



Forest Appeals Commission

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DECISION NOS. 2014-FA-001(a), 002(a), 003(a), 004(a), 005(a), 006(a), 007(a), 008(a) and 009(a)

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

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

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeals Commission
Jeffrey A. Hand, Panel Chair
Maureen Baird, Q.C., Member
Howard Saunders, Member

DATE: June 3-10 and July 16-17, 2015, followed
by submission of transcript excerpts on
July 28, 2015

PLACE: Prince George and Vancouver, B.C.

APPEARING: For the Appellant: Mark S. Oulton, Counsel
Rebecca Robb, Counsel

For the Respondent: Karen Horsman, Q.C., Counsel
Sarah Bevan, Counsel
Keith Evans, Counsel

APPEALS

[1] These appeals concern stumpage determinations issued by an employee of the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") for nine cutting permits held by Canadian Forest Products Ltd. ("Canfor"). Specifically, Canfor appeals:

- six stumpage determinations issued on December 20, 2013 for cutting permits C08, C16, C21, C22, C23, C24;
- one stumpage determination issued on January 6, 2014 for cutting permit C10;

- one stumpage determination issued on January 16, 2014 for cutting permit C37, and
- one stumpage determination issued on June 13, 2014 for cutting permit C17.

(collectively, the “stumpage determinations”)

[2] The Commission joined the nine appeals for the purposes of a hearing.

[3] The stumpage determinations were based upon a November 5, 2013 finding by the Mackenzie District Manager, David Schwarz (the “District Manager”), that the Manson log dump on Williston Lake (the “Manson Site”) is “suitable” as an appraisal log transportation route for the purposes of appraising stumpage for cutting authorities (i.e., the cutting permits) in the vicinity of those landing sites (the “Suitability Determination”).

[4] The Suitability Determination was made in response to Canfor’s October 4, 2013 request that the Manson and Nation landing sites be found “unsuitable” as appraisal log transportation routes for the purposes of stumpage rate determinations. The District Manager denied the request. He concluded that the Manson Site is suitable for an appraisal transportation route involving “lake tow” (the generic appraisal term for log transport on a vessel, or by boom and tow), under the power granted to him by section 3.1(3) of the Interior Appraisal Manual (“IAM”), since the revision of the section in the July 1, 2013 IAM.

[5] The Forest Appeals Commission has the power to hear these appeals pursuant to section 146(2)(b) of the *Forest Act*. Pursuant to section 149(2) of the *Forest Act*, the Commission has the following powers:

Powers of Commission

149(2) On an appeal, the commission may

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

[6] Canfor submits that the Manson Site is not a suitable transportation route for the cutting authorities within the meaning of the IAM. It argues that the Suitability Determination was made in error, was based on irrelevant or improper considerations and should not have been applied to determine the stumpage rates for these cutting permits. Canfor asks the Commission to rescind the determinations and refer them back to the Ministry with directions to recalculate the market stumpage rate payable for the timber harvested under each of the cutting permits.

[7] The Government submits that the stumpage determinations are reasonable and asks the Commission to confirm the stumpage determinations.

BACKGROUND

General

[8] Canfor holds a replaceable forest licence (A15384) in the Mackenzie Timber Supply Area, with an annual allowable cut of approximately 1,000,000 cubic metres which it acquired in 2004 with the purchase of Slocan Forest Products Ltd. Canfor operates a mill in the Town of Mackenzie, not far from the eastern shoreline of a large man-made reservoir known as Williston Lake. Williston Lake was created in the 1960's as a result of the construction of the W.A.C. Bennett Dam.

[9] The cutting permits issued to Canfor have effective dates ranging from March 13, 2013 to January 16, 2014, each with a four-year term extending to 2017-18. The cutting permits allow timber harvesting in an area located approximately five to fifteen kilometers from the western shore of Williston Lake.

[10] Stumpage is a fee paid to the government when a person harvests Crown timber in BC. Stumpage is determined through a complex appraisal process for the timber being harvested. In a stumpage appraisal, a Ministry employee determines the stumpage rate in dollars per cubic metre of timber that applies to the timber harvested under a particular cutting authority, such as a cutting permit.

[11] Under section 105(1) of the *Forest Act*, stumpage rates must be determined in accordance with the policies and procedures approved for the forest region by the Minister of Forests, Lands and Natural Resource Operations. The stumpage rates applied to Canfor's cutting permits were established according to an appraisal process set out in the IAM.

[12] The IAM is regularly amended and revised. Based on the effective dates of the cutting permits at issue in the appeals, two versions of the IAM are relevant to these appeals:

- (a) the version in effect July 1, 2012, as amended; and
- (b) the version in effect July 1, 2013, as amended.

[13] There are some differences in the language of the applicable provisions (discussed below), although Canfor argues that the issues regarding the suitability of the Manson Site are the same.

