Forest Appeals Commission

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APPEAL NO. 95/02

In the matter of an appeal under section 131 of the *Forest Practices Code of British Columbia Act* S.B.C. 1994, c. 41.

BETWEEN:	TOLKO FOREST PRODUCTS	**APPELLANT**
AND:	FOREST PRACTICES BOARD	**APPELLANT**
AND:	GOVERNMENT OF BRITISH COLUMBIA	**RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
David Perry Chair
David Walkem Member
Deborah Todd Member

DATE OF HEARING: July 31-August 1, 1996

PLACE OF HEARING: Kamloops, British Columbia

APPEARING:
For the Appellant, Tolko Forest Products
I. Frederick Kaatz, Counsel

For the Appellant, Forest Practices Board
John Pennington, Counsel

For the Respondent
Angela R. Westmacott, Counsel

This is an appeal brought by Tolko Forest Products Ltd. ("Tolko") and the Forest Practices Board against a review decision made by Ken Belik dated November 17, 1995 ("Review Decision"). The Review Decision upheld a Determination made by Robert Miller on September 20, 1995 ("Determination").

The appeal was brought before the Forest Appeals Commission pursuant to section 131 of the *Forest Practices Code of British Columbia Act* ("Forest Practices Code"). It is of note that this was the first appeal heard by the Forest Appeals Commission.

Tolko raised a preliminary issue as to which decision, either the Determination or the Review Decision, was properly before the Forest Appeals Commission. Section 130 of the Forest Practices Code provides that:

> "(1) A determination or failure to make a determination may only be appealed if it has first been reviewed under sections 127 to 129.
>
> (2) An appeal under section 131 is an appeal of the determination as varied by the review decision."

Tolko argues that as the Review Decision upheld in all particulars the Determination, the Determination has not been "varied" as noted in section 130(2). Accordingly, Tolko states that the appeal should properly consider *only* the Determination as the Review Decision made no changes to the initial Determination.

The Forest Appeals Commission rejects this interpretation. It is clear that there is a hierarchy of steps to be taken by any person affected by a Determination. The Forest Practices Code provides firstly such a determination must be reviewed by a review official. Section 130(1) provides that no appeal of a determination can be made directly to the Forest Appeals Commission. Section 130(2) provides that should such an appeal of a review decision be made, the Forest Appeals Commission shall only consider the determination as changed by the review official. If there are no changes, this does not deny the parties the right of appeal. It simply means that the Forest Appeals Commission shall review the order as made in the original determination and it may also consider the reasoning of the Review Panel in upholding the original determination.

FACTS

The facts in this case are, for the most part, admitted. It should be noted that Tolko called one witness who gave evidence as to the procedure used by both Mr. Miller and Mr. Belik in their respective decisions. However, Tolko called no evidence as to the substance of the alleged violation. The Forest Practices Board called no evidence.

The area in question in this appeal is Block 6 of Cutting Permit 870. Tolko operates in this area under Forest Licence A18686, which is located at Lupin Lakes South.

Chris Shallow is a compliance and enforcement officer employed by the Kamloops Forest District. In the course of a routine patrol of Block 6 on July 17, 1995, Mr. Shallow noted that a riparian zone had been crossed in two different places. Mr. Shallow in his statement noted that at one crossing, there was a "skid trail in which the integrity of the riparian area was severely damaged with the skidder continuously crossing....The second entry was in the centre of the Block...with the track marks indicating that a hoe had crossed at this point. There is little damage at this entry with only some brush knocked over...the riparian area was only crossed once at this point as a shortcut across the Block."

On July 20, 1995, Mr. Shallow re-attended the site in the company of Randy Reiter, an employee of Tolko, Mr. Shallow's supervisor and Tolko's contractor. Mr. Shallow gave evidence at the hearing before the Forest Appeals Commission that there was general agreement that a crossing had occurred at two different locations.

Mr. Shallow completed a harvest inspection report on site and provided a copy to Mr. Reiter who acknowledged receipt by signing the document. The harvest inspection report states that "infractions have been noted on stream side which were two crossings into the riparian area. These infrations (sic) are know (sic) under review and a determination will be made."

On July 20, 1995, Mr. Reiter advised his supervisor, Richard Sommer, the woods manager for Tolko, that the harvest inspection report had been received. Mr. Sommer noted in his evidence that this was 1 of 200 harvest inspections reports received in 1995.

Mr. Shallow prepared a file of material related to this alleged infraction including a chronological report dated July 26, 1995, copies of the harvest inspection report, photographs of the area, copies of the pre-harvest silviculture prescription dated January 19, 1994, excerpts from the Timber Harvesting Practices Regulation and sections from the Forest Practices Code, a logging plan application from Tolko for the Block in question dated June 27, 1995, an excerpt from a computer log of Mr. Shallow's incident report and directions on how to get to the affected Block (the "Shallow Report".)

