THE FOREST PRACTICES CODE

ADMINISTRATIVE LAW FOR MANAGERS

RESOURCE BOOK

NOTICE

This document is intended as training material and not as legal advice or opinion. For legal advice, please consult the Legal Services Branch of the Ministry of Attorney General.

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Chapter 1
Introduction

Where law ends, tyranny begins.

William Pitt

I think that in our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.

Kenneth Culp Davis, Discretionary Justice

1. The Purpose of this Resource Book

This resource book introduces the reader to the origins, importance and principles of administrative law. It relates those principles to administration and decision making under the *Forest Practices Code.* It is to be used in conjunction with a workshop and is the primary text for the participants.

Together, the resource book and the workshop will:

- allow senior managers within the British Columbia government to apply the principles of administrative law to the *Forest Practices Code.*
- provide an analytical framework and tools to assist officials in exercising discretion properly in the administration of the *Forest Practices Code*.
- provide basic concepts for officials who will supervise or review decisions of others under the *Forest Practices Code*.

After the workshop is completed, managers can use this resource book as a reference document. However, it should not be used as a decision

manual; it is intended to provide an understanding of the background principles which must be kept in mind when managing under the *Forest Practices Code*.

2. What is the Forest Practices Code?

The *Forest Practices Code* consists of the *Forest Practices Code of British Columbia Act*, regulations, standards and field guides. In this resource book the word *Code* refers to all of these documents as a whole. The words *Act*, *regulations*, and *standards* refer to individual documents.

The Code does not replace existing legislation; it complements the *Forest Act*, the *Range Act* and other relevant legislation, especially environmental legislation. Sections of the *Forest A*ct and *Range Act* that deal with forest practices have been moved to the *Forest Practices Code*. Reference must be made to other legislation in order to effectively understand and use the Code, and some examples in this document use legislation other than that found in the Code. Operationally, the *Forest Practices Code of British Columbia Act* marks a shift in the administration of forest practices from a contractual framework to a legislative framework.

3. Why is an Understanding of Administrative Law Important for the Proper Administration of the Forest Practices Code?

The *Forest Practices Code* sets forth a range of statutory requirements that must be applied by ministries, ministry staff, tribunals established by legislation and other public bodies. The application of these statutory requirements is the subject of administrative law. Administrative law addresses the relationship between state and citizen. They constrain when, where, how, why, and by whom such decisions are made.

Although the principles of administrative law may appear to be new to resource ministries, they have been used for years under the *Forest Act*, *Range Act* and other statutes. Nevertheless, their application in the context of the Code will be new to decision makers. There are also several new areas of statutory decision making under the Code, such

as mandatory plan approval and a broader range of administrative remedies.

Because of the shift from a contractual to a statutory framework, resource managers must understand the basic concepts of administrative law and, more importantly, how administering the new legislation will be different. Therefore, this book focuses on what decision makers need to know to properly carry out their responsibilities under the code.

In a contractual relationship, parties to the contract can bring disputes to court. Contracts usually provide specific provisions and procedures in the event of a breach. Therefore, under a contractual framework, a resource ministry has some choice; it can decide to take legal action for breach of contract conditions, or rely on negotiation or contract amendment to correct a problem.

This choice is still available under a statutory framework. However, when a dispute occurs under the code, a decision maker must often use discretion in deciding what to do. Discretion must be used properly and is usually subject to scrutiny and review. In some cases, discretion can be challenged not only by the directly affected party (as is the case in contract), but also by others. Tests for a valid decision involves administrative law.

In some situations, there is no discretion - the law simply requires the decision maker to perform an action. When there is discretion, however, it must be exercised properly. Therefore, it is essential that those making decisions under the *Forest Practices Code*, and those who review such decisions, be trained in principles of administrative law.

This one day course covers a lot of ground. This book focuses on the background and principles of administrative law and then relates them to sample sections in the Code. For more information on specific problems, you should contact the Legal Services Branch of the Ministry of Attorney General.

4. Notes of Caution and Optimism

Some final comments conclude this opening chapter. The first is cautionary. Although this book helps you understand the structure of and controls on discretionary and mandatory decision making under the *Forest Practices Code*, the essence of administrative law is fairness and common sense. If it were possible to provide a set of rules

applicable to every case, there would be no need for any decision making powers. The essence of discretion is the need for the application of good judgment to specific circumstances. There is no check list or formula that can be applied in every case. Judgment on what is fair and proper is required.

Therefore, consider this document as no more than a guide. It is not a substitute for good judgment, consultation or, on occasion, specific legal advice. Because every fact pattern is unique, general rules that make sense and are fair in some situations will inevitably be inappropriate in others. When making decisions standard questions are:

What would a neutral outsider think is fair and reasonable in this case? Would my decision be considered to be impartial? Would the result be considered a proper one in the circumstances?

Then make your best effort.

For balance, the second note is one of optimism. As a decision maker under the Code, you will work within a carefully thought out legal regime and administrative structure, with ample legislative and policy guidance to use in your decisions. If you are an original decision maker, you will have the advantages of detailed technical knowledge of the issues and direct dealings with the affected parties. Any subsequent reviewer of your decision may defer to your intimate knowledge and understanding of the case. As a result, if you follow the procedures set out in the Code and properly apply administrative law principles, your decision will likely be upheld unless there is a clear and good reason for overturning it.

Chapter 2
The Origins of Discretion

A Government of Laws and Not of Men.

Aristotle

1. The Need For and Problem with Discretion.

dis·cre·tion·ar·y
(dí-skrésh´-nér'ë) —adj. 1. Left to or regulated by one's own discretion or judgment. dis·cre'tion·ar´i·ly (-nâr´-lë) adv. [Dictionary Definition]

discretionary
ADJ Based on individual judgment or discretion (personal arbitrary subjective judgmental)
ADJ Not compulsory or automatic (optional elective facultative) [Roget's Thesaurus]

The above quote is one of the early statements and foundations for the *rule of law*. It illustrates a constant tension in law. Basically, the fate of citizens should not be at the whim of a few individuals. Instead, requirements, prohibitions and the consequences of non-adherence should be clearly set out in laws that have been legitimately adopted and are known and understood by those who must abide by them.

However, the rule of law does not eliminate the need for discretionary decisions on the part of government. In fact, every governmental and legal system involves both rules (laws) and discretion. The need for discretionary power is particularly significant in administrative processes.

In the application of law, the certainty of written rules must be combined with the flexibility of discretionary decisions. When the system leans toward rules, it becomes rigid and inflexible. When it tilts toward too much discretion, it becomes arbitrary. Balancing consistency and arbitrariness is one of the primary purposes of administrative law, and the history of administrative law is influenced greatly by the way in which these two essential components are accommodated. Both are required.

The issue, therefore, is not necessarily how to eliminate or limit discretion, but how best to control and guide it.

2. Why Does the Use of Discretion Continue to Grow?

There are three reasons why discretionary authority is necessary. First, governments at all levels have to regulate areas where the complexity, uncertainty and variety of potential applications requires that the law is applied on the basis of some individual judgment and decision. Second, even when detailed rules are laid down, discretion may be needed to apply the law to individual circumstances and factors. Third, discretion is needed for innovative or creative application of the law.

3. Structuring Discretion

Given the need for discretionary decisions and the problems that can result if discretion is not properly exercised, a number of tools are used to structure discretionary authority. The purpose of structuring discretion is to constrain the exercise of discretionary authority within acceptable boundaries. This is accomplished in a number of different ways, some of which are set out below.

- **Clear legislative criteria.** The law that creates a discretionary authority can also provide clear indications as to how the discretion is to be used. This includes the use of purpose or objective clauses, preambles setting out in some detail the purpose of the legislation and specific, detailed decision making criteria.

- **Policy statements and administrative guidelines.** The statute can also provide for policy statements and guidelines that can be used to inform and guide but not bind the decision maker.

- **Decision records.** As experience with the exercise of authority grows, decision makers can systematically record decisions and reasons. Other decision makers can use these (as a rough guide[1]) in order to maintain consistency.

Through these and other legislative and policy-based devices, the exercise of discretion can be structured to reduce the potential for

[1] There is a pitfall in using reports of other decisions as precedents. Each decision must be made based on the specific facts, and a decision maker must not blindly follow similar previous decisions. See the discussion on fettering decisions later in this resource book.

inappropriate use and abuse. However, structuring discretion is not enough. There must also be mechanisms to check and review discretionary authority.

4. Reviewing Discretion

The need for a review mechanism depends on the kind of discretionary authority being exercised. Simple, day-to-day administrative decisions having minor consequences usually do not require review. On the other hand, when decisions affect a person's rights or have major consequences, review is essential. The purpose of the review is to ensure the proper application of laws while simultaneously taking into account individual circumstances and factors. The following are common review mechanisms. They are not mutually exclusive, and are frequently used in combinations.

- **Supervision by superior officer.** Ongoing supervision of decision making is normally part of the management function of supervisors. It tends to be informal, although the use of systematic reviews and required training can be formally required.

- **Administrative reviews.** One step up from ongoing supervision is a formal review of a decision by an independent person or persons. This is provided for in the Act.

- **Formal audits.** In addition to being able to initiate administrative reviews, the Forest Practices Board has investigation and audit powers, which are a form of decision making review.

- **Appeal to a specialized tribunal.** Appeal boards can be specially created to review decisions. A current example is the Environmental Appeal Board, which reviews a wide range of resource based decisions in B.C. In the forest practices context, the Forest Appeals Commission will have a similar role.

- **Review by the Ombudsman or Board.** The office of the Ombudsman is specifically empowered to review decisions made by government officials. The Forest Practices Board will be established to review many decisions under the Forest Practices Code.

- **Appeal to the courts.** If legislation allows it, courts can also hear appeals of administrative decisions, substituting their decisions for those being appealed. The extent and nature of appeal can vary greatly.

- **Judicial review.** The courts can also review decisions by means of a judicial review, which examines whether a decision was made lawfully and in accordance with fair procedure, but does not substitute a new decision for a flawed one. Judicial review is considered at length later in this resource book.
- **Political appeals.** Persons who believe that they may be adversely affected by a decision can always write to a politician to complain. Political appeals are less likely to be of concern when the decision concerns purely technical matters.

Chapter 3
The Principles of Administrative Law

The preceding chapter explained the origin and need for the application of administrative law principles. This chapter describes the main administrative law principles that are applied to review administrative decision making.

Administrative law deals with actions of government as they affect the public. It sets limits on the actions of government officials, and provides remedies to those affected by a government official's transgression of those limits. There are two main aspects of decision making that involve administrative law:

1. the procedures by which a decision is made; and

2. the substance of the decision itself.

The nature and extent of the procedures required in a particular situation depend on whether the decision is:

1. legislative, or

2. administrative or quasi-judicial.

