Forest Appeals Commission

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APPEAL NO. 2000-FOR-009(b)

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:	Forest Practices Board	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Husby Forest Products Ltd., Naden Harbour Timber Ltd., Sitkana Timber Ltd., Dawson Harbour Logging Co. Ltd., and Timber West Forest Limited (the "Husby Group of Companies")	**THIRD PARTIES**
AND:	Council of the Haida Nation	**APPLICANT**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair	
PLACE OF HEARING:	Conducted by way of written submissions, concluding on July 27, 2001	
APPEARING:	For the Appellant: Calvin Sandborn, Counsel For the Respondent: Bruce R. Filan, Counsel For the Permit Holder: Murray B. Blok, Counsel For the Applicant: Cheryl Sharvit, Counsel	

APPLICATION FOR PARTY OR INTERVENOR STATUS

APPLICATION

This is an application by the Council of the Haida Nation (the "CHN") for either party or intervenor status in the above captioned appeal. The CHN brought this application under both sections 131(8) and 131(13) of the *Forest Practices Code of British Columbia Act* (the "*Code*"). Respectively, these sections of the *Code* provide the Commission with discretion to allow persons to participate in an appeal as either parties or intervenors. However, near the end of its application, the CHN clarified that it is "important" that it be granted party status in the appeal.

This application was conducted by way of written submissions.

BACKGROUND

The subject matter of this appeal is a five-year forest development plan (the "Plan") covering lands on the Queen Charlotte Islands, also known as Haida Gwaii. A forest development plan is a document that describes and illustrates how harvesting and road development for a specific area will be managed for a specified period – in this case, from 1999-2003. The Plan was prepared by the five licensees who hold timber harvesting rights in the area covered by the Plan: Husby Forest Products Ltd., Naden Harbour Timber Ltd., Sitkana Timber Ltd., Dawson Harbour Logging Co. Ltd., and Timber West Forest Limited. In this appeal, the five licensees are described as the Husby Group of Companies ("Husby").

The Plan was approved by the District Manager, Queen Charlotte Islands Timber Supply Area, in determinations made on October 22, 1999, and November 26, 1999.

The Forest Practices Board (the "Board") requested a review of the determinations to approve the Plan. In a decision dated November 22, 2000, a Review Panel confirmed the District Manager's approval of the Plan.

On December 18, 2000, the Board appealed the Plan approval to the Commission under section 130(2)(c) of the *Code*. In its Notice of Appeal, the Board raised three grounds for appeal, that may be summarized as follows:

1. The District Manager incorrectly approved approximately 17 cutblocks in the Tartu Creeks watershed. The proposed development in the Tartu watershed was contrary to section 14 of the *Operational Planning Regulation* (B.C. Reg. 107/98), which obligates a licensee to carry out a watershed assessment before it submits a forest development plan for an area. Approval of the Tartu cutblocks was also contrary to section 41(3) of the *Code*, which forbids approval of a plan that was prepared contrary to the regulations. Further, the Review Panel erred in deciding that previous District Managers had not determined that the Tartu watershed assessment was necessary.

2. The District Manager approved 2 cutblocks in the Naden watershed even though the Plan did not deal correctly with the fact that large portions of those blocks are on unstable terrain, and are therefore inconsistent with the recommendations in the watershed assessment for this area. The Plan gave no reason why the blocks should be approved despite the inconsistency, contrary to section 18(1)(y) of the *Operational Planning Regulation*. Therefore, the District Manager approved these blocks contrary to section 41(3) of the *Code*, and the Review Panel erred when it decided that the Plan complied with section 18(1)(y) of the *Operational Planning Regulation*.

3. The District Manager approved a number of cutblocks in areas previously managed for marbled murrelets and other wildlife, without reasonable consideration of whether the new development would adequately manage for threatened marbled murrelets, contrary to sections 41(1)(b) and 41(3) of the

Code. The Review Panel majority erred in deciding that the District Manager fulfilled his obligations under section 41(1)(b).

