

Forest Practices Code

Advice to Statutory Decision Makers and Their Staff from Compliance & Enforcement Branch

Number 8

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Consideration of Evidence when Making Statutory Decisions

Note: Please note that this bulletin does not constitute legal advice. Compliance and Enforcement Branch provides it as guidance for consideration by statutory decision makers. Statutory decision makers are reminded that the evaluation of evidence in any particular case up to them, and that specific circumstances must always be considered.

Introduction

British Columbia's forestry legislation makes extensive use of statutory decision makers (SDMs) for two primary reasons:

1. Forest management is a discipline that relies heavily on the site-specific application of judgment and experience.
2. For most of the specialized decisions necessary for regulating forest management on public lands, SDMs are more suitable and more efficient than the courts.

In order to make decisions which will withstand legal scrutiny, SDMs must:

- Consider and interpret the law;
- Establish the facts which are relevant to the decision;
- Apply the law to the facts to make a decision; and
- Provide a rationale for the decision.

Establishing the facts for a statutory decision is done by consideration of the evidence by the SDM. ***The purpose of this bulletin, then, is to assist SDMs to weigh the evidence before them to establish the facts necessary to make a defensible statutory decision.***

Accordingly, this bulletin is meant to apply only in the administrative remedy context and not to prosecutions. The principles identified here are useful for both approval/non-approval determinations and for contravention/penalty determinations.

The Relationship between Evidence and Facts

An SDM obviously cannot make determinations based solely on abstract legal principles - a rational and defensible decision can only be made by applying the law to the specific facts in each case. It is the SDM's role to find, or determine, the facts and those findings must be based on evidence.

Evidence is generally classified into three different forms:

1. **Oral Evidence** - also called verbal or viva voce testimony.

2. **Documentary Evidence** - evidence presented in written form, for example written statements of witnesses or suspects, affidavits, certificates, business documents, scaling records, license documents, operational plans, application forms, maps, etc.
3. **Real Evidence** - physical objects, for example "cookies" cut off a log. Photographs and sketches may be classified as real evidence or as documentary evidence.

Evidence can be further classified as direct or circumstantial:

Direct evidence goes directly to prove a fact at issue. A fact at issue, or "material fact", is one which a party must prove in order to support his or her case (see discussions below under the headings "Burden of Proof" and "Elements to be Proved".)

Circumstantial (or indirect) evidence does not, itself, prove a particular material fact - rather, it helps establish other facts from which the SDM can draw an inference or conclusion about a material fact.

Take, for example, the case of a person who is being considered for a monetary penalty for unauthorized harvest - falling a large cedar tree on vacant Crown land. One material fact that the Crown must prove is that the person suspected of the contravention "cut, damaged or destroyed" the tree. If a witness testifies that he saw the person holding a chain saw against the tree, saw sawdust flying, and saw the tree fall, then that is **direct evidence** that the person cut down the tree. On the other hand, it would be **circumstantial evidence** if the witness only heard a chain saw running and subsequently saw the suspect person covered in sawdust holding a chain saw next to the recently felled tree near where the sound was heard. Circumstantial evidence is usually entitled to *less weight* than direct evidence (the concept of weighing evidence is discussed in more detail below), but it can still be of significant value. In the above circumstances, the SDM could infer that the person holding the chain saw also felled the tree.

As mentioned above in the introduction, decision making powers are conferred on SDMs partly because of their expertise. The SDM may apply his or her expertise in assessing the evidence, and may take notice of commonly accepted incidental facts within his or her specialized knowledge. For example, facts that are generally recognized within the forest industry, the forestry profession or the general community need not be formally proven. However, the SDM must not rely solely on his or her own expertise for establishing the essential facts upon which the whole decision may turn. **The essential facts should be established upon a foundation of evidence, rather than upon the SDM's personal opinion or intuition.**

Basic Principles of Evidence

In the court system, complex rules of evidence have been developed over the centuries. Most of these rules govern the *admissibility* of the evidence - that is, will the finder of fact (either the judge or a jury) be allowed to consider a particular piece of evidence when establishing the facts in issue in the case before them. Fortunately, the rules of admissibility of evidence for SDMs are much simpler than they are for the courts - admissibility of evidence for SDMs will generally depend on whether or not the evidence is *relevant* to the decision being made.

a. Relevance

Evidence is said to be relevant if it has some logical value in proving the *fact at issue* for which it is being tendered. As mentioned above in the discussion of direct evidence, a fact at issue, or "material fact", is one which a party must prove in order to support his or her case (see discussions below under the headings Burden of Proof and Elements to be Proved). The proponent of the evidence must demonstrate that, based on logic and experience, there is a rational connection between the evidence tendered and the proposition (fact) sought to be established thereby.¹

