BRITISH COLUMBIA

Forest Appeals Commission

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NOS. 2003-FOR-005(a) and 2003-FOR-006(a)

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

BETWEEN:	Kalesnikoff Lumber Co. Ltd.	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
AND:	Interior Lumber Manufacturer's Association, Council of Forest Industries and Coast Forest and Lumber Association	**APPLICANTS**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on April 16, 2004	

APPEARING:	For the Appellant:	Kathryn Denhoff, Counsel
	For the Respondent:	Lisa D. McBain, Counsel
	For the Third Party:	Ben van Drimmelen, Counsel
	For the Applicants:	John J.L. Hunter, Q.C., Counsel

APPLICATION

This is an application by the Interior Lumber Manufacturer's Association, the Council of Forest Industries and the Coast Forest and Lumber Association (the "Applicants") for intervenor status in two appeals filed by Kalesnikoff Lumber Co. Ltd. ("Kalesnikoff").

The Applicants make this application pursuant to subsections 131(13) and (14) of the *Forest Practices Code of British Columbia Act* (the "*Code*"). They seek intervenor status in order to make submissions on the interpretation and application of section 45(3) of the *Code* and the application of the "due diligence" defence as set out in section 119.1(1)(a) of the *Code*.

This application was conducted by way of written submissions.

BACKGROUND

Kalesnikoff appealed two determinations to the Commission, the first dated January 31, 2003, and the second dated March 28, 2003.

The Appeals

January 31, 2003 Determination (Appeal No. 2003-FOR-005)

In a determination dated January 31, 2003, John Wenger, Deputy District Manager for the Kootenay Lake Forest District (the "Senior Official"), found that Kalesnikoff had contravened section 45(3)(a) of the *Code* and section 12(1)(b) of the *Forest Road Regulation* in relation to a landslide in the vicinity of the Schroeder Creek mainline on or about May 3, 2002. The landslide entered Schroeder Creek, a domestic watershed. The Senior Official considered whether Kalesnikoff had established a defence of due diligence or a defence of mistake of fact under subsections 119.1(1)(a) & (b) of the *Code* and concluded that it had not. He assessed a total penalty of $1,000 for the contraventions.

In a decision dated September 29, 2003, a review panel confirmed the Senior Official's findings of contravention but increased the penalty to a total of $5,000.

On October 27, 2003, Kalesnikoff appealed the determination on various grounds including that the Senior Official erred when he "failed to apply KLC's [Kalesnikoff's] defence of due diligence and mistake of fact to the alleged contraventions of s-s 45(3) of the Code in accordance with proper legal principles." Kalesnikoff requests an order from the Commission rescinding the determination.

March 28, 2003 Determination (Appeal No. 2003-FOR-006)

In a determination dated March 28, 2003, the Senior Official found that Kalesnikoff had contravened section 45(3)(a) of the *Code* and section 13(1)(c) of the *Forest Road Regulation* in relation to three landslides or erosion events that occurred in the spring of 2002 along the Schroeder Creek mainline. Sediment from the landslides entered Schroeder Creek. The Senior Official considered whether Kalesnikoff had established a defence of due diligence under section 119.1(1)(a) of the *Code* and concluded that it had not. He assessed a total penalty of $3,600 for the contraventions.

In a decision dated September 24, 2003, a review panel confirmed the findings of contravention and the penalty.

On October 27, 2003, Kalesnikoff appealed the determination on various grounds including that the Senior Official erred in law or mixed fact and law when he found that Kalesnikoff had not exercised due diligence to prevent the contraventions. Kalesnikoff requests an order from the Commission rescinding the determination.

On November 14, 2003, the Forest Practices Board accepted party status in both appeals in order to make submissions concerning, among other things, the interpretation of the tests that the Commission should apply to a defence of due diligence under section 119.1 of the *Code*.

In a letter dated December 2, 2003, the Commission advised the parties that the two appeals would be heard together. The hearing is currently scheduled to take place in July of 2004.

The Application for Intervenor Status

On March 22, 2004, the Commission received the application for intervenor status that is the subject of this decision.

Kalesnikoff supports the participation of the Applicants in the appeal to the "fullest extent possible." The Forest Practices Board does not oppose the application.

The Respondent submits that the Applicants have not supported their application for intervention in accordance with the law, and practice of the Commission and, therefore, should not be entitled to participate in the appeals. Alternatively, it submits that the Applicants' participation should be limited to written submissions on points of law with respect to the meaning of section 45(3) of the *Code* and the defence of due diligence as it pertains to that section.

