

DECISION NOS. 2009-FA-005(a) and 2009-FA-006(a)

In the matter of an appeal under the *Forest Act*, R.S.B.C. 1996, c. 157.

BETWEEN: Canadian Forest Products Ltd. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
James Hackett, Panel Chair

PLACE: Conducted by way of written submissions
concluding October 30, 2009

APPEARING: For the Appellant: Greg Yeomans
For the Respondent: Bruce R. Filan, Counsel

APPEAL

[1] This appeal is brought by Canadian Forest Products Ltd. (“Canfor”) against two stumpage rate determinations contained in stumpage advisory notices dated May 28, 2009. The determinations cover two road permits – one under Forest Licence FL A18688-R1 (Appeal No. 2009-FA-005) and the other under Tree Farm Licence TFL 18-R1 (Appeal No. 2009-FA-006), and are effective for timber scaled between June 1, 2009 and May 31, 2010. The determinations were made by Stuart Card, Timber Pricing Coordinator (the “Timber Pricing Coordinator”), Ministry of Forests and Range (the “Ministry”).

[2] Canfor appeals the stumpage determinations for both road permits and asks that these rates be re-calculated by including the reappraised rates for the three cutting permits (“CPs”) in the relevant billing history records.

[3] This appeal was heard by way of written submissions pursuant to Part 12, Division 2 of the *Forest Act*. The powers of the Forest Appeals Commission on an appeal are set out in section 149(2) of the *Forest Act*:

Powers of Commission

149 (2) On an appeal, the commission may

- (a) confirm, vary or rescind the determination, order or decision, or
- (b) refer the matter back to the person who made the initial determination, order or decision, with or without directions.

BACKGROUND

[4] Canfor submitted reappraisals for three CPs. Two CPs (523 and 310) were issued under FL A18688; while the third CP (267) was issued under TFL 18. These reappraisals were approved by Ministry staff, and the resulting stumpage rates were reduced significantly. Canfor expected this reappraisal information to be incorporated into the billing history records of both licences and used to calculate the stumpage rates for each road permit, for the one year period ending March 31, 2009, consistent with section 2.1(6) of the Interior Appraisal Manual ("IAM"). However, some of this reappraisal information was not incorporated due to workload pressures at the Ministry offices. Consequently the reduced road permit stumpage rates that Canfor expected were never realized.

[5] At issue is the method employed by the Timber Pricing Coordinator to calculate the stumpage rates for these two road permits. Stumpage rates for these permits are calculated in accordance with the IAM. The IAM states that road permit rates are calculated using the previous twelve month average stumpage rate for sawlogs for all cutting authorities issued under a particular licence. This twelve month period is known as the "billing history record".

[6] Canfor submits that key reappraisal information for three CPs was not included in the forest licence and tree farm licence billing history records and it should have been, according to their interpretation of the IAM. Had this information been included, stumpage rates for these two road permits would be much less than the rates issued by the Ministry.

[7] The Respondent, on the other hand, submits that the stumpage rates for both road permits were calculated correctly even though much of the reappraisal information was not incorporated into the billing history records to March 31, 2009.

ISSUE

1. Should the reappraisals of CPs 310 and CP 267 be included in the relevant billing history record in order to calculate the stumpage rates for road permits FL A18688-R1 and TFL 18-R1?

RELEVANT LEGISLATION

[8] Stumpage rates are determined under authority of section 105 of the *Forest Act*, R.S.B.C. 1996, c. 157.

Stumpage rate determined

105 (1) Subject to the regulations made under subsections (6) and (7), if stumpage is payable to the government under an agreement entered into under this Act or under section 103(3), the rates of stumpage must be determined, redetermined and varied

(a) by an employee of the ministry, identified in the policies and procedures referred to in paragraph (c),

(b) at the times specified by the minister, and

(c) in accordance with the policies and procedures approved for the forest region by the minister.

[9] The Commission is required to apply the policies and procedures referred to above pursuant to section 149(3) of the *Forest Act*:

149 (3) If the commission decides an appeal of a determination made under section 105, the commission must, in deciding the appeal, apply the policies and procedures approved by the minister under section 105 that were in effect at the time of the initial determination.

[10] The IAM, as amended by Amendment No. 4 and No. 6, is the policy "approved by the Minister" that was applied in this case. The stumpage rates under appeal were determined under section 6.3(2)(a). The algorithm by which the weighed average stumpage rate was determined is under section 6.3(4).

