amounted to $2,996.20.

Mr. Schacher appealed to the Commission on the basis that the District Manager made several mistakes and there were errors in the Ministry's timber scale. Specifically, Mr. Schacher submitted that: (1) he never intended to use the entire log, and the Ministry was aware that he intended to harvest cedar for shake blocks only; (2) the application contained an "estimate" of the volume to be harvested, and he should not be held accountable to an estimate; (3) the word "harvest" is not defined in the licence, and should be interpreted to reflect his intention to harvest wood for shakes; (4) the Ministry scaler did not scale the logs in accordance with established scaling standards, and failed to account for the amount of rot in the logs; (5) the District Manager erred by preferring the Ministry's scale over the more accurate scale performed by Mr. Schechter's scaler; (6) the District Manager implicitly acknowledged that the Ministry's scaling results were inaccurate; and (7) the District Manager incorrectly applied the penalty formula in the legislation. Mr. Schacher did not challenge the Government's evidence regarding the alleged contravention; rather, he offered explanations for his decisions and actions. Mr. Schacher requested that the Commission order the Government to pay his costs associated with the investigation and appeal.

At the appeal hearing, the Government agreed that the penalty should be reduced because three logs should not have been included in the penalty calculation, and the Government would be issuing a stumpage invoice to Mr. Schacher for some of the scaled logs. However, the Government submitted that Mr. Schacher contravened section 52 of the *Act* by cutting and damaging trees near the helicopter

landing area, cutting reserved timber, and leaving substantial amounts of cut timber at the site.

The Commission first considered whether Mr. Schacher contravened section 52 of the *Act*. The Commission found that the initial estimate of the volume to be harvested became a term of the licence that was enforceable. Although the word "harvest" is not defined in the licence, it is commonly understood to mean the cutting and removal of trees, not the cutting and removal of the desired or valuable portion of the trees, and Mr. Schacher should have been aware of that. In addition, the licence states that words not defined in it have the meaning given to them under the *Act* and its regulations. The *Forest Planning and Practices Regulation* defines "harvest" to include "felling trees", which is contrary to the assertion that only the portion of the tree that is removed from the site counts towards the harvest volume under the licence. By signing the licence, the licensee accepts the terms and conditions of the licence, which may not be exactly what the licensee sought in its application, as the Ministry has the discretion to add terms and conditions that it considers appropriate. The licensee is responsible for complying with the terms and conditions of the licence, or requesting an amendment if required, and in this case the only amendment requested was for an increase in the volume that could be harvested. There was undisputed evidence that reserved trees were cut, standing trees were damaged by a debris burn pile, and the entire log was not utilized in many instances. Mr. Schacher cut more than 45 cubic metres in order to remove that amount of cedar for shakes. Based on the evidence, the Commission found that Mr. Schacher contravened section 52.

Next, the Commission considered what volume and grade of wood was cut, damaged or destroyed contrary to section 52. Both the Ministry's scaler and Mr. Schechter's scaler testified and provided detailed evidence. Their scaling approaches and results were significantly different. The Commission preferred the evidence of the Ministry's scaler based on her experience and knowledge, and because her approach complied with the *Scaling Regulation* and accepted practices in the Ministry's Scaling Manual. However, the Commission found that three logs should not have been included in her scale, because they were likely felled before Mr. Schacher began harvesting.

Regarding the penalty, the Commission agreed with the Government's submission that a penalty levied under section 71(2) of the *Act* cannot include stumpage revenue that is recoverable under section 103 of the *Forest Act*.

The Commission concluded that the penalty should be reduced by deducting the amount of stumpage that would be billed to Mr. Schacher. The Commission rejected the request to deduct an amount for the three logs that should not have been included, because the District Manager had already reduced the potential penalty by 33 percent to account any errors in the Ministry's scaling.

Finally, the Commission denied Mr. Schacher's application for costs. The Commission held that its authority to award costs is limited to costs associated with an appeal, and not costs associated with an investigation.

Regarding Mr. Schacher's appeal costs, the Commission found that the circumstances did not warrant an award of costs.

- Accordingly, the penalty was reduced to $1,858.24 with the Government's consent, the appeal was dismissed, and the application for costs was denied.

Appeals under the *Forest Act*

Stumpage rate appeals resolved by consent without the need for a hearing

2011-FA-006(a), 2011-FA-007(a), 2011-FA-008(a) Western Forest Products Inc. v. Government of British Columbia

Decision Date: March 21, 2012

Panel: Alan Andison

Western Forest Products Inc. ("Western") appealed three separate stumpage rate determinations issued on June 29, 2011 by the Timber Pricing Business Analyst, Coast Area, Ministry of Forests, Lands and Natural Resource Operations "the "Ministry"). The stumpage rates applied to timber harvested under cutting permit ("CP") 196 for a tree farm licence located on west central Vancouver Island.

Western appealed on the grounds that the Timber Pricing Business Analyst (the "Analyst") had excluded certain road, culvert and bridge reconstruction costs associated with the Harrison Main Line. Western submitted that the reconstruction work was required to haul timber from a particular cutblock within CP 196 to the Spencer Creek appraisal log dump, which the Ministry had previously selected as the appraisal log dump for that cutblock. The Spencer Creek appraisal log dump is closer, via the Harrison Main Line, to the cutblock than an alternate route to the Coleman Creek appraisal log dump. The Ministry had previously disallowed the inclusion of the cutblock into a cutting permit that was tributary (by road) to the Coleman Creek appraisal log dump. Western argued that the Analyst erred by excluding the reconstruction costs associated with Harrison Main Line, which was the route the Ministry had designated as the shortest haul distance to the Spencer Creek appraisal log dump.

On receipt of the appeals, the Commission held them in abeyance to give the parties time to resolve the issues in the appeals. Subsequently, the parties negotiated an agreement to settle the appeals.

- Accordingly, by consent of the parties, the Commission ordered that the three stumpage rate determinations were rescinded, and the matters were remitted back to the Timber Pricing Business Analyst with directions to re-determine the stumpage rates by including a cost estimate for the reconstruction of part of Coleman Road, as the main access road for CP 196.

