Forest Appeals Commission

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APPEAL NO. 2000-FOR-009(a)

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

BETWEEN:	Forest Practices Board	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Husby Group of Companies	**PERMIT HOLDER**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair	
DATE OF HEARING:	March 16, 2001	
PLACE OF HEARING:	Conducted by way of written submissions	
APPEARING:	For the Appellant: Calvin Sandborn, Counsel For the Respondent: Bruce R. Filan, Counsel For the Permit Holder: W.R. Brash	

APPLICATION FOR A CHANGE OF VENUE

APPLICATION

This is an application by the Council of the Haida Nation to have the Forest Appeals Commission (the "Commission") change the location of hearing of this appeal from Victoria to the Queen Charlotte Islands.

This application was conducted by way of written submissions.

BACKGROUND

The subject matter of this appeal is a five-year forest development plan (the "Plan") that was submitted by the Husby Group of Companies ("Husby") for lands on the Queen Charlotte Islands, also known as Haida Gwaii. A forest development plan is a document that describes and illustrates how harvesting and road development for a specific area will be managed for a period over the specified period – in this case, from 1999-2003.

Husby's Plan was approved by the District Manager, Queen Charlotte Islands Timber Supply Area, in determinations dated October 22, 1999, and November 26, 1999.

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

On December 18, 2000, the Board appealed the Plan approval to the Commission. It seeks an order from the Commission setting aside the approval of a number of cutblocks and associated roads in the Tartu and Naden watersheds, as well cutblocks located within the previous draft Forest Ecosystem Networks.

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

On February 16, 2001, the Commission received a letter from the Council of the Haida Nation asking for the hearing to be conducted on Haida Gwaii (the Queen Charlotte Islands), rather than in Victoria. The Council of the Haida Nation is not a party to this appeal. The reason given for the Council's request is as follows: "How the forests of Haida Gwaii are managed is of prime concern to Islanders and we need to have the opportunity to witness such an important case."

All parties were asked to make written submissions on the Council's request. In the submissions provided, the Board argues in favour of changing the location of the hearing to the Queen Charlotte Islands. The Respondent and Husby both object to the proposed change.

ISSUE

1. Whether the venue should be changed to the Queen Charlotte Islands.

DISCUSSION

1. Whether the venue should be changed to the Queen Charlotte Islands.

The Respondent argues that moving the hearing is unnecessary, time-consuming and unprecedented. The Respondent also argues that a change in venue will not be beneficial to the conduct or resolution of the appeal. Further, the Respondent argues that granting the application will create an undesirable precedent as other interested persons or groups, that are not a party to an appeal, could expect a hearing to be conducted near to where that party lives because they think the case is important and want to view the proceedings. The Respondent submits "this case is important to all British Columbians and not just some of the residents of the Queen Charlotte Islands."

The Respondent also argues that to hold the hearing on the Queen Charlottes would also unnecessarily and unreasonably take those from Victoria away from their other professional and personal responsibilities.

Both the Respondent and Husby submit that moving the venue will require a large an unnecessary expenditure of money and time for all parties and the Commission. The Respondent argues that holding a hearing on the Queen Charlottes would require counsel and witnesses for the government to fly and be accommodated on the Queen Charlottes at great expense in both time and money. Husby states that "a strong majority" of participants are located in the Greater Vancouver and Victoria areas and "considerable additional expenses would have to be incurred for an already costly process in addition to changing current bookings and staff schedules.

Husby also disputes that the Council are interested parties as it did not provide comments during the public review stage and, in the past, have participated only selectively. Husby is concerned that the Council will attempt to turn a straight-forward technical appeal into a pursuit of other agendas.

Conversely, the Board argues that the relevant facts in this case support changing the venue to the Queen Charlotte Islands. It submits that:

- The Plan applies to an area of land on the Queen Charlotte Islands (Haida Gwaii).
- The communities most directly affected by the Plan – economically, socially and environmentally – are located on the Queen Charlotte Islands.
- The Ministry of Forests' District Office that made the decision is located on the Queen Charlotte Islands.
- Husby carries on business on the Queen Charlotte Islands.
- The Board, initiator of this proceeding, supports the request that the hearing take place on the Queen Charlotte Islands. At least one of the Board's two main witnesses resides on those Islands.
- The Council of the Haida Nation was one of two parties that first brought the issues involved in this case to the attention of the Board, and formally requested the Board to request an administrative review of the Plan (the other party was the Gowgaia Institute, which apparently also supports this request). The Council has also assisted the Board by providing copies of maps and providing other evidence for this proceeding.
- The Queen Charlotte Islands are quite remote from the Victoria venue. Each individual member of the Queen Charlotte Islands public who wants to attend a Victoria hearing would have to expend considerable extra time and expense. It takes approximately two days, each way, to travel by car and ferry. The alternative is to fly, which costs in the range of $900 to $1300. In addition,

each individual member of the public would have to pay for accommodation and restaurant expenses.

