



Forest Appeals Commission

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APPEAL NO. 1997-FOR-30

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

BETWEEN: Canadian Forest Products Ltd. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

AND: Forest Practices Board **THIRD PARTY**

BEFORE: A Panel of the Forest Appeals Commission
Toby Vigod Chair
Rob Kyle Member
Deborah Todd Member

DATE OF HEARING: February 5, 1998

PLACE OF HEARING: Victoria, B.C.

APPEARING: For the Appellant: Bradley Armstrong, Counsel
For the Respondent: Dawn House, Counsel
Karen Tannas, Counsel
For the Third Party: Calvin Sandborn, Counsel

APPEAL

This is an appeal by Canadian Forest Products Ltd. ("Canfor") against the September 2, 1997 decision of a Review Panel varying a September 20, 1996 determination by the Fort St. James District Manager. The District Manager issued a Remediation Order to Canfor pursuant to section 118 of the *Forest Practices Code of British Columbia Act* (the "Code"). The Remediation Order contained a finding by the District Manager that there had been two contraventions of section 17(1)(c) of the *Forest Road Regulation*. They were (1) placement of a gravel deck on the Salmon River Bridge; and (2) deposition of gravel/sand from the bridge surface into the Salmon River.

The Review Panel rescinded the finding of contravention number one, and confirmed the finding of contravention number two.

The Forest Appeals Commission (the "Commission") has the authority to hear this appeal under section 131 of the *Code*.

The Appellant is seeking an order from the Commission overturning the finding of contravention made by the Review Panel and rescinding the Remediation Order issued by the District Manager on September 20, 1996.

BACKGROUND

Canfor is the holder of Forest Licence A40873 and Road Use Permit 11250-34. Under the terms of the Road Use Permit, Canfor is responsible for the maintenance of the Salmon River Bridge at kilometre 8080.5 on the Teardrop Forest Service Road in the Fort St. James Forest District. The Ministry of Forests approved the design of the bridge on April 25, 1989, and the bridge has been in continuous use since its construction in 1989. The engineering design of the bridge specifically includes a "gravel running surface" on top of a concrete deck.

On September 14, 1996, Ms. Tracey Jones, District Engineer in the Fort St. James Forest District, received a phone call from Mr. Paul Cooper, a consultant with the Small Business Forest Enterprise Program, concerning the erosion of fill where the road meets the abutment at one end of the Salmon River Bridge. A hole ten feet in depth had formed, running from the road surface to the riverbank below the abutment wall. Ms. Jones subsequently spoke with Canfor staff and informed them of the problem and the need to close the bridge and proceed with measures to eliminate the safety hazard and to minimize any further sediment deposits into the river. She was informed on September 16 that a temporary repair had been made by placing "small riprap" fill in the hole. Her notes from the conversation indicate that further work at this crossing would include the placement of fabric and riprap, as per original design, and that this work would be completed "by the winter of 1996".

During the period September 16 to 19, 1997, Ms. Jones, Regional Engineer Carl Erickson, and other engineering staff from the Prince George Region inspected the bridge and Canfor's activities there for the primary purpose of assessing the damage from the failure at the abutment, and to determine what repairs would be needed. During these visits Ms. Jones observed that the bridge had a gravel deck in excess of 100 millimetres, that grading of the surface had resulted in material being piled along the edges of the bridge, and that gravel from both sides of the bridge deck had been deposited on the river banks and into the Salmon River. She also noted that the piles of gravel on the banks were approximately 1.5 meters in width and 1 meter in depth. These windrows of material appeared to her to extend from both sides of the bridge abutment into the river, across the width of the river, and ended at the abutment on the other side. Ms. Jones noted that a survey crew had reported that one could walk across the river on these gravel berms deposited from the bridge. Photographs were taken.

Ms. Jones found that the depth of the gravel on the bridge deck was in excess of 100 millimetres. The measurement was, by her admission, an estimate and not a precise measurement. She subsequently recommended to the District Manager, Mr. George Davis, that "all the gravel be removed from the bridge deck because it

was not being properly maintained." She also noted that the hole adjoining the bridge abutment had been repaired and that it was not continuing to erode.

