Province of British Columbia

Forest Appeals Commission

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DECISION NO. 2005-FOR-015(a)

In the matter of an appeal made pursuant to section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

BETWEEN:	Darren Smurthwaite	**APPELLANT**
AND:	Government of British Columbia	**RESPONDENT**
AND:	Forest Practices Board	**THIRD PARTY**
BEFORE:	A Panel of the Forest Appeals Commission Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on July 5, 2006	
APPEARING:	For the Appellant: Jeffrey Waatainen, Counsel For the Respondent: Bruce Filan, Counsel For the Third Party: Ben van Drimmelen, Counsel	

APPEAL

Darren Smurthwaite appeals a November 14, 2005 determination by Leonard Munt, District Manager (the "District Manager"), Queen Charlotte Islands Forest District, Ministry of Forests and Range (the "Ministry"), that Mr. Smurthwaite, in his capacity as president of a corporation, was responsible for contravening section 62(1) of the *Forest Practices Code of British Columbia Act* (the "*Code*"). The contravention involved the failure to construct a road in accordance with a road permit and road layout and design. The contravention led to damage to special features that had been identified in the road permit and other documents; namely, karst[1] features. The District Manager levied a penalty of $45,000 for the contravention.

This appeal was brought before the Commission pursuant to section 82 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "*Act*"). Under section 84(1)(d) of the *Act*, the Commission may confirm, vary or rescind the

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[1] "Karst" is a terrain underlain by solutional rocks such as limestone. Karst areas are characterized by sinkholes, disappearing streams, and caverns.

determination, or refer the matter back to the person who made the determination, with or without directions.

Mr. Smurthwaite submits that the District Manager erred by making a determination against him in his personal capacity. Mr. Smurthwaite requests that the Commission rescind the determination, including the finding of contravention and the associated penalty.

At Mr. Smurthwaite's request, the Commission conducted this appeal by way of written submissions.

BACKGROUND

Mr. Smurthwaite is the president of 544559 B.C. Ltd. (the "Company"), which changed its name to Greenwood Resources Ltd. in March 2004. According to records from the B.C. Ministry of Finance corporate registry Mr. Smurthwaite is the president, secretary, and sole officer of the Company.

Timber Sale Licence A53411 (the "TSL") and Road Permit 12417 (the "Road Permit") were issued to the Company in 2001. The areas covered by the Road Permit and the TSL are located in the Kootenay Inlet area of Moresby Island in the Queen Charlotte Islands Forest District. Mr. Smurthwaite signed the TSL on behalf of the Company. Attached to the TSL is a silviculture prescription map, which identifies the locations of swallets[2] within the TSL area and sets out swallet management objectives.

The Road Permit was issued to the Company in order to allow it to build access to the TSL area. The Road Permit is not signed by a representative of the Company, but it is addressed to Mr. Smurthwaite as president of the Company. Several documents are attached to, and form part of, the Road Permit. Those documents include: Schedule A3, which contains road plans, profiles, data and cross sections; and a report titled, "Judgmental Karst Feature Search in the Vicinity of Kootenay Inlet on the Queen Charlotte Islands." The latter document was prepared for the Queen Charlotte Islands Forest District in September 2000 by a consultant. Both of the documents identify the locations of karst features, such as swallets, epikarst[3],

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[2] "Swallets" are also known as sink holes or swallow holes, and are places where water disappears underground into a limestone region.

[3] "Epikarst" is the upper zone of karst areas that extends downward as sinkholes, fractures, fissures, and other surface karst features to where the natural pororsity of the bedrock is located.

and exsurgences[4], within the TSL area, and specify management objectives to minimize the potential effects of harvesting and road building on the karst features.

The road in question was constructed on behalf of the Company by a contractor, Dorman Timber Ltd. ("Dorman"), between October 2002 and January 2003. A pre-work meeting was held at the Forest District office on October 18, 2002. The meeting was attended by a representative of Dorman, several Forest District staff, and Lawrence Musgrave of Arrowhead Forest Products Ltd. Mr. Musgrave attended on behalf of the Company. Mr. Musgrave's notes from that meeting indicate that karst features were discussed as needing protection. His notes state, in part: "Karst features are of special concern (esp. during road construction)"; and "Retain residual vegetation along the roadside Karst features as much as possible."

On November 15, 2002, Daniel Skafte, a Compliance and Enforcement Technician with Queen Charlotte Islands Forest District, inspected the road construction activities. The Road Inspection Report prepared by Mr. Skafte states, among other things, that a verbal stopwork order was issued because the subgrade material being used to build the road contained "lots of fines wich [sic] are washing out causing sedimentation." The Road Inspection Report also states that "Over blasting during road construction has introduced rock and debris into creeks. This will need to be cleaned out."

Mr. Skafte inspected the site again on November 19, 2002. His Road Inspection Report for that date states that another verbal stopwork order was issued. Specifically, that Report states:

> Contractor is using sbgrade [sic] material with too many fines that are causing sedimentation to be an issue. Pioneering the road in wet conditions has created a real soupy mess in an area that sediment is to be controlled. Contractor was verbally asked to shut down yet again until sediment control measures have been established. Muddy water is flowing freely down the ditches and into riparian features.

Harvesting in the TSL was completed in February 2003.

On March 21, 2003, Mr. Skafte inspected the site again. In his Harvest Inspection Report/Non Compliance Summary, he describes alleged non-compliance concerning road construction, debris management, soil disturbance, and plan requirements, and he indicates that further investigation will be conducted. He states, in part, at page 2:

> … Management area for stream 10 has been compromised creating a sediment load and sloughing of material that is impacting the identified

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[4] An "exsurgence" is a point at which an underground stream reaches the surface if the stream has no known surface headwaters.

> resource feature (swallet). There is also introduced logging debris within the swallet area. This is consistent with the other two identified swallets. Todays [sic] inspection revealed that ditch material has been placed into the main feed of the swallet closest to the mainline. This is in total disregard for the information that was given to workers on site yesterday regarding the sensitivity of these features and the importance of keeping sediment out of them.
>
> … Most of the Karst features that were to be protected on the road have either been filled in or blown during the road construction. Damaging these identified features is a significant non compliance…

During the March 21, 2003 inspection, Mr. Skafte also took numerous photographs of the site. Copies of those photographs were provided to the Commission.

On April 1, 2003, Mr. Skafte inspected the area again and took more photographs of the site. Those photographs were also provided to the Commission. He completed another Harvest Inspection Report/Non Compliance Summary, in which he notes that some debris had been machine cleaned, but hand cleaning of features and creeks was still necessary.

Further inspections were conducted on May 2, 2003, and June 26, 2003. In his Harvest Inspection Reports for those dates, Mr. Skafte identifies remaining concerns regarding debris in streams and culverts at the site.

All of the reports prepared by Mr. Skafte state that the Company is the licensee, Dorman is the contractor, and that the reports were sent by mail to an address in Port Coquitlam that is, according to the Ministry of Finance corporate registry, the Company's address for delivery. The reports also show Mr. Smurthwaite's name typed beside the words "Received by:", although his signature is not on the documents.

