

INFO special report

Administrative Review Procedures: Oral Hearings and Panel Size

Introduction

Section 189(3) of the *Forest Practices Code of B.C. Act* allows the Forest Practices Board to report to government and the public on matters related to Board duties. In considering whether or not to issue such a report, the Board considers a number of factors, including whether a report would serve the public interest by:

- helping to improve forest management
- helping to sustain public confidence in forest management
- encouraging fair and consistent application of the Forest Practices Code, and/or
- clarifying the interpretation or application of the Code.

The aim of the following report is to suggest changes to the way that some administrative reviews are conducted, in order to enhance public confidence in the new forest practices regulatory system.

Background to the review process

Under the Code, senior government officials have the power to decide that a person is not meeting Code requirements, and to impose financial penalties and orders such as remediation orders. Those subject to such a decision — and the Forest Practices Board — generally have the right to ask for an “administrative review” of the decision. During a “review”, other

government employees reconsider the case, to see if the original decision should be changed. Reviewers can confirm, vary or nullify the decision; refer the case back to the original official; or make a new determination.

The review process has been designed as a speedy and informal process. As the Forest Appeals Commission has noted, a review is not a full judicial process, but is a “sober second look” at the case.¹ However, the importance of a review proceeding should not be underestimated. A review decision is generally final, unless appealed to the Forest Appeals Commission by the person involved, or by the Forest Practices Board. Members of the public can not appeal review decisions. In many cases the review will be the final decision in the case.

The issue

The Board is concerned that some review panels may be judging technically complex, contentious cases that have attracted significant public interest by:

- Relying solely on written evidence and submissions, without hearing public oral evidence from those who observed the situation in the field; and
- Proceeding with only a single-person review panel, instead of with a multi-member panel.

In order to maintain public confidence in the Code’s administrative review and appeal process, the Board believes that the above practices should be reconsidered.

Discussion

A brief survey of review panel decisions received by the Board shows that a majority of review panels have consisted of three-member panels, and most hearings have been oral hearings. As of January, 29, 1997, out of 65 review proceedings in Board files, 41 were conducted as oral hearings, while 24 were conducted based on written evidence alone. Thirty-six of the reviews were conducted with three-person panels, 26 were one-person panels, and three used a two-person-panel.

This survey indicates that procedures allowing for a multi-member panel and an oral hearing are widely used. However, slightly over one-third of the review cases surveyed involved "paper hearings" where only written materials were considered, without oral evidence. (Typically this involves consideration of the written documents that were produced leading up to the first official's decision, supplemented by written submissions from the parties or their lawyers.) Forty percent of the cases involved a single person conducting the review.

In many instances these types of expedited reviews will be justified. In cases where there is not a dispute as to the facts, and where there is not a demonstrated public interest in the case, a single reviewer conducting a paper hearing may be appropriate. Factors such as time-savings and efficiency may override the argument for a more extensive proceeding. However, if public confidence in the Forest Practices Code is to be maintained, the government must ensure that such single-member paper hearings are only invoked in appropriate circumstances.

In particular, the Board is concerned that in at least five out of sixty-five cases surveyed, contradictory evidence from the parties has been decided through paper hearings alone, without hearing oral evidence.² In addition, at least two reviews have been conducted by a single reviewer, even though the issues were of high public interest, and could well have merited a full panel.³

An example

A recent case illustrates the Board's concerns.⁴ Members of the public brought information about road

construction near Long Creek to the attention of government officials in the Horsefly Forest District. The United Fishermen and Allied Workers Union, as well as a number of environmental groups and the media, had expressed concern about the road construction. Government officials investigated, and the District Manager decided there had been five contraventions of the Code, including deposition of debris in a watercourse and inadequate construction of drainage structures.

The company involved requested a review of this decision. Although there was clearly a great deal of public involvement and interest in this case, the review involved a single reviewer conducting a paper hearing. This reviewer overturned all but one finding of contravention.

The correctness of this outcome is not questioned by the Board. There can be no suggestion that the officials involved failed to follow present law or policy in choosing a single-reviewer and a paper hearing process. However, members of the public have expressed concerns about the lack of a full oral hearing on this case.

As a result of the procedure chosen for this high-profile review:

- the reviewer and the parties were unable to test the contradictory versions of the evidence that had been given through oral cross examination of the witnesses, because there was no oral hearing;
- witnesses could not supplement and provide a context for written field report evidence with oral testimony;
- the review panel did not have the benefit of the broad and diverse experience that a multi-member panel can provide.

In order to sustain public confidence in the administration of the Code, consideration should be given to changing the rules and guidelines about when full public hearings should be held.

Note: As required by s. 182 of the Forest Practices Code Act, the Board offered the officials involved in this example case⁵ the opportunity to make comments to the Board about a draft of this report. Among other things, the officials stated it would be inappropriate

for them, as statutory decision-makers, to make representations in support of their decisions. However, they did note that the facts that contributed to their decisions were too numerous and complicated to be summarized into one or two short paragraphs, as the Board has attempted to do. The Board considered their comments in preparing this report.