The Board requests an order from the Commission setting aside the approval of a number of cutblocks and associated roads in the Tartu and Naden watersheds, and the cutblocks in areas previously managed for marbled murrelets.

By a letter dated December 20, 2000, the Commission added the subjects of the appealed decisions as parties to the appeal, namely, Husby Forest Products Ltd., Naden Harbour Timber Ltd., Sitkana Timber Ltd., Dawson Harbour Logging Co. Ltd., and Timber West Forest Limited. In a letter dated December 22, 2000, the Vice President of Husby Forest Products Ltd. advised the Commission that it would participate in the appeal. He subsequently advised, on January 12, 2001, that Husby would represent all of the subject companies in the appeal.

On January 31, 2001, the Commission issued a Notice of Hearing to the parties. The hearing was scheduled for five days, from April 30 to May 4, 2001, and was to be held in Victoria.

On February 16, 2001, the Commission received a letter from the CHN asking for the hearing to be conducted on Haida Gwaii (the Queen Charlotte Islands), rather than in Victoria. The reason given for the CHN's request was as follows: "How the forests of Haida Gwaii are managed is of prime concern to Islanders and we need to have the opportunity to witness such an important case."

On March 20, 2001, the Commission granted the CHN's request to hold the appeal hearing on Haida Gwaii (*Forest Practices Board* v. *Government of British Columbia (Husby Group of Companies, Permit Holder)*, Appeal No. 00-FOR-009(a)(unreported)).

On April 24, 2001, the Chair of the Commission and the parties' representatives participated in a pre-hearing conference call, during which it was agreed that the hearing scheduled for April 30 to May 4, 2001 should be adjourned to allow the parties time to negotiate a possible settlement. On the same date, the Commission sent a letter to the parties confirming the adjournment of the hearing, and requesting that an update on the status of the appeal be provided by June 25, 2001.

On June 12, 2001, the Commission received the CHN's application for intervenor or party status. In a letter dated June 14, 2001, the Commission offered the parties an opportunity to provide written submissions on the application.

In a letter dated June 29, 2001, the Board advised that it wished to proceed with the appeal, as the parties were unable to resolve any of the issues raised by the Board. By a letter dated July 25, 2001, the Commission rescheduled the hearing to the week of October 29, 2001.

In this application, the CHN seeks leave from the Commission to present oral evidence and submissions on the interpretation and application of section 41(1)(b)

of the *Code*. The CHN also seeks to lead oral evidence regarding the fairness of the administrative review process and allegations of bias, with respect to the appointment of the Review Official and Review Panel members.

The Board does not object to the CHN's application. However, the Board objects to the CHN presenting evidence concerning the review process.

Both the Respondent and Husby object to the CHN being granted either party or intervenor status, and request that the application be dismissed. In addition, Husby requests that it be awarded its costs "due to the inadequacy of the CHN application and the unnecessary expense to which it has been put in having to respond to the application."

ISSUES

The issues raised by this application are as follows:

1. Whether the same legal test should apply to applications for party status and intervenor status.

2. Whether the Commission should should grant the CHN standing in this appeal either as a party or as an intervenor.

Husby's request for an award of costs in relation to this application raises a further issue. However, the Commission finds that it would be inappropriate to address a request for costs at this preliminary stage of the appeal proceeding. As stated in section 4.4 of the Commission's *Procedure Manual*, a party seeking an award of costs should make such an application at the conclusion of the appeal hearing, and the Commission will not order a party or intervenor to pay costs until it has first given that person an opportunity to make submissions on this issue.

RELEVANT LEGISLATION

The following sections of the *Code* are relevant to this application:

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;

Approval of plans by district manager or designated environment official

41 (1) The district manager must approve an operational plan or amendment submitted under this Part if

(a) the plan or amendment was prepared and submitted in accordance with this Act, the regulations and the standards, and

(b) the district manager is satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies.