On August 25, 2003, Ron Tanner of the Forest District office and Dean Zambon of Dorman conducted a field inspection of the site. Mr. Tanner's field notes indicate that all provisions of the TSL and the Road Permit had been met, although a waste survey had not been completed.

In a letter dated September 10, 2003, Mr. Skafte wrote as follows, in part:

> Dear Darren Smurthwaite
>
> Inspections of your activities at A53411 Kootenay Inlet while operations were active revealed that you may be operating contrary to Section 62(1) of the *Forest Practices Code of British Columbia Act*. Specifically, it appears that the road was being constructed contrary to the approved requirements…

> We will be investigating this matter further.

That letter was addressed to "Darren Smurthwaite, President, 544559 B.C. Ltd.", and was sent to an Anson Avenue address in Coquitlam, B.C., which is different from the address to which Mr. Skafte's reports were sent.

In December 2004, Mr. Smurthwaite received an Investigation Report prepared by Mr. Skafte. That report identifies five potential contraventions of the *Code* and certain regulations. A copy of the Investigation Report was provided to the Commission. On the first page, it identifies the person(s) under investigation as follows:

> Name and Address of Person(s) / corporations(s) under investigation:
>
> Darren Smurthwaite, President
> 544559 B.C. Ltd.
> [Anson Avenue address]
> Coquitlam, British Columbia…

A cover letter dated December 2, 2004, from the Acting District Manager accompanied the Investigation Report. That letter states, in part:

> Darren Smurthwaite
> 544559 B.C. LTD.
> …
>
> Dear Darren Smurthwaite,
>
> Further to our letter dated September 10, 2003… regarding suspected contraventions… please note that ministry staff have completed their investigation.
>
> The investigation has confirmed that you may be operating contrary to: *Forest Practices Code of British Columbia Act* Section 62(1)
> …
>
> Specifically, my staff have reported that your operations within the setting A53411 were done contrary to approved designs and plans. Also noted is that you failed to take actions to minimize the amount of sediment from entering streams during road construction and while harvesting the setting…
>
> I will be making a determination regarding these alleged contraventions on the basis of evidence presented to me. Before I make my determination I would like to include your evidence relevant to this matter and therefore offer you an opportunity to be heard…

The letter was sent to an address that is, according to the Ministry of Finance corporate registry, Mr. Smurthwaite's personal address.

On March 14, 2005, Mr. Smurthwaite sent written submissions to the District Manager in response to the alleged contraventions. The facsimile cover sheet for the submissions indicates that they were sent by Darren Smurthwaite, and it states, "Please find enclosed the submissions re 544559 B.C. Ltd."

On November 14, 2005, the District Manager issued his determination. He sent the determination to "Darren Smurthwaite, President, 544559 B.C. Ltd." His determination states, in part:

> I have to conclude that Darren Smurthwaite, being president of 544559 B.C. LTD. being ultimately responsible for the operations associated with Timber Sale Licence A53411, knew the requirements identified as part of the Road Permit to manage to protect the karst features within the block, and clearly failed to do so. Therefore, I find that Section 62(1) of the [*Code*] has been violated.

In particular, the District Manager found that roadside karst features had been blasted and used as road material, a swallet had been covered with logging debris, damage to a streamside management zone had caused sloughing that could block the swallet that the stream flows into, and material cleaned out of ditches had been placed into a swallet. He concluded that section 62(1) of the *Code* was violated by a failure to construct the road in accordance with the Road Permit and the road layout and design, resulting in irreparable damage to karst features identified in the Road Permit.

The District Manager assessed a penalty of $45,000 for the contravention. The maximum penalty for such a contravention is $50,000. In determining the penalty, the District Manager considered that, although "544559 B.C. LTD." had no previous contraventions of a similar nature, the gravity and magnitude of the contravention was "substantial", and that it is impossible to compensate the Crown for the loss of the karst features. He also considered that the damage caused by blasting occurred on two separate occasions, and continued after Ministry staff advised workers in the field of the sensitivity of the features and told them to correct problems.

Mr. Smurthwaite filed a Notice of Appeal against the District Manager's determination on December 8, 2005. His grounds for appeal may be summarized as follows:

1. There is no evidence that Mr. Smurthwaite undertook the road construction and timber harvesting activities in issue. Therefore, there is no factual basis to support the finding of contravention made against Mr. Smurthwaite.

2. Neither the District Manager nor the Ministry ever referenced section 71(4) of the *Act*, which addresses the liability of corporate directors and officers for

contraventions by a corporation, in relation to the matters at issue in the determination, or presented evidence or arguments as to how Mr. Smurthwaite, in his capacity as president of the Company, authorized, permitted or acquiesced in any contravention. Accordingly, there is no factual basis to support the finding of contravention against Mr. Smurthwaite.

3. Mr. Smurthwaite did not receive an opportunity to be heard regarding the alleged contravention, and therefore, the District Manager was without jurisdiction under sections 71(1) and (2) of the *Act* to make a finding of contravention or impose a penalty against Mr. Smurthwaite.

The Government asks that the determination be confirmed.

The Forest Practices Board requests that the Commission confirm the determination with respect to liability and impose a substantial penalty.

ISSUES

The parties' submissions raise the following issues:

1. What is the legal test for finding a corporate director or officer liable under section 71(4) of the *Act*, and did the District Manager apply that test?

2. Whether there were errors in the proceedings before the District Manager, and if so, whether the appeal proceedings can correct those errors.

3. Whether Mr. Smurthwaite is liable under section 71(4) of the *Act*, and whether the penalty is appropriate in the circumstances.

LEGISLATION

Relevant sections of the *Code* are provided below. Since the determination under appeal was made after the *Act* came into force, the *Act*'s administrative penalties and defences apply. The relevant provisions of the *Act* are also provided below.

Forest Practices Code of British Columbia Act

Road construction and modification must comply with Act and plans

62 (1) A person who constructs or modifies a road on Crown land

(a) within a Provincial forest, or

(b) outside a Provincial forest if the road is constructed or modified for the purpose of providing access to timber,

must do so in accordance with all of the following:

(c) this Act, the regulations and the standards;

(d) any forest development plan, silviculture prescription or logging plan;

(e) any cutting permit, road permit or special use permit;

(f) any road layout and design.

Forest and Range Practices Act

Administrative penalties

71 (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.

(2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,

(a) if he or she determines that the person has contravened the provision,

(i) may levy an administrative penalty against the person in an amount that does not exceed a prescribed amount, or

(ii) may refrain from levying an administrative penalty against the person if the minister considers that the contravention is trifling and that it is not in the public interest to levy the administrative penalty, or

(b) may determine that the person has not contravened the provision.

(3) Subject to section 72, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.

(4) If a corporation contravenes a provision of the Acts, a director or an officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

(5) Before the minister levies an administrative penalty under subsection (2), he or she must consider the following:

(a) previous contraventions of a similar nature by the person;

(b) the gravity and magnitude of the contravention;

(c) whether the contravention was repeated or continuous;

(d) whether the contravention was deliberate;

(e) any economic benefit derived by the person from the contravention;

(f) the person's cooperativeness and efforts to correct the contravention;

(g) any other considerations that the Lieutenant Governor in Council may prescribe.