In a letter dated April 14, 2004, the Applicants replied to the Respondent's submissions, addressing the deficiencies alleged by the Respondent and clarifying the extent of its desired participation in the appeals. They advise that they seek "full party status" in the appeals. Having said that, they advise that they do not intend to lead evidence in the appeals and would therefore accept an order restricting their right to lead evidence. At a minimum, the Applicants request an opportunity to make oral submissions, and to participate fully in the legal argument in relation to the interpretation of section 45(3) of the *Code* and the defence of due diligence under section 119.1(1)(a) of the *Code* as it applies to administrative penalties.

RELEVANT LEGISLATION

The following sections of the *Code* are relevant to this application:

Protection of the environment

45 (1) A person must not carry out a forest practice that results in damage to the environment.

(2) Subject to subsection (3), a person does not contravene subsection (1) if, with respect to the forest practice referred to in subsection (1), the person is acting in accordance

(a) with this Part, Part 5 and with the regulations for this Part and Part 5, and

(b) with any of the following:

(i) an operational plan or a site plan;

(ii) an exemption from the requirement to have an operational plan or a site plan;

(iii) a permit issued under this Act or the regulations.

(3) A person must not carry out a forest practice if he or she knows or should reasonably know that, due to weather conditions or site factors, the carrying out of the forest practice may result, directly or indirectly, in

(a) slumping or sliding of land,

(b) inordinate soil disturbance, or

(c) other significant damage to the environment.

Defences in relation to administrative proceedings

119.1 (1) For the purposes of a determination of a senior official under section 117, 118 or 119, no person may be found to have contravened a provision of this Act, the regulations, the standards or an operational plan if the person establishes that

(a) the person exercised due diligence to prevent the contravention,

(b) the person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, or

(c) the person's actions relevant to the provision were the result of an officially induced error.

(2) Subsection (1) does not apply in respect of a determination made under section 117, 118 or 119 before the coming into force of this subsection.

Appeal

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

(14) An intervenor may take part in a hearing to the extent permitted by the commission and must disclose the facts and law on which the intervenor will rely at the appeal, if required by the regulations and in accordance with the regulations.

The following portions of the *Administrative Review and Appeal Procedure Regulation*, B.C. Reg. 12/2004 (the "*Regulation*") are relevant to in this decision:

Intervenors

24 (1) If an intervenor is invited or permitted to take part in the hearing of an appeal under section 131(13) of the *Forest Practices Code of British*

Columbia Act, the commission must give the intervenor a written notice specifying the extent to which the intervenor will be permitted to take part.

(2) Promptly after giving notice under subsection (1), the commission must give the parties to the appeal written notice

(a) stating that the intervenor has been invited or permitted under section 131(13) of the *Forest Practices Code of British Columbia Act* to take part in the hearing, and

(b) specifying the extent to which the intervenor will be permitted to participate.

ISSUES

In *Forest Practices Board v. Riverside Forest Products Ltd. and the Ministry of Forests* (Forest Appeals Commission, Appeal no. 95/01(A), June 11, 1996) (unreported), the Commission adopted the following test for granting leave to an applicant to participate in an appeal as an intervenor:

> ...and the Commission agrees, that the test is whether the applicant has a valid interest in participating and can be of assistance in the proceedings (*Hunter v. Board of Commissioners of Public Utilities for the Province of New Brunswick et al*. (1984), 11 Admin. L.R. 221 at 226 (N.B.C.A.)).

This panel of the Commission finds that this test is equally applicable to the present application. Therefore, the Commission has framed the issues as follows:

1. Whether the Applicants have a valid interest in participating.

2. Whether the Applicants can be of assistance in the proceeding.

If the Commission decides that the Applicants should be permitted to intervene, the extent of its participation will then be determined.

DISCUSSION AND ANALYSIS

1. Whether the Applicants have a valid interest in participating.

There is no serious dispute that the Applicants have a valid interest in participating. They consist of three industry organizations that represent most of the licensees operating in the forest sector in British Columbia. The Applicants advise that the provisions at issue in the appeals affect all of their members and that the Applicants have a concern that the determinations under appeal, if confirmed by the Commission, may lead to onerous and unreasonable requirements being placed upon all operators in the Province, beyond the intention of the legislative scheme.