Legislative decisions include the enactment of statutes, regulations, by-laws and orders. Such legislation imposes rules that affect the public generally, as opposed to specific persons, groups, or sets of facts.

Administrative decisions, in contrast, are those that affect a specific person or group. Most day-to-day regulatory decisions are administrative. Quasi-judicial decisions are those that result in the extinguishing or modification of private rights of interests, such as the cancellation of a licence. The distinction between these categories was formerly more important than it is today. Different principles of administrative law used to apply, depending on the type of decision to be made. However, modern law is less concerned with these distinctions. Instead, most of the principles apply to any decision. Depending on the issue, those principles are enforced more or less strictly. Decisions having minor consequences may require only the application of some of the principles of administrative law or none at all.

Decisions with serious consequences require the application of most or all of the principles.

The application of the principles of administrative law will ensure that your decisions are not only fair, but appear to be so to a neutral outside observer. These principles are described below, and include:

- jurisdiction - who can decide what;
- choice - whether a decision is mandatory or discretionary;
- procedural fairness, including avoiding bias and the procedural elements of fair hearings;
- proper use of discretion, including delegation of authority, avoidance of fettering, deciding for proper purposes, relevance and reasonableness; and
- reviews and appeals.

1. Jurisdiction: Do I Make the Decision?

Before a decision is made, your *jurisdiction* or legal authority to act must be determined. Are you the person authorized or required to make the decision? Even if you are the proper person to make the decision, did you make it within the scope of your authority? These two aspects of jurisdiction are indicated in the legislation. Moving outside your jurisdiction is a valid reason to have your decision overturned.

The first aspect, the question of who should make the decision, is not as straightforward as it may appear on the surface. For this reason, it is useful to ask the question: Where does the authority to make this decision come from? Authority to make any decision and any ability to delegate must be set out in legislation. If the authority to make the decision has been delegated, your next question will be: Has it been properly delegated?

Consider the following fictitious example. The chief forester designated a particular camping area as a small forest recreation site in 1982 under the *Forest Act*[2] but canceled it in 1987 as the surrounding area was harvested. The area has since been reforested and the site was

[2] Section 104.

redesignated as a recreation site under the Code. Accordingly, the chief forester has to establish objectives for each such area within six months of the designation. He has done so, but the objectives were hastily drafted and you, as a district recreation officer, think they need amendment.

The first question is: Who is authorized to change the recreation site objective? In the Act, section 6 states that the chief forester may establish recreation sites and vary or cancel established sites.[3] The chief forester must establish objectives for such sites and may vary those objectives.[4] Accordingly, you cannot make a decision but can make recommendations to the chief forester. However, subsection (5) allows the chief forester to delegate his or her authority to vary an objective to "an employee of the Ministry of Forests". Therefore, as the recreation officer, you may be able to make amendments if the chief forester delegates the authority to you.

The next question is whether that delegation has in fact occurred. The Act states that the delegation must be in writing, and that the delegation can be limited.[5] A check shows that there has been delegation in writing to vary objectives for some interpretive forest sites and recreation sites, but not for recreation trails. A file search shows that the delegation is for sites of less than 1 ha.; the site in question meets this requirement. However, the delegation is only to the district manager, it is not at the resource officer level. You would have to conclude that it is not your decision to make. However, the district manager can make the decision under the delegation powers in the Act.

As the issue of delegation can become quite complicated, you should get specific legal advice whenever you are uncertain. In this way, you will usually be able to avoid making decisions that will later be reversed.

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[3] Section 6(1).

[4] Sections 6(3) and 6(4).

[5] Section 6(5).

2. Mandatory versus Discretionary Decisions: Do I Have a Choice?

Sometimes decision making involves deciding whether you should be making a decision at all. A decision can be either mandatory or discretionary. A mandatory decision is one that must be made if particular criteria are met. For example, a district manager must prepare an access management plan for forest service roads that are not covered by a forest development plan.[6] Such a decision is usually, but not always, identified in a statute or regulation by the use of the terms *shall* or *must*.

A discretionary decision gives the decision maker a choice of action to be taken. Such a decision is usually, but not always, identified by the use of the term *may*. There are many examples of discretion in the Code. For example, under section 77 of the Act a designated forest official may issue a burning permit. However, there is no obligation to issue a burning permit;;; section 77 of the Act gives the official the choice of whether or not to issue.

Although both mandatory and discretionary decision making powers are identified below, most of the problems and discussion revolve around discretionary decision making. This type tends to make decision makers nervous. However, even *mandatory* decisions can be complicated.

A prime example of that complexity is found in section 41 of the Act, which deals with approval of operational plans by district managers and environment officials. Section 41(1) states that a district manager must approve an operational plan if it was prepared according to the Act, regulations and standards if he or she is satisfied that it will adequately manage and conserve the forest resources in the area. This is a mix of mandatory approval subject to some discretion - the district manager must be satisfied about management and conservation matters.

Subsection (3) goes further. It states that the district manager may approve a plan only if it meets the requirements of subsection (1). While the wording indicates discretion, there is no discretion granted here. Another way to state this subsection would be: The district

[6] Section 26(1).

manager must not approve an operational plan unless it meets the conditions in subsection (1).

Overall, these subsections are mandatory. Until certain conditions are met, the district manager cannot approve a plan. However, once those conditions are met, the district manager must approve the plan.

3. Making a Fair Decision: How Do I Ensure that My Decision is Procedurally Fair?

Decisions must be made in a procedurally fair manner. This is not always simple. Developers of administrative law, and a good deal of the rest of this book, examine various aspects of how *procedural fairness* can be achieved in the exercise of discretion.

The degree of procedural fairness imposed by the law on the Legislature in making its decisions is limited because there are other safeguards available; the members are elected and are directly accountable to the public. The weighing of interests and the making of trade-offs are tasks we have assigned to our elected officials. The approach is very different for administrative and quasi-judicial decision making.

The existence and extent of procedural fairness required depends on three factors[7]:

1. the nature of the decision (whether it affects a specific person or group or has a general effect and whether the decision is final rather than a recommendation);

2. the relationship between the decision maker and the individual (whether the affected individual would know what to expect); and

3. the effect of the decision on the individual's rights (whether the decision will have an impact on basic rights or privileges, such as reducing the value of private property or shutting down business operations entirely).

[7] *Board of Education of Indian Head School Division No. 19 of Saskatchewan* v. *Knight* (1990), 69 D.L.R. (4th) 489 (S.C.C.).

Thus, the extent of procedural fairness is variable. It depends on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. A court, for example, decides which procedures apply by considering all the circumstances under which the decision maker operates.[8] When there is uncertainty, the decision maker should, if possible, err on the side of caution. Similarly, greater procedural fairness is expected if the decision could have a strongly detrimental and specific effect on a person. Nevertheless, courts have accepted that efficiency may preclude the use of elaborate procedures in some cases.[9] This issue is discussed in more detail below.

Thus far, the general concept of procedural fairness has been discussed. Procedural fairness required after a determination that individual rights are not at stake is collectively referred to as *the principles of natural justice.*[10] Natural justice has two elements:

a. the decision maker must be unbiased; and

b. a person directly affected by a decision has a right to a fair hearing.

a. The Unbiased Decision Maker

Bias has two components. First, the decision maker cannot have any significant interest in the decision. Typically, this arises as a conflict of interest, such as holding shares in a company that would be affected by the decision.

The second component concerns something more ambiguous: a reasonable apprehension or suspicion of bias. In this situation, whether there is actual evidence of bias is irrelevant. Instead, the test is objective: Would a neutral outside observer believe that the decision maker would be biased?

The purpose of this test is to maintain public confidence in fair decision making. General public impression becomes important. The mere possibility of bias (such as an expectation that one will tend to favour a

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[8] *Syndicate Does employees de production du Quebec et de l'Acadie v. Can. (Cdn. Human Rights Commission)* (1989), 62 D.L.R. (4th) 385 at p. 425 (S.C.C.).

[9] *Re Consolidated-Bathurst Packaging Ltd.(1990),* 68 D.L.R. (4th) 524 at 554 (S.C.C.).

[10] *Natural justice* and *procedural fairness* tend to be used interchangeably. However, natural justice usually is used to refer to a more elaborate set of procedures, such as use of a full oral hearing.

close friend in making a decision) may not be enough to taint a decision, but there must not be circumstances from which a reasonable person would think it likely or probable that the decision maker would favour one side over another.

Unfortunately, there are no clear guidelines here; each case depends on the specific circumstances. The threshold for finding an apprehension of bias can be quite low. For example, a lawyer advising a forest appeal board under the *Forest Act* was recently disqualified from continuing to act simply because another lawyer, with whom space was shared, was doing unrelated legal work for the forest company that was appealing a timber sale licence cancellation.

b. A Fair Hearing

Hearings are usually necessary for decisions that may seriously affect a person's rights. They are not normally required for simple administrative decisions. For example, a hearing might be required before a particular licence is canceled, but not before a forest development plan is approved. A hearing includes subordinate rights such as:

- being able to explain the effect of the decision to the decision maker;
- having access to information that is before the decision maker;
- having sufficient notice of any hearing;
- having a representative involved, and;
- having notice of all remedies available, with all applicable time limits.

Unfortunately, there is no clear line between cases in which natural justice, including a hearing, is required and those only requiring a lower standard of procedural fairness. However, there are rules of thumb. Consider first the nature of the decision. Natural justice applies if the consequences are serious, such as when a person's livelihood is threatened, a right previously granted is taken away, or some sort of penalty is imposed. The more serious the potential impact of a decision on an individual, the more need to incorporate the principles of natural justice.

For decisions which have less severe potential consequences, there is normally some choice of procedures. Even in situations where some rights are seriously affected, you may decide to rely on written

submissions because it is impractical to hold a full hearing in every case. The courts have allowed such less rigorous procedures. They recognize that the "rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces."[11]

For example, despite the serious ramifications of a stopwork order, it is not logical to hold a hearing before such an order is made under section 123[12]in an emergency situation; there wouldn't be time. However, a hearing, at least by written submissions if not oral, may be required before a remediation order is imposed under section 118[13] to correct any damage caused by a contravention. The urgency is not present; thus there is greater room for procedural fairness in the form of a hearing. Procedural fairness rules can be constrained, therefore, in the interests of efficiency. Nevertheless, if there are fundamental rights at issue, the principles of natural justice must be considered. These issues are examined again in the discussion of hearings in Chapter 4.

4. Proper Use of Discretion

As noted above, the main difference between a legal regime like the Code, which relies on a statutory framework, and one like the *Forest Act*, which relies on a contractual framework, is the expanded use of statutory discretion[14] by officials. Administrative law principles define the proper and improper exercise of discretion, which involves the following issue.

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[11] *Re Consolidated-Bathurst Packaging Ltd.(1990),* 68 D.L.R. (4th) 524 at 554.