On September 20, 1996, Mr. Davis received the information relating to the bridge and immediately issued the Remediation Order. The Order read, in part, as follows:

An inspection of your activities of [the] Salmon River Bridge at 8080.5 kilometre on the Teardrop Forest Service District [Road] has revealed the following contraventions:

1. Placement of a gravel deck on the Salmon River Bridge, which contravenes Section 17(1)(c) of the *Forest Road Regulations* (sic).
2. Deposition of gravel/sand from the bridge surface into the Salmon River, which contravenes Section 17(1)(c) of the *Forest Road Regulations* (sic).

Therefore, under Section 118 of the *Forest Practices Code of British Columbia Act*, you are required to correct these contraventions by carrying out the following work:

Remove, by hand and machine, all material from the running deck of the bridge. Remove surplus material which has been deposited on riverbank from deck surface. Prevent any additional sediment from entering Salmon River during the above activities.

This work must be completed by September 24, 1996.

The Appellant did not receive notice beforehand of the possibility that a Remediation Order would be issued, nor was it given an opportunity to be heard with regard to the issuance of the Order.

Staff from the Department of Fisheries and Oceans ("DFO") examined the site on September 17, 1996 and told Ms. Jones in a telephone conversation on September 20 that there was no serious damage to fish habitat in the river. Ms. Jones informed them about the Remediation Order and that any instream work orders were left to their discretion. No orders or requests were issued by the DFO. The Ministry of Environment, Lands and Parks ("MELP") was also informed of the situation but did not subsequently communicate any concerns.

The work stipulated in the Remediation Order was not carried out, either by the Appellant or the Ministry. Testimony at the Hearing indicated that no further investigations have been carried out by the Ministry.

Pursuant to section 127 of the *Code*, Canfor requested a review of the Remediation Order. The Review Panel found that the placement of the gravel running surface was not a contravention of the Regulation, accepting Canfor's argument that the design of the bridge specifically includes such a surface and that it was approved by the Ministry of Forests on April 25, 1989. The first finding of contravention was therefore rescinded. The second finding of contravention was confirmed and this finding is the subject of the appeal to the Commission.

ISSUES

The issues before the Commission are as follows:

1. Whether the District Manager erred by issuing the Remediation Order without making a prior determination and without first giving the Appellant an opportunity to be heard.
2. Whether there was a contravention of section 17(1)(c) of the *Forest Road Regulation*.

RELEVANT LEGISLATION

The relevant legislative provisions are as follows:

The *Code*

Definitions

- 1** (1) In this Act: (...)

“forest resources” means resources and values associated with forests

and range including, without limitation, timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity;

Remediation orders

- 118** (1) If a senior official determines that a person who is the holder of an agreement under the Forest Act or the Range Act has contravened this Act, the regulations, the standards or an operational plan, the senior official, in a notice of determination given under subsection (2), may order the person to do work to remedy the contravention

(a) by requiring the holder to carry out a forest practice

(i) that is required by the Act, the regulations, the standards or an operational plan, and

(ii) that the holder has failed to carry out, or

(b) by requiring the holder to repair any damage caused by the contravention to the land on which the forest practice was carried out.

...

- (3) If a person fails to comply with an order under subsection (1) or section 82, 99 (2), 101 (2), 102 (3) or 106 (1) by the date

specified in a notice given under subsection (2), a senior official may do one or more of the following:

- (a) in a notice given to the person, restrict or prohibit the person from carrying out the work referred to in the order;
- (b) subject to section 125, carry out the work;
- (c) realize on any security the person was required to provide under a regulation made under section 201.

The Forest Road Regulation

Definitions

1 (1) In this regulation: (...)

“road prism” means the area of the ground containing the road surface, cut slope, and fill slope;

“windrow” means an accumulation of fill or surfacing material left on the road shoulder as a result of grading operations.

Road inspection and maintenance

17 (1) A person who maintains a road under section 63 of the Act must inspect the road and repair the road to ensure that

[...]

- (c) the transport of sediment from the road prism and its effects on other forest resources are minimized, [...]

DISCUSSION AND ANALYSIS

ISSUE 1: Whether the District Manager erred by issuing the Remediation Order (a) without making a prior determination, and (b) without first giving the Appellant an opportunity to be heard.

