SUPREME COURT OF YUKON

Citation: *Smith v Potvin*,
2021 YKSC 59

Date: 20211123
S.C. No. 21-A0027
Registry: Whitehorse

BETWEEN:

1) MOREY SMITH (Owner/Operator)
2) LUCKEY-ROSE WOOD DEVELOPMENT

PLAINTIFFS

AND

1) RICHARD POTVIN	EMR	
2) JASON HUDSON	FMB	FOREST MNGT.
3) BRYAN LEVIA (Retired)	CM & I	BRANCH

DEFENDANTS

Before Chief Justice S.M. Duncan

Self-Represented — Morey Smith
Counsel for the Defendants — Kimberly Sova

REASONS FOR DECISION

Introduction

[1] The plaintiff, Morey Smith, through his company, Luckey-Rose Wood Development, holds a harvesting licence and cutting permit allowing him to harvest wood in a defined area. He received a ticket under the *Forest Resources Act*, SY 2008, c. 15 (the "*Act*"), in January 2020 for misleading a forest officer in his summary report of the annual volume of wood he harvested. Morey Smith unsuccessfully contested the

ticket in the Territorial Court of Yukon. He has appealed that decision to the Supreme Court of Yukon. The appeal is scheduled to be heard on December 8, 2021.

[2] Morey Smith and Luckey-Rose Wood Development have brought this civil action against three individual defendants, who are engaged in compliance and/or enforcement activities under the *Act* and *Regulations*. The plaintiffs claim the defendants did not follow the policy and procedures under the *Act* when they issued him a notice of non-compliance with the cutting permit conditions and subsequently the ticket.

[3] The broad question to be determined in this preliminary application is whether there is a legal basis for the plaintiffs to pursue their claim against the defendants.

[4] The Yukon government, on behalf of the individual defendants, argues there is no reasonable cause of action and/or that the claim is frivolous and vexatious (Rules 20(26)(a) and (b) of the *Rules of Court* of the Supreme Court of Yukon).

[5] Morey Smith objects. He says the cause of action is the defendants' failure to follow the policy required by s. 40 of the *Act*. He says this failure amounts to negligence and breach of trust, and it resulted in an unfair process.

[6] The following sets out a brief background, the issues, the applicable law, and my analysis and conclusion.

Background

[7] Morey Smith is representing himself. The following background is taken for the most part from an occurrence report he attached to his one-page statement of claim as well as from the Compliance and Enforcement Operational Policy and Procedures document (the "Policy") also attached in part to his statement of claim. The occurrence

report was written by Bryan Levia, a senior natural resources officer, also called a forest officer, and one of the defendants.

[8] Morey Smith was charged in January 2020 with making a false or misleading statement to a forest officer under s. 39(a) of the *Act*. On August 13, 2019, he submitted his harvest summary as required by the permit conditions in which he reported no harvest of wood. A notice of non-compliance was sent to Morey Smith on October 8, 2019, stating that the minimum annual harvest volume of 5m³ of wood must be completed by December 16, 2019. Morey Smith then submitted a revised harvest summary on October 24, 2019, showing 2.265m³ harvested in October 2018, and 2.735m³ harvested in December 2018.

[9] On October 31, 2019, Bryan Levia inspected Morey Smith's licensed harvest area and saw no evidence of harvest over the last year. Bryan Levia requested by letter dated November 1, 2019 that Morey Smith show him by November 15, 2019, the location of his reported harvest. Morey Smith did not respond to Bryan Levia except to advise that he would not speak with him until a previously imposed Communications Protocol in place between Morey Smith and the Client Services and Inspection Branch of the Forest Management Branch was cancelled.

[10] Bryan Levia then included in an email about other matters to Morey Smith a reminder of the December 16, 2019 deadline for compliance.

[11] On December 17, 2019, Bryan Levia conducted a second inspection of Morey Smith's licenced area but found no evidence of harvest of 5m³ of wood. After discussion with the other two defendants, Richard Potvin, the operations manager and Jason

Hudson, head of enforcement, they decided to issue him a summary conviction ticket under s. 39(a) of the *Act* and to recommend cancellation of his authorization.

[12] Morey Smith contested the ticket and was found guilty after a trial in the Territorial Court of Yukon on March 18, 2021. He was fined $100 plus a $15 surcharge.