[12] This section allows designated officials from any of three ministries to order that an apparent contravention of the Code, *Forest Act* or *Range Act* cease or cease until proper authorization (such as a licence, permit, plan or prescription) has been obtained.

[13] In contrast to stopwork orders, remediation orders can only be made by senior officials of the three ministries.

[14] There are at least 34 separate discretionary power sections in the *Forest Act* and another 114 in the *Forest Practices Code of British Columbia Act*.

a. Proper Delegation

In the absence of explicit powers to delegate, you may not delegate your powers to make any given decision. You can delegate specific tasks, such as the collection of necessary background information or facts. You can also ask someone else to make a summary of the circumstances and recommendations. However, if the Code states that you have the discretion to make a decision, you must make it and must also be ready to show that you had enough information to be able to decide properly.

Sometimes delegation is specifically allowed, with the designated decision maker choosing whether or not to delegate. The wording might be "designated forest official, or a person authorized by a designated forest official."[15] In other cases, delegation can be made only in a specified manner to specific officials.[16] When such delegation is specified, all of the specified decision making can be delegated.

Section 3 of the Act is a specific example. It allows the chief forester to establish resource management zones and objectives for such zones.[17] Designation of such areas and objectives is not normally delegated. In this case, however, the section specifically provides for some delegation,[18] which must be in writing and only to a Ministry of Forests employee. Further, the authority to establish and vary objectives can be delegated but not the authority to establish or vary zones. Without such specific authority to delegate, the legislative discretion on resource management zones could not be delegated.

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[15] Section 77 of the Act uses this wording for issuance of burning permits.

[16] For instance, section 93 allows designated forest officials to hire temporary employees for fire suppression and to authorize such employees to exercise specific powers.

[17] Subsections 3(1) and (2), respectively.

[18] Subsection 3(5).

Some exceptions allow delegation without specific authority. Specifically, there is flexibility regarding delegation of decision making by a minister. In large ministries like Forests or Environment, Lands and Parks, a minister obviously cannot personally exercise all of the powers and duties imposed on him or her by the statute. Therefore, most decisions that a minister can make also can be made by certain other high level officials.[19]

Additional delegation is allowed specifically in both the *Forest Act* and the Code. Both statutes contain a provision[20] that a reference in either Act to the minister, the minister's designate, or to the minister or a person authorized by the minister means that any appropriate official in the Ministry of Forests may deal with such matters. On the other hand, the minister cannot delegate when an individual's rights are at stake or when the legislation implies that the minister is to exercise the power personally.

You should always watch for common-sense exceptions when delegation should not occur, even if the law seemingly allows it. Thus, you should not delegate to someone who has been, or is likely to be, involved in the issue in another way. If a particular official has already dealt with an issue at a lower level, he or she cannot subsequently make a higher-level decision on that issue. Likewise, if an official like the chief forester may have to deal with an issue later in an appeal, he or she should not be involved at the day-to-day administrative level. In administrative law, the appropriateness of the person exercising delegated decision making depends on the circumstances.

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[19] *Interpretation Act,* section 23.

[20] Sections 1(4) of the *Forest Act* and 1(3) of the *Forest Practices Code of British Columbia Act*, respectively.

b. Avoid Fettering

As explained in the previous section, delegation is improper if a designated decision maker gives someone else unconstrained or unauthorized decision making power. Fettering is the flip side of improper delegation. Fettering occurs when another authority sets such tight constraints on the designated decision maker that no real decision making remains. If the statute designates a person to decide, that person has to be allowed to decide. If the exercise of discretion has been passed to you, you must be left relatively free to decide.

Fettering becomes a concern when policy manuals are followed too rigidly. Policies are not laws.[21], but interpretations of the law and recommendations as to how staff can consistently and fairly meet their legal obligations. To make decisions consistent across the province, policies should be followed when they fit the facts. They should be rejected, however, when following them would be unfair or improper in the specific circumstances. You must consider each set of individual circumstances on its own merits; it is erroneous to state merely that your decision followed government policy.

For example, the Act[22] allows the minister to establish policies and procedures. One provision specifically requires the consideration of policies or procedures when administrative penalties[23] are applied. However, this provision requires only that the policies be considered. You must still consider each case on its merits.

If policies are not to be blindly followed, what role do they have? You can set your own policies for decision making, and inform anyone affected by your decision, as long as the facts of the particular case are considered independently. You must take policies set by higher ranking officials as guidance only,

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[21] Policies have not been passed by the Legislature. When laws are to be passed by some other body (such as Cabinet), the Legislature specifically authorizes it (by adding "The Lieutenant Governor in Council may make regulations..."). There is no such legislative authority to give policies or procedures the power of laws. Thus, they are only guidelines.

[22] Section 122(1).

[23] Section 122(2) requires that any applicable policies and procedures must be considered before levying an administrative penalty or making a remediation order.

In some cases, the statute compels you to follow specific policies. That type of instruction is rare in the Act. In several sections, however, directions of higher officials must be followed. Thus, the chief forester must abide by any directions from Cabinet or the three resource ministers in establishing or changing resource management zones or objectives.[24] The district managers must follow any directions of the chief forester in regard to establishing or changing the objectives of landscape units and sensitive areas .[25] In addition, section 84 of the Forest Act requires that regional managers actually follow policies of the minister with respect to stumpage appraisals.

c. Decide for Proper Purposes

Obviously, discretion should not be used for an outrageous or improper purpose (revenge, personal, or corrupt motives). Furthermore, there is more to proper purposes than avoiding clearly improper purposes.

What are *proper purposes*? The overall purpose of the statute must be considered. How can you determine something as vague as legislative intent? There are sources of information. The Act contains a preamble which, indicates the Act's overall purpose and refers, in particular, to several environmental considerations. The preamble must be considered, but imposes no legal obligations. Section 4 of the *Ministry of Forests Act* similarly explains legislative purpose by laying out the mandate of the Ministry of Forests as a whole. There are also provisions which indicate the purpose of a particular Part or section of the Act. For example, section 2 suggests the purpose and objectives of most of Part 2. Those could also be considered to determine the purposes of other sections. Finally, other wording in a section may suggest a context for interpreting legislative purpose and guide your decision. All of these hints of legislative purpose should be considered when making decisions.

Deciding in bad faith clearly is not a proper purpose; you must act in good faith at all times. This involves basing decisions on relevant matters. For example, you cannot designate an area as sensitive solely for the purpose of putting a chronically misbehaving company out of business. You also cannot make a decision in order to gain a personal advantage.

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[24] Subsections 3(1) and (3).

[25] Subsections 4(4) and 5(4), respectively.

Consistency is desirable and decisions must not be arbitrary. A decision may be thought arbitrary if an identical set of facts does not produce a similar decision. This does not mean, however, that you may not regroup, reconsider and repent, making a different decision because you believe the previous decision was an error. You must use judgment and show a logical basis for your decision, especially if it differs from what an outside observer would expect the result to be given other, similar decisions made by you and others. Note, however, that the term *arbitrary* refers to the process used to make the decision and not the final decision itself.

A balance must be maintained between the concerns of deciding each case on its own specifics and avoiding arbitrariness. When the same facts are present in two different cases, consistency suggests that every decision maker should reach a similar decision. The most important thing, however, is to be able to justify your own decision, showing that the proper decision making process was followed. You must not be rigidly bound by your past decisions or those of another official; this would be an example of improper fettering.

The Code is new. Therefore, some initial experimentation in decision making will be necessary and probably desirable.

d. Consider Only Relevant Things

Another principle of administrative law is that a decision maker must take into account all relevant considerations but avoid irrelevant ones. Relevant considerations include facts and reliable opinions which are pertinent or logically related to the matter at hand. In some cases, relevant considerations will be listed in the Act[26] or regulations. For example, the Act specifies the content and joint approvals required for approval of operational plans.[27] Other sections[28] provide factors to be considered in granting exemptions. When relevant factors are not specified, you must use your best judgment to determine what considerations are relevant. Unfortunately, there is little guidance available here. The test is simply: Would a reasonable decision maker in the same circumstances have found those considerations to be

[26] Sections 117(4)(a) and 122(2) require that policy established by the minister be considered.

[27] See sections 10 to 17.

[28] See sections 28 to 33.

relevant? Note that individual decision makers and tribunals are not bound, as a court is, by formal legal rules of evidence. You can consider whatever you think is relevant and reliable.

Not only must you consider all relevant matters, but you cannot take into account any irrelevant matters. For example, it would be improper to exercise discretion under the Code and refuse to grant a special use permit to a company because one of the company's directors had been convicted of impaired driving. That is not a purpose of the Code; the remedies for such violations are found in criminal and motor vehicle laws.

In some sections of the Act,[29] public review and comment is required. An example is section 4(6), which requires that a district manager provide for review of and comment on any proposed establishment or change to a landscape unit or landscape unit objective. In such a situation, the comments received must be considered seriously before a final decision is made. You need not follow what the comments set out, but they must be reviewed and considered. Your reasons for the decision should show that, this has been done. In other cases, such as when the public is likely to be affected significantly by a decision, review and comment may be recommended even when it is not mandatory.

The public interest must be considered when the legislation says this is necessary. It does not have to be considered if the legislation does not require it. The public interest is the general well-being of all citizens or some particularly affected group. This is, by definition, an ambiguous criterion, thus you will have broad discretion in deciding what is in the public interest. For purposes of the Code, the public interest can be inferred from the purposes of the Act, as discussed above.

As long as you have considered some reasonable interpretation of public interest, your decision is not likely to be overturned on appeal. An assessment of the public interest based on inadequate or no information and when the intent of the interpretation of public interest is to discriminate against a particular person or group would not be reasonable.

[29] See sections 3(4), 4(6), 39, 42, 44. Many of these requirements are relaxed during the transitional period; see Part 11.

e. Make a Reasonable Decision

Unreasonable decisions tend to be overturned on appeal or review. However, reasonableness is not always clear. For example, it may be unreasonable to base a determination on speculation rather than evidence, or worse, on no facts at all supporting the conclusion.

Another source of unreasonableness arises not in reaching the decision but in the result. For example, it would be unreasonable to impose requirements which are impossible to carry out. Similarly, it might be unreasonable to require a person to spend thousands of dollars to put land back to its original state if the land value was negligible to begin with and there would be no improvement in land quality as a result. An administrative penalty may be more reasonable than remediation in such circumstances.

5. Remedies for Improper Decisions

It is now clear that administrative law is not an exact field. You must consider a number of factors and avoid basic pitfalls in making decisions. Ultimately, discretionary decisions will be judgment calls, as fair as you can make them. Inevitably, some of your decisions will be reviewed and some of those will be reversed.