2011-FA-011(a) Western Forest Products Inc. v. Government of British Columbia

Decision Date: April 19, 2012

Panel: Alan Andison

Western Forest Products Inc. ("Western") appealed a stumpage rate determination issued on December 12, 2011 by the Regional Appraisal Coordinator, Coast Area, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The stumpage rate applied to timber harvested under cutting permit ("CP") 640 of a tree farm licence located on northern Vancouver Island.

In determining stumpage rates for timber in the Coast Region, the Ministry must apply the policies and procedures set out in the Coast Appraisal Manual ("CAM"). In this case, section 5.3.2.1 of the CAM provided that "where the total road development cost calculated in an appraisal or reappraisal is greater than $\$14.00/m^3$, the licensee and regional manager may agree that only a portion of an estimated road development cost will be used in the appraisal or reappraisal of the cutting authority area and that the balance of the estimated road development cost will be used in the appraisal or reappraisal of one or more tributary cutting authority areas."

In determining the stumpage rate applicable to timber harvested under CP 640, the Regional

Appraisal Coordinator did not apportion Western's total estimated road development costs of $1,104,725; rather, he applied it fully to CP 640.

Western appealed on the grounds that the Regional Appraisal Coordinator erred by failing to apportion the total estimated road development costs associated with CP 640. Specifically, Western submitted that CP 640 qualified for an extended road amortization agreement pursuant to section 5.3.2.1 of the CAM because the total estimated road development costs were greater than $14.00/m^3, and therefore, the costs should have been apportioned.

Western requested that $224,358 of the costs be apportioned to CP 640, and $880,367 be apportioned to future tributary cutting authority areas.

On receipt of the appeal, the Commission held it in abeyance to give the parties time to resolve the issues in the appeal. Subsequently, the parties negotiated an agreement to settle the appeal. The parties agreed that a total of $923,651.45 in estimated road development costs would be apportioned as follows: $5,801.60 to CP 640; and $917,849.85 to another cutting permit.

- Accordingly, by consent of the parties, the Commission ordered that the stumpage rate determination was rescinded, and the matter was remitted back to the Regional Appraisal Coordinator with directions to re-determine the stumpage rate by applying an apportioned cost of $5,801.60 to CP 640.

Appeals under the *Private Managed Forest Land Act*

Resort development on private land triggers an obligation to pay an exit fee due to declassification of the land as managed forest

2012-PMF-001(a) Oceanview Golf Resort & Spa Ltd. v. Private Managed Forest Land Council

Decision Date: June 22, 2012

Panel: Loreen Williams

Oceanview Golf Resort & Spa Ltd. (the "Appellant") owns five parcels of land in Nanaimo, BC. The Appellant is in the process of developing the land, which was previously managed as private forest land. The development process engages a number of processes, including those in the provincial legislation regulating private managed forest land and the City of Nanaimo's development approval process.

When the Appellant's corporate predecessor, Cable Bay Lands Inc. ("Cable Bay"), purchased the land, it was classified as "managed forest" under the *Assessment Act*. The managed forest class of property was established to encourage land owners to manage their forest land for long-term forest production. Land classified as managed forest is taxed at a lower rate than other classes of land, such as residential land. Owners can enter and exit their land from the managed forest class by providing notice to the Private Managed Forest Land Council (the "Council") and meeting certain requirements under the *Private Managed Forest Land Act* (the "*PMFL Act*") and its regulations. One of the requirements for entry is to submit a forest management commitment to the Council for approval. When private managed forest land is sold, the land will be declassified under section 24 of the *Assessment Act* if the buyer fails to submit a new management commitment to the Council. When land is declassified

or withdrawn from the managed forest class, the buyer may be liable under the *PMFL Act* and *Private Managed Forest Land Regulation* (the "*Regulation*") to pay an exit fee, if the land was managed forest land for less than 15 consecutive years and none of the exemptions in section 3 of the *Regulation* apply. The Council calculates the exit fee, which is paid by the land owner to the appropriate municipal government.

In 2005, Cable Bay purchased the land, and failed to submit a management commitment to the Council for approval. As a result, the land was declassified as managed forest land.

In 2007, the land was reclassified as managed forest land after Cable Bay submitted a management commitment that was approved by the Council.

In January 2008, parcels 3 and 4 of the land were declassified as managed forest land after Cable Bay requested their withdrawal. Cable Bay paid an exit fee to Nanaimo for the withdrawal.

In September 2008, Nanaimo passed a new Official Community Plan ("OCP") Bylaw that included designation of the Appellant's land as a resort centre, which is the first phase in the development process. In addition, Nanaimo requested that all of the Appellant's land be withdrawn from the managed forest class due to the future land uses proposed under the Master Plan, because section 21 of the *Act* prohibits local governments from adopting a bylaw in respect of private managed forest land that would restrict a forest management activity.

In January 2010, at Cable Bay's request, parcels 3 and 4 were reclassified as managed forest land.

In February 2010, Nanaimo approved a Master Plan for the proposed development by way of an amendment to the OCP Bylaw, which is the second phase in the development process. The Master Plan, which was negotiated by Nanaimo and the Appellant, designates portions of the Appellant's land for future use as park land, rights of way and public utilities.

In January 2011, at the Appellant's request, all of its land was declassified as managed forest land.

In April 2011, the Council notified the Appellant that the exit fee for declassification of the land was $312,957.20.

The Appellant requested that the Council reconsider the exit fee determination.

In November 2011, the Council issued a reconsideration decision, which upheld the Council's April 2011 decision regarding the exit fee.

The Appellant appealed the reconsideration decision to the Commission. The Appellant raised three main arguments:

- no exit fee should be payable because the Appellant's land was private managed forest land for more than 15 consecutive years when the Appellant/Cable Bay purchased the land;
- section 2(1) of the *Regulation* should be interpreted as requiring the Council to refrain from levying an exit fee until the development process has concluded, such that the portion of land that will be "gifted" to Nanaimo as parkland is known; and
- the portion of the land that will be "gifted" to Nanaimo or subject to a right of way or easement under the Master Plan should be exempt from the exit fee under sections 3(1)(a) and (c) of the *Regulation*.

