# Forest Appeals Commission

# Annual Report

# 2017

BRITISH COLUMBIA

Forest Appeals Commission

Fourth Floor, 747 Fort Street
Victoria, British Columbia
Telephone: 250-387-3464
Facsimile: 250-356-9923

**Mailing Address:**
P.O. Box 9425
Stn Prov Govt
Victoria, British Columbia
V8W 9V1

The Honourable David Eby
Attorney General
Parliament Buildings
Victoria, British Columbia
V8V 1X4

The Honourable Doug Donaldson
Minister of Forests, Lands, Natural Resource Operations and Rural Development
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Ministers:

I respectfully submit herewith the Annual Report of the Forest Appeals Commission for the period of January 1, 2017 to December 31, 2017.

Yours truly,

Alan Andison
Chair
Forest Appeals Commission

AR 2017

# Table of Contents

**Canadian Cataloguing in Publication Data**
British Columbia. Forest Appeals Commission.
Annual report. — 1995-

Annual
Issue for 1995 covers: June 15 to Dec. 31.
ISSN 1205-7606 = Annual report - British Columbia. Forest Appeals Commission

1. British Columbia. Forest Appeals Commission - Periodicals. 2. British Columbia. Forest Practices *Code* of British Columbia Act - Periodicals. 3. Forestry law and legislation - British Columbia - Periodicals. 4. Administrative remedies - British Columbia - Periodicals. I. Title.

KEB345.A7F67 354.7110082'33806 C96-960175-1
KF1750.A55F67

# Message from the Chair

I am pleased to submit the Annual Report of the Forest Appeals Commission for the 2017 calendar year.

## The Year in Review – Appeals

Section 59.2(a) of the *Administrative Tribunals Act* requires the Commission to provide a review of its operations during the preceding reporting period. The Commission continues to encourage cooperation between the Government and industry, and it appears that this is occurring given the number of appeals that were closed without the need for a hearing this year. A total of 27 appeals were active during the reporting period. Of the nine appeals that were closed, three appeals were resolved by consent of the parties, two were withdrawn and one was abandoned, which meant that they did not require a hearing. The Commission applauds all private parties, Ministry officials and the Forest Practices Board for their ongoing efforts in resolving matters without the need for a hearing before the Commission.

The appeals that were heard and decided by the Commission during 2017 involved complex legal and factual issues of significant interest to the public, the forest industry and the Government. One appeal addressed whether a person should be ordered to pay the government's costs to extinguish a wildfire that the person had caused on Crown land, and whether the "due diligence" defence applied. Another involved how to value Crown timber and other natural resources that were burned in a wildfire. Also, one appeal involved the appropriate quantum of penalty for unauthorized harvesting of ecologically important Crown timber.

During this reporting period, the BC Supreme Court issued one decision on a judicial review of a Commission decision. The Commission's decision involved an appeal by Erie Creek Forest Reserve Ltd. ("Erie Creek") against a determination of contravention and administrative penalty issued by the Private Managed Forest Land Council. The contravention arose after part of a logging road that Erie Creek used and maintained had failed, resulting in two landslides that deposited debris into a fish stream. The Commission confirmed that Erie Creek had contravened section 21(3) of the *Private Managed Forest Land Council Regulation* by failing to maintain the structural integrity of the road prism and failing to ensure the proper functioning of the road's drainage systems, resulting in a material adverse effect on fish habitat. Erie Creek sought a judicial review, arguing that the Commission erred with regard to the weight given to certain evidence, and in applying the legal test for the defence of due diligence. Erie Creek also asserted that the Commission was biased against it. By consent of the parties, the Court dismissed the petition, with each party bearing their own costs.

## Plans for improving the Commission's operations

Section 59.2(h) of the *Administrative Tribunals Act* requires the Commission to report its plans for improving operations in the future. During 2017, the Commission was involved in the replacement and upgrading of the electronic appeal management system that is used by the Commission and the seven other tribunals that are jointly administered through a shared office and staff. The existing appeal management system is nearly 20 years old and its software is no longer supported. A new appeal management system will allow the shared administrative office to continue to function effectively and efficiently, using modern information technology. The Commission plans to have the new system in place in 2018.

## Forecast of workload for the next reporting period

Section 59.2(f) of the *Administrative Tribunals Act* requires the Commission to provide a forecast of the workload for the succeeding reporting period. The Commission's workload for the 2018 reporting period is expected to be consistent with the past five years. No significant increases or decreases in workload are forecast. Based on the past five years, it is expected that approximately 13 appeals will be active, 11 new appeals will be filed, and five hearings will be completed during the coming year.

## Commission Membership

The Commission membership experienced some changes during 2017. I am very pleased to welcome two new members to the Commission who will complement the expertise and experience of the outstanding professionals on the Commission. Those new members are Darrell LeHouillier and Susan Ross. Three members' appointments concluded on December 31, 2017. Those members are James (Jim) Hackett, David H. Searle, C.M., Q.C., and Michael Tourigny. I sincerely thank each of these distinguished members for their exemplary service as members of the Commission. In particular, I take this opportunity to recognize the exceptional contribution that Jim Hackett has made to the work of the Commission since he was first appointed in 1999. As a professional forester and a forest economist, he has been a key member of the Commission, bringing valued expertise to this specialized expert tribunal. His expertise, good judgement and collegiality will be truly missed by all members 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. Throughout this reporting period the members of the Commission were also cross-appointed to the Environmental Appeal Board and the Oil and Gas Appeal Tribunal, providing further opportunities for efficiency and greater use of member expertise.

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, 2017 to December 31, 2017. 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 reporting period;
- the number of appeals completed during the reporting period (i.e., final decisions issued);
- the resources used in hearing the appeals;
- a summary of the results of appeals completed in the reporting period;
- an evaluation of the review and appeal processes;
- the reporting requirements set out in section 59.2 of the *Administrative Tribunals Act*; and
- recommendations for amendments to the legislation respecting reviews and appeals.

Finally, the decisions made by the Commission during the reporting period have been summarized, any 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; and
- University of Victoria 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:

**Forest Appeals Commission**
Fourth Floor, 747 Fort Street
Victoria, British Columbia
Telephone: 250-387-3464
Facsimile: 250-356-9923

**Website address:** www.fac.gov.bc.ca

**Email address:** facinfo@gov.bc.ca

**Mailing address:**
Forest Appeals Commission
PO Box 9425 Stn Prov Govt
Victoria, British Columbia
V8W 9V1

# 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 Act*.

## Commission Membership

Commission members are appointed by the Lieutenant Governor in Council (Cabinet) under Part 2 of the *Administrative Tribunals Act*. 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 Part 2 of the *Administrative Tribunals Act*, as are other matters relating to the appointees. This Act also sets out the responsibilities of the Chair.

During the 2017 reporting period, the membership of 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, Q.C. | Lawyer | Vancouver |
| **Members** | | |
| Maureen Baird, Q.C. | Lawyer | West Vancouver |
| Lorne Borgal | Professional Agrologist (Retired) | Vancouver |
| Monica Danon-Schaffer | Professional Engineer | Britannia Beach |
| Cindy Derkaz | Lawyer (Retired) | Salmon Arm |
| Brenda L. Edwards | Lawyer | Victoria |
| Les Gyug | Professional Biologist | West Kelowna |
| James Hackett | Professional Forester | Nanaimo |
| Jeffrey Hand | Lawyer | Vancouver |
| R.G. (Bob) Holtby | Professional Agrologist | West Kelowna |
| Kent Jingfors | Environmental Consultant | Nanoose Bay |
| Darrell LeHouillier (from December 11, 2017) | Lawyer | Vancouver |
| James Mattison | Professional Engineer | Qualicum Beach |
| Linda Michaluk | Professional Biologist | North Saanich |
| John M. Orr, Q.C. | Lawyer | Victoria |
| Susan Ross (from December 11, 2017) | Lawyer | Victoria |
| Howard Saunders | Forestry Consultant | Vancouver |
| David H. Searle, C.M., Q.C. | Lawyer (Retired) | North Saanich |
| Daphne Stancil | Lawyer/Biologist | Victoria |
| Michael Tourigny | Lawyer (Retired) | Vancouver |
| Gregory J. Tucker, Q.C. | Lawyer | Vancouver |
| Douglas VanDine | Professional Engineer | Victoria |
| Reid White | Professional Biologist/Engineer (Retired) | Dawson Creek |
| Norman E. Yates | Lawyer/Professional Forester | Penticton |

## Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the public's rights and interests. 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 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, professional development, 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, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

## Commission Resources

The fiscal 2017/2018 budget for the operations of the Forest Appeals Commission, Environmental Appeal Board, and Oil and Gas Appeal Tribunal, together with the shared office and staff that support those tribunals along with five other tribunals, was $2,083,000.

## 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, and names of other witnesses giving evidence in a hearing may also be included. The Commission's decisions 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 *Administrative Tribunals Act* as well as 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 three 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*, the *Wildfire Act*, and the *Range Act*. When an appeal is filed by someone other than the Board under those 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 *Forest and Range Practices Act* and the *Administrative Tribunals Act*. Previously, the Commission's mandate, and its basic powers and procedures, were set out in the *Forest Practices Code of British Columbia Act*. As of December 17, 2015, the mandate of the Commission, including the requirement to submit this Annual Report, is set out in Part 8.1 of the *Forest and Range Practices Act*. Part 8.1 also specifies which sections of the *Administrative Tribunals Act* apply to the Commission. In addition, Part 8.1 of the *Forest and Range Practices Act* sets out the requirement to notify and add the Forest Practices Board to certain appeals, the time limit for the Forest Practices Board to file an appeal, and the authority of the Commission to add parties to an appeal.

According to section 140.2 of the *Forest and Range Practices Act*, the following provisions in the *Administrative Tribunals Act* apply to the Commission: Parts 1, 2, 4 (except sections 22, 25, in some cases 33, and 34(1) and (2)), 6 (except sections 47.1 and 47.2), 7, 8, sections 59.1, 59.2, and Part 10 (except section 62). These provisions of the *Administrative Tribunals Act* establish the basic structure, powers and procedures of the Commission, as well as the Commission's ability to

make rules of practice and procedure, order document disclosure, summon witnesses, and order costs, among other things. Section 24 of the *Administrative Tribunals Act* establishes the time limit for filing an appeal, except for appeals filed by the Forest Practices Board. Additional procedural details, and the content requirements for this Annual Report, are provided in Parts 3 and 4 of the *Administrative Review and Appeal Procedure Regulation*, B.C. Reg. 12/04 (the "*Regulation*").