[14] Pursuant to section 3.1 of both versions of the IAM, the responsibility of the licensee submitting an appraisal data submission, and the responsibility of the Ministry employee who determines the stumpage rate, is to produce the "highest stumpage rate" for the Crown, regardless of the *actual* harvest method or transportation route that the licensee might use. Logs may be transported by truck, by rail or by water transport, or combinations thereof. When it is available, water transport of logs to the sawmill, rather than road haul by truck, often results in lower cost and, accordingly, generates the highest stumpage rate. As such, it would be used as the basis for determining stumpage.

[15] The IAM provides one exception to the overriding principle of appraising in a manner that produces the highest stumpage rate: that is, if a district manager

determines that the harvest method or, since July 1, 2013, the transportation route, is deemed "unsuitable".

The Manson Site and its use as a log transportation route

[16] According to the undisputed evidence before the Panel, the Manson Site, which lies within Canfor's operating area of the McKenzie Timber Sale Licence, has been an access point to Williston Lake for log transport since the 1970's. In the early years, the Manson Site was used as a water transportation point for "boom and tow" operations. This typically involves logging trucks accessing the area at the Manson Site, just above the foreshore, and dumping raw logs onto a ramp known as a "skid" where gravity would convey the log bundles into the lake. The bundles would then be assembled into a floating rectangular "boom" held together by chains which would, in turn, be towed by a tugboat across the lake to Mackenzie. There, the logs would be lifted from the water and placed onto trucks to continue a short journey to the sawmill.

[17] Williston Lake freezes in the winter months and, therefore, the boom and tow operations can only be conducted during the summer season: no lake transport of logs would take place over the winter months.

[18] In or about 1995, Findlay Navigation constructed a large self-propelled barge called the Williston Transporter (the "Transporter"). The Transporter was able to carry 6,500 cubic meters of timber across Williston Lake, and was able to operate throughout the year because it had ice breaking capability. The Transporter operated out of a number of log dump sites around Williston Lake, including the Manson Site. Canfor eventually came to own the Transporter in 2004 through its acquisition of Slocan Forest Products Ltd., which had previously acquired the Transporter from Findlay Navigation, and operated it continuously between 2005 and 2007.

[19] In 2007, the forest industry in British Columbia was generally experiencing an economic recession. Canfor temporarily closed its sawmill at Mackenzie, as did other major licence holders in the area. Logging operations in the Mackenzie Forest District ceased for a period of time. The Transporter was taken out of service and anchored near Mackenzie in the fall of 2007. Canfor retained the then Captain of the Transporter, Jarl Sundve, to undertake periodic checks on the Transporter, to run its engines from time to time, and to generally keep it safe. Canfor intended to reactivate the Transporter in the future, and expected that this would likely occur within five to ten years.

[20] During this period while logging operations ceased, Canfor took steps to keep some of the permits required for the Manson Site current; specifically, a Licence of Occupation that granted Canfor the right to the use of the land on which the Manson Site was located. Canfor did not perform any physical maintenance at the Manson Site during this period. The Manson Site was subject to the effects of erosion due to significant seasonal variation in the water level at Williston Lake and the occurrence of strong winter winds.

[21] In or about 2009, the outlook for forestry companies in the Mackenzie Forest District began to gradually improve. The prevalence of pine beetle-kill timber in the

southern areas of the District presented an opportunity for Canfor, and other licensees, to renew timber harvesting in areas that provided relatively short road haul access to the sawmills in Mackenzie.

[22] In 2012, Canfor began the process of conducting reconnaissance on the areas that would ultimately be included in the cutting permits that are the subject of these appeals. At this point, Canfor had begun to shift its harvesting efforts further north on Williston Lake, principally into the Blackwater Arm area adjacent to the Manson Site.

[23] In the following year, 2013, Canfor submitted applications for the cutting permits. At or about the same time, Canfor also started the planning process for reactivating the Transporter, with a view to having it back in service at the Manson Site by September, 2015. This timing was driven by Canfor's business plan for its expected harvesting activities in the future. In particular, Canfor preferred the use of the Transporter to boom and tow operations, and it wanted larger volumes of timber moving through the Manson Site before it mobilized the Transporter again.

[24] There was a brief period of time in early 2013 when Canfor considered the possibility of temporarily leasing the Transporter to a company called Cardero Coal Ltd. ("Cardero"). This would have had the benefit of Cardero paying for the cost of bringing the Transporter back into service, and generating some income for Canfor in lease payments until such time as Canfor chose to put the Transporter back into service for its own use in 2015. However, negotiations with Cardero fell through by July, 2013.

