
DECISION NO. 2009-FA-007

In the matter of an appeal under section 147 of the *Forest Act*, R.S.B.C., 1996, c. 157

BETWEEN: International Forest Products Limited **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Gabriella Lang, Panel Chair
Bruce Devitt
O'Brian Blackall

DATE: May 3, 4 and 5, 2011

PLACE: Victoria, BC

APPEARING: For the Appellant: Mark S. Oulton and Tam C. Boyer,
Counsel
For the Respondent: A.K. Fraser and Elisabeth Graff, Counsel

APPEAL

[1] International Forest Products Limited ("Interfor") appealed a stumpage advisory notice ("SAN") issued on June 25, 2009 by William B. Luscombe, RPF, Regional Business Analyst for the Coast Forest Region of the Ministry of Forests and Range, now known as the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). The Ministry issued the appealed SAN as a changed circumstance reappraisal of the stumpage rate payable by Interfor for timber harvested under cutting permit ("CP") 136. CP 136 is a cutting authority issued under Interfor's forest license A19232.

[2] This appeal was filed pursuant to section 146(2)(b) of the *Forest Act*, R.S.B.C. 1996, c. 157 ("*Act*"). Under section 149(2) of the *Act*, 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.

[3] Interfor asks the Commission to rescind the June 25, 2009 SAN, and to restore the stumpage rate to that in the original SAN effective April 30, 2007.

BACKGROUND

[4] Interfor is a logging and sawmilling company with operations on the B.C. coast, including Vancouver Island. It has licenses to harvest timber on Crown land. On April 30, 2007, the Ministry issued CP 136 to Interfor under its forest licence A19232, for two cut blocks – ELK 131 and ELK 134 - in the Elk Bay area of northern Vancouver Island. The CP defined the permit area, the term for the permit and it set out a number of other conditions.

[5] Stumpage is the amount of money that a licensee, such as Interfor, must pay to the Government for the right to harvest Crown timber in British Columbia. A stumpage assessment and appraisal determine the stumpage rate payable by a licensee to harvest such timber pursuant to a cutting authority.

[6] Section 105(1) of the *Act* states that stumpage rates must be determined according to the policies and procedures approved for the forest region by the Minister. The applicable policies and procedures for determining rates of stumpage for Crown timber harvested in the Coast Forest Region are set out in the Coast Appraisal Manual (“CAM”) effective February 29, 2004. That version of the CAM applies to this appeal.

[7] The CAM applies a market pricing system (“MPS”) for appraisals of timber harvested on Crown land in the Coast Region. Both parties submitted evidence, including expert opinion evidence, about the development of the MPS, the factors considered in MPS stumpage rate determinations, and how the MPS is applied in appraisals. That evidence is discussed in the Panel’s findings

[8] For the purpose of providing a general background, the Panel finds that the Commission’s discussion of the MPS at pages 3 and 4 of its recent decision in *Western Forest Products Ltd. v. Government of British Columbia* (Decision Nos. 2005-FA-002(a), 003(a), 009(a), 010(a), 048(a), 078(a), 131(a), 2006-FA-020(a) and 031(a); issued May 19, 2011) (“*Western Forest Products*”), is instructive, and the evidence reviewed in that decision is similar to the undisputed evidence that was heard by this Panel. This Panel adopts it for the purposes of this decision. Below is the Panel’s summary of the process for determining stumpage rates for timber held under long-term tenures, according to the CAM that applies the MPS.

[9] Basically, for timber harvested on Crown land under long term tenures, the MPS is used to establish a market stumpage rate. It is an equation-based model that uses transaction evidence or data from previous winning bids for Crown timber sold through competitive bidding processes that is then correlated with a stand’s timber characteristics and market information to develop equations that predict the estimated winning bid for a stand of timber.

[10] The process to determine the stumpage rate for a cutting authority area begins with an appraisal data submission by a licensee, such as Interfor. The CAM sets out what is required in an appraisal data submission. A preliminary estimated winning bid for the timber is then calculated by the Ministry using the data in the

appraisal data sheet and the preliminary estimated winning bid equation in section 4.3 of the CAM. Statistical analyses were used to determine the significance of the variables in that equation, and "CABLE" is one of those variables. "CABLE" is defined in section 4.2 of the CAM as the "fraction of the total net cruise volume of timber in a cutting authority area where terrain conditions require timber to be cable yarded."

[11] Next, the final estimated winning bid is calculated by subtracting the cost allowance for any applicable "specified operations" from the preliminary estimated winning bid. Specified operations are unique logging systems or situations that apply to the area to be harvested. A "tenure obligation adjustment" is then deducted from the final estimated winning bid, resulting in the market stumpage rate (unless the market rate is lower than the prescribed minimum stumpage rate, in which case the minimum rate applies).

[12] In April 2007, Interfor sent its appraisal data submission for CP 136 to the Ministry.

[13] On May 16, 2007, the Government issued the original SAN for CP 136. The market stumpage rate set out in that SAN was \$17.59 per cubic metre. The SAN indicated that the effective date of the appraisal was April 30, 2007, and it applied to sawlogs scaled between April 20, 2007 and June 30, 2007. The SAN also indicated that the cable yarding volume was 11,273 cubic metres and the net cruise volume was 32,866 cubic metres. The portion of timber to be harvested by cable yarding was 34 percent of the total volume.

[14] Interfor's contractor started harvesting the two cutblocks under CP 136 in May 2007. A Ministry Compliance and Enforcement Officer inspected the site in June and July 2007, and noted that the contractor had mainly used a ground-based harvesting method rather than cable yarding. After that site inspection, the Ministry determined that the volume of timber harvested by cable yarding in the two cutblocks was considerably less than the estimated volume of harvest by cable yarding in the original appraisal data submission.

[15] The Ministry notified Interfor that it had determined that a harvest method changed circumstance had occurred, and it requested a changed circumstance reappraisal data submission from Interfor. Section 3.3.1 of the CAM addresses "changed circumstances", and it specifies a reappraisal procedure when a changed circumstance has occurred. For the reappraisal, Interfor submitted the same appraisal data submission that it had sent in April 2007 for CP 136. Interfor sent its reappraisal data submission to the Ministry in May 2009, based on its position that the effective date of the reappraisal was May 1, 2007.

[16] On June 25, 2009, the Government issued a revised SAN for CP 136 and the two cut blocks, but it indicated a market stumpage rate of \$19.96 for sawlogs scaled between May 1, 2007 and June 30, 2007. The effective date of the reappraisal in the revised SAN was May 1, 2007. Also, that SAN indicated that the cable yarding volume was 1,127 cubic metres and the net cruise volume was 32,868 cubic metres. Thus, according to the revised SAN, cable yarding represented only four percent of the total volume.

[17] As part of its reappraisal, the Ministry determined that less timber was harvested by cable yarding, which is generally more costly harvesting than ground-based harvesting methods, and therefore, a higher stumpage rate was payable by Interfor. The higher stumpage rate is stated in the appealed SAN.