For example:

A SDM is making a determination as to whether a woodlot licensee failed to leave the required riparian reserve zone (RRZ) on an S3 stream. The compliance and enforcement technician (C&E tech) provides evidence that she measured the width of the stream as 2.0 metres to establish the proposition (fact) that the stream is an S3 stream. The SDM is entitled to consider her evidence because it is relevant - it has some value in proving a material fact, i.e. that the stream is an S3 stream. (Of course, merely establishing the width of the stream is not enough to prove that it is an S3. Evidence that it is a fish stream or that it is located within a community watershed would be another piece of relevant information necessary to prove that it is an S3 stream.)

The administrative law principles of fairness require that an SDM *must* consider all relevant information in making a decision, and that the SDM *must not* base the decision on irrelevant information. In the above-noted example, the C&E tech might tender evidence that the licensee had recently been found responsible for a similar contravention on a timber sale licence in a neighboring forest district. However, the SDM would not be entitled to base his or her contravention decision on that information because it is not relevant. In other words, the information or evidence of the previous contravention does not tend to prove that the licensee did or did not leave the required RRZ on the stream in the current case. (Past contraventions, however, may often be considered in the penalty determination. See discussion below under the heading "Enforcement - Determination of Penalty".)

The SDM must consider any evidence that is relevant to a fact at issue. If the failure to consider relevant evidence affects the fairness of the proceeding, the decision may be overturned on review or appeal. Accordingly, when in doubt as to relevance, it may be advisable to admit the evidence and decide later on whether or not to give it any weight. Of course, SDMs should not allow their decision to be influenced by irrelevant evidence that they have heard.²

b. Weight

The SDM's findings of fact may only be based upon relevant evidence. Once evidence has been determined to be relevant, the next question is how much *weight* or value can be placed upon this evidence? Evidence that has little or no weight may still be relevant to a fact at issue before the SDM. However, once the evidence is accepted as relevant, the SDM must then evaluate it and determine how much (if any) weight should be given to it. The assessment of weight is actually an assessment of the extent to which the evidence is reliable and persuasive.³

Not all relevant information is worthy of being given the same weight. In the above-noted example, suppose the C&E tech had not measured the stream width, but had only estimated its width visually. Her evidence on the width of the stream would still be relevant, and the SDM would be entitled to consider it, but it would be of less value or weight than an actual measurement. Similarly, evidence of the stream width taken at only one point would be worthy of less weight than evidence of a series of measurements over a 100 m reach of the stream.

In the context of an approval/non-approval determination, assume that a licensee has submitted a forest development plan (FDP) for review and comment. On referral, or during public review and comment, a person advises that he flew over a portion of the area under the plan several years ago, and from the air saw some tracks in the snow that he thought might be caribou tracks. On the basis of this observation, he ventures the opinion that that area is critical winter caribou habitat and that the licensee should delete the cutblock that is proposed there.

The first step is for the SDM to decide whether the information is relevant to the plan approval/non-approval decision. The tendered information is some evidence as to the existence of a particular forest resource (caribou) within the area under the plan, and accordingly is relevant to the decision being considered.

The second step is for the SDM to decide how much weight to give that information. The SDM will have to consider a number of factors: How long ago was this observation made? What are the person's qualifications for determining caribou tracks from other types of tracks? Is it possible for even an expert biologist to be reasonably sure what kind of tracks these were by observing them from an airplane? Is there any other evidence to support or to contradict the proposition that caribou are present in the area? Does the person have any personal stake or interest in the outcome of the operational plan determination?

After weighing and considering evidence on the issue as to whether there are caribou in the area under the plan, the SDM will then have to consider evidence as to what effect, if any, the proposed development activity may have on the caribou. The SDM would then apply his or her understanding of the law to the facts. He or she would determine which provisions of the law apply to the situation. (Assume in this example that the appropriate provision is section 41(1) of the *Forest Practices Code of British Columbia Act*.) The SDM would then rely on the facts established by the evidence to decide whether it is more likely than not (i.e. on a balance of probabilities) that the proposed plan "was prepared and submitted in accordance with" the law, and whether it "adequately manages and conserves" the forest resources.

For more detail on the two-part statutory test in section 41(1) of the *Forest Practices Code of British Columbia Act* (the FPC Act), see the bulletin "[Application of Section 41\(1\)\(b\) of the Forest Practices Code of British Columbia Act](#)".