Defences in relation to administrative proceedings

72 For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the

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

...

DISCUSSION AND ANALYSIS

1. What is the legal test for finding a corporate director or officer liable under section 71(4) of the *Act*, and did the District Manager apply that test?

The discussion and analysis under this issue concerns the substantive legal requirements for an analysis of liability under section 71(4), and not the procedural requirements of section 71. Those procedural requirements are discussed under the second issue.

Mr. Smurthwaite submits that section 71(4) of the *Act* requires a two-step analysis before a corporate director or officer can be found personally liable for a corporation's contravention. First, the minister or a delegated decision-maker (in this case a district manager) has to determine that a corporation contravened the *Code*. That requirement is found in section 71(4) and provides that "[i]f a corporation contravenes a provision of the Acts", then a director or officer who authorized, permitted or acquiesced in the contravention is also in contravention.[5]

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[5] At the time the determination was issued (November 14, 2005), section 59(1) of the *Act* defined "Acts" to include both the *Act* and the *Code*.

Second, a district manager must determine that the director or officer has "authorized, permitted or acquiesced in" the corporation's contravention.

Mr. Smurthwaite contrasts the language in section 71(4) with that in section 71(3), which states that "if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision." He maintains that section 71(3) imposes presumptive and direct liability, which does not require proof of the person's authorization, permission or acquiescence. Consequently, as soon as a contravention by a licensee's contractor, employee or agent has been shown, the burden of proving due diligence shifts to the licensee. On the other hand, he argues that section 71(4) imposes derivative liability, which requires proof of the person's authorization, permission or acquiescence. Therefore, a director's contravention does not follow presumptively on proof of the corporation's contravention, but rather, requires additional proof of the director's authorization, permission or acquiescence, and the director has no evidentiary burden until that has been proved.

Mr. Smurthwaite submits that section 71(4) of the *Act* gives effect to the common law principle that a corporation is a separate legal entity from its directors and officers, because that section exposes directors and officers to personal liability for an administrative penalty only if they authorized, permitted or acquiesced in the corporation's contravention. Mr. Smurthwaite submits that a high standard of proof is generally required to establish a director's or officer's personal liability for regulatory offences regarding authorization, permission or acquiescence, and no such proof exists in this case. Mr. Smurthwaite maintains that the District Manager wrongly assumed that Mr. Smurthwaite's status as president of the Company made him personally liable, without evidence of his intent, knowledge or control of the conduct that led to the contravention.

Mr. Smurthwaite further submits that the judicial decisions cited by the Government and the Forest Practices Board do not support the view that there is no meaningful distinction between corporate and personal liability, because in all cases cited, both the corporation and one of its directors, in his or her personal capacity, were charged with a regulatory offence.

Mr. Smurthwaite submits that the District Manager failed to properly perform the two steps required by section 71(4), in that he: (1) investigated whether the Company and its contractor had contravened the *Code* but did not make a finding that the contractor or the Company contravened the *Code*; and (2) he determined that Mr. Smurthwaite had contravened the *Code* without investigating whether Mr. Smurthwaite authorized, permitted or acquiesced to a contravention by the Company. Mr. Smurthwaite notes that the District Manager found in his determination that Mr. Smurthwaite, "being President of the Licensee," was "ultimately responsible" for contravening the *Code*, yet when he considered the penalty amount, he found that it was the Company and not Mr. Smurthwaite that had no previous contraventions of a similar nature.

The Government maintains that there is no statutory requirement that a district manager must determine that a corporation contravened the Acts before the district manager can determine that a corporate director or officer is liable for the contravention. The Government argues that liability under section 71(4) operates similarly to liability under section 71(3). Specifically, it argues that, under sections 71 and 72, where a person, in this case a licensee, has a contractor that commits a contravention, the licensee is liable for that contravention unless the licensee establishes that it exercised due diligence. Similarly, where a licensee is liable for that contravention, an officer or director of the licensee is also liable for the contravention if the director or officer, among other things, permits the contravention.

The Government submits, therefore, that the enquiry into Mr. Smurthwaite's liability in this case, where the Company's contractor committed the contravention, is a two-stage process that depends on: (1) whether the evidence presented by Mr. Smurthwaite to the District Manager established that the Company exercised due diligence; and (2) whether Mr. Smurthwaite permitted the contravention.

The Government submits that the question of whether a person exercised all reasonable care (i.e. due diligence) to prevent a contravention is determined by an examination of whether that person: (1) established a proper system for preventing the commission of the offence; and, (2) took reasonable steps to ensure the effective operation of the system. Moreover, the availability of the defence of due diligence depends on whether due diligence was taken by the directing minds of the corporation, whose acts are the acts of the corporation. The Government notes that section 136 of the *Business Corporations Act*, S.B.C. 2002, c. 57, states that "[t]he directors of a company must… manage or supervise the management of the business and affairs of the company."

Regarding the "permitting" aspect of a contravention, the Government maintains that the focus is on the person's passive lack of interference, that is, the person's failure to prevent an occurrence that the person ought to have foreseen. The Government submits that it is insufficient for a licensee to hire a contractor that the licensee understands to be experienced and highly recommended, and then take no responsibility for the occurrences for which that contractor is responsible.

Specifically, the Government maintains that there is no question that Dorman committed repeated and blatant infractions of the silviculture prescription and the Road Permit, despite warnings from Ministry staff. The Government says that Mr. Smurthwaite's submissions to the District Manager provide no evidence that the Company or Mr. Smurthwaite established a proper system for preventing the contravention or took reasonable steps to ensure the effective operation of such a system.

The Government says that, based on Mr. Smurthwaite's submissions to the District Manager, it appears that the Company provided Dorman with maps, plans and work specifications, and held a pre-work meeting with Dorman's representatives. However, the Government submits that those actions do not constitute a system for

preventing contraventions on a day-to-day basis. Although Mr. Musgrave of Arrowhead Forest Products Ltd. was described by Mr. Smurthwaite as being onsite during each new shift and reviewing operations, Mr. Smurthwaite provided no information on how often a Company representative was onsite or what constituted a review of operations. Moreover, the Government submits that, although Mr. Smurthwaite claims that the Company responded to reports of non-compliance, responding to incidents is not the same as taking proactive steps to prevent them from happening. Given the many incidents of non-compliance reported by Ministry staff and the magnitude of those incidents, the Government argues that the only reasonable conclusion is that there was inadequate supervision of the operations by either the Company or Dorman. Moreover, the Government submits that the incidents that constituted the contravention were foreseeable. Accordingly, the Government submits that the Company did not exercise due diligence.