POSITIONS ON THE APPEAL

[18] Interfor submits that the Government should not have issued the June 25, 2009 SAN based on a harvest method changed circumstance reappraisal pursuant to section 3.3.1. of the CAM, because there was no changed circumstance within the meaning of the CAM. Interfor further submits that, even if there was a changed circumstance, which it does not admit, the reappraisal must be done based on the CAM. Since the changed circumstance reappraisal has an effective date of May 1, 2007, the conditions to be factored into that appraisal are the same as the conditions factored into the original appraisal with an effective date of April 30, 2007. In addition, Interfor submits that there should be no change to the stumpage rate, because all of the appraisal data submissions and the reappraisal data submissions are the same.

[19] The Government submits that Interfor harvested at least 15 percent more timber by ground-based methods than was indicated in the original appraisal data submission for CP 136. This change in harvest method was a changed circumstance as defined section 3.3.1(1) of the CAM. The Government also submits that a higher stumpage rate should apply because a lesser volume of timber was harvested by cable yarding.

ISSUE

[20] The issue in this appeal is:

Whether in the circumstances of this case there was a harvest method changed circumstance requiring a reappraisal to determine a revised stumpage rate.

RELEVANT LEGISLATION AND POLICIES

[21] Section 105(1) of the *Act* sets out how stumpage rates are 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.

[22] Sections 146 to 149.2 of the *Act* provide for appeals to the Commission and the following sections are relevant to this appeal:

- 148.6** (1) The commission may admit as evidence in an appeal, whether or not given or proven under oath or admissible as evidence in a court,
- (a) any oral testimony, or
 - (b) any record or other thing relevant to the subject matter of the appeal and may act on the evidence.
- (2) Nothing is admissible in evidence before the commission or a member of it that is inadmissible in a court because of a privilege under the law of evidence.
- (3) Subsection (1) does not override an Act expressly limiting the extent to or purposes for which evidence may be admitted or used in any proceeding.
- (4) The commission may retain, call and hear an expert witness.
- 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.

[23] The CAM that is effective February 24, 2004 sets out the Minister's approved policies and procedures that are applicable to this appeal. The appealed SAN was issued under that version of the CAM. Therefore, the Commission has applied that CAM in this appeal, and the following sections apply. Other sections are cited later in this decision.

3.2 Appraisals

1. An appraisal is a process used to determine a stumpage rate for a cutting authority area using the manual in effect on the effective date of the cutting authority. The appraisal is effective on the date of the effective date of the cutting authority.
2. A licensee or BCTS [BC Timber Sales] shall submit the appraisal data submission to the district manager when the licenses or BCTS makes an application for a cutting authority.
3. The district manager may require the licensee or BCTS to complete and submit an estimated stumpage rate calculation for both helicopter and cable methods of harvesting when the district manager is not satisfied that the method proposed by the licensee or BCTS is the only method that is suitable for the area intended to be harvested.

4. The district manager may review the licensee or BCTS appraisal data submission and may inform the licensee or BCTS of any omission, errors or provisions of the manual that, in the opinion of the district manager, the signing of the RPF or RFT may not have considered. The licensee or BCTS signing the RPF or RFT may consider the district manager's information and may revise the appraisal data submission.
5. The district manager shall give any information supplied by the licensee or BCTS under this section to the person who determines the stumpage rate together with any other information that the district manager considers relevant to the appraisal.
6. The person who determines the stumpage rate may review the licensee or BCTS submission, and information supplied by the district manager, and may inform the licensee or BCTS of any omissions, errors or provisions of the manual that, in the opinion of the person who determines the stumpage rate, the signing RPF or RFT may not have considered. The licensee or BCTS signing RPF or RFT may consider the information and may revise appraisal data submission.
7. 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.
8. Regional staff will notify the applicant of the stumpage rate determination.

3.3 Reappraisals

1. A reappraisal is a process used to redetermine a stumpage rate for a cutting authority using the manual in effect on the effective date of the reappraisal.
2. Except as provided for under section 3.3.1(1)(d), 3.3.2 and 3.3.4, a reappraisal is based on a complete reassessment of the cutting authority area on the effective date of the reappraisal, as if the area has been returned to the condition as it was prior to development or harvesting.
3. Non-tabular cost estimates made in the appraisal of a cutting authority area may be re-established once in a subsequent reappraisal after works have been constructed using information required under section 5.3.4.
4. Road development costs originally estimated using ministry approved competitive bids may not be re-estimated in a reappraisal.

3.3.1 Changed Circumstances

1. In this section a changed circumstance means a circumstance where:
 - a. (i) the licensee plans to use a method of harvesting to harvest at least fifteen percent of the volume of the timber in the cutting authority area that is different from the method that was planned to be used for that timber at the time of the most recent appraisal or reappraisal of the cutting authority area, and
 - (ii) the different method of harvesting that is planned to be used:
 - (aa) when used in the changed circumstance reappraisal will produce the highest stumpage rate, and
 - (bb) is different from the method of harvesting that was used in the most recent appraisal or reappraisal, or
- ...
2. The licensee must notify the district manager immediately of a changed circumstance.
3. Where the district manager believes that a changed circumstance has occurred, the district manager will notify the licensee of that belief.
4. A cutting authority area other than a cutting authority area that is subject of a road permit or a cutting authority with fixed rates, must be reappraised when a changed circumstance has occurred.
5. Where a cutting authority area is reappraised because of a changed circumstance, any bonus bid in existence prior to the reappraisal does not change and remains in effect.

3.3.1.1 Changed Circumstance Reappraisal Procedure

1. Where the cutting authority area must be reappraised because of a changed circumstance, the licensee shall submit to the district manager an appraisal data submission.
2. Thereafter, the reappraisal procedure shall be the procedure required by section 3.2.(2) through 3.2.(8).

3.3.1.2 Effective Date of Changed Circumstance Reappraisal

1. Except as provided in subsections (2) and (3) of this section, a reappraisal because of a changed circumstance is effective on the day after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal.

4.1 Appraisal Methodology

1. The person who determines the stumpage rate must estimate the stumpage rate for a cutting authority area in a manner that will produce the highest stumpage rate for the cutting authority area.
2. For each part of the cutting authority area, the person who determines the stumpage rate must use the procedures in this manual that must be used for the harvest method that produces the highest stumpage rate other than a method that the district manager states is unsuitable for that part of the cutting authority area.
3. Regardless of the harvest method that the holder of a cutting authority uses or intends to use on the cutting authority area or a part of the cutting authority area, or any other fact or law pertaining to the harvest method to be used, the district manager when deciding whether a harvest method is unsuitable may only consider:
 - a. the physical feature and terrain stability of the cutting authority area and the areas through which access to the cutting authority area may be gained,
 - b. the physical features of the areas outside of the cutting authority area that may be affected by the harvesting in or the transportation of the timber from the cutting authority area,
 - c. visual quality objectives, and
 - d. public safety.