Issues

[13] Does the plaintiffs' claim that the defendants failed to follow the Policy created under s. 40 of the *Act* constitute a reasonable cause of action? In other words, is it plain and obvious, assuming the facts pleaded to be true, that the plaintiffs' pleading discloses no reasonable prospect of success?

[14] In addition, or in the alternative, is the plaintiffs' pleading frivolous, vexatious or an abuse of process?

Law

[15] Rule 20(26) provides:

> **Scandalous, frivolous or vexatious matters**
>
> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[16] Rule 20(29) provides that no evidence is admissible on an application brought under Rule 20(26)(a).

[17] Although the Yukon government's notice of application is brought under Rule 20(26)(a), (b) and (d), counsel for Yukon government in her outline and oral argument advised she was only relying on (a) and (b). I have considered the applicability of abuse of process here on the basis of the Court's inherent jurisdiction to do so.

Rule 20(26)(a) – no reasonable claim

[18] The Supreme Court of Canada set out the elements of the modern test to be met on a motion to strike pleadings on the basis of no reasonable claim and its purpose in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 ("*Imperial Tobacco*") at paras. 19-25. It must be plain and obvious that the claim has no reasonable prospect of success. The assessment must be done on the basis of the pleading, the particulars, and any documents incorporated by reference. The facts in the pleading must be read generously and accepted as true, unless they are manifestly incapable of being proven. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show.

[19] The purpose of giving the court power to strike a claim with no reasonable prospect of success is to promote litigation efficiency and to reduce time and cost. Weeding out unmeritorious claims allows resources to be devoted to the claims with a reasonable chance of success. "The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice" (*Imperial Tobacco* at para. 20).

[20] The high bar on an application to strike pleadings was confirmed by the Supreme Court of Canada in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 ("*Nevsun*") at paras. 64-66. The court reiterated that the facts pleaded are assumed to be true and that a court must construe the pleading generously and overlook defects that are drafting deficiencies. Only material facts capable of being proven need be accepted as true.

[21] Allegations based on speculation or assumptions, bare allegations or bald assertions without any factual foundation, pleadings of law, or allegations that are patently ridiculous or incapable of proof, do not have to be accepted as true *(Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources),* 2021 YKSC 3 (*"Northern Cross"*) at para. 16, and the cases cited therein).

[22] The pleading should not be struck solely on the basis of the complexity of the issues, the novelty of the claims being advanced, or the apparent strength of the defences to the claim. This test has been applied in the Yukon in *Wood v Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16; *North America Construction (1993) Ltd v Yukon Energy Corporation*, 2019 YKSC 42 *("North America")*; *Northern Cross*; *Grove v Yukon (Government of)*, 2021 YKSC 34 ("*Grove*"); *Mao v Grove*, 2020 YKSC 23; *Brown v Canada (Attorney General)*, 2019 YKSC 21; and *DKA v TH*, 2011 YKCA 5.

Rule 20(26)(b) – frivolous and vexatious

[23] The Supreme Court of Yukon in *Sidhu v Canada (The Attorney General)*, 2015 YKSC 53 at para. 8, adopted the findings of the British Columbia Supreme Court in *Citizens for Foreign Aid Reform Inc v Canadian Jewish Congress* (1990), 91 ACWS

(3d) 362 (“*Citizens*”), on the meaning of the terms “frivolous,” and “vexatious” at para. 47:

> ... A pleading is “unnecessary” or “vexatious” if it does not go to establishing the plaintiff’s cause of action or does not advance any claim known in law; ... A pleading is “frivolous” if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel [citations omitted].

[24] In *McDiarmid v Yukon (Government of)*, 2014 YKSC 31, a decision that has been followed by this Court several times (*Northern Cross*; *North America Construction*; *Vachon v Twa*, 2019 YKSC 37 (“*Vachon*”); and *Wood v Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16), the court described the test for an unnecessary, scandalous, frivolous or vexatious pleading as requiring the defendant to demonstrate that the pleading is groundless or manifestly futile, or that it is not in an intelligible form, or that it was instituted without any reasonable grounds whatsoever or for an ulterior purpose: *McNutt v AG Canada et al*, 2004 BCSC 1113; *Hartmann v Amourgis*, [2008] 168 ACWS (3d) 40 (ONSC) (“*Hartmann*”) (appeal dismissed 2009 ONCA 33). These two referenced cases also considered abuse of process in a way that is consistent with the principles set out below.