(a) The Prior Determination Issue

Canfor argues that the District Manager erred by issuing the Remediation Order without making a prior determination that there was a contravention, “as required under section 118 of the *Code*”, and without first giving the Appellant an opportunity to be heard in accordance with the principles of procedural fairness. It cited the Commission’s decision in *Houston Forest Products v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 96/07, February 28, 1997)(unreported), where it submits that the Commission made it clear that the District Manager is required to make a determination, and to give the licensee an opportunity to be heard before issuing a Remediation Order.

It appears to this Panel that Canfor has interpreted section 118 as requiring that a finding of a contravention must be *communicated* or *issued* to a person before a Remediation Order can be issued. The Commission disagrees. Section 118 states that if a senior official determines that a person has contravened the *Act*, the regulations, the standards, or an operational plan, the official may order the person to do work to remedy the contravention. In issuing a Remediation Order, the senior official is required to include a notice of determination, listing, among other things, the nature of the contravention, but it is not stipulated that this information be communicated *prior to* the issuance of the Remediation Order. Rather, under section 118(2), the Notice of Determination and the Remediation Order can be contained in the same document. The content requirements for Remediation Orders ensure that one or more findings of contravention necessarily have to be made before a Remediation Order can be issued.

The Commission finds that the intention underlying the language of section 118 is that Remediation Orders shall not be issued blindly without a stated reason, but that the prerequisite of a finding of contravention is satisfied so long as it is set out in the Remediation Order itself. This enables a senior official to act immediately without taking the time to serve a separate notice of a determination that a contravention has occurred.

(b) The opportunity to be heard issue

As noted above, Canfor argues that there was a breach of procedural fairness, as it was not given an opportunity to be heard prior to the issuance of the Remediation Order. The Respondent agrees that administrative bodies owe a duty of fairness to the parties that will be affected by a decision, but states that the existence of a general duty to act fairly is dependent on factors which make the duty one that is not rigid, but variable.

In the case of *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489 (S.C.C.), L'Heureux-Dubé J. wrote that the object of administrative bodies is:

...not to import the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith... the aim is not to create 'procedural perfection' but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.

The Commission finds that the Ministry of Forests' "*Ministry Policy, Volume 1 – Resource Management*" (Policy 16.10 – Determinations) reflects this flexible approach to the requirements of procedural fairness in that the word "should", not "must", is used in the section titled "Opportunity to be Heard". The section states:

The senior official should ensure that the person responsible for the non-compliance is offered an opportunity to present any evidence prior to the senior official making the determination. The offer must be in writing, and:

- must provide a reasonable time frame for the person to take advantage of the opportunity to be heard;
- must indicate the method by which the person must contact the senior official to discuss the incident;
- must indicate that the person may have legal representation, and/or witnesses if desired; and,
- must include a statement that the determination will be made after the expiry of the opportunity time frame.

The policy is designed to ensure "that determinations are made in a fair and equitable manner, with due regard to the rules of administrative law" and to this end provides *guidelines* for the process and recording of determinations by decision makers. The policy covers determinations made by senior officials under section 118 of the *Code*, among others.

At the hearing, Mr. George Davis, the District Manager who issued the Remediation Order, stated that he is not bound by the Ministry policy and that he has the discretion to disregard the policy if he finds it appropriate to do so. He submitted that the nature of the evidence before him on September 20, 1996 was sufficient for him to determine that there was an "emergency situation". The reports and evidence he received indicated that the amount of material being deposited from the bridge was on a scale beyond anything he had seen in his experience with the Ministry. He added that the amount of deposited gravel was far above what would normally be expected as an incident of maintenance in the form of grading, and that the District Engineer's report regarding the depth of the gravel running surface was a cause for concern that the problem would be ongoing. Mr. Davis therefore stood by his decision to issue the Remediation Order without delay so as to minimize the transport of gravel and sand from the bridge, the damage to forest resources and values, and to remedy the existing damage as soon as possible. He testified further that September 20 was a Friday and he did not want to wait until the following Monday before taking action because, in his opinion, this would be an unacceptable delay. Accordingly, he issued the Remediation Order on the Friday, stipulating in it that the required work be completed by September 24, the following Tuesday.

