

DECISION NOS. 2009-FA-008(a); 009(a); 010(a); 011(a); 012(a)

In the matter of an appeal under section 146 of the *Forest Act*, R.S.B.C. 1996, c. 157.

BETWEEN: Juggernaut Development Inc. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
David Ormerod, Panel Chair

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

APPEARING: For the Appellant: Rick Biller, RPF
For the Respondent: Bruce Filan, Counsel

APPEAL

[1] This appeal is brought by Juggernaut Development Inc. ("Juggernaut") against the Stumpage Advisory Notices ("SANs") for cutting permits issued pursuant to Licences to Cut L48183, L48184, L48211, L48212 and L48213 (the "Licences"), in April and June 2009. The Licences are situated in the Arrow Boundary Forest District of the Southern Interior Forest Region, Ministry of Forests and Range (the "MOFR").

[2] Linda Davidson, Regional Appraisal Administrator, issued the SANs which set the stumpage rates in accordance with section 6.2(1) of the Interior Appraisal Manual ("IAM"), which states:

6.2 Cutting Authorities With 5 000 m³ or Less Volume

1. Where the total coniferous volume to be harvested in a cutting authority area is 2 000 m³ or less, and where the agreement under which the cutting authority authorizing harvesting on the cutting authority area has been issued has a coniferous allowable annual cut of not more than 3 000 cubic metres, or no coniferous annual allowable cut:
 - a. The stumpage rate for each species of coniferous timber in the cutting authority area must be determined using the stumpage rate in Table 6-1 for the forest zone in which the cutting authority area is located, except that,

- b. Where the agreement holder is not required to establish a free growing crop of trees on the cutting authority area, the stumpage rate for each species of timber shall be
 - i. the sum of the rate determined under paragraph (a) of this subsection and the basic silviculture cost for the species in the forest region, or
 - ii. where the Crown has the responsibility for silviculture, the silviculture levy determined under section 5.6.4(1)

[3] The Commission understands that the basic silviculture cost was added to the stumpage rate under subsection (i).

[4] The Appellant appeals the SANs on the grounds that there was inconsistency in the form of harvesting authorities issued and in the MOFR's application of the IAM. It submits that the resulting stumpage rates are unfair.

[5] The Government's position is that the IAM was applied consistently, and that the SANs appealed were properly determined.

[6] These appeals are heard pursuant to Part 12, Division 2 of the *Forest Act*. The powers of the Commission on an appeal are set out in section 149(2) of the *Forest Act*:

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.

[7] The Appellant asks the Commission to rescind the SANs.

BACKGROUND

[8] The subject Licences were just five of a number of licences issued to the Appellant for the purposes of "daylighting" (clearing) 20 kilometres of right-of-way along Highways 3 and 3b. This project was initiated at the request of the Ministry of Transportation and Highways ("MOTH"), and in co-operation with the MOFR, so that the highway would be safer.

[9] Discussions regarding this right-of-way harvesting project began in the summer of 2008. The Appellant says that, during these discussions, both the MOTH and the MOFR fully understood that the project was financially marginal, and made commitments to materially aid the project by paying for traffic control (e.g., flagging), keeping stumpage as low as possible, among other things.

[10] The Appellant further says that these commitments were broken. The MOTH stopped paying for the flagging, and the MOFR changed the form of tenure from Forestry Licences to Cut ("FLCs") to Occupant Licences to Cut ("OLCs"). Regarding the changed form of tenure, the Appellant submits as follows.

[11] From the beginning, the Appellant understood that this project would require a number of Licences to Cut because the maximum volume of any one Licence to Cut is 2 000 m³.

[12] In 2008 and in early 2009, the Ministry issued a number of FLCs to the Appellant in relation to this project, and the stumpage was set in accordance with section 6.4 of the IAM and Table 6-2, both of which apply to the salvage of damaged timber. The stumpage rates issued for these licences were not appealed.

[13] The Appellant then applied for two further FLCs, but MOFR staff required them to be resubmitted as applications for OLCs. There is no dispute that these licences were for green timber. The OLCs were issued as L48183 and L48184, with higher stumpage rates than would otherwise be the case for FLCs. The stumpage rates are calculated in accordance with section 6.2(1) of IAM (as above), which requires the rates to be set by Table 6-1 of the IAM. Table 6-1 is titled "Coniferous Average Sawlog Stumpage in \$/m³ by Forest Zone and Species".

[14] On receipt of the SANs for these OLCs, the Appellant found that the stumpage rates had been further increased from the rates in Table 6-1, and upon inquiry, was advised that this was because of a silvicultural levy, which varies by species harvested, but averages approximately \$4.00/m³. The levy was added in accordance with section 6.2(1)(b) of the IAM, as there is no reforestation obligation associated with OLCs.