Mr. Sommer, after receiving the harvest inspection report, contacted Peter Lishman, the assistant district manager for the Kamloops Forest District, sometime in July 1995. The purpose of the phone call was to arrange a meeting on site at Block 6 to discuss riparian management. This initial meeting was cancelled and Mr. Sommer subsequently arranged a meeting on site with both Mr. Lishman and Robert Miller, the District Manager.

On September 6, 1995, Mr. Miller, Mr. Richmond and Mr. Sommer attended at Block 6. The field visit lasted approximately 1/2 hour and was followed by visits to three other locations on this Block and visits to other sites some distance from Block 6.

Before attending this meeting, Mr. Miller gave evidence that he reviewed portions of the Shallow Report, specifically the photographs. Mr. Miller did not provide a copy of the Shallow Report to Tolko before the field visit.

There is some divergence in the testimony as to each party's understanding of the purpose of this field trip. Mr. Miller believed it was clear that the purpose of the field trip was to allow him to make a determination pursuant to section 67(1) of the Forest Practices Code. In Mr. Sommer's testimony, he indicated that he knew a determination was possible after reviewing the harvest inspection report. However, he did not know that the specific reason for the field visit was for the purposes of making a determination pursuant to the Forest Practices Code.

Mr. Miller did not take an active role during the site visit. He simply observed the areas where there had allegedly been a crossing of a riparian management zone. There was general agreement amongst all the parties attending on site that, at one point, the riparian management zone had been logged through and skidded through while at another location an operator had crossed the riparian management zone as a short-cut to a cutting area.

Following the on-site inspection, Mr. Miller reviewed the Shallow Report in full and the relevant Forest Practices Code sections. Following this review he made a determination

pursuant to section 117 of the Forest Practices Code that there had been a violation of section 67 of the Forest Practices Code.

The specific violation was that Tolko had breached a Pre-harvest Silviculture Plan ("PHSP") and logging plan by permitting crossing and logging through the riparian management zone. The PHSP provides in part that a 15 metre riparian management area will be maintained along with a 6 metre no machine zone. The PHSP is accompanied by a map indicating the location of the riparian management area. The logging plan provides that there is a 15 metre riparian management area but also provides for a 6 metre no harvest zone. There was no evidence led at the hearing as to why there was a discrepancy between the logging plan and the PHSP. However, it was admitted that both documents were prepared by Tolko.

After making his determination, Mr. Miller telephoned Mr. Sommer on September 12, 1995 to advise him of what he had done. Mr. Sommer was surprised to receive this call as he did not know that the determination process had begun. In the course of that telephone call Mr. Sommer indicated that Tolko would appeal as he believed the determination did not fit with the intent of the Forest Practices Code. He was not told he was under investigation and his rights were not read to him.

Mr. Miller committed his determination to written form on September 20, 1995, and delivered a copy to Tolko.

The Determination was subsequently appealed to Mr. Belik. Mr. Belik is the district manager for the Vernon Forest District. He held an oral hearing on November 15, 1995, at which Mr. Sommer gave evidence for Tolko and Mr. Miller and his field operations supervisor, Jim Massey, gave evidence for the Ministry of Forests.

Mr. Belik gave evidence at the hearing before the Forest Appeals Commission. At some points his recollection of events differed from that of Mr. Sommer's. Specifically, Mr. Sommer gave evidence that he asked for an adjournment of the review hearing based on late disclosure of the Shallow Report. It was common cause between the parties that the Shallow Report was not delivered to Tolko until the commencement of the review hearing. Mr. Belik could not recall a request for an adjournment on that basis but did refuse an adjournment based on a complaint from Tolko that, as the district manager in a neighbouring forest district, he was biased. Mr. Belik made a finding that he was not biased and continued with the review hearing.

At that hearing, no evidence was lead by Tolko with respect to whether or not there had been a violation of the Forest Practices Code. The evidence of Mr. Sommer was restricted to concerns over the process used by Mr. Miller.

After hearing the evidence, Mr. Belik determined that there had in fact been a violation of the riparian management zone at two different locations and, accordingly, he upheld the Determination of the district manager. It should be noted that the penalty assessed in the Determination was a $2000 fine which was upheld by Mr. Belik.

Mr. Belik also gave evidence that although district managers meet on occasion as a group, they deal with policy issues not operations.

ISSUES

Tolko raised a variety of issues relating to alleged deficiencies in the process used by Mr. Miller. Many of the arguments raised by the appellant are overlapping but can be generally characterized as an assertion that natural justice was not respected by the process used by Mr. Miller. A similar allegation was made with respect to the process used by Mr. Belik. Tolko also argued that both Mr. Miller and Mr. Belik were biased in their approach. Finally, Tolko argued that, because of the fundamental breaches of natural justice, the decisions made by Mr. Miller and Mr. Belik were void and the Forest Appeals Commission must rescind the Determination.