It is important to note that the powers and procedures in Part 8.1 of the *Forest and Range Practices Act*, the specified provisions of the *Administrative Tribunals Act*, and the *Regulation*, which generally apply to all appeals heard by the Commission, are subject to some exceptions in the specific Acts under which the Commission hears appeals. Most importantly, provisions in each of the *Forest and Range Practices Act*, the *Forest Act*, the *Private Managed Forest Land Act*, the *Range Act*, and the *Wildfire Act* specify what types of decisions may be appealed, who may file an appeal, whether parties or interveners may be added to an appeal, and the Commission's powers in deciding the merits of an appeal.

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 Practice and Procedure Manual setting out the Commission's policies, and has created Rules of Practice and Procedure pursuant to section 11 of the *Administrative Tribunals Act*. These documents contain more details and information about the Commission's policies and procedures. These 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. Both the Practice and Procedure Manual and the Rules of Practice and Procedure are posted on the Commission's website.

## 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, Natural Resource Operations and Rural Development, the Minister of Forests, Lands, Natural Resource Operations, and Rural Development, 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, Natural

Resource Operations and Rural Development, 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 a 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, and;
- amendments to a grazing licence or grazing permit reducing the number of animal unit months due to non-compliance with a 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.

## Appeals under the *Private Managed Forest Land Act*

Approximately 2% 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 established 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 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 managed forest 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

During this reporting period, there were no legislative changes that affected the Commission's powers or procedures, or the types of appeals that the Commission hears.

# Evaluation and Recommendations

Under section 27 of the *Administrative Review and Appeal Procedure Regulation* and section 140.3(1)(b) and (c) of the *Forest and Range Practices Act*, 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. In addition, section 59.2(g) of the *Administrative Tribunals Act* requires the Commission to report any trends or special problems it foresees.

During this reporting period, the Commission issued a decision in an appeal involving the appropriate quantum of penalty for unauthorized harvesting of Crown timber with important ecological values (*Forest Practices Board v. Government of British Columbia (M.G. Logging & Sons Ltd., Third Party)*, Decision No. 2016-FRP-001(a), February 10, 2017). The appeal was filed by the Forest Practices Board, which has the authority to appeal enforcement decisions and penalties imposed by the government under the *Forest and Range Practices Act* and other specified forest-related legislation. The Forest Practices Board was established by the Legislature in 2005 as the public's "watchdog" on forest practices in British Columbia, and to represent the public interest.

During the hearing of the appeal, the Forest Practices Board requested, among other things, that the Commission consider making a recommendation to the Minister in its annual report that "penalty determinations be published in order to meet the administrative justice goal of general deterrence." The Commission noted the Forest Practices Board's request at the conclusion of its decision on the appeal, and stated that it would consider the request during its annual review of the appeal process and its decisions.

The Commission also notes that the Forest Practices Board addressed this issue in its December 2017 report titled "Special Report: Opportunities to Improve the Forest and Range Practices Act". In that report, the Forest Practices Board recommended that all penalty determinations under the *Forest and Range Practices Act* and the *Wildfire Act* be made public "to promote compliance in the regulated community and to contribute to public confidence in enforcement."

The Commission concurs with the Forest Practices Board's recommendation that all penalty determinations under the *Forest and Range Practices Act* and the *Wildfire Act* be published. The Commission also believes that all contraventions and penalties under those Acts, the *Forest Act* and the *Range Act* should be published. Publishing such information would be consistent with the administrative justice goal of general deterrence, would promote compliance in the regulated community, and would improve the transparency of penalty determinations. Accordingly, the Commission recommends that all determinations of contraventions and penalties under the *Forest and Range Practices Act*, *Forest Act*, *Range Act*, and *Wildfire Act* be published.

# Statistics

## Forest Appeals Commission

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

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

In addition, section 59.2(c) of the *Administrative Tribunals Act* requires the Commission to report details on the nature and number of appeals and other matters received or commenced by the Commission during this reporting period.

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, which are included in a separate line in the statistics below.

In 2017, a total of 18 new appeals were filed with the Commission. Four appeals were filed under the *Forest and Range Practices Act*, eight were filed under the *Forest Act*, and six were filed under the *Wildfire Act*. No new appeals were filed under the *Range Act* or the *Private Managed Forest Land Act*.

A total of nine appeals were completed during 2017. In regard to those appeals, the Commission issued three final decisions that were published on the Commission's website. In addition, three appeals were resolved by consent of the parties. Two appeals were withdrawn, and one appeal was abandoned.

| | |
|---|---|
| **Appeals** | |
| Open Appeals at period start | 9 |
| Open Appeals at period end | 18 |
| **Appeals filed** | |
| Appeals filed under the *Forest and Range Practices Act* | 4 |
| Appeals filed under the *Forest Act* | 8 |
| Appeals filed under the *Private Managed Forest Land Act* | 0 |
| Appeals filed under the *Range Act* | 0 |
| Appeals filed under the *Wildfire Act* | 6 |
| **Total appeals filed** | **18** |
| **Appeals Closed** | |
| Withdrawn or abandoned | 3 |
| Final decisions on the merits | 3 |
| Consent orders | 3 |
| Rejected | 0 |
| **Total appeals closed** | **9** |
| **Hearings held on the merits of appeals** | |
| Oral hearings completed | 2 |
| Written hearings completed | 0 |
| **Total hearings held on the merits of appeals*** | **2** |
| **Published decisions issued*** | |
| Final decisions (excluding consent orders) | |
| *Forest and Range Practices Act* | 1 |
| *Forest Act* | 0 |
| *Private Managed Forest Land Act* | 0 |
| *Range Act* | 0 |
| *Wildfire Act* | 2 |
| Consent orders | |
| *Forest and Range Practices Act* | 3 |
| *Forest Act* | 0 |
| *Private Managed Forest Land Act* | 0 |
| *Range Act* | 0 |
| *Wildfire Act* | 0 |
| Decisions on preliminary applications | |
| *Forest and Range Practices Act* | 0 |
| *Forest Act* | 8 |
| *Private Managed Forest Land Act* | 0 |
| *Range Act* | 0 |
| *Wildfire Act* | 0 |
| **Total published decisions issued** | **14** |
| **Total unpublished decisions issued** | **11** |
| **Total decisions issued** | **25** |

**Note:**

* Hearings held and decisions issued in 2017 do not necessarily reflect the number of appeals filed in 2017.

# Performance Indicators and Timelines

Sections 59.2(b) and (d) of the *Administrative Tribunals Act*, respectively, require the Commission to report on performance indicators, and provide details of the time from filing or commencement to decision of the appeals and other matters disposed of by the Commission during this reporting period.

The Commission strives to facilitate the early resolution of appeals, and the resolution of appeals without the need for a hearing, to reduce the time and expenses associated with appeals for all parties. The Commission is pleased to report that two-thirds of the appeals that closed during this reporting period were resolved without the need for a hearing. As a result, the parties and the Commission avoided the time and expenses associated with a hearing in those cases.

Regarding the appeals that were concluded without the need for a hearing, the time elapsed between the filing of the appeal and the closure of the appeal was an average of 285 days. Regarding appeals which involved a hearing on the merits, the time elapsed from the filing of the appeal until the final decision was issued was an average of 474 days. The overall average for all appeals concluded during this reporting period was 348 days.

# Summaries of Decisions

## January 1, 2017 ~ December 31, 2017

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.

In some cases, the Commission will be asked to make certain preliminary or pre-hearing orders or decisions before the matter proceeds to a hearing, for example, to deal with procedural issues or make orders to assist the parties in preparing for a hearing.

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 reporting period, and summaries of those decisions, please refer to the "Decisions" page on the Commission's website.

# Appeals under the *Forest and Range Practices Act*

## Penalty increased for unlawful harvesting of environmentally significant trees

**2016-FRP-001(a) Forest Practices Board v. Government of British Columbia (M.G. Logging & Sons Ltd., Third Party)**

**Decision Date:** February 10, 2017

**Panel:** Alan Andison, Howard Saunders, Reid White

The Forest Practices Board (the "FPB") appealed a determination issued by the Acting District Manager (the "Manager"), Prince George Operations, Ministry of Forests, Lands and Natural Resource Operations. The Manager determined that M.G. Logging & Sons Ltd. (the "Company") contravened sections 52(1) and 52(3) of the *Forest and Range Practices Act* (the "*FRPA*") by cutting and removing Douglas-fir trees that were to be retained according to a timber sale licence ("TSL") held by the Company. The Manager levied an administrative penalty of $3,500 against the Company for the contraventions.

The TSL authorized the Company to harvest Crown timber in an area within the Prince George Forest District. The TSL specified that all Douglas-fir trees must be retained except where retention would impede road building, felling, decking or safety. In early 2013, the Company cut and removed, without authority, most of the Douglas-fir on the site while harvesting under the TSL.

Following an investigation by Ministry staff, and after giving the Company an opportunity to be heard, the Manager concluded that the Company's sole director, Mr. Goncalves, was instructed by Ministry staff during a pre-work meeting, and was reminded during harvesting, that the Douglas-fir were not to be harvested. Mr. Goncalves admitted that he instructed the Company's logger to harvest Douglas-fir. 522 Douglas-fir stumps were found on the site, including 135 stumps harvested after Mr. Goncalves was warned. 281 cubic metres of Douglas-fir were unlawfully harvested. Allowing a 10% reduction for incidental damage that may normally occur during harvesting, the Manager concluded that the volume of unauthorized harvest was 253 cubic metres.

In calculating the penalty, the Manager considered the factors listed in section 71(5) of the *FRPA*. The Manager found that there were no previous contraventions of a similar nature by the Company, the magnitude of the contravention was significant because the Douglas-fir trees were reserved for biodiversity reasons, the contraventions were repeated and deliberate, and Mr. Goncalves cooperated with the investigation but made no effort to correct the contraventions. The Manager also found that the Company received an economic gain of $509.60 from the contravention. The Manager calculated the maximum penalty that could be imposed would be $50,600 (253 cubic metres multiplied by $200), based on section 13(2) of the *Administrative Orders and Remedies Regulation* (the "*Regulation*"). However, after taking into account the circumstances and the objective of deterrence, the Manager imposed a penalty of $3,500.

