Forest Appeals Commission

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APPEAL NO. 2001-FOR-004(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:	Chetwynd Forest Industries, a Division of West Fraser Mills Ltd. D & L Enterprises Ltd.	**THIRD PARTIES**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair	
DATE OF HEARING:	Conducted by way of written submissions, concluding on December 24, 2001	

APPEARING:	For the Appellant:	Calvin Sandborn, Counsel
	For the Respondent:	Jeffrey M. Loenen, Counsel
	For the Third Parties	
	Chetwynd Forest Industries:	Ashlynne V. Dale, Counsel
	D & L Enterprises Ltd.	Richard M. Stewart, Counsel

PRELIMINARY ISSUE OF COMMISSION JURISDICTION

This decision addresses the preliminary issue of the Commission's jurisdiction to consider an appeal filed by the Forest Practices Board (the "Board"). The Board appealed the July 23, 2001 decision of a Review Panel confirming the April 4, 2001 determination of a District Manager. The District Manager determined that Chetwynd Forest Industries, a Division of West Fraser Mills Ltd. ("CFI"), contravened sections 67(1) and 47(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*") and section 24(1) of the *Timber Harvesting Practices Regulation* (the "*Regulation*"). The District Manager levied a total penalty of $13,000 against CFI. The Board appealed on the basis that D & L Enterprises Ltd. ("D&L"), a timber harvesting contractor for CFI, was unfairly excluded from the hearings before the District Manager and the Review Panel.

In a letter dated August 30, 2001, the Forest Appeals Commission (the "Commission") requested submissions from the parties on whether the appeal falls within the jurisdiction of the Commission. Specifically, the Commission noted that

the District Manager's determination and the Review Panel's decision dealt with alleged contraventions by CFI, and the grounds for appeal and remedy sought did not appear to arise from the finding of contravention or penalty imposed on CFI.

In a letter dated October 15, 2001, the Commission offered D&L standing for the limited purpose of making submissions on the jurisdictional issue.

This preliminary matter was heard by way of written submissions. Submissions were provided by all of the Parties.

BACKGROUND

In 2000, CFI entered into a contract with Dan Boyd of D&L, whereby D&L was to conduct timber harvesting on cutblock 2, Cutting Permit 189 ("CP 189"), Forest Licence A13840. The silviculture prescription for cutblock 2 required the cutblock to be harvested using cable logging methods, due to sensitive soils on the cutblock.

On July 26, 2000, CFI staff contacted the Ministry of Forests (the "Ministry") and requested a joint inspection of cutblock 2. CFI suspected that improper harvesting methods had been used on the cutblock. On that same day, CFI suspended its contract with D&L.

On July 31, 2000, a Forest Officer met with CFI employees at the cutblock, and discussed possible contraventions. On August 1, 2000, Ministry staff sent an investigation commencement notice to CFI, and conducted a field investigation on cutblock 2. On August 3, 2000, CFI was instructed to remove debris from an S6 stream and conduct a soil disturbance survey on the cutblock.

In a letter dated August 22, 2000, CFI notified D&L that it was terminating its contract with D&L, effective immediately, on the basis that harvesting operations on cutblock 2 were conducted in contravention of the silviculture prescription, the logging plan, and section 1.1(d) of the timber harvesting contract. CFI also advised that it would be contacting D&L with respect to D&L's "obligation to indemnify" CFI for "any damages it may incur as a result of this breach of the Contract."

On March 1, 2001, the District Manager met with CFI representatives and gave them an opportunity to be heard with respect to alleged contraventions on cutblock 2. At this meeting, CFI claimed a defence of due diligence and submitted that D&L had harvested cutblock 2 contrary to: the silviculture plan and logging plan provided to D&L, the terms of D&L's contract with CFI, and verbal instructions from CFI staff. No D&L representatives attended this meeting.

On April 30, 2001, the District Manager determined that CFI had contravened section 67(1) of the *Code* by conducting timber harvesting not in accordance with the approved operational plan, and contravened section 47(1) of the *Code* by exceeding the maximum amount of soil disturbance within the net area to be forested specified in the silviculture prescription. The District Manager also determined that CFI had contravened section 24(1) of the *Regulation* by permitting the tracks or wheels of ground based machinery within 5 metres of a stream bank.

A total penalty of $13,000 was levied against CFI, including $10,000 for contravening section 47(1) of the *Code*.

In particular, the District Manager determined that CFI had not practiced due diligence to an extent that would absolve it from liability for the contraventions. The District Manager stated that:

> D & L Enterprises Ltd. provided CFI with several indications that he was conducting business contrary to his established operating methods.