The Forest Practices Board has asked that section 118 be interpreted by the Commission, arguing that as written, section 118 creates the potential for the principle of fairness to come into conflict with proactive action by government. The Forest Practices Board submits that situations can and do arise where the need for a Remediation Order is "time-sensitive" – meaning that the remediation of a problem must take place as soon as practically possible, as for example when an unstable slope or road needs to be stabilized so as to prevent an imminent slide and incidental damage to forest and other resources.

The Forest Practices Board also submits that, in true emergency situations where a remediation order is immediately necessary to protect resources, it may be necessary to issue the order without first providing any opportunity to be heard.

The Forest Practices Board cited references from three administrative law texts in support of this position, including Dussault and Borgeat, *Administrative Law* (2nd Ed.) pp. 270-275, where it states that "in emergency circumstances requiring an agency to act quickly, the courts are generally inclined to allow the rule [the *audi alteram partem* rule] to be suspended or totally set aside". One case noted in Dussault is that of *R. v. Randolph*, [1966] S.C.R. 260 (S.C.C.), in which the power of the Acting Postmaster General to sign an interim order without first hearing the party concerned was challenged. In delivering judgement on behalf of the Supreme Court of Canada, Cartwright J. concluded that the main object of the Postmaster General's power was to enable him to take prompt action to prevent criminal activity, and that "that purpose might well be defeated if he could take action only after notice and a hearing" (Dussault, at 271).

Dussault also cites the case of *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), in which the Supreme Court of Canada held that the Director of the institution had breached the rule of procedural fairness in continuing to keep two inmates in administrative segregation without allowing them an opportunity to be heard. However, the Court also stated that the original decision to issue the segregation order was lawful given the circumstances. Le Dain J. wrote, "Because of the apparently urgent or emergency nature of the decision to impose segregation in the particular circumstances of the case, there could be no requirement of prior notice and an opportunity to be heard before the decision" (Ibid. at 272).

The Commission finds that the District Manager has discretion to suspend or set aside a person's opportunity to be heard in appropriate circumstances, such as in the case of an emergency. In providing officials with the authority to issue Remediation Orders, the legislature has given government the ability to require holders of agreements under the *Forest Act* or the *Range Act* to deal quickly with matters needing immediate attention. However, questions about what constitutes an "emergency" for administrative purposes, and about the validity of determinations made by government officials in this regard, remain open and must be examined on a case by case basis.

In this appeal, the "emergency situation" faced by Mr. Davis involved the deposition of materials from the bridge, and the presence of the deposits of materials in the Salmon River and on its banks, on a scale beyond anything he had seen in his experience with the Ministry.

Although this may constitute a serious matter, the Commission finds that the evidence forming the basis for the contravention determination and Remediation Order does not indicate the existence of an "emergency" that would justify dispensing with procedural fairness. Although the evidence before the District Manager indicated that there were relatively large deposits of materials below the bridge and that the problem was ongoing, there was no evidence to indicate the extent or urgency of the effect of these deposits on forest resources. Before the Remediation Order was issued, representatives from the DFO and MELP had been advised of the situation but did not express any concerns about environmental impacts to Ms. Jones.

Further, the Commission finds that the need for the Order does not appear to have been time-sensitive; the windrows on the riverbank and in the river had apparently been forming for some time (the bridge was built in 1989), and leaving them there for the time necessary to give Canfor the opportunity to be heard would not, in the opinion of the Commission, have caused any appreciable additional effects on forest resources or values. In fact, if Canfor had been given an opportunity to be heard, Mr. Davis would have learned that the bridge design had been approved by the Ministry in 1989.

At the hearing, testimony from the witnesses called by both Canfor and the Respondent indicated that no further investigations or works have been carried out by the Respondent since the events in 1996 that led to this appeal. In the Commission's view, this further brings into question the legitimacy of characterizing the situation as an "emergency". The Commission notes that section 118(3) of the *Code* provides that a senior official may carry out needed work if a person fails to comply with an order under subsection (1). The appeal of the determination does not prevent or hinder the District Manager's power to carry out such work. If there was truly an "emergency", the District Manager could have ensured that the situation be remedied promptly.