The FPB appealed the Manager's determination on the basis that the penalty was far too low. The FPB submitted that the penalty should be increased substantially to reflect the seriousness of the contravention, particularly based on new evidence regarding the environmental values that were affected by the unauthorized harvest. The FPB also argued that the Manager should have considered evidence of previous contraventions of a similar nature by Mr. Goncalves personally and other companies he controlled. In addition, the FPB submitted that the Manager failed to properly calculate the maximum penalty under section 13(2) of the *Regulation*, and the $3,500 penalty was too low to compensate the Crown for its ecological losses.

The Commission found that administrative penalties are intended to encourage compliance with the legislation, by providing specific deterrence in respect of the contravener as well as general deterrence in respect of the industry. In addition, administrative penalties for unauthorized timber harvesting have the purpose of compensating the Crown for loss or damage to its resources. These overall purposes, in addition to the specific factors under section 71(5) of the *FRPA*, should be considered when assessing administrative penalties.

Regarding the relevance of the maximum penalty in assessing the appropriate penalty, section 71(2) of the *FRPA* states that a penalty may be levied that "does not exceed a prescribed amount", and in this case, the prescribed amount is calculated under section 13(2) of the *Regulation*. However, the Commission noted that there are three different ways to calculate the maximum under section 13(2), and the resulting maximums vary depending on which formula is used and the circumstances of the case. Also, there is no legal requirement to calculate the maximum penalty before assessing an administrative penalty, and the maximum penalty is of questionable relevance in determining the seriousness of the contravention. The Commission concluded that the factors listed in section 71(5), and the objectives of deterrence and compensation, provide a more suitable framework for assessing administrative penalties.

Next, the Commission considered whether previous contraventions by Mr. Goncalves in his personal capacity, and by closely related companies of which he was the controlling mind, should be considered "previous contraventions of a similar nature by the person" for the purposes of section 71(5)(a) of the *FRPA*. A violation ticket was issued to Mr. Goncalves in 2013 for unauthorized harvesting of Crown timber, and a compliance notice was issued to M.G. Logging Ltd. in 2010 for mismarking timber. Mr. Goncalves is the sole director of M.G. Logging Ltd.

The Commission found that a previous "contravention" includes any compliance or enforcement action recorded by the Ministry. A violation ticket is clearly a "contravention". The Commission also found that official warnings and compliance notices are contraventions, although the weight given to them in a penalty determination will vary with the circumstances. Regarding the meaning of "by the person" in section 71(5)(a) of the *FRPA*, the Commission found that this phrase is limited to the person who is the subject of the determination, and not directors or officers of a corporate person, or other corporations. However, the Commission held that it is consistent with the objectives of encouraging compliance, and deterring non-compliance, to consider previous non-compliance by a director, an officer, or a closely related company. However, to ensure procedural fairness, the person who is going to be the subject of the determination should be notified, before the penalty is determined, that such past contraventions are being considered, so that the person may make submissions at the opportunity to be heard.

In the present case, the Commission found that the violation ticket issued to Mr. Goncalves in 2013 involved circumstances in which he did not direct the unauthorized harvesting, but it showed that he had previous experience with unauthorized

harvesting and he had not been deterred from future noncompliance. The Commission found that the compliance notice issued to M.G. Logging Ltd. in 2010 was not sufficiently relevant to warrant consideration in the present penalty assessment.

Turning to the factors under section 71(5) of the *FRPA*, the Commission agreed with the Manager's findings that there were no previous contraventions of a similar nature by the Company, that the magnitude of the contravention was significant, and that Mr. Goncalves cooperated with the investigation but made no effort to correct the contravention. Based on new expert evidence regarding the environmental impact of the contravention, the Commission found that the Douglas-fir trees were ecologically important to the local area, which is near the northern limit for Douglas-fir, and it would take 50 to 100 years for the environment to recover. The Commission also found that the contraventions were continuous and repeated, and there was a high to very high degree of deliberateness, especially regarding the 135 trees harvested after Mr. Goncalves was reminded to retain Douglas-fir. Regarding the economic benefit from the contravention, the Commission estimated that the Company actually lost $2,144.38 based on the stumpage paid on the merchantable volume of Douglas-fir harvested.

Considering all of those factors, and the objectives of deterrence and compensating the Crown for the loss of resources and environmental values, the Commission decided that the penalty should be increased as follows: $6,000 for deterrence; plus $21,128.76 for compensation for lost biodiversity values. Loss of timber values was not included in this penalty, because that loss was addressed through the stumpage paid by the Company.

- Accordingly, the Commission varied the Manager's determination by increasing the penalty to $27,128.76. The appeal was allowed.

## Inadequate road drainage and clearcut logging leads to landslide and penalty

### 2016-FRP-004(a) Weyerhaeuser Company Ltd. v. Government of British Columbia

**Decision Date:** June 27, 2017

**Panel:** Alan Andison

Weyerhaeuser Company Ltd. ("Weyerhaeuser") appealed a determination issued by the District Manager (the "Manager"), Okanagan Shuswap Natural Resource District, Ministry of Forests, Lands and Natural Resource Operations. The Manager determined that Weyerhaeuser contravened section 9(1)(c)(iv) of the *Forest Road Regulation* (the "*Road Regulation*"), section 67(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*"), section 37 of the *Forest Planning and Practices Regulation* (the "*Planning Regulation*"), and sections 46(1) and 52(1) of the *Forest and Range Practices Act* ("*FRPA*"). The Manager levied administrative penalties totalling $14,500 against Weyerhaeuser for the contraventions.

The matter arose from a landslide that occurred in April 2012, in the vicinity of Sugar Lake about 50 km east of Vernon, BC. Between August 2011 and February 2012, Tolko Industries Ltd. ("Tolko") harvested a cutblock in the area. Originally, the harvesting rights for the cutblock were held by Weyerhaeuser, which had constructed the logging road to the cutblock in 2002 and 2003. The harvesting rights were transferred to Tolko in 2004, and the road permit was transferred to Tolko in 2005.

Tolko reported the landslide to the Ministry after being alerted to it by a resident. The landslide occurred downslope from the area Tolko had harvested, and the associated road. The landslide caused soil and timber to slide downhill, causing scouring of a stream channel, soil damage, and the loss of Crown timber and regenerating trees.

Following an investigation by Ministry staff, and after giving Weyerhaeuser (and Tolko) an opportunity to be heard, the Manager concluded

that Weyerhaeuser's road construction was a primary cause of the landslide. An inadequate number and placement of drainage structures on the road directed increased water flows towards the area where the slide originated. Consequently, Weyerhaeuser contravened the *Code* and the *Road Regulation*, which were in force when the road was built.

In addition, the Manager found that Tolko's clearcut logging of the cutblock also contributed to the landslide by increasing the timing and peak flow of runoff during a period of warm weather. However, the Manager found that the landslide, and resulting damage to Crown timber and the environment, were potential liabilities to Weyerhaeuser that were accruing as of the date when it transferred the harvesting rights and road permit to Tolko. As such, Weyerhaeuser also contravened the *FRPA* and the *Planning Regulation*, despite that fact that this legislation was not in force when the road was built.

In addition, the Manager concluded that Weyerhaeuser did not take all reasonable care to prevent the contraventions, and therefore, the defence of due diligence did not apply. The Manager imposed the following penalties: $2,000 for contravening section 9(1) of the *Road Regulation*; $500 for contravening section 67(1) of the *Code*; $5,000 for contravening section 37 of the *Planning Regulation*; $5,000 for contravening section 46(1) of the *FRPA*; and, $2,000 for contravening section 52(1) of the *FRPA*.

Weyerhaeuser appealed the determination to the Commission.

Before the appeal was heard, Weyerhaeuser and the Government negotiated an agreement to resolve the appeal. They agreed that, although Weyerhaeuser made best efforts in constructing the logging road, Weyerhaeuser had contravened section 67(1) of the *Code* in the circumstances related to the landslide. In constructing the logging road, Weyerhaeuser allowed water to flow onto potentially unstable slopes and soil material, in contravention of section 9(1)(c)(iv) of the *Road Regulation*. The parties agreed that a penalty of $8,000 was appropriate in the circumstances. Consequently, the Commission ordered that the determination was varied, and the total penalty was reduced from $14,500 to $8,000, in accordance with the parties' agreement.

- By consent of the parties, the appeal was allowed in part.

In a companion appeal (*Tolko Industries Ltd. v. Government of British Columbia*, 2016-FRP-003(a), August 8, 2017) that was also resolved by consent of the parties, Tolko was found to have contravened the *Planning Regulation* by failing to ensure that its timber harvesting did not cause a landslide that had a material adverse effect on legislated ecological values, and a penalty of $8,000 was assessed.

## Appeal involving unauthorized timber harvesting is resolved by consent

### 2017-FRP-002(a) Glory Pit Mines Inc. v. Government of British Columbia

**Decision Date:** September 20, 2017

**Panel:** Alan Andison

Glory Pit Mines Inc. ("GPM") appealed a determination issued by the Acting District Manager (the "Manager"), Selkirk Resource District, Ministry of Forests, Lands, Natural Resource Operations, and Rural Development. The Manager determined that GPM had contravened section 52(1) of the *Forest and Range Practices Act* ("*FRPA*") by harvesting Crown timber without authorization. The Manager levied an administrative penalty of $17,887.30 against GPM for the contravention.

The matter arose from GPM's timber harvesting activities in 2015. GPM held a licence to cut Crown timber for the purpose of mineral exploration. However, during the logging operations, GPM's faller cut 1.2 hectares outside of the area covered by GPM's licence to cut.

Following an investigation by the Ministry, the Manager concluded that GPM had harvested 601.5 cubic metres of Crown timber without authorization. The Manager also concluded that the defence of due diligence did not apply, because GPM did not take reasonable steps to ascertain the boundaries of the area covered by the licence to cut. The Manager levied a penalty consisting of $14,887.30 to remove the estimated economic benefit that GPM had received from the contravention, plus an additional $3,000 to act as a deterrent.

GPM appealed the determination to the Commission. GPM acknowledged that it had contravened section 52(1) of the *FRPA*, but argued that the penalty should be reduced to $3,000 because GPM received no economic benefit from the contravention.