It is important to understand that this is an anticipated part of the process. You should have no sense of failure or impropriety if your decisions are reviewed. Having no appeals is not the objective. What is important is that proper procedures are followed. It is acceptable, even expected, that some decisions will be overturned.

a. Administrative Review and Appeal

What happens if someone thinks you have made a wrong decision? There is no automatic right to appeal. Specific appeal rights must be created by legislation. Each statute states which decisions can be appealed, by whom and on what grounds. A person may only use the appeal procedures that are provided in the particular statute under which the decision was made. For example, a decision made under the *Forest Act* cannot be appealed using the appeal provisions of the *Forest Practices Code of British Columbia Act*.

Appeal may be to another official, a tribunal or the courts, depending on what is specified in the statute. Various levels of appeal and specific procedures are specified in the Act:

1. administrative review[30] by one or more government employees;

2. Forest Appeals Commission;[31] and

3. the courts.[32]

Rights to appeal are restricted in various ways in the Act. For example, no determination can be appealed unless it has first gone through an administrative review.[33] Further, only some determinations can be reviewed.[34] Also, only a person subject to such a determination and the Forest Practices Board can request an administrative review.

A decision may have more than one level of appeal. For example, a decision may first be put through an administrative review,[35] then appealed to the Forest Appeals Commission, appealed again to the B.C. Supreme Court and then possibly to the Court of Appeal. Courts normally do not look at the merits of a decisions and substitute their views. They can, however, substitute new decisions when errors of law or jurisdiction have been made.

The following chart sets out various levels of review and appeal.

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[30] Section 129 provides for one or more employees to conduct a review.

[31] Procedures of the Commission are specified by section 131. The Commission is actually established under section 194.

[32] Section 141 allows limited appeals to court. Only the minister or a party to the Commission appeal may apply. Appeal can be taken to Supreme Court as long as there is an error in law or jurisdiction (not an error of fact). For the Court of Appeal, that court must give permission.

[33] Section 130.

[34] See section 127. Generally, the reviewable decisions relate to fire, insect and disease control, trespass and imposition of administrative remedies.

[35] Section 127 specifies which decisions can be reviewed at the request of a directly-affected person. The review will be conducted by one or more government employees under section 129.

The Act establishes one other entity that may appeal under the Act. The Forest Practices Board can investigate public complaints[36] and request administrative reviews,[37] which in turn can lead to appeals to the Forest Appeals Commission. The Board acts somewhat like an ombudsman, but has the power to initiate appeals. The only public access to the appeal process is by filing complaints with the Board. The Board then decides whether or not an appeal should be initiated.

b. Judicial Review

Another remedy is judicial review. Judicial review is different from the administrative review process[38] in the Code. Administrative reviews in the Act are actually a form of appeal restricted to determinations made under specific sections of the Act. Such reviews can be requested by affected individuals[39] or by the Forest Practices Board[40] and are

[36] Sections 177, 178.

[37] Section 128.

[38] Sections 126-129 refer to administrative reviews, which are essential precursors to formal appeals under section 131.

[39] Section 127.

[40] Section 128.

conducted by government employees. Judicial reviews are done in B.C. Supreme Court under the *Judicial Review Procedure Act*. Normally, a person first must have used all statutory rights of appeal before being granted judicial review. The court's function in a judicial review is not to go into all of the evidence used in a decision. Instead, the court will determine whether fair procedures were followed and whether the decision was made within proper jurisdiction. Sometimes the court will looks for errors of law in judicial review.

The results of a successful judicial review are usually different from those of an appeal. If a judicial review finds a serious defect, the court usually sends the matter (often with directions) back to the decision maker to be decided properly.[41] A successful appeal, in contrast, can result in the appeal body making a new decision.

The issue of who can initiate a judicial review (standing) can be quite complex. In the case of appeals, standing is granted by the appeal provisions in the statute. In the case of judicial review, a person normally has standing only if directly affected by the decision. Occasionally a person may be granted standing if he or she has an indirect interest as part of the generally affected public, but there are special conditions. A person or group that is not directly affected by a decision may be granted public interest standing if a serious issue is being raised, there is no better party to bring the issue to the attention of the courts and the person or group has a genuine interest in the issue. Note that many groups may have little difficulty in meeting this test.

Members of the public will likely ask for judicial review of an approval of a silviculture prescription that does not comply with the requirements of the Code. However, it is unlikely that public interest standing would be granted to a member of the public who wanted to challenge the imposition of a penalty against the holder of an agreement under the *Forest Act*. In such a case, the person subject to the penalty would be a more directly affected person and there would be no need to grant public interest standing to bring the issue to court.

In summary, a court may engage in a judicial review of your authority (jurisdiction) to make a decision.[42] Some of the common reasons for setting aside a decision on judicial review are that the procedure was unfair, the decision was completely unreasonable, an error was made in

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[41] The effect of sending the decision back with directions may be similar to substituting a new decision. Careful attention must be paid to the directions, which can virtually dictate the new decision.

[42] This is the case in the Act; see section 141(1).

interpreting the law, or the decision maker went beyond the limits of the authority specified by the statute. On the other hand, a court will not re-examine the facts behind a decision.

It is therefore likely that some of your decisions will be either appealed or reviewed. It is acceptable, and at times unavoidable, for a decision to be changed because the appeal or review body disagrees with your conclusion. You should, however, avoid inducing appeals and reviews because you went beyond your statutory authority, used unfair procedures, acted in bad faith or acted for an improper purpose. Do your best to interpret the legislation and make decisions in accordance with that interpretation. There are many cases in which courts have found the final decision startling but have shown deference to the decision maker and not interfered with the decision because the proper procedures were followed.

You may wish to consider the review possibilities for each significant decision that you make. One way to do this is to ask yourself a series of questions:

- Is this decision subject to administrative review and appeal?
- Is this decision subject to judicial review?
- Will the merits and background facts and evidence leading to my decision be considered?
- Can my decision be changed or will it be sent back to me for reconsideration?

Your final assessment should ensure not only that your decision is fair in the circumstances, but that you can demonstrate it to be so. For example, was notice to certain parties required? If so, has this been done properly? Did you take all required matters into account? Can you show that this was done?

It should be stressed that the above is an overview only. The extent and complexity of the review of discretion must be related to specific authorities and circumstances. In many instances, a series of procedures and rules have to be considered. The following charts set out a schematic representation of the process followed by the Forest Practices Board and the Forest Appeals Commission. As you can see, there are many steps and internal decisions within both.

Forest Practices Board - Decision Flow Chart

Forest Appeals Commission - Decision Flow Chart

Chapter 4
Administrative Functions in the Code

The above are the general principles of administrative law. The next part of this resource book discusses the application of these principles when you exercise general administrative functions under the Act, including:

- granting approvals;
- imposing conditions;
- granting exemptions,
- assessing penalties;
- issuing stopwork orders;
- suspending or cancelling rights;
- conducting hearings;
- carrying out inspections and investigations; and
- dealing with forfeited forest products.

1. Approvals and Consents

Several provisions in the Code require officials to examine plans or other documents.[43] In most cases, the provisions also specify what action you must take in response to the review. Many of these approval provisions are found in the transition sections of the Act.

[43] Sections 10 - 16 of the Act list the required content for operational plans and prescriptions. Approvals are provided for in sections 41 - 44. There are also approvals for specifications such as range developments in section 73.

When approval is required from an official within the Ministry of Forests, it must be guided by the legislation and the general purpose of the provision and the Code as a whole. Again, you must not unreasonably withhold approval. A rationale should be given for a denial so that the person knows how approval can be obtained. Do not decide approvals simply by following policy; individual facts and judgment must be used in each case.

In several sections of the Act, the approval of an official outside of the Ministry of Forests, such as an official of the Ministry of Environment, Lands and Parks, is required. Such approval is usually required when a decision will affect areas within that ministry's concern. In deciding whether or not to grant approval, you must consider the impact of the proposed decision on the areas within your ministry's jurisdiction. Approval is not to be withheld unless there will be a detrimental effect on something or someone within your ministry's jurisdiction. You must not withhold approval purely on the basis of another ministry's exclusive mandate, but there will invariably be overlaps.

An example of a required joint approval is section 41(6), which concerns approval of a forest development plan that covers part of a community watershed.[44] Both the district manager and a designated environment official must approve before the plan can be accepted. Subsection (7) specifies the role of the environment official. He or she must ensure not only that the Code has been complied with but also that the plan will adequately manage and conserve the forest resources within the community watershed.

The same rules apply when consent is required. There is no precise distinction between a consent and an approval. Generally, *consent* is used when a private individual gives or receives the permission. *Approval* is usually used when a public authority or official is required to agree to the proposed actions of another public authority or official or when approval of something like plans is required before action is taken.

However, in section 38 a review of plans is required but action in response is implied, not defined. This section deals with review of outdated silviculture prescriptions. The district manager must review the prescription but the section does not specify what action must be taken in response to the review. It is only logical that some type of action must be taken by the district manager after the review. If, after such a review, the district manager decides that the outdated

[44] Defined in subsection (8).

prescription meets all requirements, no action is needed. However, if deficiencies are identified, the district manager would be expected to remedy the deficiencies. If a decision under the Act has a similar open-ended provision, you should assume that you have to review the documents and make any amendments required to ensure that the purposes of the Code are being carried out.

2. Setting or Imposing Conditions

Several provisions in the legislation give decision makers the power to impose conditions. The discretion is usually quite broad and little if any guidance is given with respect to what types of conditions can be imposed. The purpose of the particular section and the legislation as a whole should be considered. For example, assume that you have the authority to approve forest development plans "subject to conditions".[45] Approval of such plans is logical in ensuring that activities are carried out according to the principles of sustainable use as set out in the preamble. Any conditions imposed by you must relate to that purpose. It would not be appropriate to impose conditions relating to issues such as community planning, which are more appropriately dealt with under a municipal statute.

3. Granting Exemptions

Several provisions in the Code allow specified officials to grant exemptions from requirements. In most cases, certain conditions must be met before an exemption can be granted. Although granting exemptions is a discretionary power, valid reasons are needed to refuse to grant an exemption if all conditions have been met. One such set of reasons would be in consideration of the purpose of the requirement and the purposes of the Code as a whole. In cases where there are extensive conditions for an exemption specified, you may have to grant an exemption whenever those conditions have been met, unless there are special circumstances.

For example, where a district manager may grant an exemption only if a long list of conditions are satisfied, he or she may have difficulty

[45] Subsection 41(5) allows approval subject to conditions.

justifying refusal of an exemption when all conditions have been satisfied. It should also be noted that the Lieutenant Governor in Council (i.e., the Cabinet) has the authority to restrict the powers of exemption by regulation.

An example of granting an exemption is in section 29 regarding logging plans. In that section, a district manager has the discretion to exempt a person from preparing and receiving approval of a logging plan. However, the exemption is only possible if the timber harvesting is required for stated purposes.[46]

If an application for an exemption clearly fits within one of the listed purposes, an exemption should be granted. The only clear basis for refusal is provided by section 33, which states that the district manager may only exempt a person if the district manager determines that the requirement is not necessary to adequately manage and conserve the forest resources of British Columbia.