CFI requested a review of the District Manager's determination. CFI did not dispute that the contraventions had occurred. Rather, CFI disputed the amount of the penalty levied for contravening section 47(1) of the *Code*, and submitted that the District Manager erred in finding that CFI failed to exercise due diligence and in assessing a deterrent penalty.

On June 8, 2001, the Review Panel held an oral hearing of the matter, and heard submissions from the District Manager and Jesse Rashke, Wood Manager for CFI.

On July 23, 2001, the Review Panel confirmed the District Manager's determination. The Review Panel found that a deterrent penalty was necessary, and held that the District Manager did not err in finding that CFI failed to exercise due diligence. In particular, the Review Panel stated:

> …as indicated in his [the District Manager's] determination, CFI did not react appropriately to D & L Enterprises when he started conducting business outside of well established operating methods.

On July 31, 2001, the Board appealed the Review Panel's decision on the basis that the District Manager and the Review Panel did not adhere to the general principles of fairness and natural justice when they excluded D&L from their hearings. In its Notice of Appeal, the Board submitted that the District Manager, Review Panel, and Ministry:

- Failed to provide proper notice to D & L Enterprises Ltd. of the proceedings, which significantly affected D & L's reputation, finances and employment.

- Failed to provide D & L Enterprises with the most basic information regarding the proceedings, even refusing a copy of the determination which significantly affected D & L's reputation, finances and employment.

- Failed to provide D & L Enterprises with an opportunity to either know the allegations against it or to address those allegations, in proceedings which significantly affected D & L's reputation, finances and employment.

The Board requested that the Commission consider the appeal in a manner that affords fairness to D&L, add D&L as a party to the appeal, and make a decision to vary, rescind or confirm the determination. Alternatively, the Board requested that

the Commission refer the matter back to the District Manager with directions to give standing to D&L.

With respect to the preliminary matter now before the Commission, both the Board and D&L submit that the appeal is within the Commission's jurisdiction. The Board and D&L maintain that the District Manager's determination and the Review Panel's decision contain findings that D&L contravened the *Code*. They further submit that D&L is adversely affected by those findings, and that CFI has relied on the findings in suspending its contract with D&L and claiming an indemnity of $13,000 against D&L.

The Government and CFI both submit that the appeal is not within the Commission's jurisdiction and request that the appeal be dismissed. Additionally, CFI requests an order of costs.

ISSUES

In determining whether the Commission has jurisdiction over the appeal, three issues have been considered:

1. Whether D&L is the subject of a "determination" within the meaning of the *Code*.

2. Whether the grounds for appeal and remedy sought by the Board are sufficiently related to the determination and the review decision in question.

3. Whether D&L would be deprived of redress if the Commission does not hear the appeal.

RELEVANT LEGISLATION

The following sections of the *Code* are relevant to this application. Other relevant provisions are referenced in the body of the decision.

1 (1) In this Act:

> **"determination"** means any act, decision, procedure, levy, finding, order or other determination made under this Act, the regulations or the standards by a reviewer, official or senior official;

Determination not effective until proceedings concluded

126 (1) A determination that may be reviewed under section 127 does not become effective until the person who is the subject of the determination has no further right to have the determination reviewed or appealed.

...

Person subject to a determination may have it reviewed

127 (1) A person who is the subject of a determination under section 82, 95(2), 99(2), 101(2), 102(3), 106(1), 117 to 120 or 123(1) may deliver, to the review official named in the notice of determination, a written request for a review of the determination.

...

Forest Practices Board may have determination reviewed

128 (1) The board may request a review of

(a) a determination made under section 82, 95(2) or 117 to 120,

(b) a failure to make a determination under section 82, 95(2) or 117 to 120, and

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

...

Determinations that may be appealed

130 (1) Subject to subsection (3), a person who is the subject of a determination referred to in

(a) section 127, or

(b) section 129(5)(c)

may appeal the determination to the commission.

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

(a) a determination referred to in section 128(1)(a),

(b) a failure to make a determination referred to in section 128(1)(b),

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

(d) any determination for which a review decision has been given under section 129(6).

(3) No appeal may be made under subsection (1) or (2) unless the determination or failure to make a determination has first been reviewed under section 129.

Appeal

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

...

Powers of commission

138 (2) On the appeal, the commission may

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

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

(i) who made the initial determination, or

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

DISCUSSION AND ANALYSIS

1. Whether D&L is the subject of a "determination" within the meaning of the *Code*.

CFI submits that the Commission's jurisdiction in this case is confined to an appeal of a "determination" for which a review decision has been given, as required under section 130(2)(d) of the *Code*. CFI submits that the matters under appeal are not within the Commission's jurisdiction because they were never the subject of a "determination" as defined in the *Code*, and were never the subject of a review decision. CFI maintains that the grounds for appeal do not arise from the orders in the determination attributing liability or assessing penalties with respect to CFI. CFI submits that the matters under appeal relate to alleged omissions, and are unrelated to the orders made with respect to liability or penalties.