Before the appeal was heard, GPM and the Government negotiated an agreement to resolve the appeal. Based on the parties' agreement, the Commission issued an order confirming that GPM had contravened section 52(1) of the *FRPA*, and varying the penalty by reducing it to $7,000.

- Accordingly, by consent of the parties, the appeal was allowed in part.

# Appeals under the *Forest Act*

## Application to summarily dimiss appeals is denied

**2017-FA-001(a) to 2017-FA-008(a) Canadian Forest Products Inc. v. Government of British Columbia**
**Decision Date:** June 22, 2017
**Panel:** Alan Andison

Canadian Forest Products Ltd. ("Canfor") appealed eight stumpage rate redeterminations issued in 2017 by an employee of the Ministry of Forests, Lands and Natural Resource Operations. The stumpage rates applied to timber harvested by Canfor under cutting permits ("CPs") issued under a forest licence. Stumpage is a fee paid to the government for harvesting Crown timber. In determining stumpage rates for timber harvested in the Interior Region, the Ministry must apply the policies and procedures set out in the Interior Appraisal Manual ("IAM"). The original stumpage rates, which were determined in 2012 and 2013, were lower than the re-determined rates.

The re-determinations were issued in February 2017, after a delegate of the Minister of Forests, Lands and Natural Resource Operations (the "Minister") directed the original stumpage rates to be re-determined under section 105.2 of the *Forest Act*. The Minister received submissions from Canfor before issuing the direction, and the Minister issued reasons for his direction. The Minister directed the Ministry employee to re-determine the stumpage rates by taking into account water transportation (lake tow) of the harvested logs for part of the distance from the CP areas (i.e., from a log dump on Williston Lake) to the point of appraisal, rather than based on truck haul for the entire distance. Lake tow is a lower cost transportation method than truck haul, and therefore, lake tow produced a higher stumpage rate. The direction to conduct the re-determinations was preceded by a 2015 decision of the Commission regarding several other stumpage appeals by Canfor involving the issue of water transportation from the same log dump on Williston Lake (*Canadian Forest Products Ltd. v. Government of British Columbia*, Decision Nos. 2014-FA-001(a) to 009(a)). The Commission's decision was confirmed on appeal to the BC Supreme Court in November 2016 (*Canadian Forest Products Ltd. v. British Columbia*, 2016 BCSC 2202).

After Canfor appealed the re-determinations, the Government applied to the Commission for an order summarily dismissing the appeals pursuant to section 31(1) of the *Administrative Tribunals Act*.

The Government argued that the appeals were not within the Commission's jurisdiction because they were, in substance, seeking to challenge the Minister's direction, and the *Forest Act* does not provide for appeals of Minister's directions. The Government also submitted that the appeals raised the same issues that were addressed in the Commission's 2015 decision. The Government argued that the appeals gave rise to an abuse of process, and/or their substance had been appropriately dealt with in another proceeding.

The Commission found that the appeals were within its jurisdiction. Section 105.2 of the *Forest Act* required the Ministry employee to take into account the information that formed the basis of the Minister's direction, but the employee was not bound by the Minister's opinion or the reasons for the Minister's direction. The appeals were against the re-determinations, and not the Minister's direction.

The Commission also found that the appeals were not an abuse of process or an attempt to re-argue issues that that had been appropriately dealt with in another proceeding. The Commission held that the process that led to the Minister's direction did not take the place of the appeal process. In addition, the Commission held that its 2015 decision did not consider the argument that formed that basis of the current appeals. The current appeals raised an issue regarding the proper interpretation and application of a different section of the IAM than was considered in the Commission's 2015 decision, and it would be unreasonable to expect Canfor to have raised that issue in the previous appeals.

- For all of those reasons, the Commission denied the Government's application to summarily dismiss the appeals.

# Appeals under the *Private Managed Forest Land Act*

No decisions were issued under the *Private Managed Forest Land Act* during the reporting period.

# Appeals under the *Range Act*

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

# Appeals under the *Wildfire Act*

## Burning debris when unsafe to do so leads to wildfire

**2015-WFA-001(a) Madeline Oker v. Government of British Columbia**

**Decision Date:** May 2, 2017

**Panel:** Maureen Baird, Q.C.

Madeline Oker appealed a determination issued by the Deputy Fire Centre Manager (the "Manager"), Kamloops Fire Centre, Ministry of Forests, Lands and Natural Resource Operations. The determination arose from the following circumstances. In late August or early September 2012, Ms. Oker and another person burned some debris piles on Crown land near Fort St. John. On September 13, 2012, a wildfire ignited in that area. Firefighters from the Ministry extinguished the fire, which burned approximately 8.7 hectares of land.

Following an investigation by Ministry staff, the Manager offered Ms. Oker an opportunity to be heard prior to determining whether she had contravened the *Regulation*. She did not respond to the invitation.

Based on evidence provided by Ministry investigators, the Manager determined that the wildfire was likely caused by a flare up of embers from one of the debris piles. The Manager determined that Ms. Oker had contravened sections 5(1) and 10(3) of the *Wildfire Act* (the "*Act*"), respectively, by not complying with the requirements in section 21(1) of the *Wildfire Regulation* (the "*Regulation*") with respect to lighting, fueling or using an open fire, and by lighting debris piles on fire when open fires were prohibited. The Manager levied an administrative penalty of $600 against Ms. Oker for the contraventions, and ordered her to pay the Ministry's fire suppression costs of $113,776.78.

Before the appeal was heard, the Government advised that there was insufficient proof that Ms. Oker had contravened section 10(3) of the *Act*. Accordingly, the Commission rescinded that portion of the determination, and the appeal proceeded based on the issue of whether there was a contravention of section 5(1) of the *Act*.

Ms. Oker submitted that she did not contravene section 5(1) of the *Act*. She also submitted that the Manager had made various errors, including failing to consider relevant information, failing to speak with her regarding the circumstances of the fire, and relying on flawed or unreliable information from Ministry investigators. In addition, she argued that there was a lack of procedural fairness in the Manager's decision-making process, and the Ministry investigators were biased, among other things. She requested that the contravention be rescinded, the administrative penalty be waived, and the order to pay fire suppression costs be reduced or eliminated.

The appeal was conducted as a new hearing of the matter, in which both parties had an opportunity to present evidence, examine and cross-examine witnesses, and make arguments on the facts and the law. As such, the Commission found that the appeal hearing cured any procedural errors that the Manager may have made, including the alleged failure to consider relevant information.

In addition, the Commission found that Ms. Oker provided no submissions or evidence regarding the allegations of bias, and therefore, that ground for appeal was either abandoned or was not made out.

In her testimony, Ms. Oker admitted that she lit several debris piles, and one of those debris piles was the origin of the wildfire. She testified regarding how she tended the fires she had lit, and only lit them in the evening when it was cooler and there was no wind. She also advised that she had water nearby when she was burning the debris piles, she made a fuel break around each fire using a rake, and she poured water on the fires afterwards. However, she did not check the fire hazard rating or the weather report before she lit the fires. She believed that an underground tree root caused the wildfire but she admitted that, at the time, she did not know roots could cause fires to spread, and she did not feel the ground to see if it was still hot before she left the area.

Based on Ms. Oker's evidence and the evidence of the Ministry's investigators, the Commission found that Ms. Oker had contravened section 21(1)(b) of the *Regulation* by lighting a fire when it was unsafe to do so, based the conditions when she lit the debris piles. Those conditions included high temperatures, low humidity, wind, extremely dry ground conditions, and a very high fire danger rating. The Commission also fund that she contravened section 21(1)(c) of the *Regulation* by not establishing a fuel break around the debris piles. Photographs showed no evidence of a band of bare soil around the burn piles. Instead, the photographs showed burnt vegetation right up to the ashes of the debris pile. Further, the Commission found that she contravened section 21(1)(e) of the *Regulation* by not ensuring that the fire was adequately extinguished before she left the burn area. Consequently, the Commission concluded that she had not met the requirements of sections 21(1)(b),(c), and (e) of the *Regulation* contrary to section 5(1) of the *Act*.

Next, the Commission considered whether Ms. Oker had established the statutory defences of due diligence or mistake of fact. The Commission found that Ms. Oker had failed to make inquiries about the fire danger rating or the weather conditions before lighting the debris piles. Although she may have believed she took sufficient steps to establish a fuel break around the burn area and extinguish the burnt debris piles, the Commission found that neither the defence of due diligence nor mistake of fact applied based on the evidence.

Finally, the Commission reviewed the factors to be considered when assessing administrative penalties under section 27(3) of the *Act*, and concluded that the $600 administrative penalty was on the low end of the range regardless of whether it applied to one contravention or two, and was reasonable in the circumstances. Regarding the order to pay the Ministry's fire suppression costs, the Commission found that although Ms. Oker was experiencing financial hardship and may be unable to pay those costs, the legislation does not recognize an inability to pay as a basis for not ordering a person to pay for fire suppression costs. Therefore, both the penalty and the order to pay fire suppression costs were confirmed.

▶ Accordingly, the appeal was dismissed.

## Railway must pay compensation after train ignites wildfire that burns Crown timber and land

**2016-WFA-002(a) Canadian National Railway Company v. Government of British Columbia (Forest Practices Board, Third Party)**

**Decision Date:** November 2, 2017

Panel: Gregory J. Tucker, Q.C., John M. Orr, Q.C., Howard Saunders

Canadian National Railway Company ("CNR") appealed an order issued by the Deputy Fire Centre Manager, Coastal Fire Centre, Ministry of Forests, Lands and Natural Resource Operations. In 2014, one CNR's railway trains ignited a wildfire that burned 171 hectares of Crown land near Williams Lake, BC. The burnt area was designated as winter habitat for mule deer pursuant to the *Forest and Range Practices Act*, and as an old growth management area under the *Land Act*. The Manager ordered CNR to pay compensation totalling $321,929.23 under section 25 of the *Wildfire Act* and section 30 of the *Wildfire Regulation*, for the value of mature Crown timber ($141,929.23), and other forest land resources and grass land resources ($180,000), that were damaged or destroyed as a result of the fire.