In their initial notice of appeal, the Forest Practices Board raised the issue of bias with respect to the Belik hearing. During the course of the hearing before the Forest Appeals Commission, the Forest Practices Board withdrew a second ground of appeal relating to the issue of whether of not the crossings of the riparian management area had caused environmental damage.

Each of these issues will be addressed in turn.

Nature of Administrative Review Under The Forest Practices Code

Tolko argued at length that an administrative determination made under the Forest Practices Code was a quasi-criminal proceeding that required "the same duty of fairness afforded an accused person subject to criminal proceedings before a court."

The appellant cited a variety of cases including *Wigglesworth v. the Queen,* [1987] 2 S.C.R. 541. In this case, the court discusses, at length, the circumstances where the full protection of section 11 of the Charter of Rights will apply to administrative proceedings. The court held at page 559 that

> "'the phrase criminal and penal matters' which appears in a marginal note would seem to suggest that a matter could fall within section 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within section 11 under either branch."

On behalf of the court, Madam Justice Wilson goes on to state:

> "if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity:...There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

> ...In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."

Tolko argues that because many of the penalties under the Forest Practices Code are quasi-criminal, including punitive fines, and because charges can be laid under the *Offence Act* for contraventions of the Forest Practices Code, that the full panoply of protection outlined in section 11 of the Charter of Rights must apply.

With respect, Tolko has not distinguished between administrative proceedings under the Forest Practices Code and offences. A determination made by the district manager is not an offence under the *Offence Act*. Rather, it is within the realm of activity described in *Wigglesworth* (above) which is "to regulate conduct within a limited private sphere of activity." Administrative determinations are made to ensure licensees respect the provisions of the Forest Practices Code and incorporate them into their forest activities. It is clear that the $2000 fine assessed by the district manager in this case is not "imposed for the purpose of redressing the wrong done to society at large," but is rather a regulatory tool to encourage compliance with the Forest Practices Code.

It is common ground between the parties that Tolko is entitled to natural justice at all levels of administrative review. However, the Forest Appeals Commission finds that the nature of the procedural fairness necessary is not such to require the full protections accorded by criminal procedure. Accordingly, following *Wigglesworth*, the protection of section 11 of the Charter of Rights is not extended to the licensee affected by determinations made pursuant to the Forest Practices Code.

Insufficient Notice Of Alleged Breach

Tolko argued that they had not been given sufficient notice of the wrong they were alleged to have done. The notice was lacking particulars in time, place, individuals who committed the breach and which sections of the Forest Practices Code were alleged to have been breached.

In support of this argument, Tolko cited the evidence given by Mr. Belik during the course of his cross examination. Mr. Belik was unclear as to where the 6 metre no machine zone was located within the riparian management area and was unclear as to whether the logging plan was breached given that it provided for a 6 metre no harvest zone. Tolko argued that the confusion of the review official on these points indicated that, at the root of this case, there had been insufficient particulars given to Tolko.

In support of this argument, Tolko cited *Finch v. Association of Professional Engineers and Geoscientists (British Columbia)* (1994) 24 Admin.L.R. 227 (B.C.C.A.). In his minority supporting decision, Mr. Justice J.A. Cumming stated that "a fair opportunity to answer a charge requires that the charge contain sufficient particulars to enable the accused to prepare his defence. Such particulars must be furnished before the person charged can be called upon to answer the charge" (at page 237).

Counsel for the Ministry of Forests says, if there is any confusion in interpreting the PHSP or the logging plan, these should be held against Tolko because they are documents prepared by Tolko. The logging plan provides for a no harvest zone while the PHSP provides for a no machine zone. Forest licence A118686 paragraph 7.21

provides that, if a logging plan is inconsistent with the PHSP, the PHSP prevails. If in spite of this specific provision Tolko was confused by the differences between the two documents, this confusion was of their own making and cannot be held against the statutory decision maker.

The Ministry of Forests further argues that Tolko had sufficient notice in fact of the alleged violations. An employee of Tolko, Mr. Reiter, was present when the initial finding of a possible violation was made by Mr. Shallow. The particulars of the offence were set out in the harvest inspection report, specifically, that there had been two crossings of the riparian management area within Block 6. When the district manager attended at the site in the company of Mr. Sommer, the evidence was that it was clear from all parties that a crossing had occurred within the riparian management area and the locations were noted by both representatives for Tolko and the Ministry of Forests.

The Ministry of Forests attempts to distinguish *Finch* on the basis that this is a case where further particulars were requested by the subject of the disciplinary proceedings but this request was denied. Nonetheless, the principle set out in *Finch* that a person who is the subject of administrative proceedings must have notice of the alleged offence is a valid one and forms a crucial element of natural justice.