4. Administrative Remedies, Fines and Tickets

Administrative penalties and remediation orders are all punishments. In being punitive, you must be sure that the punishments are actually warranted. Therefore, you should comply strictly with all provisions dealing with administrative remedies.[47] The Act sets out the considerations that may be taken into account[48] and specifies what notice must be given.[49] Regulations and policies will also have a large impact on the choice and nature of remedies, as provided for in section 122. Nevertheless, you must still use your judgment and consider individual circumstances.

Penalties must be assessed independently of any action taken in court with respect to offences, although some penalties cannot be used

[46] Listed in Sections 28(1)(a) and 29(1).

[47] Sections 117 to 125 of the Act. They include not only monetary penalties, but also remediation orders, stopwork orders and burning permit cancellation powers.

[48] Sections 117(4), 118(1).

[49] Sections 117(5), 118(2)

together.[50] For example, although you could not assess a penalty under section 119(1), for unauthorized timber harvesting in addition to an administrative penalty under section 117, you could add a bill for costs of re-establishing a free-growing stand because that power is specifically set out in section 119(3).

You will have a limited role with regard to fines and orders imposed by courts. Administrative penalties are for less serious contraventions. For more serious matters, legislation specifies offences. Offences related to forest practices have been deleted from the *Forest Act* and *Range* Act and included in the Code. When such an offence is specified, prosecutions can only be commenced in court. A decision about whether or not to proceed is made by Crown counsel and not ministry employees. The role of the ministry is to bring the infraction to the attention of Crown counsel, who will decide whether to take the matter further. Note that some offences, such as those involving timber marking, scaling and document production, remain in the *Forest Act*.

If the decision is made to proceed, ministry employees will likely be required to assist by supplying documents and possibly testifying in court as witnesses. This type of prosecution is independent of any other type of penalty the ministry decides to impose. The decision on the penalty for these offences rests with the judge. A judge may, and usually will, take into account that an administrative penalty was also paid. Crown counsel might not proceed with a prosecution if an administrative penalty has been assessed.

Ticketing for some of the less serious contraventions of the Code will also be provided for by regulation under the *Offence Act*, as is the case under the *Forest Act*. Tickets may be challenged in court. Much of the above information on other court prosecution matters also applies to ticket offences.

5. Stopwork Orders, Suspensions and Cancellations

Section 123 of the Act allows an official to make stopwork orders. Although these orders can only be made in response to contravention of legislation, the effect may be similar to a suspension. Thus, you

[50] For example, see section 119(2), which states that a penalty for unauthorized timber harvesting cannot be imposed in addition to an administrative penalty under section 117.

should keep fairness, including notice, in mind for stopwork orders as well. On the other hand, since a contravention has occurred[51] and no one has a right to break a law, you may be permitted to issue the order without advance notice. In any event, you will usually be dealing with an emergency situation. However, the most important lesson in this course is that there is always a need to be procedurally fair and forthright. If in any doubt, you should err on the side of fairness. A stopwork order must always be reasonable and interfere as little as possible with lawful activities to accomplish the objective of the order.

Forestry legislation has many provisions for granting rights, usually by licences or permits. These rights may be significant. It follows that fair procedures must be used if you intend to take away such a right. In fact, if the rights are significant, the additional procedural protections of natural justice are required. Generally, you will be required to conduct a hearing, based either on written submissions or oral evidence. You must give adequate notice so that the person has an adequate opportunity to respond. You must also precisely follow any procedures set out in the legislation and seriously consider any response.

With the exception of some transition provisions, suspensions and cancellations will be carried out under the Act under which the permit or licence was issued. Therefore, most suspensions and cancellations will still be carried out under the *Forest Act*[52] and *Range Act,*[53] not the Code. Sections 78 and 124 of the Act allow suspension or cancellation of a burning permit if the permittee contravenes conditions of the permit or if there is a fire hazard. The transition provisions apply only during a specified time period, and only for specific purposes. The regulations also allow for the suspension and cancellation of a special use permit.

Even if not required by the legislation, the duty to be fair requires that you give affected persons notice of any cancellation or amendment of a previously held right or privilege. You must seriously consider any response and give enough advance notice so that the affected person can prepare for the change. In summary, most suspensions and cancellations remain under the *Forest* and *Range Acts,* as do the procedures you must follow. If, however, suspension or cancellation under the Code is required, ensure that the fairness provisions of administrative law are fully considered.

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[51] Section 123 requires that an official "consider that a person is contravening a provision of this Act.". This requires more certainty than a mere suspicion.

[52] Sections 59, 61 and 62.

[53] Sections 27 to 36.

6. Conducting Hearings

As indicated above, some type of hearing is generally required whenever a person's rights are involved. Typically, this includes decisions that may affect a person's livelihood, take away a right or impose a penalty. Hearings are not normally required before simple administrative decisions. The nature of the hearing will depend on the circumstances. There are a number of procedural factors to consider, including:

- whether to use a written or oral hearing;
- how much notice is required;
- confidentiality; and
- the need for written reasons.

a. Form of Hearing - Written or Oral?

When a hearing is required, you may be able to choose between oral and written types or a combination. At *oral* hearings witnesses are called and verbal submissions are made. In *written* hearings the decision is based on written evidence and reports only. The choice of hearing depends on three things:

1. whether the legislation provides a choice;
2. whether credibility is an issue (two very different versions of the facts are suggested, both of which cannot be correct); and
3. the significance of the legal rights which are at issue.

The Act does not always specify that a hearing is required. Section 117 is an example. It provides a range of administrative penalties that can be imposed by a *senior official*.[54] The Act, however, does not require a hearing. Instead, it requires that a person affected must be informed by a

[54] Defined as a district or regional manager plus designated staff of the Ministries of Forests, Environment, Lands and Parks, and Energy, Mines and Petroleum Resources.

notice of determination,[55] including rights of review and appeal. Despite the absence of a requirement, you may want to at least give the person a chance to respond prior to deciding to assess a penalty.

Occasionally, the Act requires a hearing but gives you a choice of the type of hearing to be held. Section 129, dealing with administrative reviews, is an example. Under subsection (4), an employee conducting a hearing may decide the matter on the basis of either an oral hearing or a "written explanation" plus any other communication. Despite this discretion, a person conducting a review should consider the severity of the order or penalty being reviewed in deciding the form of the hearing. Note that a hybrid hearing involving aspects of both oral and written hearings could be used.

An oral hearing is usually required whenever significant rights are at issue, such as the opportunity to earn a livelihood or a right to compensation. When the legislation is silent on the type of hearing, the same considerations should be applied in choosing the type of hearing. Of the two types of hearing, an oral hearing is usually more complex. It is used when one party, or the decision maker, wants to test the credibility of a party or witness by asking questions in cross-examination. An oral hearing can also be simple, with each party telling you his or her version separately and then later being able to respond to what the other side has said.

An oral hearing can also involve oral submissions made in the presence of all parties. These may be supplemented by written submissions. Parties are entitled to be represented by lawyers or agents in a formal hearing. You must give each party ample opportunity to make its case and respond to the submissions of the other parties. This includes a right to cross-examine witnesses if all parties hear all submissions at the same time. Unless the legislation so states, there is no requirement that an oral hearing be open to the public. Note that section 134 requires that Forest Appeals Commission hearings be open to the public. Even though if there is no requirement that a hearing be open to the public, there may be advantages to having an open hearing, particularly if the public interest is a consideration.

b. Adequate Notice

All parties must have adequate notice of the hearing plus enough time to review and consider any written submissions. As usual, what is

[55] Section 117(5).

reasonable depends on the circumstances. Minimum time periods are stipulated in the Act[56] and must be met. Again, consider how a neutral, fully informed observer would react. The greater the potential impact on a person's individual rights, the greater the need for notice. Notice must be sufficiently detailed and given early enough for the affected person to respond to the proposed action. Therefore, reasonable lead time could be a couple of days or several months. Consider what action the person affected might have to take in response. Then, provide enough lead time to allow such activity. You should also ensure that all involved parties are notified of other important steps and stages leading up to the hearing.

c. Disclosure

Disclosure is encouraged, regardless of the type of hearing. Therefore, encourage all parties involved to make their cases in writing to you, but tell them that they may have to provide copies of their submissions to the others. Finally, ensure that all parties are aware of, and have a source for, any other information you will consider (unless there are overriding considerations of confidentiality) so that they can respond to this information. For your part, seriously study all submissions and be careful not to consider other information in your decision.

Openness is related to disclosure. One problem, of course, is how to treat information, such as business records, which may be confidential. Generally, the Crown is expected to be open and forthright in disclosing the materials used in making a decision. However, disclosure may actually be prevented by a statute. In particular, you should be familiar with the *Freedom of Information and Protection of Privacy Act.*[57] Note that you must refuse to disclose information that would be harmful to the interests of a third party.[58] This includes trade secrets and other information that could harm the third party's competitive position. You should request specific advice from the Legal Services Branch of the Ministry of Attorney General if you are uncertain about disclosure.

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[56] Section 115(3) provides a minimum period for notice concerning forfeiture auctions.

[57] S.B.C. 1992, c. 61. Sections 12 to 22 protect Cabinet deliberations, some confidential business records, personal information and other records.

[58] Ibid., section 21(1).

d. Giving Reasons for Decisions

You should provide a rationale for your decisions whenever possible. Technically, there is no requirement for you to do so unless the legislation states.[59] However, you should make an effort to give comprehensive reasons for your major decisions, especially when there is a right of review or appeal. For the smaller, more routine administrative decisions, you can simply state your rationale without writing reasons that discuss the evidence in detail.

There are several reasons to encourage written reasons for major decisions. First, sound reasoning could make an appeal less likely. Second, if there is an appeal, the appeal body usually sees only the documentary record; it will want to know the background and be able to follow your reasoning. All the facts relevant to the decision should be described (what evidence you considered, what you rejected as unreliable or irrelevant) and why you decided as you did. If you decide that some evidence was unreliable or irrelevant, that should also be mentioned in the reasons.[60] In that way, an appeal body will be able to see that the evidence was at least considered. In summary, you should explain enough to show that you considered all relevant factors and that the decision was based only on those relevant factors. Courts tend to defer to decisions backed by a comprehensive set of reasons.

e. Appeal Hearings and Administrative Reviews

Special note should be made of formal appeal hearings where you are required to listen to submissions from parties, and receive documentary evidence and testimony of witnesses. You may, for example, be appointed to conduct an administrative review under the Act.[61] If so, it is essential to read the statute to determine exactly what powers you have. For example, a person conducting an administrative review does not have the powers of a judge in civil trials, such as the power to administer oaths, to order witnesses to come and testify or to compel the production of documents. (Such broad powers are granted to the

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[59] Section 129(6) requires that a written decision on an administrative review must be provided.