In this case, the Government submits that the District Manager determined that the Company contravened section 62(1) of the *Code*. While the Government concedes that the District Manager did not make that determination "in those few simple words", it argues that when the District Manager considered the penalty amount, he stated that the Company had no previous contraventions of a similar nature. The Government maintains that, if the District Manager had only determined that Mr. Smurthwaite had contravened the *Code*, then there would have been no reason to refer to the Company. In any case, the Government argues that, if the Commission decides that the District Manager did not determine that the Company contravened the *Code*, the Commission has the jurisdiction to consider the facts and reach that conclusion. Additionally, the Government argues that Mr. Smurthwaite provided no evidence to either the District Manager or the Commission to establish that he or the Company had exercised due diligence by establishing a proper system for preventing the contravention and taking steps to ensure the effective operation of such a system.

Regarding Mr. Smurthwaite's liability, the Government notes that he is the president of the Company and his signature is on the TSL. The Government submits that, as the directing mind of the licensee, he had ultimate responsibility for ensuring that operations were carried out properly. The Government argues that he presented no evidence to the District Manager that he did any more than the Company regarding the occurrences that constituted the contravention. The Government argues, therefore, that he failed to prevent occurrences that he ought to have foreseen, and thereby committed the contravention.

In support of those submissions, the Government cites *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (hereinafter *Sault Ste. Marie*), which involved offences under provincial environmental legislation, and the availability of the due diligence defence to strict liability offences. Regarding the availability of the due diligence defence to corporations, the Court states as follows in *Sault Ste. Marie*:

> ... The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing

> mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The Forest Practices Board submits that Mr. Smurthwaite's submissions are highly legalistic and are more suited to proceedings involving prosecution for an offence rather than administrative proceedings such as these. The Forest Practices Board agrees with Mr. Smurthwaite that a necessary element of section 71(4) is a contravention by a corporation. However, the Forest Practices Board submits that this does not require that a separate determination or penalty be imposed against the corporation. Rather, in this appeal, it requires the Commission to either accept that the District Manager implicitly made such a finding in his determination, or to find as a fact that the Company contravened section 62 of the *Code*.

In that regard, the Forest Practices Board submits that Mr. Smurthwaite does not argue that the Company did not contravene the *Code*. Rather, he argues that the District Manager did not formally determine under section 71(1) that the Company contravened the *Code*. The Forest Practices Board maintains that there is ample evidence to support a finding by the Commission that the District Manager implicitly concluded that the Company contravened section 62 of the *Code*, or to find as a fact that the Company contravened section 62 of the *Code*. In this regard, the Forest Practices Board notes that Mr. Smurthwaite stated as follows in his March 14, 2005 submission to the District Manager:

> Simply put, 544559 is, by operation of Section 117(2) liable for the contraventions of Dorman.

Regarding the second part of section 71(4), the Forest Practices Board submits that Mr. Smurthwaite's status as president of the Company may be insufficient, on its own, to attribute liability, because meaning must be given to the words "authorized, permitted or acquiesced". However, the Forest Practices Board submits that, on a proper interpretation of section 71(4) of the *Act*, a director or officer has a duty to exercise reasonable care to ensure that measures are in place to prevent reasonably foreseeable occurrences that lead to a contravention, and a failure to do so constitutes authorization, permission or acquiescence.

Specifically, the Forest Practices Board submits that positions of authority entail corresponding responsibilities, as reflected in section 142(1)(b) of the *Business Corporations Act*, which states:

> **142** (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must
>
> (b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

In support of its interpretation of the phrase "authorized, permitted, or acquiesced in", the Forest Practices Board cites several judicial decisions, including *Sault Ste.*

Marie, where the Court states as follows regarding the meaning of "permitted" in the context of an environmental offence:

> It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the *actus reus* of discharging, causing or permitting pollution… from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but failed to do so. …The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.
>
> [underlining added in the Forest Practices Board's submissions]

The Forest Practices Board also cites *R. v. A & A Foods Ltd.,* [1997] B.C.J. No. 2720 (B.C.S.C.)(hereinafter *A & A Foods*). That case involved an appeal of convictions by both a corporation and one of its directors under the Canada *Agriculture Products Act*. The corporation was convicted of being in possession of unlabelled cheese, contrary to section 17 of that Act, and the director was convicted under section 36 of that Act. The Court made the following finding:

> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to or acquiesced or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

The trial judge had concluded that the cheese was not labelled for over two months after it was delivered to the corporation's factory, and that both the corporation and the director failed to take reasonable care to establish a proper plan or protocol to deal with the receipt of unlabelled cheese from suppliers. The director appealed, arguing that no knowledge, acquiescence, authorization assent or participation could be ascribed to him.

The Forest Practices Board notes that the Court in *A & A Foods* considered the words "directed, authorized, assented to or acquiesced or participated in the commission of the offence is a party" to be "far reaching." The Court stated at paragraph 20:

> The terms used in the section… are far reaching. The clear purpose of these provisions is to bring pressure to bear on those persons who are the directing or operating mind of the company… They control the activities of the company, and have the power and authority to see that reasonable steps, usually the placement of an effective system to prevent the commission of the offence, are taken.

The Forest Practices Board also notes that the Court considered several judicial decisions, including *Sault Ste. Marie*, that interpreted "permit" to mean "fail to prevent an occurrence which ought to have been foreseen" or something similar.

The Forest Practices Board also notes that the Alberta Provincial Court considered the meaning of the terms "authorized, permitted or acquiesced" in the context of the Alberta *Securities Act* in *R. v. Boyle*, [2001] A.J. No. 70 (hereinafter *Boyle*). In *Boyle*, the Court decided that *A & A Foods* went too far in applying a test based on a foreseeable risk rather than knowledge of factual circumstances amounting to a contravention. However, the Forest Practices Board maintains that the reasoning in *A & A Foods* is to be preferred, since it is consistent with the interpretation of "permitted" adopted in *Sault Ste. Marie*.

Regarding the standard of proof required to assign liability for an administrative penalty, the Forest Practices Board notes that the Commission recently held that the appropriate standard for administrative remedies in the forestry context is proof on a balance of probabilities: *Marilyn Abram v. Government of British Columbia* (Decision No. 2004-FOR-13(a), April 12, 2005)(unreported) (hereinafter *Abram*).

The Forest Practices Board submits that its interpretation is consistent with the purposes of administrative penalties, which are to provide an alternative to prosecution and to supplement other enforcement measures as a means of providing deterrence and compensation to the Crown.

Additionally, the Forest Practices Board submits that director liability can provide an alternative source for financial remedies if a company has insufficient resources to pay a penalty or remediate damage, although there is no evidence that this applies to the Company in this case. The Forest Practices Board says that this may be especially important in the case of small logging companies, which account for a significant portion of logging in B.C. In support of those submissions, it cites *Alpha Manufacturing Inc. v. British Columbia* (2005), 15 C.E.L.R. (3d) 6 (BCSC) at paragraph 215:

> There are sound policy reasons why government would want to convict both individuals and corporations of environmental offences. Dual responsibility provides greater assurance of compliance. It avoids the possibility that an individual or corporation will organize his, her or its affairs with the expectation that only an asset-poor entity will be held legally responsible.