4.2 Market Pricing System (MPS) Variables

...

CABLE The fraction of the total net cruise volume of timber in a cutting authority area where terrain conditions require timber to be cable yarded. Cable yarding is an overhead cable system including highlead (spar), mobile (grapple or dropline) and skyline less than 600m in a straight line horizontal yarding distance. Timber from within road right-of-ways that traverse cutting authority areas will have its volume assigned to the harvest method used to determine the stumpage rate in the same area on which the road lies.

DISCUSSION AND ANALYSIS

Whether in the circumstances of this case there was a harvest method changed circumstance requiring a reappraisal to establish a revised stumpage rate.

Interfor's submissions

[24] Interfor submits that, in this case, there was no harvest method "changed circumstance" as defined in the CAM. It acknowledges that less timber was harvested by cable yarding and more by ground-based systems than the volumes that were estimated in its April 2007 appraisal data submittal; however, it submits that this change in the actual harvest method was not a changed circumstance. Interfor asserts that the change in harvest method occurred because weather conditions during the relevant harvest period varied significantly from the weather conditions considered by Interfor in its appraisal estimate. Unforeseen dry conditions allowed Interfor's contractor to log a greater portion of the blocks with ground based logging equipment.

[25] Bruce Gullickson, a logging engineer with Interfor, testified about the preparation and submittal of the appraisal data and cutting permit application for CP 136. Mr. Gullickson has been a Registered Forest Technologist since 2003 and has worked for Interfor since 2000. As part of his responsibilities, he prepares and submits applications for road and logging permits. He also oversees the logging and road building operations of Interfor's contractors in the northern areas of Vancouver Island.

[26] Mr. Gullickson testified that he is involved in all aspects of compiling and submitting appraisal data and submitting cutting permit applications. For the SAN issued in May 2007, he sent the appraisal data submission in the required format on April 16, 2007. Appraisal data submissions must be sent within a couple of weeks of cutting permit applications so that the Ministry can issue a SAN with a stumpage rate for the timber to be cut as authorized by a permit. The general rule is that the more cable yarding to be used, the lower the stumpage, because the costs of harvesting by cable yarding are higher compared to ground-based methods.

[27] Appraisal data submissions must include estimates of the volume of timber to be harvested by different methods, so Mr. Gullickson provided the total net harvest volume figures and the estimated proportions for the cable yarding and ground-based systems in the appraisal data submission. Mr. Gullickson said he made his estimates of the volume of timber that would be harvested by each method based on his field observations and his knowledge of the terrain and weather conditions in the area to be logged. He stated that the factors that determine whether an area will be cable logged include the type of terrain, the type of rock and soil, expected weather and especially anticipated precipitation during harvest. Weather conditions can affect the type of harvest method. For example, rain can affect soil conditions and drastically reduce the harvesters' ability to support ground-based operations.

[28] Mr. Gullickson testified that he used his professional judgment in arriving at his estimates, and he considered the cable yarding estimate to be reasonable and accurate at the time. He also stated that he is bound by the Forest Technologist's professional code of ethics to not over-estimate. He submitted what he believed to be an honest estimate of the volume of timber that would be cable yarded. That

appraisal was accepted by the Ministry's District Manager with an effective date of April 30, 2007.

[29] He also testified that Interfor generally does no harvesting or logging itself; it uses contractors. Interfor also does not tell its contractors what harvest method to use nor does it specify which areas are to be cable yarded or harvested by any specific method. That is left up to the contractor who will be on site and will decide how to harvest. Interfor allows such flexibility with its contractors to encourage efficiencies in harvesting.

[30] No part of the appraisal data submission is given to a contractor, not even the appraisal map. Mr. Gullickson emphasized that the appraisal map is prepared only for the stumpage calculation. It is not a harvest map and it is not a harvest plan. Interfor does, however, provide its contractors with environmental and safety information and with site plans. Mr. Gullickson referred to the site plans for cut blocks ELK 134 and ELK 131, describing these as harvesting documents setting out how the strategies in Interfor's 2006 North Island Forest Stewardship Plan apply to the site. He stated that these are "plans" that Interfor and its contractors refer to, but they do not indicate where in the cut blocks cable yarding will be used or what volume of timber will be cable yarded.

[31] Interfor's contractor started harvesting the two cut blocks in May 2007. According to Mr. Gullickson, that contractor is above average with a highly skilled crew and with good equipment. Mr. Gullickson explained that less volume was logged by cable yarding, primarily because of the weather conditions. The unusually dry weather enabled the contractor to harvest more areas by hoe chucking, a more cost effective method than cable yarding. The contractor's choice of harvest method in May 2007 was based on the dry weather conditions and the terrain conditions.

[32] Mr. Gullickson provided evidence of precipitation records to show that the precipitation in May 2007 was less than half of what was expected in the harvest area. The weather in May 2007 was hot with much less rain than anticipated when he made his estimates for the April 2007 data submission.

[33] In June and July 2007, a Ministry Compliance and Enforcement Officer visited the cut blocks. She prepared a harvest inspection report for each cut block indicating a discrepancy between the estimated ground-based and cable yarding areas that were in the appraisal. The Ministry sent Interfor the harvest inspection reports and then asked Interfor for a reappraisal based on what it considered to be changed circumstance harvest method.

[34] Subsequently, a series of emails and letters were exchanged, and a meeting was held, between the Ministry and Interfor over the issue of whether a harvest method changed circumstance had occurred. In May 2009, Mr. Gullickson sent the Ministry a reappraisal data submission that was in fact a re-submittal of the original April 2007 appraisal data submittal, because it was Interfor's position that there was no changed circumstance. Interfor also maintained that the conditions underlying the original data submitted had not changed, because the effective date of the reappraisal was May 1, 2007, the day after the effective appraisal date of the first SAN – April 30, 1997.

[35] Robin Modesto, a Registered Professional Forester and a Registered Professional Engineer, also testified about Interfor's logging operations, this particular harvest and the application of the CAM to the circumstances in this case. Mr. Modesto is an operations engineer for Interfor. In his previous position as an assistant engineer, he did layouts and collected data for appraisals, and he has worked with appraisals since 1995.

[36] Mr. Modesto's responsibilities as an operations engineer with Interfor include stumpage matters. He is a member and co-chair of the Coast Timber Pricing Advisory Committee which provides advice to the Ministry regarding timber pricing on the Coast. He also sits on the market pricing system technical sub-committee, the price and road sub-committee, and the Board of Examiners and Appraisals Task Force for the Association of BC Forest Professionals.

[37] Mr. Modesto referred to cable yarding as a variable in the MPS equation in the version of the CAM that applies to both the appraisal and the reappraisal. He testified that cable yarding generally lowers the stumpage rate: the more cable yarding, the lower the stumpage rate; the less cable yarding, the higher the stumpage rate payable to the Government.