[60] This can be done diplomatically. If you believe that a witness was unreliable, you need note only that you "preferred the evidence" of another witness; there is no need to go into detail about why a witness was disbelieved.

[61] Section 129.

Forest Appeals Commission.[62]) You do not have any such powers unless the statute specifically grants them, and no such powers are provided under administrative reviews.

Formal hearing procedures are often specified in the statute as well. As evidence in an administrative review cannot be taken under oath, the rules on what may and what may not be admitted are considerably relaxed in comparison to court rules. For example, in an administrative review you can probably base your decision on written submissions or even just by inviting both parties to come and give information. You can consider evidence which would not be allowed in court. However, there are good reasons why courts are reluctant to admit certain evidence, so be careful not to put undue weight on controversial evidence in making your decision.

7. Inspections

Provisions in the Act grant powers to:

- inspect;[63]
- enter land[64] or premises;
- stop vehicles[65] or a person; and

[62] Section 135 allows Commission members to summon and enforce attendance of witnesses and to compel witnesses to give evidence, including production of records.

[63] Section 107.

[64] Section 107.

[65] Sections 108 and 109.

- demand and inspect documents.[66]

There is an important distinction between inspection and investigation. An *inspection*[67] is usually less intrusive and may occur as part of regularly scheduled visits, random spot checks or in response to a complaint that there may be a problem at a site. In order to do an inspection, you need not suspect that a contravention has occurred. Under the Act, an inspection applies to work premises,[68] not private residences. Inspections take place during normal business hours.[69] A person is presumed to have agreed to reasonable inspections by undertaking a regulated activity such as timber harvesting. Inspections are meant to encourage compliance and provide government with a mechanism to detect problems. Finally, an inspection does not normally include the power to seize private property or records.

Investigations, on the other hand, are undertaken in order to gather evidence of a contravention. There must first be facts that lead a person to reasonably believe that a contravention may have occurred. Investigation powers usually involve more intrusive actions by officials than do inspection powers. There is no presumption that a person has agreed in advance to being investigated. There are, therefore, more procedural safeguards for investigations than for inspections.

In some cases, the difference between inspections and investigations is very clear. However, many situations fall into a grey middle area. For example, how far can an inspecting official go when there has been a public complaint and a contravention of the legislation is suspected? More seriously, what if an inspector detects a serious violation? Can the inspection turn into an investigation? The important factor is that anyone conducting an inspection only has the powers of an inspector as set out in the legislation. You must read the legislation carefully and stay within those powers. Even for inspections under the Act, several provisions[70]

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[66] Section 110.

[67] Sections 107 to 112 of the Act deal with inspection powers.

[68] The inspection powers of section 107 are restricted to “land or premises, other than a dwelling house...”.

[69] The inspection powers of sections 107 and 110 are restricted to “any reasonable time”.

[70] For example, section 108 requires that an official wanting to stop and inspect a vehicle or vessel must have reasonable grounds to believe both that the vehicle or vessel contains designated forest products and that the vehicle or vessel is owned or operated by a specified licensee.

require that the official have "reasonable grounds to believe" something is amiss before the inspection powers may be exercised. If you stay within your legislated bounds, your actions are likely to be acceptable. You should also use some judgment in deciding whether in some cases an inspection requires a search warrant. This involves consideration of a person's *expectation of privacy*, a concept discussed in the next section.

8. Investigations, Searches and Seizures

The Act allows an official to apply to a judge for a search warrant to enter premises and search for and seize evidence of contraventions of the Act, the *Forest Act*, and the *Range Act.*[71] Such powers are intrusive and are scrutinized closely by the courts. All procedures and requirements in the legislation must be strictly followed. In issuing a search warrant the judge must be convinced that there are reasonable grounds to believe that a contravention has occurred and also that the premises to be searched contain evidence of the contravention. This does not mean that there need be certainty of either criterion, but the person applying for the warrant must have knowledge of objective facts that reasonably lead to those conclusions. Warrants are issued by justices of the peace.

A search warrant is required whenever you want to carry out a search that you are not otherwise authorized to do (e.g., through an inspection) and there is a violation of a person's expectation of privacy. There is no clear delineation between when a warrant is required and when it is not. If you are entering a private home, you almost certainly need a warrant. On the other hand, if you are looking at operations of a licensee on Crown land, you do not need a warrant. There is little expectation of privacy in the latter situation. Problems can still arise, however, if you want to search a tent that has been set up on Crown land.

The following factors should be considered in assessing the degree of privacy expected. That assessment will assist you in deciding whether a search warrant may be required before an investigation proceeds.

- The site. Is it Crown land? If so, there is less expectation of privacy.

[71] Section 113.

- The relationship between the operator and the Crown. If the operator is a licensee on public land, he or she is presumed to have submitted to reasonable inspections. However, if the operator is a licensee on a private woodlot, more deference is required.

- The nature of the *search*. Items in plain view can be inspected, but if files, buildings or vehicles must be opened and items moved, the search will normally be investigative, requiring a warrant.

- The operator's expectation of privacy. A person's dwelling, even if merely a tent or shed, is his or her castle. Inspection of such premises normally requires a warrant. On the other hand, one does not expect privacy in most parts of a timber processing facility; thus inspection there is probably acceptable.

Keep expectations of privacy in mind whenever you inspect or investigate. If there is a reasonable expectation of privacy in the circumstances and you do not have clear legislative authority to enter, consider obtaining a warrant before proceeding further.[72] What are the consequences of searching premises and seizing evidence without a warrant? The *Charter of Rights and Freedoms* gives everyone a right to be free from unreasonable search and seizure. Therefore, if a violation of that right is found to have occurred, any evidence collected through the violation may be inadmissible.

Everything involved in a search must be reasonable, including the manner in which it is carried out. This means that you should invade a person's privacy as little as possible while still accomplishing the purpose of the search. You may not need a warrant if the person who occupies the premises consents to the search. Such consent must, however, be a fully informed and meaningful one. The person who gives the consent must know the full possible consequences of the search and precisely what a search entails.

As stated previously, it is not always clear whether a given activity is an inspection or a search, or whether a warrant is required. In case of uncertainty, obtain legal advice. Otherwise, err on the side of caution, get a warrant and use any other applicable procedural safeguards that may be available before activities are undertaken.

[72] Alternatively, a peace officer may accompany you in an investigation. Such accompaniment is provided for in section 114 of the Act.

9. Forfeiture versus Seizure

Superficially, forfeitures resemble seizures arising from warranted searches. However, there is a crucial difference. The distinction is in who owns the item at the time it is taken. Searches, and the resultant seizures of private property usually owned by the person being searched, are intended to obtain evidence of contraventions. *Forfeitures* occur when something is taken to which the government has a right. Forfeiture arises in situations where Crown resources are used without authorization,[73] such as timber or hay taken without authorization and livestock trespassing on Crown land.

Despite the distinction, a duty of fairness applies to both searches and forfeitures. The difference is in the makeup of reasonable grounds. Searches and seizures require reasonable grounds that a contravention has occurred and a warrant. Taking things under forfeiture requires only *reasonable grounds* to believe that the government is entitled to the property. Note, however, that anything taken under forfeiture powers is likely not to be admissible in court as evidence for a prosecution, because the procedural safeguards which protect against wrongful seizure are not applied to forfeiture.

10. Relations with the General Public

The Act requires public review and comment for the establishment of resource management zones,[74] landscape units[75] and some operational plans.[76] Other public review and comment requirements may be imposed by regulation.[77] In some cases, public review and comment will be advisable even when not mandatory, such as when the

[73] See sections 115 and 116.

[74] Section 3 (4).

[75] Section 4(6).

[76] Section 39.

[77] Section 208 provides general authority for regulations for review and comment on any matter dealt with in this Act or the regulations.

public is significantly affected by a decision. However, if certain persons will be particularly affected by a decision, such as a forest company working in an area, you may wish to give separate notice to them in addition to the general public notice. Keep in mind that public review and comment does not, by itself, allow sufficient input from an individual seriously affected by a decision. Such individuals may also be entitled to more elaborate procedural safeguards, even if they are not required by the legislation.

Section 94 of the Act allows designated forest officials to order persons and equipment to help fight fires. Such powers, being intrusive, are scrutinized closely by courts and should be used with caution only in emergency situations. Orders for the use of equipment are not viewed as strictly as those ordering people to help fight fires. This provision replaces section 124 of the *Forest Act*. Note that there is a change regarding training. The former law required only that the person be physically capable of assisting. Now, the person must first be trained in fire fighting.

With regard to the general issue of government liability to the public, the government is usually liable for its actions like anyone else. For example, if a government employee doing government work negligently hit a pedestrian while driving, both the employee and the government as employer would be liable for the damage. However, liability is more limited in cases of discretionary decision making. In such cases, the employee and the government are liable only if bad faith was involved. Bad faith appears in two types of circumstances: when a decision is made to hurt someone or when it is made with the knowledge that it is beyond one's authority. Although there are provisions in the legislation which exempt the government and its employees from liability,[78] these offer no protection if you act in bad faith.

Section 160 of the Act states that no compensation will be paid as a result of the exercise of powers under the Code. There is one exception which gives the regional manager discretion to compensate when timber rights are reduced.[79] This is unusual, because compensation provisions are normally mandatory.[80] Nevertheless, there have to be strong reasons to refuse to offer compensation because compensation is the norm if rights are taken away. This provision may be interpreted as mandatory unless there are exceptional

[78] Section 160.

[79] Section 240(4).

[80] See, for example, section 53 of the *Forest Act*.

circumstances (such as when timber is not available) or there is some other way to assist the affected person. This is another example of when the word *may* could actually be interpreted as *must*.

11. Conclusion

Although there are many considerations to be kept in mind when carrying out the various administrative functions under the Code, the single most important factor is to be fair to all those affected by your decisions. Read and follow all applicable legislation carefully. Use tools such as the Electronic Library to assist you. Be careful to apply judgment before you act. Remember, that this resource book is a training tool, providing only a general review of the principles. You should contact your Ministry's solicitor at the Legal Services Branch of the Ministry of Attorney General for specific legal advice whenever you are uncertain about the action to be taken in a specific situation.

Decision making must be taken seriously. You have been granted many decision making powers in the Code and your decisions will affect many people. It is significant that the Legislature has given those powers specifically to you. You are the one to decide and ,therefore, you need not fear making decisions because they may be challenged. As long as you have used caution and judgment and have followed fair procedures, there is no need to be concerned about being overruled on occasion by another authority. Your job is to make decisions. You now have some guidance in how to make them. The following Appendix presents a decision making analysis of several sections of the Act.