In summary, the Forest Practices Board submits that, on a proper interpretation of section 71(4) of the *Act*, Mr. Smurthwaite had a duty, as a director and officer, to exercise reasonable care to ensure that measures were in place to protect the karst features. The Forest Practices Board submits that Mr. Smurthwaite controlled the Company's activities and had the authority to ensure that precautions were taken to prevent the contravention which was reasonably foreseeable. Having failed to prevent incidents which he ought to have foreseen, he "authorized, permitted, or acquiesced in" the contravention.

Commission's findings

In deciding this issue, the Commission has considered the proper interpretation of the language in section 71(4) of the *Act*. The Commission must interpret the language in section 71(4) based on the ordinary meaning of the words, in the context of the *Act*, and considering the purposes of administrative penalties under the *Act*.

The parties have cited several judicial authorities to assist in the interpretation of section 71(4), but it is important to note that those cases all involved regulatory offences rather than administrative penalties. The Commission has previously held that the administrative penalty regime set out in the *Code*, and now the *Act*, is distinct from the offence regime set out in those Acts, and administrative penalties serve different purposes than the penalties available under the offence provisions (see, for example, *MacMillan Bloedel* and *Abram*). Thus, while the cases cited by the parties may provide some assistance in interpreting the language in section 71(4), it is important to consider the context in which those cases were decided when applying them to the present appeal.

Before considering the language in section 71(4), it is helpful to consider the nature of the administrative penalty scheme, and how statutory defences fit into that scheme.

In *MacMillan Bloedel*, the Commission found that administrative penalties provide an alternative to the penalties associated with offences. Administrative penalties do not include the possibility of imprisonment, and although monetary administrative penalties may be substantial, they are not penal in nature. They may provide some deterrence, but also serve to compensate the Crown for damage to, or losses of, Crown forest resources associated with a contravention. *MacMillan Bloedel* was decided before forestry legislation in B.C. was changed to make statutory defences expressly available in administrative proceedings. However, the Commission finds that its conclusions in *MacMillan Bloedel* regarding the general purposes of administrative penalties are still applicable.

Additionally, the Panel agrees with the findings in *MacMillan Bloedel* that intent need not be proved to establish a contravention in administrative proceedings, unless specifically required by legislation. However, evidence of knowledge or intent may be relevant to an administrative decision-maker when the decision-maker considers the factors listed in section 71(5) of the *Act* regarding the assessment of penalties. As stated at page 17 of *MacMillan Bloedel*:

> …The Commission finds while the person's behaviour may become relevant in regard to the quantum of an administrative penalty imposed, these factors do not apply in addressing the question of whether a contravention has occurred in the first place and whether any penalty should be assessed…

Evidence of knowledge and intent may also be relevant in deciding whether the defence of due diligence applies. The test for due diligence was recently considered by the Commission in *Weyerhaeuser Company Limited v. Government of British Columbia* (Decision No. 2004-FOR-005(b), January 17, 2006)(unreported) (hereinafter *Weyerhaeuser*). In that case, the Commission held as follows:

> Due diligence is determined by whether the person charged has exercised reasonable care in view of the particular circumstances. Exercising reasonable care implies taking reasonable actions to prevent things the particular accused can reasonably be expected to control, which depends on what the accused has knowledge of or can reasonably be expected to foresee.
>
> …
>
> In the context of a licensee who engages a contractor whose acts or omissions result in the contravention, the test applied by the Supreme Court of Canada in *R. v. City of Sault Ste. Marie* requires the licensee to demonstrate that:
>
> (a) the act took place without the licensee's direction or approval; and
>
> (b) the licensee exercised all reasonable care by taking all reasonable steps to ensure that the contravention did not occur.
>
> The determination of whether a licensee is duly diligent depends on the circumstances of the case…
>
> [underlining added]

It should be noted that the onus is on the Ministry in proceedings before a district manager, or the Government in proceedings before the Commission, to establish that the contravention occurred. However, the onus of establishing a statutory defence rests with the person claiming the defence. Section 72 of the *Act* states that "no person may be found to have contravened a provision… if the person establishes that" the person exercised due diligence [underlining added].

With that legislative context in mind, the Commission has considered the language in section 71(4) of the *Act*. The Commission finds that the analysis for attributing liability to a corporate director or officer under section 71(4) has two stages. First, there must be a finding of fact that a corporation contravened the Acts (in this case, the *Code*). Second, there must be a finding of fact that a director or officer of the corporation authorized, permitted or acquiesced in the corporation's contravention.

Regarding the first stage of the test, as with any contravention, intent becomes relevant only if the corporation alleged to be responsible for the contravention

claims a statutory defence such as due diligence. As noted by Mr. Smurthwaite, a corporation can only act through its employees, contractors, agents, directors and officers. Thus, evidence regarding the actions, omissions, knowledge, and intent of those people may be relevant to the question of whether a corporation exercised due diligence.

Regarding the second stage of the section 71(4) analysis, the Commission finds that the Legislature intended that there must be some factual basis for concluding that a corporate director or officer "authorized, permitted or acquiesced in" the corporation's contravention. Otherwise, those words would serve no purpose. In that regard, it is helpful to compare the language in sections 71(4) with that in section 71(3). The two sections are reproduced below for convenience:

> (3) Subject to section 72, if a person's contractor, employee or agent contravenes a provision of the Acts in the course of carrying out the contract, employment or agency, the person also contravenes the provision.
>
> (4) If a corporation contravenes a provision of the Acts, a director or an officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

Under section 71(3), liability is direct: as long as the contractor, employee or agent contravened the Acts while acting in the course of carrying out the contract, employment or agency, the person (in this case, the corporation) also contravenes the Acts. In contrast, section 71(4) does not impose liability on corporate directors or officers simply by virtue of the corporation contravening the Acts in the course of its operations; rather, a director or officer must have authorized, permitted or acquiesced in the contravention. The onus is on the Ministry (in proceedings before a decision-maker of first instance) or the Government (in an appeal before the Commission) to establish that the director or officer "authorized, permitted or acquiesced in" the corporation's contravention.

The next question is what the words "authorized, permitted or acquiesced in the contravention" mean in section 71(4) of the *Act*.

The words "authorized", "permitted" or "acquiesced" are not defined in the *Act*. Therefore, the Commission has considered their ordinary meaning in the context of the *Act*.–

The verb "authorize" is defined in *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995) as follows:

> **1 :** to establish by or as if by authority **:** SANCTION <a custom *authorized* by time>
> **2 :** to invest especially with legal authority : EMPOWER <*authorized* to act for her husband>

The above definition suggests that "authorize" involves a positive act by a person holding some measure of authority, and that the person intends to empower or sanction a thing or event. In the context of section 71(4), that could include a director or officer giving authority to a corporation's employee or contractor to do something that contravenes the Acts.

