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Best Practices in Advising and Preparing Your Client for an Opportunity to Be Heard

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BEST PRACTICES IN ADVISING AND PREPARING YOUR CLIENT FOR AN OPPORTUNITY TO BE HEARD

I. Introduction[1]

The question of how best to prepare for or approach an opportunity to be heard is not a topic that has received much commentary, nor does it lend itself well to academic study. However, that should not diminish the important role the opportunity to be heard process plays in the forest industry in British Columbia. Opportunities to be heard arise in a variety of forestry related contexts and will affect most, if not all, licensees and contractors at some point over the course of their operations in the province.

Determinations from opportunities to be heard are not published and generally will only make their way into the public domain by reference through appeals brought to the Forest Appeals Commission, a right that is held only by the industrial operators who wish to challenge the determination of the designated decision maker. Accordingly, there is a limited body of jurisprudence that addresses the nature of the process and potential strategies or pitfalls.

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1 Mark wishes, as usual, to thank his colleagues at Hunter Litigation Chambers for acting as a sounding board for some of the points and comments made here and for usually, although not always, putting up with him.

What follows is a collection of thoughts and insights drawn from the author's experience. It is not intended to be exhaustive or to serve as a 'how to' manual for participants in an opportunity to be heard. Rather, it is intended to give readers a general overview of the opportunity to be heard process and to provide some tips, strategies and coping mechanisms for navigating that process in a manner that best protects and serves your client's interests.

Finally, it should also be noted that the commentary that follows is drawn largely, if not exclusively, from the author's experience representing and assisting industry participants in this process. It is anticipated that not every participant in an opportunity to be heard will share the views expressed herein and what follows should be taken in that context.

II. Opportunity to be Heard—What is it Anyway?

An opportunity to be heard is a quasi-judicial process intended, as its name may indicate, to give a licensee subject to a contravention investigation an opportunity to present its side of the story before any contravention is found. It is a creature of statute that likely finds its origins in the common law concepts of procedural fairness. The concept behind an opportunity to be heard is simple – before a discretionary administrative penalty is imposed, the statute requires that the minister (or the minister's designate) provide the person alleged to have committed a contravention an opportunity to be heard.

The right to an opportunity to be heard ("OTBH") arises under a variety of statutes and statutory provisions relating to forestry matters.[2] Most often, an OTBH will arise pursuant to section 71(1) of the *Forest and Range Practices Act*,[3] which simply reads: [4]

> 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.

The "Acts" in this section is a reference to one or more of *FRPA*, the regulations and standards made under *FRPA*, the *Forest Act*, the *Range Act* or a regulation made under the *Forest Act* or the *Range Act*.[5]

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2 See, for example,

> (a) *FRPA*, ss. 16(4) [Determining conformance of an FSP]; 67(3) [Prior to sale of seized timber at public auction]; 97(3) [Prior to suspension of a forest stewardship plan for interference, non-compliance or misleading a person acting in an official capacity]; s. 107 [Determination that an obligation specified in a s. 107 declaration has not been fulfilled]; and s. 164.1 [Cancellation and Disqualification]
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> (b) *Wildfire Act*, s. 17(3.1) [Determination that a person caused or contributed to a fire or spread of fire]; 25(3) [cost recovery]; and 26 [Contravention orders].

3 *Forest and Range Practices Act*, S.B.C. 2002, c. 69, as amended ("*FRPA*").

4 It is worth noting that not all administrative penalties in the forestry context are discretionary. Where the penalty for a contravention is mandatory, an opportunity to be heard will be unavailable: see, for example, *656632 BC Ltd. v. British Columbia*, 2010 BCSC 1311.

5 See section 58.1 of *FRPA*.

In short, section 71(1) operates to ensure that before making a determination that a contravention of any of these legislative enactments has occurred, the alleged wrongdoer is given an opportunity to be heard on the matter.

A. The Process

As a starting point, OTBHs are not mandatory. As set out below, the Ministry will offer an OTBH where it is alleged that a contravention has occurred. Whether to accept that offer is up to the licensee; however, in general, licensees will accept the offer.