The Board acknowledges that it is unknown how many members of the public might attend a hearing in either Victoria or the Queen Charlotte Islands, but states that there is some likelihood that, because of local interest, more people would attend a hearing on the Queen Charlotte Islands.

In addition, the Board suggests that there would be some value in having this decision-making process open to all members of the local community as it may enhance local understanding of how the *Code* legislation works and could demonstrate to the local people how *Code* decisions on plan approvals, and on appeals, are made.

There is no provision in the *Code* or its regulations setting out where an appeal hearing is to be located, nor are there any provisions specifically authorizing the Commission to change the venue. Choosing a venue is at the discretion of the Commission and, as master of its procedure, the Commission may decide whether the chosen location should be changed.

However, section 134 of the *Code* states that "Hearings of the Commission must be open to the public." In the Commission's view, it is undeniable that the Haida would constitute interested members of the public since the lands to be impacted by the Plan are located on the Queen Charlotte Islands, and they have shown an interest in the appeal by bringing their concerns to the attention of the Board, and later by making this application to the Commission. The question then is whether holding the hearing in Victoria means that the hearing will not be "open" to the relevant "public" in violation of section 134 of the *Code*. As the parties to the appeal did not initially address the relevance of this section to the Council's request, the Commission requested submissions on this matter; specifically, whether a failure to hold the hearing on the Queen Charlotte Islands would result in a violation of section 134 of the *Code*.

The Board argues that the *Code* requirement for an open hearing must be read in the context of the entire statute. It submits that the *Code* was designed to enhance provision of information to the public, and public participation, in forest practices decisions. The Board further states that this purpose is reflected in numerous *Code* provisions, including those establishing public review and comment on proposed plans, the establishment of the Board to accept public complaints and to report to the public on audits and investigations, and section 134. The Board submits that public hearings are necessary to show that justice is being done – to allow members of the public to see how legal decisions are being made.

The Board also argues that the test in *Gervasoni* v. *Canada,* [1995] 3 F.C. 189 (F.C.T.D.) ("*Gervasoni*") should be applied to the change of venue request before the Commission. In *Gervasoni*, an inquiry regarding a deportation order was held at the Vancouver Island Regional Correction Centre in Victoria. Subsection 29(1) of the *Immigration Act* provides that an inquiry shall be "conducted in public". The issue was whether the inquiry had been "conducted in public" when certain

members of the public, who had sought to attend the inquiry, were not admitted to the premises by the institution's staff because there was insufficient time to conduct security checks. The Adjudicator did not adjourn the inquiry in order to make arrangements to continue it in another venue to which the public had access, deciding that the inquiry would proceed "with the limited access by the public under the circumstances here today." He noted that the public's inability to satisfy institutional officials that they be permitted to attend the inquiry was not a matter within his jurisdiction to resolve.

In a judicial review by the Federal Court, Trial Division, the Court set aside the Adjudicator's decision. The Court states:

> I am not persuaded that in the circumstances of this case mere absence of an order by the Adjudicator to exclude the public or his affirmation that he had no objection to their attending means that the inquiry would meet the requirement of subsection 29(1) that it be "conducted in public". Here the Adjudicator was aware that no members of the general public were present although he knew one or more members of the public apparently desired access to the inquiry hearing.

The Court decided that the requirement that an inquiry be conducted in public was mandatory. It considered the parties submissions on definitions of "open court", "public trial" and cases regarding admission of the press and stated that these cases were helpful to underline the accepted purposes of an "open court", purposes which the Court found were intended to be served by the specific requirement in the *Immigration Act* that an inquiry be "conducted in public". The Court then stated:

> In my view, those purposes do not require unreasonable measures. They *are met if interested members of the public are not unreasonably restricted from attending the inquiry,* within the facilities available, and if representatives of the press have opportunity to attend, except in circumstances where they may be expressly excluded by Parliament in legislative provisions that do not offend the Charter. [emphasis added]

Referencing several dictionary definitions, the Board argues that "interested members of the public," means any section of the public, without regard to the numbers thereof, showing or having curiosity or concern. The Board states that the people living on Graham Island would be the most affected by the outcome of this hearing because they are near the affected land. Therefore, the majority of the "interested members of the public" would reside on or near Graham Island in the Queen Charlottes.

