

The Futility of Fairness: Forestry Revitalization Proposals

A FRIEND OF MINE DESCRIBES THE WORD “FAIR” AS A BIG, PINK, FUZZY term that means nothing specific but that everyone nevertheless still likes. His point is that “fairness” is a crutch we use to gloss over difficult questions: after all, everyone is in favour of fairness.

But when fairness is used as a legislative tool, disappointment is inevitably the result. Such was undoubtedly the case with the recent arbitration award in *Powell Daniels Contracting Ltd. v. Cascadia Forest Products Ltd.* that concerned a so-called “fairness dispute” under the Timber Harvesting Contract and Subcontract Regulation (Bill 13) in respect of a forestry revitalization proposal. The respondent licensee had made a proposal that eliminated the claimant contractor’s replaceable contract. The proposal passed a requisite vote of impacted contractors so, if the claimant did not wish to accept termination, it had to file a fairness objection and proceed with mediation and arbitration as contemplated under Bill 13.

Under Bill 13, the sole question in a fairness dispute is whether a proposal applies the allowable annual cut (AAC) reduction criteria “fairly, impartially and without regard to any past disagreements between the parties.” As a matter of definition, there are four AAC reduction criteria under Bill 13, and the arbitrator concluded that the proposal satisfied each one. The arbitrator also concluded that there was no evidence that past disagreements played any role in the application of the AAC reduction criteria, so the dispute turned on whether the criteria were applied fairly and impartially. This is where the use of fairness as a legislative tool breaks down.

The arbitrator purported to apply objective fairness. To the arbitrator, this means that “the licence holder must not discriminate against, or favour one contractor over another for reasons unrelated to the fair and equitable application of the AAC reduction criteria.” Yet, this notion of objective fairness appears to add nothing to the requirement of impartiality. If this is all that is required for a proposal to fairly apply the ACC reduction criteria, then the requirement to apply these criteria impartially seems entirely redundant. But, as the arbitrator acknowledges, principles of statutory interpretation presume that each word used in legislation is intended to add something, so when Bill 13 requires a proposal to apply the AAC reduction criteria fairly and impartially, then both words should represent separate requirements.

While the award references concepts such as equity and justice, it ultimately reduces fairness down to a form of procedural fairness. The award seems to conclude that so long as the licensee acted impartially then objective fairness is satisfied. Specifically, objective fairness does not require mitigation, or any requirement to keep all contractors involved insofar as possible. In other words, the impartial application

of AAC reduction criteria is fair regardless of ... well ... how unfair the substantive result may seem.

But the reason an objective reasonable person would settle upon this conception of procedural fairness is unclear. For example, why wouldn’t the objective reasonable person think that mitigation is fair, or that keeping all contractors involved insofar as possible is fair? Why does objectivity necessarily exclude substantive fairness? Why is the objective, reasonable person concerned solely with impartiality to the exclusion of all substantive factors that may otherwise enter a fairness calculation?

None of this is to say that the arbitrator necessarily arrived at the wrong result. The problem is that the use of fairness in Bill 13 is, at best, next to useless or, at worst, entirely deceptive. It invites those subject to a proposal to believe that they have substantive fairness on their side when, as it has apparently turned out, all they really have is a thin form of procedural protection. Ultimately, if a licensee proceeds in an impartial manner then, based upon the award, it can apply the AAC reduction criteria as it wants regardless of the substantive impact on affected contractors. 🐿

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Correction: The *Resource Road Act* was incorrectly identified as the *Forest Resource Act* in Jeff Waatainen’s article in the May/June issue of **BC Forest Professional**. We apologize for this error.



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