Where the Ministry believes that a licensee or contractor[6] has contravened a provision, a notice letter will be sent notifying the licensee of the alleged contravention. That letter will typically state:

(a) the particulars of the alleged contravention (i.e. indicate the provision or provisions at issue with a brief summary of the background facts that give rise to the alleged contravention),

(b) that the author of the letter has been delegated the authority to make a determination under s. 71; and

(c) that the recipient of the letter is being offered an OTBH in respect of the alleged contravention.

The Ministry's evidence package will also usually accompany the letter. In most, if not all, circumstances licensees will want to avail themselves of the offer and participate in the OTBH.

OTBHs may be conducted either by way of written submissions or oral hearing. In the case of an oral hearing, it is a relatively informal process – particularly when compared to court proceedings. There is no written procedural manual or set of rules in place, although the decision maker (usually the District Manager) has both the responsibility and right to control the process. Part of this will generally entail establishing a framework in advance of the hearing for the delivery of materials, giving notice of witnesses and any expert evidence. As a general rule, licensees will be asked to provide their materials between 14 and 21 days in advance of the hearing.

1. Prior to the Hearing

Before the hearing, the Ministry should provide its evidence (as noted it often accompanies the initial letter offering the OTBH) as well as notice of any experts or witnesses that the Ministry intends to have in attendance at the hearing. The licensee should review that material closely and determine what information, documents and witnesses are required to respond to the allegations, to address any potential statutory defences (due diligence, officially induced error and mistake of fact)[7] and to address the factors relating to the penalty. As discussed in section III below, this is often best done with the assistance and input of counsel.

In some circumstances, the Ministry may contact a licensee to suggest that the parties agree to an "Agreed Statement of Facts". As discussed in section III below, determining whether to agree to an

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6 For simplicity, I will use 'licensees' in the balance of this discussion. This should be taken to include contractors or other persons offered an opportunity to be heard unless the context dictates otherwise.

7 See section 74 of *FRPA*.

"Agreed Statement of Facts" and which facts to include in such a document is often best done with the assistance and input of counsel.

A licensee who has been offered an oral hearing may decline and request that the OTBH proceed in writing. In such a case, the determination will be made based on the written submissions and documentary and other evidence exchanged by the parties, without any opportunity to speak or give oral testimony.

2. At the Hearing

At an oral hearing, the procedure is relatively informal. The decision maker, as noted, has the right to control the process and will usually provide an outline of how the hearing is to proceed together with any ground rules at the outset of the hearing.

A licensee has the right to be represented by counsel. Whether it is necessary for a licensee to have counsel appear will depend on the nature and extent of the issues raised in the OTBH. This issue is addressed further in section III below.

Like most administrative and other adjudicative proceedings, the Ministry will have an opportunity to present its evidence first, followed by the licensee. Given the informal nature of the proceeding, witnesses are not generally sworn and typically there is no opportunity for formal cross-examination, although the parties do have the opportunity to question each other's witnesses. The decision maker may also ask questions and, in some circumstances, may offer parties the opportunity to re-examine a witness on a point raised during questions.

The proceeding, while informal, ought to be civil and respectful. The decision maker will likely impose limits in circumstances where that general rule is not being followed.

OTBH hearings will be of various lengths depending on the complexity and number of allegations. Most OTBH hearings are not scheduled for more than one day.

In addition to the presentation of their evidence, the parties may be given the opportunity to make submissions that summarize their position and the evidence.

B. The Determination and Remedies

It is unlikely that the decision maker will render a determination at the hearing. The usual practice is to render a determination in writing, with reasons, sometime after the hearing concludes.

Where a contravention is found, the determination will usually outline the potential remedies available to the licensee which include:

(a) requesting a review based on new information within 21 days of receiving the determination;[8] and

(b) appeal to the Forest Appeals Commission within 21 days of the determination.[9]

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8 See section 80 of *FRPA* and the *Administrative Review and Appeal Procedure Regulation*, BC Reg. No. 12/2004.

