

## **Appeals to the Forest Appeals Commission On the Basis of Written Submissions –**

### **Advantages and Pitfalls**

#### ***Introduction***

A party subject to an incorrect administrative determination of the Ministry of Forests and Range (the “MoF”) may wish to appeal the determination as a matter of principle. The incorrect determination may have consequences beyond any financial penalty:

- domestic and international public relations;
- operational precedent;
- future penalty assessments;
- certification compliance requirements;
- reputation with the MoF.

However real, these consequences are sometimes difficult to quantify in terms that are comparable to the immediately quantifiable costs that are necessary to pursue an appeal to the Forests Appeal Commission (the “Commission”). If the financial penalty associated with the determination is nominal or non-existent (as is often the case), the person subject to the contentious determination has to undertake a sometimes difficult and slippery calculus as to whether the point of principle justifies the costs of an appeal. The Commission’s policy against awarding costs other than in the most egregious circumstances adds to this difficulty: even if an appellant ultimately succeeds on the matter of principle, it will still come out a financial loser, at least in terms of immediately quantifiable dollars and cents.

One possibility that may reduce the financial costs of an appeal is to have it conducted on the basis of written materials only. Of course, the written appeal procedure is potentially available for any appeal regardless of whether it is commenced purely as a matter of principle or also on account of the immediate financial consequences of the determination at issue (for example, a stumpage appraisal or a major trespass determination). That said, the possibility may appear even more attractive when the determination does not have an immediate financial impact on the balance sheet, and the prospective appellant simply wishes to appeal the determination on the basis that it is wrong and reflects poorly upon that party.

*This article provides a general overview and does not constitute legal advice. Persons requiring further information or advice should contact Jeff Waatainen at 250.758.9485 or [jeff@bcforestrylaw.com](mailto:jeff@bcforestrylaw.com).*

## ***How it Works***

The authority of the Commission to conduct an appeal only on the basis of written materials is somewhat obscure. There is no express statement of this authority in the legislation. Instead, the legislation requires that the Commission hold a “hearing”. The Commission’s jurisdiction to conduct an appeal only on the basis of written materials comes from a broad interpretation of “hearing”. This interpretation finds implicit support from another part of the legislation to the effect that no person is entitled to an “oral hearing” as of right. If the Commission is required to hold a “hearing”, but an appellant is not necessarily entitled to an “oral hearing”, then the definition of “hearing” must include more than just an “oral hearing”. In the absence of express language to the contrary, the Commission may conduct a “hearing” using any procedure that complies with the administrative law principles of procedural fairness that apply in the circumstances. In other words, the Commission may conduct an appeal on the basis of written materials if it is fair and reasonable to do so.

*The Forest Appeals Commission Procedure Manual* (the “Manual”) sets out the Commission’s comments on the written hearing procedure. To engage this procedure, the Manual states that a party should make a request to the Commission as soon as possible. Often, an appropriate time to make this request is in the statement of relief included in the notice of appeal. However, as long as there is a reasonable explanation for any delay, a party may request the written appeal procedure at virtually any time, even if the Commission has already set an appeal down for an oral hearing.

Once a party has made a request for the written hearing procedure, the Commission will determine whether this procedure is appropriate in the circumstances—a party to an appeal is not entitled to the written hearing procedure as of right. The Manual states that the Commission may consider a number of factors:

- the expense of an oral hearing;
- whether the appeal raises question of law only;
- whether the credibility of evidence is an issue.

Another reason the Commission may accept a request for the written appeal procedure is if the parties to the appeal agree to the procedure. The MoF and the Forest Practices Board are sometimes just as eager to reduce the burden of an appeal on their resources as is an appellant. While the Commission does not necessarily just rubber stamp any proposed agreement that comes before it, as a general proposition the Commission’s tendency is not to interfere with agreements that the parties may come with respect to the disposition of an appeal.

Once the Commission receives a request for the written appeal procedure, it will write to the other parties to ask for any comments they may have. If the parties have already come to an agreement, then one of the parties simply needs to advise the Commission of the agreement, and request the Commission to proceed in accordance with the agreement. Even if the parties have not come to an agreement in advance, the Commission may well still agree to proceed on the basis of the written materials so long as it does not receive any objections. If a party does object to the written hearing procedure, or the Commission itself has reservations about the appropriateness of the procedure under the circumstances, then the Commission will likely provide an opportunity to respond to any concerns before it makes its decision.

If the Commission agrees to conduct an appeal on the basis of written materials only, the parties are then required to present their entire submissions in writing, including all evidence and legal authorities. The appellant is required to file its materials first, and then the MoF and any other participants are typically required to file their written materials two weeks to a month later. The appellant is then entitled to file materials in reply—again, typically another two weeks to a month later—and then the parties may file “closing comments” if they choose to do so. The Commission may then address specific questions to the parties in writing if it requires clarification. Once the hearing has closed, the Commission will then make a decision based only upon the written materials filed before it.