The Appellant requested that the Commission rescind the Council's reconsideration decision and exempt all of the Appellant's land from the exit fee; or alternatively, recalculate the exit fee based on exemptions for the portions of land that are designated for future use as parks, public utilities and right of ways.

The Commission found that, when the Appellant's land was declassified in 2011, it had not been classified as managed forest land for more than 15 consecutive years, and therefore, it was not exempt from the exit fee under section 2(5) of the *Regulation*.

Although Cable Bay may have intended for the land to remain in the managed forest class when it purchased the land in 2005, Cable Bay's failure to file a management commitment for the land, as required by the legislation, led to the declassification. The Commission found that Cable Bay should have been aware of the applicable legal requirements, and the Appellant, as Cable Bay's corporate successor, cannot seek an exemption under section 2(5).

In addition, the Commission held that the legislative framework requires the Council to determine the exit fee when the land is declassified, rather than at a future date when the development process is complete. In particular, the language in section 2(1) of the *Regulation* requires the Council to determine the exit fee when the land is declassified under the *Assessment Act*. The Council has no discretion to delay the determination of the exit fee, and even if it did, the process would be unmanageable because the Council would have to monitor proposed developments to determine when they are complete. The Commission also found that delaying the determination of the exit fee would be contrary to the statutory scheme, which encourages owners of private forest land to manage their land for forestry over the long term in return for a lower tax rate on the land.

Finally, the Commission held that when the Appellant's land was declassified in 2011, none of it fell within the exemptions in sections 3(1) (a) or (c) of the *Regulation*. Section 3(1) states that the exemptions apply to declassified land that "is" gifted to a government or "is" subject to a right of way or easement. When the Appellant's land was declassified, none of it had been transferred to Nanaimo. Furthermore, the OCP Bylaw could be amended in the future to change the land uses contemplated in the Master Plan. Consequently, the designations in the Master Plan should not be taken as certainties upon which exemptions from the exit fees may rest.

▶ Accordingly, the appeal was dismissed.

Appeals under the *Range Act*

No decisions were issued under the *Range Act* during the report period.

Appeals under the *Wildfire Act*

Licensee responsible for contraventions after a prescribed burn escapes the intended burn area and damages Crown forest resources

2008-WFA-005(a) Louisiana-Pacific Canada Ltd. v. Government of British Columbia

Decision Date: January 10, 2012

Panel: Robert Wickett, Bruce Devitt, R.A. (Al) Gorley

Louisiana-Pacific Canada Ltd. ("LP") appealed a determination issued by the Manager, South East Fire Centre, Ministry of Forests and Range, (now the Ministry of Forests, Lands and Natural Resource Operations), (the "Ministry"), that LP had contravened two sections of the *Wildfire Regulation* (the "*Regulation*").

The contraventions were in relation to a prescribed burn ignited by LP under a plan that was approved by the Ministry. The plan authorized LP to burn slash on a cutblock. The plan did not include a "wet line", which involves sprinklers and/or personnel with water hoses to contain the fire. Rather, Mr. King, LP"s manager in charge of the prescribed burn, retained a retired Ministry staff member with fire fighting expertise (the "Consultant") to assist in planning and supervising the burn.

On September 27, 2006, the burn was ignited following a test burn, based on instructions from Mr. King with the Consultant's concurrence. Immediately, the fire began burning much more

intensely than expected, and large fuels ignited. The Consultant concluded that the fire could not be controlled and would escape the intended burn area. Mr. King was unable to start the two water pumps at the burn site. In an attempt to minimize what they considered to be the fire's inevitable escape, the Consultant suggested that they ignite an area adjacent to the burn site, to burn off fuel and attempt to pull the two fires towards one another at the centre of the cutblock. Mr. King accepted that advice and ignited the adjacent area, however that second ignition did not successfully contain the fire. Mr. King remained at the site until dark, at which time the fire appeared to stabilize. On September 28, 2006, LP took some further steps to contain the fire, including requesting a helicopter and Ministry firefighters to help fight the fire. The helicopter arrived late in the day. That evening, high winds caused a spot fire in an adjacent cutblock.

On September 29, 2006, Ministry firefighters began working at the site. On September 30, no effort was made to fight the fire due to severe winds. The fire continued to spread over the next few days, as more spot fires ignited. The fire was fully extinguished by rain and snow on October 6, 2006. In total, 47.6 hectares of Crown land were affected by the fire, and 8388 cubic metres of Crown timber were destroyed or damaged.

Following a Ministry investigation, the Manager issued the determination and penalties. He found that LP had contravened: section 23(3)(a) of the *Regulation* by igniting the area outside of the prescribed burn area in an attempt to stop the escape, when such action was not necessary or required; section 23(3)(b) of the *Regulation* by allowing the fire to escape; and section 23(4)(a) of the *Regulation* by failing to immediately carry out fire control and extinguish, if practicable, the escaped prescribed burn. The Manager also found that LP could not rely on the statutory defences of due diligence or officially induced error. The Manager levied a penalty of $10,000 against LP for contravening section 23(3), a further penalty of $10,000 for contravening section 23(4), and he required LP to pay $1,128.18 for Crown resources that were damaged or destroyed as a result of the contraventions.

The Commission found that igniting the area adjacent to the intended burn area was not part of the burn plan.

However, the Commission also found that igniting the adjacent area was a response to the immediate concern of an escape, and as such, was not the result of misunderstanding or disregarding the burn plan. In that context, the Commission held that LP"s actions were not the type of "mischief" that is intended to be addressed by section 23(3)(a) of the *Regulation*. The Commission found that Mr. King and the Consultant reasonably concluded that the fire was out of control, and that immediate fire control action was necessary to mitigate damage from the anticipated escape. Consequently, the Commission concluded that igniting the adjacent area did not breach section 23(3)(a) of the *Regulation*. However, the Commission held that there was no dispute that LP allowed the fire to escape the intended burn area, contrary to section 23(3)(b) of the *Regulation*.