[25] On or about October 13, 2013, Canfor formally requested the District Manager to deem the Manson Site "unsuitable" as an appraisal log transportation route until the Transporter was operational or suitable boom and tow infrastructure was installed. This request was made pursuant to section 3.1(3) of the 2013 IAM. In the Suitability Determination, the District Manager found the Manson Site was suitable as an appraisal log transportation route, and therefore not "unsuitable" under section 3.1(3). In doing so, he considered water transportation as producing the highest stumpage in accordance with section 3.1 of the IAM. He did not apply the particular test set out in section 3.1 for determining suitability. Rather, he applied criteria from a different manual, the Coast Appraisal Manual.

[26] By 2014, Canfor was focusing its efforts on performing remedial work at the Manson Site. Canfor retained an engineering consultant, Emily Cheung., P.Eng., of DWB Consulting Services, to advise it on the steps necessary to put the Manson Site back into service for the use of the Transporter, and for recommendations on how to improve the efficiency of the operations at the Manson Site. Ms. Cheung recommended re-grading the access ramps to the foreshore, and rebuilding ramps that had eroded since the Manson Site was last used. Further, upgrades by way of increasing the storage room available on site, and relocating that storage area closer to the water, would permit more efficient operations. She recommended installing armour rock to improve the shoreline's resistance to erosion.

[27] In January, 2015, Canfor secured the necessary permits to use the Manson Site again. A Special Use Permit provided for an expanded landing area at the Manson Site. A *Water Act* permit allowed access to the shore, and Canfor

completed a referral of its use of the Manson Site to the Department of Fisheries and Oceans. The remedial work and upgrades at the Manson Site were underway during 2015. Canfor expects the Manson Site to be in service, with the use of the Transporter, at the beginning of September, 2015.

The Determinations and Appeals

[28] When Canfor initially made its appraisal data submissions for the nine cutting permits between March 5, 2013 and November 19, 2013, it based its original data submission on a direct haul (truck haul) for the entire distance from the area of the cutting permits to the point of appraisal, being the mill in Mackenzie.

[29] Although the subsequent events are slightly different for some of the cutting permits, ultimately, Canfor resubmitted its appraisal data for the cutting permits but still based them on direct haul from the cutting authority to the point of appraisal. In its comments, Canfor expressly recognized that its appraisal data submission was contrary to the Suitability Determination, and reserved all of its rights in this regard.

[30] On or about November 22, 2013, the Ministry directed Canfor to re-submit its appraisal data for the cutting permits by:

- a) using cycle times between each cutting authority and the Manson Site; and
- b) including 'specified operations adjustments for lake tow, dump & boom and dewater/reload'.

[31] Canfor's data submissions were returned to Canfor for re-submission based on water transportation as the appraisal transportation route for the cutting authorities.

[32] Canfor complied with the Ministry's direction and re-submitted the re-appraisal data for the cutting permits, but continued to reserve all of its rights with respect to the Suitability Determination.

[33] Between December 20, 2013 and June 13, 2014, the Ministry issued the stumpage rate determinations forming the subject of these appeals. Each of the cutting permits were appraised on the basis that a portion of the journey of the raw logs from the cutting area to the sawmill would take place on Williston Lake via the Manson Site.

[34] The District Manager's Suitability Determination confirming the suitability of the Manson Site as an appraisal log dump (transfer point for water transportation) was incorporated into at least eight of the nine stumpage rate determinations being appealed. One of the cutting permits (C10) was issued prior to July 1, 2013. As the wording of the IAM was different prior to July 1, 2013, there is some dispute between the parties as to whether any discretion existed under the applicable IAM to disqualify the Manson Site as an appraisal log dump, given that lake tow from the Manson Site produces the highest stumpage, and the IAM at that time provided no suitability discretion with respect to transportation routes.

[35] Canfor appealed each of the stumpage determinations. It states that, for each of the stumpage determinations under appeal, the Ministry has appraised Canfor based on a transportation route that includes transport of the relevant timber by water along Williston Lake, using the Manson Site as a landing site on one end, and Canfor's mill site at Mackenzie on the other. For each stumpage determination, Canfor submits that transport of timber by water via the Manson Site is unsuitable for the cutting authority area.

[36] Canfor submits that determining suitability under the IAM requires an objective analysis, constrained to an enumerated list of factors set out under section 3.1 of the IAM. Under that section in the 2013 version of the IAM, the District Manager may only consider:

- (a) the physical features 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,
- (d) the licensee's written rationale in the appraisal data submission that describes why a harvest method or transportation route should be considered unsuitable.

[37] Canfor maintains that these are factual considerations that must be applied objectively, without consideration of any subjective reasons (business or otherwise) behind why a particular transportation route is used, or not used, by any particular licensee. It submits that, when this is done, it is clear that the Manson Site is not suitable as a transportation route within the meaning of the IAM. This is due to two related considerations.