[38] Mr. Modesto explained that when determining the cable yardage estimate for the appraisal data submission, the forest professional who prepares the appraisal data submission reviews the site to be logged to judge how much cable would be required. The site characteristics that are considered include slope, terrain, soils, distance from roads and terrain off the road. The estimate of timber to be harvested by cable yarding or any other harvest method occurs "pre-harvest" when the trees are standing, and are based on what the expected conditions will be at the time of harvest.

[39] Mr. Modesto also explained that Interfor's data appraisal submissions do not reflect Interfor's actual costs, but are part of a larger cost estimate. Specific costs for various operations are not part of the appraisal. The appraisal process takes an average cost approach; that is, averages are determined from coastal cost surveys collected and compiled by the Ministry, and therefore, costs are not licensee specific.

[40] Mr. Modesto submitted that Interfor had no "harvest plan" and no "planned method of harvest," and the "actual" harvest method may be different from the "appraisal" harvest method. The appraisal data submission is an estimate made by Interfor, but the Ministry is not obligated to agree with that appraisal data submission. The Ministry will take its own position. The Ministry's District Manager reviews the appraisal data submittal for accuracy, suitability and reasonableness.

[41] Mr. Modesto stated that, to determine what conditions and other factors should be included in the requested reappraisal, Interfor relied on section 3.3.1.2 of the CAM which states that a changed circumstance reappraisal is effective on the day after the effective day of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance appraisal. The effective date of the appraisal for the first SAN for CP 136 was April 30, 2007. Therefore, Interfor decided that the effective date of the reappraisal was May 1, 2007, although Interfor actually submitted the reappraisal data in May, 2009.

[42] Mr. Modesto said that Interfor also relied on section 3.3(2) of the CAM, which states that "... a reappraisal is based on a complete reassessment of the cutting authority area on the effective date of the reappraisal, as if the area has been returned to the condition as it was prior to development or harvesting." For its reappraisal, Interfor interpreted "prior to development or harvest" to mean that the reappraisal assesses a stand with the trees standing the way they were before harvest – it's a fresh set of eyes on the original stand of timber. The reappraisal does not consider the actual harvest method.

[43] As with appraisals, in a reappraisal the District Manager does not automatically accept a licensee's proposed harvest method for a cutting authority area. Mr. Modesto referred to section 4.1, the appraisal methodology section of the CAM, which requires the person determining the stumpage rate to estimate the stumpage rate for a cutting authority area in a manner that will produce the highest stumpage rate for the cutting authority. Section 4.1(3) requires the District Manager to do a suitability analysis. However, for that analysis, the District Manager may only consider the factors set out in that section: physical features of the cutting authority area and access areas, physical features of areas outside the cutting authority that may be affected, visual quality objectives and public safety.

[44] Mr. Modesto stated that, because section 4.1 of the CAM requires the Ministry to achieve the highest stumpage rate for an area, the suitability of ground-based harvesting is considered first, since it is generally the most cost effective method and would result in the highest stumpage rate. If the area is unsuitable for that method, then cable yarding, followed by helicopter harvesting methods are generally considered. However, Mr. Modesto emphasized that the appraisal is not based on the "actual" harvest method used. The District Manager has to be satisfied that the best stumpage rate will be achieved regardless of what harvest method a licensee used in its appraisal data submission, and regardless of what actual harvest method was used.

[45] According to Mr. Modesto, the appraisal estimate, including the appraisal map, is based on the opinion of a forest professional who considers all the conditions in a cutting authority area at the time the appraisal data is developed. The licensee, however, is not obligated to use the harvest methods described in that appraisal, and the harvest methods or areas to be harvested by certain methods are not reflected in the site plans, environmental or safety documents Interfor gives to the contractor.

[46] Mr. Modesto also said that, in this case, the yardage was based on a forest professional's estimate that 11,273 cubic metres or 34 percent of the volume would be harvested using cable yarding.

[47] Mr. Modesto testified that, from the outset, Interfor disagreed with the Ministry's interpretation and application of section 3.3.1 of the CAM in this particular case. He was involved in a series of correspondence and a meeting between the parties, and then articulated Interfor's position in a letter dated May 2, 2008 to the District Manager.

[48] Interfor's position then is the same as it was at this hearing; that is, the appraisal data submission is not a "plan" for the purposes of section 3.3.1 of the CAM. The word "plan" infers something in the future, an action to be taken in the future. The appraisal data submission is not used by Interfor as a harvest plan or as evidence of how it intends to or will harvest an area. The appraisal data submission is only an assessment by a professional of pre-harvest volume and terrain conditions. The data submission is not given to a contractor nor is it required to be given to the contractor. In this case, the area under permit was logged by cable yarding and ground methods as estimated, but the volume percentages for the two methods changed because of the unforeseen and uncharacteristically dry conditions at the time of harvest.

[49] Interfor further submits that the appraisal data submission also does not bind Interfor as to how the actual harvest is to be done or what areas are to be harvested by a particular method. Interfor gives no instructions to its contractors about what trees to harvest by what method, and it gave none in this case. It did provide its contractor with the management and site plans required by the *Forest and Range Practices Act*. However, Interfor submits that those are not harvest plans, and certainly not "plans" within the meaning of section 3.3.1 of the CAM. The appraisal data submission does not form any part of those other documents.

[50] Interfor pointed to the language in section 3.3.1(1)(a) of the CAM, and noted that the word "plan" is used, but the words "used a method to harvest" or "harvested" are not used. It submits that the changed circumstance provision in section 3.3.1(1)(a) addressing harvest methods is also different from sections 3.3.1(1)(b), (c) and (d) addressing road building changes, cutting authority changes and damage changes. The language in 3.3.1(1)(a) regarding harvest method changes is prospective, whereas in (b) it is not; it is retrospective. Also, unlike section 3.3.1(1)(b), there is no language in section 3.3.1(1)(a) about appraisal field data; that is, accounting for what you did or did not encounter on the ground. Interfor asserts that the difference between the two sections informs the reader how to interpret them.

[51] Interfor also submits that basing an appraisal on the actual harvest method is inconsistent with the appraisal methodologies in the CAM that require evaluation of the pre-harvest physical features and terrain conditions of the cutting authority area. The CAM and the underlying MPS do not take into account any licensee's unique operations or later determinations of harvest method. The appraisal data is cutting authority specific, not licensee specific. There are tenure obligation adjustments, but those are not based on actual costs except for certain types of road conditions and major developments that need Ministry approval.

[52] With respect to the reappraisal data submission, Interfor asserts that in April 2007, Mr. Gullickson would not have known about the uncharacteristically dry period later that spring and summer. If he had, he would have made different cable and ground-based estimates. Mr. Gullickson's understanding of the conditions in the cutting authority area did not change on May 1, 2007, the effective reappraisal date for CP 136. In his professional opinion, nothing had changed between April 30, 2007 and May 1, 2007, and therefore, he submitted the same appraisal data estimate.