The verb "permit" is defined in *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995) as follows:

> **1 :** to consent to expressly or formally <*permit* access to records>
> **2 :** to give leave **:** AUTHORIZE
> **3 :** to make possible <the design *permits* easy access>
> *intransitive verb* **:** to give an opportunity **:** ALLOW <if time *permits*>

The first two parts of the definition describe positive acts, and suggest that knowledge or intent informs those acts. The second part of the definition also suggests that "permit" may be synonymous with "authorize" in certain circumstances. However, the third part of the definition suggests passive acts, or possibly omissions, which may "allow" something to happen. Thus, in the context of section 71(4), "permit" could mean allowing contravention by a contractor that could have reasonably been foreseen and that could have been prevented.

Finally, the verb "acquiesce" is defined in *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995) as follows:

> **:** to accept, comply, or submit tacitly or passively – often used with *in* and sometimes with *to*

This definition suggests that "acquiesce" includes the positive acts of accepting or complying with something that it proposed, as well as submitting tacitly or passively to opposition or pressure.

The Commission finds that the reasons in *Sault Ste. Marie* are helpful in ascertaining the meaning of "permitted". The Court stated that "[t]he "permitting" of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen" [underlining added]. Those findings are consistent with the dictionary definitions of "permit" cited above.

The reasoning in *A & A Foods* is also helpful in ascertaining the meaning of "authorized", "permitted" or "acquiesced". In that case, the B.C. Supreme Court considered the meaning of those words in section 118(3) of the Ontario *Securities Act*, and how they related to similar language in section 36 of the Canada *Agriculture Products Act*. In that regard, the Court stated as follows at paragraphs 30 and 33:

> The wording or terms in s. 118(3) are similar to those in s. 36 which is before me, save that the latter may be said to be a more expansive

> version of the former. Their purpose, in my view, is the same, to bring home responsibility to directors and officers, who control the activities of the corporation, for their negligence; those who are directly or indirectly involved in the commission of the offence by the company, and who cannot show that all due care, reasonable care, was taken by them. The focus is on their conduct, active and passive. By direct involvement, I mean, generally speaking, positive action, or inactivity which, in effect, enables or allows the foreseeable offence to occur.
>
> …
>
> The terms "authorizing", "permitting" or "acquiescing" … seem to be more concerned with passive rather than active conduct… However, positive conduct would also be caught by one or more of the terms…
>
> [underlining added]

The Commission finds that the reasoning in *A & A Foods* is consistent with the interpretation of "permitted" adopted by the Supreme Court of Canada in *Sault Ste. Marie*.

The Commission has already noted that the present appeal involves administrative proceedings, and the consequences of a finding of liability are not penal in nature. This appeal involves an appeal of a regulatory decision, and it is appropriate to apply a regulatory test. Consequently, in the context of section 71(4) of the *Act*, the "active or passive conduct of a director is relevant" to the question of whether a director "authorized, permitted or acquiesced in" a corporation's contravention.

Accordingly, the Commission concludes that the words "authorized, permitted or acquiesced in the contravention" include both positive acts and omissions such as a failure to prevent a foreseeable occurrence that leads to a contravention. In particular, "permit" includes a "passive lack of interference," through inaction or omissions, on the part of a director or officer who should have foreseen an occurrence leading to a contravention. The statutory language does not import a mental element in terms of an intention to commit the contravention or knowledge that the contravention would actually occur, but it does require that the director or officer had the power to control whether the contravention occurred. Thus, where a director or officer is responsible for setting up a system to deal with foreseeable occurrences that could lead to contraventions, and he or she fails to set up such a system and take precautions to prevent the occurrences, he or she could be held liable under section 71(4).

In summary, section 71(4) requires, at a minimum, that: (1) there is sufficient evidence to establish, on a balance of probabilities, that a corporation contravened the Acts, and the corporation fails to establish that a statutory defence applies; and, (2) there is sufficient evidence to establish, on a balance of probabilities, that a corporate director or officer failed to prevent an occurrence which he or she ought

to have foreseen. The onus is on the Ministry or the Government to establish that the contravention occurred and, to establish that the director or officer authorized, permitted or acquiesced in the contravention.

Applying the above findings to the facts in this case, the Commission notes that the District Manager's determination implies that he determined that the Company contravened the *Code*. Further, there was evidence that Dorman's actions or omissions in building the road on behalf of the Company contravened section 62(1) of the *Code* and Mr. Smurthwaite conceded, in his submissions to the District Manager, that the Company was vicariously liable for Dorman's contravention, if there was a contravention.

However, the District Manager's determination does not expressly state that the Company contravened the *Code*. He does state that the Company had no previous contraventions of a similar nature. The statement by the District Manager that there were no previous contraventions by the Company does not lead to the conclusion that there has now been one. If there is to be a finding of a contravention, which is a very serious and appealable determination, then it must be clearly stated. It cannot be a casual finding that once and for all prejudices that corporate citizen and its officers and directors.

Similarly, there was no formal finding of contravention against the contractor that could lead to a finding of contravention by the Company. Mere assertions of contravention by either the contractor or the Company are an insufficient basis for a finding of contravention by a director or officer under section 71(4) of the *Act*.

In addition, although the determination states at page 2 that the statutory defences were considered and none applied, there is no analysis indicating how the District Manager arrived at that conclusion.

Further, and more importantly to this issue, there is no indication in the determination that the District Manager properly applied the rest of section 71(4). There is no discussion of any evidence establishing that Mr. Smurthwaite authorized, permitted or acquiesced in the Company's alleged contravention. Consequently, it is unclear as to how the District Manager arrived at his conclusion that Mr. Smurthwaite was liable in his capacity of president of the Company, or whether the District Manager even considered the second stage of the test set out in section 71(4) of the *Act*.

Accordingly, the Commission finds that the District Manager failed to properly apply the legal test set out in section 71(4) of the *Act* in making his determination. Accordingly, there is no evidentiary basis for the determination against Mr. Smurthwaite in his capacity as an officer and director of the Company, nor is there a basis upon which the Commission could evaluate the case against him. On this basis alone, the Commission would allow the appeal.

2. Whether there were errors in the proceedings before the District Manager, and if so, whether the appeal proceedings can correct those errors.

Mr. Smurthwaite argues that the District Manager failed to give him an opportunity to be heard, as is required by section 71 of the *Act*. He maintains that, in undertaking the first step of the section 71(4) analysis, the District Manager had to give the Company an opportunity to be heard and, in undertaking the second step of the analysis, he was required to give Mr. Smurthwaite an opportunity to be heard.

Specifically, Mr. Smurthwaite submits that, because section 71(4) states that a director or officer who authorized, permitted or acquiesced in a corporation's contravention "also contravenes the provision", the director or officer is, like the corporation, "a person who is alleged to have contravened a provision" for the purposes of section 71(1) of the *Act*, and is therefore entitled to an opportunity to be heard. Mr. Smurthwaite submits that this is so due to the plain wording of section 71(1), and the gravity of the liability to which directors and officers are exposed. He argues that he should have had an opportunity to adduce evidence and make submissions to the District Manager regarding to his intent and knowledge or his ability to influence and control the relevant conduct.