CFI refers to the definition of "determination" in section 1(1) of the *Code*, and argues that a determination is equivalent to "an order attributing liability and assessing penalties." CFI submits that the language used in section 126 of the *Code* supports its position that a determination is equivalent to a judicial order. In addition, CFI notes that the definition of "determination", which previously included the word "omission", was repealed and replaced in 1997 with the current definition, which excludes the word "omission". CFI submits that this indicates that the Legislature intended "determination" to be limited to decisions actually made and not omissions, including the procedural omissions that are raised by the Board.

CFI further argues that the matter under appeal has never been subject to a review, as the primary issues before the Review Panel were whether the penalty was excessive, whether a deterrent penalty was necessary, and whether the defence of due diligence was available to CFI. CFI submits that the Review Panel did not consider or address the issues raised by the Board.

The Board submits that CFI's interpretation of the definition of "determination" is unnecessarily restrictive. The Board submits that meaning must be given to the words "finding" and "decision" found in the definition of determination. The Board submits that the District Manager made a "finding" or "decision" that D&L had contravened the *Code*, and that is the "determination" being appealed. The Board maintains that determinations, which are unlike orders, are routinely made under the *Code*. For example, a District Manager may issue a determination that the *Code* has not been contravened, or determine that the *Code* has been contravened but issue no penalty or order. The Board submits that the latter is essentially a declaration of contravention, and is akin to the determination made against D&L.

The Board also submits that it is not appealing an "omission." Rather, it appeals a determination that is tainted because of an omission of natural justice. The Board argues that there is no statutory requirement that the "matter" of fairness to D&L be subject to a review prior to an appeal, and that the Commission should not be restricted to dealing with only those issues raised in the proceedings below.

Similarly, D&L submits that CFI's interpretation of the definition of "determination" is unduly restrictive, and is not supported by the plain reading of the definition or other sections of the *Code*. In particular, D&L notes that the definition refers to "any act, decision, procedure, …finding…" [emphasis added] made under the *Code* or its regulations. D&L argues that the word "finding" suggests a process of weighing evidence and reaching a conclusion on that evidence. In support of these submissions, D&L refers to the definitions of "procedure", "finding", and "decision" found in *Black's Law Dictionary* (5th ed.). D&L further argues that any "orders" with respect to CFI were inextricably tied to findings of wrongdoing with respect to D&L.

In reply, CFI submits that the word "procedure" in the definition of "determination" refers to the types of orders that compel persons to take certain actions, such as remediation orders, and not the procedures used in reaching a determination. CFI further submits that the Board and D&L seek to artificially expand the meaning of "finding."

The Commission's jurisdiction to hear appeals arises solely from its enabling statute, which in this case is the *Code*. This appeal is brought by the Board under section 130(2)(d) of the *Code*, which provides that the Board may appeal to the Commission "any *determination* for which a review decision has been given…" [emphasis added]. Thus, the Commission's jurisdiction to hear this appeal must be found in the District Manager's "determination" that was reviewed by the Review Panel. In particular, the Commission must consider the nature of the "determination" that was reviewed before considering whether the grounds for appeal and remedy sought relate to that determination.

The word "determination" is defined in section 1(1) of the *Code*:

> **"determination"** means any act, decision, procedure, levy, finding, order or other determination made under this Act, the regulations or the standards by a reviewer, official or senior official;

This definition indicates that "determination" has quite a broad meaning within the *Code* generally. However, the focus of the Commission's inquiry for the purposes of this preliminary determination is not on the general meaning of "determination" within the *Code*, but rather the nature of the particular "determination" made by the District Manager. Consequently, the Commission has considered the meaning of "determination" in the context of those sections of the *Code* that relate to this particular determination.

Before a determination may be appealed by the Board under section 130(2)(d), a review decision in respect of the determination must have been issued. The *Code* expressly sets out the types of determinations that may be reviewed. In this case, CFI requested a review under section 127(1), which provides that a "person who is the subject of a determination under section 82, 95(2), 99(2), 101(2), 102(3), 106(1), 117 to 120 or 123(1)" may request a review. The District Manager indicated that he made his determination pursuant to section 117 of the *Code*. After finding that CFI had contravened sections 67(1), 67(2), and 47(1) of the *Code* and section 24(1) of the *Regulation*, the District Manager stated:

> Therefore, under section 117 of the *Forest Practices Code of British Columbia Act*, you are required to pay to the Crown a combined penalty of $13,000 for all contraventions…
>
> This determination will become part of your record and could be considered by senior officials in making future determinations.