Rule 20(26)(d) and at common law – abuse of process

[25] “Abuse of process” has been interpreted broadly by courts. It may be found in *Citizens* at para. 52:

> ... where proceedings involve a deception of the court or constitute a mere sham; where process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose ...

[26] Judges have an inherent and residual discretion to prevent the misuse of the court's process in a way that would bring the administration of justice into disrepute (*Canam Enterprises Inc v Coles* (2000), 51 OR (3d) 481 (CA), ("*Canam*") rev'd on other grounds, 2002 SCC 63).

[27] A finding of abuse of process generally allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice (*Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 ("*Toronto*"); *Vachon* at para. 8).

[28] As stated by the Court in *Hartmann* at para. 21:

> Courts have recognized that an abuse of process occurs when litigants are intent on re-litigating or re-defending causes of action or issues that have already been decided. Abuse of process by litigation has now become an accepted doctrine. See *Toronto (City) v Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64, at paras. 35 and 37.

[29] The commencement of a civil action which has as an objective to prove that the plaintiff is not guilty of a criminal charge is a collateral attack on the criminal proceeding and is considered to be an abuse of process (*Yashcheshen v Canada (Attorney General)*, 2020 SKQB 185 ("*Yashcheshen"*) at para. 68, quoting from *Harris v Levine*, 2014 ONCA 608 ("*Harris"*) at paras. 5-7).

Analysis

No reasonable claim

[30] The statement of claim contains no facts, only assertions of failure to comply with certain sections of the *Act* (ss. 40 and 88) and the Policy (ss. 2.1.3 and 5.5.2). As well the pleading references the occurrence report commencing August 13, 2019 and ending

February 20, 2020. The occurrence report and part of the Policy are attached to the pleading. These references mean that these documents form part of the pleading (*Das v George Weston Ltd*, 2018 ONCA 1053 at para. 74) and the Court is required to take them into account when considering the sufficiency of the pleading (*McLarty v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 206 at paras. 10-11; *Best v Ranking*, 2015 ONSC 6269 at para. 126, quoted in *Darmar Farms Inc v Syngenta Canada Inc*, 2019 ONCA 789 at para. 41).

[31] As Morey Smith is representing himself, I have also considered in this analysis the additional facts, explanations, and articulation of relief requested that he provided during oral submissions at the hearing of this application.

[32] To summarize Morey Smith's allegations:

a) once the Policy is made public under s. 40 of the *Act*, it is assumed it will be followed; because the Policy was not followed, s. 40 is breached (see s. 40 attached in Appendix);

b) Bryan Levia waited 60 days after receiving the first harvest summary report before he sent a letter of non-compliance;

c) Bryan Levia should have conducted an inspection before issuing the notice of non-compliance (see ss. 3.0 and 3.1 of the Policy attached in Appendix);

d) Bryan Levia failed to communicate with Morey Smith to find out if he did harvest any wood (see s. 2.1.3 of the Policy attached in Appendix);

e) any indecision with respect to whether to investigate after review of the file by the compliance team under the Policy should have been addressed by

the assistant deputy minister (see ss. 5.5.2 and 5.6 of the Policy attached in Appendix); and

f) generally, s. 41 of the *Act* was not followed, in particular s. 41(5), withdrawal of the notice of non-compliance once compliance has been achieved (see s. 41 attached in Appendix).

[33] Section 88 of the *Act* (attached in Appendix) is referred to in the claim, but Morey Smith did not explain why he relies on this section. I do not see that it is relevant here or how it gives rise to a civil claim.

[34] Morey Smith did not set out the relief he is seeking in the claim. In answer to my question during the hearing he advised that he wanted declarations that the forest officer and compliance team were negligent, and had breached trust by failing to follow the Policy in this case. He also wanted the lawyer for the Yukon government to convey these failures to the individual defendants, and to the assistant deputy minister.