The Commission finds that the Applicants have a valid interest in the statutory interpretation issues raised in Kalesnikoff's appeals. Therefore, they meet the first stage of the test.

2. Whether the Applicants will be of assistance in this proceeding.

When considering whether an applicant for intervenor status will be of assistance in a proceeding, there are a number of relevant factors to be considered, such as:

- the uniqueness of the applicant's perspective,
- the applicant's expertise in the area,
- whether the applicant's participation will unnecessarily delay the appeal, and
- whether the applicant's evidence or argument will repeat or duplicate evidence or argument presented by the other parties.

The Applicants submit that the issues raised in the appeals are of "industry-wide importance". They seek to participate in the appeals to provide a broader perspective on the issues and to assist the Commission to appreciate the ramifications of its decision to the industry as a whole.

In general, the Respondent submits that the Applicants will not have a unique or different perspective from the other parties and, therefore, will not be of assistance to the Commission. The Respondent notes that Kalesnikoff is a member of two of the Applicant's organizations (Interior Lumber Manufacturer's Association and Council of Forest Industries), and is indirectly involved with the third. It also notes that Kalesnikoff seeks to have the Applicants participate to the "fullest extent possible". Further, Kalesnikoff stated in its submissions that, as a small family-owned business, it should not, and cannot, bear the burden of these issues on behalf of the entire BC forest industry. The Respondent submits that this statement seems to indicate that either (a) Kalesnikoff has the same position as the Applicants but should not have to "take it on for everyone," or (b) the Applicants intend to raise issues that are beyond the context of the appeal. The Respondent submits that, in either case, this type of participation is contrary to the intended role of an intervenor.

In support for this position, the Respondent refers to an article by the Honourable Justice Major titled "Interveners and the Supreme Court of Canada", National, May 1999. In that article, Justice Major notes that

> The value of an intervener's brief is in direct proportion to its objectivity. Those interventions that argue the merits of the appeal and align their argument to support one party or the other with respect to the specific outcome of the appeal are, on this basis, of no value. That approach is simply piling on, and incompatible with a proper intervention. (p. 27)

Justice Major goes on to say, "[t]he anticipation of the court is that the intervener remains neutral in the result, but introduces points different from the parties and helpful to the court."

The Respondent also refers to decisions of the British Columbia courts in support for its argument that an intervenor should have some unique or different perspective

than the other parties, and that an intervenor should not be permitted to shift the focus or expand the point of law involved in the appeal. In the subject application, the Respondent notes that:

- no details have been provided as to how the Applicants' position will differ from that of Kalesnikoff; and
- intervention on the issues of the application of section 45(3) of the *Code* and the "due diligence defence" is overly broad - both matters pertain to the specific circumstances of the cases and are not the subject in which the Applicants would be of assistance to the Commission.

Finally, the Respondent points out that, despite the Applicants statement that it seeks to assist the Commission in appreciating the ramification of its decision to the industry as a whole, the Commission is a creature of statue. As such, it must interpret the legislation and apply the legislation to the facts as found by the Commission. The Respondent submits that "appreciating the ramifications of its decision is not a factor that as a matter of law may be taken into consideration when deciding the facts and applying the law."

For all of these reasons, the Respondent submits that the Applicants do not have a unique perspective and would simply be "piling on" in support of the Appellant. In this respect, the Applicants cannot offer any assistance to the Commission on the appeal.

Alternatively, if the Commission decides to grant intervenor status to the Applicants, the Respondent submits that the participation should be limited to written submissions on points of law with respect to the meaning of section 45(3) of the *Code* and the defence of due diligence as it applies to that section.

In response, the Applicants advise that they do not seek to deal with the particular facts, but rather the development of the law as it affects all participants in the forest sector. It notes that, despite the article by Justice Major, the Supreme Court of Canada has "frequently granted intervenor status to industry organizations in forestry matters, presumably to gain an industry-wide perspective on the issue before the Court." The Applicants cite *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture),* 2002 SCC 31 and *Canadian Forest Products Ltd. v. British Columbia*, SCC File No. 29266 (currently under reserve) and The *Minister of Forests and Weyerhaeuser Company Ltd. v. Council of the Haida Nation*, SCC File No. 29419 (currently under reserve).