He further argues that, inherent in the requirement to be given an opportunity to be heard is a further requirement that he should have been given notice of his potential liability. Specifically, Mr. Smurthwaite argues that he should have been given notice of an investigation into whether he authorized, permitted or acquiesced in the Company's potential contravention, and that such an investigation should have actually been conducted. Mr. Smurthwaite argues that the Investigation Report was directed exclusively at the activities of the Company and its contractor, and raised no possibility that Mr. Smurthwaite might be personally liable. In particular, he submits that:

- the Investigation Report was headed "544559 B.C. Ltd.";
- the contravention is described only in terms of activities on the ground;
- the Investigation Report does not discuss whether Mr. Smurthwaite authorized, permitted or acquiesced in the potential contravention;
- the other reports prepared by Mr. Skafte only deal with the activities of the Company and its contractor;
- Mr. Skafte's letter dated September 10, 2003, refers only to potential contraventions regarding activities on the ground, and not an investigation of whether Mr. Smurthwaite had authorized, permitted or acquiesced in the potential contraventions; and
- the submissions provided by Mr. Smurthwaite to the District Manager were those of the Company and related solely to the Company's potential liability.

Mr. Smurthwaite further argues that, in order for the District Manager to have jurisdiction to make the determination, he had to comply with the mandatory requirement in section 71(1) to give Mr. Smurthwaite an opportunity to be heard. Mr. Smurthwaite argues that the determination is void due to a lack of jurisdiction arising from the District Manager's failure to comply with the *Act*'s mandatory requirements. Mr. Smurthwaite maintains that an administrative decision made without jurisdiction cannot be validated by a statutory appeal tribunal such as the Commission, because if the appealed decision is a nullity then there is nothing to cure. Mr. Smurthwaite further argues that, even if the Commission had discretion to consider his liability as an officer of the Company, it would be highly prejudicial to his rights to do so because he never received an opportunity to be heard by the District Manager, as required under section 71(2).

Moreover, the statutory limitation period for imposing administrative penalties, as set out in section 75(1) of the *Act*, has expired. He submits that the facts associated with this matter first came to the attention of Ministry officials in November 2002, or arguably, March 20, 2003, at the latest.

In support of those submissions, Mr. Smurthwaite relies on two judicial reviews of decisions of property tax authorities under the *Assessment Act*: *Crown Forest Industries Ltd. v. Assessor of Area 24 – Cariboo* (1986), 2 B.C.L.R. (2d) 397 (C.A.), at pages 399-400; and, *Annacis Auto Terminals (1997) Ltd. v. Richmond/Delta Assessor, Area No. 11* (2003), 14 B.C.L.R. (4th) 241 (C.A.), at para. 53 per Finch C.J.B.C. and para. 55 per Newbury J.A.

The Government maintains that there is no statutory requirement that a District Manager must give a corporation an opportunity to be heard before the District Manager can determine that a corporate officer is liable for the contravention. The Government further submits that the opportunity to be heard requirement in section 71 of the *Act* is not a condition precedent to the District Manager's jurisdiction, which if not followed voids the District Manager's determination. Rather, the Government maintains that section 71 simply confirms a common law requirement, in that an opportunity to be heard was, and continues to be, a matter of procedural law. The Government argues, therefore, that a failure to provide an opportunity to be heard does not void the entire process. Rather, it is a procedural error that may be corrected by the Commission on appeal.

Additionally, the Government argues that there is no requirement in the *Act* or any other enactment that an investigation report must refer to evidence of authorization, permission or acquiescence of an event.

The Government argues that, if there were any procedural deficiencies in the determination process, the determination is not a nullity because the errors are corrected by the appeal process, which is a *de novo* hearing of the matter. In support of those submissions, the Government relies on the Commission's decision in *Tolko Forest Products Ltd. v. Government of British Columbia* (Appeal No. 95/02, November 12, 1996)(unreported) (hereinafter *Tolko*).

Additionally, the Government submits that both the Company and Mr. Smurthwaite had an opportunity to be heard. In that regard, the Government notes that Mr. Smurthwaite acknowledges that the written submissions he provided to the District Manager were made on behalf of the Company. The Government also notes that the District Manager considered in the determination that the Company had no previous contraventions.

The Government further submits that correspondence from the Ministry indicates that Mr. Smurthwaite was also given an opportunity to be heard. Specifically, the Government maintains that Mr. Skafte's September 10, 2003 letter was sent to Mr. Smurthwaite and it informed him of the investigation. The Government maintains that the letter was addressed to him as president of the Company, and the salutation in the letter was to him personally and not simply to his attention. The Government submits that page 2 of the Investigation Report identifies the persons under investigation as both Mr. Smurthwaite and the Company. In addition, the December 2, 2004 letter to Mr. Smurthwaite was addressed and included a salutation to him personally, and informed him of his opportunity to be heard.

The Forest Practices Board submits that the Company was given an opportunity to be heard before the District Manager, and that Mr. Smurthwaite provided submissions to the District Manager on behalf of the Company. The Forest Practices Board questions whether his submissions would have been any different if he had been given a personal opportunity to be heard. Moreover, the Forest Practices Board argues that the appeal process provided Mr. Smurthwaite with a new opportunity to explain his involvement or lack of involvement in the contravention, and he has failed to do so.

The Forest Practices Board submits that, if there were any deficiencies in the District Manager's procedures, the appeal process can cure them. The Forest Practices Board maintains that the Commission has *de novo* powers, and that the procedural protections required for administrative proceedings are less than those required for offence proceedings. The Forest Practices Board submits that a hearing before the Commission corrects any errors made in the process leading to the determination. In support of those arguments, the Forest Practices Board cites the Supreme Court of Canada's decision in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, as considered in the Commission's decision in *Tolko*.

Commission's findings

The Commission has considered whether the *Act* requires that a corporation that is alleged to have contravened the Acts and a director or officer who is alleged to have authorized, permitted or acquiesced in the contravention are each entitled to notice of the allegations against them, and to opportunities to be heard. The Commission has also considered whether notice of the allegations, notice of an investigation into the allegations, and an opportunity to be heard are prerequisites to the jurisdiction to make a determination. In particular, the Commission has considered the language in sections 71(1) through 71(4) of the *Act*.

Section 71(1) states as follows:

71 (1) The minister, after giving a person who is alleged to have contravened a provision of the Acts an opportunity to be heard, may determine whether the person has contravened the provision.

[underlining added]

The Commission finds that the word "after" means that a determination that a person has contravened the Acts may only be made after the person in question has been given an opportunity to be heard. This indicates that, based on the two-stage test in section 71(4), both a corporation that is allegedly responsible for contravening the Acts and a corporate director or officer who is allegedly also liable for that contravention may each be entitled to an opportunity to be heard before a determination is made against them.

Regarding whether an opportunity to be heard is mandatory, the Commission notes that section 71(1) of the *Act* does not state that an opportunity to be heard "must" or "shall" be given, which would be clear indications of an imperative statutory requirement. However, the section is written in such a way as to indicate that a determination "may" be made regarding a person only after that person has been given an opportunity to be heard.