It is clear on the evidence that the Respondent did not find the problem to be urgent enough to perform the remediation work itself, or even conduct further investigations at the site, even after it became apparent that the Appellant would not obey the Order and would in fact file an appeal. There was also no reason given as to why the District Manager did not attempt to provide even a quick opportunity to be heard by attempting to make the appropriate contacts by telephone. The Commission notes that it is not always necessary to hold a full hearing to satisfy the "opportunity to be heard" requirement. It depends on the circumstances. However, in this case, the Commission finds that the circumstances were not such that a true emergency existed justifying Mr. Davis' decision to dispense with procedural fairness. After a hearing, either by telephone or informally in person within a reasonable time, he would still have been free to issue the Remediation Order if the Appellant had chosen not to address his concerns voluntarily.

The Commission therefore finds that the District Manager erred by issuing the Remediation Order without first giving the Appellant an opportunity to be heard, and that this error constitutes a breach of procedural fairness under the principles of administrative law.

However, as the Commission found in *Tolko Forest Products v. Government of British Columbia* (Forest Appeals Commission, Appeal No. 95/02, November 12, 1996)(unreported), defects in procedure may be cured by a review or on appeal to the Commission. As the work has not yet been done, (i.e., the Order is outstanding), the Commission will consider whether Canfor contravened section 17(1)(c) of the *Forest Road Regulation* to determine whether there is still justification for the issuance of the Remediation Order.

ISSUE 2: Whether there was a contravention of section 17(1)(c) of the *Forest Road Regulation*.

There were two findings of contravention, the first of which concerned the placement of the gravel running surface on the concrete deck of the bridge. This finding was dismissed by the Review Panel below, which found that the Respondent had originally approved the gravel surface as a part of the design of the bridge, and that it had never before expressed concerns about the presence or excess of gravel on the bridge.

The Commission notes that the Review Panel, in giving its final decision, addressed the contraventions only. While upholding the Remediation Order, it did not specifically vary the wording of the Order to reflect this finding. The Review Panel indicated in its analysis that the extent of the works required by the original Remediation Order were not justifiable given the Ministry's approval of the bridge design, and that a Remediation Order should therefore not have been used to order removal of the gravel surface from the bridge. The Commission agrees that the issuance of the Remediation Order, to the extent that it appears to have been used to remedy a design issue, was inappropriate.

It appears that there was a general concern in the Prince George Region about gravel decks on forest road bridges. On October 25, 1996, a letter was sent to Canfor (and other licencees) from Ms. Jones indicating that "the use of gravel decks on any bridge today is not acceptable in the Prince George Region." This was based on a memorandum dated September 19, 1996 from the Regional Manger, Prince George Forest Region to all District Mangers in that region. Ms. Jones' letter further indicated that "all existing gravel decks will be required to be removed over the next year. However, until specific instructions are given, current gravel decks must be maintained as per the original depth specified on the approved drawings." According to Ms. Jones, this policy was being drafted prior to the discovery of the incident at the Salmon River Bridge.

The second finding of the Review Panel was that there had been "deposition of gravel/sand from the bridge surface into the Salmon River, which contravenes Section 17(1)(c) of the *Forest Road Regulation*". Section 17(1)(c) states that a person responsible for maintaining a road must ensure that "the transport of sediment from the road prism and its effects on other forest resources are minimized". The Respondent submits that Canfor is required to inspect and repair the road to ensure that the transport of sediment from the road prism and its effects on other forest resources are minimized.

Canfor makes several arguments in support of its position that the District Manager erred in making this contravention determination. First, it states that the surface of the bridge did not fall within the definition of "road prism" in the Regulation and that there was therefore no contravention of section 17(1)(c). The Commission disagrees. The bridge had road-building materials on its deck and it was graded as a part of the road. The Commission therefore agrees with the Review Panel's finding that the definition of a "road prism" includes the bridge in this case.