"Elements" Requiring Proof

For each contravention determination, there are certain material facts or "elements" that must be proved.

Primary elements are those that are common to every contravention determination. The primary elements are:

- the identity of the person suspected of the contravention;
- the time of the contravention; and
- the place the contravention occurred.

Secondary elements are those that are set out in the legislation and that are specific to the individual contravention. For example, suppose a determination is being made against a person under section 86 of the FPC Act for failure to report a fire. In order to make a finding of contravention the SDM will require evidence on each of the primary elements, and on each of the following specific secondary elements as set out in section 86:

- the person suspected of the contravention saw
- a fire
- within 1 km of a forest

- apparently unattended or burning without any precautions
- and did not immediately report.

The "primary/secondary elements" concept does not apply to approval/non-approval determinations. See the discussion of approval/non-approval determinations below under the heading "Burden of Proof".

Burden of Proof

For purposes of this bulletin, the term "burden of proof" relates to the party that has the obligation to prove a particular fact or proposition. In contravention determinations, it is the Crown that bears the burden of proving that the alleged contravention occurred, that it occurred at a time and a place that brings the matter within the jurisdiction of the SDM and that it is the person suspected of the contravention who committed the contravention. In other words, the Crown must prove the primary and secondary elements of the contravention or no finding of a contravention can be made. This "burden" arises primarily because of the *presumption* in law that "A person is innocent until proven guilty".

Once the Crown has tendered evidence to prove those facts, the burden shifts to the person suspected of the contravention to present evidence on any applicable defence. Considering again the above-noted RRZ example, once the Crown's evidence has been tendered to prove all the necessary elements of the contravention, the licensee will bear the burden of proving either that the logging in the RRZ was lawful (i.e. it was done with authority), or that he has a defence such as due diligence or officially induced error.⁴ Only once the licensee has proven the facts necessary to establish a defence will the burden of proof shift back to the Crown to show that the defence is either not established or not applicable.

The concept of 'burden of proof' is of less significance in the case of approval/non-approval determinations. An applicant for either a discretionary approval (such as a free use permit), or a mandatory approval (such as an operational plan approval) has the burden of satisfying the SDM (that is, proving to the SDM) that all the legislated eligibility criteria, if any, are fulfilled and that the approval should therefore be granted. However, there is no presumption in law either for or against most approvals/non-approvals. The SDM has a duty to consider all the relevant evidence and circumstances of the particular application to determine whether or not it is appropriate to grant the approval, and should be prepared to provide a written rationale as to why the approval was or was not granted. If a decision rejecting a plan or application is subsequently challenged, for example by judicial review, the SDM has the burden of showing why the approval was denied.

Standard of Proof

What does it mean to "prove" a fact for the purpose of making a statutory decision? It does not mean proof to 100% absolute certainty. The degree of proof required for statutory decisions is known as "proof on the balance of probability" or "the preponderance of evidence". This is in contrast to the standard of proof in criminal cases, which is "proof beyond a reasonable doubt".

The difference between these two standards has been described as follows:

"To understand these concepts better, imagine the familiar symbol of the scales of justice. Imagine that during the course of the [opportunity to be heard] the two parties [Crown and licensee] are each putting pieces of evidence in their respective sides of the scale, and that only evidence that is 'credible', or believable, has any weight. At the end of the [opportunity to be heard], the [SDM] looks at the scales. If the party who had the burden of proof [the Crown] has put enough "weighty" evidence into the dish on its side to tip that side down, it will

have furnished a 'preponderance' - the greater weight - of the evidence, and [the contravention will be proven].

But in a criminal case, the prosecutor must have more than a preponderance. He must tip the scales so far down that there is not enough weight in [the defendant's] side to create even a [reasonable] doubt ...about [the defendant's] guilt. Then [the defendant] can be convicted. Criminal lawyers like to think of a preponderance of the evidence as being 51 percent or more of the weight of the evidence produced at trial. No one has ever put a figure on the percentage of the weight needed to satisfy the 'reasonable doubt' standard, but it is generally agreed that it is far more than 51 percent, a much more difficult burden.^{5"}

As one judge described it:

"[The standard for balance of probability] is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the [SDM] can say: '[I] think it more probable than not,' the burden is discharged, but if the probabilities are equal, it is not.^{6"}

Whether or not a fact is proved depends on whether the SDM is 'satisfied' that it is, based upon the totality of the circumstances on which the statutory decision is formed including the gravity of the consequences of the decision. What amounts to 'satisfaction' will vary with the issues involved. Degrees of 'satisfaction' vary along a continuum dependent on all the circumstances and consequences of a particular case.⁷ The more trivial the issue, the more easily and swiftly will 'satisfaction' materialize. The more momentous and serious the consequences, the greater the caution and deliberation required, that is, the greater amount of relevant evidence before there can be any 'satisfaction' about where the proper decision lies.⁸

Assessing and Weighing the Evidence

As mentioned earlier, the decision making process requires SDMs to:

- Consider and interpret the law;
- Establish the facts which are relevant to the decision;
- Apply the law to the facts to make a decision; and
- Provide a rationale for the decision.