6.3 Road Permits

2. Except as provided in subsections (3) and (7) of this section, the stumpage rate for a road permit shall be the weighted average sawlog stumpage rate for:
 - a. all cutting authorities, authorizing harvesting on cutting authority areas that have been fully appraised, that authorize the harvesting of timber in the same forest district in which the road permit cutting authority area is located, and that are issued under the licence that entitles the licensee to apply for the road permit, or
 - ...
4. a. In paragraph (a) of subsection (2) of this section, the weighted average sawlog stumpage rate that is in effect for the period between June 1 of one year in this subsection hereinafter referred to as the first year, and May 31 of the following year is determined as follows:

$$\$/\text{m}^3 = \frac{\text{(sum of Grade 1 value billed)} + \text{(sum of Grade 2 value billed)}}{\text{(sum of Grade 1 volume billed)} + \text{(sum of Grade 2 volume billed)}}$$
 - b. Subject to subsection (10) of this section, volumes and values in the formula above are taken from the history billing records for coniferous sawlogs during the 12-month billing period ending on March 31 in the first year, if the volume of those coniferous sawlogs is greater than 500 cubic metres.

DISCUSSION AND ANALYSIS

1. Should the reappraisals of CPs 310 and CP 267 be included in the relevant billing history record in order to calculate the stumpage rates for road permits FL A18688-R1 and TFL 18-R1?

[11] Canfor argues that the re-appraised stumpage rates for CPs 310 and 523 and CP 267, respectively, reduced stumpage significantly on these cutting permits. This reappraisal information should have been included in the billing history records for

both the forest licence and the tree farm licence and used to calculate new, lower volume weighted average stumpage rates for both road permits.

[12] Canfor submits that its reappraisals were approved by the forest district before the end of 2008, and this information was then forwarded to the regional office. Canfor then refers to section 2.1(6) of the IAM which states:

6. The person who determines the stumpage rate shall consider:
 - a. the information provided by the licensee or BCTS and the district manager, and
 - b. any information available to the person who determines the stumpage rate that is relevant to the appraisal.

[13] Canfor argues that this section of the IAM compels the Timber Pricing Coordinator to consider any information that is relevant to the appraisal in the determination of the road permit stumpage rates. This information includes the approved reappraisals for the three CPs. It was not considered and, therefore, the Timber Pricing Coordinator acted contrary to the IAM.

[14] Mr. Greg Yeomans, Canfor's Forestry Supervisor for its Vavenby operation, also notes in a letter dated September 8, 2009 that he was told by regional staff that reappraisals "were not being processed due to a backlog and they were a lower priority." Since reappraisal information was not being processed by regional staff in a timely way, the resulting high road permit stumpage rates has hurt Vavenby Division's competitiveness relative to other Canfor operations and, presumably, other parts of the forest sector.

[15] Canfor also referred to section 4 of the *Ministry of Forests and Range Act* which sets out the purposes and functions of the Ministry. In particular, Canfor highlights subsections (d)(i) and (e) which state:

Purposes and functions of ministry

4 The purposes and functions of the ministry are, under the direction of the minister, to do the following:

...

(d) encourage a vigorous, efficient and world competitive

(i) timber processing industry, and

...

in British Columbia;

(e) assert the financial interest of the government in its forest and range resources in a systematic and equitable manner.

[16] In this case, Canfor maintains that the Ministry failed to assert the financial interest of the government in a systematic and equitable manner in the calculation of these two road permit stumpage rates and, consequently, has contributed to the closing of Canfor's Vavenby Division for economic reasons, thereby acting in a way that is inconsistent with the *Act*.

[17] Canfor also cites section 105(1) of the *Forest Act*. Under this section, stumpage rates must be determined, redetermined and varied in accordance with policies and procedures approved for the forest region by the minister, and that this must be done "at the times specified by the minister". Canfor states that one of the Ministry's policies is for approval time frames of 45 days. Since the CP reappraisal information in the billing history records far exceeded a 45 day period, Canfor argues that section 105(1) of the *Act* was breached.

[18] Finally, Canfor submits that although regional staff seemed generally concerned about the situation, and advised that procedures have been put in place to prevent this situation from occurring again, "the rates should also be corrected".

[19] The Respondent submits that stumpage advisory notices for road permits A18688-R1 and TFL18-R1 provided new stumpage rates for both permits, effective June 1, 2009. The billing history period applicable to the calculation of both of these rates is April 1, 2008 to March 31, 2009, according to section 6.3(4)(b) of the IAM. This means that information included on stumpage invoices issued between April 1, 2008 and March 31, 2009 was relevant to the stumpage rate determinations for both road permits under appeal.