9 See section 82 of *FRPA*.

An appeal may be brought either after the determination or after a decision following a review of the determination, but not both.

III. Role and Function of Counsel

A. Role of Counsel— Some General Comments

Counsel can play various roles in respect of an OTBH, ranging from preliminary advice through to attendance and conduct of the hearing itself. Determining when and how much to involve counsel will depend on various factors, including the nature of the allegations raised, the sophistication of the client, cost sensitivity, the positions taken and the nature and extent of the evidence of the Ministry. As a general rule, it will usually be a good idea for counsel to be consulted at an early stage to determine whether and to what extent they should be involved.

In most instances, it is advisable to have counsel involved in some manner in the preparation for an OTBH. Some key areas where counsel can assist include:

(a) assessing the nature of the alleged contraventions, including any legal issues arising out of the alleged wrongs;

(b) assessing the content and nature of the Ministry's evidence;

(c) determining what evidence is necessary to respond to the alleged contraventions, including whether any expert opinion evidence is required; and

(d) determining which statutory or other defences may be available.

Specific aspects of each of these areas are addressed below under "Pitfalls and Challenges".

It is usually unnecessary for counsel to attend the OTBH hearing itself unless the issues raised are primarily legal in nature and require counsel's specialized knowledge or skill set to be effectively addressed. In those limited circumstances counsel's attendance may be advisable or necessary. As well, depending on the level of sophistication of the client some clients may prefer to have counsel attend an OTBH to present their position, as counsel is often more comfortable operating in an adversarial forum (even a relatively informal one like an OTBH) than the client. The desire of the client to have counsel attend an OTBH hearing must be balanced against the fact that having counsel attend the hearing will often change the tone and conduct of the hearing. When counsel attend on behalf of the licensee the Ministry will usually respond in kind and have their counsel attend. This often can add a layer of formality to the proceeding that otherwise would not be present.

B. Pitfalls and Challenges

Some of the pitfalls and challenges that counsel can help avoid or overcome include:

1. Avoiding Admissions

One of the common strategies of the Ministry is to seek agreement on an Agreed Statement of Facts in advance of the OTBH. This is generally sound practice as it can streamline the OTBH and reduce the amount of evidence necessary. Licensees must also be mindful of both their general obligation to cooperate in the investigation process and the fact that the extent to which they cooperate is one of the considerations in assessing any applicable penalty. However, that does not mean that a licensee should blindly agree to the Ministry's articulation of the facts. A balance must

be struck between the licensee's obligation or desire to cooperate and the need to avoid making admissions that may compromise any potential defences to the alleged contravention.

2. Potential Overreaching by Compliance and Enforcement

A common issue faced by licensees in an opportunity to be heard is what may be characterized as overreaching by the Ministry. This is not intended as a criticism of Compliance and Enforcement, who are both obligated and motivated to ensure that alleged contraventions are prosecuted and are simply trying to do their job based on the information available to them. However, in reviewing the alleged contraventions and the evidence the Ministry has advanced to support those allegations, counsel and licensees alike must be mindful of this possibility and be on the lookout for gaps in the evidence (an issue that will be addressed further below), unsubstantiated allegations and, in some circumstances, double jeopardy.[10]

3. Evidentiary and Other Issues Relating to Burden of Proof

In every circumstance, it is critically important to understand and appreciate both the nature of the alleged contravention and the extent and nature of the evidence being advanced by the Ministry in support of the allegations. This serves several purposes.

By understanding the nature of the allegations and the evidence of the Ministry, licensees will be better positioned to determine: (i) what evidence is needed to respond to the alleged contraventions, (ii) whether any of the statutory defences apply, (iii) whether any other defences may be available, (iv) whether additional disclosure is required from the Ministry, and (v) the nature and extent of counsel's involvement, if any. In particular, understanding the nature of the allegations made by the Ministry can be critical in determining what evidence is required and what defences may be open to your client. This is important because the Ministry must prove each of the consistent elements of each alleged offence on a balance of probabilities. Understanding the nature of the allegation and each element that must be proven can often provide opportunities for a licensee to challenge the allegations made.