[38] Canfor submits that the Manson Site is not currently in a physical condition which would permit its use effectively or efficiently as a log dump site for the purposes of transporting timber by boom and tow, or for any other form of water transport. In fact, it states that no one currently uses the Manson Site for any form of log transport at this time, and no one has done so since approximately 2008.

[39] It says the evidence establishes that natural processes have altered the character of the foreshore at the Manson Site such that it cannot currently be used as a watering point for the transportation of timber without dredging and other physical alterations, including the installation of additional infrastructure if the site is to be used efficiently as a log dump/boom site, and/or more significant structural changes if it is to be effectively used for barge transportation.

[40] Second, Canfor notes that stumpage rates under the IAM are based on the market pricing system ("MPS"), which is intended to approximate what a notional average market participant would bid for the timber at issue. Due to the physical constraints at the Manson Site, no market participant would reasonably bid on the timber from these cutting authorities based on a transportation route that included water transport via the Manson Site. Any market participant harvesting the cutting

authorities at issue in the appeals would face the same physical constraints with respect to water transport through the Manson Site; namely, that the site or sites located at or near kilometre 8.6 of the Manson Site Forest Service Road could not be used in its current condition to transport timber from these cutting authorities. It submits that the Manson Site is not suitable as a log dump because a notional timber sales bidder would not incur the costs of putting the site into service.

[41] Canfor further submits that, while it intends to rehabilitate and redevelop the Manson Site to make it suitable as a log dump for the water transport of timber (specifically, as a log dump and landing site for the Transporter), in 2013 it was still in the early stages of planning and carrying out the site's redevelopment. This required, among other things, updating and amending authorizations required to operate the Manson Site for this purpose. In the interim, Canfor submits that no market participant can, or would reasonably, use the Manson Site to transport timber.

[42] Canfor submits that it should not, and cannot, be penalized for the time that it takes to bring the Manson Site up to a condition suitable for facilitating water transportation of timber using the site. Until the site redevelopment is complete, and the necessary authorizations are in place, Canfor submits that the Manson Site is not suitable as a transportation route for the purposes of appraising stumpage for cutting authorities in the vicinity of that site.

[43] The Government asks the Commission to dismiss the appeals. It argues that stumpage appraisal under the IAM is subject to an overriding highest-stumpage principle that requires all variables relevant to the calculation of the stumpage rate to be determined in a manner that will produce the highest stumpage rate. A licensee may not submit appraisal data on the basis of where or how it actually desires or intends to transport logs; rather, the appraisal data must assume the transportation route to the point of appraisal that results in the shortest truck haul time in combination with other variables to produce the highest stumpage.

[44] The Government submits that section 3.1 of the July 1, 2013 IAM is different from the previous July 1, 2012 IAM, in that it confers discretion on a district manager to deem a particular transportation route, that otherwise produces the highest stumpage rate, unsuitable for appraisal purposes. Once deemed unsuitable, the route must be excluded from consideration in the appraisal.

[45] The Government submits that the concept of suitability of a transportation route must be viewed in accordance with the MPS scheme, which does not focus on the particular licensee's operation. Therefore, it submits that Canfor's evidence and arguments regarding its particular business operations should not be allowed to disqualify the Manson Site as an appraisal transportation route for its cutting permits simply because it has chosen to delay restoring the site to operational status following a period of disuse.

[46] With respect to the earliest of the nine cutting permits in issue (C10), the Government submits that the applicable 2012 version of the IAM did not provide discretion to deem the highest stumpage transportation route unsuitable. Cutting permit C10 "stands apart from the other eight at issue ..., as no mechanism exists in its case to depart from the highest-stumpage transportation route."

ISSUES

[47] The Panel has characterized the main issues to be decided in these appeals as follows:

1. Was the Manson Site “unsuitable” for water transportation in 2013, pursuant to section 3.1(3) of the July 1, 2013 IAM, as amended?
2. Does section 3.1 of the July 1, 2012 IAM provide a mechanism to disqualify the Manson Site as an appraisal log dump; i.e., does the 2012 IAM allow transportation routes to be found unsuitable?
3. Whether the Suitability Determination is inconsistent with the object and purposes of the IAM, specifically, the MPS?
4. Is the District Manager’s Suitability Determination entitled to deference?

RELEVANT LEGISLATION AND POLICIES

Forest Act

[48] The determination of stumpage rates is governed by section 105 of the *Forest Act*:

- 105(1)** Subject to the regulations made 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.

THE IAM

[49] In the context of these appeals, eight of the cutting permits were appraised under the July 1, 2013 IAM, as amended. As the first of the nine cutting permits, C10, was issued prior to publication of the July 1, 2013 IAM, the applicable IAM is the July 1, 2012 version, as amended.