Thus, it is clear that the District Manager exercised his statutory authority under section 117 to make the "determination" against CFI. While the District Manager refers to D&L as "conducting business contrary to his established operating methods," and even states that D&L "may well have contravened the *Code* and regulations while not under the mantle of the Licensee," he makes no reference to having made a "determination" against D&L under any section of the *Code*.

Further, while the Board and D&L submit that a "determination" was made against D&L, neither has suggested which statutory provision the District Manager employed in making the alleged determination against D&L. There is certainly no express indication that the District Manager made a determination against D&L based on any of the provisions listed in section 127(1). Nor is there any express indication by the District Manager that he was making a determination against D&L under any of the provisions listed in section 128(1) of the *Code*, which empowers the Board to request reviews of particular types of determinations. It should also be noted that, while the Board may, under section 128(1)(b), request a review of a failure to make a determination under certain sections of the *Code*, there has been no suggestion by the Board that this case involves a failure to make a

determination, nor has there been a review of an alleged failure to make a determination.

In considering the nature of the District Manager's "determination", it is also useful to consider the language used in section 117 of the *Code*:

> **117** (1) If a senior official *determines that a person* has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty *against the person* up to the amount and in the manner prescribed.
>
> (2) If a person's employee, agent or contractor, as that term is defined in section 152 of the *Forest Act,* contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.
>
> ...
>
> (5) The senior official who *levies a penalty against a person under this section*, section 118(4) or (5) or 119 *must give a notice of determination to the person* setting out all of the following:
>
> (a) the nature of the contravention;
>
> (b) the amount of the penalty;
>
> (c) the date by which the penalty must be paid;
>
> (d) *the person's right to a review and appeal* including the title and address of the review official to whom a request for a review may be made.
>
> [emphasis added]

The Commission notes that, although section 117(2) expressly makes a person liable for the contraventions of their employees and contractors, section 117(5) only requires that notice of a determination, and a person's right to review and appeal, need only be given to the person against whom a penalty is levied. There is no requirement to give notice of a determination under section 117 to a person who is **not** subject to a penalty.

In this case, there is no dispute that CFI is the person subject to a penalty under section 117. While D&L's actions are discussed by the District Manager and the Review Panel, the subject matter of the determination and the review decision are CFI's contraventions and the penalty levied **against CFI**. There is no decision, order, finding, or other determination against D&L under section 117. While the District Manager is empowered under the *Code* to make determinations and levy penalties against contractors, if justified by the evidence, he did not do so in this case.

The Commission has also considered section 126(1) of the *Code* in determining whether the Board's appeal is of the District Manager's "determination". Section 126(1) provides that a "determination *that may be reviewed*… does not become effective until the person who is the subject of the determination has no further right to have the determination reviewed or appealed" [emphasis added]. This section implies that a reviewable determination is one that has some effect on the person in the form of a penalty, order, or other administrative remedy imposed as a result of the contravention.

With respect to the Board's submission that a senior official may determine that a person has contravened the *Code* but levy no penalty under the *Code*, the Commission notes that such a determination still forms part of the person's performance record. As indicated in the determination with respect to CFI, a person's record may be considered by senior officials in making future determinations. A person's record of contraventions may also provide grounds for administrative action under the *Forest Act*. For example, section 81(1)(b)(iv) of the *Forest Act* provides that a cutting permit may be refused or have special conditions attached "if an agreement provides for cutting permits and the district manager determines that… the holder of the agreement has failed to… comply with a requirement of the *Forest Practices Code of British Columbia Act* or the regulations or the standards made under that Act in respect of…" an area of land specified in a cutting permit previously issued under the agreement, or an area of land specified in a road permit or road use permit associated with the agreement. Further, under sections 81(3) and 81(4) of the *Forest Act*, an application for an agreement listed under section 12 of the *Forest Act* (including a forest licence, timber sale licence, timber licence, tree farm licence, pulpwood agreement, woodlot licence, or road use permit), a permit under the *Forest Act*, or a permit under the *Code* may be rejected on that same basis. Thus, it is clear that a determination of contravention may lead to future administrative remedies or actions, even if no order is made nor penalty levied at the time of the determination.

In this case, there is no suggestion that the statements with respect to D&L by the District Manager or the Review Panel have become part of D&L's performance record, and could be considered in making future determinations against D&L or in issuing cutting permits or *Forest Act* agreements to D&L.

On this basis, the Commission finds that section 126(1) provides further support for the conclusion that the determination which was reviewed (and thus may be appealed) in this case is the determination against CFI, and that no determination was made with respect to D&L.