Determinations that may be appealed

130 (2) Subject to subsection (3), the board may appeal to the commission

...

(c) if the regulations provide and in accordance with the regulations, a determination under Division 5 of Part 3 with respect to approval of a forest development plan, range use plan or amendments to either of those plans, and

...

Appeal

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

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

...

(12) A party may

(a) be represented by counsel,

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

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

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

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

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

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

Powers of commission

138 (2) On the appeal, the commission may

(a) confirm, vary or rescind the determination appealed from, or

(b) refer the matter with or without directions back to the person

(i) who made the initial determination, or

(ii) in the case of a determination made under section 129(5)(c), the reviewer who made the determination.

The following portions of the *Administrative Review and Appeal Procedure Regulation*, B.C. Reg. 114/99 (the "*Regulation*") are referred to in this decision:

Review requests by board

2 (1) The board may request a review of a determination under the *Forest Practices Code of British Columbia Act* with respect to approval of a forest development plan, range use plan or amendment to either plan if the board believes that, in relation to the preparation of the plan or amendment, there has been a contravention of that Act or the regulations made under that Act.

...

Intervenors

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

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

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

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

DISCUSSION AND ANALYSIS

1. Whether the same legal test should apply to applications for party status and intervenor status.

The CHN's submissions address the test set out in *Forest Practices Board* v. *Riverside Forest Products and Ministry of Forests* (Appeal No. 95/01(A), June 11, 1996) (unreported). This test has been applied by the Commission in several previous applications for intervenor status under the *Code*. The CHN submits that in *Forest Practices Board*, the Commission held that the test for granting leave for a "party" to participate in an appeal is whether the applicant "has a valid interest in participating and can be of assistance in the proceeding." However, the CHN's submissions do not draw a distinction between party status and intervenor status under the *Code*, except to recognize that the former is provided for under section 131(8) and the latter is provided for under section 131(13) of the *Code*.

The Board, the Government, and Husby do not address whether there is a legal or practical difference between a party and an intervenor under the *Code*, or whether the test in *Forest Practices Board* is, in fact, relevant to an application for party status.

It is clear that the test set out in *Forest Practices Board* is relevant to the CHN's application for **intervenor** status under section 131(13) of the *Code*. However, the Commission has never before received a request from a person seeking to be added as a party under the *Code*, and no submissions have been made as to what factors should be considered in assessing an application for party status. Thus, the first question before the Commission is whether the test in *Forest Practices Board* is relevant to an application for party status under the *Code*. In deciding this question, the Commission has considered the relevant provisions of the *Code*, general principles of law, and the nature of the test in *Forest Practices Board*.

The Commission notes that the *Code* makes important distinctions between intervenors and parties. Under section 131(8), the Commission has discretion to add, as a party, "a person who may be affected by the appeal". Section 131(13) of the *Code* simply provides that "a person" may be invited or permitted to take part in a hearing as an intervenor. The *Code* does not specify any factors that should be taken into account by the Commission in determining whether a person will be permitted to participate in a hearing as an intervenor.

The different language used in the *Code* in relation to intervenors and parties is recognized in the Commission's *Procedure Manual*, which states as follows at pages 18-20, section 4.2:

> In deciding whether to add a person as a party, the Commission will consider whether the person may be "affected" by the appeal, has relevant evidence to provide to the Commission, and any other factors that are relevant in the circumstances.
>
> …
>
> Intervenors are generally individuals or groups that do not meet the criteria to become a party (i.e. "may be affected by the appeal") but have sufficient interest in, or some relevant expertise or view in relation to the subject matter of the appeal.