Next, the Commission considered whether LP failed to immediately carry out fire control and extinguish the fire, if practicable, once the fire escaped. The Commission found that, when LP ignited the prescribed burn, it did have all of the resources on site that were required by the burn plan to prevent an escape. Specifically, LP did not have the required number of personnel, length of hose, or a 1000-litre portable water tank. The Commission concluded that LP did not immediately undertake fire control activities on September 27 or 28, 2006, before the onset of high winds, contrary to section 23(4)(a) of the *Regulation*, because LP was not in a position to do so.

Regarding the statutory defences, the Commission found that the defence of due diligence

did not apply to LP, because the contraventions were foreseeable, and LP lacked a proper system and procedures to avoid the contraventions. The Commission also found that LP failed to check the moisture level in large fuels at the site before igniting the prescribed burn. In addition, the Commission found that the defence of officially induced error did not apply, because there was no evidence of any erroneous representation of law by the Ministry in relation to LP, and there was no evidence of a mistake of fact.

In addition, the Commission rejected LP"s arguments that the Manager was biased, and that there was an excessive delay in the Ministry's investigation and issuance of the determination.

Finally, the Commission concluded that the penalty should be reduced by $5,000 based on its finding that LP did not breach section 23(3)(a) of the *Regulation*.

- Accordingly, the appeal was allowed, in part.

Appeals of Commission Decisions to the Courts

January 1, 2012 ~ December 31, 2012

British Columbia Supreme Court

Standard of Review – Reasonableness

During this report period, the Court issued five judgments on appeals of Commission decisions under the *Forest Act* and the *Wildfire Act*. Appeals to the Supreme Court from decisions of the Commission under these Acts are provided for under section 141 of the *Code* on a question of law or jurisdiction. In each of these five decisions, which involve very different facts and different legislation, the Court considered the "Standard of Review" that should be accorded to the Commission when the Court is reviewing Commission decisions. In each case, the Court upheld the Commission's decision and concluded that decisions from the Commission should be accorded a significant amount of deference; that is, Commission decisions should be reviewed on a reasonableness standard, rather than the less deferential standard of correctness. The Court was able to reach this conclusion in each of these decisions because the Commission decisions met the standard of reasonableness that was articulated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, as follows: ***reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process***. In each case the Court was able to conclude that the Commission's decisions were "transparent and intelligible", and that the Commission was interpreting its home statute or a related statute that was closely connected to the Commission's function. The Court also recognized the special expertise that the Commission has in adjudicating forestry related matters. Accordingly, the Court determined that it should not interfere with the Commission's decisions when it meets this standard of reasonableness in its decision-making process.

"Snag" tree on power line causes forest fire

Telus Mobility Inc. v. British Columbia (Minister of Forests and Range) and Forest Appeals Commission
Decision date: March 29, 2012
Court: BCSC, Justice Russell
Citation: 2012 BCSC 459

Telus Mobility Inc. ("Telus") appealed a decision of the Commission to the BC Supreme Court. The decision involved whether Telus was liable under the *Wildfire Act* for fire control costs incurred by the Ministry of Forests and Range (the "Ministry"), and Crown timber losses, arising from a forest fire.

Telus holds a licence of occupation on Crown land to "construct, maintain and use" a power line that runs along a Forest Service Road. The power line supplies electricity to a Telus communications tower. In July 2006, a dead tree or "snag" fell on the

power line, causing a power failure. Telus' contractor was alerted to the power failure and went to the site. As he drove to the site, he was stopped by Ministry officers because a forest fire had occurred at kilometre 4.4 of the power line. The fire was caused by the snag falling on the power line. The snag caused insulators to break, resulting in a conductor falling to the ground and igniting the fire, which grew to over 380 hectares in size.

A Forest Official with the Ministry determined that Telus had failed to maintain its utility line equipment as required under section 10(a) of the *Wildfire Regulation* (the "*Regulation*"). He ordered Telus to pay for the Ministry's fire control costs, and the value of the Crown timber that was damaged or destroyed by the fire. Those costs totalled over $2 million. Telus appealed the Forest Official's determination to the Commission.

At the parties' request, the Commission heard only the matter of liability. Specifically, the Commission considered: (1) whether section 10(a) of the *Regulation* imposes on Telus the obligation to engage in site maintenance, such as the removal of snags from or near the power line right-of-way, so as to prevent their interference with the power line, thereby reducing the risk of wild fires; (2) whether the statutory defence of due diligence applied to Telus in the circumstances; and (3) whether the design and construction of the power line was defective. Telus argued that it did not contravene section 10(a) of the *Regulation*, because that section does not impose a duty with respect to vegetation maintenance; rather, it imposes a maintenance obligation with respect to "equipment, apparatus and material" only. Alternatively, Telus submitted that the statutory defence of due diligence applied in the circumstances.

In *Telus Mobility Inc. v. Government of British Columbia* (Decision No. 2009-WFA-002(a), issued October 4, 2010), the Commission confirmed the Forest Official's finding that Telus contravened section 10(a) of the *Regulation*. In particular, the Commission held that section 10(a) of the *Regulation* deals with the risk of fire ignition on, or adjacent to, "the site". Section 10(a) specifically refers to "the site" and not just the utility transmission equipment. The Commission found that, for ignition to occur, both the equipment and site combine to produce the appropriate conditions. The evidence established that trees or snags falling on overhead power lines are a known source of potential line failure and fire, and that fire prevention measures in utility transmission operations typically include a vegetation management program involving regular right-of-way inspections, brush removal, and identification and removal of snags that may fall onto power lines. The obligations on a transmission utility operator under section 10(a) of the *Regulation* include both preventive and reactive maintenance, and there was no evidence that Telus had a program of preventive vegetation management for the power line. On the other two issues, the Commission found that Telus failed to exercise due diligence, and the design and construction of the power line was not defective.

Telus appealed the Commission's determination on the first issue to the Court.

The Court first considered the standard of review that should apply to the Commission's decision. In determining the appropriate standard, the Court applied the test set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Court found that the standard to be applied to decisions of the Commission when it is interpreting its own statute, or a related statute, is reasonableness, which means that the Court must defer to the Commission's findings. The Court held that this standard applies even when the Commission is deciding a question of law, with the exception of questions of jurisdiction. In the present case, the reasonableness standard applies because the Commission is a specialized tribunal and was interpreting statutes that are closely connected to

the Commission's function, and with which it has particular familiarity.