The Panel finds as a fact that, in the circumstances, Tolko was aware of the alleged infractions. The riparian management area was sketched out in considerable detail in maps attached to both the PHSP and the logging plan. Whether or not the restricted area within the riparian management area was "no harvest" or "no machine", both of these provisions were clearly breached. By crossing and re-crossing the riparian management area with a skidder, the vegetation within the area immediately adjacent to the creek was both harvested by removal of vegetation and had been entered by a machine. This also holds true for the second single crossing where a hoe had apparently cut across the riparian management area.

The location of both areas was brought to the attention of both Mr. Reiter when the infraction was first discovered and to Mr. Sommer when they further attended the site in the company of the district manager. Tolko therefore had all the information necessary to know the particulars of the alleged violation and had sufficient information to prepare a full answer and defence.

Although Tolko was aware of the facts underlying the Determination, it must further be discussed whether or not Tolko was put on proper notice that a determination was being considered.

Failure to Advise That a Determination Was Being Considered

Tolko argues that, even though the harvest inspection report states that "a determination will be made", they were unaware that the field visit by the district manager was, in fact, the commencement of a process during which a determination may have been made.

Both Mr. Sommer and Mr. Miller indicated that, prior to passage of the Forest Practices Code, it was common for the district manager to attempt to resolve matters informally with logging companies. This could take the form of either a telephone call to discuss the problems in forestry practices or in field visits to assess whether or not ministry guidelines were being followed.

During the course of his testimony, Mr. Miller indicated that, for him, the purpose of the field visit was to allow Mr. Sommer an opportunity to make any comments relevant to the alleged violation. One of the reasons for making this assumption was that, in the past, this is how Mr. Miller had dealt with potential violations under regulations which preceded the Forest Practices Code. He believed that an on site discussion with the affected party would maintain good relations with the logging companies and could deal with minor problems in an expeditious manner.

Produced in evidence at the Forest Appeals Commission hearing was Enforcement Branch Policy No. 16.10 dated June 15, 1995. The relevant section of the policy at page 2 states under the heading "Opportunity To Be Heard"

> "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."

In evidence, Mr. Miller indicated that he was aware of this policy and took it into account when deciding how he would proceed with making a determination. In his view, the field visit was a replacement for a more formal hearing such as is contemplated under the policy.

Counsel for the respondent Ministry of Forests argued that, in the circumstances, there had been sufficient notice to Tolko that a determination was being considered. The Ministry of Forests cited *R. v. Ontario Racing Commission*, *Ex Parte* Taylor, [1971] 1 O.R. 400 (CA) at 402 where the court says "the cases establish beyond peradventure that whether a notice given in any particular case is sufficient depends entirely upon the circumstances of the case."

Counsel for the Ministry of Forests also cites *Conception Bay South (Town) v. Newfoundland (P.U.B.)* (1991), 6 Admin.L.R. (2d) 287 where the Newfoundland Supreme Court held that the knowledge and experience of the person to whom notice is given are relevant factors in determining whether or not the notice is sufficient.

The Ministry of Forests relies heavily upon the harvest inspection report as providing adequate notice that a determination was being considered. Although the Forest Appeals Commission agrees that the harvest inspection report and the subsequent meetings between the parties provided sufficient notice of the violations which were alleged, there remains doubt as to whether or not Tolko was sufficiently aware that the process of making a determination had been formally started.

What must be kept in mind is the long-time previous relationship between the parties. Both the Ministry of Forests and Tolko gave evidence that in the past the problems in this case, i.e. crossing a riparian management area, were dealt with on an informal basis. Because the Forest Practices Code sets out an elaborate regulatory framework which now governs the relationship between the Ministry of Forests and regulated

forest companies, there must be some formal notice to a company that the process of making a determination has begun.

There was no such notice given in this case. The district manager simply assumed that Tolko was aware that the field visit was for the purpose of making a determination. The district manager did not give any formal opportunity to be heard, although he was prepared to hear submissions from Tolko at the field site.

Of persuasive value to the Forest Appeals Commission is the policy cited above. The policy was not established by the minister under s. 122 of the Code and, therefore, the district manager was not required by statute to use that procedure. However, the requirement that notice to a party that a determination is being considered be in writing is essential according to the requirements of natural justice as it overcomes any possible misunderstandings as were evident in this case. Mr. Miller was aware of this policy and chose to disregard it.

The Forest Appeals Commission finds that there was a breach of procedural fairness in this case in that the district manager failed to give adequate notice in writing that he was considering making a determination under the Forest Practices Code.

Right To Be Heard

Tolko argued that they had no opportunity to present evidence to the district manager when he was making the Determination.

The Commission accepts the evidence of Mr. Miller that his intention was to allow Tolko to present evidence should it desire to do so at the field visit. However, for the same reasons noted above, Tolko may not have been aware of this opportunity. Accordingly, this was also a breach of procedural fairness.