[20] The Respondent submits that while the timing of an appraisal or a reappraisal affects the content of subsequent billing history records, matters pertaining to the stumpage rate redeterminations for CPs 310, 523, and 267 are not relevant to the issue of whether the IAM was applied properly to set the reappraised stumpage rates.

[21] The Respondent relies on a letter to the Commission from the Timber Pricing Coordinator, dated October 13, 2009. In his letter, the Timber Pricing Coordinator states that when a stumpage rate is redetermined, old invoices issued on the basis of original rates are cancelled, new invoices bearing the new rate are issued, and this information becomes a part of the billing history record.

[22] The Timber Pricing Coordinator detailed the reappraisal procedures that he used for all three of Canfor's CPs. First, he states that "CP 523 was reappraised March 10, 2009 with a reappraisal effective date of November 1, 2008". The stumpage value that became part of the billing history record for this forest licence was reduced by approximately \$70,000 and,

is a result of the original invoices being cancelled and new invoices issued based on the reappraised stumpage rate being applied to all sawlog volume previously invoiced at the original rate The information on the new invoices became part of the "billing history record" for the period ending March 31, 2009, and the reappraised rate for A18688 CP 523 was used in the calculation of the weighted average for the determination of the rate for A18688 CP-R1.

[23] The Timber Pricing Coordinator went on to describe the reappraisal procedures that he used for the remaining two CPs:

A18688 CP 310 and TFL18 CP 267 were reappraised on March 30, 2009 and April 14, 2009 respectively. CP 310 had a reappraisal effective date of August 6, 2005 and CP 267 had a reappraisal effective date of October 1,

2007. While efforts were made to process the reappraisals earlier, other priorities and issues with the appraisal data submissions resulted in some delay. The original invoices were not cancelled and new invoices were not issued as a result of the reappraisals until after March 31, 2009 in the case of CP 310 and April 14, 2009 in the case of CP 267. As a result, the information on the new invoices for CP 310 and CP 267 were not part of the "billing history record" prior to March 31, 2009. The information on the new invoices as a result of the reappraisals will however become part of the "billing history record" ending March 31, 2010.

[24] Simply put, key reappraisal information for these two CPs was not incorporated into the billing history records ending March 31, 2009 which, in turn, meant that the stumpage rates for the two road permits were not reduced.

[25] The Respondent maintains that the stumpage rates for both road permits were calculated correctly even though some of the reappraisal information was not incorporated into billing history records. The reappraisal information for CP 523 was included in the billing history record for this forest licence. However, reappraisal information for CP 310 and CP 267 was not incorporated into the records. These CPs were reappraised on March 30, 2009 and April 14, 2009 respectively.

[26] The Respondent also submits that the billing history records were correct since the original invoices had not been cancelled. New appraisal information cannot be incorporated into the billing history records until old invoices are cancelled and replaced by new ones that reflect the new appraisal information.

[27] In his letter to the Commisison, the Timber Pricing Coordinator addressed Canfor's concerns that all three CP reappraisals were approved by the forest district before the end of 2008 and were forwarded to the regional office for processing, but were never considered in the reappraisals. The Timber Pricing Coordinator notes that forest district offices do not "approve" appraisals. He states that, "Information contained in the appraisal may be used by the statutory decision maker when **determining** stumpage rates. Ministry staff in the districts are not statutory decision makers nor do they approve appraisals." [emphasis in original]

[28] The Timber Pricing Coordinator also addressed Canfor's concern that the CP reappraisal information was not incorporated into the billing history records in a timely way. He noted that the region had other higher priorities, but was still able to act on these billing history records in late February and early March, 2009. Moreover, billing history records were amended and road permit rates were determined in either March or April. He stated that his efforts to amend the rates were hampered by delays from Canfor correcting the required information and returning the submissions to the region.

[29] In regards to Canfor's allegation that the Ministry violated its policy of approving appraisals and reappraisals within 45 days, the Timber Pricing Coordinator advised that no such policy currently exists. Although a previous version of the IAM required *annual* reappraisals to be submitted to the District Manager at least 45 calendar days prior to the anniversary date of the cutting authority, annual reappraisals have not been required since 2003. Moreover, he

notes that the 45 day period was the time frame for *submitting* reappraisal information, not for review and rate determination.

[30] Finally, the Timber Pricing Coordinator addressed the issue of "correcting the rates" requested by Canfor. The Timber Pricing Coordinator states that rates cannot be "corrected". To do so would contravene the IAM. He states:

If a reappraised rate is determined at the end of a cutting authority with rate corrections going back to the beginning of the cutting authority (up to four years), then, following Canfor's argument, four years of licence average road permit rates would need to be "corrected". Since the licence average rates include all active cutting authorities issued under that licence and all cutting authorities have different terms, the road permit rates would be constantly changing and there would be no business certainty for the licensee or the government.