Specifically, the value of the mature Crown timber was determined pursuant to section 30(a) of the *Wildfire Regulation*, which assesses the timber's stumpage value under the *Forest Act*. Section 103(3) of the *Forest Act* states that the timber value is calculated by multiplying the volume of damaged or destroyed Crown timber by the stumpage rate that "would likely have applied to the timber … if rights to the timber had been granted under an agreement entered into under" the *Forest Act*. The Manager assessed the timber value based on the stumpage rate that would have applied if the burnt area was subject to a BC Timber Sales harvesting licence. The rest of the compensation was determined pursuant to sections 30(c) and (d) of the *Wildfire Regulation*, which specify that "other forest land resources" are valued at $5,000 per hectare for protected areas and $1,000 per hectare for areas that are not protected, and the value of "grass land resources" is $500 per hectare. The burnt area was mapped and assessed based on GPS coordinates taken from a helicopter, and GIS (geographic information system) data about the timber species and volume. Field assessments were carried out to determine the impact of the fire on habitat values, but not to measure the volume of Crown timber or other resources that were damaged or destroyed.

CNR appealed the determination. CNR requested that the Commission reduce the quantity of compensation it was ordered to pay. The issues on appeal were the size of the area in which Crown timber, other forest land resources, and grass land resources were "damaged" (rather than destroyed), the appropriate stumpage rate and type of harvesting agreement for calculating the value of the damaged or destroyed Crown timber, and whether an area may be treated as both "other forest land resources" and "grass land resources" for the purposes of calculating compensation.

The Commission considered the meaning of "damage" in the context of section 25(1) of the *Wildfire Act*. The Commission found that trees without visible signs of fire damage could have suffered damage from a fire, as a fire may weaken trees and make them more susceptible to insects or disease. However, invisible damage to a tree would need to be assessed by an arborist or botanist, and in this case, there was no such evidence. Consequently, based on the available evidence, the Commission concluded that the "damaged" timber in this case consisted of timber with visible damage from the fire. The Commission also held that, under the legislation, economic loss to the Crown is not a prerequisite for establishing "damage" to Crown resources. In addition, the Commission found that it may be difficult to assess visible damage to standing trees based on an aerial view alone, and that ground-based observations would be helpful in cases such as this. Although the purpose of the habitat assessment was not to assess the volume of damaged timber, it contained information about the burn intensity in different areas which supported a finding that not all of the mature Crown timber within the burnt area was damaged or destroyed. Based on the evidence, the Commission estimated that 96% of the mature Crown timber within the burnt area was damaged or destroyed.

Turning to the appropriate stumpage rate and type of harvesting agreement for the purpose of calculating the value of the damaged or destroyed Crown timber, the Commission found that the appropriate agreement type depends on the circumstances. Recent harvesting agreements in the area near the fire were BC Timber Sales licences, and the characteristics of the burnt area would not have supported a major tenure agreement. Consequently, the Commission concluded that a BC Timber Sales licence was the appropriate type of agreement for the purposes of determining the applicable stumpage rate in this case. In calculating the applicable stumpage rate, the Commission found that the Manager already applied a cost adjustment for cable yarding in some areas, but the Manager should have taken into account additional road construction costs. Consequently, the Commission reduced the stumpage rate that applied for the purpose of calculating the timber value. Applying that stumpage rate to 96% of the timber volume in the burnt area resulted in a value of $90,047.04 for the damaged or destroyed mature Crown timber.

Finally, based on the language in the legislation, the Commission concluded that "other forest land resources" and "grass land resources" are separate categories. Although "forest land" can contain areas of grass, the tree cover must drop below a particular threshold for the land to be categorized as "grass land". Therefore, the burnt Crown land should be valued as either forest land or grass land, but not both. Based on the evidence, the Commission determined that compensation of $107,500 was due for "other forest land resources" and $6,050 was due for "grass land resources".

- Consequently, the total compensation owing was reduced to $203,597.04, and the appeal was allowed.

# Appeals of Commission Decisions to the Courts

January 1, 2017 ~ December 31, 2017

## British Columbia Supreme Court

### Erie Creek Forest Reserve Ltd. v. Forest Appeals Commission and Private Managed Forest Land Council

**Decision date:** April 11, 2017

**Court:** B.C.S.C., Registrar

**Citation:** Nelson Registry No. 18824

Erie Creek Forest Reserve Ltd. ("Erie Creek") sought a judicial review by the BC Supreme Court of a decision issued by the Commission (*Erie Creek Forest Reserve Ltd. v. Private Managed Forest Land Council*, Decision No. 2014-PMF-001(a)).

The Commission's decision involved Erie Creek's appeal against a reconsideration decision issued by the Private Managed Forest Land Council (the "Council"), which confirmed a previous determination of contravention and penalty against Erie Creek. The Council determined that Erie Creek had contravened section 21(3) of the *Private Managed Forest Land Council Regulation* (the "*Regulation*") by failing to maintain the structural integrity of a road prism and failing to ensure the proper functioning of the roads' drainage systems, resulting in a material adverse effect on fish habitat. Part of a logging road that was used and maintained by Erie Creek failed during the spring of 2012. Two slides occurred on the road within 100 metres of one another, causing damage to the road surface and depositing debris into a fish stream below the road. The Council levied an administrative penalty of $7,500 against Erie Creek and ordered it to conduct remedial work.

On appeal, Erie Creek submitted that the defences of due diligence and mistake of fact in the *Private Managed Forest Land Act* (the "*Act*") applied to absolve it from liability for the contravention, and that the penalty was inconsistent with the factors to be considered under section 26(5) of the *Act*.

For the mistake of fact defence to succeed, Erie Creek had to prove, on a balance of probabilities, that it reasonably and honestly believed in the existence of facts that, if true, would establish that it did not contravene section 21 of the *Regulation*. The Commission found that Erie Creek may have honestly believed that the road was stable after Erie Creek had repaired it in early 2011, but that belief was not a reasonable one. Erie Creek knew, or should have known, that there was a high risk of slope failure where the slides originated, and that a slope failure could have a material adverse effect on the fish stream below the road. Erie Creek was aware that the road was built many years ago when road-building standards were lower than modern standards, the road has steep side slopes, and is in an area of high precipitation. Also, in early 2011, Erie Creek repaired the road within a one kilometre stretch of where the

slides occurred, including at the point where one of the 2012 slides originated. The repairs were done to address chronic erosion. Although precipitation during spring 2012 was higher than normal, it was not unprecedented, and there was no evidence that Erie Creek had considered whether the road could withstand foreseeable high precipitation events during the winter/spring, when Erie Creek's practice was to leave the road unmonitored.

For the defence of due diligence to succeed, Erie Creek had to prove, on a balance of probabilities, that it took all reasonable steps to avoid the contravention. In particular, it had to show that it had a system to prevent the contravention from occurring, and it took reasonable steps to ensure the effective operation of that system. The Commission found that Erie Creek failed to establish that it had a system in place for assessing the risk of material harm to fish habitat from a failure of the road prism or the road's drainage systems, and determining whether action should be taken to mitigate those risks. Erie Creek provided no evidence that it considered whether measures should be taken with the road prism or drainage structures to avoid a material adverse effect on fish habitat that could foreseeably arise during the winter/spring, when Erie Creek left the road unmonitored. The road repairs conducted in early 2011 were not part of a system designed to minimize or prevent negative impacts on the environment caused by inadequate maintenance of the road.

Given that neither of the defences applied, the Commission considered whether the penalty was appropriate based on the facts and the factors to be considered under section 26(5) of the *Act*. Based on those considerations, and given that the maximum penalty is $25,000, the Commission found that the penalty should be reduced to $3,000. In particular, the Commission found that: Erie Creek reported the slides, cooperated with the Council's investigation, and took steps to repair the damage before it was ordered to do so; Erie Creek had no previous contraventions; the contravention was not deliberate or continuous; Erie Creek received no economic benefit from the contravention; and, although there was a permanent loss of fish habitat, the lost habitat was of marginal importance to fish.

In conclusion, the Commission dismissed the appeal, except for the reduction of the penalty.

Erie Creek sought a judicial review of the Commission's decision on the grounds that the Commission erred in law with regard to the weight to be given to certain evidence, and in applying the legal test for the defence of due diligence. Erie Creek also asserted that the Commission was biased against it.

- By consent of the parties, the Court ordered that the petition was dismissed, with each party bearing their own costs.

## British Columbia Court of Appeal

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

## Supreme Court of Canada

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

APPENDIX I

# Legislation and Regulations

Reproduced below are the sections of the *Forest and Range Practices Act*, and the *Administrative Review and Appeal Procedure Regulation* which establish the Commission and set out some 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*, the *Wildfire Act*, and the *Private Managed Forest Land Act*. Also included is the *Private Managed Forest Land Regulation*.

Finally, the applicable provisions of the *Administrative Tribunals Act* are included. The applicable provisions of that Act are set out in section 83.1 and Part 8.1 of the *Forest and Range Practices Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (December 31, 2017). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications. An unofficial copy of the legislation is also publicly available free of charge at www.bclaws.ca.

## *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) The board, if it so requests, has standing to be a party 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) [Repealed 2015-10-85.]

### Application of *Administrative Tribunals Act* to appeals under this Act

**83.1** In addition to the provisions of the *Administrative Tribunals Act* incorporated under Part 8.1 of this Act, section 33 of that Act applies to appeals under sections 82 and 83 of this Act.

### 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) and (4) [Repealed 2015-10-85.]

## Part 8.1 – Forest Appeals Commission

### Forest Appeals Commission continued

**140.1** (1) The Forest Appeals Commission is continued.

(2) The commission is to hear appeals under

(a) section 82 or 83, or

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

(3) 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.

### Application of *Administrative Tribunals Act*

**140.2** The following provisions of the *Administrative Tribunals Act* apply to the commission:

(a) Part 1 *[Interpretation and Application]*;

(b) Part 2 *[Appointments]*;

(c) Part 3 *[Clustering]*;

(d) Part 4 *[Practice and Procedure]*, except the following:

(i) section 22 *[notice of appeal (inclusive of prescribed fee)]*;

(ii) section 25 *[appeal does not operate as stay]*;

(iii) section 33 *[interveners]*;

(iv) section 34 (1) and (2) *[party power to compel witnesses and require disclosure]*;

(e) Part 6 *[Costs and Sanctions]*, except sections 47.1 *[security for costs]* and 47.2 *[government and agents of government]*;

(f) Part 7 *[Decisions]*;

(g) Part 8 *[Immunities]*;

(h) section 59.1 *[surveys]*;

(i) section 59.2 *[reporting]*;

(j) Part 10 *[Miscellaneous]*, except section 62 *[application of Act to BC Review Board]*.