Regarding the phrase "not unreasonably restricted", the Board submits that the dictionary definition for "reasonable" is, in part, "fair or moderate, not extreme", and "restricted" is defined as "limited to members of a specified group". The Board argues that the extremely high cost of travelling from the Queen Charlotte Islands to Victoria would be an extreme limitation on the residents of the Queen Charlottes.

Residents of the Queen Charlottes would therefore be "unreasonably restricted" from the hearing.

The Respondent argues *Gervasoni* should be distinguished because, in that case, members of the public were *actually prohibited* from attending the inquiry. The Respondent states that *Gervasoni* stands for the proposition that "members of the public may not be unreasonably prohibited from being present at an inquiry." It argues that residents of the Queen Charlotte Islands will not be prohibited from being at the hearing if the hearing is held in Victoria. Further, if it is accepted that some residents of the Queen Charlotte Islands would be prohibited from attending the hearing if it is held in Victoria, then it could be equally argued that everyone else in British Columbia, outside of areas easily accessible to the hearing location on the Queen Charlotte Islands, would be prohibited from attending a hearing on the Queen Charlottes. The Respondent argues that, under section 134 of the *Code*, the location is not relevant. What is relevant is that members of the public are not prohibited from attending the hearing.

While *Gervasoni* is not a change of venue case, the Commission finds the Court's interpretation of the public hearing provision in section 29(1) of the *Immigration Act* of assistance in interpreting section 134 of the *Code*. Like section 129, the Commission finds that the purpose of section 134 of the *Code* is to ensure that the principle of an "open court" is preserved, as opposed to *in camera* or "secret trials." However, the Commission agrees with the Respondent that the *Gervasoni* case is distinguishable on the facts from the case before the Commission.

In *Gervasoni*, the Court was concerned that *no* member of the public had access to the inquiry due to the institution's policy. In the case before the Commission, there is no bar or public access issue with respect to the Commission's office. Further, the Commission agrees that, if "open to the public" is tied to the cost or logistics of attending a hearing, the argument can equally be made that a hearing on the Queen Charlotte Islands is a bar to the hearing being "open" to interested members of the public living elsewhere in the Province. Therefore, the Commission finds that holding the hearing in Victoria would not violate section 134 of the *Code* vis-à-vis the applicant in this case.

While acknowledging that it is not directly applicable to the situation before the Commission, the Board also referenced the change of venue provision in the Supreme Court Rules, and associated caselaw. Rule 39(7) states:

> 39(7) The place of trial shall be the place named in the statement of claim, but the court may order that the place of trial be changed or that the trial be heard partly in one place and partly in another.

The Board notes that, under this rule, it would generally have been able to choose the registry (i.e. venue) where the hearing would take place as it was the party to initiate the appeal. Further, the Board cites a recent British Columbia Supreme Court decision, *Carten* v. *Carten*, [1994] B.C.J. No. 2565, in which Cashman J. cites with approval the statements:

> The plaintiff, as dominus litis, has the right to control the course of litigation. He has the absolute right, unless in cases covered by the Rule, to choose the place of trial, subject to its being changed by the defendant for sufficient cause. The burden is on the defendant to make it appear that serious prejudice is likely to arise to him if it is not changed. Usually the question turns on the balance of convenience, based on number of witnesses, distance from the place of trial, and expenses of attendance. It then becomes a question of degree of less or more, and the test is variously expressed as to whether there is a great or very great, or overwhelmingly preponderance of convenience shown by the defendant which ousts the right of the plaintiff. (pp. 2-3)

The Board also cited an Alberta case, *Bank of British Columbia* v. *Baker* (1984), 35 Alta. L.R. (2d) 219 at paras. 10 – 14 (Alta.Q.B.) where the Court allowed for a change in venue to Grande Prairie. The decision was based on factors such as: the defendants were residents of Grande Prairie, the plaintiff corporation carried on business in Grande Prairie, the transaction in question took place in Grande Prairie, and the witnesses would all be from Grande Prairie. The Court also made an explicit point that the residence or place of business of counsel was not a relevant consideration.

The Board also cites an Ontario case, *Chippewas of Sarnia Band* v. *Canada (Attorney General)*, [1996] O.J. No. 627, where the First Nations Band was applying to have the trial moved from Toronto to Sarnia:

> The facts of this case have absolutely no connection with Toronto. However, the facts have every connection with Sarnia. The plaintiff's claims are in respect to almost four square miles of land, most of which is situate within the borders of Sarnia.... If they wish, persons affected by a lawsuit, either as a party, or as a member of a community affected by the result of the proceeding, should be able to attend the trial, conveniently and without expense.