Based on its consideration of the relevant sections of the *Code* and the facts in this case, the Commission finds that the "determination" which was reviewed is the determination under section 117 that CFI is responsible for certain contraventions of the *Code* and *Regulation*, and that a penalty shall be levied against CFI. The Commission finds that no determination was made against D&L in this case. Therefore, the subject matter of the determination that was reviewed and may, therefore, be appealed, is the determination with respect to CFI.

2. Whether the grounds for appeal and remedy sought by the Board are sufficiently related to the determination and the review decision in question.

The Board submits that the grounds for appeal arise from the determination and the review decision. In particular, the Board argues that the District Manager had to find that D&L contravened the *Code* in order to find CFI liable for the contraventions. The Board submits that the actions of D&L were "on trial" in both proceedings, and that CFI's submissions in both proceedings focused on trying to blame D&L for the contraventions. The Board maintains that, as a result of the proceedings before the District Manager and the Review Panel, and the standard industry indemnity clause in D&L's contract, D&L is legally obligated to pay the $13,000 penalty. The Board submits that the appeal should be heard by the Commission because D&L is directly affected by the proceedings before the District Manager and the Review Panel. In support of its submission that D&L should be afforded natural justice because it is directly affected by the proceedings, the Board refers to the Federal Court of Canada's decision in *Canadian Transit Co.* v. *Canada (Public Service Staff Relations Board)*, [1989] F.C.J. No. 527 (Q.L.) (hereinafter *Canadian Transit*).

D&L's submissions echo those of the Board. D&L submits that all of the grounds for appeal arise from the findings of contravention or penalty imposed on CFI. D&L submits that CFI was held vicariously liable on the basis that D&L had committed the contraventions. D&L further submits that it has suffered financial harm and damage to its business reputation as a consequence of the determination and the review decision. D&L submits that CFI relies on the findings in those decisions to support the suspension of D&L's contract and seek an indemnity of $13,000 from D&L. D&L submits that, since D&L is directly affected by the matters under appeal, the Commission has jurisdiction to hear the appeal. D&L notes that section 131(8) of the *Code* authorizes the Commission to add as a party to an appeal any person who "may be affected" by an appeal. In support of its submissions on this point, D&L also refers to *Canadian Transit*.

The Government submits that the Board is bringing the appeal on behalf of D&L, which has no ability to appeal in its own right. The Government argues that, in doing so, the Board seeks to circumvent the intention of the *Code*. Specifically, the Government submits that section 130(1) of the *Code* prescribes the parties that may bring an appeal, and that this section would be rendered redundant if the Board was permitted to bring this appeal on behalf of D&L.

The Government further submits that section 130(2) of the *Code* was not intended to provide the Board with a totally unrestrained right to appeal determinations on any grounds. The Government argues that a bare right to appeal identifies who may bring an appeal, and not whether the party may appeal on the specific grounds in question. The Government maintains that section 131(8) of the *Code* does not assist in determining whether a particular party has authority to advance particular grounds of appeal, because that section addresses the addition of parties to appeals that have been properly commenced.

The Government submits that the common law principles of standing are helpful in weighing whether the Board's alleged public interest in this appeal is too remote and is overwhelmed by D&L's individual interests in procedural fairness. The Government referred to a number of cases setting out the common law principles with respect to private interest standing and public interest standing.

CFI submits that D&L's alleged liability arises wholly from an "intermediate conduit", namely, its contract with CFI, and not from the *Code*. CFI submits that D&L is not directly subject to any penalties or adverse consequences under the *Code*. As such, CFI submits that D&L is only indirectly affected by the proceedings before the District Manager and the Review Panel.

In addition, CFI maintains that its contract with D&L was terminated over 7 months before the District Manager's determination, and not because of the District Manager's determination. In support of this proposition, CFI provided a copy of a letter dated August 22, 2000 from Jesse Rashke, Woods Manager, to Dan Boyd of D&L. The letter states, in part:

> West Fraser has reviewed the results of its investigation leading up to the issuance by the Ministry of Forests of an FS-107 Harvesting Inspection Report for Forest Licence A13840, Cutting Permit 189, Block 2, dated July 31, 2000… West Fraser has concluded that the harvesting operations on this cut block were conducted in contravention of:
>
> (i) Section 1.1(d) of the Fixed Term Timber Harvesting Contract Conditions - Part 1, entitled "Operating Provisions";
>
> (ii) the Silviculture Prescription; and
>
> (iii) the Logging Plan.
>
> As a result of the foregoing, West Fraser hereby provides official notice that your Contract is terminated immediately.