The Commission has considered the other provisions in section 71 for further clarification. Section 71(2) reinforces that an opportunity to be heard is to be provided to the person who allegedly contravened the Acts before a determination may be made, and an administrative penalty is levied, against that person. Section 71(2) also recognizes that a person may decide not to participate in an opportunity to be heard, and it allows for determinations to be made and penalties to be levied in those circumstances, one month after the person was "given" an opportunity to be heard. That section states:

71 (2) After giving a person an opportunity to be heard under subsection (1), or after one month has elapsed after the date on which the person was given the opportunity, the minister,

(a) if he or she determines that the person has contravened the provision,

(i) may levy an administrative penalty against the person…

[underlining added]

Thus, when read together, sections 71(1) and 71(2) indicate that a determination may be made, and a penalty may be levied, against a person after that person has been given an opportunity to be heard, even if the person does not take advantage of the opportunity to be heard. "Giving" or offering a person an opportunity to be heard is, therefore, an express statutory requirement, but there is no mandatory

statutory requirement that an opportunity to be heard must actually occur as a prerequisite to a statutory decision-maker's jurisdiction. If a person is given an opportunity to be heard but decides not to use it, that does not preclude the decision-maker from making a determination and levying a penalty against that person.

However, the failure to provide an opportunity to be heard is a breach of a statutory right and may render a subsequent decision a nullity.

Regarding the requirements to provide both a corporation and a corporate director or officer with an opportunity to be heard, the Commission notes that those requirements need not be onerous. There are many circumstances where it may be in the interests of all parties to conduct a joint or concurrent opportunity to be heard involving more than one person where those persons face potential liability arising from the same occurrences or the same set of facts. It may save all parties time and expenses to provide a corporation and the corporate director(s) or officer(s) with a joint or concurrent opportunity to be heard regarding their potential liability for a contravention. This is especially so when one person is the sole guiding mind of the corporation. In cases such as the present appeal, where a corporation has only one director and officer, that person could quite conceivably participate in an opportunity to be heard as both a representative of the corporation and in their capacity as a director and/or officer.

However, in the Commission's view, it is important that a director or officer be given clear notice of the dual nature of the proceedings before the opportunity to be heard takes place. This is so despite the fact that providing notice of an opportunity to be heard is not a mandatory statutory requirement, but rather, a requirement of procedural fairness. Such notice would include enough information for the person to understand the nature of the case against them. At a minimum, such notice should at least state the alleged contravention(s). Without notice of the allegations against a person, an opportunity to be heard would be ineffective.

Turning to the facts in this case, the Commission finds that, although Mr. Smurthwaite concedes that he received notice of an opportunity to be heard, in the form of the Ministry's letter dated December 2, 2004, the notice was inadequate in that it did not clearly notify Mr. Smurthwaite that the District Manager was considering making a determination under section 71(4) of the *Act* regarding his liability as president of the Company. The Commission finds that simply providing a personal salutation in correspondence or sending a notice to a corporate director's personal address, rather than a corporate address for delivery, does not constitute adequate notice of a potential determination under section 71(4). At a minimum, there must be some clear indication that section 71(4) is being considered. Virtually all of the Ministry's correspondence in this case, beginning with Mr. Skafte's Road Inspection Reports and culminating in the notice letter dated December 2, 2004, list both Mr. Smurthwaite's name and the Company's name in the address. Sometimes it is addressed to him in his capacity as president, and sometimes it is not. There was never a clear indication in the December 2, 2004 notice, or the other correspondence, that the District Manager was considering

making a determination regarding Mr. Smurthwaite in his capacity as president of the Company and finding him liable under section 71(4) of the *Act*. Given that the usual route is for the Government to name the licensee (or contractor) in any determinations made, there is no doubt that this determination against him in his capacity as an officer and director would have come as a complete surprise.

The Commission concludes that Mr. Smurthwaite was not given sufficient information in the notice regarding the opportunity to be heard to make an informed decision about whether to address his personal liability under section 71(4) during the opportunity to be heard. Although he participated in the opportunity to be heard, it is clear from his submissions to the District Manager that he intended to act on behalf of the Company only. Whether he would have chosen to make submissions on his own behalf regarding his potential liability under section 71(4) is irrelevant at this point. He was not given an opportunity to be heard on whether he "authorized, permitted or acquiesced" in the alleged contravention and/or whether a determination should be issued to him under section 71(4). The notice was inadequate and, based on the evidence before the Commission, the lack of proper notice of the case to be met led Mr. Smurthwaite to misapprehend the purpose of the proceedings and the potential penalty that he faced. Consequently, there was a breach of section 71 of the *Act* as well as a clear breach of the requirements of natural justice/procedural fairness.

The Government and the Forest Practices Board have argued that Mr. Smurthwaite has, through these appeal proceedings, been informed of the District Manager's intentions, and has had an opportunity to respond to the case against him regarding his liability under section 71(4). They argue that Mr. Smurthwaite's silence in the appeal proceedings regarding his actions or omissions, in his capacity as president, should weigh against him in a decision by the Commission. The Commission disagrees.

The flaws in the process leading up to the determination, as well as the content of the determination itself, are serious – they are not mere technicalities or irregularities. The failure to give proper notice that a determination may be made against Mr. Smurthwaite in his role as president of the Company rather than naming the Company itself, ultimately led to a completely flawed and ineffective opportunity to be heard. The determination that was then issued, was equally flawed in that it did not clearly specify that the Company contravened the Acts, nor did it apply the clear test set out in section 71(4) for finding a contravention against Mr. Smurthwaite in his capacity as an officer or director of the Company. It provided no basis for the determination issued. The determination then went on to levy a substantial penalty of $45,000 against Mr. Smurthwaite personally.

In light of the complete failure to notify Mr. Smurthwaite of the possible determination under section 71(4), the complete failure to comply with a statutory requirement to give Mr. Smurthwaite an opportunity to be heard on his role in the alleged contravention(s), the fact that the determination ultimately assessed a significant financial penalty against him personally, and the errors in the determination itself (i.e., the failure to apply the test in section 71(4) of the *Act*),

the Commission finds that the determination cannot be corrected by the Commission, nor would it be appropriate, or even possible in this situation, for the Commission to decide whether Mr. Smurthwaite is liable under section 71(4) of the *Code*. The determination is void and, therefore, a nullity. Accordingly, the Commission need not address the third issue set out in this appeal.

The Commission appreciates the consequences of this finding. While the Government may still issue a determination for the contraventions that occurred in 2002, it is statute-barred from issuing a penalty. The Commission does not take the damage to the important resources involved in this case, or the financial loss to the Crown, lightly. However, given the nature of the errors in this case, the Commission is of the view that it does not have the jurisdiction to correct the errors or to send the determination back to the decision-maker. The determination is fundamentally flawed.

Accordingly, the Panel rescinds the determination as against Darren Smurthwaite.

DECISION

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

For the reasons provided above, the Commission orders that the November 14, 2005 determination and penalty of $45,000.00 against Darren Smurthwaite are rescinded.

The appeal is allowed.

“Alan Andison”

Alan Andison, Chair
Forest Appeals Commission

November 24, 2006