The Board submits that the main considerations for a change of venue are, (a) in the interests of justice, or (b) the preponderance of convenience. It states that many of the factors seen by the courts in the case law above as pointing to a preponderance of convenience, are present in this case:

- The "defendant" (Husby) carries on business on the Queen Charlotte Islands.
- The land in question is on the Queen Charlotte Islands.
- The fact that legal counsel are not from the Queen Charlotte Islands may not be a determinative factor.
- The fact that members of the community that would be affected by this decision reside on the Queen Charlotte Islands and would not be able to attend a hearing in Victoria conveniently or without great expense is analogous to the situation in the *Chippewas* case.

The B.C. Supreme Court Rules and the decisions referenced by the Board are not directly applicable to the Commission. The cases are helpful, however, in that they provide some factors which have been considered relevant when these types of applications have come before the courts. These factors, derived from *Baker, Carten* v. *Carten,* and the *Chippewas* cases, include:

- Location of business operations.
- Location of transaction in question.
- Location of witnesses.
- Location of land in question.
- Location of persons affected, either as a party or as a member of the community.
- Economic considerations.

Many of the factors weigh in favour of the hearing being held on the Queen Charlottes Islands. The Plan involves lands on the Queen Charlottes, the persons most affected by resource decisions in Queen Charlottes reside on the Queen Charlottes, and the Respondent and Husby both maintain operations and offices on the Queen Charlottes. Further, in *Baker* the Alberta Queen's Bench stated that the location of counsel is not a relevant consideration.

In addition, the Commission agrees that one of the purposes behind the *Code* was to increase accountability and public involvement in the decision making. Although members of the public from Vancouver or Victoria would have easy access to a hearing held in Victoria, it is difficult to reconcile the principle of accountability with the inability of local residents, those most affected by the decision, to observe the process. If the relevant public is to have confidence in the system of operation planning under the *Code*, and the appeal procedure, it must not be effectively prevented from observing the hearing if it so wishes

While the Respondent is correct in that this case may be of importance and interest to all British Columbians, all British Columbians are not as closely impacted as those people living on the Islands. Further, it is a product of the legislation that prevents the Council from being an appellant in this case. According to section 128 of the *Code* and section 2 of the *Administrative Appeal and Procedure Regulation*, B.C. Reg. 114/99, only the licensee or the Board may request a review and subsequently appeal a forest development plan approval; the general public cannot. Therefore, this case is somewhat unique.

Although Husby argues that the local community and the Council are not truly interested in the proceedings as the Council did not provide comments during the public review, the Commission does not find Husby's submissions on this point convincing. A lack of full participation in the past may reflect reasons other than a lack of interest, such as limited resources or understanding of the appeal process.

Furthermore, the evidence before the Commission is that the Council was one of the parties that first brought the issues in relation to the Plan to the Board, and it has shown its interest in the appeal by making this application to the Commission.

In addition, Husby's concern about the Council using the hearing for their own purposes is not a valid concern since neither the Council nor the local residents are parties to the appeal, and can therefore only observe the hearing.

Of course, there may be interested persons from other parts of the Province who might want to observe the hearing. As the Respondent has pointed out, if the hearing is held on the Queen Charlottes, then members of the public in the rest of the province are as restricted from seeing the hearing as would be Queen Charlotte residents if the hearing were in Victoria. As with most decisions, this decision requires the balancing of competing interests. In this case, the Commission finds that the local public must be given priority over members of the public in the rest of the Province. Just as it would be unfair for a hearing involving resource decisions on Vancouver Island to be held on the Queen Charlotte Islands, or some other remote location, so it would be unfair for such a hearing involving the Queen Charlottes to be held on Vancouver Island or elsewhere in the Province.

The Commission recognizes the greater financial burden that will be borne by the parties to the appeal if the hearing is held on the Queen Charlottes since the main offices of Husby, the Respondent, and the Board are all in Greater Victoria or Greater Vancouver areas, and most of the witnesses at the hearing will be from those areas as well. However, this decision involves a balancing of interests, and, in this case, the Commission finds that the balance is in favour of holding the hearing on the Queen Charlotte Islands.

DECISION

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

The Commission finds that the change of venue request should be granted. The hearing will be held on the Queen Charlotte Islands with details of the venue to follow.

Alan Andison
Chair

March 20, 2001