[15] Once the additional OLCs L48211, L48212 and L48213 were issued and the SANs had been received, the Appellant appealed all five of the SANs for the OLCs to the Commission. These additional OLCs were also for green timber.

[16] In addition to facing the substantially higher stumpage rates associated with OLCs as opposed to FLCs, the Appellant says that the MOTH added the operational requirement to pile, burn and mulch the logging debris following harvest. The Appellant estimates that the MOTH has "off loaded" \$100,000 in debris piling, clean up and flagging costs, and that the MOFR has added approximately \$90,000-100,000 in stumpage costs "by invoking the highest stumpage rate possible for this type of operation."

[17] The Appellant appeals on the grounds that the MOFR has been inconsistent in the form of Licences to Cut issued to the Appellant and to other operations in the area, without any apparent reason or rationale for the differences. Further, it has broken its commitment to keep stumpage rates as low as possible and this is unfair.

[18] As evidence of its inconsistency in the form of licencing, the Appellant states that, while OLCs were issued to the Appellant for the Highway 3 project, FLCs were provided to harvest timber in conjunction with cross-country ski trails developed in the area. Specifically, there were three other directly awarded FLCs issued, or in the process of being issued, for the purposes of ski-trail clearing, which the Appellant says were all in green timber. The Appellant says that the stumpage rates for these licences are approximately \$10/m³ less than for the OLCs issued to the Appellant to clear the highway.

[19] The Appellant submits that it is a small independent operator in the West Kootenays and just wants to be treated fairly. It points out that the stumpage rates for the OLCs are higher than the general rates received by British Columbia Timber Sales ("BCTS", a division of MOFR) for sales in the general area over the same period.

[20] Stuart Card, RPF, an employee of the MOFR in the Southern Interior Forest Region, wrote to the Commission on October 13, addressing the Appellant's appeal submissions of September 9, 2009. Mr. Card states that the five OLCs were issued because the areas to be harvested did not meet the criteria in section 6.4 of the IAM, which applies to the salvage of damaged timber. Mr. Card does not explain why the three FLCs issued earlier for the project met the criteria in section 6.4. What he does say is that the five OLCs at issue do not meet the requirements in section 6.4 of the IAM for damaged timber and, therefore, are priced under section 6.2(1).

[21] Mr. Card also states that some of the BCTS stumpage rates listed by the Appellant are advertised rates, and as such are 30% below the calculated rates in order to allow competitive bidding.

[22] Regarding the FLCs issued for the purposes of ski-trail clearing, Mr. Card says that these licences were for decked timber and were priced at the proper rate, which applies the lower Table 6-2 rates. The Appellant says that this is misleading.

[23] The Government does not defend or explain the use of OLCs in its submission, other than referring to Mr. Card's letter to the Commission and stating that he addressed other concerns "not relevant to this appeal."

[24] The Government states that the only relevant issue before the Commission is whether or not the IAM was properly applied in determining the rates under appeal and that the Appellant's grounds for appeal do not address this. It submits that the rates were properly determined and must be confirmed.

ISSUES

[25] There are two issues raised in this appeal that the Commission will consider:

1. Whether the Commission has jurisdiction to consider whether the Ministry properly required and issued OLCs for continuation of the highway clearing project in the context of stumpage policy administration?
2. Were the stumpage rates correctly determined?

RELEVANT LEGISLATION

[26] 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.
- 149** (2) 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.

DISCUSSION AND ANALYSIS

1. Whether the Commission has jurisdiction to consider whether the Ministry properly required and issued OLCs for continuation of the highway clearing project in the context of stumpage policy administration?

[27] The Appellant submits that, prior to the arrangements between itself, the MOTH and the MOFR, the Government had not been able to deal with the safety problems of Highway 3 in this area; specifically, the “icing-up” of the highway in the spring and fall due to shading from mature timber left standing in the right-of-way.

[28] The extraordinary value of the service provided by the Appellant was recognized by at least one employee in MOFR, who stated “He [Rick Biller] is doing us a great service by taking on this work” [email between Grant Walton and Brian Russell, May 15, 2009].

[29] The Appellant says that, before it took on the highway clearing work, it was clear from discussions that all parties understood that the project would be financially marginal due to current log market conditions, and that help from both ministries would be required: from the MOTH, by paying for the flagging (traffic control), and from the MOFR, by keeping stumpage rates as low as possible.

[30] The stumpage rates set by Table 6.2 of the IAM for damaged timber, which apply to FLCs, are lower than those set by Table 6.1, which apply to OLCs. The first three harvesting authorities issued to the Appellant for the highway clearing project were FLCs, and the last five were OLCs.