Take, for example, an alleged contravention of s. 57 of the *Forest Planning and Practices Regulation*. That section requires that primary forest activities must be carried out "at a time and in a manner that is unlikely to harm fish or destroy, damage or harmfully alter fish habitat".[11] To prove the alleged contravention, the Ministry must have included evidence in its evidence package to establish: (i) that the licensee was carrying out a "primary forest activity"[12]; (ii) at a time that it was likely to harm fish or destroy, damage or harmfully alter fish habitat. This, in turn, requires that the Ministry establish on the evidence that the area in which the alleged contravention occurred in fact contained fish or fish habitat.

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10 The principle of double jeopardy arises out of s. 11 of the *Charter of Rights and Freedoms*. While it does not generally apply to regulatory proceedings, the rule against multiple convictions for same offence does. This may have application in some circumstances in the context of an opportunity to be heard, depending on the nature and extent of the allegations made by the Ministry. The potential applicability of this doctrine must be assessed on a case by case basis and is beyond the scope of this paper; however, this is an area where counsel's guidance will clearly be of assistance.

11 *Forest Planning and Practices Regulation*, B.C. Reg. No. 14/2004, s. 57, as amended ("*FPPR*").

12 This is defined in s. 1 of the *FPPR*.

Several potential issues arise out of this example that may point to certain defences being available, including:

(a) Has the Ministry provided evidence to demonstrate that the area affected by the alleged contravention, in fact, contained fish or fish habitat?

This can be important because many streams are classified as fish bearing, or not, simply based on assumptions from prior downstream studies. There may be natural barriers between those areas and the area of the alleged contravention such that the area in question was in fact not fish bearing. This is a factual issue that may require expert evidence to assess or refute. Often the Ministry will not have conducted any independent assessment to confirm whether a particular stream or reach is fish bearing. If the licensee is able to gather evidence to show that the area did not contain fish or fish habitat, this can defeat the allegation.

(b) Did the 'primary forest activity' in question actually harm fish or fish habitat, or was it carried out in a manner that meant it was likely to do so?

This may require opinion evidence to establish that the activity in question actually harmed fish or destroyed, damaged or harmfully altered fish habitat. Implicit in the statutory language is the recognition that not all alterations of fish habitat will be harmful. If the Ministry has not adduced any opinion evidence to establish this aspect of the allegation, it may be open to the licensee to argue that the Ministry has failed to prove the constituent elements of the allegation. Depending on the circumstances, a licensee may also wish to consider whether expert opinion evidence may be led to establish that no fish were harmed and any existing fish habitat was not destroyed, damaged or harmfully altered.

(c) Was the 'primary forest activity' carried out at a time in which it was likely to harm fish or fish habitat?

This requires an assessment of whether there were times at which the forest activity could have been carried out which would have been less likely to harm fish or fish habitat. This may require opinion evidence.

(d) Are there references to photos, documents, studies or other information in the Ministry's evidence that have not been included in the evidence package?

Often times, the Ministry's materials will include reference to other pieces of information which have not been included in their evidence package. Licensees and counsel should be mindful of this when reviewing and assessing the Ministry's material. Where there are missing documents, photos or other data, that information should be requested from the Ministry before finalizing or completing any substantive response to the allegations.

(e) What steps or processes did the licensee implement to ensure that the 'primary forest activity' in question was carried out at a time or in a manner to minimize the risk of harm to fish or fish habitat?

This issue engages consideration of the statutory due diligence defence and requires an assessment of the licensee's internal processes and the steps taken to try to avoid the alleged contravention.

The foregoing example is not intended to be exhaustive, but illustrates the importance of understanding the nature of each of the allegations advanced by the Ministry.