Next, the Court considered whether the Commission erred in interpreting section 10(a) of the *Regulation* to include an obligation to maintain the site's vegetation. The Court concluded that, when the *Wildfire Act* and the *Regulation* are read in their entirety, in their ordinary and grammatical sense and harmoniously with the scheme and object of the legislation, the Commission's interpretation fell within a range of possible, acceptable outcomes, and the Commission justified its decision in a transparent and intelligible manner. The Court concluded that the Commission's interpretation of section 10(a) to include an obligation to maintain the site's vegetation was reasonable.

Finally, the Court considered whether the Commission erred in interpreting section 10(a) of the *Regulation* to include a vegetation maintenance obligation that Telus could not legally undertake. Telus argued that this was so, because it was required under the *Forest and Range Practices Act* and its licence of occupation to obtain permission before felling timber on Crown land. The Court held that the requirement to obtain permission before removing timber in a utility right-of-way does not result in an interpretation of the *Regulation* that would make compliance impossible. Compliance is possible, with permission. In the event of an emergency, Telus could remove a hazard without permission, and discuss the matter with the Crown afterwards. The defence of necessity would be open to Telus, should an issue arise after the fact. In cases where Telus is denied permission, it would have the defence of due diligence. The Court concluded, therefore, that the Commission's interpretation of section 10(a) the *Regulation* in that regard was also reasonable.

▶ Accordingly, the Court dismissed the appeal.

Method of harvest affects stumpage rate

Province of British Columbia v. International Forest Products Limited and Forest Appeals Commission

Decision date: May 22, 2012

Court: BCSC, Justice Brown

Citation: 2012 BCSC 746

The Province of British Columbia (the "Province") appealed a decision of the Commission to the BC Supreme Court. The decision relates to the stumpage rate that International Forest Products Limited ("Interfor") should pay for harvesting Crown timber in a cutting permit ("CP") area on Northern Vancouver Island. The appeal concerned the interpretation of provisions of the Coast Appraisal Manual ("CAM"). The CAM sets out the policies and procedures that apply to stumpage appraisals in the Coast Region. The CAM is approved by the Minister of Forests, Lands and Natural Resource Operations under section 105(1) of the *Forest Act*, and has the force of law.

The process for determining stumpage rates begins with the licensee sending an appraisal data submission to the Ministry of Forests, Lands and Natural Resource Operations (then the Ministry of Forests and Range). In April 2007, Interfor sent an appraisal data submission for the CP to the Ministry. In the appraisal data submission, Interfor estimated that 34 percent of the timber volume would be harvested by cable yarding, and the rest would be harvested by ground-based methods. Cable yarding is generally more expensive than ground-based harvesting methods, and it generally causes less disturbance of moist soils. In May 2007, the Ministry used the appraisal data submission to determine that a stumpage rate of $17.59 per cubic metre applied to sawlogs harvested under the CP, effective April 30, 2007.

Subsequently, Ministry staff inspected the CP area, and observed that there had been less harvesting by cable yarding than indicated in the appraisal data submission. The Ministry determined

that there had been a change in harvesting method, from cable yarding to a ground-based method, in excess of 15 percent of the total volume harvested, and therefore, a "changed circumstance" under section 3.3.1(1)(a) of the CAM had occurred and a reappraisal of the stumpage rate was required.

The Ministry requested that Interfor provide a reappraisal data submission reflecting the change in volume harvested by cable yarding. However, Interfor disputed that a "changed circumstance" had occurred, and re-sent its original appraisal data submission to the Ministry.

In May 2009, the Ministry conducted a reappraisal and determined that a stumpage rate of $19.96 per cubic metre applied to sawlogs harvested under the CP, effective May 1, 2007. The Ministry based the reappraisal on its estimate that four percent of the total volume had been harvested by cable yarding, representing a 30 percent change to the harvesting method of the total volume.

Interfor appealed the reappraisal to the Commission, and requested that the original stumpage rate be restored on the basis that: (1) there had been no "changed circumstance" under section 3.3.1(1)(a) of the CAM; and (2) even if there was a changed circumstance, section 3.3.1.2 of the CAM specified that the effective date of the reappraisal was May 1, 2007, and the original appraisal data submission should be used in a reappraisal because there was no change in the site conditions between April 30, 2007 (the effective date of the original stumpage determination) and May 1, 2007 (the effective date of the reappraisal).

The Government submitted that a changed circumstance had occurred because Interfor harvested at least 15 percent more volume by ground-based methods than was indicated in the original appraisal data submission.

In *International Forest Products Ltd. v. Government of British Columbia* (Decision No. 2009-FA-007, issued June 16, 2011), the Commission rescinded the reappraisal and ordered that the original stumpage rate should be restored. Specifically, the Commission considered the words in section 3.3.1(1)(a) of the CAM based on the principles of statutory interpretation. The Commission found that the words "plans" and "is planned" indicate an intention to do something, and are prospective or forward looking. The Commission considered whether there was evidence that Interfor's plan or intentions with respect to harvesting methods had changed after it submitted the original data appraisal submission. The Commission held that Interfor's staff estimated the percentage of harvesting by cable yarding based on their knowledge of the site and the typical weather conditions at the site when harvesting would occur. The Commission found that there was no evidence that, sometime after submitting the original data submission, Interfor planned or intended to use a different method to harvest at least fifteen percent of the total volume. Rather, the site conditions when harvesting occurred were unusually dry, and the contractor was able to do more ground-based harvesting than was originally planned. The Commission held that, if the Minister had intended that evidence of the actual volumes harvested by different methods should trigger a changed circumstance reappraisal, the Minister should have clearly said so in the CAM.

In addition, the Commission found that, if a reappraisal was required, section 3.3(2) of the CAM indicates that the reappraisal would look at the CP area as if the trees were still standing, as the area was on the effective date of the reappraisal, i.e. May 1, 2007. Given that there was no difference in the CP area conditions between April 30, 2007 and May 1, 2007, the original appraisal data submission would be used.

The Province appealed the Commission's decision to the BC Supreme Court.