[50] Section 3.1 of the IAM changed somewhat between the July 1, 2012 and July 1, 2013 versions, as amended, as did the language regarding transportation routes being subject to a suitability determination. However, the objective of producing the highest stumpage rate has not changed. All of the opening paragraphs of the relevant versions of section 3.1 state as follows:

- 3.1(1) Except as provided in section 5.1 and chapter 6 of this manual, the licensee must submit an appraisal data submission that is capable of being used by

the person who determines the stumpage rate for the cutting authority area in a manner that will produce the highest stumpage rate.¹

[51] The relevant portions of section 3.1 establishing the test for “unsuitability” in the 2012 and 2013 versions of the IAM are set out below. The change in these sections relevant to the appeals is found in the addition of “transportation route” to the 2013 version.

2012 IAM

3.1(4) 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 features and terrain stability of the cutting authority area and the areas through which access to the cutting authority 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 timber from the cutting authority area,
- (c) visual quality objectives.

2013 IAM

3.1(3) Regardless of the harvest method or transportation route that the holder of a cutting authority uses or intends to use for the cutting authority area or any other fact or law pertaining to the harvest method or transportation route to be used, the district manager when deciding whether a harvest method or transportation route is unsuitable may only consider:

- (a) the physical features and terrain stability of the cutting authority area and the areas through which access to the cutting authority 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 a cutting authority area,
- (c) visual quality objectives,

¹ The November 1, 2013 amendment to the July 1, 2013 IAM is worded slightly different as it includes the following words after “produce the highest stumpage rate”: “once the point of appraisal has been determined in accordance with section 3.5.2 [Point of Appraisals].”

- (d) the licensee's written rationale in the appraisal data submission that describes why a harvest method or transportation route should be considered unsuitable.

[Emphasis added]

[52] A November 1, 2013 amendment to the July 1, 2013 version of the IAM kept the same four parts to the test set out in 3.1(3)(a)-(d), but made minor changes to the opening paragraph which are not relevant to the issues in these appeals.

DISCUSSION AND ANALYSIS

1. Was the Manson Site "unsuitable" for water transportation in 2013, pursuant to section 3.1(3) of the July 1, 2013 IAM?

[53] Neither version of the IAM defines suitability as it pertains to a transportation route, beyond indicating that:

Appraisal Methodology

3.1(3) ... the District Manager when deciding whether a harvest method or transportation route is unsuitable may only consider the following:

...

- (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 timber from the cutting authority area,

...

[54] Canfor urges the Panel to find that, in order for the Manson Site to be suitable it must, in fact, be ready for use.

[55] The Government argues that it is sufficient that the Manson Site has historically been used as a log dump, and could be made suitable with a minimum of effort. The Government adds that, if the Manson Site is not immediately available for use, that is because Canfor chose not to take steps to reactivate the Manson Site until it had a sufficient volume of timber to move to justify the expense, which would necessarily include putting the Transporter back into service as well. The Government submits that Canfor's business decisions, particularly the timing of its re-activation efforts and its desire to enhance the operability of the site, should not be grounds for finding that the Manson Site is unsuitable.

[56] Canfor relies on the expert evidence of Emily Cheung, P.Eng. Ms. Cheung testified at the hearing and wrote a report dated September 22, 2014. She was qualified as an expert to give opinion evidence on the design considerations required to place the Manson Site into service. In her opinion, the Manson Site, as she observed it in 2014, was not safe for use by equipment due to the soft soils, its susceptibility to erosion, and the steepness of the earth-filled ramps used to access

the foreshore. Ms. Cheung's September 22, 2014 report includes the following statements: "The requirements are to re-grade the log dump site to provide safe and proper access to the Williston Transporter that will handle modern equipment on site", and "It was proposed that the site would be re-graded to allow for sorting and loading closer to the Transporter docking locations."

[57] As noted earlier in this decision, the evidence discloses that the Manson Site had been used for several decades as a location for boom and tow operations and, more recently, as a landing site for the Transporter. The evidence discloses that the Manson Site possessed the physical characteristics that made it suitable as a log transportation route in the past, those characteristics being:

- existing road infrastructure connecting the landing to the surrounding cutting areas in the Blackwater Arm;
- a scale for weighing logging trucks;
- a flat area cleared of trees for use as a stock piling area;
- graded ramps leading to a lower bench area capable of use by Caterpillar 988 loaders; and
- water depth and foreshore area generally configured to permit the Transporter access to the foreshore during periods of fluctuating water depth.

[58] That is not to say that the Manson Site was perfect, but the Panel finds that "perfection" is not the relevant test. The test is whether the transportation route is unsuitable.

[59] The evidence discloses that extreme seasonal fluctuations in the water level at Williston Lake caused ongoing erosion, and that the soft sand in the area sometimes required logs to be deposited in a "corduroy layout" to allow heavy equipment to traverse the beach area and climb the ramps to the upper bench. The evidence also discloses that these less than perfect conditions were not so challenging as to prevent the Manson Site from being used with some consistency in the past. The former Captain of the Transporter, Jarl Sundve, testified that, prior to most landings of the Transporter at the Manson Site, some amount of earthworks was required to address erosion of the foreshore and, as described above, the placement of logs to provide additional support to the front end loaders.