The *Code* does not define the words "party" or "intervenor". However, general legal principles may provide some assistance in intepreting the meaning of "party". *Black's Law Dictionary* (1999), 7th. ed., defines "party" as follows:

> **party. 2.** One by or against whom a lawsuit is brought <party to a lawsuit>.
>
> ***aggrieved party.*** A party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court decree or judgement.
>
> ***indispensable party.*** A party who, having interests that would inevitably be affected by a court's judgement, must be included in the case. If such a party is not included, the case must be dismissed.
>
> [underlining added]

These definitions suggest that, in the context of appeals, "party" generally includes the person who brings an appeal (i.e. the appellant), and the person against whom the appeal is brought (i.e. the respondent, which is always the Government in appeals under the *Code*). Parties may also include other persons with rights that may be adversely affected by an adjudicative decision, or persons with interests that would inevitably be affected by the decision, such that it would be impossible to proceed if the person was not involved.

The Commission has also considered which parties are specified in section 131(7) of the *Code* as parties in an appeal to the Commission. In an appeal of a forest development plan, these parties include the Board, since under section 130(2)(c) of the *Code*, only it can initiate such appeals, the Government, which is always the respondent, and the holder of an agreement granting timber harvesting rights. All of these parties are, or represent, persons whose rights may be affected by the Commission's decision as to whether the Plan complies with the *Code* or regulations made under the *Code*. In addition, these parties are, or represent, persons whose interests in exercising sound forest management or harvesting rights, may be affected by the appeal.

The Commission has also considered other ways in which the *Code* differentiates between intervenors and parties. In particular, the *Code* makes distinctions between the extent to which intervenors and parties may, at the Commission's discretion, participate in appeal hearings. Under section 131(14), the Commission is granted broad discretion to determine the extent of an intervenor's participation in an appeal hearing. Specifically, an intervenor "may take part in a hearing to the extent permitted by the commission." Accordingly, under section 21 of the *Regulation*, when an intervenor is permitted or invited to take part in a hearing, the Commission must notify the parties and the intervenor in writing, "specifying the extent to which the intervenor will be permitted to take part."

In contrast, sections 131(12) and 131(15) of the *Code* provide that parties may exercise specified participatory rights in appeal hearings: parties may be represented by counsel, present evidence, ask questions at an oral hearing, and make submissions as to facts, law and jurisdiction. Although the Commission retains control over the general conduct of the hearing, it is the Commission's view that the Legislature clearly intended that parties should have a full and fair opportunity to present their case before the Commission, including the ability to present evidence and cross-examine witnesses. The Legislature also clearly intended that intervenors should be able to participate to the limited extent that the Commission considers appropriate, having regard to the circumstances of the appeal. The Panel is of the view that these sections are consistent with the general principles of natural justice and procedural fairness. As stated by the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the "duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected." The language of the *Code* reflects this flexibility by providing for a person's participation in a hearing either as a party or as an intervenor.

In summary, the language of the *Code* clearly distinguishes between parties and intervenors, and the extent to which they may, as a matter of discretion and procedural fairness, be allowed to participate in an appeal hearing. With regard to appeals of forest development plans, the parties must always include the Board and the Government, and will include the agreement holder who is subject to the appealed determination, unless they decline to participate. The agreement holder will normally participate since its timber harvesting rights may be affected by the Commission's decision in the appeal, and since it may be required to make changes to the plan it prepared. Accordingly, it can be logically concluded that a party under section 131(8) must be affected in a manner similar to the parties that are described in section 131(7) of the *Code*. It can also be concluded that in order to be considered a party under section 131(8) the Commission must be satisfied that substantial rights such as the personal, pecuniary or property rights of a person may be affected.

Next, the Commission has considered the nature of the test for intervenors in *Forest Practices Board*. The Commission notes that the test referred to in *Forest Practices Board* is based on the Court's analysis in *Hunter* v. *Board of Commissioners of Public Utilities for the Province of New Brunswick et al.* (1984), 11 Admin. L.R. 221 (at 226). In that case, the New Brunswick Court of Appeal considered a tribunal's decision to deny an application for intervenor status. The Court made no mention of applications for party status. The test in *Forest Practices Board* requires the applicant to show that they have a valid or genuine "interest" in the appeal, and that their participation will provide assistance to the Commission.