[35] As I understand Morey Smith's pleading, elaborated on during oral submissions, his main concern is that he was not provided an opportunity to explain what he says was an error in his submission of the first harvest summary report which indicated no harvest, before the notice of non-compliance was issued. Further, he says he was not contacted by Bryan Levia or anyone else on the compliance team during the process. He was thereby denied the chance to show them where he had harvested the wood. He says he should have been issued another letter after the notice of non-compliance so the forest officer could ensure he was truly in non-compliance.

[36] The occurrence report describes the steps taken by the forest officers and compliance team in this matter, including their attempted interactions with Morey Smith.

As noted above, the courts have held that in an application to strike all facts in the pleading are deemed to be true (*Imperial Tobacco*; *Nevsun*). This includes the documents incorporated by reference.

a) Section 40 contravened because Policy not followed

[37] The success of this claim rests on Morey Smith's ability to prove that the Policy was not followed. As a result of the findings set out in the following paragraphs, this claim has no reasonable chance of success. There is nothing in the pleading that shows the allegation of failure to follow the Policy has any reasonable chance of success.

b) Notice of non-compliance sent 60 days after receiving harvest summary report

[38] The time between Morey Smith's submission of his first harvest summary report and the issuance of the letter of non-compliance was 56 days. There is nothing in the Policy or the statute that requires the non-compliance letter to be issued within a certain time period. Accepting the pleaded facts as true, this claim has no reasonable chance of success.

c) Bryan Levia should have done inspection before issuing the notice of non-compliance

[39] Neither the Policy nor the statute requires an inspection to be done before a notice of non-compliance is sent. The statute does not address inspection. The Policy says an inspection may, not must, be done, before issuing a notice of compliance. The purpose of the inspection in advance is to gather sufficient information about the non-compliance (s. 3.1). Here, the non-compliance notice was issued due to the failure of Morey Smith to harvest the minimum annual amount of wood, evident from his own submitted harvest summary report in which he indicated zero harvest. The information provided by Morey Smith in the first harvest summary was sufficient to warrant

compliance action, without an inspection. The Policy was followed. This claim has no reasonable chance of success.

d) Bryan Levia failed to ask Morey Smith whether he harvested any wood

[40] Section 2.1.3 of the Policy refers to communication with the regulated party during an investigation by forest officers. It cautions that the communication should not compromise the investigation and states that communication may be necessary to mitigate environmental, health and safety impacts, or discuss solutions to address the non-compliance. Nowhere does the Policy mandate communication. The statute is silent on communication during this process.

[41] In this case, no investigation occurred. There were two inspections and a ticket issued. Technically, s. 2.1.3 is not applicable on the facts and this claim as a result has no reasonable prospect of success.

[42] In any event, Bryan Levia communicated at least twice with Morey Smith after issuing the notice of non-compliance and before issuing the ticket. On one of those occasions, after the first inspection, in the letter of November 1, 2019, he invited Morey Smith to show him where the harvest had been done. Morey Smith chose not to communicate with Bryan Levia during this process.

e) Indecision about whether to investigate should have been resolved by Assistant Deputy Minister

[43] Bryan Levia reviewed this file after his second inspection of the licensed area with the two other defendants, Richard Potvin, operations manager, and Jason Hudson, head of enforcement. After discussion, they concluded that the issuance of a ticket under s. 39 of the *Act* would be appropriate. The flow chart at s. 5.6 of the Policy shows the assistant deputy minister's involvement if there is indecision about whether there

should be an investigation from the compliance team. Here, there was no indecision and therefore no need to involve the assistant deputy minister under the Policy. This claim has no reasonable chance of success.

f) Section 41(5) of the Act was not followed

[44] This subsection allows for the withdrawal of the notice of non-compliance, upon the rectification of the non-compliance. Rectification did not occur in this case. Morey Smith provided no explanation or evidence to address the forest officer's conclusion that the minimum volume of wood had not been harvested before the ticket was issued. This claim has no reasonable chance of success.

[45] Counsel for Yukon government further argued that in any event failure of a government official to follow a policy is not a cause of action. No authority was provided to support this proposition.