The Court first considered the standard of review that applied to the Commission's decision. It held that the BC Court of Appeal's decision in *Western*

Forest Products Limited v. HMTQ, 2009 BCCA 354, establishes that, where the Commission is interpreting the provisions of the CAM, the applicable standard of review is that of reasonableness, which means that the Court must defer to the Commission's findings. In addition, the Court applied the test set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Court found that the reasonableness standard applies in this case, because the Commission is a specialized tribunal that hears appeals under forestry legislation, it has expertise in interpreting and applying the CAM that the Court does not have, and the Commission was interpreting a law that is closely connected to the Commission's function. The Court distinguished the Court's previous decision in *Pope & Talbot v. British Columbia*, 2009 BCSC 1715, on the basis that the issue in that case was one of general importance to the legal system as a whole, and did not engage the Commission's specialized expertise.

Next, the Court considered whether the Commission's interpretations of sections 3.1.1(1)(a) and 3.3(2) of the CAM were reasonable. It concluded that the Commission's interpretations were reasonable, because they fell within the range of possible acceptable outcomes, and were defensible in respect of the facts and law.

- The appeal was dismissed, and the Commission's decision was upheld.

Distance to "Log Dump" affects stumpage rate

Western Forest Products Inc. v. Forest Appeals Commission and Province of British Columbia
Decision date: May 28, 2012
Court: BCSC, Justice Johnston
Citation: 2012 BCSC 772

Western Forest Products Inc. ("Western") appealed a decision of the Commission to the BC Supreme Court. The decision relates to the stumpage rate that Western should pay for harvesting Crown timber in nine cutting permit ("CP") areas on the West Coast of Vancouver Island near Jordan River. The appeal concerned the interpretation of provisions of the Coast Appraisal Manual ("CAM").

Under the CAM, stumpage rates are affected by variables, and the variable at issue in this case was the selection of the appraisal log dump. The stumpage rates were determined using a version of the CAM that incorporates the market pricing system ("MPS"). The MPS is an equation-based model that uses data from past winning bids for Crown timber sold through a competitive bidding process. Data from competitive timber sales are applied in calculating stumpage rates for timber held under long-term tenures, such as the nine CPs in this case, which are not sold through a competitive bidding process. The truck haul distance is a variable in the MPS equation in the CAM. The truck haul distance variable is the volume weighted average one-way haul distance from the geographic centre of the CP area to the appraisal log dump. The farther the appraisal log dump is by road from the CP area, the longer the truck haul distance. All other variables being equal, the longer the truck haul distance between the CP area and the appraisal log dump, the lower the stumpage rate. The phrase "appraisal log dump" is defined in the CAM, but the parties disputed how that definition should be interpreted and applied for the purpose of selecting the appropriate appraisal log dump.

In this case, Western had proposed that the Shoal Island log dump on the East Coast of Vancouver Island was the appropriate choice of appraisal log dump for the nine CPs, but the Regional Appraisal Coordinator, Ministry of Forests (the "Ministry"), selected the Jordan River log dump as the appraisal log dump. The Jordan River log dump is 70 to 80 kilometres closer to the CP areas than the Shoal Island log dump, and this significantly increased the amount of stumpage that Western had to pay to the

Province. The Jordan River log dump is owned by Western, and was used almost exclusively by Western during the relevant time period. Most of the timber harvested from the nine CP areas was hauled to the Jordan River log dump.

Western appealed the stumpage rate determinations to the Commission, on the grounds that the Regional Appraisal Coordinator erred by selecting the Jordan River log dump rather than the Shoal Island log dump as the appraisal log dump. Western submitted that the Jordan River log dump was not a reasonable choice because it was unavailable to any operator other than Western. Western argued that in choosing an "appraisal log dump" as defined in the CAM, the market pricing system requires the selection of the closest log dump by road to the centre of the CP area that is operational and generally available to all licensees, which in this case was the Shoal Island log dump.

The Ministry submitted that the definition of "appraisal log dump" in the CAM provides the Regional Appraisal Coordinator with no discretion when selecting an appraisal log dump. The Coordinator must pick the closest log dump by road to the centre of the CP area, which in this case was the Jordan River log dump.

In *Western Forest Products Inc. v. Government of British Columbia* (Decision Nos. 2005-FA-002(a), 003(a), 009(a), 010(a), 048(a), 078(a), 131(a); 2006-FA-020(a) and 031(a), issued May 19, 2011), the Commission considered two issues: (1) whether the Regional Appraisal Coordinator exercises discretion when selecting the appraisal log dump; and if so, (2) whether the Coordinator exercised his discretion in an unreasonable manner when he selected Jordan River as the appraisal log dump for the CPs. Applying the principles of statutory interpretation to the relevant provisions of the CAM, the Commission held that the Regional Appraisal Coordinator exercises discretion when selecting an appraisal log dump, and in this case, he exercised his discretion in a reasonable manner when he selected Jordan River as the appraisal log dump.

Specifically, the Commission found that section 4(e) of the *Ministry of Forests and Range Act* requires the Ministry to assert its financial interests in Crown forest resources in an equitable manner. However, the equitable application of the CAM may result in different stumpage rates for different licensees harvesting different stands of timber from the same general area. The Commission also found that "appraisal log dump" is defined in the CAM to mean the closest site to the CP area that is a functional log dump at the time of appraisal, and is available for use by both a hypothetical market bidder and the affected licence holder. The evidence established that the winning bids at auctions for timber located near the nine CP areas were appraised to the Jordan River log dump despite that fact that those bidders did not use that log dump, and those winning bids were used to develop the CAM equations that applied in this case. There was no reason why a hypothetical winning bidder, participating in a hypothetical timber auction, could not have made a winning bid that took into account the haul distance to the Jordan River log dump.

In addition, the Commission found that section 4.1(1) of the CAM requires the Regional Appraisal Coordinator to select the appraisal log dump that will result in the highest stumpage rate that a hypothetical winning bidder would pay if the timber were sold at an auction. In this case, the Jordan River log dump was the appropriate choice because it was the closest log dump to the nine CP areas that was functional and available to a hypothetical winning bidder at the time of appraisal, and it resulted in a higher stumpage rate than if the Shoal Island log dump was selected. In conclusion, the Commission confirmed the nine stumpage rate determinations.