In a previous decision concerning an application for intervenor status (*Thomas Paul* v. *Government of British Columbia* (Appeal No. 97-FOR-12(a), October 24, 1997) (unreported)), the Commission considered the interpretation of a person with a valid or genuine "interest" in an appeal.

> In previous decisions, the Commission has interpreted "interest" to mean a "valid" or "genuine" interest in the proceeding. This does not mean that the applicant [for intervenor status] must be "directly affected", but… the applicant should have some greater interest than simply a concern about the effect of the decision.

Based on all of these considerations, the Commission finds that the test in *Forest Practices Board* is not relevant to an application for party status. Clearly, both the *Code* and the principles of natural justice indicate that different criteria or thresholds must be considered in respect of persons seeking to participate as intervenors and those seeking to participate as parties. The test set out in *Forest Practices Board* is based on criteria that are relevant to applications for intervenor status, but are not appropriate, based on the language of the *Code* and principles of natural justice, for deciding applications for party status.

Therefore, the Commission finds that different legal tests, as set out above, apply respectively to applications for party status and intervenor status.

2. Whether the Commission should should grant the CHN standing in this appeal either as a party or as an intervenor.

The CHN's application

The CHN submits that it is the official governing body of the Haida people, and it has a genuine interest in the appeal. The CHN further states that the Haida people are directly affected by the appeal because they rely on the forests of Haida Gwaii for sustenance, medicinal, cultural, spiritual, and other purposes. While the CHN states that it does not wish to raise the issue of aboriginal rights and title in this proceeding, it submits that the Haida have constitutionally protected aboriginal rights which are relevant to their interest in the management of Haida Gwaii's forests.

The CHN states that it is particularly concerned with the application and interpretation of section 41(1)(b) of the *Code*. The CHN submits that the Ministry of Forests' current interpretation of that section precludes decision-makers from protecting wildlife and addressing many of the CHN's concerns, and precludes the CHN from being effectively involved in decisions regarding Haida Gwaii's forests.

The CHN notes that the review of the Plan was partly triggered by a request from the CHN to the Board. The CHN submits that it has been actively involved in forestry issues on Haida Gwaii for many years. For example, it has challenged forestry decisions in the courts, it reviews forest management and forest development plans (to the extent that their resources allow), it operates the Haida Forest Guardians Project, and since 1994, it has been actively involved in negotiations with the provincial government regarding forest management on Haida Gwaii.

The CHN further submits that it has a unique perspective on the meaning of section 41(1)(b) of the *Code*, which could assist the Commission. The CHN argues that the

Board represents the general public in British Columbia, and does not have the same perspective as the CHN. The CHN submits that it has a unique perspective because the Haida people are intimately connected with and have a stewardship responsibility over the forests of Haida Gwaii. In addition, the CHN argues that it can bring a unique perspective in interpreting the principles set out in the preamble to the *Code*, and how those principles relate to meeting the needs of First Nations.

The CHN also raises issues concerning breaches of procedural fairness in the review process. The CHN wishes to lead evidence at the hearing "regarding the designation of the Review Official and review panel members that brings into doubt the ability of the review process to provide a fair hearing and gives rise to a reasonable apprehension of bias." In particular, the CHN states that it wishes to lead evidence that neither the Review Official nor Review Panel members were designated according to the requirements of the *Code* and the principles of natural justice, and that such circumstances are characteristic of the review process.

In closing, the CHN argues that it is important that it be granted "party" status, so that it "may present oral evidence and argument and provide the Commission with the benefit of the unique perspective of the CHN on the interpretation of s. 41(1)(b)" of the *Code*.