### Mandate of commission

**140.3** (1) In accordance with the regulations, the commission must

(a) hear appeals under this Act, the *Forest Act*, the *Private Managed Forest Land Act*, the *Range Act* or the *Wildfire Act*,

(b) provide the minister with an annual evaluation of the manner in which reviews and appeals under this Act, the *Forest Act*, the *Private Managed Forest Land Act*, the *Range Act* and the *Wildfire Act* are functioning and identify problems that may have arisen under the provisions of those Acts,

(c) make recommendations to the minister annually, and at other times it considers appropriate, concerning the need for amendments to this Act, the *Forest Act*, the *Private Managed Forest Land Act*, the *Range Act* and the *Wildfire Act* and related regulations respecting reviews and appeals, and

(d) perform other functions required by the regulations.

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

(3) The minister must promptly lay the report before the Legislative Assembly if it is in session or, if it is not in session when the report is submitted, file the report with the Clerk of the Legislative Assembly.

### Time for appeal by board

**140.4** (1) If the board may appeal a decision, order or determination, the board must do so no later than 60 days after the latest of the following to occur:

(a) the original decision, order or determination;

(b) any correction of the original decision, order or determination;

(c) any review of the original decision, order or determination.

(2) The board may apply for an order under section 84 (2) no later than 60 days after the

period prescribed for section 83 (2) (b) has elapsed.

### Persons and bodies entitled to notice and to be parties to appeal

**140.5** (1) In this section, **"minister"** means the minister responsible for the administration of the section of the Act under which the decision, order or determination giving rise to an appeal was made.

(2) On receipt of a notice of appeal, the commission must give a copy of the notice of appeal to the minister.

(3) On receipt of a notice of appeal in which the board has standing, the commission must give a copy of the notice,

(a) if a person other than the board delivered the notice, to the board, or

(b) if the board delivered the notice,

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

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

(4) The following are parties to an appeal:

(a) the government;

(b) the board, if it has standing and so requests;

(c) the person who is the subject of the determination or would be the subject of the determination, if made.

(5) 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.

### Appeal by new hearing

**140.6** The commission may conduct an appeal by way of a new hearing.

### Appeal to court

**140.7** (1) A party to an appeal, or the minister, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction.

(2) An appeal under subsection (1) must be filed no later than 3 weeks after the date the person filing the appeal receives the decision of the commission.

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

(4) 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.

## *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) This Division does not 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.

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

### Part 8.1 of *Forest and Range Practices Act* applies

**146.1** Part 8.1 of the *Forest and Range Practices Act* applies to an appeal referred to in section 146 (1) or (2) of this Act.

### Parties to appeal

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

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

(b) in respect of whose agreement it is made.

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

### Repealed

**148** [Repealed 2015-10-79.]

### Repealed

**148.1 to 148.6** [Repealed 2015-10-79.]

### 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) and (5) [Repealed 2015-10-79.]

(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.

### Repealed

**149.1** [Repealed 2015-10-79.]

### 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.

### Repealed

**150** [Repealed 2015-10-79.]

### Division 2.1 – Appeals of Contraventions

#### *Forest and Range Practices Act* applies to contravention appeals

**150.1** Division 4 of Part 6 of the *Forest and Range Practices Act* applies to a correction, review or appeal under the *Forest and Range Practices Act* in respect of a contravention of this Act or the regulations under this Act.

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

**167.3** (1) Divisions 1 to 3 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) [Repealed 2015-10-82.]

## *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 natural resource officer under section 60 (1),

(b) an order of the minister under section 36 (1) or (2), 49 (1), 50 (1), 55, 60 (1), 62 (1) (b) or 63,

(c) a decision of the minister referred to in section 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) [Repealed 2014-7-62.]

(3) Part 8.1 of the *Forest and Range Practices Act* applies to an appeal under this Act.

### Interveners and board standing in appeals

**70.1** (1) In addition to the provisions of the *Administrative Tribunals Act* incorporated under Part 8.1 of the *Forest and Range Practices Act*, section 33 of the *Administrative Tribunals Act* applies to an appeal under this Act.

(2) The board has standing to be a party, if it so requests, to an appeal under this Act.

### 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) and (4) [Repealed 2015-10-160.]

### 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) [Repealed 2015-10-194.]

### 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) [Repealed 2015-10-194.]

### Procedure on appeals

40.1 (1) Part 8.1 of the *Forest and Range Practices Act* applies to an appeal under this Act.

(2) In addition to the provisions of the *Administrative Tribunals Act* incorporated under Part 8.1 of the *Forest and Range Practices Act*, section 33 of the *Administrative Tribunals Act* applies to an appeal under this Act.

(3) The board has standing to be a party, if it so requests, to an appeal under this Act.

### 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) [Repealed 2015-10-196.]

(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 *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 3 – Forest Appeals Commission Procedure

**Repealed**

16 [Repealed 2015-10-79.]

**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.

**Repealed**

18 to 20 [Repealed 2015-10-79.]

**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, and

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

[am. 2015-10-79.]

**Repealed**

22 [Repealed 2015-10-79.]

**Notice of additional parties and interveners**

23 (1) If a party is added as a party to an appeal, the commission must promptly give written

notice of the addition to the other parties and any interveners.

(2) If an intervener is invited or permitted to take part in the hearing of an appeal, the commission must promptly give written notice of the addition to the parties and any other interveners

(a) stating that the intervener has been invited or permitted to take part in the hearing, and

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

### Repealed

**24** [Repealed 2015-10-79.]

### 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.

### When commission must serve a decision in appeal under *Forest Act*

**26** The commission must serve, on the appellant and the minister, a decision in an appeal of a determination under section 146 (2) (b) of the *Forest Act* no later than 42 days after the final day 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 140.3 (2) of the *Forest and Range Practices Act*.

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

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

(b) the number of appeals completed under the *Forest Act*, the *Forest and Range Practices Act*, the *Private Managed Forest Land Act*, the *Range 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 140.3 (1) (b) of the *Forest and Range Practices Act*, and

(f) any recommendations referred to in section 140.3 (1) (c) of the *Forest and Range Practices Act*.

[am. 2015-10-79.]

## *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) [Repealed 2015-10-196.]

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

(5) [Repealed 2015-10-196.]

(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)–(14) [Repealed 2015-10-196.]

(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, or

(c) [Repealed 2015-10-196.]

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

(16) [Repealed 2015-10-196.]

### Application of Part 8.1 of *Forest and Range Practices Act*

**33.1** Part 8.1 of the *Forest and Range Practices Act* applies to an appeal under this Act.

### Repealed

**34** [Repealed 2015-10-196.]

# *Private Managed Forest Land Regulation*

## (B.C. Reg. 371/04)

### Repealed

**9** [Repealed 2015-10-79.]

### Deficiencies in notice of appeal

**10** If the chair of the commission or the chair's delegate allows a period of time to correct deficiencies in an notice of appeal under section 23 of the *Administrative Tribunals Act*, the appeal may proceed only after the earlier of

(a) the expiry of the period specified for correcting the deficiencies, and

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

# *Administrative Tribunals Act*

### Part 1 – Interpretation and Application

### Definitions

**1** In this Act:

**"applicant"** includes an appellant, a claimant or a complainant;

**"application"** includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

**"appointing authority"** means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;

**"court"** means the Supreme Court;

**"decision"** includes a determination, an order or other decision;

**"facilitated settlement process"** means a process established under section 28 *[facilitated settlement]*;

**"intervener"** means a person who is permitted by the tribunal to participate as an intervener in an application;

**"member"** means a person appointed to the tribunal to which a provision of this Act applies;

**"tribunal"** means a tribunal to which some or all of the provisions of this Act are made applicable;

**"tribunal's enabling Act"** means the Act under which the tribunal is established or continued.

### Application by incorporation

**1.1** (1) The provisions of this Act do not operate, except as made applicable to a tribunal or other body by another enactment.

(2) If another enactment refers to a provision of that enactment or of a third enactment that incorporates a provision of this Act, the reference is deemed to include a reference to the incorporated provision of this Act.

(3) If another enactment incorporates section 1 *[definitions]* of this Act,

(a) the definitions in this Act apply to provisions of this Act incorporated by the other enactment, but

(b) unless a contrary intention appears in the other enactment, the definitions in this Act do not apply to a use of a term in the other enactment outside of the incorporated provisions.

(4) Subsection (1) does not apply to this section or to section 62 *[application of Act to BC Review Board]*.

## Part 2 – Appointments

### Chair's initial term and reappointment

**2** (1) The chair of the tribunal may be appointed by the appointing authority, after a merit-based process, to hold office for an initial term of 3 to 5 years.

(2) The chair may be reappointed by the appointing authority, after a merit-based process, for additional terms of up to 5 years.

### Member's initial term and reappointment

**3** (1) A member, other than the chair, may be appointed by the appointing authority, after a merit-based and consultation with the chair, to hold office for an initial term of 2 to 4 years.

(2) A member may be reappointed by the appointing authority, after a merit-based process, as a member of the tribunal for additional terms of up to 5 years.

### Appointment of acting chair

**4** (1) If the chair expects to be absent or is absent, the chair may designate a vice chair as the acting chair for the period that the chair is absent.

(2) If the chair expects to be absent or is absent and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the chair may designate a member as the acting chair for the period that the chair is absent.

(3) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time, the appointing authority may designate a vice chair as the acting chair for the period that the chair is absent or incapacitated.

(4) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended

period of time and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the appointing authority may designate a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for the period that the chair is absent or incapacitated.

(5) If the tribunal has no chair, the appointing authority may appoint an individual, who is a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for a term of up to 6 months.

(6) In exceptional circumstances an individual may be appointed as the acting chair under subsection (5) for an additional term of up to 6 months.

(7) Subsections (3), (4) and (5) apply whether or not an individual is designated, under the Act under which the chair is appointed, to act on behalf of the chair.

(8) An individual designated or appointed under any of subsections (1) to (5) has all the powers and may perform all the duties of the chair.

### Member's absence or incapacitation

**5** (1) If a member is absent or incapacitated for an extended period of time or expects to be absent for an extended period of time, the appointing authority, after consultation with the chair, may appoint another person, who would otherwise be qualified for appointment as a member, to replace the member until the member returns to full duty or the member's term expires, whichever comes first.