In conclusion, CFI argues that the Legislature did not intend for the Commission to adjudicate contractual disputes such as this one. Rather, it established the *Code* and the Commission to help sustain forests. In support of this proposition, CFI cites the preamble to the *Code*, which makes references to the desire for, and meaning of, "sustainable use" in respect of the province's public forests.

In reply, the Board submits that the common law principles of standing do not apply to it, as its standing to appeal under section 130(2) of the *Code* is paramount over the common law. The Board also argues that the cases cited by the Government are irrelevant because none involve an agency, such as the Board, which is given explicit statutory standing to appeal specific determinations in the public interest.

The Board further submits that the Government has misconstrued the purpose of section 130(1) of the *Code*. The Board argues that the purpose of that section is to

grant certain parties the power of appeal, not to "strip" people of a "legal right" to ask the Board to initiate an appeal. The Board submits that the public's interest in a fair and credible *Code* process is the basis for the appeal. The Board submits that the public's confidence in the *Code* would be undermined if there were no remedy for the types of breaches of natural justice that occurred in this case. The Board also submits that there is a public interest in ensuring that proceedings under the *Code* are decided based on all of the relevant evidence, and argues that the exclusion of D&L's evidence from the proceedings may have resulted in the wrong decision being made.

The Board says that it brings the appeal as a "watchdog" agency with broad power to bring appeals on behalf of the public, and not to promote the particular interests of D&L. The Board notes that in 1994, when the *Code* was introduced in the Legislature, Hon. A. Petter, the then Minister of Forests, referred to the Board as:

> …a true watchdog agency that can assure the public that the forest practices being practised in this province are consistent with the requirements of the code. Beyond the powers that might normally be accorded to a watchdog agency, the board will have additional powers to actually bring appeals on behalf of the public, where circumstances warrant such appeals.
>
> (*Hansard*, Vol. 15, No. 21, 30 May 1994, at 5)

The Board submits that the *Code* gives the Board broad power to appeal as an alternative to allowing citizens broad standing to appeal. The Board refers to section 129(6) of the *Code*, which requires that all review decisions be delivered to the Board, and argues that that section indicates the Legislature's intention for the Board to screen all review decisions for possible appeal. The Board submits that it acts as a "floodgate" to screen out "busybodies", as it initiates relatively few appeals.

In reply, the Government submits that D&L's individual interests in procedural fairness are the primary interests being advanced in the appeal, and the public interest asserted by the Board is vague and generalized. The Government acknowledges that the Board has authority to bring appeals from determinations where there are "clear and cogent public interest grounds for doing so," but argues that this is not such a case.

In reply, CFI refers to the rule stated in *Wolinski* v. *Wolinski*, (1989) 34 C.P.C. (2d) 119 (Man. C.A.) at 120 (hereinafter *Wolinski*) that, "Appeals must be from judgements or orders, not from reasons or decisions." CFI argues that the Board and D&L seek to appeal the "reasons or decisions" underlying the "judgement or order" with respect to CFI. CFI submits that the Board's argument could lead to the absurd result that individual loggers and truck drivers could claim to be adversely affected by a determination that mentioned them as having taken actions that contravened the *Code*.

In surreply, the Board submits that individual loggers and truck drivers differ from D&L in that they would not be compelled to pay the penalty imposed on the licensee through the operation of a standard contract clause.

The Board also submits that its public interest in the appeal does not disappear simply because D&L has a private interest in the matter. The Board submits that the Commission has recognized that section 130(1) of the *Code* authorizes licensees to appeal on grounds of breach of natural justice, and refers to the Commission's previous decisions in *Dean Foisey* v. *Government of British Columbia* (Appeal No. 97-FOR-35, June 30, 1998)(unreported) and *Tolko Forest Products* v. *Government of British Columbia* (Appeal No. 95/02, November 12, 1996)(unreported) (hereinafter *Tolko*). The Board submits that in *Tolko*, the Commission also heard an appeal by the Board with respect to natural justice and alleged bias by a reviewer, even though the licensee was directly affected by the alleged bias and had raised that issue in its grounds for appeal.

In surreply, D&L submits that *Wolinski* is irrelevant because it involved a situation where a government official sought to appeal a matter over which he had no authority, whereas the Board has a clear authority to bring this appeal.

The Commission accepts that the Board was created as a "public watchdog" agency under the *Code*. The *Code* expressly provides the Board with broad powers to help ensure the fair and effective application of the *Code*, including the power to investigate complaints brought by the public, conduct special investigations, conduct audits with respect to forest practices and government enforcement of the *Code*, and bring reviews and appeals in certain circumstances. Further, the Commission agrees with the Board that there is a public interest in ensuring the fair application of the *Code*, and the fact that an appeal arises from an alleged unfairness to an individual person does not necessarily mean that the broader public interest in fair procedure is lost. Without deciding the general question of the Board's standing to bring appeals, the Commission notes that the *Code* does not expressly restrict the Board from bringing an appeal of a determination based solely on a question of law.