To establish the facts, it is necessary for SDMs to consider all the evidence that is before them. They must first decide which evidence is relevant to the issues to be decided. Then they must weigh and evaluate that relevant evidence to see whether it is sufficient to determine the issue(s) on the balance of probabilities. Any defensible conclusion or decision must be based on and supported by relevant evidence.

The following discussion will focus on specific evidentiary issues.

a. *Credibility*

SDMs frequently have to make findings of fact on the basis of evidence that is incomplete, inconclusive, or contradictory. In such circumstances, SDMs should use their experience and professional judgment in selecting the normally most reliable kind of

evidence, and in assessing the credibility of particular witnesses and items of evidence.⁹ Credibility affects the weight that the SDM gives to the evidence.

Factors that may be considered in assessing credibility include:

- a witness's appearance, demeanour and manner when testifying;
- their ability to observe and describe the events about which they are testifying;
- a motivation to fabricate evidence;
- partisanship towards or bias against one of the parties;
- inconsistencies in their evidence and between their evidence and earlier statements;
- the existence of other contradictory or supporting evidence;
- the probability of the witness's story.¹⁰

The SDM may choose to believe all of a witness's evidence, part of it, or none at all. If the SDM rejects a witness's evidence, reasons for the rejection should be provided in the rationale.

b. *Expert Evidence*

SDMs are frequently required to consider evidence from experts, e.g. professional foresters, biologists, engineers, hydrologists etc. As a general rule, expert evidence should be accorded more weight than evidence from someone who does not have the same level of skill, training, education or experience. However, this is just a rule of thumb - expert evidence must be weighed, like all other evidence, in the context of the circumstances of each case. Information from an untrained individual with a level of local knowledge and experience may, in the right circumstances, be of more value than the expert evidence of a professional who has never been on the site.

Some of the factors an SDM should use to evaluate expert evidence include:

- What are the educational and professional credentials of the expert?
- How much practical training and experience does the expert have?
- Does the particular fact at issue fall within the scope of the expert's skills, training, knowledge and experience?
- Is the evidence based on a field trip to the site in question?

- How much field time was spent on site? Was it adequate to form a reasonable opinion?
- Did the season and weather conditions at the time of the field trip permit an adequate opportunity to observe the necessary site factors?
- Is there either contradictory or corroborating expert evidence?
- Is the expert likely to be biased or partisan?
- How probable or improbable is the expert's evidence? Is it credible? Does it accord with common sense?

Changes were made to the FPC Act in 1998 to put more reliance on "professional accountability". Government staff having the responsibility of reviewing operational plan submissions were encouraged to have "respectful regard" for the opinions of prescribing professionals, and to avoid recommending against approval unless they had "no doubt" that the plan as submitted would not "adequately manage and conserve" the forest resources in the area under the plan. That guidance cannot act as a fetter on the discretion of SDMs. When a licensee submits an operational plan for approval, it is in effect tendering evidence to the SDM to show that the operational plan satisfies the two part test in section 41(1). That evidence consists largely of the expert opinion of the prescribing forester. The SDM must weigh that expert's opinion in the same manner as evidence from any other source. The SDM can give the plan proponent the "benefit of the doubt" only to the extent that the SDM is satisfied on the balance of probabilities that the plan as proposed meets the statutory tests for approval.

Just as SDMs are not bound to follow the advice of experts regarding timber values, they are not bound to follow the advice of experts regarding non-timber values. The SDM has a statutory obligation to consider the entire range of environmental, social and economic values and all the relevant evidence when making a statutory decision. That is an obligation and a perspective that the person tendering the evidence does not share. So, while SDMs should show due consideration for the opinion of experts, they should only give that opinion the weight they feel is appropriate in the circumstances. On the other hand, the SDM should not require the expert to produce evidence approaching the "beyond a reasonable doubt" standard before according it any weight. The standard is "Is it more likely than not?" It should not be necessary, for example, for a MELP biologist to be required to provide photographic evidence of a species of interest in one of the proposed cutblocks in order to satisfy the SDM of its presence there. At the other end of the spectrum, referring back to an example mentioned above, seeing some tracks from the air that may or may not belong to the species of interest is not, in itself, likely to provide sufficient evidence to satisfy an SDM of the presence of the species.