(2) The appointment of a person to replace a member under subsection (1) is not affected by the member returning to less than full duty.

### Member's temporary appointment

**6** (1) If the tribunal requires additional members, the chair, after consultation with the minister responsible for the Act under which the tribunal is established, may appoint an individual, who would otherwise be qualified for appointment as a member, to be a member for up to 6 months.

(2) Under subsection (1), an individual may be appointed to the tribunal only twice in any 2 year period.

(3) An appointing authority may establish conditions and qualifications for appointments under subsection (1).

### Powers after resignation or expiry of term

**7** (1) If a member resigns or their appointment expires, the chair may authorize that individual to continue to exercise powers as a member of the tribunal in any proceeding over which that individual had jurisdiction immediately before the end of their term.

(2) An authorization under subsection (1) continues until a final decision in that proceeding is made.

(3) If an individual performs duties under subsection (1), section 10 applies.

### Validity of tribunal acts

**7.1** An act of the tribunal is not invalid because of a defect that is afterwards discovered in the appointment of a chair, vice chair or member.

### Termination for cause

**8** The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

### Responsibilities of the chair

9 The chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among its members.

### Remuneration and benefits for members

10 (1) In accordance with general directives of the Treasury Board, members must be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in carrying out their duties.

(2) In accordance with general directives of the Treasury Board, the minister responsible for the tribunal's enabling Act must set the remuneration for those members who are to receive remuneration.

## Part 3 – Clustering

### Designating clusters

10.1 (1) The Lieutenant Governor in Council may, by regulation, designate 2 or more tribunals as a cluster if, in the opinion of the Lieutenant Governor in Council, the matters that the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone.

(2) The Lieutenant Governor in Council may, by regulation, do one or both of the following:

(a) remove a tribunal from a cluster;

(b) add a tribunal to a cluster.

(3) If a tribunal is in a cluster, this Part applies to the tribunal despite any other enactment.

### Executive chair

10.2 (1) The Lieutenant Governor in Council may, after a merit-based process, appoint an executive chair to be responsible for the effective management and operation of all of the tribunals in a cluster.

(2) The executive chair has all the powers, duties and immunities of the chair of each tribunal in the cluster under an enactment.

(3) To the extent necessary to give effect to subsection (2), and subject to this Part, if a tribunal is in a cluster, any reference to the chair of the tribunal in an enactment is deemed to be a reference to the executive chair of the cluster.

(4) The executive chair holds office for an initial term of 3 to 5 years.

(5) The executive chair may be reappointed by the Lieutenant Governor in Council, after a merit-based process, for additional terms of up to 5 years.

(6) The executive chair must have all the qualifications required of a chair of any tribunal in the cluster under any enactment.

(7) The executive chair is a member of each of the tribunals in the cluster for which he or she is responsible.

### Tribunal chairs

10.3 (1) Subject to section 10.6 *[transition]*, the appointing authority may, after a merit-based process, appoint a tribunal chair for a tribunal in the cluster under the direction of the executive chair of that cluster.

(2) The term of appointment of a tribunal chair is the same as the term of appointment of the chair of the tribunal under the tribunal's enabling Act.

(3) A tribunal chair may be reappointed, after a merit-based process, on the same basis as the chair of the tribunal under the tribunal's enabling Act.

(4) The executive chair may delegate to a tribunal chair a power or duty of the chair of the tribunal under an enactment, including a power under the enactment to delegate a power or duty to another person.

(5) The tribunal chair has all the immunities of the chair of the tribunal under an enactment.

(6) The appointing authority may appoint the executive chair of a cluster to also be the tribunal chair of a tribunal in the cluster.

(7) The tribunal chair is a member of the tribunal for which he or she is appointed.

### Alternate executive chair

**10.4** (1) The Lieutenant Governor in Council may designate a member of a tribunal in a cluster, other than the executive chair of the cluster, as an alternate executive chair.

(2) If the executive chair of a cluster is absent or incapacitated, the alternate executive chair has all the powers and immunities and may perform all the duties of the executive chair.

### Validity of tribunal acts

**10.5** An act of a tribunal is not invalid because of a defect that is afterwards discovered in the appointment of an executive chair or tribunal chair.

### Transition

**10.6** (1) On the designation of a tribunal as part of a cluster under section 10.1 (1) or (2) (b) *[designating clusters]*, the individual appointed as chair under the tribunal's enabling Act is no longer appointed under the tribunal's enabling Act and is deemed to be appointed as tribunal chair under section 10.3 *[tribunal chairs]*.

(2) The term of the deemed appointment as tribunal chair under subsection (1) ends on the date the individual's appointment under the tribunal's enabling Act would have ended if the tribunal had not been designated as part of a cluster.

(3) On a tribunal in a cluster ceasing to be in any cluster, the individual appointed as tribunal chair is deemed to be the chair under the tribunal's enabling Act for the remainder of the term of his or her appointment as tribunal chair.

(4) On an individual appointed as tribunal chair being appointed as executive chair of a cluster, the individual remains the tribunal chair until his or her appointment as tribunal chair expires or is terminated.

(5) This section applies despite any other provision in this Part.

## Part 4 – Practice and Procedure

### General power to make rules respecting practice and procedure

**11** (1) Subject to an enactment applicable to the tribunal, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) respecting the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference;

(b) respecting facilitated settlement processes;

(c) respecting receipt and disclosure of evidence, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit;

(d) respecting the exchange of records and documents by parties;

(e) respecting the filing of written submissions by parties;

(f) respecting the filing of admissions by parties;

(g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an application and specifying the time within which and the manner in which the party must respond to the notice;

(h) respecting service and filing of notices, documents and orders, including substituted service;

(i) requiring a party to provide an address for service or delivery of notices, documents and orders;

(i.1) requiring an intervener to provide an address for service or delivery of notices, orders and other documents;

(j) providing that a party's address of record is to be treated as an address for service;

(j.1) providing that an intervener's address of record is to be treated as an address for service;

(k) respecting procedures for preliminary or interim matters;

(l) respecting amendments to an application or responses to it;

(m) respecting the addition of parties to an application;

(n) respecting adjournments;

(o) respecting the extension or abridgement of time limits provided for in the rules;

(p) respecting the transcribing or tape recording of its proceedings and the process and fees for reproduction of a tape recording if requested by a party;

(q) establishing the forms it considers advisable;

(r) respecting the joining of applications;

(s) respecting exclusion of witnesses from proceedings;

(t) respecting the effect of a party's non-compliance with the tribunal's rules;

(u) respecting access to and restriction of access to tribunal documents by any person;

(v) respecting witness fees and expenses;

(v.1) respecting filing and service of a summons to a witness;

(w) respecting applications to set aside any summons served by a party.

(x) requiring or allowing that a process be conducted electronically, with or without conditions.

(3) In an application, the tribunal may waive or modify one or more of its rules in exceptional circumstances.

(4) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

(5) Rules for the tribunal may be different for different classes of disputes, claims, issues and circumstances.

### Practice directives tribunal must make

12 (1) The tribunal must issue practice directives respecting

(a) the usual time period for completing an application and for completing the procedural steps within an application, and

(b) the usual time period within which the tribunal's final decision and reasons are to be released after the hearing of the application is completed.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) Practice directives must be consistent with any enactment applying to the tribunal and any rule of practice or procedure made by the tribunal.

(4) The tribunal must make accessible to the public any practice directives made under this section.

### Practice directives tribunal may make

13 (1) The tribunal may issue practice directives.

(1.1) Practice directives must be consistent with any enactment applying to the tribunal and any rule of practice or procedure made by the tribunal.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) The tribunal must make accessible to the public any practice directives made under subsection (1).

### General power to make orders

14 In order to facilitate the just and timely resolution of an application the tribunal, if requested by a party or an intervener, or on its own initiative, may make any order

(a) for which a rule is made by the tribunal under section 11,

(b) for which a rule is prescribed under section 60, or

(c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

### Interim orders

15 The tribunal may make an interim order in an application.

### Consent orders

16 (1) On the request of the parties to an application, the tribunal may make a consent order if it is satisfied that the order is consistent with the enactments governing the application.

(2) If the tribunal declines to make a consent order under subsection (1), it must provide the parties with reasons for doing so.

### Withdrawal or settlement of application

17 (1) If an applicant withdraws all or part of an application or the parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.

(2) If the parties reach a settlement in respect of all or part of the subject matter of an application, on the request of the parties, the tribunal may make an order that includes the terms of settlement if it is satisfied that the order is consistent with the enactments governing the application.

(3) If the tribunal declines to make an order under subsection (2), it must provide the parties with reasons.

### Failure of party to comply with tribunal orders and rules

18 If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:

(a) schedule a written, electronic or oral hearing;

(b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;

(c) dismiss the application.

### Service of notice or documents

19 (1) If the tribunal is required to provide a notice or any document to a party or other person in an application, it may do so by personal service of a copy of the notice or document or by sending the copy to the person by any of the following means:

(a) ordinary mail;

(b) electronic transmission, including telephone transmission of a facsimile;

(c) if specified in the tribunal's rules, another method that allows proof of receipt.

(2) If the copy is sent by ordinary mail, it must be sent to the most recent address known to the tribunal and must be considered to be received on the fifth day after the day it is mailed, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(3) If the copy is sent by electronic transmission it must be considered to be received on the day after it was sent, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(4) If the copy is sent by a method referred to in subsection (1) (c), the tribunal's rules govern the day on which the copy must be considered to be received.

(5) If through absence, accident, illness or other cause beyond the party's control a party who acts in good faith does not receive the copy until a later date than the date provided under subsection (2), (3) or (4), that subsection does not apply.

### When failure to serve does not invalidate proceeding

20 If a notice or document is not served in accordance with section 19, the proceeding is not invalidated if

(a) the contents of the notice or document were known by the person to be served within the time allowed for service,

(b) the person to be served consents, or

(c) the failure to serve does not result in prejudice to the person, or any resulting prejudice can be satisfactorily addressed by an adjournment or other means.

### Notice of hearing by publication

21 If the tribunal is of the opinion that because there are so many parties to an application or for any other reason it is impracticable to give notice of a hearing to a party by a method referred to in section 19 (1) (a) to (c), the tribunal may give notice of a hearing by public advertisement or otherwise as the tribunal directs.