The Board's submissions

The Board states that it does not object to the CHN being granted party status, as the Board represents the general public interest of British Columbians, and does not specifically represent the interests of the CHN. The Board acknowledges that it received a request from the CHN to initiate the review of the Plan, but states that it decided against pursuing all of the issues raised by the CHN. The Board states that, as a matter of policy, it attempts to cooperate with groups that have requested a proceeding, but it forms its own positions on issues and does not represent public groups directly.

However, the Board objects to the CHN raising issues about the fairness of the review process. The Board submits that such issues are irrelevant to the appeal. The Board maintains that the original Review Panel, against which the CHN's allegations are directed, resigned and was replaced by a different panel which made the review decision which is at issue in this appeal. The Board advises that it has asked the Ombudsman to investigate the concerns about the process for appointing review panel members. The Board argues that dealing with this "peripheral" issue in the hearing would distract from the issues raised by the Board. Finally, the Board submits that the Commission may conduct a new and fair hearing of the matter regardless of any defects in the review process.

The Government's submissions

The Government opposes the CHN's application. The Government argues that the CHN has not indicated what evidence it seeks to introduce, if any, in respect of the 3 issues raised by the Board. Rather, it seeks to lead evidence about the review process, which is not relevant to the appeal. The Government indicates that the

appeal was brought under section 130(2)(c) of the *Code*, which permits the Board to appeal the approval of a forest development plan. The Government argues that the appeal is from the determination made by the District Manager under section 41 of the *Code*, and is not from a determination as varied under section 130(4) of the *Code*. Further, the Government argues that the Commission's powers under section 138(2) of the *Code* do not include making orders with respect to the review process. Thus, the CHN should not be permitted to participate on the basis of its desire to lead evidence concerning the review process.

The Government further argues that the CHN will not assist in addressing the issues raised by the Board. The Government maintains that the issues regarding the Tartu and Naden watersheds will focus on what was stated in documents, including letters written by the District Manager and the proposed forest development plan. As such, the Government maintains that those issues will be determined based on written evidence, and the purported unique perspective of the CHN would provide no assistance. The Government submits that the CHN has no special expertise in these issues, and has no expertise beyond that of the Board in interpreting these documents. Further, the Government argues that the CHN makes no suggestion that its submissions on these two issues would be different from those of the Board.

With respect to the third issue raised in the Board's Notice of Appeal, the Government submits that the CHN has not suggested that it has particular expertise on the biology or conservation of marbled murrelets, or intends to present a witness with such expertise. The Government submits that the conservation of marbled murrelets is of interest to all British Columbians, and the Board is capable of representing the CHN's interest in that issue.

In closing, the Government argues that the CHN has not supported its position that it has a unique perspective on the relevant issues, nor has it explained how its unique perspective, if it exists, would assist the Commission. Thus, any unnecessary involvement of the CHN will only further delay the resolution of the appeal. The Government maintains that the CHN's application should be dismissed because it has "not even satisfied the criteria for intervenor status".

Husby's submissions

Husby also opposes the CHN's application, arguing that the CHN seeks to raise issues that are not relevant to the appeal, and that it would be improper to allow the CHN to raise issues that are completely different from those raised by the Board. Husby submits that if the CHN is allowed to participate and raise new issues, the length of the hearing may double, resulting in financial hardship to the existing parties. Husby notes that the parties must already bear additional expenses associated with holding the hearing on Haida Gwaii, instead of in Victoria as originally scheduled.

Husby further argues that the Board provides a vehicle through which the CHN's perspective on the existing issues may be brought to the appeal, as its interests have evidently been adequately represented by the Board thus far. Husby submits that the CHN chose not to participate in either the public review or the

administrative review of the Plan, and could have applied earlier to join the appeal but declined to do so, even after the hearing was initially scheduled for May 2001.