[53] Interfor noted that the Ministry's witness, Glen Griffiths, also a forestry professional, agreed that harvest methods are reviewed in the context of a "suitability" analysis. For the appraisal with the effective date of April 30, 2007, the Ministry determined that Interfor's estimate of volume of timber to be harvested by certain methods was "suitable" as of that date. The Ministry accepted those harvest methods as producing the highest stumpage rate, and therefore the Ministry should make the same stumpage rate determination for the reappraisal effective on May 1, 2007.

[54] Interfor submits that section 3.3.1 should not be used by the Ministry as a method to correct appraisals or check on appraisal accuracies. There are other avenues and remedies such as section 105.2 of the *Act*. If the Ministry wants checks and balances, section 105.2 creates an express mechanism to change stumpage rates where there has been inaccurate information.

[55] In summary, Interfor's position is that its appraisal data submissions, including maps, are based on the procedure in the CAM for estimating the highest stumpage rate. They are not prepared for harvest planning purposes. The appraisal data submissions, including maps, are completed only to comply with the CAM so that the Ministry can determine the stumpage rate. Identifying the harvest method is relevant to calculating the harvest volume and the stumpage rate, and the data is submitted by a professional and reviewed by a professional.

[56] Interfor acknowledges that fifteen percent more of the volume of timber harvested in the cutting authority area was harvested by a ground-based method rather than cable yarding. However, there was no change in "plan". The contractor just took advantage of dry weather conditions.

[57] Interfor does not admit that there was a changed circumstance; however, it submits that if there is a changed circumstance reappraisal then that reappraisal process must follow the requirements in the CAM. That reappraisal is not an exercise in hindsight and also does not consider "actual harvest" volumes, but rather in this case it is based on the same considerations as the preceding appraisal. On May 1, 2007, no harvesting had taken place. The trees were still standing and the factors, such as terrain conditions, were the same as those Interfor considered in its original appraisal data submission in April, 2007.

[58] Interfor submits, therefore, that its estimates of the cable yardage volume and ground-based volume would be the same on May 1, 2007 as on April 30, 2007, and therefore, the stumpage rate would be the same as in the first SAN. Only if the original estimates were incorrect or the terrain conditions had materially changed before May 1, 2007 would there be a different result. In this case, the only change was a decrease in the actual volume of timber harvested by cable yarding and actual harvesting results are not a factor to be considered in appraisals or reappraisals. Therefore, the stumpage rate should not change.

[59] Interfor submits that the appeal should be allowed, the June 25, 2009 SAN rescinded, and the stumpage rate restored to \$17.59.

Government's submissions

[60] The Government's position is that at least fifteen percent more of the volume of timber in CP 136 was actually harvested by a less costly method than cable yarding, and that is sufficient to establish that there was a changed circumstance in this case. That change in the volume of timber harvested by a ground-based method was considered in the Ministry's reappraisal, resulting in a higher stumpage rate for the area covered by CP 136.

[61] The Government interprets section 3.3.1 of the CAM, and specifically the wording "licensee plans to use a method of harvesting," as the intent to do something. Therefore, at the point in time when someone made a decision to vary the harvest methods identified in the original appraisal data submission, there was an intent to change harvest methods and a changed circumstance occurred as defined by section 3.3.1. The Government also submits that when that occurred the licensee, Interfor, had to notify the District Manager immediately of the changed circumstance.

[62] Witnesses for the Government testified about its inspection of the two cut blocks, and how it appraised and reappraised Interfor's appraisal data submissions. Anne Molony, a Registered Forest Technologist who has worked for the Ministry since 1991, testified that she conducted a harvest inspection of both cut blocks and then issued reports. At the time of the inspection, Ms. Molony was a Compliance and Enforcement Officer for the Ministry.

[63] She visited cut block ELK 131 between June 1 and 6, 2007, doing inspections of road construction on that block. She returned on July 13, 2007 to both ELK blocks 131 and 134. She stated that, at that time, it looked like a large portion of the area had been hoe forwarded. There was machinery on site and tracks on the terrain. There was no cable equipment in the area. She reviewed the site plan and the cutting permit, and also used appraisal maps for a reference and took photos. She then prepared harvest inspection reports for each cut block.

[64] In the report for cut block ELK 131, she noted a discrepancy between the estimated ground-based and cable yarding areas applied for within the appraisal. The cable area was indicated at 16.3 hectares but in actuality it was significantly less. A similar report was prepared for cut block ELK 134. Those reports also had a compliance summary for roads/trail construction and management, falling, riparian management, soil conservation, public safety, and forest health.

[65] Ms. Molony testified that the Ministry conducts what she called appraisal inspections, but not for appraisal purposes. The Ministry does estimates of factors in its appraisals and then the Compliance and Enforcement Branch conducts the inspections. They can randomly pick areas for appraisal inspections or they can inspect an area if the Ministry had concerns about some data submitted; for example, if a road or bridge was to be built on a difficult site.

[66] The Ministry sent Ms. Molony's reports to Interfor, and in subsequent correspondence, referred to Interfor's appraisal data submission submitted on April 16, 2007 for CP 136, and the Ministry's field inspections of June and July 2007. The Ministry maintained that the field inspections indicated that the methods of harvesting as stated in the appraisal data submission had changed by more than fifteen percent of the total appraised volume in the cutting authority area. Therefore, pursuant to section 3.3.1(4) of the CAM, the District Manager wrote to Interfor advising that he believed a harvest method changed circumstance had occurred and an appraisal data submission was required with an "effective date of May 1, 2007 and the content must conform to s. 105.1 of the *Act*." The Ministry asked Interfor to submit a reappraisal taking into account the change in harvesting method, as well as any other pertinent changes that had come to light by June 22, 2009.

[67] In response to Interfor's resubmittal of the original appraisal data for the reappraisal with an effective date of May 1, 2007, the Ministry indicated that it had considered information it had about changes made to the volume of timber harvested by cable yarding and by ground skidding harvest methods, and it reappraised the cutting authority based on the its calculations of the changes in the volume harvested by each method.

[68] Glen Griffiths, a Registered Forest Technologist and a Timber Pricing Officer in the Ministry's Timber Pricing Branch, also testified for the Government. He is a Registered Forest Technologist. In the summer of 2008, he was asked to review Interfor's appraisal and confirm data for changed circumstances. He derived the timber volume per hectare for areas on the appraisal map to determine the whole volume. He found a difference of more than sixteen percent between the appraisal estimates and the actual harvest method used.

[69] Mr. Griffiths testified that he and others in the Timber Pricing Branch review data submissions in accordance with the CAM. They review for accuracy, completion, compliance with the CAM and whether the estimates of the volume of timber by harvesting method are reasonable. Certain elements of the CAM are fed into the MPS, and at the time of these appraisals, "CABLE" was one of the factors, but it is no longer a variable in the CAM.