[46] In fact, it is commonly accepted that "although government discretion may not be actionable, if a government official is acting in execution of a policy or discretionary decision, or, in other words, in the operational area, a common law duty of care may arise more readily" (*Eliopoulos v Ontario (Minister of Health & Long Term Care)* (2004), 132 ACWS (3d) 485 (Ont Sup Ct), at para. 31 and *Air India Flight 182 Disaster Claimants v Air India et al* (1987), 62 OR (2d) 130 (HCJ) at p. 410). In other words, if a government official acting in an operational capacity is alleged to be negligent, the matter may be actionable.

[47] Therefore I find that negligence of a government official while acting in an operational capacity to implement a policy may be a cause of action. However, given my findings here, it is not necessary for me to consider this argument further.

Frivolous and vexatious

[48] As a result of my findings on no reasonable cause of action, it is unnecessary to consider whether the claim is frivolous or vexatious.

Abuse of process by collateral attack on the summary conviction proceeding

[49] Although my findings above are sufficient to dismiss this claim, I will also address the ground of abuse of process under the Court's inherent power and residual discretion to control its own process: *Canam*, rev'd on other grounds, 2002 SCC 63.

[50] Abuse of process was not argued by the Yukon government, according to counsel because it required evidence and this was not permitted by the Rule. However, the no evidence rule (20(29)) applies only to Rule 20(26)(a), not to (b), (c) or (d). An application on the basis that the claim is frivolous or vexatious, as has been argued here by the defendants, as well as an abuse of process can rely on evidence.

[51] Here, in any event, no evidence is required to address this argument. The issuance of the ticket (described in the pleading through the occurrence report incorporated by reference) and the published decision of the Territorial Court of March 18, 2021, provide a sufficient basis to consider this ground of an application to strike. Further, because I can also consider abuse of process under the inherent right of the Court to control its own process, I am not bound by the conditions in the Rule.

[52] As noted by other courts, the term abuse of process is often used interchangeably with the terms frivolous or vexatious. A vexatious pleading, as described above, is one that was:

> … commenced for an ulterior motive … or maliciously for the purposes of delay or simply to annoy the defendants … Put another way, it is vexatious if it does not assist in establishing the plaintiff's cause of action or fails to advance a claim known in law. (*Yashcheshen* at para. 24.)

[53] The doctrine of abuse of process has been described by the Supreme Court of Canada as concentrating on the integrity of the adjudicative process, rather than on the motive or status of the parties (*Toronto* at para. 51). Determining abuse of process is discretionary; there is no set test (*Canada (Attorney General) v Merchant Law Group LLP*, 2017 SKCA 62).

[54] There are many examples in the jurisprudence of cases in which a statement of claim has been struck as an abuse of process because it constitutes a collateral attack on a decision in a criminal proceeding (see *MLR v Dueck*, 2002 SKQB 113; *Demeter v British Pacific Life Insurance Co and two other actions* (1984), 48 OR (2d) 266 (CA); *Fischer v Halyk*, 2003 SKCA 71; *Harris*; *Yashcheshen*)

[55] Morey Smith has not specifically sought in his relief the setting aside of the ticket or his conviction. However, his allegations that the defendants were negligent and breached trust in their failure to follow the policy, especially to the extent that their actions did not permit him to explain the mistake he says he made with the first harvest summary report or advise them of the location of his harvest, in effect are a challenge to his conviction on the ticket. The arguments he raises all go to reasons why he says he should never have been issued a notice of non-compliance or a ticket in this case.

[56] The conviction is under appeal, to be argued on December 8, 2021. It is possible that the conviction may be overturned on appeal and returned for a new trial. It is also possible that the conviction will be upheld. Either way, an appeal of the conviction is the proper approach for Morey Smith to pursue his insistence that the conviction was wrong. The use of a civil action to re-litigate the process and outcome of the conviction on the ticket is an improper use of the court’s process.

[57] Part of the rationale for this is that the standard of proof in a civil claim is a balance of probabilities, which differs from the regulatory negligence standard of strict liability and a due diligence defence. If the civil action were allowed to proceed it could lead to a conflicting result based in part on the different standards of proof.

[58] As a result, this civil action may also be dismissed for abuse of process.

Conclusion

[59] The claim is dismissed on the basis of no reasonable cause of action and abuse of process for the reasons set out above.

[60] There will be no award of costs.

_____
DUNCAN C.J.

APPENDIX

Section 40 of the *Act*:

> 40 Enforcement and compliance policy
>
> The Director must establish and make public a policy respecting the enforcement of this Act, including procedures and guidelines governing the exercise of discretionary powers under this Act.