4. Determining Whether and When to Engage Experts

As the example set out in the previous section highlights, to effectively respond to elements of an alleged contravention expert opinion evidence may be required. Where the Ministry's evidence package includes expert evidence in support of the alleged contravention, this is a clear indication that the licensee should engage one or more experts to assess the Ministry's position and to respond as appropriate. In other circumstances, as in the fish habitat example above, the nature of the allegation advanced by the Ministry may indicate that expert opinion evidence could assist in defending the allegation, even where the Ministry has not called any opinion evidence to support its position.

In either circumstance, it is generally advisable to involve counsel in the engagement of experts to ensure that any work product and dialogue with the expert is appropriately protected by privilege unless and until such time as the expert evidence is adduced at the opportunity to be heard.

5. Addressing Available Defences— Statutory or Otherwise

An important area that can often be overlooked by licensees in their evidence package relates to the statutory defences available under section 72 of *FRPA*, namely the defences of (a) due diligence, (b) mistake of fact, and (c) officially induced error. While the potential scope and application of each of these defences is beyond the scope of this paper, it is important to note that licensees should ensure that these defences are considered and, where appropriate, that their evidence package and any related submissions address them.

Of these, the most common defence is the defence of due diligence. In addition to ensuring that licensees address this defence, where appropriate, in their evidence and accompanying submissions, it is worth noting that valuable lessons can be learned through the OTBH process. The defence of due diligence is not a static concept. What is considered due diligence will evolve over time and is not to be assessed with the benefit of hindsight.[13] Participating in an opportunity to be heard provides licensees with a measuring stick against which their existing processes may be measured. An unfavourable outcome at an OTBH (e.g. a finding that the licensee was not duly diligent) can provide important guidance to industry on how to adapt and improve those processes going forward.

6. Addressing the Penalty

One final area in which counsel can be of assistance is in ensuring that the licensee's evidence and submissions appropriately addresses the issue of the appropriate penalty for the alleged contravention, in the event that the Ministry is successful in demonstrating that a contravention occurred and that none of the statutory defences applies or have been established. Maximum penalties are typically prescribed for the various contraventions by the applicable statutory regime, most often the *Administrative Orders and Remedies Regulation*.[14] The specific penalty applicable to any particular contravention will fall somewhere between zero and the prescribed maximum and is determined by the decision maker following the opportunity to be heard with reference to the factors prescribed by section 71(5) of *FRPA*, namely:

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

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13 See, for example, *R. v. British Columbia Hydro and Power Authority* (1997), 25 C.E.L.R. (N.S.) 51 at paras. 54 and 55; and Ministry of Forests and Range. *Assessing Due Diligence as a Defence*. BSB and C&E Advice Bulletin #14. April 2003. at pp. 7 to 8

14 *Administrative Orders and Remedies Regulation*, BC Reg. No. 178/2014, as amended.

(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.[15]

Licensees and counsel must ensure that any evidence pertaining to the above noted factors is included in the licensee's evidence package and addressed in the accompanying submission. In addition, the Ministry's materials should be reviewed carefully to ensure that any inaccuracies (e.g. inclusion of prior contraventions that are dissimilar) are addressed.

IV. Managing the Client and the Process

Client management is one of the more important tasks of counsel in any context, and an OTBH is no different. More sophisticated clients may often think that they can handle preparing for and attending an OTBH hearing with little or minimal support from counsel. Less sophisticated clients may try to defer too much to counsel or, conversely, take the OTBH too lightly and fail to respond appropriately. The best approach is generally somewhere in between these extremes.

There are five general guidelines or rules of thumb that should assist any person responding to an opportunity to be heard in an efficient and appropriate manner. First, anyone confronted with an alleged contravention and an opportunity to be heard should seek advice early from counsel or other advisors. Obtaining appropriate guidance at an early stage of the process can help to avoid pitfalls or issues later.

Second, licensees should be mindful to ask for (and take) the time they need to respond appropriately to an opportunity to be heard. The Ministry will often try to push for quick hearing dates following the acceptance of the offer of an opportunity to be heard. Licensees should ensure that they have sufficient time to marshal the evidence necessary to respond appropriately, particularly where the outcome of the OTBH could have broader implications for the licensee's operations (e.g. because it involves a matter of principle that would have broader application). Requests for additional time should be made as necessary.