However, the Commission finds that the Board's grounds for appeal in this case focus on the unfairness of D&L's exclusion from the processes that led to the determination and review decision with respect to CFI. The Board does not appeal on the basis of any error in the conclusions of the District Manager or the Review Panel with respect to whether the particular contraventions occurred, CFI's liability for the contraventions, or the penalty levied against CFI. The Board also seeks no remedy in respect of those matters. While the Board suggests that it may be able to provide evidence that could lead to a different determination if the appeal proceeds, that is not the remedy sought by the Board. The remedies sought by the Board all focus on obtaining a new hearing in which D&L is afforded a full opportunity to participate.

The Commission finds that the submission that D&L is owed a duty of fairness is based on D&L's **contractual** relationship with the person directly affected by the

determination. Moreover, the Commission notes that the letter dated August 22, 2000, from Jesse Rashke of CFI to Dan Boyd of D&L, indicates that CFI terminated D&L's contract over 7 months before the District Manager's determination, based on CFI's own findings. That letter makes no reference to the determination or the review decision. As such, any adverse effects on D&L's financial or contractual interests arise directly from the independent decisions and actions of CFI, and not from the determination or the review decision in this case. Since the contract between CFI and D&L is a private agreement entered into by private parties, any dispute arising out of that contract is clearly outside of the Commission's jurisdiction under the *Code*. Furthermore, the Commission agrees with the Government that the Commission's jurisdiction under section 131(8) of the *Code* to grant party status to a person who "may be affected" by an appeal does not assist in this case because that section only applies once an appeal is properly before the Commission.

The Commission finds that the fairness of the process leading to a determination or a review decision may be considered by the Commission only after a valid appeal is before the Commission. While the Board correctly notes that the Commission has previously considered appeals in which the Board or a licensee has alleged breaches of natural justice in the processes leading to a determination or review decision, the Commission finds that those appeals involved an alleged unfairness in regard to a person who was the subject of a determination under the *Code*, and not a person in a similar position to D&L.

The Commission has also considered the practical implications of determining that it has jurisdiction over this appeal. If appeals could be brought based on an alleged breach of a duty of fairness to any person indirectly affected by a determination, as a result of a contractual relationship with a person who is the subject of a determination, it could lead to any employee or contractor claiming to be owed a duty of fairness. The Commission finds that this would be an absurd result. The Board attempts to distinguish D&L on the basis that D&L is subject to a standard clause used in all timber harvesting contracts. However, the Commission does not find D&L's contractual relationship with CFI to be unique from an employment contract in this regard. For example, the Commission notes that a licensee could cancel a contract of employment if the licensee determined that the employee acted outside of normal operating procedures, and this could have significant effects on the employee's reputation, finances, and future employment prospects.

Consequently, the Commission finds that hearing appeals such as this one may frustrate one of the primary purposes of the appeal process, which is to provide persons subject to government decisions with a cost-effective and timely alternative to complex litigation. If senior officials, Review Panels, and the Commission were obligated to hear all persons who may, as a result of a contractual relationship, have an interest in an administrative proceeding under the *Code*, those proceedings could become unduly complex, lengthy, and costly due to the number of persons who may be involved. Aside from the difficulty of ascertaining who should be invited to participate in the proceedings, notice of a

hearing would have to be provided to all indirectly affected contractors, subcontractors, and employees, in every case and at every level.

The Commission also finds that this approach is consistent with the legal principle stated in *Wolinski*. In the context of court proceedings, it is accepted law that an appeal is from the judgement or order issued, and not against the reasons behind the judgement or order. This rule is expressed as follows in Sopinka and Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993) at 4 and 5:

> It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgement or order, as issued, and entered in the court appealed from, and not against the reasons expressed by the court for granting the judgement or order. Although the appellate court will frequently discover in the reasons for judgement errors of law that ultimately ground the reversal of the judgement or order, it is the correctness of the judgement or order that is in issue in the appeal, and not the correctness of the reasons.

While this rule may not apply strictly to the Commission, which is an administrative appeal tribunal and not an appellate court, the Commission finds that this rule may provide guidance in this case, in that there is no appeal of the determination or penalty with respect to CFI. Rather, the appeal may be characterized as being based on the purported implications of the reasons leading to the determination and the review decision.

For these reasons, the Commission concludes that the grounds for appeal and remedies sought in this case are not related to the determination or review decision with respect to CFI.