Second, Canfor argues that the nature and quality of its maintenance of the gravel running surface on the bridge, and in particular, of the depth and grading of the gravel running surface, was appropriate. Canfor submitted a memorandum dated December 19, 1997, regarding the washout at the Salmon River Bridge, which indicated that surface maintenance of gravel forest roads varies based on the flow of traffic. The memorandum indicated that grading was performed on a regular basis (on 10 days over a three month period from June 28 - September 24, 1996). Log hauling had ceased by the end of August, and traffic was lighter in September, 1996. Mr. Nedoborski, Harvesting Superintendent with Canfor, testified that in September, the gravel surface had been graded on September 15 and then again on September 23 and 24, 1996. The MOF photographs were taken on September 18 and 19, 1996.

Canfor submitted that any deposition of materials from the bridge surface was not a contravention of the Regulation because the design and maintenance of the bridge minimized any incidental loss of gravel. Mr. Wayne Nedoborski testified that the grading procedures and schedule applied in the maintenance of the bridge were standard for the industry. He stated that it was not practical or feasible to minimize the deposition of material any more than was already being done, given that the grading process is accomplished with heavy machinery that can not always prevent the deflection of some material towards the sides of the road. He submitted that the curb rail and grading strip were designed to assist the grader operator in maintaining the proper gravel depth. The design drawings for the Salmon River Bridge indicate that the gravel running surface was to be laid between, and up to the level of, two 150 by 150 millimetre grading strips running along the inside edge of the curb rails of the bridge.

The design of this bridge is such that there is no barrier or interception mechanism between the outside edges of the grading strips and the river below that would prevent any of the graded material from falling over the edge of the grading strip and into the water below. This has led to small amounts of gravel falling over the grading strip from the bridge deck at each grading, and has resulted since 1989 in the eventual build-up of a sizeable berm in the river below.

Mr. Nedoborski added that Canfor was required only to maintain the bridge in accordance with the design, which was approved by the Ministry of Forests. He also stated that there was no indication that the incidental deposition of material from the bridge was having any significant effect on the river or on forest resources. In his opinion, the deposition of gravel had occurred in small amounts over an extended period of time and there was no visible change to water quality resulting from it.

Ms. Jones gave evidence that the bridge had a gravel deck in excess of 100 mm in depth, that the regular grading maintenance had resulted in material being piled along the edges of the bridge, and that gravel from both sides of the bridge deck had been deposited on the river banks and into the Salmon River. She also noted that the piles of gravel on the banks were approximately 1.5 meters in width and 1 meter in depth.

Ms. Jones testified that her September 19 measurement of the depth of the gravel running surface was an estimate, accomplished by standing in the wheel ruts and observing the height of the gravel piled on the sides of the bridge relative to the height of her boots. She noted that the grading strips, which she believed were designed to assist the grader in maintaining the proper depth of gravel on the bridge of 100 mm., were not visible and that she had to dig through approximately 6½ inches (160 mm.) of compacted material to see them. No precise measurements were taken. A photograph entered as evidence confirms that there was some mounding of material at the edges and centre of the bridge and that the grading strips were not visible.

The Respondent also tendered as a witness Mr. Carl Erickson, Regional Engineer. In responding to questions from the Panel he acknowledged that the design of the bridge in fact called for 6 inches (150 mm) of gravel and not 100 mm. He also noted that his own estimate of the depth of the gravel, in comparison to the height of his boots, was that it was over 150 mm, not taking into account the fact that he was standing on the layer of gravel in the rut and not on the concrete deck itself. He inferred from this that the depth of the gravel to the deck surface was between 9 and 11 inches (225 to 275 mm). He was of the opinion that this depth of gravel exceeded the design specifications of the bridge, resulting in a contravention of section 17(1)(c) of the *Forest Road Regulation*. Under cross-examination, Mr. Erickson conceded that no general standards exist in British Columbia for the depth of gravel running surfaces on concrete deck bridges.

Canfor provided photographs of other forest road bridges and argued that the accumulation and deposition of gravel as occurred at the Salmon River Bridge is not an unusual feature of bridges on forest roads in British Columbia. Canfor submits that the question of minimization should be determined in light of the standards of common practice. Mr. Nedoborski testified that the common practice used in maintaining the gravel running surfaces of forest road bridges is to apply an amount of gravel one to two inches in excess of the level of the grading strips (6 inches) in order to allow for compaction resulting from the grading process and vehicle traffic. This process inevitably leads to the deposition of some material from bridges.