[31] Part 3, Division 8.1 of the *Forest Act* provides authority to direct award various forms of timber harvesting tenure on Crown land, including Licences to Cut,

in certain circumstances, including over Designated Areas as established under Part 13 of the *Act*.

[32] No one advised the Commission on whether the highway right-of-way area at issue was a Designated Area, and there is no information as to whether the harvesting authorities given to the Appellant for the highway clearing were direct awards.

[33] Part 3, Division 8.2 of the *Forest Act* deals with the various forms of Licences to Cut, including OLCs. Section 47.5(1) sets out the contents of OLCs, including the requirement to pay stumpage under Part 7, and to meet other terms and conditions established by the Regional Manager or District Manager, or a Forest Officer authorized by either of them.

[34] FLCs are addressed under section 47.6 of the *Forest Act*. Section 47.6(2)(d) provides for the issuance of FLCs for a harvest volume not to exceed 500 m³ for a "prescribed purpose" or "prescribed circumstance". FLCs may also be issued under circumstances that are prescribed by subsections (3), (4), and (5), none of which apply in the cases appealed.

[35] Section 47.7(f) provides for the holders of FLCs to pay stumpage under Part 7, and section 47.7(h) allows the Regional Manager, District Manager, or Timber Sales Manager to impose other terms and conditions that are consistent with the Act and other specified legislation.

[36] The "prescribed purpose or circumstance" for the issuance of the first three harvesting authorities to the Appellant as FLCs has not been described to the Commission. Similarly, the change in purpose or circumstance that resulted in the later five authorities being issued as OLCs has not been explained.

[37] The only hint that there may have been qualitative differences is provided by the Appellant in discussing the work on the south side of the highway:

... Juggernaut was advised by the MOTH representative that he did not feel comfortable issuing the two [additional licences to cut] as Forestry Licences to Cut's [sic] as the volume of dead timber was less on this side of the highway.

[38] This language suggests that the original justification for the Appellant's FLCs may have included some element of timber "salvage" as contemplated by section 47.6(4)(a), which provides for the issuance of FLCs to reduce the spread of insect infestations.

[39] While there may have been insect infestations in the area, the Appellant's submissions are clear that the intent and purpose of the timber removal was to reduce the amount of shade that contributed to making the highway icy in the spring and fall.

[40] In addition to appealing the internal inconsistency in the forms of licence issued to the Appellant for the highway clearing project, the Appellant points to

three other licences recently issued, or to be issued, over green timber as FLCs for the purposes of ski-trail clearing, and says that he was told by the MOFR representative that these were issued this way to “give the applicants a break”. One of these licensees is the Appellant (Juggernaut), on behalf of the Nordic Ski Club. The other two are for the Blackjack Ski Club Society and the Rossland Biathlon Society.

[41] The Appellant states that the purpose of its Licences to Cut for the highway project, and these other licences to clear ski trails issued to the Appellant and others, are the same. It says:

All the licences reference here, whether they are the five licences I am appealing (L48183, L48184, L48211, L48212 and L48213) or the three other licences referenced (A85109, A86321 or a third licence not yet issued) are all for right of way timber removal. All licences were for green timber extraction.

[42] The Appellant’s point appears to be that, since the purpose of the licences is the same, the MOFR should have issued the same type of Licence to Cut, or, at the very least, applied the same stumpage rates.

[43] Stuart Card says that these other licences were issued for decked timber, and, therefore, were priced under section 6.5 of the IAM, which applies Table 6-2. The Appellant says that while the licences are for decked timber, this was only done so that Table 6-2 could be applied under section 6.5, and that the felling, skidding and decking for these licences was authorized under section 52 of the *Forest Act*. A letter confirming this was submitted by the Appellant for A86321. Section 52(1)(b) provides for agents of the government to harvest Crown timber in respect of such an agency.

[44] In the circumstances, and on the face of the evidence provided by the Appellant, section 47.6(2)(d) of the *Forest Act* would have provided authority to issue FLCs for the purposes of clearing timber from the highway’s right of way, regardless of insect infestation in the timber. This section states:

Forestry licence to cut

47.6(2) The regional manager or district manager may enter into a forestry licence to cut

- (a) [Repealed 2008-20-18.]
- (b) in which the volume of timber specified does not exceed 500 m³ and the timber, in the opinion of the regional manager or district manager, is to be harvested under controlled scientific or investigative conditions,
- (c) if authorized to do so under another provision of this Act, or
- (d) to authorize the harvesting of timber for prescribed purposes or in prescribed circumstances.

[45] Further, the section 52 approach could also have been used to facilitate stumpage appraisal under section 6.5.