[70] He acknowledged that the timber pricing staff do not know what actual conditions will be at the time of a harvest. However, he does know average conditions and historical data from his experiences working in the area. He agreed that appraisal data submissions do not reflect weather conditions, but do have estimates based on expected terrain conditions which can be influenced by the weather. For example, there is generally less soil stability if an area is really wet, and that, in turn, would affect ground-based harvest methods. In some areas, the terrain conditions would obviously allow ground harvesting and in other areas the harvest method would not be as certain.

[71] Mr. Griffiths also testified that Ministry officials accepted Interfor's April 2007 appraisal data submission, and then issued the first SAN which indicated a stumpage rate of \$17.59 per cubic metre. For the reappraisal, Mr. Griffiths said he used cruise data and a map from Ms. Molony. He did not visit the area and made no independent assessment of the terrain.

[72] Mr. Griffiths agreed that the effective date of the reappraisal in this case is May 1, 2007, and under the reappraisal provisions of the CAM, a reappraisal is made as if the trees are still standing. The reappraisal data submission is similar to the appraisal data submission in that the person preparing the submission does not know what the site conditions will actually be at the time of harvesting. Mr. Griffiths agreed that generally, in a reappraisal review, he does not look at what actually happened. The review is based on the suitability of the harvest method to produce the highest stumpage rate. Mr. Griffiths also acknowledged that the CAM does not use the word "actual" in the appraisal or reappraisal sections or methodology.

[73] The Government submits that this appeal is all about the sale of timber, and the Government wants the highest stumpage revenue possible. Citing the obligation to report changed circumstances in section 3.3.1, the Government submits that Interfor as part of its contract to harvest timber has a duty to submit information that could raise the stumpage rate of that timber. The Government also cited section 105.1 of the *Act* as an obligation on the licensee to provide accurate information.

[74] According to the Government, there are three checks in the system to get the highest price for Crown timber: first, the professional responsibility of those who submit appraisal data; second, the ability to inspect when the Ministry receives data submissions to see if the information is correct; and third, the reappraisal process. The Government maintains that the Ministry has the right to go from "estimate" in the original data submission to "actual" in the reappraisal process.

[75] The Government also cited section 2.4 of the CAM, which requires appraisal data submissions to be in a prescribed form, and section 2.5, which states that an appraisal map must be completed in accordance with the requirements in Appendix V. One of those requirements is a delineation of areas by harvest method.

[76] The Government submits that the appraisal data submissions, and specifically the appraisal maps, are the licensee's "plans" as that term is used in section 3.3.1. The harvest methods are delineated on the appraisal map, and therefore, that map visually sets out the estimates in the appraisal data submission. In its appraisal data submission, the licensee has to tell the Ministry what it plans to do. However, if that plan changes by fifteen percent in volume, it is a changed circumstance if the stumpage rate will be higher.

[77] The Government submits that nothing should turn on whether the change is formally made, or whether the licensee or employee or contractor made the change. Ultimately, the licensee is responsible for the change in plan. The

Government submits that at the point at which the licensee changes its mind and decides to log in a different way, that is the point at which the licensee changed its logging plan. If that change is made on the day when logging starts, that is a changed circumstance. The Government also argued that, in this case, the fact that the actual harvest method changed is evidence of a changed circumstance.

[78] The Government further submits that section 3.3.1 of the CAM must be looked at as a whole, and in the context of the CAM as a whole. The Government submits that this section is based on outcomes, and all the listed changed circumstance events in that section result in reappraisals. The harvest method provision is the same as the road provision and the same logic should apply for an actual change as for a plan change.

[79] Also, according to the Government, the whole point of the reappraisal is to consider evidence that was not available before so that the Ministry can change the stumpage rate to the highest stumpage rate, as it did in this case.

[80] The Government submits, therefore, that this appeal should be dismissed.

The Panel's Findings

[81] The Panel finds that the fundamental facts in this case are not in dispute. In April 2007, Interfor sent an appraisal data submission so that the Ministry could determine the stumpage rate for timber to be harvested in the cutting authority area that would be covered by CP 136. Interfor's contractor harvested more of the timber by ground based methods than Interfor had indicated in its appraisal data submission. After an inspection of the cut blocks, the Ministry asked Interfor to submit reappraisal data estimates which Interfor did in May 2009, sending the same appraisal data submission that it sent in April 2007. Both parties agree that the effective date of the reappraisal was May 1, 2007 and the effective date of the original appraisal was April 30, 2007. The Ministry reappraised the timber volumes for each harvest method for the cutting authority area, and raised the stumpage rate for CP 136 to \$19.96.

[82] The parties differ in their interpretation and application of the changed circumstances provision of the CAM, and what factors are to be considered in a changed circumstance reappraisal. Witnesses during the hearing testified about the relevant sections of the CAM and how those sections, in their opinions, should be interpreted and applied. Mr. Stephen Potter, who appeared as a witness for Interfor, and Mr. George Silvestrini, who appeared as a witness for the Government, were qualified to give expert opinion evidence, and the Panel admitted their evidence pursuant to section 148.6 of the *Act*.

[83] The Panel finds that there is no need to review and discuss their evidence about the MPS in detail in this decision. Much of their evidence was essentially the same in terms of providing a broad overview of the MPS, although they differed on whether the concept of a "notional market bidder" is a factor in the stumpage appraisal process. The Panel also notes that the Commission considered similar evidence from these two witnesses in its recent decision in *Western Forest Products*. The Panel has decided to give their evidence some weight to the extent

that it provides a broad overview of the MPS, and in that regard, the Panel adopts the Commission's reasons in *Western Forest Products*. The Panel has incorporated that evidence into the "Background" part of this decision.

[84] In addition, this Panel agrees with the Commission's decision in *Western Forest Products* regarding opinion evidence about the interpretation or intended meaning of the CAM. Specifically, this Panel adopts the Commission's statement at paragraph 83, page 21:

Questions regarding the proper interpretation and intended meaning of the provisions in the CAM are issues for the Panel to decide, and the witnesses' opinions in that regard are of little relevance in the present appeals. The Panel must interpret the language in the relevant provision of the CAM in the context of the CAM as a whole and the relevant legislation.

[85] Accordingly, the Panel gives no weight to any of the witnesses' opinion evidence about the interpretation or intended meaning of the sections of the CAM.

[86] This Panel also notes that in *MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)*, 2000 BCCA 351, the court stated that provisions of the CAM are a form of subordinate legislation. In *Western Forest Products*, the Commission stated that, since the courts have held that the CAM is akin to subordinate legislation, it must be interpreted in accordance with the rules of statutory interpretation. The modern principle of statutory interpretation suggests that such legislation should be read in the ordinary sense of the words, by giving the words their most obvious ordinary meaning which accords with the context and purpose of the legislation in which they occur. The Panel adopts the position of the appellate court and the Commission, and applies these principles in its review of applicable sections of the CAM to the facts in this case.