Finally, Husby submits that the CHN has not indicated what evidence it proposes to present that would be unique from that of the Board. Moreover, any additional evidence or perspective that the CHN may provide would be of marginal value, at best, and would be outweighed by factors such as the added costs for other parties. Husby submits that, in order to make a successful application for intervenor or party status, the CHN must describe the evidence it intends to present with sufficient detail to properly assess the application, and the CHN has failed to do this.

The CHN's reply

The CHN submits that the issue it raised concerning section 41(1)(b) of the *Code* and the risks posed to marbeled murrelets is not a new issue in this appeal. The CHN submits that interpreting section 41(1)(b) requires the Commission to consider not only scientific evidence, but also legal arguments. The CHN says that it intends to refer to international law, and the concept of "sustainable use" as one of the underlying premises of the *Code*, to aid in the interpretation of section 41(1)(b). The CHN submits that, as the definition of sustainable use in the preamble refers to meeting the "economic, social and cultural needs of peoples and communities, including First Nations", the CHN should be given an opportunity to make submissions on how to "adequately manage and conserve" lands to meet Haida peoples' physical, material, cultural and spiritual needs. The CHN argues, therefore, that it can provide assistance in interpreting section 41(1)(b) regardless of whether it introduces evidence on that issue.

With regard to its allegations of unfairness in relation to the review process, the CHN submits that, since the Commission has *de novo* powers, it is not limited to addressing the issues raised by the Board, and it is entitled to address procedural deficiencies in the proceedings below. The CHN submits that the existence of bias with regard to panel appointments is relevant to considering the Review Panel's findings in relation to the Plan.

In response to Husby's submission that hearing the issues raised by the CHN would cause additional hardship, the CHN argues that "utilitarian" considerations should not limit the Commission in conducting a fair hearing.

With regard to evidence that the CHN could provide, the CHN states that it intends to call witnesses with respect to the review panel issue, and may call one witness regarding the section 41 issue.

In closing, the CHN submits that it has a valid interest in these proceedings because Haida culture "is the relationship of Haida people to all living and inanimate inhabitants of Haida Gwaii", and because the Haida people will have to "live with the consequences of the determination".

Analysis

To be added as a party to the appeal, the CHN must establish that it, or the Haida people it represents, may be affected by the appeal and in particular, how substantial rights such as personal, pecuniary or property rights may be affected. Before considering whether the CHN has met this requirement, it is important to clarify what this appeal is about.

The Commission notes that section 130(2)(c) of the *Code* and section 2 of the *Regulation* together provide that appeals of forest development plans may only be initiated by the Board, and only if it believes that there has been a contravention of the *Code*, or the regulations made under that Act, in relation to preparation of the plan. The specific issues raised by the Board in this appeal reflect those statutory limitations. Consequently, this appeal is concerned with whether the Plan complies with the *Code* and its regulations, and whether the District Manager properly considered section 41 of the *Code*. Furthermore, as noted by the Government, the Review Panel confirmed the District Manager's approval of the Plan, and, therefore, this is an appeal of the merits of the District Manager's decision, brought under section 130(2)(c) of the *Code*. This is not an appeal of a determination as varied by a review panel, and is not, therefore, brought under section 130(4) of the *Code*.

Based on these considerations, the Commission finds that the selection of Review Panel members and the fairness of the administrative review process have little relevance to this appeal and will provide the Commission with no assistance in deciding this appeal. This is particularly so given that the Commission may conduct the appeal as a new hearing of the matter as is acknowledged by the CHN. By holding a new hearing of the matter, any defects in the proceedings below may be cured by the hearing before the Commission. Accordingly, the Commission is not prepared to hear evidence or argument regarding the review process.

Having made that determination, the Commission has considered whether the CHN is affected by the appeal such that it should be granted party status in these proceedings. Although the CHN made general comments regarding the forests on Haida Gwaii, it has not explained how the Haida will be affected by the particular activities proposed in the Plan, or by the Commission's decision as to whether the Plan complies with the *Code*. Specifically, the CHN has not specified whether, or how, the Haida people rely on the Tartu watershed, Naden watershed, or the areas previously managed for marbled murrelets, or how logging or road building in those areas may affect the Haida people. Further, the CHN has failed to indicate how the Commission's powers on appeal described in section 138(2) of the *Code*, if exercised, would affect the Haida people.