[60] Mr. Anderson, another of Canfor's witnesses who observed the use of the Manson Site in the 1990's, testified that the Caterpillar 988 loaders utilized the site successfully without becoming stuck and that, to his knowledge, none of the operators ever raised safety concerns about operating this equipment at the Manson Site. While Ms. Cheung testified that in 2014 it was not safe (-after six years of disuse), Mr. Anderson's testimony is evidence that, prior to the cessation of operations in 2008, the conditions at the Manson Site were not such that the Manson Site could not be used consistently.

[61] The Panel has considered the various photographs of the Manson Site that were placed into evidence, showing both its condition in 2014 and during the years when it was in operation. While the photographs confirm that the site has

undergone some continued erosion, the photographs also reveal that the overall general physical characteristics of the site remained unchanged.

[62] The Panel takes the whole of this evidence to support the conclusion that, historically, the Manson Site was suitable, both as a location for boom and tow operations, and for use by the Transporter, and that the need for ongoing maintenance did not make the site unsuitable in the past. It is reasonable to conclude that the physical characteristics of the Manson Site made it fit for use as a transportation route.

[63] In the Panel's view, it is important to consider the historical suitability of the Manson Site and the challenges it posed, as described above, in the context of the argument Canfor now makes that the Manson Site was not suitable in 2013. The evidence discloses that, between 2007 (when the Manson Site was last used prior to the economic recession in the forestry industry) and 2013, the Manson Site had continued to undergo the typical erosion that it had in the past. No evidence was led to quantify the amount of erosion.

[64] It is reasonable to conclude that, without the periodic maintenance that was employed when the Manson Site was in use, erosion of the foreshore and the lower-most ramps to the upper bench may well have deteriorated to a greater degree than it had in the past. Indeed, Ms. Cheung's evidence is that, when she viewed the Site in 2014, the ramps required some regrading to make them serviceable and, in her view, safe.

[65] However, the majority of Ms. Cheung's recommendations for the Manson Site were directed at improving and upgrading the Manson Site to more efficiently process a larger volume of logs than it had in the past. In the Panel's view, in 2013, the Manson Site still possessed the general characteristics that made it suitable as a log transportation route, as it had historically. The need to address the erosion that had accumulated as of 2013 was no different in character than the periodic erosion that the site had experienced in the past when it was in use, even if the cumulative effect was greater due to the deferral of maintenance.

[66] Further evidence of the suitability of the Manson Site as a transportation route is the fact that the necessary permits to allow it to be used as a water transportation access point were either maintained by Canfor after 2007, or easily obtained when Canfor elected to put the Manson Site back into service. The evidence discloses that those permits became available within weeks of Canfor applying for them in early 2015.

[67] The Panel rejects the submission made by Canfor that suitability must necessarily mean that the Manson Site was in ready operating condition. Rather, the Panel finds that suitability is achieved if the site possesses the physical characteristics that make it capable of being placed into operation, even if to do so requires some amount of remedial work.

[68] Such a finding on suitability is consistent with the Commission's previous decision in *Weyerhaeuser Company Ltd v. British Columbia (Ministry of Forests)*, (Appeal No. 2000-FA-009, March 21, 2002), where the Commission concluded that a harvest method, while possible, was nonetheless unsuitable if it was not practical due to the need to employ extraordinary measures. In the present case, the

evidence does not establish the need for Canfor to take extraordinary measures in order to return the Manson Site to operating condition.

[69] A great deal of evidence was led concerning the steps taken to reactivate the Transporter after it had been taken out of service by Canfor in 2007. Canfor describes that process as both complex and time consuming. The steps generally involved undertaking certain repairs and/or upgrades to the Transporter, and securing a crew and necessary permits for its operation. Like some of the work that was proposed at the Manson Site, much of the work proposed for the Transporter was by way of enhancements and upgrades, rather than work that was absolutely necessary to put it into service. It is noteworthy that a marine survey, commissioned by Canfor in or about the time that Canfor considered leasing the Transporter to Cardero found that, as of April 11, 2013, the Transporter was in "good overall condition", and was mechanically "ready to work immediately", subject only to renewing the expired regulatory certificates.

[70] In the Panel's view, the issue before the District Manager, and before the Panel, is whether the Manson Site is unsuitable as a transportation route. The availability of the Transporter is not relevant to determining suitability of the Manson Site, which, according to the wording of section 3.1 of the IAM, is determined on the basis of the physical characteristics of the Manson Site. Looked at another way, had the Manson Site been in immediate operational condition but the Transporter was not available, it surely could not be said that those facts would support a finding that the Manson Site became unsuitable because one type of equipment that might be used at the Manson Site was unavailable.