Lack of Full Disclosure

The appellant cited *Nrecaj v. Canada* (Minister of Employment and Immigration) (1993) 14 Admin.L.R. 2d 161 (FCTD), in support of their argument that, failure to disclose all evidence considered by the decision maker, is a breach of procedural fairness. The alleged breach in this case is that Mr. Miller did not provide a copy of the Shallow Report to Tolko before making the Determination.

The respondent states that all of the evidence in the Shallow Report was known to the appellant Tolko. It is true that the facts outlined by Mr. Shallow were known by the appellant. However, they were not aware of the specific chronological document nor of the recommendations for action that Mr. Shallow made. Had Tolko been aware of either one of these documents it may have put them on notice that there was a case to be met and may have alerted them to the necessity to make more formal presentations to the district manager.

The respondent cites *Quebec v. Canada* (1994) 112 D.L.R. (4th) 129 (S.C.C.) for the proposition that “in general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision maker of sufficient information to permit meaningful participation in the hearing process...the extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and

in particular with the type of decision to be made and the nature of the hearing to which the affected parties are entitled" (at page 146).

What is argued by the appellant and accepted in this aspect by the Forest Appeals Commission is that there was not sufficient disclosure to allow "meaningful participation" in that Tolko was not aware that the determination process had begun.

Bias of Mr. Miller

Tolko argued that the district manager had participated in the investigation and accordingly could no longer be unbiased in making the Determination.

The evidence before the Forest Appeals Commission was that Mr. Miller was not an active player in the investigation. Rather, he received information from Mr. Shallow and attended at Block 6 to take a view. In these circumstances, he has not participated in the investigation to the extent that his independence is at issue. In fact, the district manager attended at the site on the request of Tolko and, accordingly, Mr. Miller cannot be held to have initiated the investigation.

This ground of appeal fails.

Procedural Fairness At The Review Level

The appellant argued that there had been procedural unfairness by the district manager. It also argues that there were breaches of procedural fairness before Mr. Belik when he made his Review Decision.

The Forest Practices Board joins in criticism of the Review Decision. In their view, because Mr. Belik is district manager of a neighbouring forest district, there is a reasonable apprehension of bias.

The respondent argues that any breaches in procedural fairness by the district manager were cured by the hearing before Mr. Belik. Further the procedure before Mr. Belik lacked any deficiencies in procedural fairness.

The appellant's attack on procedure before Mr. Belik was confined to an argument that (a) there was failure to disclose all evidence and (b) there was bias.

(a) Failure To Disclose Evidence

It was common ground between the parties that at the opening of the hearing before Mr. Belik, the Shallow Report was disclosed to the appellants for the first time. There was conflict in the evidence as to whether or not Mr. Sommer, on behalf of the appellant, asked for an adjournment because of this late disclosure. Mr. Belik had no recollection of such a request.

Tolko argues that because of the late disclosure they did not have an opportunity to review the material prepared by the respondent and did not have an opportunity to respond properly to that case.

In the course of cross-examination of Mr. Sommer, he acknowledged that the only part of the Shallow Report that he had not previously seen was the chronology. All of the other documents were either ones that had been prepared by Tolko, such as the PHSP and the logging plan, or documents that had been previously provided to Tolko such as the harvest inspection report. Mr. Sommer also acknowledged in the course of cross-examination that there were no surprises in the material presented to him at the Belik hearing.

Although the Shallow Report was disclosed late, there does not appear to be, in fact, any lack of fairness to the appellant. Mr. Sommer acknowledged, quite forthrightly, that he was not surprised by the material presented at the hearing. Furthermore, he was given an opportunity to present evidence on any aspect of the incident and a further opportunity to cross-examine witnesses from the Ministry of Forests. It would be preferable for the sake of caution that all documents to be relied upon by the parties should be exchanged in advance of a hearing. Although the facts are not clear as to whether Mr. Shallow requested an adjournment, the Forest Appeals Commission finds that he was not prejudiced by the failure to grant an adjournment in any event.

The Forest Appeals Commission finds that, in the circumstances, Tolko was given ample opportunity to respond to the case made against it and to provide any defences that it wished.

(b) Bias of Mr. Belik

Tolko argued there was both actual bias and a reasonable apprehension of bias in the Belik hearing. The Forest Practices Board supports Tolko in its allegation that as Mr. Belik was a district manager in a neighbouring forest district, there is a reasonable apprehension of bias.

Actual Bias

Dealing first with the question of actual bias, Tolko cites evidence given by Mr. Belik. Mr. Belik was asked in cross examination whether he felt it was his responsibility to ensure that Mr. Miller had not made any errors. In response Mr. Belik gave evidence that he "owed it to Bob to ensure that his ducks were in a row" and Mr. Belik also said that, if in the future one of his own determinations were to be reviewed by Mr. Miller, he would expect Mr. Miller to ensure that there was "no egg on his face" and "I would hope that if I've blown it in terms of putting my mind to it he would help me out by correcting the decision."