c. *Consistency with Higher Level Plans*

A FDP must be consistent with any higher level plan (HLP) in effect 4 months before the date the FDP is submitted for the district manager's approval or given effect by the district manager. A silviculture prescription (SP) must be consistent with any FDP that is in effect, with any HLP in effect 4 months before the SP is submitted for the district manager's approval or given effect by the district manager in backlog areas or other areas where there is no FDP. Whether or not an operational plan is consistent with an HLP is part of the assessment as to whether the plan meets section 41(1)(a) of the FPC Act.

The degree of consistency should be assessed in the context of the specific circumstances of each case. Being "consistent" doesn't require slavish repetition of the wording of the HLP or precise adherence to every minute element of the HLP. This is the concept that section 1(10) of the FPC Act establishes by providing that consistency between a HLP and operational plan is achieved if they do not "materially conflict". *The Canadian Oxford Dictionary* (1998) defines "material" in this context as "**4a** (often foll. by to) pertinent, essential, relevant (*at the material time*). **b** serious, important, of consequence." In other words, the FPC Act contemplates that it is acceptable to have some minor conflict between an HLP and an operational plan, as long as the conflict is not "serious, important or of consequence".

d. *Results of Review Panel and Forest Appeal Commission Decisions*

Previous decisions by administrative review panels or the Forest Appeals Commission are not "evidence" - they are a tool for helping SDMs interpret the law, and may also provide some guidance as to how SDMs might apply the law to the facts in the case before them. In an administrative regime, previous decisions are not binding on SDMs. While it is desirable for certainty and consistency that similar fact patterns result in similar decisions, each case and each set of facts must be considered on its own merits.

e. *Enforcement - Determination of Penalty*

In the enforcement context, there are two stages where the evidence has to be weighed and considered:

- i. the contravention determination - did a contravention occur and did the suspect person actually commit that contravention?
- ii. the penalty determination - if the person did commit the contravention, what is the appropriate enforcement action or penalty?

Evidence that was not relevant for the contravention determination may well be relevant for determining the ultimate disposition of the case. In the discussion of Relevance on page 3, the example was used of a licensee failing to leave the required RRZ on a stream. It was mentioned that evidence of a previous similar contravention was not relevant to the determination of whether the licensee was responsible for the current alleged contravention. However, once the determination is made that the licensee is responsible for the current contravention, then the evidence of the previous contravention is relevant for the purpose of determining the penalty. Some other relevant considerations for the penalty determination phase are identified in section 117(4) of the FPC Act.

Conclusion

To establish the facts necessary to make a defensible statutory decision, SDMs have to consider all the evidence before them, and then assess how much weight to give to the relevant evidence. Not all relevant evidence has the same value, or weight. Some evidence is worth more than other evidence - it largely will depend on a common sense evaluation of the credibility and importance of the evidence that has been tendered.

Ultimately, the party bearing the burden of proof must present enough evidence to prove its proposition. It is the SDM's responsibility to determine whether he or she is "satisfied" that the proposition has been proven on the balance of probabilities. A defensible conclusion or decision and the rationale for the decision must be based on and supported by relevant evidence.

Contacts

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¹ Delisle, Ronald J., *Canadian Evidence Law in a Nutshell* (1996), 5.

² Blake, Sara, *Administrative Law in Canada, Second Edition* (1997), 50-51

³ Intrator, Daphne, Ontario Social Assistance Review Board training materials (1995), 61 as cited by The Continuing Professional Education Institute, *Fact Investigation, Fact Finding and Decision Making for Administrative Tribunals*, (1998)

⁴ In the administrative remedy context, the defence of due diligence, if proven, will not absolve the licensee from a "contravention" or compensatory penalty, but it will save him from a deterrent penalty. If the licensee proves the defence of officially induced error, the result is that no contravention at all will be deemed to have occurred.

⁵ Bailey, F. Lee, *To Be a Trial Lawyer* (1985), 66.

⁶ *Miller v. Min. of Pensions*, [1947] 2 All E.R. 372, 374 (K.B.)

⁷ Delisle, *Evidence Principles and Problems* (1984), 56

⁸ Fridman, *Standards of Proof* (1955), 33 Can. Bar Rev. 665, 670

⁹ Evans, Janisch, Mullan, Risk, *Administrative Law: Cases, Text and Materials*, Fourth Edition (1995), 645.

¹⁰ Blake, Sara, I, 51