In light of that conclusion, and the previous finding that no determination was made with respect to D&L, the Commission finds that it has no jurisdiction to hear the Board's appeal.

Since it has no jurisdiction over the appeal, the Commission is not strictly compelled to consider the final issue of whether the Commission's lack of jurisdiction will deprive D&L of redress. Nevertheless, the Commission has considered that issue, as follows.

3. Whether D&L would be deprived of redress if the Commission does not hear the appeal

D&L submits that it will be deprived of redress if the Commission does not hear the appeal, as the findings with respect to D&L will "stand" and D&L will enter the mediation and arbitration process under the *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96 (the "*Contract Regulation*") with a disadvantage. Moreover, D&L submits that its reputation will not be repaired through the mediation and arbitration process if denied a full opportunity to be heard before the Commission.

The Board submits that the findings against D&L in the determination and the review decision will be persuasive evidence that D&L failed to comply with the terms of its contract, and will prejudice D&L in its contract dispute with CFI.

The Government submits that D&L should pursue their cause in a more appropriate forum, such as through an application for judicial review. The Government argues that this appeal is not about public rights established under legislation or administrative policy, and a more reasonable and effective way to resolve this issue is through judicial review proceedings.

CFI submits that D&L will not be deprived of redress if the Commission does not hear the appeal, as paragraph 4.1 of the contract specifies a process for resolving contract disputes. Specifically, it requires "all disputes" arising "under or in connection with this Contract will be referred to mediation in accordance with" the *Contract Regulation*. Part 4 of the *Contract Regulation* provides for dispute resolution using mediation and, if that fails, arbitration.

CFI notes that D&L has already sought to initiate the dispute resolution process. CFI provided a copy of a letter dated November 3, 2000 from counsel for D&L, by which counsel for CFI was served with a Notice of Dispute pursuant to paragraph 4.1 of the contract, and was requested to indicate whether CFI would take part in a mediation.

In reply to the Government's submission that a judicial review may be more appropriate, the Board submits that D&L might face the argument in a judicial review that it should have first exhausted its remedies by asking the Board to appeal to the Commission.

There is clear evidence that D&L has taken steps to avail itself of the mediation and arbitration processes provided for in its contract, pursuant to the *Contract Regulation*. D&L is certainly not without redress in resolving its contract dispute with CFI. The Commission concludes that the statements with respect to D&L in the determination and the review decision will not unduly prejudice D&L in those proceedings. As a general rule of law, administrative tribunals are not bound to follow the decisions of other tribunals. This is so even where the same issues are raised. As stated in S. Blake, *Administrative Law in Canada* (3rd. ed., 2001) (Toronto: Butterworths) at 124, "…a tribunal should not regard as binding a decision of a different tribunal on the same issues between the parties."

In this case, statements made by the District Manager and the Review Panel are likely to be given even less weight by a mediator or arbitrator because the issues and parties are very different in the two proceedings. In the proceedings under the *Code*, D&L was not a party and the main issues were whether contraventions of the *Code* and the *Regulation* had occurred, whether CFI was responsible for the contraventions, and the appropriate quantum of administrative penalty. In the mediation and arbitration proceedings, D&L will be a party and the purpose of the proceeding is to settle a contractual dispute between CFI and D&L. As a party to those proceedings, D&L will have a full opportunity to present its case, and respond

to the case of CFI, with respect to the cancellation of its contract with CFI, and D&L's indemnity to CFI.

In addition, the Commission notes that at least one reference to D&L in the review decision was somewhat positive. At page 8 of the review decision, the Review Panel states that CFI and D&L have "demonstrated good performance in the past…."

Finally, D&L may be able to pursue a judicial review of the matter, given that the Commission has found that it has no jurisdiction over the appeal. The Commission notes that in a judicial review, the B.C. Supreme Court may consider questions of law and jurisdiction, including issues of procedural fairness.

For these reasons, the Commission concludes that D&L will not be deprived of redress for its concerns as a result of the Commission's lack of jurisdiction over the appeal.

COSTS

In its submissions, CFI requested an award of costs. Section 138(4) of the *Code* gives the Commission the power to order a party to pay another party any or all of the actual costs in respect of an appeal.

The Commission has adopted a policy that costs should only be awarded in special circumstances. The Commission finds that no special circumstances arise in this matter to justify an award of costs. Therefore, the Commission denies CFI's request for an award of costs.

DECISION

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

For the reasons given above, the Commission finds that it has no jurisdiction over the appeal, as filed. Accordingly, the appeal is dismissed.

Alan Andison, Chair
Forest Appeals Commission

February 8, 2002