In addition, the Commission notes that the British Columbia Court of Appeal recently held in *Paul* v. *Forest Appeals Commission*, 2001 BCCA 411, that the Commission has no jurisdiction to decide questions of aboriginal rights or title in exercising its mandate under the *Code*. Therefore, the Commission's decision in this appeal will not affect the Haida in terms of deciding or defining any aboriginal rights they may assert on Haida Gwaii.

For these reasons, the Commission finds that the CHN has failed to establish that its rights and interests, are sufficiently affected by the issues before the Commission to satisfy an application for party status under section 130(8) of the *Code*.

However, the Commission finds that the CHN does have a genuine interest in the issues under appeal, and particularly, in the interpretation of section 41 of the *Code*. It is clear that the Haida people have a particular interest in ensuring that forest development plans that cover portions of Haida Gwaii comply with the *Code*, particularly as they relate to sustainable forest use, wildlife conservation, and meeting the needs of First Nations communities on Haida Gwaii. The Commission accepts that the Haida have taken an active interest in forestry issues on Haida Gwaii, and have for several years been negotiating with the provincial government with respect to forest management on Haida Gwaii. The CHN also says that it "may" wish to call a witness to support its arguments on section 41 of the *Code.*

Therefore, the Commission is satisfied that the CHN can provide unique legal arguments and evidence regarding the interpretation of section 41 of the *Code* in light of the principles set out in the preamble to the *Code*, and particularly in relation to sustainable forest uses and balancing the needs of First Nations communities. The Board acknowledges that it does not directly represent the CHN, and has decided not to pursue all of the concerns raised by the CHN in its communications with the Board. Therefore, the Commission finds that the CHN has a unique perspective that is not fully represented by the Board, and that the CHN may provide unique legal arguments and evidence concerning the interpretation of section 41 and the relevant statutory provisions.

Accordingly, the Commission is satisfied that the CHN has met the test for intervenor status in these proceedings.

The Commission agrees with Husby and the Government that the appeal hearing should not be unnecessarily delayed by irrelevant or duplicate submissions. The Commission is satisfied that the CHN's participation will not result in unnecessary delay, so long as its participation is limited to presenting one witness and making submissions on the interpretation of section 41 of the *Code*. Therefore, the Commission is prepared to allow the CHN to participate on this limited basis.

Conclusion

The Commission finds that the CHN has not established that it is sufficiently affected by the issues under appeal to be granted party status in these proceedings.

However, the Commission finds that the CHN has a valid interest in the appeal, and could assist the Commission by providing relevant and unique evidence from one witness and legal arguments with respect to section 41 of the *Code*, that may assist the Commission in deciding the appeal. Therefore, the Commission finds that the CHN should be permitted to participate in the appeal as an intervenor.

The CHN will be restricted to presenting evidence from one witness and oral argument on the interpretation of section 41 of the *Code* only. To ensure an efficient and expeditious hearing, the CHN will be given **one hour** to present its argument, after the Board's closing arguments, but before the closing arguments of the Government and Husby. In addition, the CHN will be allowed to call one witness following the close of the Board's case and before the opening of evidence from the other parties.

DECISION

In making this decision, the Commission has considered all of the evidence before it, whether or not specifically reiterated here.

The Commission dismisses the application for party status. The Commission grants the application for intervenor status, subject to the restrictions stated above.

The Commission requests the CHN to provide a statement outlining the name of the witness; a summary of evidence of the witness; and a written brief of its argument to the parties, one copy each; and the Commission, three copies; at least 30 days before the first day of the hearing.

Alan Andison
Chair

September 7, 2001