[46] The switch from FLC to OLC had a profound impact on the stumpage and silviculture levy costs to the Appellant. Not only are the rates in the IAM's Table 6-1 higher than in Table 6-2, but direct award FLCs apparently do not attract a silvicultural levy, whereas OLCs do.

[47] Section 5.6.4(1) of the IAM specifies that a silvicultural levy applies to licences whose stumpage rate is determined under section 6.2(1), the section applied by the Regional Appraisal Administrator in this case, and which terms do not apply to a direct award FLC.

[48] The Appellant says that the additional stumpage and levy costs resulting from the MOFR changing the harvesting authorities from FLCs to OLCs, together with additional offloading of flagging costs by the MOTH, "forces me [Juggernaut] to the brink of financial ruin".

[49] In summary the Appellant states:

We are not trying to get out of something here; we simply want to pay what is fair and be treated fairly. We have not been treated fairly on this project, promises have been broken and in the end it was only one small companies [sic] desire to complete this project that made it happen. I simply ask that you consider my appeal as a request for a fair deal. A reduction in stumpage will not cover all the losses we have encountered on this project but it will send a message that at least the effort was appreciated to complete a difficult project in a very difficult time.

[50] The Government submits that none of the Appellant's evidence and/or submissions under this heading relate to the central question on the appeal of the SANs, that is, whether the Regional Appraisal Administrator who determined the stumpage rates under appeal, properly applied the IAM when determining those rates.

Decision on Issue #1

[51] Section 4(e) of the *Ministry of Forests and Range Act* requires the Minister to "assert the financial interests of the government in its forest and range resources in a systematic and equitable manner".

[52] There is inconsistency in the MOFR's administration of the harvesting authorities that were issued to facilitate this timber clearing project for the MOTH. There is no clear explanation of why the first three Licences to Cut were issued as FLCs, and the last five as OLCs. On the face of the evidence the test of "systematic and equitable" administration of the Crown's financial interest is not met.

[53] However, the Commission does not have the jurisdiction on a stumpage appeal to redress this inconsistency in administration of this highway clearing project by the MOFR, despite the sympathy it has for the Appellant's position. The

Commission can only point out that there is an apparent inconsistency in the way the licences for this highway project were issued, and that the legislation and associated regulations, including the IAM, are confusing and often ambiguous as to how a project of this nature can be fairly and consistently administered with respect to stumpage rates.

[54] The financial and other distress felt by the Appellant in trying to satisfy the contractual objectives and arrangements between itself, the MOFH and the MOFR, is a civil matter, and can only be remedied through other avenues, such as the courts.

[55] Accordingly, the Commission is unable to grant a remedy under this heading due to a lack of jurisdiction.

2. Were the stumpage rates correctly determined?

[56] The Appellant does not take a position on whether the stumpage rates for the OLCs are incorrectly determined. It only states that the MOFR:

has the option to increase rates taking out the allowances for silviculture. For the MOFR to default to a paragraph out of the Interior Appraisal Manual that they may or may not choose to burden the operator with additional stumpage is unacceptable.

[57] While part of the Appellant's position is obviously that the MOFR had a choice to issue FLCs instead of OLCs, and thereby apply lower rates of Table 6-2 and eliminate the application of the silvicultural levy, the Commission understands that the Appellant is also saying that application of the silviculture levy under the OLCs was optional.

[58] The email correspondence between the Appellant and staff of the Arrow Boundary Forest District suggest that there may have been, at least for some period of time, a misapprehension by both parties that application of the silvicultural levy was optional.

[59] Section 6.2(1)(b) of the IAM was cited by MOFR staff as authority for the silviculture levy. It states that, where the licensee does not have responsibility for reforestation, the silvicultural levy must be added to the stumpage rates of Table 6-1. When Table 6-1 applies, and when the licensee is not responsible for reforestation, the application of the silviculture levy is not optional.

[60] The Appellant does not take issue with the calculation of the silvicultural levy amounts, only that they have been applied. The stumpage rates in the SANs under appeal used the Revenue Branch Silvicultural levy amounts effective April 1, 2009, and the Commission finds that they are correct in the circumstances.

[61] Further, the Commission finds that the Table 6-1 rates applied in the SANs under appeal are similarly correct. The IAM Amendment #6 applies to the SANs for L48183 and L48184 and Amendment #7 applies to L48211, L48212 and L48213. No errors have been made.

[62] The Commission finds that the SANs appealed were determined correctly.

DECISION

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

[64] For the reasons stated above, the Panel confirms the stumpage determination set out in the SANs issued for L48183, L48184, L48211, L48212 and L48213.

[65] The appeal is dismissed.

"David Ormerod"

David Ormerod, Panel Chair
Forest Appeals Commission

December 3, 2009