The Applicants acknowledge that Kalesnikoff is a member of two of their organizations but state that this fact should be of no greater significance than it was to the Supreme Court of Canada when it granted the Council of Forest Industries intervenor status in a case in which its member, Weyerhaeuser Company Limited, was an appellant. The Applicants note that, inevitably, the position of an intervenor will support one side or the other in a dispute. They submit that the fact that they may share the ultimate "position" of Kalesnikoff in this case should not be determinative of whether they will be of assistance to the Commission. The Applicants submit that they seek to bring a different "perspective" to the issues, even thought its ultimate position on the issue is the same as Kalesnikoff's position.

Their perspective is an industry-wide perspective. In these appeals, the Applicants submit that their perspective is sufficiently different from Kalesnikoff's perspective to be of value to the Commission.

The Applicants submit that the interpretation of section 45(3) of the *Code* and the application of the due diligence defence will have an impact on all companies operating in the forest sector. They submit

> not only is it unfair that the Appellant be required to carry the burden of this argument for the industry, as the Appellant has pointed out, it would be unfair to the industry to have to rely solely on the Appellant to protect the interests of all forest companies.

Regarding restrictions on its participation as an intervenor, the Applicants advise that they prefer participation in the nature of full party status. However, they advise that they do not intend to lead evidence. At a minimum, they seek to make oral submissions on the interpretation of section 45(3) and the defence of due diligence as it applies to administrative penalties, and to make oral submissions on these points and to participate fully in the legal argument.

On this branch of the test, the Commission finds that the Applicants have a different perspective in relation to the interpretation issues raised in the appeals. The Applicants, as an industry-wide group, have significant information and resources to draw upon and have some combined expertise and unique views on the sections at issue in the appeals. Their perspective is not fully represented by Kalesnikoff or the Board. Whereas Kalesnikoff will be addressing the defence of due diligence and section 45 of the *Code* in terms of its own actions and the impact of those actions, and the Board will be arguing from a broad public perspective, the Applicants' arguments will be from the perspective of the larger forest-sector community. Neither the other parties nor the Respondent will be bringing that particular perspective to the hearing.

While awareness of the impact of a particular interpretation on the industry as a whole, or any other sector may not be the first step to interpreting legislation, the impact of a particular interpretation does have a role to play, particularly when the legislation does not set out the elements of a test, such as the test for establishing the defence of due diligence.

The Commission appreciates the importance of the interpretive issues before it and prefers to have the issues fully and thoughtfully argued. Although decisions of one panel of the Commission are not binding upon another panel, when issues are fully canvassed and argued those past decisions are generally more persuasive and followed more frequently by other panels. This facilitates a more efficient and effective appeal process.

In addition, as noted above, the Commission is aware that both industry and the government rely on Commission decisions for guidance when interpreting legislation and the administration of activities under the *Code* and other related legislation.

For these reasons, the Commission is satisfied that the Applicants have met the test for intervenor status in these proceedings. The next question is the extent to which the intervenor may take part in the appeals.

The Commission is always concerned about delay and duplication of evidence. Kalesnikoff's hearing should not be unnecessarily delayed by irrelevant or duplicate submissions. The Commission is satisfied that the Applicants' participation will not result in unnecessary delay, so long as its participation is limited to providing legal argument in relation to the interpretation of subsection 45(3) of the *Code* and the appropriate test for establishing a defence of due diligence under subsection 119.1(1)(a) of the *Code*. Therefore, the Commission is prepared to allow the Applicants to participate on this limited basis and in accordance with the schedule below.

DECISION

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

The Commission grants the Applicants' application for intervenor status. Pursuant to subsection 131(14) of the *Code* and section 24 of the *Regulation*, the Applicants may take part in the appeal as follows:

- provide a joint written argument on the interpretation of subsections 45(3) and 119.1(1)(a) of the *Code* in a Statement of Points. The Commission asks the Applicants to provide their written argument to the parties, one copy each; and the Commission, three copies; at least 30 days before the first day of the hearing.
- provide joint oral opening remarks.
- provide joint written and oral closing argument on these issues. The Applicants may provide oral argument after the closing arguments of Kalesnikoff, but before the closing arguments of the Board and the Government.
- the Applicants will not be given an opportunity to lead evidence, cross-examine witnesses or provide expert evidence.

Although some overlap in arguments is to be expected, the Commission cautions the Applicants to avoid repeating or duplicating the arguments presented by Kalesnikoff. They may wish to consult with the Appellant to ensure this does not occur.

Alan Andison, Chair
Forest Appeals Commission

May 10, 2004