Counsel for Tolko attacked the statements as indicating that Mr. Belik's intention throughout the review was simply to assist the Ministry of Forests. According to the submissions of Tolko this indicated that he did not have an open mind during the course of the hearing and was biased in favour of the Ministry of Forests.

The Forest Appeals Commission disagrees with this analysis of Mr. Belik's evidence. It is clear from Mr. Belik's evidence that if he found an error, he had every intention of correcting it. His evidence was that, if Mr. Miller had made a mistake, he felt it was his responsibility to Mr. Miller and perhaps to the Ministry of Forests to ensure that that mistake was corrected. Mr. Belik did not show bias against finding errors in a decision made by another district manager. Rather, he had an interest in ensuring that, any decision made by a district manager was correct. As a result, he was open to vary the

Determination made by the district manager if he found errors in substance or process. Accordingly, no actual bias has been demonstrated.

Reasonable Apprehension of Bias

Turning to the question of reasonable apprehension of bias, the Forest Practices Board argues that the scheme of the Forest Practices Code suggests that it is improper for a district manager to review a determination made by another district manager. Section 1 defines "senior official" as including district managers but also other persons designated by the minister. According to counsel for the Forest Practices Board there are currently 49 senior officials in the province consisting of 43 district managers and 6 regional managers.

Under section 117, a senior official must make a determination. However, under section 129, an "employee" can conduct a review. Obviously, the class of persons who are employees is significantly larger than those who are senior officials.

The Forest Practices Board argues that because the ambit of section 129 is wider than that of section 117, the legislature intended that a much broader group should review decisions made by senior officials.

The Forest Practices Board suggests that, instead of a district manager acting as the review official, the review should be made up of panels of three which could include staff from the central office of the Ministry of Forests and perhaps a district manager.

Both Tolko and the Forest Practices Board cite the standard statement of what constitutes reasonable apprehension of bias as set out by Mr. Justice de Grandpré in *Committee for Justice and Liberty Foundation v. National Energy Board* [1978] 1 S.C.R. 369 at 394 where he states

> "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

The Forest Practices Board also cites, to the same effect, *Newfoundland Telephone Company Ltd. v. The Board of Commissioners of Public Utilities* [1992] 1 S.C.R. 623 at 636

> "Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal....As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

And at page 637

"Public confidence in the impartiality of Board decisions was required to further the public interest."

In order to determine the level of impartiality required for review decisions, it is necessary to examine the statutory scheme. The relevant sections are reproduced here for ease of reference.

"Penalties

117. (1) If a senior official determines that a person has contravened this act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.

(2) If a person's employee, agent or contractor, as that term is defined in section 158.1 of the *Forest Act,* contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency of contract, the person also commits the contravention.

(3) If a corporation contravenes this Act, the regulations or the standards, a director or officer of it who authorized, permitted or acquiesced in the contravention also commits the contravention.

(4) Before the senior official levies a penalty under subsection (1) or section 119, he or she

(a) must consider any policy established by the minister under section 122, and

(b) subject to any policy established by the minister under section 122, may consider the following:

(i) previous contraventions of a similar nature by the person;

(ii) the gravity and magnitude of the contravention;

(iii) whether the violation was repeated or continuous;

(iv) whether the contravention was deliberate;

(v) any economic benefit derived by the person from the contravention;

(vi) the person's cooperativeness and efforts to correct the contravention;

(vii) any other considerations that the Lieutenant Governor in Council may prescribe.

(5) The senior official who levies a penalty against a person under this section, section 118(4) or (5) or 119 must give a notice of determination to the person setting out all of the following:

(a) the nature of the contravention;

(b) the amount of the penalty;

(c) the date by which the penalty must be paid;

(d) the person's right to a review and appeal including the title and address of the review official to whom a request for a review may be made.

(6) For the purposes of subsection (1) the Lieutenant Governor in Council may prescribe penalties that vary according to

(a) the area of land,

(b) the volume of timber,

(c) the number of trees, or

(d) the number of livestock

affected by the contravention.

Review

129. (1) If a request for a review is received by a review official under section 127 or 128 (3), the review must be considered by one or more persons employed under the Public Service Act.

(2) A review of a failure to make a determination must be made by one or more persons employed under the *Public Service Act* after a request is received by the deputy minister under section 128(2).
(3) The employees who conduct the review must not have made the determination or have participated in an investigation that resulted in the determination.
(4) The employee who conducted the review, or a majority of the employees conducting the review if more than one, may decide the matter
(a) based on an oral hearing, or
(b) without an oral hearing, based on
(i) the written explanation that is part of the request, or
(ii) the written explanation and any other communication with persons the employee considers necessary to decide the matter, including the person or board requesting the review and the person who made the determination.
(5) The employee who conducts the review, or a majority of the employees conducting the review if more than one, may make a decision
(a) confirming, varying or rescinding the determination or making a determination,
(b) referring a determination or failure to make a determination back to the person who made it or failed to make it with or without directions, or
(c) making a determination, if the review concerns the failure to make a determination.
(6) A written decision must be given to the board, to the person who is the subject of the determination and to the person who requested the review, not later than 60 days after the request for the review was received by the review official.
(7) Despite subsection (6), if a person conducting the review determines that the written request for a review does not comply with the content requirements of the regulations, the 60 day period referred to in that subsection does not begin until a written request for review that does comply with the content requirements of the regulations is received.