Western appealed the Commission's decision to the BC Supreme Court. Western argued that the Commission exceeded its jurisdiction

by finding that the Jordan River log dump was the proper appraisal log dump, given that other licensees harvesting timber near the nine CP areas were appraised to Shoal Island, in the absence of a policy or procedure in the CAM that would permit different treatment to similarly situated licensees. Western also argued that the Commission erred in law in concluding that the Jordan River log dump was available to at least one hypothetical winning bidder when there was no evidence to support such a conclusion.

The Court applied the test set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9. The Court also noted that the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, had seriously weakened Western's argument that the Commission exceeded its jurisdiction. On the jurisdictional issue, the Court held that the Commission was interpreting its home statutes (the CAM and the *Forest Act*) and a related statute (the *Ministry of Forests and Range Act*) when it reached its conclusions about the Regional Appraisal Coordinator's determinations, and the Commission's interpretations were well within the range of reasonable outcomes.

Next, the Court considered whether the Commission erred in law when it found that the Jordan River log dump was available for use by a hypothetical winning bidder. The Court concluded that the Commission's finding was reasonable. The Court found that the Commission's reasons indicate that it included Western as a hypothetical winning bidder, and it considered that a private forest land owner had occasionally used the Jordan River log dump. The Commission also referred to evidence that the Jordan River log dump was selected as an appraisal log dump for auctioned timber sales that were used to generate the equations in the CAM. The Court held that there was evidence upon which the Commission could have found that the Jordan River log dump was available to a hypothetical winning bidder, and there was no dispute that it was a functioning log dump. The Court also held that to exclude Western from consideration as a hypothetical winning bidder would be illogical.

- Accordingly, the appeal was dismissed and the Commission's decision was upheld.

Controlled burning of debris piles causes forest fire but was it a contravention of the *Regulation*?

Province of British Columbia v. Louisiana-Pacific Canada Ltd. and the Forest Appeals Commission
Decision date: October 22, 2012
Court: BCSC, Justice Harvey
Citation: 2012 BCSC 1546

Louisiana-Pacific Canada Ltd. ("LP") appealed a decision of the Commission to the BC Supreme Court. The matter arose from the following circumstances.

In late October 2007, LP staff ignited three piles of logging debris in a cutblock. At that time, LP staff thought that snow on the cutblock would act as a fuel break to prevent the fires from spreading. One day after the fires were ignited, LP staff found that the fires had spread into the fuel break. However, LP staff decided that an adequate fuel break of snow was still in place, and the fires would not spread any further. LP staff did not take fire control action or report the spread of the fires to the Ministry of Forests and Range (the "Ministry"). A few days later, Ministry staff found that the fires had burned approximately three hectares of seedlings in the cutblock. The Ministry staff observed smoke coming from the piles and other areas in the cutblock. All of the fires self-extinguished before November 2007.

In October 2009, the Manager of the Ministry's Southeast Fire Centre (the "Manager")

determined that LP had contravened sections 22(3) and 22(4)(a), (b) and (c) of the *Wildfire Regulation* (the "*Regulation*") by failing to ensure that its fires did not escape, and by failing to take fire control action or report the fires when the fires spread beyond the burn area or otherwise became out of control. The Manager levied penalties totalling $4,230 for the contraventions.

LP appealed to the Commission.

In *Louisiana-Pacific Canada Ltd. v. Government of British Columbia* (Decision No. 2009-WFA-004(b), issued May 16, 2011), the main issue was whether LP had contravened sections 22(3) or 22(4) of the *Regulation*. On that issue, the Commission's three-person panel split 2-1 in finding that LP had not contravened the *Regulation*.

Specifically, the majority of the Commission found that the fires did not "escape" within the meaning of section 22(3) of the *Regulation*. The majority found that "escape" in that section means when a fire burns beyond the cutblock, as opposed to when a fire burns beyond the intended burn area. Although the fires spread beyond the burn area, they did not spread beyond the cutblock, and there was no damage to the environment, public property, private property or other values protected by the legislation. Since the fire did not "escape", there was no contravention of section 22(3).

In addition, the majority held that section 22(4) of the *Regulation* was unclear. Where section 22(4) states "spreads beyond the burn area or is otherwise out of control", the majority found that the word "or" was intended to mean "and". Therefore, the requirements in section 22(4) to take fire control action and report a fire are triggered when a fire is beyond the burn area and is out of control. The majority concluded that, in this case, although the fire spread beyond the burn area, the fire was never "out of control", because it was never beyond the capacity of the people or equipment required to be present, or the site conditions, to prevent further spread of the fire to forest land or other values that the legislation protects. Since the fire was not "out of control", there was no contravention of section 22(4).

Accordingly, the majority of the Commission concluded that the contraventions and penalties against LP should be rescinded.

The Province appealed the Commission's decision to the BC Supreme Court. The Province submitted that the majority of the Commission erred in law: (1) in its interpretation of the word "escape" in section 22(3) of the *Regulation*; and (2) when it replaced the word "or" in section 22(4) with the word "and". The parties agreed that the appropriate standard for the Court to apply in reviewing the Commission's decision was that of "reasonableness", which means that the Court recognized the Commission's specialized expertise and would give some deference to the Commission's reasons for its decision.

The Court concluded that the majority's interpretation of the word "escape" in section 22(3) was reasonable, because it was in accordance with the principles of statutory interpretation and was within the range of possible acceptable outcomes. The Court also held that the majority's interpretation of section 22(4) was reasonable and accords with the legislative intent underlying the *Regulation*.

- Accordingly, the appeal was dismissed and the Commission's decision was upheld.

Sparks from a train cause forest fire but what are the damages?

Province of British Columbia v. Canadian National Railway and Forest Appeals Commission

Decision date: December 10, 2012

Court: BCSC, Justice Armstrong

Citation: 2012 BCSC 1856

The Province of British Columbia (the "Province") appealed a decision of the Commission to the BC Supreme Court. The decision relates to a

cost recovery order issued under the *Wildfire Act*, and more specifically, the amount that Canadian National Railway ("CNR") was obligated to pay as a result of causing a fire that damaged or destroyed Crown timber.