[71] While Canfor's use of the Manson Site was premised on the use of the Transporter, that is a business decision unique to Canfor since it owned the Transporter, and this was its preferred method of log transport. The usual method of water transport on water bodies in the BC Interior, and the basis for appraisal cost estimates, is boom and tow. This is apparent from the allowance for water transport, which cites amounts for "dump and boom", "tow", and "de-water and reload" for all of the major reservoirs, including Williston Lake. Historically, the Manson Site had also been used for boom and tow operations and was, therefore, suitable for that use as well.

[72] Canfor submits that, as of 2013, the infrastructure for boom and tow operations was no longer present at the Manson Site. However, the evidence also discloses that the infrastructure required for boom and tow operations was modest, requiring rather rudimentary skids to allow logs dumped from logging trucks to slide into the water. Some form of de-watering equipment to retrieve the logs from the water in McKenzie would also be required, but there was no evidence that this would be a challenging exercise or that it would be prohibitively expensive (i.e., no extraordinary measures required). Rather, the evidence confirms that it was a process that Canfor chose not to utilize after it acquired the Transporter in 2004.

[73] As noted above, the Panel is of the view that the term "suitability" does not require absolute readiness; rather, it should be interpreted more broadly to encompass log dump sites that have all of the requisite physical characteristics to allow the site to be made usable as a transportation route, without exceptional/extraordinary effort or expense. The Manson Site, as of 2013, retained

the physical attributes that would make it suitable for boom and tow operations, as well as barging operations.

[74] The finding that a log dump site is “suitable” or “unsuitable” is a finding of fact, very much dependent on the individual circumstances of a given log dump. Counsel for the Government submits that it cannot be the case that every log dump suitability determination requires a six day hearing of *viva voce* testimony, as occurred during the hearing of these appeals. While the Panel does not envision the need for such an inquiry for every determination, the IAM does contemplate suitability being determined on the physical characteristics of a dump site. This will necessarily require a licensee, who seeks a determination of “unsuitability” under section 3.1 of the IAM, to place sufficient evidence of those physical characteristics before the District Manager to allow the factual determination to be made. Not every such determination will then result in an appeal.

[75] Based on the whole of the evidence before us, the Panel finds that the Manson Site was not unsuitable for appraisal purposes as a transportation route in 2013, pursuant to section 3.1(3) of the July 1, 2013 IAM.

2. Does section 3.1 of the July 1, 2012 IAM provide a mechanism to disqualify the Manson Site as an appraisal log dump; i.e., does the 2012 IAM allow transportation routes to be found unsuitable?

[76] Having found that Canfor has not established that the Manson Site is unsuitable under the July 1, 2013 IAM, the Panel finds that differences between the 2012 and 2013 IAM do not affect the outcome in this appeal. That said, the parties directed a portion of their submissions to the effect of these amendments and, thus, the Panel will deal briefly with this issue.

[77] The 2013 IAM unquestionably added suitability of the “transportation route” to the prior wording of section 3.1, which only expressly referred to the suitability of the “harvest method”: the July 1, 2012 IAM did not expressly provide for a transportation route to be deemed unsuitable. As a result, Canfor would not have had grounds for challenging the stumpage rate appraised for cutting permit C10 on the basis of the suitability of the Manson Site, since that was not a criterion that could be considered by the District Manager under the 2012 version of the IAM.

[78] Canfor submits that, notwithstanding that the opening paragraph of section 3.1(4) of the 2012 IAM did not refer to the unsuitability of a transportation route, transportation is referred to later in subsection 3.1(4)(b), which refers to the “area outside of the cutting authority that may be affected by the ... transportation of the timber from the cutting authority area”. Canfor submits that this requires a district manager to consider the “suitability” of a transportation route.

[79] The Panel disagrees. In our view, the 2012 IAM restricts the suitability analysis to the harvest method only. The 2012 wording invites consideration of the physical features of an area outside of the cutting permit that may be affected by the transportation of timber from the cutting authority in the context of deciding if a *harvesting method* is unsuitable; it does not invite a consideration of whether that transportation route is, itself, unsuitable. In contrast, the July 1, 2013 version of

the IAM expressly refers to a "transportation route" being unsuitable by reason of its physical features.

[80] Accordingly, the Panel finds that the 2012 version of the IAM does not allow transportation routes to be "unsuitable".

3. Whether the Suitability Determination is inconsistent with the object and purposes of the IAM, specifically, the MPS?

[81] Both Canfor and the Government tendered expert evidence concerning the operation of the MPS to establish stumpage rates for licence holders such as Canfor. Because long term tenure holders, such as Canfor, do not bid for the right to cut timber in the same way as smaller operators who purchase timber licences through auctions, the object of the MPS system is to achieve a stumpage appraisal system that sees major licence holders paying stumpage rates that are, effectively, similar to those that would be expected to be paid by small operators. This is accomplished by maintaining a data set of BC Timber sales which records the final selling price along with the particular characteristics of the timber auctioned such as species, terrain, and harvest method. The data set is updated annually and maintained for a five-year period. Statistical regression analysis is used to generate an estimate of the winning bid that would have been paid, and uses this to generate a stumpage rate for major licensees.