### Notice of appeal (exclusive of prescribed fee)

23 (1) A decision may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must

(a) be in writing or in another form authorized by the tribunal's rules,

(b) identify the decision that is being appealed,

(c) state why the decision should be changed,

(d) state the outcome requested,

(e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,

(f) include an address for delivery of any notices in respect of the appeal, and

(g) be signed by the appellant or the appellant's agent.

(3) If a notice of appeal is deficient the chair or the chair's delegate may allow a reasonable period of time within which the notice may be corrected.

### Time limit for appeals

**24** (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

### Organization of tribunal

**26** (1) The chair of the tribunal may organize the tribunal into panels, each comprised of one or more members.

(2) If the chair organizes a panel comprised of more than one member, the chair must designate one of those members as chair of the panel.

(3) The members of the tribunal may sit

(a) as the tribunal, or

(b) as a panel of the tribunal.

(4) Two or more panels may sit at the same time.

(5) If members of the tribunal sit as a panel,

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

(b) a decision of the panel is a decision of the tribunal.

(6) The decision of a majority of the members of a panel of the tribunal is a decision of the tribunal and, in the case of a tie, the decision of the chair of the panel governs.

(7) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel, with consent of the chair of the tribunal, may continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.

(8) If a panel is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the tribunal, with the consent of all parties to the application, may organize a new panel to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

(9) The chair or the chair's delegate may hear and decide any interim or preliminary matter in an application, and for that purpose may exercise any of the powers of the tribunal necessary to decide the matter.

### Staff of tribunal

**27** (1) Employees necessary to carry out the powers, functions and duties of the tribunal may be appointed under the *Public Service Act*.

(2) The chair of the tribunal may engage or retain consultants, investigators, lawyers, expert witnesses or other persons the tribunal considers necessary to exercise its powers and carry out its duties and may determine their remuneration.

(3) The *Public Service Act* does not apply to a person retained under subsection (2) of this section.

### Facilitated settlement

**28** (1) The chair may appoint a member or staff of the tribunal or another person to conduct a

facilitated settlement process to resolve one or more issues in dispute.

(2) The tribunal may require 2 or more parties to participate in the facilitated settlement process, in accordance with the rules of the tribunal.

(3) The tribunal may make the consent of one, all or none of the parties to the application a condition of a facilitated settlement process, in accordance with the rules of the tribunal.

### Disclosure protection

**29** (1) In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose

(a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a facilitated settlement process, or

(b) a statement made by a party in a facilitated settlement process specifically for the purpose of achieving a settlement of one or more issues in dispute.

(2) Subsection (1) does not apply to a settlement agreement.

### Tribunal duties

**30** Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

### Summary dismissal

**31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the application is not within the jurisdiction of the tribunal;

(b) the application was not filed within the applicable time limit;

(c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the application was made in bad faith or filed for an improper purpose or motive;

(e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the application will succeed;

(g) the substance of the application has been appropriately dealt with in another proceeding.

(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

### Representation of parties to an application

**32** A party to an application may be represented by counsel or an agent and may make submissions as to facts, law and jurisdiction.

### Interveners

**33** (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that

(a) the person can make a valuable contribution or bring a valuable perspective to the application, and

(b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.

(2) The tribunal may limit the participation of an intervener in one or more of the following ways:

(a) in relation to cross examination of witnesses;

(b) in relation to the right to lead evidence;

(c) to one or more issues raised in the application;

(d) to written submissions;

(e) to time limited oral submissions.

(3) If 2 or more applicants for intervener status have the same or substantially similar views or expertise, the tribunal may require them to file joint submissions.

### Power to compel witnesses and order disclosure

**34** (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

### Recording tribunal proceedings

**35** (1) The tribunal may transcribe or tape record its proceedings.

(2) If the tribunal transcribes or tape records a proceeding, the transcription or tape recording must be considered to be correct and to constitute part of the record of the proceeding.

(3) If, by a mechanical or human failure or other accident, the transcription or tape recording of a proceeding is destroyed, interrupted or incomplete, the validity of the proceeding is not affected.

### Form of hearing of application

**36** In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

### Applications involving similar questions

**37** (1) If 2 or more applications before the tribunal involve the same or similar questions, the tribunal may

(a) combine the applications or any part of them,

(b) hear the applications at the same time,

(c) hear the applications one immediately after the other, or

(d) stay one or more of the applications until after the determination of another one of them.

(2) The tribunal may make additional orders respecting the procedure to be followed with respect to applications under this section.

### Examination of witnesses

**38** (1) Subject to subsection (2), in an oral or electronic hearing a party to an application may call and examine witnesses, present evidence and submissions and conduct cross

examination of witnesses as reasonably required by the tribunal for a full and fair disclosure of all matters relevant to the issues in the application.

(2) The tribunal may reasonably limit further examination or cross examination of a witness if it is satisfied that the examination or cross examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic hearing.

### Adjournments

**39** (1) An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

(2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:

(a) the reason for the adjournment;

(b) whether the adjournment would cause unreasonable delay;

(c) the impact of refusing the adjournment on the parties;

(d) the impact of granting the adjournment on the parties;

(e) the impact of the adjournment on the public interest.

### Information admissible in tribunal proceedings

**40** (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

(5) [Repealed 2015-10-18.]

### Hearings open to public

**41** (1) An oral hearing must be open to the public.

(2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

### Discretion to receive evidence in confidence

**42** The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

## Part 6 – Costs and Sanctions

### Power to award costs

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay all or part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay all or part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay all or part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing 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 on it as if it were an order of the court.

### Maintenance of order at hearings

48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

### Contempt proceeding for uncooperative witness or other person

49 (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court:

(a) attend a hearing;

(b) take an oath or affirmation;

(c) answer questions;

(d) produce the records or things in their custody or possession.

(2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.

## Part 7 – Decisions

### Decisions

50 (1) If the tribunal makes an order for the payment of money as part of its decision, it must set out in the order the principal

sum, and if the tribunal has power to award interest and interest is payable, the rate of interest and the date from which it is to be calculated.

(2) The tribunal may attach terms or conditions to a decision.

(3) The tribunal's decision is effective on the date on which it is issued, unless otherwise specified by the tribunal.

(4) The tribunal must make its decisions accessible to the public.

### Final decision

**51** The tribunal must make its final decision in writing and give reasons for the decision.

### Notice of decision

**52** (1) Subject to subsection (2), the tribunal must send each party and any interveners in an application a copy of its final decision.

(2) If the tribunal is of the opinion that because there are so many parties to an application or for any other reason that it is impracticable to send its final decision to each party as provided in subsection (1), the tribunal may give reasonable notice of its decision by public advertisement or otherwise as the tribunal directs.

(3) A notice of a final decision given by the tribunal under subsection (2) must inform the parties of the place where copies of that decision may be obtained.

### Amendment to final decision

**53** (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:

(a) a clerical or typographical error;

(b) an accidental or inadvertent error, omission or other similar mistake;

(c) an arithmetical error made in a computation.

(2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.

(3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers that the amendment will clarify the final decision.

(4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).

(5) This section must not be construed as limiting the tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

### Enforcement of tribunal's final decision

**54** (1) A party in whose favour the tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the court.

(2) A final decision filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

## Part 8 – Immunities

### Compulsion protection

**55** (1) A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a facilitated settlement process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information

obtained in the discharge of the member's or person's duties.

(2) Despite subsection (1), the court may require the tribunal to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

### Immunity protection for tribunal and members

**56** (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under an enactment governing an application, or

(b) in the exercise or intended exercise of any power under an enactment governing an application.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

## Part 9 – Accountability and Judicial Review

### Surveys

**59.1** For the purposes of evaluating and improving its services, the tribunal may conduct surveys in the course of or after providing those services.

### Reporting

**59.2** At the times, and in the form and manner, prescribed by regulation, the tribunal must submit the following to the minister responsible for the tribunal:

(a) a review of the tribunal's operations during the preceding period;

(b) performance indicators for the preceding period;

(c) details on the nature and number of applications and other matters received or commenced by the tribunal during the preceding period;

(d) details of the time from filing or commencement to decision of the applications and other matters disposed of by the tribunal in the preceding period;

(e) results of any surveys carried out by or on behalf of the tribunal during the preceding period;

(f) a forecast of workload for the succeeding period;

(g) trends or special problems foreseen by the tribunal;

(h) plans for improving the tribunal's operations in the future;

(i) other information as prescribed by regulation.

## Part 10 – Miscellaneous

### Power to make regulations

**60** (1) The Lieutenant Governor in Council may make regulations as follows:

(a) prescribing rules of practice and procedure for the tribunal;

(b) repealing or amending a rule made by the tribunal;

(c) prescribing tariffs of fees to be paid with

respect to services provided, or anything done, by the tribunal, employees of the tribunal or other persons;

(d) prescribing the circumstances in which an award of costs may be made by the tribunal;

(e) prescribing a tariff of costs payable under a tribunal order to pay part of the costs of a party or intervener;

(e.1) establishing restrictions on the authority of a tribunal under sections 47.1 *[security for costs]* and 47.2 *[government and agents of government]*, including, without limiting this,

(i) prescribing limits, rates and tariffs relating to amounts that may be required to be paid or deposited, and

(ii) prescribing what are to be considered costs to the government in relation to an application and how those are to be determined;

(f) prescribing limits and rates relating to a tribunal order to pay part of the actual costs and expenses of the tribunal.

(g) prescribing the form, manner and timing of reports to the minister responsible for the tribunal;

(h) prescribing information that must be included in reports to the minister responsible for the tribunal;

(i) prescribing information the tribunal must make public;

(2) The Lieutenant Governor in Council may make different regulations under subsection (1) for different tribunals.

### Application of *Freedom of Information and Protection of Privacy Act*

**61** (1) In this section, **"decision maker"** includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.

(2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:

(a) a personal note, communication or draft decision of a decision maker;

(b) notes or records kept by a person appointed by the tribunal to conduct a facilitated settlement process in relation to an application;

(c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;

(d) a transcription or tape recording of a tribunal proceeding;

(e) a document submitted in a hearing for which public access is provided by the tribunal;

(f) a decision of the tribunal for which public access is provided by the tribunal.

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

BRITISH
COLUMBIA