Critical criteria when choosing review procedures

In general, the Board believes that reviews should provide for open oral hearings in the following circumstances:

- **Cases with contradictory and complex evidence**

Generally, an oral hearing should be held when the evidence of the parties is at odds, especially when the evidence is complex. When two very different versions of the facts are suggested, both of which cannot be correct, an oral hearing may be the only satisfactory way to resolve the factual dispute. If a review panel is faced with conflicting accounts about things like the extent of soil disturbance, the condition of a road or what materials were in a stream, oral evidence may be the only way of getting at the root of the matter. Oral cross-examination can pinpoint the differences between the parties' evidence, clear up misunderstandings, and test the perceptions, memory and credibility of witnesses in a way that written submissions alone cannot.

Both Forest Service training materials and court decisions have indicated that when contradictory evidence is involved, oral hearings may be appropriate. The Forest Service's training manual, *Administrative Law for Managers*, suggests that one of the main factors to be considered in choosing between oral and written hearings is "whether credibility is an issue (two very different versions of the facts are suggested)".⁶

- **Cases with a high degree of public involvement or interest**

Justice must not only be done, it must be *seen* to be done. This is particularly true in the enforcement of the Forest Practices Code, because a major purpose of the Code is to sustain public confidence in the stewardship of provincial forests.

Procedures used to resolve a case that has aroused public interest should be obviously fair. When significant public concern has been expressed about a particular case — or when members of the public actually initiated the proceeding — the review procedures must take that concern into account. A number of government bodies recognize this principle by specifically taking public concern into consideration when they decide how open their proceedings will be.⁷

An oral hearing in a public forum will almost always be publicly perceived as more open and transparent than a hearing conducted by exchanges of written submissions. In the Board's opinion, open oral hearings should normally be held whenever there is a high degree of public interest or involvement in a particular review. These cases should be dealt with in such a way that there can be no doubt that justice is being done — and usually the most effective way of doing that is to conduct a public hearing, with oral evidence and submissions. In the long run, providing such open hearings whenever the public is highly concerned about a case will serve to enhance public confidence in the implementation of the *Forest Practices Code*.

Even in cases where the public has not yet expressed a concern, oral hearings should be held if the review is potentially of high public interest because it deals with a particularly significant issue (for example, serious environmental damage or serious issues of law or policy).

In the Board's view, when a case meets the criteria described above, panels should normally consist of at least three members with an appropriate range of experience. A multi-member panel with diverse backgrounds can bring varied expertise, background and perspectives to a complex case; and can add credibility, weight and finality to the final decision.

Ministry of Forests policy already indicates that if a case involves complex issues, or has attracted a high degree of public interest, those factors must be considered in determining whether to appoint a larger panel.⁸ The implementation of this policy should be re-examined, to ensure its application in all relevant cases.

Recommendations

The Board recommends that the provincial government review and, if necessary, revise legislation, policy and personnel training manuals to:

- 1 Ensure that all future Code administrative reviews that involve contradictory and complex evidence should allow for oral presentation of that evidence, including the opportunity for cross-examination.**
- 2 Ensure that review hearings are conducted as public oral hearings wherever (a) the public has provided information that led to the determinations, (b) there is a high degree of public interest in the outcome, or (c) the case involves particularly significant issues.**
- 3 Ensure that review panels consist of at least three members with an appropriate range of experience, whenever there are complex or important issues, contradictory evidence, or a high degree of public interest in the case.**

It is recognized that government will be obliged to balance the factors discussed above with other factors, including such things as administrative cost, time constraints, and the rights of parties.

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More information

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Notes

¹ See *Tolko Forest Products and Forest Practices Board and Government of British Columbia*, Forest Appeals Commission Appeal No. 96/02, November 12, 1996.

² For example, see Ministry of Forests files ERA# DCR-96-0052, DCR-96-0274, DPA 96-0092, FLA-16827-CP-209-B4-2, and DDC-96-0012/0014.

³ See Ministry of Forests file ERA# DWL-96-0014, as well as the case discussed below. DHO-97-0008.

⁴ Ministry of Forests file ERA # DHO-97-0008.

⁵ Ministry of Forests file ERA # DHO-97-0008.

⁶ See *Administrative Law for Managers, Participant's Manual E-407*, Forest Service of British Columbia, Compliance and Enforcement Branch, p. 37. For an example of how courts have treated the issue, see *Cadillac Investments Ltd. v. Northwest Territories Labour Standards Board* 24 Admin. L.R.(2d) 81.

⁷ For example, the *Canadian Environmental Assessment Act* specifically enumerates "public concerns" as one of the factors to be considered when determining whether a project must be referred to a mediator or review panel. See s. 23(b)(iii).

⁸ See *Policy 16.22: Selection and Responsibilities of Review Officials and Panel Members for Administrative Reviews -- Section 127 and 128*, p. 3.