Section 41 of the *Act*:

> 41 Request for voluntary compliance
>
> (1) A forest officer may issue a notice of non-compliance to a person where a forest officer believes that the person or an activity under that person's control is not in compliance with this Act.
>
> (2) A notice under subsection (1) must state
>
> (a) the nature of the non-compliance;
> (b) a request for voluntary compliance;
> (c) the steps to be taken to achieve compliance; and
> (d) the date by which compliance is to be achieved.
>
> (3) The Director may establish a public register of notices of non-compliance and where such a register is established, must place a copy of every active notice of non-compliance on the register.
>
> (4) A register established under subsection (3) must be accessible to the public without charge during normal business hours at an office of government to be specified by the Director.
>
> (5) If a forest officer is satisfied that a person to whom a notice of non-compliance was issued under subsection (1) has complied with the notice, the officer must withdraw the notice of non-compliance and the Director must then cause the copy of the notice to be removed from the public register.

Section 88 of the *Act*:

> 88 Proof of exception
>
> In a prosecution under this Act, the burden of proving that an exception, exemption, excuse or qualification under this Act operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or ticket commencing the proceedings.

Forest Resources Act, Compliance and Enforcement Operational Policy and Procedures, February 2011:

Section 2.1.3:

> 2.1.3 Communications With a Regulated Party During an Investigation
>
> During the investigative process, it is important to ensure that communications between FMB, CS&I staff and the regulated party do not compromise the investigation. Ongoing communication with the permitted party is often necessary to mitigate environmental, 10 human health and safety impacts, or seek solutions to rectify the non-compliance. Therefore, FMB and CS&I staff responsible for ongoing administration related to the regulated party under investigation are to ensure that there is dialogue between the investigating officer regarding roles and responsibilities prior to engaging in discussions with the regulated party.
>
> Where an alternative approach to proceeding with charges is being considered, the investigating officer and program staff must discuss the options and reach consensus with an alternative approach prior to discussing the alternative approach with the party under investigation.

Sections 3.0 and 3.1:

> 3.0 Voluntary Compliance (Self Monitoring)
>
> Permits/licences issued under the FRA require the holder to comply with the terms and conditions listed; or may require the permit/licence (clients) holder to collect data,submit returns or

submit applicable dues to the government on a regular basis. Failing to comply with terms and conditions or submit the required information or dues in the prescribed manner constitutes non-compliance with the permit/license and may be deemed to be a violation under the Act.

Forest Officers, in conjunction with a site inspection, will issue an Inspection Report notifying a party that they are in compliance with a specific regulatory requirement and where applicable, identify areas where minor improvements in the operation are required. Generally, this information is recorded in an Inspection Report as satisfactory or unsatisfactory. A copy of the inspection report must be given to the client and a copy must be placed on the client's file.

3.1 Notice of Non-Compliance

A Notice of Non-compliance, as authorized under Section 41(1) of the Act, may be an initial response for a minor violation of the *FRA*, Regulations, or a permit/licence, that notifies the party in writing, that they are not in compliance with a specific regulatory requirement. A notice of non-compliance warns of the possibility of an escalating response; should non-compliance continue. Notices are generally used when it is determined that a verbal exchange of information alone would not be deemed sufficient in achieving compliance. A copy of the Notice of Non-Compliance must be given to the client and a copy must be placed on the client's file.

When issuing a Notice of Non-compliance, Forest Officers are expected to have sufficient information to satisfy themselves that a client's activity is non-compliant.

A Notice of Non-Compliance will be in writing and must give the non-compliant party the following information:

1. the nature of the non-compliance;
2. a request for voluntary compliance;
3. the steps to be taken to achieve compliance; and
4. the date by which compliance is to be achieved.

Note that if there is non-compliance with the requirements of the Notice, further action will be taken by the Forest Officer.

A Notice of Non-Compliance may:

1. require an inspection prior to issuing the notice, in order to gather sufficient information regarding the non-compliance (a follow-up inspection will also be undertaken in order to verify compliance); and,

2. request a written confirmation from the client that compliance has been achieved, or receive verbal confirmation of the work being completed (verbal confirmation must be documented and placed on the applicable file).