APPENDIX 1
Interpreting Administrative Responsibilities

At this stage, you have an overview of the concepts and principles which form the area of "administrative law". You now also have an understanding of the concepts and principles involved in carrying out specific administrative tasks. The final step is to link these principles to the legislation under which you will be operating. Law students are told:

To know the law, you need do only three things: read the statute, read the statute and read the statute

Keeping the administrative law principles in mind, you will now be able to interpret the statutes and regulations to obtain considerable guidance on how each task can be done properly and fairly, with minimal risk of successful appeal or review.

The Reference Material contains suggested considerations on a section by section basis, catalogued by official: the minister, chief forester, regional manager and district manager as well as others such as "official", "senior official", "designated forest official", "designated environment official" and "designated energy, mines and petroleum resources official". In addition, the Electronic Library includes the Forest Practices Code of British Columbia Act, Regulations and Standards. You can simply search the Electronic Databases by keyword (e.g. - "official", "designated environment official", etc.) to find the provisions that apply to you.

This chapter will apply the administrative law principles to five sample sections of the Act to indicate the type of interpretation required to properly carry out the indicated duties. The following sections are considered in some detail:

- S. 3 - Resource management zones and objectives
- S. 6 - Interpretive forest sites, recreation sites and recreation trails

- S. 18 - Forest development plans for small business forest enterprise program
- S. 26 - Access management plans
- S. 41 - Approval of plans by district manager or designated environment official

When reviewing these representative provisions, ask yourself the following questions before you consider the analysis that has been provided.

- First, what is the nature of the decision under the Act?
- Second, whose decision is it?
- Third, can the decision be delegated and, if so, to whom?
- Fourth, is the decision reviewable or subject to appeal and, if so, by which authority or body? Is there more than one level of appeal?
- Fifth, what should be considered, and what sources should be consulted, as part of the decision?
- Sixth, what steps must be respected as part of the decision-making process?

Example One - S. 3 - Resource management zones and objectives

Forest Practices Code of British Columbia Act
Part 2 - Strategic Planning, Objectives And Standards

3.(1) To ensure that Crown land in a Provincial forest and private land in a tree farm licence or woodlot licence are managed and used in accordance with section 2 and the regulations, the chief forester, by written order, may establish an area of land as a resource management zone, and may vary the boundaries of the zone or cancel the zone,

(a) in accordance with directions from the Lieutenant Governor in Council, or

(b) if the Lieutenant Governor in Council has not issued directions to the chief forester with respect to an area, in accordance with directions approved by the ministers.

(2) The chief forester must establish objectives for a resource management zone and may vary or cancel an objective.

(3) When establishing, varying or canceling an objective for a resource management zone the chief forester must do so by written order and in accordance with the regulations and any directions from the Lieutenant Governor in Council or the ministers.

(4) Before establishing, varying or canceling a resource management zone or objective in a way that significantly affects the public, the chief forester must provide for review and comment in accordance with the regulations.

(5) The chief forester may delegate in writing to an employee of the Ministry of Forests, the chief forester's authority to establish, vary or cancel objectives for a resource management zone and may limit or cancel the delegation.

(6) The chief forester must file an order establishing, varying or canceling a resource management zone or objective with the regional manager for the area affected by the order.

(7) The establishment, variance or cancellation of a resource management zone or objective takes effect

(a) 6 months after the order is filed with the regional manager, or

(b) if authorized by the regulations and in accordance with the regulations, at an earlier time specified in the order.

(8) The regional manager must make available to the public,

(a) the order, and

(b) a map showing the boundaries of the resource management zone.

Analysis

This section includes examples of discretion subject to conditions. The chief forester has discretion in subsection 1 to establish resource management zones. This discretion is limited, however, to Crown lands in the provincial forests and particular private lands. The mode of establishment is also defined - it can only be done by written order. The proper purpose is set by the section to ensure that such lands "are managed and used" in ways that are consistent with the purposes listed in section 2 and the regulations.

Any directions from Cabinet must be followed. If there are no such directions for the area under consideration, the chief forester must abide by directions approved by the ministers (defined in Section 1 as the ministers of Forests, Environment, Lands and Parks, and Energy, Mines and Petroleum Resources). As the chief forester must comply with directions, there is very little discretion in this subsection.

Subsection (2) requires that, once a resource management zone has been established, the chief forester must establish objectives; this is mandatory. Subsection (3) requires that establishment, variance and cancellation of objectives must also be by written order and in accordance with regulations and any directions from Cabinet and the resource ministers. According to subsection (6), the order must be filed with the affected regional managers, who must in turn (under subsection (8) make the order and a suitable map available to the public. There is no discretion in any of this; it all mandatory.

Subsection (4) is a mandatory requirement for public review and comment, but the chief forester has discretion to decide whether the establishment or alteration of a resource management zone or objective will "significantly affect the public". Here is a classic judgment call - the decision on public effect must be reasonable. That decision can be restricted by the regulations and any directions by the Cabinet or the ministers, but nothing else. Once the decision is made to allow public review and comment, comments must be genuinely considered. The regulations will give details on how to allow review and comment. The public must have a reasonable opportunity to comment before final decisions are made.

Delegation is provided for in subsection (5). The chief forester may delegate to a Ministry employee some or all of the authority to establish or change objectives, but may not delegate the authority to establish or vary the resource management zones themselves. Delegation must be in writing. Anyone exercising such delegated powers will be subject to the same conditions covered by subsections (2), (3) and (4) as the chief forester.

Decisions on zones and objectives are legislative decisions.

Example Two - S. 6 - Interpretive forest sites, recreation sites and recreation trails

Forest Practices Code of British Columbia Act
Part 2 - Strategic Planning, Objectives And Standards

6.(1) In accordance with the regulations the chief forester, by written order, may establish Crown land as an interpretive forest site, recreation site or recreation trail, if the land is

(a) within a timber supply area, or

(b) subject to a tree farm licence, woodlot licence or timber licence,

and may vary or cancel an establishment under this subsection.

(2) Before establishing, varying or canceling an area under subsection (1), the chief forester must obtain the consent of the holder of

(a) a cutting permit, free use permit, Christmas tree permit, road permit, timber licence, timber sale licence, licence to cut, silviculture prescription or stand management prescription, or

(b) an interest issued or granted under the *Land Act*,

if the holder's rights under the permit, licence, prescription or interest would be adversely affected by the establishment, variation or cancellation.

(3) If the chief forester establishes an area under subsection (1), the chief forester must establish objectives for the area, in accordance with the regulations, within 6 months of the designation.

(4) The chief forester may vary or cancel an objective established under subsection (3).

(5) The chief forester may delegate in writing to an employee of the Ministry of Forests, the chief forester's authority to establish, vary or cancel an objective and may limit or cancel the delegation.

Analysis

This section includes more examples of discretion, subject to fewer conditions than section 3. There is also an extra onus of procedural fairness, as previously-granted rights may be affected. The chief forester has discretion in subsection 1 to establish the specified sites and trails. This discretion is limited, however, to lands within a timber supply area or subject to specified tenures. The mode of establishment is again mandatory - it can only be done by written order. Proper purposes are not defined. The purposes are therefore to be inferred by the names (interpretation, recreation) and the purposes of the statute. Policy may also give some guidance.

There are no special conditions for establishing, as opposed to merely varying or canceling, these areas. For all of these actions, however, subsection 2 requires prior consent of holders of specified interests in the affected lands if (and reasonable exercise of discretion again) their rights would be adversely affected. Again, the decision on adverse effect must be reasonable. Unlike section 3, there is no provision here for directions. Nevertheless, subsection (1) requires adherence to any restrictions in the regulations.

Subsection (3) requires that, once an interpretive or recreation site or trail has been established, the chief forester must establish initial objectives; this is mandatory. Subsection (4) gives the discretion to vary or cancel those objectives without specified conditions, although the normal fairness considerations will still apply.

Delegation is provided for in subsection (5). The chief forester may delegate to a Ministry employee some or all of the authority to establish or change objectives, but may not delegate the authority to establish or vary the sites and trails themselves. Delegation must be in writing. Anyone exercising such delegated powers will be subject to the same conditions covered by subsections (1) and (4) as the chief forester.

Decisions with respect to the sites, trails and objectives are legislative decisions.

Example Three - S. 18 - Forest development plans for small business forest enterprise program

Forest Practices Code of British Columbia Act
Part 3, Division 2 - Operational Planning Requirements

18.(1) The district manager may only invite applications for, or enter into, a timber sale licence that does not provide for cutting permits if a forest development plan identifies

(a) the cutblocks to be harvested under the timber sale licence during the period covered by the forest development plan, and

(b) the location of existing and proposed roads that provide access to the cutblocks.

(2) Subsection (1) does not apply to a timber sale licence for timber harvested under the *Park Act*.

(3) The holder of a timber sale licence that is not a major licence and that provides for cutting permits may only apply for a cutting permit if a forest development plan identifies

(a) the cutblocks to be harvested under the cutting permit, and

(b) the location of existing and proposed roads that provide access to the cutblocks.

(4) If a timber sale licence that is not a major licence and that does not provide for cutting permits has a term that extends beyond the period covered by the forest development plan referred to in subsection (1), the holder of the timber sale licence must not harvest timber under the timber sale licence from an area that was not identified in that forest development plan unless another forest development plan is given effect that identifies

(a) the additional cutblocks to be harvested under the timber sale licence, and

(b) the location of existing and proposed roads that provide access to the cutblocks.

(5) A forest development plan for a timber sale licence that is not a major licence takes effect

(a) if the district manager prepares the plan, on the effective date specified in the plan, or

(b) if a holder of a timber sale licence that provides for cutting permits prepares the plan with the district manager's consent, on the date specified in the approval of the plan under Division 5 of this Part.

(6) A forest development plan under this section expires after a prescribed period from the date the plan takes effect.

(7) Before or after the expiry of a forest development plan under this section, the plan may be extended for a period or periods not exceeding a total of one year

(a) by the regional manager if the plan was prepared by the district manager, or

(b) by the district manager if the plan was prepared by the holder of a timber sale licence and the holder requests or consents to the extension.

(8) If the term of a forest development plan is extended under this section, the person who prepared the plan must promptly amend the forest development plan to the extent necessary to ensure compliance with the current requirements of this Act, the regulations and the standards.

Analysis

Notice the discretion of the district manager in subsection (1). There is a restriction on entering into timber sale licences that do not provide for cutting permits. The restriction is that there must be a forest development plan that identifies the cutblocks and all roads which will be used to access the timber. (Note that this subsection does not apply to timber sale licences that provide for cutting permits.) Subsection (1) does not, as per subsection (2), apply to timber sale licences for timber in parks

Where there is discretion, denial of an application for a timber sale licence by a small business forest enterprise operation should not be done unreasonably. The application must meet all applicable conditions; any failure is an obvious basis for denial. If all conditions are met, however, applications should be accepted and licences entered into where appropriate. The only other basis for denial would be a conflict with the purposes[81] of the Act.