### ***Advantages of the Written Hearing Procedure***

The major advantage of the written hearing procedure is that it forgoes the additional time and expense that accompanies an oral hearing. An oral hearing will require the parties to spend virtually the same money and effort required for a written hearing plus a whole lot more. This includes the time simply spent at the hearing itself, both for a party’s staff, its counsel, and witnesses. This significantly increases the financial costs of an appeal and takes resources away from a party’s day-to-day operations insofar as a party’s employees are needed at the hearing.

But this is just the tip of the iceberg. Before the hearing, a party will have to prepare its witnesses, and prepare to cross-examine opposing witnesses. The witnesses themselves will have to prepare to give their own evidence, and prepare for cross-examination. This additional preparation will consume more time and resources than the actually hearing itself. And if a party chooses to skimp on preparation, then it may as well not have bothered with the appeal in the first place.

There are other additional costs associated with an oral hearing. While opening and closing arguments should largely reflect the written submissions a party will already have prepared for the hearing, parties need to tailor their arguments to the evidence that actually emerged at the hearing (as opposed to the evidence that was anticipated before the hearing). This, again, will take more time and additional resources. Disbursement costs such as photocopying and transcript charges are typically higher with an oral hearing, and there are also travel, hotel, and meal costs for all persons a party needs at the hearing.

Not only does a written hearing avoid these costs, but the savings may provide a prospective appellant with better opportunities to pursue an appeal. For example, the written hearing procedure may allow some parties to pursue an appeal in circumstances where they could not otherwise justify the expense of an oral hearing. Or, an appellant who would otherwise have pursued an appeal, but would have represented itself at an oral hearing as a cost saving measure (a practice I would not typically recommend) may have the opportunity to retain counsel to take conduct of a written appeal instead.

An oral hearing can be stressful as well. While some appellants are familiar with the procedure, and are comfortable giving evidence and answering hostile questions on their feet, others are not. Even the most competent professional in his or her field can lose sleep over an upcoming cross-examination, particularly if not familiar with the process.

Finally, in a written hearing, each party is largely in control of its own evidence. A party to a written appeal chooses what documents it puts into evidence. While that evidence is

exposed to some scrutiny in that the other side is able to comment on its significance and present its own rebuttal evidence, one party cannot force the other party to provide evidence in a written appeal that contradicts the other party's own case. In contrast, each party has the opportunity to cross-examine the other party's witnesses under oath at an oral hearing, and can force evidence out of the other side that damages the other side's case. In a written appeal, there is less risk that a party will trip over its own shoelaces.

### ***Difficulties of the Written Hearing Procedure***

The biggest problem with the written hearing procedure is that it is not well-suited to resolve apparent conflicts of evidence. While a choice between an official, signed document that clearly demonstrates the facts at issue, on the one hand, and a hard copy of a brief email with some obscure reference that may or may not contradict the first document, on the other hand, is unlikely to cause much difficulty for the Commission, assessing the reliability of documentary evidence is not always so simple.

Most problematic are conflicts in expert opinions. An appeal may relate to technical factual circumstances that invites the assistance of expert opinion. An appellant may, accordingly, pay for and submit an expert's report to provide evidence in support of its theory of the case. But to the dismay of the appellant, the MoF or the Board may subsequently submit their own expert reports that may appear to contradict the appellant's expert evidence. In these circumstances the Commission is placed in a difficult position: it is, essentially, asked to choose between the opinions of two qualified experts when it may not have the capacity to do so on its own.

Contradictions in expert opinions are often more apparent than real – usually, the contradiction is not, in fact, a flat out disagreement as it may first appear. Rather, the experts may have considered different factors or made different assumptions; they may have addressed different questions or emphasized different aspects of a question; or they may have operated at different levels of generality or specificity, or placed different limitations on their opinions. At an oral hearing, the Commission, with the assistance of the opposing parties, is able to scrutinize the expert opinions, draw out meaningful distinctions and, thereby, better assess the applicability of the opinion to the issue in dispute.

This is difficult to do with the written hearing procedure. While, parties may offer rebuttal expert evidence or criticize the applicability of opposing expert evidence, the Commission will not put up with much of this before it announces that it is unable to make a decision without an oral hearing and cross-examination. The appellant who made its decision to proceed with an appeal on the basis of the written hearing procedure will then find itself with an unfortunate set of alternatives: proceed with the oral hearing and incur far greater costs than expected; cut a deal with the other parties (if there's one to be had) that is unlikely to achieve the appellant's objectives for its appeal; or cut its losses and abandon the appeal (as well as the resources the appellant already invested in the appeal).

The mechanics of just how evidence gets before the Commission raises additional problems for the written appeal procedure. The Commission does not consider itself bound to strict courtroom rules of evidence, and this flexibility usually enables the Commission to accept documentary evidence that is referenced in and filed with a party's submissions. Nevertheless, a party to a written appeal before the Commission needs to keep in mind that the statements made in its submissions, on their own and without more, are not evidence.

