

## **CONFLICT OF INTEREST GUIDELINES FOR STATUTORY DECISION-MAKERS**

### **Purpose**

The purpose of this bulletin is to provide Ministry of Forests and Range staff and, in particular, those with authority to make administrative quasi-judicial determinations, with guidance on how to recognize and manage conflict of interest situations.

### **What's a Conflict of Interest?**

A conflict of interest is a situation in which a decision-maker has a competing interest, sufficient to influence or appear to influence his or her impartial exercise of discretion. In other words, it's a situation of real or perceived bias.

### **Focus of this Bulletin**

In our Ministry, the visibility and risks associated with conflicts are probably highest for those making statutory decisions under delegated authority (DDMs). As such, they are the focus of this bulletin. Nevertheless, the discussion below may also benefit those with statutory authority to exercise discretion in the course of issuing violation tickets, stop work orders or tenures, for example.

This bulletin does not specifically address the circumstance where a professional duty competes with a person's official duty. That issue will require a separate bulletin.

### **Why Worry About Conflicts?**

First, few things do more to undermine respect for decisions, decision-makers and the decision-making process than a conflicting interest or agenda of the decision-maker.

Second, the need to address conflicts is a matter of ethics and natural justice. Ethics and the law require decision-makers to act with integrity and impartiality.

Finally, the failure to operate in accordance with the common law requirement of procedural fairness can result in statutory decisions being overturned. A charge of bias provides a ground on which a person can challenge a determination (and the decision-maker) before the Forest Appeals Commission, the Courts, and the media.

### **Sources of Conflicts**

Conflicts can arise from competing roles and personal interests. Whether the conflict is actual or is simply perceived, all conflicts are important to recognize and manage.

### *Conflicts of Roles*

Conflicts of roles arise when a statutory decision-maker is required to carry out a competing role in the organization. Conflicts between roles can give rise to conflicts of interest in individual cases. If conflicting roles are not adequately managed, they can become systemic, leaving the organization at risk of a judicial finding of institutional bias and a ruling that the entire statutory decision-making regime is without lawful foundation.

### *Conflicts Involving Personal Interest*

Conflicts of personal interest stem from the influence of personal considerations, financial or otherwise, on statutory decisions. The conflict here is between an official duty and a private interest.

### *Actual or Perceived Conflict*

An **actual** conflict exists when a decision-maker is actually biased as a result of a competing interest or role. A **perceived** conflict exists where a decision-maker is not actually biased, but could appear to be in the eyes of a reasonable and informed observer. The law calls this "a reasonable apprehension of bias". Perceived bias is more easily proved and more commonly found than actual bias. The legal effect of a finding of actual or perceived bias is the same: the challenged decision becomes a nullity.

## **Identifying and Managing Conflicts**

There are different degrees of conflict of interest, ranging from the trivial to the serious. Some must be avoided; others cannot reasonably be. Nevertheless, you should be alive to them all and where they are identified, manage them appropriately. The Ministry has to ensure both the reality and appearance of fairness in decision-making. Even where a perceived conflict does not meet the legal threshold of a reasonable apprehension of bias, the Ministry has an interest in minimizing all perceptions of bias. Ultimately, that depends on the good judgment of individual decision-makers.

### *Some Potential Conflict Situations*

The District Manager's (DM) role as supervisor of Compliance and Enforcement (C&E) staff and his or her role as a DDM for the purposes of making statutory determinations can give rise to conflicts. The DDM is required to make impartial determinations about incidents investigated and brought forward by his or her own staff. The reporting relationship between a DM and staff must never be allowed to influence a determination made while performing the DDM role.

The effect of a DDM's determination on an investigator's career, for example, is obviously not a valid consideration for the purposes of making the determination, nor is the effect of the determination on the professional or personal relationship between a DM and his or her staff.

A reasonable apprehension of bias can result from private conversations between a DM and an investigator about a case that is before the DM as DDM. This kind of conflict is easily managed by not discussing cases that are before the DDM for determination.

Conflicts can arise if a DDM permits the supervisor of an investigating officer (such as a District Compliance Leader (DCL) or C&E Supervisor) to assist in drafting a determination that the investigator worked on. An observer might reasonably perceive that the supervisor might, first, have some role in weighing the evidence and, second, have a tendency to give more weight to the investigator's evidence, both of which could influence the final determination.

The principle of natural justice that stipulates "no one shall be a judge in his own cause" has relevance here. That is, an individual with an interest in the outcome of a determination should have no role in the making of the determination. Another administrative law principle — the person who hears, decides — should also be kept in mind in this context. This rule requires that all the findings and conclusions within the determination be the DDM's alone, assuming the DDM ran the OTBH and heard the evidence.

Although it is appropriate for a DDM to get assistance in drafting determinations, care must be taken in deciding who assists and whether that choice may give rise to a conflict.

DDMs who require assistance or who wish to mentor staff might consider requesting assistance from DCLs and C&E supervisors from other districts or from their own non C&E staff. DMs may wish to let other DMs know that their C&E staff are willing and available to assist with determination writing. There is value in mentoring staff in the craft of determination writing, but care must be taken to properly manage actual and perceived conflicts.

Inappropriate behaviour before, during or after a hearing will support a finding of reasonable apprehension of bias. If a decision-maker's words or conduct leave the impression that he or she was not really listening to the person, that his or her mind was made up before the person had finished presenting their case, or that the decision-maker naturally gave more weight to the investigator's evidence, the resulting decision will be ripe for challenge. One of the key features of procedural fairness is the right to be heard. Embedded in this principle is the right to be heard by a decision-maker who will listen to and consider the evidence impartially.

Transparency in the management of conflicts is often fundamental. Where a non-trivial, avoidable conflict is identified, it should be disclosed to interested persons. The person may waive their right to challenge the determination on the basis of the conflict by assenting to it, in which case, the conflict is essentially defused. If the person is not willing to provide their assent, the decision-maker should do what is

reasonably possible to avoid the conflict, taking into account its nature and seriousness.

Where conflicts can not be resolved, you should seek guidance from colleagues and from legal advisors within government.

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