[31] In reply, Canfor reiterated its previous submission that the Respondent, in determining the stumpage rates, contravened (or did not properly apply) section 2.1(6) of the IAM. It also argued that the reappraisal information for the three CPs was reviewed and accepted by competent district staff at least 3, and as much as 9 months before regional staff had to act on the information. Canfor believes that the information should have been included in the rate determination since it was available to regional staff, and it was relevant information. It submits that to argue, as the Respondent does, that the billing history record is the only relevant information, is far too limited an interpretation of the IAM.

[32] Canfor also addressed the Timber Pricing Coordinator's statement that the delay in receiving information was, in part, due to problems that Canfor had producing correct data. Canfor explains that reappraisal information for CP 267 was submitted to the regional office on June 11th, 2008, yet returned to the district on March 11th, 2009, 9 months later. It states that CP 310 information was also returned to the district office, but for no apparent reason since there were no changes to the appraisal information. It says that there was an issue with regard to the compilation version, but, in its view, this made no difference to the CP 310 reappraisal since the issue outstanding was a correct date on the compilation.

[33] Canfor submits that, in any event, this discussion about delays takes away from the actual "root cause". It states that in a December 2008 phone conversation with region staff, Canfor was told that the reappraisals were not being processed because they were not a priority. This reappraisal information would be incorporated into a subsequent set of billing history records, but not before Canfor paid a full year of higher rates which, it argues, is unfair in this difficult economic time, and contrary to the requirement for the Ministry to "assert the financial interest of the government in its forest and range resources in a systematic and equitable manner."

[34] The Respondent also submitted a reply to Canfor's reply. It reiterated its position that information taken into consideration in an appraisal must not only be available but must also be relevant. Information that is not authorized by the IAM is not relevant; information that is not relevant cannot be taken into consideration in the appraisal.

[35] It also states that district staff may have made things available to regional staff, but they were not relevant, and therefore, could not have been taken into consideration in the determination of the road permit stumpage rates. The Respondent submits that the only information that was considered in the determination was that which was relevant to the appraisals.

The Commission's Findings

[36] According to section 149(3) of the *Forest Act*, the Commission is required, in deciding appeals of stumpage determinations, to apply the policies and procedures that have been approved under section 105. This is not optional. The Commission must apply the law which, in this case, includes the IAM.

[37] In this case, the Commission agrees with the Respondent. Based on the evidence presented to the Panel, the IAM was applied correctly by the Timber Pricing Coordinator.

[38] The IAM states that road permit stumpage rates are calculated using the previous twelve month average stumpage rate (the billing history record) for sawlogs for all cutting authorities issued under a particular licence. In this case, the twelve month period ends on March 31, 2009.

[39] In order for the billing history records to include the CP reappraisal information, old invoices must be cancelled and new invoices issued prior to March 31st; for CP 310 and CP 267, this did not happen. Therefore, the billing history records applied to the reappraisal of both road permits by the Timber Pricing Coordinator were correct.

[40] Reappraisal information for CP 523 was incorporated into the billing history record for this forest licence by the Timber Pricing Coordinator because old stumpage invoices were cancelled and replaced by invoices that included the new reappraisal information prior to March 31, 2009.

[41] The Commission agrees with the Respondent that no policy exists stating that the Ministry must update licence billing history records with new appraisal information within a set time period of 45 days, or any other time period on or before the critical March 31st deadline.

[42] Regarding Canfor's request that the stumpage rates be "corrected", given the Commission's finding on the appeal, this request is denied.

[43] In arriving at this decision, the Commission has sympathy for Canfor's position. On the evidence, Canfor submitted reappraisal information for all three CPs well in advance of the March 31, 2009 billing history deadline and reasonably expected to have this information incorporated into the billing history record. While the Ministry must be allowed to set its own work load priorities, the Commission finds on the facts that this reappraisal information could have been incorporated into the billing history records ending March 31, 2009. The Respondent argued that delays were, in part, the fault of Canfor. However, the Commission finds that the reasons for the delays were not substantive, and reasonable parties should have agreed on the accuracy of the submissions well before the deadline.

DECISION

[44] In making this decision, this Panel of the Commission has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

[45] For the reasons provided above, the Commission finds for the Respondent.

[46] The appeal is dismissed.

"James Hackett"

James S. Hackett, Panel Chair
Forest Appeals Commission

December 14, 2009