[82] In recognition of the fact that timber sale bidders do not necessarily operate in the same manner or on the same scale as long term tenure holders, the estimated winning bid is further adjusted to take into account tenure obligation adjustments that long term tenure holders will incur such as forest management, silviculture and road development, as well as adjustments for specified operations. The latter are operations such as water transport, the costs of which may not be well reflected in the timber sales data set.

[83] Canfor's expert witness, Steve Potter, R.P.F., and the Government's expert, Steve Fletcher, Senior Timber Pricing Forester (Systems), agree that the purpose of the MPS system is to resemble reality, not to mirror it. Both experts agree that departures from reality are expected and are part of the MPS. For instance, the "point of appraisal" for establishing the stumpage rate is to be chosen based on using a mill that produces the highest stumpage rate, regardless of whether that mill would in fact be used, or indeed, was even available for use. As long as this system is applied universally, the experts agree that it will achieve "as near as possible" the establishment of stumpage rates in a manner that is "licensee neutral", meaning the stumpage rate should be the same no matter who is harvesting the timber.

[84] Mr. Fletcher and Mr. Potter also agree that the establishment of stumpage rates under the MPS is to be based solely on statistical data: it is not to be adjusted according to actual operations that any given licensee might perform and, in the context of these appeals, regardless of the transportation route used. The Panel heard evidence that the other major licence holder in the Mackenzie District, Conifex, had two cutting permits appraised in 2013, with stumpage rates

established on the basis of water transportation using the Manson Site, even though Conifex would not, in fact, be able to utilize the Manson Site.

[85] The MPS system also incorporates a concept known as symmetry. Similar tracts of timber should attract the same stumpage rate, and licence holders and timber sales bidders should be treated the same. Both experts agree that the requirement for symmetry is not determinative of whether the Manson Site is suitable or not.

[86] Canfor submits that the Manson Site is not suitable as a log dump because a notional timber sales bidder would not incur the costs of putting the site into service. The Panel does not accept that this is the proper test for suitability. There could be any number of reasons why a timber sales bidder, operating on a much smaller scale than a long term tenure holder, might choose one mode of transport over another. Posing this question necessarily requires a consideration of actual operations, and an inquiry into how individual operators might choose to conduct their harvesting. That approach is at odds with section 3.1 of IAM, which expressly states that stumpage rates should be set without regard for the actual harvest method or transportation route that would be used.

[87] The Panel finds that section 3.1 of the 2013 IAM sets out the complete criterion for establishing stumpage rates:

- 1) use the harvest method or transport route that produces the highest rate;
- 2) subject to the harvest method or transport route being unsuitable;
- 3) unsuitability is determined on the physical characteristics of the site.

[88] No mention is made in the IAM that a site must also be suitable (or unsuitable) to a notional timber sale bidder as Canfor submits.

[89] The Panel finds that a determination that the Manson Site is not unsuitable is consistent with the object and provisions of the IAM, specifically, the MPS.

4. Is the District Manager's Suitability Determination entitled to deference?

[90] The Government agrees that this is a hearing *de novo* and that the issue of deference only arises if the Panel finds that the test for unsuitability being advanced by it, and Canfor, are both reasonable and that a "tie" situation exists. In that case, the Government says that the Panel should give deference to the test applied by the District Manager. In the present case, this situation does not arise because the Panel does not accept the test advanced by Canfor, so the issue of deference, as argued by the Government, does not come into play.

[91] Further, the Panel adds that, while it agrees with the District Manager's ultimate conclusion that the Manson Site was not unsuitable, the Panel is concerned with the District Manager's approach to applying the IAM. Specifically, the District Manager utilized criteria from the Coast Appraisal Manual in place of the provisions set out in the IAM. In the Panel's view, this was not appropriate. The IAM does not

specify which physical factors that may make a site unsuitable. In considering the limitations imposed by the Coast Appraisal Manual there is a risk the District Manager could have fettered his decision-making powers.

DECISIONS

[92] 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.

[93] The Panel finds that the Manson Site was not unsuitable for appraisal purposes.

[94] The stumpage rate determinations set out in the cutting permits are confirmed.

[95] The appeals are dismissed.

“Jeffrey A. Hand”

Jeffrey A. Hand, Panel Chair
Forest Appeals Commission

“Maureen Baird”

Maureen Baird, Member

“Howard Saunders”

Howard Saunders, Member
September 8, 2015