[87] The CAM is used by the Government to determine what price; that is, what stumpage rate, to charge for the timber harvested on Crown land. The CAM sets out appraisal methodology, appraisal variables, equations, and other elements that are applied and taken into consideration by the person who determines the stumpage rate.

[88] The primary objective of the appraisal, as stated in section 4.1(1) of the CAM, is to "estimate the stumpage rate for a cutting authority area in a manner that will produce the highest stumpage rate for the cutting authority area." Section 4.1(2) states that the person who determines the stumpage rate must use the procedures in the CAM that "must be used for the harvest method that produces the highest stumpage rate other than a method that the district manager states is unsuitable for that part of the cutting authority area." This means that the District Manager can take another look at the appraisal to decide whether a harvest method is unsuitable, but he or she may only consider the four suitability factors listed in section 4.1(3). Those factors were not at issue in this case.

[89] What is at issue is whether the change to the harvest method that resulted in a higher volume of timber being logged by a more cost-effective method triggered a changed circumstance reappraisal within the meaning of the CAM and whether that reappraisal should have produced a higher stumpage rate for the Government.

[90] One of the considerations in the Ministry's stumpage rate appraisal is the harvest method, because some methods are more cost effective for a licensee than others. For example, in section 4.2 of the applicable CAM which lists the MPS variables, helicopter yarding was considered in certain conditions, and before June 1, 2007 cable yarding was considered in certain conditions. The harvest methods by volume have to be provided in appraisal data submissions. In this case, Interfor's April 2007 submission listed a net cruise volume of 32,866 cubic metres, with cable yarding of 11,273 cubic metres and ground systems harvest of 21,593 cubic metres. The appraisal map, which is part of the appraisal data submission, also showed two harvest methods: cable yarding and ground systems.

[91] Section 3.2 of the CAM addresses appraisals, reappraisals and quarterly adjustments. Section 3.2(1) states that an appraisal is a process used to determine a stumpage rate using the manual in effect on the effective date of the cutting authority. Interfor submitted its appraisal data for CP 136 on April 16, 2007. The District Manager accepted it, and that appraisal was given an effective date of April 30, 2007.

[92] Section 3.3 defines reappraisals, and what they are to be based on. Reappraisals can be triggered by the four different changed circumstances listed in section 3.3.1. If the criteria in one of the four listed circumstances are met, then a cutting authority area must be reappraised under section 3.3.1(4). The licensee must notify the District Manager immediately of a changed circumstance under section 3.3.1(2), or the District Manager will notify the licensee pursuant to section 3.3.1(3) if he or she believes that a changed circumstance occurred.

[93] Section 3.3.1.1 requires the licensee to submit an appraisal data submission if a changed circumstance has occurred, and then the reappraisal procedure essentially follows the previous appraisal process. Section 3.3.1.2 defines the effective date of reappraisals for various situations. The applicable reappraisal date under that section is the day after the effective date of the most recent appraisal or reappraisal of the cutting authority area prior to the changed circumstance reappraisal. In this case, the parties agreed that the reappraisal effective date was May 1, 2007.

[94] Section 3.3.1(1)(a) has three elements that have to be met for a harvest method changed circumstance:

- (i) The licensee [Interfor] plans to use a method of harvesting to harvest at least fifteen percent of the volume of timber [in the CP 136 area] that is different from the method that was planned to be used for that timber at the time of the most recent appraisal..., and
- (ii) the different method of harvesting that is planned to be used:

- (aa) when used in the reappraisal will produce the highest stumpage rate, and
- (bb) is different from the method of harvesting that was used in the most recent appraisal...

[underlining added]

[95] The parties disagree on what the words “plans” or “planned to be used” mean.

[96] The Government submits that the word “plan” in the context of section 3.3.1(1) simply means the licensee’s “intent”. That intent, or plan, in this case was indicated on the appraisal map. Whether or not the map was given to the contractor or used on site for logging purposes is immaterial. The Government also asserts that the fact that the harvest method actually changed is the best evidence that at some point in time the licensee intended to change the harvest method.

[97] Interfor submits there was no “plan”. There is no document in evidence that is a harvest method or logging method plan. The site plans and other documents given to its contractor are not “harvest method plans”. Interfor also submits that the appraisal data submission, including the appraisal map of April 2007, is not a “plan” or its “plan to use” a specific harvest method. The appraisal data submission is developed and submitted for appraisal purposes only, and is not indicative of a harvest method purpose or intent.

[98] The Panel finds that there is no definition of “plan” in the CAM that would apply to section 3.3.1 or to the appraisal or reappraisal provisions. The Panel also finds that no document in evidence in this hearing was actually labeled as a “harvest method plan” for CP 136. The Panel, therefore, turns to the plain and ordinary meaning of the words “plans” and “planned to be used” as used in section 3.3.1(1)(a).

[99] The parties each submitted dictionary definitions for the verb “plan”. The Ministry provided the Oxford English Dictionary On Line Edition, and Interfor provided the Oxford Canadian Dictionary, 2nd ed. The Panel finds that there is no material difference in the definitions cited by the parties. Based on those dictionary definitions, the Panel finds that the verbs “plan” and “planned” mean “intend to do” and “intended to do” something, which indicate a prospective or forward looking state of mind. Therefore, in this case, the question becomes: is there evidence of Interfor’s intent regarding its harvest methods for the two cut blocks?

[100] The Panel finds that, based on the evidence, the only reference to harvest methods for the two cut blocks before the May 2007 SAN was issued, is in Interfor’s appraisal data submission. That submission indicated two types of harvest methods and their respective volumes later accepted by the Ministry and reflected in the April 30, 2007 appraisal.

[101] This case is also all about appraisals, reappraisals and how to determine stumpage rates which include considerations of harvest methods. Therefore, the Panel finds that the words in section 3.3.1 have to be considered in the context of the CAM's purpose, which is to set out the approved process for appraisals and reappraisals for the purposes of determining stumpage rates.

[102] In this overall context, the Panel finds that Interfor's initial intent regarding the harvest methods for the two cut blocks is set out in its April 2007 appraisal data submission (including the appraisal map). Interfor's intent was to harvest an identified volume by cable yarding and a different identified volume by ground-based systems. That was what Interfor "planned" as its harvest methods.

[103] The next question is did Interfor, at some point after it prepared and submitted the appraisal data submission, "plan" or intend to use a different harvest method within the meaning of section 3.3.1(1)(a)(i).

[104] The parties disagree about who is responsible for the change in the harvesting methods, and whether that even matters. The Government argues that the fact that so much more timber was logged by ground-based methods is proof of Interfor's intent to change its harvest methods and it is immaterial whether Interfor or the contractor made that change. Interfor is responsible for the appraisal and reappraisal submissions, and what its contractors do.