Appeal
131. (1) Not later than 3 weeks after receiving a review decision under section 129(6), the person or the board may appeal the decision by delivering to the commission a notice of appeal that meets prescribed requirements.
(2) Before or after the time limit in subsection (1) expires, the chair or a member of the commission may extend it.
(3) If the person or the board does not deliver the notice of appeal within the time required, the person or board loses the right to an appeal.
(4) On receipt of the notice of appeal, the commission must, in accordance with the regulations, give a copy of the notice of appeal to the ministers and to
(a) the board, if the notice was delivered by the person who is the subject of the determination, or
(b) the person who is the subject of the determination, if the notice was delivered by the board.
(5) The government, the board, if it so requests, and the person who is the subject of the determination are parties to the appeal.
(6) 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.
(7) The commission, after receiving a notice of appeal, must promptly give the parties to an appeal a hearing.
(8) A party may

(a) be represented by counsel,
(b) present evidence
(c) if there is an oral hearing, ask questions, and
(d) make submissions as to facts, law and jurisdiction.

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

(10) An intervenor may take part in a hearing to the extent permitted by the commission.

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

What is of particular interest is to compare the review section, 129, with the appeal section, 131. Section 131 appeals set out the rights of a party under subsection 8 to be represented by counsel, present evidence, ask questions and make submissions on the facts, law and jurisdiction. These are the full protections of an adversarial trial process such as would be found in the courts. None of these rights are set out in section 129. The person or persons making the review can do so simply on the basis of written explanations or other information that the review official requires.

Of particular note is section 129(3) which sets the only restriction on who may hear a review. That restriction is of course that the person who made the determination cannot participate in the review.

It is apparent that the legislature has spoken with respect to the degree of independence expected from the review official. Counsel for the respondent, Ministry of Forests, cites *Ringrose v. College of Physicians and Surgeons of the Province of Alberta,* [1997] 1 S.C.R. 814. At page 824 of that decision, Mr. Justice de Grandpré states "no reasonable apprehension of bias is to be entertained when the statute itself prescribes overlapping of functions." As counsel for the Ministry of Forests points out, section 129 contemplates exactly this overlapping of functions in that only those persons who made the initial determination or participated in it are barred from conducting a review.

In effect, the argument is that because Mr. Belik is a district manager he has an institutional bias in favour of the Ministry of Forests. In *Finch* (cited above) the court quoted, with favour, the *Ringrose* decision and particularly noted that "as to the predetermination by association, the theory, if it has any validity, must be restricted to very special circumstances which certainly do not exist here." The Court of Appeal goes on to say that "In that we may take notice of the fact that many adjudicative tribunals validly re-hear matters that have been heard by other members of the same tribunal, when it must be assumed that everyone concerned is aware of the previous findings" (at page 373.)

The British Columbia Court of Appeal has held that it is proper for members of the same tribunal to re-hear decisions made by another member. This is an even closer relationship than one between two different district managers. It must be concluded, that simply from the fact that both Mr. Belik and Mr. Miller are district managers employed by the Ministry of Forests, is insufficient to create a taint of institutional bias. As Mr. Justice de Grandpré notes in *Committee for Justice and Liberty* at page 395, "the grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience.'"

The structure of the Forest Practices Code suggests very strongly that the section 129 review is to be a sober second look rather than a full quasi-judicial review. None of the indicia of a judicial review such as representation by counsel or the right to cross-examine are provided for in section 129. If section 129 is to be a speedy and informal review, such as is suggested by the statutory framework, then use of a neighbouring district manager for this purpose makes good practical sense. The person does not have to travel such a great distance and can be presumed to have a high degree of familiarity with the issues involved in the application of the Forest Practices Code. Further, after the review, a full appeal is available to this Commission.

Accordingly, the Forest Appeals Commission rejects the argument that Mr. Belik is biased simply by reason of his office.

REMEDY

It was found above that Mr. Miller made some errors in making his determination, specifically, not giving formal written notice that a determination was being considered and, secondly, not disclosing the Shallow Report to Tolko before making the Determination.

Tolko argues that, because this decision violated the principles of natural justice, it is void. Tolko goes on to argue, without citing authority in support of this proposition, that because section 24(2) of the Charter of Rights and Freedoms permits exclusion of evidence which has been improperly obtained, it would be wrong to allow the Ministry of Forests to benefit from their error by simply remitting this matter back to Mr. Miller for a determination using an appropriate procedure.