The Commission finds that the estimation evidence tendered by the Respondent is insufficient to form the basis for a finding of a contravention of section 17(1)(c) of the Regulation and for the issuance of a Remediation Order. As the Commission stated in *Houston*, a certain degree of proof of a contravention is necessary before a Remediation Order may be issued. In this case, the degree of proof falls short of what is reasonably required. No precise measurements were taken of the depth of the gravel; there were only estimates. Rather than making estimates, measurements of the depth of the gravel should have been made at a number of locations along the bridge. Also, Ms. Jones, in her December 9, 1996 letter to Mr. Nedoborski, referred to the original design of the bridge as showing a compacted gravel deck that was 100 millimetres in depth. The Commission finds that the design drawing actually indicates a depth of 150 millimetres, as acknowledged in the testimony of Mr. Erickson.

Further, the Commission finds that the Remediation Order, as a whole, was premised on the assumption that the gravel running surface was placed illegally on the bridge deck. This was not the case. The gravel surface was part of the design approved by the Ministry of Forests in 1989.

The Commission accepts Canfor's position that it is inherent to the design of the bridge that some materials would fall into the Salmon River. The design allowed for 150 mm. of gravel, and the grading strip was also 150 mm. in height. It was inevitable that some material would fall from the bridge in these circumstances. The Ministry of Forests approved the design in 1989, and, in the ensuing regular inspections over the years, no concerns were raised about the gravel running surface – except in one case where, Canfor claims, the Ministry of Forests was concerned that there was not *enough* gravel on the bridge.

In addition, the wording of the second finding of contravention in the Remediation Order is problematic. Section 17(1)(c) requires that the deposition of materials from the road prism be "minimized", not prevented entirely. The finding of contravention states, "Deposition of gravel/sand from the bridge surface into the Salmon River, which contravenes Section 17(1)(c) of the *Forest Road Regulations*". The Commission finds that the simple finding that deposition of materials into the river has occurred is *not* a contravention of section 17(1)(c), particularly where such deposition it is to be expected due to the design of the bridge. No evidence was presented by the Respondent as to how the maintenance efforts described by Canfor were inadequate. There is no evidence that the gravel fell into the river as a result of poor maintenance practices. Rather, it appears that the design itself facilitated this result. For all these reasons, the Remediation Order is rescinded.

DECISION

Section 138 of the *Code* provides that the Commission may confirm, vary or rescind the decision appealed from and make any decision that the person whose decision is appealed could have made.

The Commission finds that the circumstances surrounding the issuance of the Remediation Order do not indicate that there was an emergency justifying the denial of an opportunity to be heard to the Appellant. The Commission therefore finds that there was a breach of the principles of procedural fairness in that the District Manager erred in not providing the Appellant with an opportunity to be heard before issuing the Remediation Order. However, the Commission finds that the defects in procedure may be cured by the appeal before the Commission.

The Commission finds that the evidence tendered in support of the finding of a contravention of section 17(1)(c) of the *Forest Roads Regulation* did not constitute sufficient proof for making this determination. In addition, it finds that the issuance of the Remediation Order was based primarily on the premise that the gravel surface was placed on the bridge without Ministry approval, which was not the case. The Remediation Order is therefore rescinded.

In its submissions, the Forest Practices Board requested that the provisions of section 118 be examined with a view to deciding if amendments to the section

would be helpful or appropriate. The Commission finds that the provisions of section 118 of the *Code* need not be amended. In true emergency situations where a Remediation Order is immediately necessary to protect resources, a senior official should be free to act quickly, and no opportunity to be heard may be necessary. If the Remediation Order is challenged by the person to whom it is issued, a full hearing opportunity is available at both the review and the appeal of the determination.

The Appeal is allowed. The finding of a contravention of section 17(1)(c) of the *Forest Road Regulation* and the Remediation Order are rescinded.

COMMENT

As noted above, there has been a recent general concern with the use of gravel decks of forest road bridges. If MOF is dissatisfied with the condition of the Salmon River Bridge, the Commission encourages it to communicate these concerns to Canfor. The Commission recommends that the parties discuss appropriate methods of dealing with the situation and ways to prevent it from continuing.

Toby Vigod, Chair
Forest Appeals Commission

March 24, 1998