In an oral hearing, verbal evidence supports documentary evidence. For example, if a party intends to rely upon a statement from a forest stewardship plan, then counsel for that party will have a witness with knowledge of the FSP identify the document. In a written appeal that does not have the benefit of this oral evidence, the Commission is left to assume that the document referenced in the appellant's submissions is, in fact, the FSP. Typically in a written appeal, however, the Commission is not troubled with these assumptions when it comes to the identification of documents, and is willing to overlook the fact that a statement in a written submission that identifies an attached document is not, technically, evidence.

However, the Commission's willingness to make these assumptions diminishes as the importance of the assumption increases. Suppose, for example, that the date a particular document came to the attention of the appellant was of some consequence and, moreover, that this date did not correspond with the date on the actual document. In an oral hearing, the appellant's witness could simply provide verbal evidence to identify the document and to confirm that the appellant did not become aware of it until a certain date. In a written appeal, the Commission may overlook the mere fact that a statement in the appellant's submission that identifies the document is not, technically, evidence; however, it may not so easily overlook this technicality if the statement also asserts a date when the appellant became aware of the document--especially if this date appears to contradict the document itself.

Again, the Commission has flexibility in terms of the documentary evidence it will accept to support an assertion made in a written submission. In the foregoing example, the appellant could support its date with a contemporaneous file note, diary entry, email or letter, and the Commission would likely accept the date (assuming the MoF or the Board does not produce stronger evidence to the contrary). However, parties before the Commission in a written appeal must keep in mind that the Commission's flexibility is limited, and the more important the fact at issue, the more strict the Commission will become.

The point is that a party who wishes to proceed with an appeal to the Commission on the basis of written submissions must make sure that it has the necessary evidence in documentary form to support the important factual assertions it intends to rely on in its arguments. If there are too many gaps in the evidence, the Commission may decide that it needs an oral hearing to dispose of the appeal or, worse, it may decide the appeal against the appellant for a want of evidence.

If in a written appeal there is a gap in the documentary evidence on a fact that is important to a party's case, then that the party will have to file an affidavit with its submissions. An affidavit is a written statement of facts that a person with knowledge of those facts affirms under oath before a notary. An affidavit may allow a party to a written appeal to get evidence before the Commission that would otherwise require verbal testimony. An affidavit is sometimes a simple way to manage gaps in the documentary evidence that might otherwise exist in a written appeal. That said, they are also not without their risks. For example, in response to an appellant's affidavit, the other parties to the appeal may submit their own affidavits that contradict the appellant's affidavit. While the Commission may simply decide to prefer one affidavit over another and make its decision on that basis, it may also decide that it is not in a position to choose between the affidavits. This could lead the Commission to require a limited hearing to conduct cross-examinations of the persons who swore the affidavits; or the Commission could, again, simply declare that it is unable to decide the matter on the basis of the evidence before it, and order an oral hearing of the appeal.

## ***Closing Comment***

Written appeals are ideally suited for those disputes that are of a legal nature--disputes about the legal consequences of agreed upon facts, and not about the facts themselves. Where the facts are agreed upon, or a party is in a position to concede disputed facts without prejudicing its case, the written appeal procedure provides an effective, cost-saving alternative to a full-blown oral hearing.

Sometimes, a joint statement of facts between the parties is helpful, if you can get it. A joint statement of facts can provide some certainty in advance with respect to the evidence, and may help to clarify and confirm the issues in dispute. Nevertheless, an appellant must take care when it negotiates the facts that go into the joint statement. First, the appellant must ensure that the joint statement contains all the facts that the appellant needs to make its case or, if not, that the parties retain the freedom to present evidence of other facts in addition to those that go in the statement. Second, the appellant must ensure that it does not agree to any statement that contradicts its legal position. While this may seem obvious, I have reviewed numerous "draft" joint statements of fact with statements that would have amounted to admissions of liability.

Agreement upon a joint statement of facts is sometimes difficult to come by. Sometimes the parties' seem more interested in advancing their own case in the joint statement rather than coming to a neutral description of the facts associated with the dispute. This is human nature to some extent, but if the parties are only interested in advocating for their position in a joint statement of facts, the chances are that they will not come to an agreement. As well, if the parties do have difficulty coming to an agreement, then perhaps the agreement they thought was there was more imagined than real. Finally, the parties to an appeal may just not have much motivation to commit to a joint statement of facts. After all, if the essential facts of an appeal are not in dispute, or are indisputable, then this will become apparent to the Commission with or without a joint statement of facts. Why tie one's hands?

None of this is to say that only those appeals with no factual disputes are suitable for the written appeal procedure. However, if there are potential factual disputes, the appellant needs to carefully evaluate the nature of these disputes, and how important they are to the Commission's ability to make a decision, before the appellant proceeds with the written appeal procedure. The more important the factual dispute and the more inconclusive the documentary evidence, the less likely the appeal is suitable for the written appeal procedure.