The Forest Practices Board took no formal position on an appropriate remedy. However, they did argue that the Review Decision made by Mr. Belik was void. On this argument, the Forest Appeals Commission did not have the power to substitute its own decision because there had not been a proper review. Without a review, according to section 130 of the Forest Practices Code, there cannot be an appeal of a determination.

Counsel for the Ministry of Forests argues first, that any errors made by Mr. Miller were cured by the review held by Mr. Belik. Counsel for the Ministry of Forests goes on to argue that, if there were any errors in the Review Decision, those can be cured during the course of the hearing before the Forest Appeals Commission.

During the course of a review, section 129(5) states clearly that the review official has all the powers of a person making a determination. This includes the power to review further evidence as is set out in section 129(4)(b).

These are all the powers associated with a *de novo* hearing rather than simply an appeal on the record. Likewise, section 137 of the Forest Practices Code permits the Forest Appeals Commission to admit “any evidence” and section 138 provides that the Commission may “make any decision that the person whose decision is appealed could have made." These are also all the indicia of a *de novo* hearing.

The authorities are clear that, where an administrative tribunal has *de novo* powers, those include the powers to cure any procedural deficiencies that occurred at the lower level. In *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561 at page 582, the Supreme Court reviewed a situation where a committee of the university council

disciplined a student. There were procedural errors at this level, specifically, the student was not given the opportunity to correct any statements prejudicial to his position. The university provided for an appeal to the senate of the university which had *de novo* powers to "hear and decide". Mr. Justice Beetz found at page 582 that there was " a general principle in holding that the denial of natural justice in the earlier proceedings could be cured in appeal, and implicitly but necessarily, that the decision appealed from was not a complete nullity since it could be appealed."

Mr. Justice Beetz goes on to say that there are good practical reasons for making this finding. If the decisions made at the first level are a nullity, then the only remedy available is judicial review. If for example, the Determination made by Mr. Miller was void because of its failure to give written notice that he was considering a determination, then no appeal would lie to a review official. If a decision is void, then there is nothing to appeal. This would leave the only remedy for Tolko to be judicial review to have the initial Determination set aside.

Such a theoretical approach would undermine the entire structure of the Forest Practices Code. The purpose of a review under section 129 is to correct any errors made in the course of a determination. The corrections may consist of giving the parties a proper opportunity to be heard or may involve overturning the determination. In any event, the review official has full *de novo* powers to substitute his decision for that of the person making the original determination.

The same analysis holds true for the Forest Appeals Commission. If Mr. Belik has made any errors, although we have found that he has not, those errors can be cured in the course of a hearing before the Forest Appeals Commission.

Counsel for Tolko argues that if there have been any errors in the opportunity to be heard, this contaminates the whole procedure. Accordingly, Tolko chose not to call any evidence as to the substance of the alleged offence in this case, neither at the review hearing before Mr. Belik, nor before the Forest Appeals Commission. In our view, this imports a point of view from criminal procedure which is inappropriate in administrative determinations. In Administrative Law in Canada by Sarah Blake, she notes at page 9 that the purpose of the duty of to be fair is that "at a minimum, the doctrine of fairness requires that, before a decision adverse to a person's interests is made, the person should be told the case against him or her and be given an opportunity to respond. The purpose is twofold. The person to be affected is given an opportunity to defend his interests or assert a claim and, by allowing that person to provide information, the decision maker is better able to make a rational and informed decision."

If there are errors made in the course of administrative decisions, this does not void the entire process. The purpose of excluding evidence under the Charter of Rights is to act as a check on the power of the state in imposing criminal sanctions. The courts have held, as is discussed above, that such remedies are not available in administrative tribunals for failure to respect section 11 of the Charter of Rights and Freedoms procedures. The proper remedy is a review, where any errors can be corrected. If, during the course of that review, it is discovered that the original official making a determination has erred in law or in fact, then that error can be corrected. The proper remedy is not to void the entire process, but rather to either substitute a decision at a higher level review or remit the matter back for further consideration to the original official.

CONCLUSION

The Forest Appeals Commission finds that, although there were errors made in the course of the determination by Mr. Miller in the procedure he used, there was ample opportunity for the appellant to present its case both before Mr. Belik at the review level and before the Forest Appeals Commission. Tolko has elected to not call any evidence to refute the substance of this offence and, accordingly, the Forest Appeals Commission finds as a fact that the two crossings of the riparian management area have occurred.

Given that these crossings occurred when the riparian management area was dry and minimal environmental damage was caused, the Forest Appeals Commission upholds the original Determination that a $2000 penalty be assessed.

The appeal of Tolko and of the Forest Practices Board is dismissed and the Determination is upheld as reviewed by the review official.

David Perry
Chair

November 12, 1996