In some instances, the Ministry's desire for an early hearing date may be motivated by the need to ensure that the OTBH is held and a determination issued within the three year limitation period imposed by s. 75 of *FRPA*. In those instances, licensees should consider whether to waive any limitation defence that may accrue in order to ensure that they have sufficient time to gather the evidence required to appropriately respond to the allegations. In each instance, the merits of doing so will need to be based on an assessment of the circumstances at play, including the nature and severity of the allegations and the time required to gather the necessary evidence.

Third, licensees must always appreciate that evidence is critical— on both sides of the OTBH. The Ministry's package must be reviewed carefully to ensure that (i) any gaps in their evidence are identified and addressed in the licensee's responsive submissions, (ii) any errors or omissions are addressed and corrected in the licensee's evidence, and (iii) any issues requiring response, including

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15 To date, no further considerations have been prescribed.

expert opinion, are identified and appropriately addressed with responsive evidence. As noted above, this is an area in which counsel may be of particular assistance.

Fourth, licensees must ensure that their materials are responsive to all three elements of an alleged contravention: (a) the constituent components of the alleged contravention, including any underlying facts; (b) any applicable statutory or other defences; and (c) the appropriate penalty. Put another way, licensees should ensure that their evidence and any submissions made at the OTBH address the merits of each alleged contravention, any applicable defences and the issue of penalty in the event that a contravention is found and no defences are made out.

Finally, licensees should always take an OTBH seriously and put their best foot forward in responding to the alleged contraventions. As noted above, past contraventions are one of the factors that can influence the quantum of penalty imposed in any given situation. As such, there are potential future ramifications for any contraventions found. It is important therefore to ensure that a licensee asserts as strong a defence as possible to any allegations. This means fully assessing and understanding the allegations and ensuring that the evidence necessary to respond is appropriately marshalled and put together with a cogent submission that addresses the allegations in a fulsome manner, advances any available defences and highlights why a small penalty, if any, would be appropriate.

The end game of an OTBH is simple: to defeat the alleged contravention, either on its merits or through establishing one of the available defences. The case should be organized and developed to achieve this goal or, in the event of an unsuccessful result, to best position your client for a potential appeal to the Forest Appeals Commission. While an appeal to the Forest Appeals Commission is a hearing de novo and is not limited to the record from the OTBH, structuring your case appropriately before an OTBH can assist in crystallizing the issues for any potential appeal and can also make preparing for any such appeal more efficient.

V. Concluding Remarks

An opportunity to be heard is an unusual process. Licensees who are alleged to have contravened one of the statutory requirements applicable to their operations are given an opportunity for a hearing that is adjudicated by one of the principals (usually a District Manager) of the entity that is alleging the contravention. It is largely informal with no clear rules of procedure, yet can have potentially serious consequences for a licensee. Despite these and other potential shortcomings, it is the process that has been blessed by the legislature and licensees should clearly make the best of it.

Notwithstanding the informal nature of the process, licensees should be encouraged to involve counsel at an early stage, at least in an advisory role to ensure that the allegations are fully understood and to provide guidance on how best to respond. Involving counsel early in this regard can avoid potentially difficult situations later and ensure that realistic timelines can be achieved.

Licensees should be encouraged to always hold the Ministry accountable in this process. Obtain expert evidence when necessary to respond to allegations. Do not hesitate to request additional information or copies of documents, studies, photographs or other materials referenced in the Ministry's materials. Similarly, do not hesitate to request additional time to ensure that the licensee has sufficient time to prepare its response in a fulsome manner.

Finally, licensees must always ensure that their evidence and submissions fully address each of the three elements of any alleged contravention – the merits, any applicable statutory defences and the appropriate penalty. Doing so will put your client in the best position to succeed at first instance

and, if not, will position the client well to assess and, where appropriate, bring any potential appeal to the Forest Appeals Commission.