[105] Interfor disagrees, submitting that the decision to change harvest methods was made by the contractor on site when the unexpectedly dry conditions were encountered.

[106] The Panel finds that it does not matter whether Interfor or the contractor decided to change the harvest method. Interfor is the licensee who submitted the appraisal data, received the SAN and the cutting permit, and is responsible for its contractor.

[107] The Panel turns to the question of whether at some point Interfor's intent was to use a "method of harvesting to harvest at least fifteen percent of the volume that is different from the method that was planned to be used at the time of the most recent appraisal" (underlining added). The Panel notes that section 3.3.1(1)(a)(i) does not just state that a licensee plans or intends to use a different harvest method. That section adds a condition. The words in section 3.3.1(1)(a)(i) "to harvest at least fifteen percent of the volume of timber in the cutting authority area that is different from the method that was planned" cannot be separated from the preceding words "the licensee plans to use a method". The Panel finds that 3.3.1(1)(a)(i) must be read as a whole to give that section of the CAM its plain and ordinary meaning in its proper context. The verb "plans" has a qualifier – to harvest at least fifteen percent more volume by a different method.

[108] Therefore, for there to have been a harvest method changed circumstance in this case, Interfor, at some point after it received CP 136 and the first SAN, had to plan or intend to harvest at least fifteen percent more of the timber volume by

ground-based systems than by cable yarding. There was a change in harvest method, and the volume by method changed, but the Panel finds that there is no evidence that either the contractor or Interfor planned to harvest "at least fifteen percent of the volume of the timber" by a different method than that which was set out in the April 2007 appraisal data submission.

[109] The Government asserted that evidence of the actual harvest resulting in a change of more than fifteen percent in the volume harvested by ground-based systems satisfies the requirements of section 3.3.1(1)(a)(i). The Panel disagrees. The evidence only establishes that the contractor changed harvest methods because of drier than expected conditions. There is nothing in the evidence to demonstrate that the contractor or Interfor planned or intended that harvest method change in order to harvest at least a fifteen percent difference in volume, or for that matter, any specific percentage difference in volume by that changed method. Without such evidence, the Panel finds that a condition in the CAM for a harvest method changed circumstance is not satisfied. Moreover, if the Government wants to consider actual harvest volume for the fifteen percent volume threshold in section 3.3.1(1)(a)(i), it should state that intent plainly and clearly in the CAM.

[110] Therefore, the Panel finds that in the circumstances of this case, Interfor did not plan to use a method of harvesting to harvest at least fifteen percent of the volume of timber in the cutting authority area that was different from the harvest methods it planned in April 2007.

[111] For harvest method changed circumstances, section 3.3.1(1)(a)(ii) provides that the different method of harvest that is planned to be used, when used in the changed circumstance reappraisal, will produce the highest stumpage rate and is different from the method of harvesting that was used in the most recent appraisal or reappraisal. Given that the Panel has already found that Interfor did not plan to use a method to harvest at least fifteen percent of the volume of timber differently, the Panel finds that section 3.3.1(1)(a)(ii) does not apply in this case.

[112] The Panel next considers what the reappraisal, effective May 1, 2007, under section 3.3 was based on, and how it affected the stumpage rate in this case.

[113] According to the Government's witnesses, the Ministry used the appraisal data submissions from April 2007 when inspecting the cutting authority area in June and July, 2007. It then compared the "actual" volume harvested to the harvest volumes by method in that appraisal data submission. Based on the difference in volume, the Ministry determined that its changed circumstance reappraisal should reflect more ground-based harvest than the appraisal effective on April 30, 2007. The Ministry, in other words, used section 3.3.1(1)(a) of the CAM to make a correction to the stumpage rate, based on actual volumes harvested by each method. However, the Government's witnesses did not explain how they arrived at a stumpage rate of \$19.96 per cubic metre to replace the original stumpage rate of \$17.59 per cubic metre, except that there were differences in cable yarding and in ground-based volumes.

[114] Section 3.3.1.2(1) of the CAM defines the effective date of a changed circumstance reappraisal. The parties agree that the effective date of the reappraisal in this case is May 1, 2007, and the effective date of the first appraisal is April 30, 2007.

[115] Section 3.3(2) states that a reappraisal is based on a "complete reassessment of the cutting authority area on the effective date of the reappraisal, as if the area has been returned to the condition as it was prior to development or harvest." (underlining added). Interfor submits that, in this case, that means it had to look at the cutting authority area as if all the trees were still standing. The Panel agrees.

[116] Interfor's witnesses, Mr. Gullickson and Mr. Modesto, are both forest professionals with considerable experience in stumpage and appraisal data submissions. They testified that, in their professional opinions, there were no changes in the terrain conditions, the anticipated weather conditions, or any of the other appraisal estimate considerations between April 30, 2007 and May 1, 2007 for the area covered by CP 136. They also said that they used their professional judgement in preparing and submitting the appraisal and reappraisal data submissions according to the requirements in the CAM. They assessed the conditions for the cutting authority area as of May 1, 2007, and determined that the same conditions existed as those that were considered in Interfor's appraisal data submission that was accepted for the appraisal effective April 30, 2007. They did not factor actual harvest volumes by harvest methods into Interfor's reappraisal submittal. They estimated the same volumes for harvest by cable yarding and by ground-based systems for May 1, 2007 as for April 30, 2007, because all appraisal conditions were the same.

[117] The Panel accepts this testimony as that of forest professionals who used their professional judgement and experience to determine what the cutting authority area conditions would be on April 30, 2007 and on May 1, 2007 for their appraisal and reappraisal data submissions. The Panel has found that the requirements in section 3.3.1(1)(a) were not met in this case, and the Panel further finds that, based on the opinions of Interfor's forest professionals, there would have been no changes in the appraisal conditions for the cutting area authority between April 30, 2007 and May 1, 2007. Interfor correctly used the same appraisal data with the same CAM methodology in April 2007 as on May 1, 2007. The April 2007 appraisal data submission was accepted by the Ministry based on the requirements in the CAM, and the Ministry determined a stumpage rate of \$17.59. The reappraisal effective on May 1, 2007 should be no different from the appraisal effective on April 30, 2007, and therefore, neither should the stumpage rate be any different.

DECISION

[118] The Panel has carefully considered all of the submissions of the parties and the documents and evidence before it, whether or not specifically reiterated herein.

[119] For the reasons set out above, the Panel finds that the June 25, 2009 stumpage determination should be rescinded, and the stumpage rate restored to \$17.59 per cubic metre.

The appeal is allowed.

"Gabriella Lang"

Gabriella Lang, Panel Chair

"Bruce Devitt"

Bruce Devitt, Panel Member

"O'Brian Blackall"

O'Brian Blackall, Panel Member

June 16, 2011