On July 29, 2005, a CNR train caused a fire that damaged or destroyed 25,010.8 cubic metres of Crown timber. At the time of the fire, there were no approved plans to harvest the timber. In the Fall of 2006, the salvageable timber was harvested. A total of $4,874.80 in stumpage was paid for 19,809.79 cubic metres of timber, at a stumpage rate of $0.25 per cubic metre of timber.

In 2008, the Fire Centre Manager (the "Manager"), Ministry of Forests and Range, determined that CNR had contravened the *Wildfire Act* and the *Wildfire Regulation* in causing the fire. The Manager levied penalties of $1,000 for the contravention of the *Wildfire Act*, and $10,000 for the contravention of the *Wildfire Regulation*. The Manager also ordered CNR to pay $254,680.38 for the damaged or destroyed Crown timber, which was 75 percent of the timber's stumpage value at the time of the fire, as calculated by the Manager. CNR appealed to the Commission.

The parties settled several issues before the appeal was heard. The remaining issue for the Commission to decide was the value of the Crown timber that was damaged or destroyed in the fire. The parties agreed on the volume of damaged or destroyed timber, but disagreed on the applicable valuation date for the timber. CNR argued that the timber value should be based on the stumpage rate that applied when the salvaged timber was scaled, which resulted in a value of $6,252.50. In addition, CNR submitted that the Manager had jurisdiction to reduce the amount to 75 percent of the timber value, and that CNR should pay nothing for the timber because stumpage was paid when the timber was salvaged. The Government argued that the timber value should be based on the stumpage rate that applied on the date that the fire ignited, that the Manager had no jurisdiction to reduce the amount to 75 percent of the timber value, and that the claim for cost recovery under the *Wildfire Act* was unrelated to the stumpage collected when the timber was salvaged.

In *Canadian National Railway v. Government of British Columbia* (Decision Nos. 2008-WFA-001(a) & 2008-WFA-002(a), issued June 27, 2011), the Commission found that section 27(1)(c) of the *Wildfire Act* together with section 30(a) of the *Wildfire Regulation* require that the value of damaged or destroyed timber must be calculated by ascertaining the amount of stumpage applicable under the *Forest Act*. The Commission found that, under section 103(1) of the *Forest Act*, if a harvesting agreement had been in place, the damaged timber would have been valued based on the stumpage rate when the timber was scaled, which would have been $0.25 per cubic metre. The Commission also considered section 103(3) of the *Forest Act*, which describes the procedure for calculating the stumpage owing when a person "cuts, damages, destroys or removes Crown timber without authorization". Section 103(3) contemplates using the stumpage rate that "would likely have applied to the timber" under section 105(1) of the *Forest Act* "if rights to the timber had been granted under an agreement entered into under" the *Forest Act*. The Commission interpreted this to mean that the applicable stumpage rate is the one that would have applied when the timber might have been harvested. The Commission concluded, in this case, the appropriate stumpage rate is not the one that applied when the fire occurred, given that no cutting permit was in place at that time. Rather, it is the rate that would likely have applied in the future, and the most likely future rate is the one that applied when the timber was cruised or scaled; namely, $0.25 per cubic metre.

In addition, the Commission found that the Manager had no statutory authority to reduce the cost recovery order to 75 percent of the timber's

value, and nothing in the legislation indicated that the stumpage paid on the salvaged timber should be applied as a "credit" towards the amount owed by CNR. Accordingly, the Commission concluded that the cost recovery order should be for $6,252.50.

The Province appealed the Commission's decision to the BC Supreme Court. The Province argued that the Commission erred in law when it held that section 30(a) of the *Wildfire Regulation* requires the amount of stumpage applicable to damaged or destroyed timber to be ascertained on the date when the timber was scaled or might have been harvested, rather than on the date of destruction. The Province submitted that the Crown's statutory right to recover the value of damaged or destroyed timber is in the nature of common law "damages," which crystallize at the time the damage occurs.

The Court applied the standard of "reasonableness" in reviewing the Commission's decision. This meant that, for the Province to succeed, the Court had to be satisfied that the Commission's reasoning on the timber valuation question was outside of the range of possible or acceptable outcomes, and indefensible in respect of the law and facts.

The Court held that it was open to the Commission to reach a conclusion on the appropriate valuation date for the timber. The Court concluded that it was a reasonable exercise of the Commission's specialized expertise in relation to forestry statutes to make such a determination, and that it was also legally correct. The Court held that the Commission acted reasonably in concluding that common law principles on damages did not apply, because the legislation creates a complete scheme for valuing lost Crown timber, and there is clear legislative intent not to follow the common law principles on damages.

In addition, the Court found that the Commission's decision was based on factual considerations that were reasonable and adequately justified. The Commission clearly and rationally explained its decision regarding the appropriate valuation date. The Commission's specialized skill and experience qualified it to interpret the legislation and reach a different conclusion than the Manager. It was reasonable for the Commission to decide that the factors affecting the likely valuation date would have included the fact that harvesting rights would be unexercised until a cutting permit was issued.

- Accordingly, the appeal was dismissed and the Commission's decision was upheld.

British Columbia Court of Appeal

During this report period, the Court issued no judgments on appeals of Commission decisions.

Supreme Court of Canada

During this report period, the Court issued no judgments on appeals of Commission decisions.

APPENDIX I

Legislation and Regulations

Reproduced below are the sections of the *Code* 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 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 are 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, 2012). 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

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) After 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 – Corrections, 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.

Requirement to publish

85 (1) The minister must publish an annual report on enforcement activities.

(2) The minister must keep and make available to the public a performance record for holders of agreements under the *Forest Act* and the *Range Act*.

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) 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 it if 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.

Range 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 (3.1), 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) 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 Procedure Regulation
(B.C. Reg. 12/04)

Part 1 – Definitions

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 that 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 administration of

those portions of the *Forest Act* for which the Minister of Finance is not responsible,

(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. Regs. 83/2006, s. 12; 4/2010, s. 2.]

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) a 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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