Subsection (3) applies conditions to operators who hold timber sale licences that are not major licences, but that do provide for cutting permits. Cutting permits can only be applied for if there is a forest development plan covering the licence area that identifies the cutblocks and all roads which will be used to access the timber.

Subsection (4) also constrains operators on timber sale licences that are not major licences, but this section applies if the licences do not provide for cutting permits. Such timber sale licences must already have met the conditions of subsection (1), but subsection (4) covers the contingency where a timber sale licence term extends beyond that of the forest development plan for the licence area. The operator may not harvest timber from cutblocks that were not identified on the plan. Another forest development plan must be in place for the affected

[81] Consider the Preamble and the uses of provincial forests listed in section 2.

timber and that plan must describe the roads required to access the timber and the additional cutblocks to be harvested.

There is no choice or discretion when a forest development plan expires under this section. Subsection (6) states that they expire after a period stated in the regulations. However, there is an exemption provision in subsection (7), which allows extension of forest development plans for up to a year. The regional manager can extend plans prepared by the district manager with no specified conditions, but district managers can extend those prepared by a licensee only if the licensee requests or consents to such an extension.

If an extension is made, the district manager or licensee, whomever prepared the plan, must, under subsection (8), amend it promptly to ensure that it complies with the law. For initial guidance, refer back to subsection (1); ensure that all cutblocks to be harvested and all access roads are identified. However, the rest of the Act, regulations and standards must also be examined. The purposes of the *Act* and of forest development plans[82] in particular must be considered in deciding whether to extend and for how long. An exemption should not be unreasonably withheld. Each case must be considered individually.

[82]Consider the matters to be included in forest development plans under section 10 and the general planning requirements of section 17.

Example Four - S. 26 - Access management plans

Forest Practices Code of British Columbia Act
Part 3, Division 2 - Operational Planning Requirements

26.(1) The district manager must prepare an access management plan for the development, maintenance and deactivation by the government of forest service roads that are not identified in a forest development plan.

(2) Before the holder of a major licence constructs, modifies, maintains or deactivates roads for which the holder of the major licence is responsible under a cutting permit or road permit, other than roads identified on a forest development plan, the holder must prepare and obtain the district manager's approval of an access management plan for the area within which the roads are located.

(3) An access management plan takes effect

(a) if the district manager prepares the plan, on the effective date specified in the plan, or

(b) if a holder of a major licence prepares the plan, on the date specified in the approval under Division 5 of this Part.

(4) An access management plan expires after a prescribed period from the date it takes effect.

(5) Before or after the expiry of an access management plan, the plan may be extended for a period or periods not exceeding a total of one year

(a) by a regional manager, if the plan was prepared by the district manager, or

(b) by the district manager if the plan was prepared by a holder of a major licence and the holder requests or consents to the extension.

(6) If the term of an access management plan is extended, the person who prepared the plan must promptly amend it to the extent necessary to ensure compliance with current requirements of this Act, the regulations and the standards.

Analysis

Subsection (1) contains mandatory instructions for district managers. They must prepare access management plans for development, maintenance and deactivation of any forest service roads that are not identified in a forest development plan. The first question will be what

qualifies as "forest service road". There is no definition in the *Act*, so the definition in the *Forest Act* applies.[83]

Subsection (2) applies to holders of major licences[84] and work on roads for which they are responsible under a cutting permit or road permit. Note the exemption for roads identified on a development plan. Before any road work begins, the licensee must obtain approval of an access management plan from the district manager. The administrative law on approvals applies here - not to be withheld unreasonable. Consider the purposes of the *Act,*[85] the requirements for operational plans[86] and the requirements for access management plans.[87] However, do not blindly follow policy. If approval is withheld, give reasons, both to provide clear guidance to the licensee to allow correction of deficiencies and in case your denial is appealed.

There is no choice or discretion in when an access management plan expires. Subsection (4) states that they expire after a period stated in the regulations. However, there is a form of exemption in subsection (5), which allows discretion to extend access management plans for up to a year. The regional manager can extend plans prepared by the district manager with no specified conditions, but district managers can extend those prepared by a licensee only if the licensee requests or consents to such an extension. The purposes of the *Act* and of forest development plans[88] in particular must be considered in deciding whether to extend and for how long. An exemption should not be unreasonably withheld. Each case must be considered individually.

If an extension is made, the district manager or licensee, whomever prepared the plan, must, under subsection (6), amend it promptly to

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[83] Section 1(2) of the *Code Act* states that any undefined terms carry the same meanings as in the *Forest Act* and *Range Act*, and the term is defined in section 1 of the *Forest Act*.

[84] Again, in the absence of a definition in the *Code Act*, the *Forest Act* definition applies.

[85] Consider the Preamble purposes of sustainability, stewardship and balance of economic and cultural needs. Consider the uses of provincial forests listed in section 2.

[86] Section 17.

[87] Section 15.

[88] Consider the matters to be included in forest development plans under section 10 and the general planning requirements of section 17.

ensure that it complies with the law. The rest of the Act, regulations and standards must be examined.[89]

[89]This sort of broad search for the legal requirements for forest development plans can be most easily performed by computer search using the **ELECTRONIC DATABASE** provided with this course

Example Five - S. 41 - Approval of plans by district manager or designated environment official

Forest Practices Code of British Columbia Act
Part 3, Division 5 - Notice and Evaluation of Operational Plans

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.

(2) Before approving a plan or amendment the district manager may require the holder to submit information that the district manager reasonably requires in order to determine if the plan or amendment meets the requirements of subsection (1).

(3) The district manager may approve an operational plan or amendment only if it meets the requirements of subsection (1).

(4) Despite subsection (1), to the extent provided in the regulations a district manager may refuse to approve a logging plan or amendment that meets the requirements of that subsection if the district manager determines that the person submitting the plan or amendment

(a) has previously contravened this Act, the regulations or the standards, and

(b) has not taken all measures necessary to prevent or minimize the effects of the contravention, or rehabilitate the affected area.

(5) The district manager may make his or her approval of a forest development plan or amendment subject to a condition.

(6) A forest development plan or amendment that covers an area in a community watershed or an area meeting prescribed requirements requires the approval of both the district manager and a designated environment official.

(7) The designated environment official must approve a forest development plan or amendment under subsection (6), if the plan or amendment meets the requirements of subsection (1) and the designated environment official is satisfied that the plan or amendment will adequately manage and conserve the forest resources of the community watershed or the area meeting the prescribed requirements.

(8) For the purposes of subsection (6) **"community watershed"** means a watershed with a drainage area of not more than 500 km2 that

(a) is licensed under the *Water Act* for community water use, or

(b) is licensed under the *Water Act* for domestic water use and the holder of the licence, the district manager, the designated environment official and the Minister of Health all agree that the area should be regarded as a community watershed.

Analysis

Subsection (1) is mandatory; an operational plan must be approved by the district manager if the conditions are met. However, there is discretion in clause (b) - the district manager must be satisfied as regards management and conservation of forest resources. How should these competing directives by balanced? Obviously, the message is to approve unless there are good and substantive reasons, which must be reasonable.

The first concern is that there will be abundant room for a forest operator to challenge a refusal. There will also, given the scope in "adequately manage and conserve the forest resources", be room for challenge if a plan is approved. This is an ideal example of a discretionary power that requires procedural fairness and reasonableness.

Reasons, usually quite informal, should be given for refusal to approve. However, for this section, reasons for approval should be documented because there could be an administrative review. An approval under this section is specifically listed[90] as subject to review at the request of the Forest Practices Board.

Your reasons must be reasonable and the factors considered must be relevant to management and conservation of forest resources in the area covered by the plan and nothing else. "Forest resources" are defined in section 1. Consider also the purposes of the *Act* as a whole[91] and the requirements for operational plans generally.[92] "Management" and "conservation" are not defined and so standard dictionary definitions would apply. As to "adequacy" of management and conservation, this is a judgment call to be decided on the specific facts each time a plan or amendment is submitted. Has the person submitting the plan done all that you would consider reasonable, given

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[90] Section 128(1)(c), but only if the regulations also provide for such review.

[91] The Preamble also lists purposes of sustainability, stewardship and balance of economic and cultural needs. Consider the uses of provincial forests listed in section 2.

[92] Section 17.

the time available, the inventory of forest resources available and so on? Consider the opinions of other participant Ministries when required by the legislation in determining adequacy of management and conservation of forest resources in which they have a management interest.

The key here is to walk the fine line between considering everything that may be relevant and yet discarding things that aren't. Consider whether you should be taking into account any factors which are suggested to you. Then, evaluate and make your decision. You should document your reasoning in some manner, but comprehensive reasons are required only in the most serious cases.

Reasonableness must be determined again in subsection (2), the information required to exercise the discretion under subsection (1). The subsection refers to deciding what the district manager reasonably requires, but you should also consider what would be reasonable for the operator to provide.

Note that there is a requirement for joint approval in some cases under subsection (7).

Subsection (3) is read in association with subsection (1). Subsection (1) states that a plan must be approved if it meets the stated requirements. Subsection (3) states that a plan may be approved only if it meets those same requirements. The net effect is that a plan must be approved if it meets the requirements, but may not be approved if it does not. There is no discretion in whether to approve; the only discretion is in assessing the adequacy of resource management and conservation measures.

Subsection (4) is an exception to the mandatory approval of plans required by subsection (1). It is restricted to "logging plans" and amendments. There will be guidance in the regulations. If approval is to be withheld under this subsection, both of the conditions must be met. There must be proof of a prior contravention and inadequate mitigation or rehabilitation of the effects of that contravention. Adequacy will depend on the specific facts and on the terms of any order which may have been made in response to the contravention.[93] Reasons will be required if approval is withheld, but they can be informal under this provision. The evidence of the prior contravention and the factors used to determine "necessary measures" should be clearly identified. Measures considered necessary must be reasonable

[93] Section 118, section 147.

and relevant to the specific effects of the contravention on the affected area.

If conditions are attached to an approval pursuant to subsection (5), they must be reasonable for the operator and must be relevant to the purposes of the Act and the purpose of the requirement for forest development plans.

Subsection (7) directs "designated environment officials" in their joint approval of development plans in community watersheds and other prescribed areas under subsection (6). These are designated employees[94] of the Ministry of Environment, Lands and Parks. Approval is mandatory if subsection (1) is met and the designated environment official is also satisfied with respect to adequate management and conservation. The same considerations and procedures should be used and followed as were described previously for the district manager. However, more weight should be given to the concerns that are under the mandate of the Ministry of Environment, Lands and Parks (i.e.- water, fish, wildlife, recreation). Blind adherence to policies of the Ministry would be improper fettering of the discretion provided by this subsection.

[94] Designation is by the Minister of Environment, Lands and Parks; see the definition in section 1.