The Director may establish a public registry of notices of non-compliance and, where a register is established, a copy of all non-compliance notices should be placed on the register (§ 41.3 FRA). Accordingly when the respective non-compliance is addressed, the notice will be removed from the registry.

Sections 5.5.2 and 5.6:

5.5.2 Collaboration between Departments & Branches – (IRM)

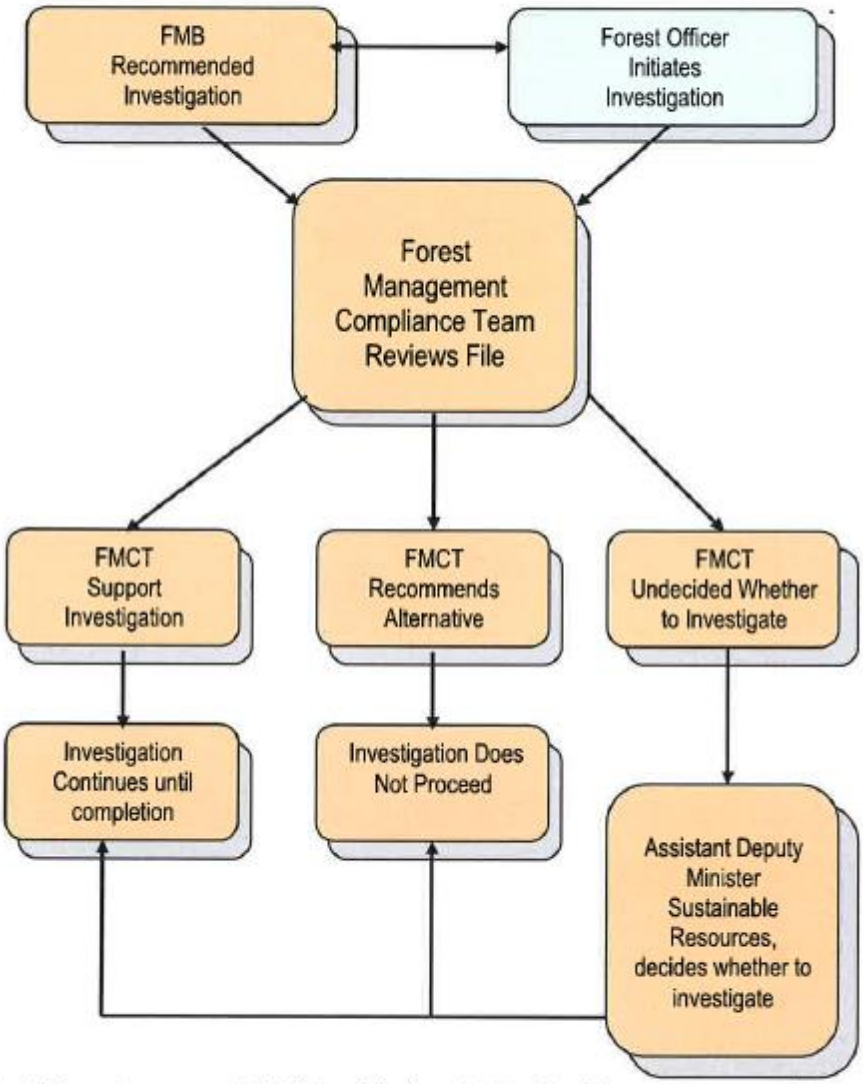
One of the purposes of the Investigative/Case File Review process is to ensure interbranch collaboration when responding to non-compliance. Where an investigation does not involve a pre- or post-investigation review by the FMCT, it is still incumbent on FMB and CS&I staff to collaborate on a compliance approach, as appropriate (i.e. where an ongoing administrative relationship exists with the regulated party, and the party is still in non-compliance of their licence/permit).

…

[see next page for s. 5.6]

5.6 Dispute Resolution

The same process applies to the recommendation of charges to Legal Counsel.



Note: At the review process the initiator of the investigation should be present to provide the information to the FMCT.

The FMCT will also act as a dispute resolution mechanism if there is disagreement between FMB program staff and Forest Officers as to the appropriate compliance approach (this applies to all possible compliance approaches such as the issuance of warnings, tickets, referrals, or taking no action).